

# CORRUPTION AND CRIME COMMISSION

Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health

25 January 2008

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### **CORRUPTION AND CRIME COMMISSION**

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Dear Mr President Dear Mr Speaker

In accordance with sections 84 and 93 of the *Corruption and Crime Commission Act 2003*, the Commission is pleased to present the Corruption and Crime Commission's Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health.

The opinions contained in this report are those of this Commission.

The Commission recommends that the report be laid before each House of Parliament forthwith pursuant to the *Corruption and Crime Commission Act* 2003.

Yours faithful

The Hon LW Roberts-Smith RFD QC

**COMMISSIONER** 

25 January 2008

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#### **EXECUTIVE SUMMARY**

#### **Prelude**

During 2005 and 2006, the Corruption and Crime Commission (the Commission) investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach Development in Yallingup. That investigation examined the efforts of Canal Rocks Pty Ltd, and Mr Brian Burke and Mr Julian Grill, in their role as lobbyists acting for Canal Rocks Pty Ltd, and their influence or attempts to influence public service officers involved in the development proposal.

Public hearings were held at the Commission in respect of that matter in October, November and December 2006 and February 2007. During this time Mr Burke, and his relationships with senior public officers, received widespread media attention in Western Australia and nationally.

### The investigation

Dr Fong is the Director General of the Department of Health (DOH) and the Executive Chairman of the Health Reform Implementation Taskforce (HRIT). Dr Fong is also the Chairman and Commissioner of the Western Australian Football Commission.

Dr Fong commenced as a public officer in 1983 as an intern at the Royal Perth Hospital (RPH), then worked as a medical officer at RPH before becoming the Chief General Manager of Operations at the Department of Health. In 1998 Dr Fong undertook the role of Chief Executive Officer of St John of God Hospital (SJOG) in Subiaco before commencing as the Executive Chairman of the HRIT in 2004. Dr Fong commenced as the Acting Director General of the DOH in November 2004 and was substantively appointed to the position in October 2005.

In June 2007 the Commission received an allegation concerning the relationship of, and contact between, Dr Neale Fong and Mr Brian Burke. The allegation stemmed from claims Dr Fong had made to *The Australian Financial Review* on 7 March 2007 that he had no personal or business relationship with Mr Burke, followed by evidence of emails uncovered under a Freedom of Information request to the Department of Health.

Based on an assessment of the allegation and other information gathered by the Commission, pursuant to section 32 and 33 of the Corruption and Crime Commission Act 2003 (the CCC Act), an investigation was initiated.

The general scope and purpose of the Commission's investigation was to enable the Commission to make an assessment and form an opinion as to whether misconduct by public officers including the Director General of the Department of Health, Dr Fong, had or may have occurred or was occurring in regards to any and all communications with Mr Burke. The Commission's investigation focussed on the relationship, communications and

correspondence between Dr Fong and Mr Burke between 2002 and 2007. Contacts prior to 2 August 2004 were relevant only insofar as they revealed the nature of the relationship between the two men and illuminated the contacts between them after that date.

Following the authorisation by the Commissioner to examine further issues identified during the inquiry, the scope and purpose of the investigation was broadened on 14 September 2007, by deleting the reference limiting the investigation to communications with Mr Burke. This was to enable the Commission to investigate unrelated allegations which had been made to it concerning Dr Fong.

The Commission's investigation was conducted between June and December 2007 and encompassed a review of documentation provided by the DOH to the Commission, interviews with DOH staff, forensic analysis of DOH computers and computers lawfully seized during the Smiths Beach investigation, analysis of telecommunications interception material and private hearings.

This report examines the relationship between Dr Fong and Mr Burke, and the level of communication, particularly email communication, between the two. The report incorporates the Commission's assessment and opinions as to Dr Fong's actions.

The Commission emphasises the investigation was confined to the conduct of Dr Fong. Although that concerned the facts of Dr Fong's relationship with Mr Burke, there was no allegation against Mr Burke, his conduct was not the subject of the inquiry and the Commission expresses no opinion about it in this report.

The background to the investigation including a Freedom of Information (FOI) request by the Leader of the Opposition, and subsequent FOI review, the DOH's handling of the request and information provided to a Legislative Assembly Estimates Committee Hearing are outlined in Chapter 2.

### The Commission's assessment and opinion

The Commission's assessment of Dr Fong's relationship with Mr Burke is set out in Chapter 3, and the opinion formed as a result of this assessment in Chapter 4.

The Commission has identified 33 emails between Dr Fong and Mr Burke in the period August 2002 to June 2006. Twenty-four of those emails were after Dr Fong took up his role as Executive Chairman of the HRIT on 2 August 2004.

The major issue of concern resulting from the investigation of Dr Fong and his relationship with Mr Burke is in regard to Dr Fong's representation to his Minister of his relationship and email correspondence with Mr Burke. In the Commission's assessment Dr Fong, in his capacity as Director General of the DOH, made misrepresentations to his Minister, DOH staff and the media culminating in him maintaining untruthfully in his evidence to the Commission

that he had no recollection of any of the 33 email communications between him and Mr Burke identified above.

Dr Fong consistently maintained that there was no personal or professional business relationship between himself and Mr Burke, and that there were no emails.

Witnesses have described Dr Fong as a remarkably astute person with an immense capacity to absorb information, who has excellent recall and can produce facts and figures as required. The Commission accepts that to be so.

In the Commission's assessment, it is inconceivable that Dr Fong had not, could not, and did not recall that there were any email communications between himself and Mr Burke between August 2004 and June 2006. The Commission is positively satisfied on the balance of probabilities that at all relevant times he well knew at least that there had been email communications between them and the general nature of those.

The Commission accepts that in relation to minor or "circular" emails Dr Fong could have legitimately forgotten their content and/or existence, particularly given the communications were sporadic, the 24 emails were spaced over some 22 months and that they were in the main initiated by Mr Burke. What is unlikely is that Dr Fong would forget communications in regards to Smiths Beach, Amcom and approaching individuals on behalf of Mr Burke. The Commission does not accept that he had no recollection whatsoever of any email contact at all between August 2004 and June 2006.

Under examination by the Commission Dr Fong was unable to provide a plausible explanation for his lack of recall. In the Commission's assessment Dr Fong deliberately attempted to remove or distance himself from his relationship with Mr Burke.

