

# SSC Inquiry into the Use of External Security Consultants by Government Agencies

STATE SERVICES COMMISSION  
TE KAWA MATAAHO



## STATE SERVICES COMMISSIONER'S RESPONSE

In March 2018 I launched an Inquiry under the State Sector Act into the Use of External Security Consultants. The Inquiry has identified and reported on engagement between government agencies and external security consultants – including but not limited to Thompson & Clark Investigations Limited (TCIL).

In total the Inquiry undertook more than 100 interviews, including of several key witnesses under oath and two under summons. It focused on the last 10 years, but also looked at events going further back.

Ultimately, the Inquiry focused on whether there have been any breaches of the law or the SSC Code of Conduct.

I am disappointed that the Inquiry has uncovered some shortcomings across the State Services.

While many of the events are historic, the Inquiry has found that seven government agencies have breached the Code of Conduct, including four agencies that breached the Code with their use of private security consultants to undertake inappropriate surveillance.

What concerns me most is that TCIL has treated 'issue motivated groups' as a security threat in its reporting to government agencies. I am very disappointed that government agencies did not challenge TCIL on that. It is an affront to democracy, and it is not consistent with how we should view democratic freedom.

There are times when it is acceptable for an agency to gather information about a person or a group – for example, to investigate fraud or tax evasion.

But I am very clear that it is never acceptable for an agency to classify a person or group of people as a security threat just because they lawfully exercise their democratic rights, or to use that as justification for gathering information. Equally, it is never acceptable to gather information about people or groups for the sole purpose of managing reputational risk to an agency.

Today I have issued new Model Standards using my powers under Section 57(4) of the State Sector Act 1988.

The new Model Standards set out my minimum expectations around how public servants should gather information for regulatory compliance and law enforcement. Government agencies need to be clear about why the activity is necessary, transparent about the kind of activity the agency undertakes, ensure rigorous and independent oversight, and have in place a fair and effective complaints or review process.

I have requested assurance from Public Service chief executives and Crown Entity Board Chairs that their agencies are fully compliant with these standards by 30 April 2019.

The tables below set out the actions I have taken to address both agency-specific and system-wide Inquiry findings.

### Agency-specific findings

The Inquiry found that seven agencies breached the SSC Code of Conduct. The full list of agency-specific findings can be viewed in the report [here](#).

Inquiry finding	Action
<p><b>Southern Response Earthquake Services</b></p> <p><i>The Inquiry found that Southern Response acted inconsistently with the Code of Conduct from 13 March 2014 to 31 December 2014, and was in breach of the code from 1 January 2015 to 12 May 2016 when the Code formally applied to the company.</i></p> <p><i>On behalf of Southern Response, TCIL attended and recorded several closed meetings of insurance claimants that discussed options for legal action against Southern Response. The recordings were made by a contractor who was not a licensed private investigator, and the recordings may themselves have been unlawful, but it was not possible to make findings because the recordings were not retained – itself a breach of the Code.</i></p>	<p>Today I have laid a complaint with the New Zealand Police regarding the potentially unlawful recording of these meetings.</p> <p>Southern Response is a Crown company, with a Board responsible to shareholding Ministers, and the State Services Commission has limited jurisdiction to determine how these matters should be addressed. As shareholding Ministers, it is appropriate for Ministers Woods and Robertson to determine the necessary course of action. I have written to both Ministers outlining my concerns to enable them to consider any necessary action.</p>
<p><b>The Ministry of Primary Industries (formerly the Ministry of Agriculture and Fisheries)</b></p> <p><i>Two former employees of the Ministry of Agriculture and Fisheries (MAF) carried out secondary employment with TCIL in breach of the Code of Conduct. The same employees accessed New Zealand Transport Agency (NZTA) information on behalf of TCIL, directly or indirectly, breaching individual privacy and in breach of the Code of Conduct requirement to treat information with the level of care expected by the public.</i></p> <p><i>The Inquiry also found that MAF breached the Code of Conduct by engaging TCIL to attend two conferences of interest to the animal rights movement in 2005 and 2006. At the first conference, MAF paid for TCIL to ‘monitor’ activists, likely involving surveillance, and to liaise with a paid informant. At the second conference, MAF contributed to the fees for the paid informant within the animal rights group. This breached the Public Service Code of Conduct requirements to respect the rights of the public and the privacy of individuals.</i></p>	<p>The secondary employment that occurred at MAF and related issues are being treated extremely seriously. After consultation with the Commissioner, Ministry for Primary Industries (MPI) referred the matter to the Serious Fraud Office (SFO) in March. A Stage Two Investigation by the SFO is ongoing. Neither of these individuals remain in the Public Service.</p> <p>I acknowledge the Inquiry’s finding that MAF breached the Code by engaging TCIL to attend two conferences of interest to the animal rights movements, likely involving inappropriate surveillance, and to liaise with a paid informant. However, I am also aware that these events took place over ten years ago, and the previous State Services Commissioner has already issued guidance as a direct result. I am satisfied that MAF, and subsequently MPI, has taken the former Commissioner’s guidance on board, and I note that the Inquiry did not find any evidence of inappropriate surveillance activity following these historic instances.</p>