The emails in possession of the Commission clearly contradict the recollection of Dr Fong that there were no emails and it can reasonably be inferred that Dr Fong, rather than having no recall of the communication, deliberately sought to reduce and minimise representation of his actual contact and his personal relationship with Mr Burke.

Dr Fong had been under considerable media scrutiny and the subject of extensive comment in his role as Director General of the Department of Health ever since his acting appointment to that position on 24 November 2004. Prior to that, he had been Executive Chairman of the HRIT since 2 August 2004. There was a great deal of public interest in him, his performance and that of the department. As his Minister, the Hon Jim McGinty said, the issue of Dr Fong's contact with Mr Burke, in the political climate of the times, was:

"...a very clear-cut example of a matter of very high public profile."

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<sup>&</sup>lt;sup>1</sup> Transcript of private examination of the Mr McGinty 19/12/07, p 23

It was something which was very important to the Minister, not only as having the potential for political embarrassment given his own known very poor relationship with Mr Burke, but also in respect of his expressed concern about potential influence by Mr Burke (or grounds for a perception of that). It was also of great concern to the Minister as a matter going to the proper operation of the Department of Health. There can be no doubt Dr Fong was well aware of the importance and concern to the Minister, of any contacts of a personal nature, or any personal relationship between him and Mr Burke.

In these circumstances particularly, the proper performance of his functions as Director General certainly required Dr Fong to act with integrity and be honest with his Minister about his relationship with Mr Burke and about the email and other communications between them. For reasons given in this report, the Commission makes no comment about what was, or may have been, said to the Parliament. This is a matter for the Parliament.

Dr Fong's lawyers submitted that in light of Mr McGinty's evidence it was not open to the Commission to form an opinion that Dr Fong had misrepresented his relationship with Mr Burke. That submission cannot be accepted on any of the grounds advanced in support of it. It is clear that Dr Fong told his Minister there had been some contact or communications between him and Mr Burke from time-to-time but it is also clear that whatever precisely that was, it was intended to (and did) leave the Minister with the understanding that there was no friendship, no personal relationship and no business relationship between Dr Fong and Mr Burke.

In fact there had been much more contact between the two than Dr Fong had revealed, and although not of a close personal friendship it was very much closer and more frequent than conveyed by Dr Fong. It was also of a kind which on the Minister's evidence, would have given him cause for concern about the potential exercise of influence by Mr Burke (or a perception of such influence). Thus, the submission (in effect) that the Commission should accept Mr McGinty's understanding that the two did not have a personal or business relationship, is ill-founded, because Mr McGinty was completely unaware of the extent and nature of the contact there had in fact been.

For the same reason it is simply incorrect to assert (as Dr Fong's lawyers do) that Mr McGinty is the person best able to cast light on whether he was misled because he is the person best placed to evaluate the substance of what was said to him by Dr Fong in the past and to assess that against such evidence as there may be of the association. Dr Fong has never told Mr McGinty the true nature and extent of his association and contacts with Mr Burke.

A number of the representations made on behalf of Dr Fong argued that there was no evidence of any impropriety on his part in his contacts or relationship with Mr Burke, nor of any benefit received by him nor of any personal business dealings between them. The Commission accepts these representations, except for Dr Fong's disclosure to Mr Burke that the Commission was investigating a DOH employee, Mr Michael Moodie, and his failure to report the disclosure to Dr Fong of what Mr Burke claimed was

confidential Cabinet information.<sup>2</sup> But those representations do not go to the issue here, which is whether Dr Fong knowingly misrepresented to his Minister, the true nature and extent of his email and other communications with Mr Burke. In the Commission's assessment, the evidence leads irresistibly to the conclusion that he did.

It was put on behalf of Dr Fong that Mr Burke sought to cultivate and ingratiate himself with Dr Fong, who nonetheless, to all intents and purposes, largely ignored such requests or approaches as were made by Mr Burke and certainly did not do anything of substance for him. The Commission accepts that as so, to a point. However, it is evident from the totality of the communications between them which the Commission has been able to identify, that the relationship between them is, and was, of a much closer personal nature than Dr Fong was willing to admit to his Minister or publicly.

Having assessed all the material gathered during the investigation the Commission has formed an opinion in regard to misconduct by Dr Fong.

It is the Commission's opinion that Dr Fong has engaged in misconduct in that his actions, in professing to his Minister that:

- (a) he had no recollection of any email communications between himself and Mr Burke; and that
- (b) he had no personal relationship with Mr Burke

constituted or involved the performance of his functions in a manner that was not honest, and a breach of the trust placed in him by reason of his office and could constitute a disciplinary offence providing reasonable grounds for the termination of a public officer's office or employment under the *Public Sector Management Act* (PSMA), contrary to section 4d(ii)(iii) and (vi) of the CCC Act.

The Commission is of the opinion that Dr Fong engaged in misconduct within the meaning of section 4(d)(iii) and (vi) of the CCC Act, in that his failure to report to his Minister (or at all) that Mr Burke had disclosed to him what Mr Burke claimed was confidential information from Cabinet, constituted or involved a breach of the trust placed in him by reason of his office and could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office as a public service officer under the PSMA.

Further, pursuant to section 22(1) of the CCC Act the Commission has formed the opinion that Dr Fong has engaged in serious misconduct within the meaning of section 4(c) of the CCC Act, by disclosing a restricted matter concerning an investigation into Mr Michael Moodie, contrary to section 167 and a notation under s.99 of the CCC Act.

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<sup>&</sup>lt;sup>2</sup> The Commission notes that Mr Burke's position is that he does not accept this to be an accurate reflection of his conversations with Dr Fong about Mr Moodie or the confidential Cabinet information.

#### Recommendations

The Commission has made five specific recommendations, three dealing with Dr Fong and two relating to the dissemination of official information and material to other agencies, and a suggested review of government handling of email communications.

#### Recommendation 1

That Commission recommends that the Director General of the Department of Premier and Cabinet give consideration to the taking of disciplinary action against Dr Fong for his lack of integrity in relation to his misleading representations regarding his relationship with Mr Burke, and, in particular, the email communications between them.

#### Recommendation 2

The Commission recommends that the Director General of the Department of Premier and Cabinet give consideration to the taking of disciplinary action against Dr Fong for failing to report the disclosure to him by Mr Brian Burke of what the latter claimed to be confidential information from Cabinet.

#### Recommendation 3

The Commission recommends that the Director of Public Prosecutions consider the prosecution of Dr Fong in respect of disclosure of a restricted matter concerning Mr Michael Moodie, contrary to section 167 of the CCC Act.

#### Recommendation 4

The Commission recommends that matters relating to the appropriateness and adequacy of the FOI processes and record-handling of the Department of Health, as detailed in this report, be referred to the Office of the Information Commissioner and State Records Commission.

#### Recommendation 5

The Commission recommends that the Department of Premier and Cabinet in conjunction with the State Records Commission consider a whole of government standard in relation to agencies' archival processes and retention of email communications.

# CHAPTER 1 FOREWORD

#### **Prelude**

Between June and December 2007 the Corruption and Crime Commission (the Commission) conducted an investigation under the *Corruption and Crime Commission Act 2003* (the CCC Act) in regard to possible misconduct by Dr Neale Fong stemming from issues regarding his relationship with Mr Brian Burke, and contact between them. Following the receipt of an allegation of misconduct in regard to Dr Fong by the Commission an investigation was commenced pursuant to section 33 of the CCC Act.

In accordance with section 22 of the CCC Act the purpose of the investigation was to assess the allegation and form an opinion as to the possible occurrence of 'misconduct', as defined in section 4 of the CCC Act.

The Commission's investigation encompassed a review of documentation provided by the Department of Health (DOH) to the Commission, interviews with DOH staff, forensic analysis of DOH computers and computers lawfully seized during the Smiths Beach investigation, analysis of telecommunications interception material and private hearings.

#### 1.1 The Commission's Jurisdiction

The Commission is an executive instrument of the parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the CCC Act faithfully and impartially. The Commission cannot, and does not, have any particular agenda, political or otherwise, other than to comply with the requirements of the CCC Act.

Under the CCC Act, the Commission is statutorily bound to deal with any allegation of misconduct made to it, in accordance with the procedures set out in the CCC Act.

One of the Commission's functions, pursuant to section 18 of the CCC Act, is to deal with allegations of misconduct regarding public officers.

#### 1.1.1 Definition of Public Officers

The term 'public officer' is defined in section 3 of the CCC Act by reference to section 1 of *The Criminal Code* which defines 'public officer' and encompasses police officers, government officers, elected members of Parliament, local council employees and public service officers. 'Public service officers' are those individuals who work in the State Public Service and who are subject to the *Public Sector Management Act 1994 (PSMA)*. 'Public service officers' are 'public officers' for the purposes of the CCC Act.

Dr Fong is the Director General of the DOH and is thus a public officer for the purposes of the CCC Act.

#### 1.1.2 Definition of Misconduct

It is important to appreciate that the term 'misconduct' has a very particular and specific meaning in the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC Act provides that misconduct occurs if:

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;
- (b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or
- (d) a public officer engages in conduct that —
- (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct; (ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;
- (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person.
- and constitutes or could constitute —
  (v) an offence against the Statutory Corporations
  (Liability of Directors) Act 1996 or any other written law; or
  (vi) a disciplinary offence providing reasonable
  grounds for the termination of a person's office
  or employment as a public service officer under
  the Public Sector Management Act 1994

(whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

# 1.1.3 Reporting by the Commission

Under section 84(1) of the CCC Act the Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct. By section 84(3) the Commission may include in a report:

- (a) statements as to any of the Commission's assessments, opinions and recommendations; and
- (b) statements as to any of the Commission's reasons for the assessments, opinions and recommendations.

The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4).

Section 86 of the CCC Act requires that, before reporting any matter adverse to a person or body in a report under section 84 the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning that matter.

Accordingly, Dr Fong was notified by letter to his solicitors dated 1 November 2007 of possible adverse matters which it was proposed to include in the report, and he was invited to make representations about them by 28 November 2007. At his solicitors' request a short extension of that time was agreed to, and by letter dated 30 November 2007 they provided extensive submissions. In response to a further notification Dr Fong's solicitors made additional submissions on 8 and 21 January 2008. The Commission has taken all those submissions into account in finalising this report.

One submission made on Dr Fong's behalf was that it was not open to the Commission to make a "finding" (sic: express an opinion) that Dr Fong misrepresented his relationship with Mr Burke to the Hon Jim McGinty MLA, Attorney General; Minister for Health; Electoral Affairs (Mr McGinty) because amongst other reasons, there was no evidence from the Minister as to what, if anything, Dr Fong had told him about his relationship with Mr Burke and nor was there any evidence as to how the Minister understood that matter.

To that point in the investigation, no direct evidence had been sought from the Minister about that, as it had not been thought to be necessary in light of the other material available.

Nonetheless, the Commission accepted that submission, recognising that as an investigating body and not a tribunal which merely makes findings or expresses opinions on material put before it by competing parties, it has an obligation to make its own inquiries. That obligation continues until the point at

which the investigation or inquiry is concluded by the tabling of a report under section 84 or other action under section 89 of the CCC Act.

The Commission therefore convened a further private hearing on Monday 17 December at which Mr McGinty was examined by the Commission. Dr Fong's legal representatives were advised prior to the hearing. Being satisfied that there were special circumstances, for the purposes of section 142(5) of the CCC Act, the Commission allowed Dr Fong and his counsel, Mr C. Zelestis QC and Mr S. Davies, to be present at that further hearing. Following examination of Mr McGinty by counsel assisting, leave was given to Mr Zelestis QC to ask certain further questions and to produce certain documents. He also sought and was given leave to provide further written representations in light of Mr McGinty's evidence, by close of business on 18 December 2007. Those representations were received and have been taken into consideration.

Despite the investigation being confined to the conduct of Dr Fong, and the Commission making no assessment of, nor expressing any opinion about Mr Burke in its report, the Commission accepts that the words 'any matters adverse to a person' in section 86 of the CCC Act have a meaning wider than merely the Commission's assessments and opinions.

In this report, the Commission necessarily sets out the facts of contacts and communications between Dr Fong and Mr Burke, as well as some references to Mr Burke made in evidence, bearing upon the reasons the Minister was concerned that Dr Fong give him a full understanding of any relationship between Dr Fong and Mr Burke.