Inquiry finding	Action
<p><b>The New Zealand Transport Agency</b></p> <p><i>The Inquiry found that the NZTA’s prior lack of oversight of authorised access to the motor vehicle register, and the lack of formality and care in information sharing through the Combined Law Agency Group<sup>1</sup>, left both of those forms of access open to exploitation, and breached the Code’s requirement to treat information with the level of care expected by the public.</i></p>	<p>NZTA is a Crown Entity, with a Board responsible to the Minister of Transport, and the State Services Commission has limited jurisdiction to determine how these matters should be addressed.</p> <p>Given the Minister is currently undertaking a review into NZTA, I have written to him to suggest that he considers the legislative and administrative processes that govern access to the motor vehicle register in that context.</p>
<p><b>Crown Law Office and the Ministry of Social Development</b></p> <p><i>In 2007, Crown Law, on behalf of the Ministry of Social Development (MSD), instructed private investigators to assist with a civil case alleging abuse in state care (the White case). The Crown’s instructions were broad, including seeking any information that could be used to cross-examine a group of similar fact witnesses to be called by the claimants.</i></p> <p><i>Crown Law did not rule out low-level surveillance in the lead up to the trial. There were indications in the file that the investigators did use techniques involving low-level surveillance, or something close to it, together with a covert approach for at least one person of interest.</i></p> <p><i>The Inquiry found the broad nature of the instructions to the private investigators, without explicit controls to protect privacy interests, breached the Code of Conduct requirement to respect individual privacy and avoid activities that might harm the reputation of the State Services.</i></p> <p><i>MSD was aware of the potential use of low-level surveillance and a covert approach in the White case. The Inquiry did not see any evidence that MSD queried this or sought any assurance that individual privacy would be properly weighed and protected.</i></p> <p><i>Accordingly, the Inquiry found that MSD was in breach of the Code of Conduct, although at a lower level than Crown Law. The breach was at the lower end of the scale given that Crown Law had primary responsibility to manage the litigation and direct the private investigators.</i></p>	<p>The Solicitor-General is responsible for Crown litigation and acts independently of the Commission. The Solicitor-General has accepted the Inquiry’s findings and has undertaken to develop and implement a specific policy about information gathering for use in civil litigation, consistent with the law, the new Model Standards, and the Code of Conduct. I will be referring the report, in respect of the findings on Crown Law, to the Attorney-General.</p> <p>In relation to the Ministry, because I was Chief Executive at the time, I have referred this matter to the incoming Deputy State Services Commissioner to consider and determine. I have also referred these matters to the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions for consideration.</p>

<sup>1</sup> A multi-agency body designed to facilitate information sharing among agencies.

Inquiry finding	Action
<p><b>The Ministry of Business Innovation and Employment</b></p> <p><i>The Inquiry found that the Ministry of Business Innovation and Employment's (MBIE's) management of its regulatory responsibilities in the petroleum and minerals area, compounded in some instances by employees not maintaining an appropriate professional distance, contributed to a perception of bias by some stakeholders and was evidence of poor regulatory practice.</i></p> <p><i>The most significant feature of the relationship between MBIE and TCIL related to 'Operation Exploration'. MBIE established and led Operation Exploration as the key interagency governance mechanism following an amendment to the Crown Minerals Act 2013. The design of the Operation was influenced by the concept of 'issue motivated groups', which the Inquiry found to be a problematic construct overall.</i></p> <p><i>Considering its conduct as a whole, the organisation breached the Code of Conduct, by failing to maintain the level of objectivity and impartiality that the Code requires.</i></p>	<p>I have requested that the Chief Executive of MBIE considers whether Operation Exploration should continue – either in its current form, or at all.</p> <p>I have also suggested that the Chief Executive reviews the agency's internal policies and assures herself that they are consistent with the Code of Conduct.</p> <p>I am encouraged by the Inquiry's findings that:</p> <ul style="list-style-type: none"> <li>• MBIE has already taken steps to address the tensions between its regulatory and promotional responsibilities, including by making structural and leadership changes.</li> <li>• The individual instances on their own, which led to a breach as a whole, are low-level. It also found that most MBIE employees, including senior leaders, maintained an appropriate professional distance in their relationship with TCIL.</li> </ul>
<p><b>New Zealand Security Intelligence Service</b></p> <p><i>The Inquiry found that email contact between an NZSIS employee and a TCIL Director risked harming the reputation of the NZSIS and was therefore inconsistent with the Code. The Inquiry agrees with the conclusion of an internal NZSIS review that any breach was at the lower end of the scale.</i></p>	<p>I am satisfied that the NZSIS has conducted an investigation into the nature of that employee relationship, and it has been resolved as an employment matter. This was an appropriate step to take, particularly given that the NZSIS did not become subject to the Code until 28 September 2017.</p>