As it was possible those matters may in themselves be regarded as matters adverse to Mr Burke, the Commission notified him of them pursuant to section 86 of the CCC Act and afforded him the opportunity to make representations about them if he wished.

On 14 January 2008 Mr Burke's solicitor, Mr S. Lemonis and Mr Burke's daughter, Ms Sarah Burke (also a lawyer but acting on this occasion as Mr Burke's personal agent) attended the Commission, where the relevant material was made available for their examination.

Mr Burke's solicitor subsequently provided written representations dated 17 and 21 January 2008 and the Commission has given them careful consideration.

A number of the representations made on behalf of Dr Fong argued that there was no evidence of any impropriety on his part in his contacts or relationship with Mr Burke, nor of any benefit received by him nor of any personal business dealings between them. The Commission accepts these representations, save for Dr Fong's disclosure to Mr Burke that the Commission was investigating a DOH employee, Mr Michael Moodie, and his failure to report the disclosure to Dr Fong of what Mr Burke claimed was confidential Cabinet information. But those representations do not go to the issue here, which is whether Dr Fong knowingly misrepresented to his

Minister the true nature and extent of his email and other communications with Mr Burke. In the Commission's opinion, the evidence leads irresistibly to the conclusion that he did.

#### 1.2 Disclosure

The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, compel the production of documents and other things, compel attendance at hearings and to compel responses to questions on oath in hearings conducted by the Commissioner.

Section 151 of the CCC Act controls the disclosure of a 'restricted matter' including evidence given before the Commission, information or documents produced to the Commission and the fact that any person has been or may be about to be examined by the Commission.

Section 151(4)(a) states that a restricted matter may be disclosed in accordance with a direction of the Commission. Pursuant to section 152(4) official information may be disclosed in various instances including: for the purposes of the CCC Act, for the purposes of prosecution or disciplinary action, when the Commission has certified that disclosure is necessary in the public interest, or to either House of Parliament.

The Commission takes the decision in releasing information to the public very seriously and is required to weigh the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.

#### 1.2.1 Telecommunications interception material

The Commonwealth's *Telecommunications* (*Interception and Access*) *Act* 1979 (TI Act) contains strict controls and safeguards in relation to telecommunications interception and dealing with information gathered from lawfully intercepted telecommunications services. Section 63 of the TI Act prohibits the communication of lawfully intercepted information.

Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission<sup>3</sup>, to make use of (a) lawfully intercepted information and (b) interception warrant information for a 'permitted purpose'. 'Permitted purpose', as defined in section 5(g) of the TI Act, in the case of the Corruption and Crime Commission includes; (i) an investigation under the CCC Act into whether misconduct has or may have occurred or (ii) a report of such an investigation.

# 1.2.2 Privacy considerations

In formulating this report the Commission has considered the benefit of public exposure and public awareness weighed against the potential for prejudice

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<sup>&</sup>lt;sup>3</sup> As defined in section 5 of the TI Act

and privacy infringements and complied with the strict requirements of the TI Act in the utilisation of telecommunication interception information in this report.

As a result of these considerations the Commission has decided not to include names of members of staff of the DOH, and various other individuals, who assisted the Commission during its investigation. Similarly, some extracts from TI material set out in this report have been edited by omitting the names of individuals or other information collateral to this inquiry.

# 1.3 Opinions of misconduct – standard of proof

The Commission fully appreciates that any expression of opinion by it in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion (or, indeed, even an adverse assessment not amounting to misconduct, as defined in section 4 of the CCC Act) against a public officer, or any other person, may have serious consequences for them and their reputations.

The Commission is careful to bear these matters in mind, when forming opinions, when conducting inquiries and when publishing the results of its investigations.

The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.

Furthermore, the Commission could not reach an opinion of misconduct on the basis of a mere mechanical comparison of probabilities, without any actual belief in its reality. That is to say, for the Commission to be satisfied of a fact on the balance of probabilities, it would have to have an actual belief of the existence of that fact to at least that degree.

The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the inquiry. Any expression of opinion in this report is so founded.

# CHAPTER 2 BACKGROUND

# 2.1 The Smiths Beach Investigation

During 2005 and 2006 the Commission investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach Development in Yallingup. The investigation examined the efforts of Canal Rocks Pty Ltd and its consultants in seeking to influence the Council, public service officers and politicians to support the development. The investigation touched on Mr Burke and Mr Grill, in their role as lobbyists acting for Canal Rocks Pty Ltd development, and their influence or attempts to influence public service officers involved in the development proposal.

The Commission's Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup was tabled in Parliament on 5 October 2007.<sup>4</sup>

Public hearings were held at the Commission in respect of that matter in October, November and December 2006 and February 2007. During this time Mr Burke, and his relationships with senior public officers, received widespread media attention in Western Australia and nationally.

# 2.2 The Freedom of Information (FOI) Request

On 28 March 2007, Mr John Kime, the Chief of Staff to the Hon Paul Omodei Leader of the Opposition, submitted a Freedom of Information (FOI)<sup>5</sup> request to the Department of Health following an article printed in *The Australian Financial Review* on 7 March 2007 referring to Dr Fong's relationship with Mr Brian Burke. The article quotes Dr Fong, in response to a series of written questions from *The Australian Financial Review*, as saying he 'had no personal or business relationship with Brian Burke'. The Leader of the Opposition believed these representations to be untruthful, and that communications existed to indicate a relationship between the two.

This article was one of those produced in evidence on behalf of Dr Fong. Mr Zelestis QC told the Commission that it (and other documents produced on behalf of Dr Fong) were being put before the Commission on the basis that they accurately set out what had been said.

# 2.3 The Department of Health's handling of the FOI Request

The FOI request submitted to the DOH sought, in general terms, any correspondence, electronic or otherwise, pertaining to any matter between Dr Neale Fong, Mr Julian Grill and Mr Brian Burke. The time frame for the request encompassed Dr Fong's time as Director General of DOH and his previous (sic) positions as the Executive Chairman of the Health Reform

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<sup>&</sup>lt;sup>4</sup> Available at http//www.ccc.wa.gov.au

<sup>&</sup>lt;sup>5</sup> Pursuant to section 11 of the Freedom of Information Act 1992

Implementation Taskforce (HRIT) and Chief Executive of the North Metropolitan Area Health Service.<sup>6</sup>

The scope of the request included any records, or part of any record, files, plans, briefing notes, emails, attachments, letters, electronically stored information, memos and any other thing deemed to be communication.

On 2 April 2007, the request was passed to the Acting DOH FOI Co-ordinator, who in turn contacted Dr Fong's executive staff requesting documentation falling under the scope of the FOI request.

On 16 April 2007, a member of Dr Fong's executive staff contacted the FOI Co-ordinator via email stating "...we are fairly sure there will be no documents that fall within the scope of the application" and further "...Neale is sure there won't be any relevant documents."

On 27 April 2007, another member of Dr Fong's staff contacted the FOI coordinator stating "...very happy to say that our response is 'NIL'...We are not aware of any corres to or from Neale to either of these people".

On 3 May 2007, the Acting FOI Co-ordinator contacted the previous FOI Co-ordinator and was advised as follows:

"The FOI Act requires a diligent effort when searching for records including emails for FOI purposes. Emails are problematic because a lot of people delete their email records. To me a diligent effort is requesting the email author to advise if relevant email records exist and if they do then making arrangement to retrieve those records. In the past this has been undertaken by the author or an assistant on their behalf. (I have never personally experienced problems in this area.) If the author advises that relevant records do not exist that should be sufficient to conclude the search unless there are issues of deceit or misconduct etc. Then senior management advice should be sought as to how to discharge the agency's responsibilities under FOI. The agency is legally required to make a full and diligent search for any relevant records. Seeking the services of the IT Department would be relevant if the author was unco-operative or obstructive and relevant emails clearly existed. This is a grey area because then management authority would have to be forthcoming to use IT assistance..."8

On 4 May 2007, the Acting DOH FOI Coordinator informed the Office of the Leader of the Opposition that all reasonable steps had been taken to locate documents fitting in the scope of the application, but that none had been located.

<sup>8</sup> DOH internal email to Acting FOI co-ordinator, 3 May 2007

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<sup>&</sup>lt;sup>6</sup> Dr Fong was appointed to HRIT on 2 August 2004, Acting Director General on 24 November 2004 and gained the substantive position of Director General on 11 October 2005

<sup>&</sup>lt;sup>7</sup> DOH internal email, 16 April 2007

#### 2.4 The FOI Internal Review

On 21 May 2007, the Office of the Leader of the Opposition requested an internal review of the FOI process<sup>9</sup> as the Leader of the Opposition's staff believed that documents falling within the scope of the original FOI request existed and were held by DOH. 10

On 24 May 2007, staff from DOH sought advice from the Office of the Information Commissioner as to the handling of the review. They were advised that someone independent of the handling of the initial request should Officers from the Information Policy and Support handle the review. Directorate (DOH IT) were engaged on 29 May 2007 to assist with the review and on 5 June 2007 a request was made of Dr Fong for a search of his email archives to be undertaken.

As a result of the internal review DOH IT staff subsequently recovered nine 'logs and headers' of emails between Dr Fong and Mr Burke dated between February and June 2006. The contents of the emails could not be recovered. DOH records indicate the results of the review were provided to Dr Fong's executive staff on 11 June 2007.<sup>11</sup>

The Office of the Leader of the Opposition received correspondence from DOH on 20 June 2007, outlining the result of the review and the discovery of the nine email 'logs and headers'.

### 2.4.1 Record Keeping within the Department of Health

Officers from the Commission met with various officers from DOH IT regarding their involvement in the search for, and subsequent location of the '9 logs and headers' during the FOI review process. DOH IT provided substantial information in relation to DOH policies and procedures for retention and storage of electronic records, including emails.

The State Records Act 2000 (the SR Act) requires that all government departments develop a record keeping plan that sets out its record keeping policies and practices consistent with the Principles, Standards and Guidelines developed by the State Records Commission. 12 The State Records Office approved the DOH Record Keeping Plan and underlying policies in 2004.

Consistent with the SR Act the DOH Record Keeping Plan requires the DOH have an electronic document records management system to capture, store and manage electronic and hard copy records in order to achieve full compliance. The DOH has an electronic record keeping system called 'TRIM' that electronically captures all incoming records that pass through the DOH

<sup>&</sup>lt;sup>9</sup> In accordance with section 54 of the FOI Act

<sup>&</sup>lt;sup>10</sup> The opposition at this time were in possession of the '10<sup>th</sup> email', which was later publically revealed by the media.

DOH records of email correspondence

<sup>&</sup>lt;sup>12</sup> Available at: http://www.sro.wa.gov.au/src/policies.asp

central mail office, although the full functionality of TRIM was not deployed due to its complex user interface. Internal memos and outgoing communications are not captured and it is not the current practice at DOH that emails deemed to be Departmental Records are captured in TRIM.

The DOH's *Records Policy and Procedures 2004*<sup>13</sup> requires the recipient of emails to determine their value as a record and if necessary print and place a copy on file. In the case of a Senior Manager this can be delegated to a subordinate. An email is deemed a record if it records "what happened, what was decided, what advice was given, who was involved, when it happened and the order of events" in regards to DOH matters. Where messages are of a personal nature, such as lunch appointments, they are considered to be ephemeral in nature and do not need to be saved.<sup>14</sup>

The SR Act, and the DOH's *Records Policy & Procedures 2004*, requires that emails which are considered records of business activity must be saved into a proper record keeping system. Furthermore it is the individual employee's responsibility to ensure appropriate record keeping is maintained in accordance with the policies.

In early 2006, the DOH identified shortcomings in relation to the management of electronic records and commissioned a business case to articulate a fully functional electronic document records management system. That process is currently ongoing.

DOH officers informed the Commission that the DOH email system is primarily a communication system and is not designed as an electronic records keeping system. Retention of each individual employee's emails is limited by the storage limit allocated. Full backups of the exchange information databases, system software and system transactions are run every evening and a three month tape rotation cycle is currently employed by DOH. These tapes are overwritten on a three monthly cycle.

Therefore the only records in existence of email content beyond a three month period would be contained in the individual employee's inbox, sent items folder or copied to a personal folder or stored on disc or on their personal drive.

# 2.4.2 The Department of Health's search for Email Correspondence

DOH IT staff were not approached during the initial FOI request, becoming involved only at the review stage. On 6 June 2007, DOH IT staff were provided the details of the scope of the FOI Review. On Friday 8 June 2007, the DOH Email Administrator initiated the search, discovering the nine 'logs and headers' on 11 June 2007. No content was located for any of the emails. On 12 June 2007, DOH IT staff undertook further searches but were unable to recover the content of the emails.