## System-level findings

The Inquiry's findings have also surfaced several system issues.

Inquiry finding	Action
<p><b>New Zealanders exercising their democratic rights</b></p> <p><i>The Inquiry looked at TCIL's reporting to government agencies on 'issue motivated groups', which treated these groups as a security threat. Among the groups were Greenpeace, the Green Party, the Mana Movement, and some iwi groups in Northland, the East Coast and Taranaki.</i></p>	<p>This is an affront to democracy, and government agencies should have challenged TCIL's definition and treatment of issue motivated groups.</p> <p>I am clear that it is never acceptable to classify a person or group of people as a security threat just because they lawfully exercise their democratic rights, or to use that as justification for gathering information.</p> <p>I have issued my expectations on this matter in the new Model Standards, which agencies will need to be compliant with by 30 April 2019.</p> <p>In addition, the SSC will advise the Minister of State Services on how the Government's current review of the State Sector Act will reflect how the Public Service supports the principles of democracy in NZ.</p>
<p><b>Lack of professional distance</b></p> <p><i>The Inquiry found evidence of a lack of professional distance between some public servants and TCIL.</i></p>	<p>I am disappointed that some public servants have lost sight of the fact that they are exercising powers of the State and that they are dealing with an organisation outside the Public Service.</p> <p>This issue is called out in the new Model Standards, which agencies will need to be compliant with by 30 April 2019.</p> <p>Where the Inquiry surfaced issues around inappropriate secondary employment, I have raised my concerns directly with the relevant chief executive or Board Chair.</p> <p>I have also requested chief executives and Board Chairs to ensure that by 30 April 2019 they have sufficiently robust secondary employment policies in place in their agencies, and to review individual instances of approved secondary employment to ensure they do not create a real or perceived conflict of interest.</p>

Inquiry finding	Action
<p><b>Lack of written contracts and oversight arrangements</b></p> <p><i>The Inquiry found that a number of agencies had inadequate oversight and contracting arrangements in place to manage work undertaken by external security consultants.</i></p>	<p>I expect all agencies to have clear, robust contracts and oversight in place whenever external security consultants are used to carry out work of a sensitive nature – no matter how big or how small the contract is. The task or service should be well-defined and include specific protocols around information management.</p> <p>This is addressed in the new Model Standards, which agencies will need to be compliant with by 30 April 2019.</p>

### Findings in relation to TCIL’s conduct

The Inquiry found that a number of government agencies have engaged TCIL to undertake work as an external security consultant. The Inquiry’s findings also point to behaviour by TCIL that does not meet the professional standard I would expect of a consultant carrying out work on behalf of government.

The Inquiry was provided evidence that, while contracted by government agencies, TCIL:

- Used an unlicensed private investigator
- Covertly attended public meetings without disclosing their purpose or the identity of their client
- Produced electronic recordings of meetings, some of which were closed, without the knowledge or consent of attendees
- Approached public servants, who had access to sensitive information, for secondary employment with TCIL
- Accessed the motor vehicle register for potentially improper purposes. TCIL claimed they were accessing the data for the purposes of assisting government agencies, which is categorically denied by those agencies
- Advised a client not to disclose the source of information obtained inappropriately to the Police
- Likely, provided information obtained by surveillance for private sector clients to government agencies without disclosing the source and nature of the information supplied
- Was not consistent in retaining records of information collected.

Today I have laid a complaint to the New Zealand Police regarding the potentially unlawful recording of meetings.

I have also lodged a formal complaint about TCIL’s conduct with the Private Security Personnel Licensing Authority today to outline my concern about an unlicensed private investigator in breach of the Private Security Personnel and Private Investigators Act 2010.

Finally, I have written to the Chief Executive of MBIE asking her to consider the removal of TCIL from the Government Procurement Panel. The Chief Executive has now removed TCIL from the Panel.