<sup>&</sup>lt;sup>13</sup> Non-patient records only

<sup>&</sup>lt;sup>14</sup> Consistent with State Records Standard 4

On 13 June 2007, DOH IT staff notified Dr Fong's executive staff that the contents of the emails could not be recovered.

# 2.5 The Legislative Assembly Estimates Committee Hearing – Parliamentary Privilege

During a Legislative Assembly Estimates Committee meeting on Wednesday 23 May 2007, Dr Kim Hames MLA posed a question to the Minister for Health, the Hon Mr Jim McGinty MLA (Mr McGinty). <sup>15</sup>

However what was said there is protected by parliamentary privilege and cannot be relied upon in evidence "in any court or place out of Parliament" if such reliance would bring what was said into question in any way<sup>16</sup>. The Commission is clearly a "court or place out of Parliament" for the purposes of article 9 of the Bill of Rights, and so does not rely in any way on the content of what was said in the proceedings of the Committee on that occasion.

The FOI material supplied by the Minister's office to the Leader of the Opposition shows that the Chief of Staff to the Minister forwarded a draft Ministerial Statement to Dr Fong, the Director General of the Department of Premier and Cabinet and the Policy Advisor to the Minister on 20 June 2007.

Although that draft email and Dr Fong's email of 20 June 2007 at 6:09pm were provided to the Commission, as they were created for the purpose of the Minister's response to the Parliament it is the Commission's view that they are also subject to the protection of parliamentary privilege. The Commission therefore is unable to rely upon nor make any comment as to the content of them and does not do so.

The same protection clearly extends to the statement tabled in Parliament by the Minister on 21 June 2007 and the Commission takes the same position in respect of that.

#### 2.5.1 Public Release of Information

On 23 June 2007, the Leader of the Opposition publically indicated, via *The West Australian*<sup>17</sup>, that the Opposition had in it's possession a tenth email from 2005, yet to be disclosed. *The Australian Financial Review* reported on 25 June 2007<sup>18</sup> that the tenth email related to lobbying of Dr Fong by Mr Burke. The next day *The West Australian* indicated Mr Brian Burke had set up a meeting between Dr Fong and Mr Eddy Lee, then Executive Director of the telecommunications company Amcom.<sup>19</sup>

<sup>&</sup>lt;sup>15</sup> Legislative Assembly Estimates Committee, Wed 23 May 2007 201b-245a/1

<sup>&</sup>lt;sup>16</sup> Bill of Rights 1689, Art 9; Parliamentary Privileges Act 1891 (WA), s.1; Halsbury's Laws of Australia, (on-line) [27095]; *Sankey v Whitlam* (1978) 142 CLR 1, per Gibbs ACJ at 37; *Mundey v Askin* [1982] NSWLR 369; *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 81 ALR 710 per Beaumont J at 717-718; *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407

<sup>&</sup>lt;sup>17</sup> Article *Libs warn of damaging Burke-Fong email*, 23 June 2007

<sup>&</sup>lt;sup>18</sup> Article *Burke email lobbied health chief,* 25 June 2007

<sup>&</sup>lt;sup>19</sup> Article: Burke emailed Fong on client's business, 26 June 2007

### 2.6 The Pettit Inquiry

Following the tabling of the Ministerial Statement, Mr McGinty engaged Mr Ken Pettit SC to conduct an inquiry into the matter. The terms of reference of that inquiry included, amongst other things, the full extent of communication between Dr Fong and Mr Brian Burke since 2 August 2004, the full extent of the relationship between Dr Fong and Mr Brian Burke since 2 August 2004 and whether there were any additional email exchanges between Dr Fong and Mr Burke since 2 August 2004 other than those found during the DOH FOI review.

On 27 June 2007, Mr Pettit SC interviewed 10 officers of the DOH, and requested a copy of the chronology of 'Key Dates' that had been prepared by a DOH Executive Officer in consultation with Dr Fong.

# 2.7 The Commission Investigation

On 22 June 2007, the Commission received an allegation regarding Dr Fong, alleging misconduct regarding the disclosure of information relating to the relationship between Dr Fong and Mr Burke and the record keeping processes within DOH, and suggesting that there were possible implications concerning the subversion of Parliamentary processes, the FOI Act and the SR Act.

On 27 June 2007, a Commission assessment was undertaken to determine whether the allegations concerning Dr Fong potentially had substance. An internal review of Commission holdings identified a number of specific issues and material indicating that Dr Fong and Mr Burke had been in contact since at least 2002.

Following the assessment of the allegations, and following Commission consultation with Mr Ken Pettit SC, on 2 July 2007 the Commissioner, the Hon Len Roberts-Smith RFD QC, authorised an investigation pursuant to section 33 of the CCC Act. Following representation from the Commission, Mr Pettit SC determined to cease his inquiry and provided all material gathered during his inquiry to the Commission.

The Commission's investigation was conducted between June and December 2007 and encompassed a review of documentation provided by DOH to the Commission, interviews with DOH staff, forensic analysis of DOH computers and computers lawfully seized during the Smiths Beach investigation, analysis of telecommunications interception material and private hearings conducted between 5 July and 17 December 2007.

Section 139 of the CCC Act stipulates that except as provided in section 140, an examination is not to be open to the public. Section 140(2) allows the Commission to open an examination to the public only if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.

In this case, there was no immediate benefit to be gained from public exposure of the Commission's investigation; there was no need for the public to be made aware of the evidence being obtained (for example, so that steps could be taken to stop some ongoing conduct). As the media had reported extensively on Dr Fong and his role as Director General of the DOH there was obviously substantial potential for prejudice to his reputation prior to the Commission evaluating the evidence and expressing any opinion in its report to Parliament. Having weighed those considerations the Commission could not conclude it would have been in the public interest to conduct public examinations.

# 2.8 Referral to the Office of the Information Commissioner and State Records

On 27 June 2007, the Office of the Leader of the Opposition contacted the Office of the Information Commissioner and the State Records Office expressing a concern about a subversion of the FOI process, and possible breach of the State Records Act by the Department of Health.

On 5 and 9 July 2007, the Information Commissioner and the Acting Director of State Records respectively postponed their inquiries until the finalisation of the Commission's investigation.

### 2.9 Scope and Purpose of the Investigation

The general scope and purpose of the Commission's investigation was to enable the Commission to make an assessment and form an opinion as to whether misconduct by public officers including the Director General of the Department of Health, Dr Fong, had or may have occurred or was occurring in regards to any and all communications with Mr Burke. The Commission's investigation focussed on the relationship, communications and correspondence between Dr Fong and Mr Burke between 2002 and 2007. Contacts prior to 2 August 2004 were relevant only insofar as they revealed the nature of the relationship between the two men and illuminated the contacts between them after that date.

Following the authorisation by the Commissioner to examine further issues identified during the inquiry, the scope and purpose of the investigation was broadened on 14 September 2007, by deleting the reference limiting the investigation to communications with Mr Burke. This was to enable the Commission to investigate unrelated allegations which had been made to it concerning Dr Fong.

# CHAPTER 3 EXAMINATION OF DR FONG'S RELATIONSHIP WITH MR BURKE

# 3.1 Dr Fong's representation to his Minister.

At the time of the initial FOI request and subsequent review the Commission's Smiths Beach investigation was nearing conclusion. The Commission's public hearings in relation to that matter were held during October, November and December 2006 and into related matters in February 2007, resulting in extensive national media coverage in which Mr Burke's role as a lobbyist and his relationship with a number of politicians and senior public servants was reported.

The issue was one of great public importance and was recognised as such by the State Government. Mr McGinty clearly had a keen appreciation of it, not least of all because of his relationship with Mr Burke, which he said:

"...is best described as poisonous and has been for two and a half decades." <sup>20</sup>

He was therefore concerned to ascertain from Dr Fong whether he had any relationship with Mr Burke. He had a general recollection that he raised the matter briefly with Dr Fong at the time of the Commission's public hearings into the Smiths Beach matter. The Minister's vague recollection of this first inquiry was that broadly speaking he was seeking an assurance:

"...that Brian Burke wasn't up to his usual tricks, if I can put it that way, in respect of anything to do with Dr Fong and the Health Department."<sup>21</sup>

He said that from what Dr Fong told him he was satisfied that was not the case. His recollection was that the contact was of a "fairly innocuous nature"<sup>22</sup>, and substantially, but not exclusively, was unsolicited by Dr Fong.

Asked what understanding he had of the relationship between Dr Fong and Mr Burke at that time, Mr McGinty said:

"Dr Fong told me that they had no relationship and - but then again I understand Dr Fong knows an awful lot of people around town who might talk to him from time to time, even send him emails from time to time. That to my mind doesn't constitute a relationship. He certainly denied to me that there was any friendship or ongoing relationship."<sup>23</sup>

The Minister was at pains to point out that the fact there was contact is not particularly significant in itself, despite what others might seek to make of it.

<sup>&</sup>lt;sup>20</sup> Transcript of private examination of Mr McGinty 17/12/07, p 10

<sup>&</sup>lt;sup>21</sup> Transcript of private examination of Mr McGinty 17/12/07, p 7

Transcript of private examination of Mr McGinty 17/12/07, p 8

<sup>&</sup>lt;sup>23</sup> Transcript of private examination of Mr McGinty 17/12/07, p 8

The issue is the nature of the contact – and he was very concerned to make sure there was no improper contact. The Commission agrees that contact with lobbyists is not of itself in any way wrong or improper and does not suggest otherwise; the real issue is how a public officer responds to a lobbyist in the particular situation. But in the present case, that is not an issue either. The issue here is the nature and extent of the contacts between Dr Fong and Mr Burke, the relationship between them and whether Dr Fong misrepresented those contacts or that relationship.

In early March 2007 Mr Andrew Burrell, a reporter with *The Australian Financial Review*, submitted a series of questions to the DOH about Dr Fong's relationship with Mr Burke. The questions and suggested answers were the subject of emails between media advisers at the DOH and the Office of the Minister for Health. One answer it was proposed to be given by Dr Fong in the departmental response was that:

"I do not have any personal or professional business dealings with Brian Burke."

In his evidence Mr McGinty said that this response reflected what Dr Fong had previously said to him about his relationship with Brian Burke. His evidence continued:

THE COMMISSIONER: "How did you understand the statement, 'I do not have any personal or professional business dealings with Brian Burke'?---Very much to be as Neale Fong had relayed to me; that he had no personal relationship, he at best was somebody he knew of many tens of thousands of people no doubt around Perth that Dr Fong knew, and there was nothing of a - of a personal relationship or certainly not a business relationship in any sense.

So looking at that you would not have read that and did not understand that, as I understand what you have just told us, as not saying, 'I do not have any personal business dealings with Brian Burke'?---No; no, more than that.

I see?---Perhaps I can give an example. I'm - there are certain people I would regard as friends, I would say I have a relationship with them; there's other people I regard as enemies, I have a relationship with them but not somebody who you just happen to occasionally say hello to or you would know as you do with - - -

It's the difference between knowing someone and having occasional contact with them and having a relationship? ---Yes.

Is that the distinction you draw?---Yes, that's the distinction that Neale Fong drew to me and that I tried to reflect in what was said here.

HARRIES, MS: So Mr McGinty, you would have understood then that there wasn't regular contact between the two? ---Yes.

And that that contact wouldn't have been of a personal nature?--- It wouldn't have been of a personal nature, and wouldn't have been of a business nature."<sup>24</sup>

The article was published in *The Australian Financial Review* on 8 March 2007, entitled "Fong business Links with Burke". It stated:

Dr Fong has come under pressure to explain his relationship with Mr Burke after the Corruption and Crime Commission exposed the strong influence Mr Burke and his lobbying partner Julian Grill held over senior public service and cabinet ministers.

The article was mostly about Dr Fong's involvement in a company called Australian Healthcare Technology Limited (AHTL), previously B2B.net, and the fact that Mr Burke was a shareholder. Mr McGinty said he had had a discussion with Dr Fong about that and had been told Dr Fong had relinquished his directorship about the day before he took up his appointment as Acting Director General. According to Mr McGinty, Dr Fong told him subsequently that he was unaware of Mr Burke's involvement in the company.

The 'trigger' for the article in *The Australian Financial Review* had been a dinner at Perugino Restaurant attended by Dr Fong and Mr Kevin Rudd. Mr McGinty regarded Dr Fong's attendance at that as completely unexceptional, observing again:

"It's not the contact itself, it's what transpires that can become problematic." <sup>25</sup>

The Commission agrees in both respects.

Asked about his understanding of what happened in the FOI process, Mr McGinty said Dr Fong had told him there had been no emails between him and Mr Burke, subsequently explaining to him that he could say that because the department had checked and there were no such emails on the DOH computer system.

The Minister said that some time later he was told by his Chief of Staff that there were eight or nine emails between Dr Fong and Mr Burke. His immediate reaction was to instruct his Chief of Staff to find out what had

<sup>25</sup> Transcript of private examination of Mr McGinty 17/12/07, p 18

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<sup>&</sup>lt;sup>24</sup> Transcript of private examination of Mr McGinty 17/10/07, pp 14-15

happened and to get copies of the emails. That process took some days. At first the advice was that the emails could not be retrieved. Mr McGinty did not accept that. He sought independent IT advice from outside the DOH. That was obtained from the Department of Premier and Cabinet (DPC) IT specialists. They were able to retrieve the headers to the emails, but that was all.

Mr McGinty had a general recollection of discussing these matters with Dr Fong over this time:

"In essence he said that his staff had checked. As I now know that was as a result of an FOI request from the Liberal Party in respect of emails, and in fact an FOI appeal because the initial response to the FOI was the response that Neale Fong gave in the Parliament, that is, that there were no emails, so it was a request for review, I think, by the Liberal Party to ascertain which showed up that these emails did exist, had been deleted from the system, but the headers remained. I think was what it was about. I remember Neale trying to ascertain, according to the best of his recollection, what they were about and the headers provided him with a bit of a memory jolt, to say, "This one was about" - and I remember one was about a mental health Nothing really to do - not in his capacity as Director-General of Health, but somebody who, as it transpires, and I didn't know this at the time, that I know, Neale Fong obviously knew and Brian Burke knew, and seeking some advice on a mental health issue. There was a couple of others of that sort of general nature, but Neale assured me that there was nothing untoward in any of the emails that had, to the best of his recollection, given that he didn't have copies of them.

Did you express a concern to Dr Fong that he failed to tell you about those emails?---Yes, and he said to me, well he had previously told me that he had had communication with Brian Burke, but whether that communication was email, telephone or any other form, he had no recollection of and when his staff advised him that there were no emails, that he took their word for - essentially, that the communication must have been, for instance, over the telephone rather than by email.

When Dr Fong offered you that as an explanation, did you put to Dr Fong the issue of whether he received an email or not would be something within his knowledge, not necessarily within his staff's knowledge?---He - yes, he replied to me that he received a phenomenal number of emails each year. I think it was more phone calls that Brian Burke made, but I don't remember the exact figure, but a phenomenal number and that he didn't obviously remember every one of them and that was his response, or words to that effect.

Did you raise with him the fact that Brian Burke being who he is, a figure of public prominence, that that may be a person he may not easily forget?---I certainly remember thinking that. I can't say that I can expressly remember saying that to him, but that featured as part of the discussions that we were having about - I think I might've even said to him at one stage, "If I received one email from Brian Burke I'd remember it," but then again that's me." <sup>26</sup>

#### And further:

"So that was my focus and that obviously thinking through the public reaction to this and knowing the appetite in the media for anything to do with Brian Burke, that we would have covered at least in a general sense - I don't know that I ever put those precise questions to him but we would have covered, "How could you have not remembered an email from Brian Burke?" <sup>27</sup>

Mr McGinty's evidence was that there was nothing in what Dr Fong told him to suggest there was anything improper in his dealings with Mr Burke through those emails.

On 21 June 2007 Mr McGinty made a statement to Parliament based on that information. The Opposition then announced it had what it claimed was a tenth email.

When Mr McGinty asked Dr Fong about that, Dr Fong told him he did not know what it was about and "the system didn't throw it up" or words to that effect.

As a result of that, Mr McGinty set up the Pettit Inquiry.

Mr McGinty was questioned during his examination about the conversations following the discovery of the emails:

"At that time, following the discovery of the emails, did you then have more in-depth conversations with Dr Fong about the type of contact that he had had with Mr Burke?

---It was more about the content of the emails, which again dealt with the nature of the contact. Again, the assurance was given to me that as best he could recollect from the headings that there had been nothing of a business nature or of a close personal relationship, or a personal relationship, contained in those emails."<sup>28</sup>

<sup>28</sup> Transcript of private examination of Mr McGinty 17/12/07, p 27

<sup>&</sup>lt;sup>26</sup> Transcript of private examination of Mr McGinty 17/12/07, pp 21-22

Transcript of private examination of Mr McGinty 17/12/07, p 23

In response to a question whether the discovery of the emails had given rise in him to a concern that perhaps he was not being told the full truth about the relationship between Dr Fong and Mr Burke, Mr McGinty said:

"...I believed Dr Fong."29

He said he did question Dr Fong more about it, and:

"...Well, he - yes, and we had that discussion and the - my recollection of the nature of the answer that he gave was that it was minimal but there had been contact and it wasn't of a business or personal nature. When I say a personal nature, a personal relationship nature."

His understanding from what Dr Fong told him was that any contact was overwhelmingly at Mr Burke's invitation.

The Minister was then referred to the transcript of an interview of him by Ms Rebecca Carmody on 'Stateline' on 29 June 2007. In the course of that interview Mr McGinty told Ms Carmody that he did not think Dr Fong and Mr Burke had what anyone would call a relationship and he did not think they were friends. He confirmed in evidence that those answers had been based on the information given to him by Dr Fong. In elaboration, he explained that many people with a high profile in public life know possibly thousands of people who they might contact, or who may contact them, to get assistance or information, but that would not constitute a personal friendship or relationship.

Mr McGinty said that the assistance Dr Fong sought from Mr Burke in connection with the payment of an account at Perugino Restaurant did not indicate anything more than an acquaintanceship – although he did agree in examination that the request indicated Dr Fong knew Mr Burke was on very good terms with the owner of the restaurant and had an expectation that Mr Burke would be willing to speak to the owner in order to assist Dr Fong.

In the Stateline interview, Mr McGinty said that over the years he had worked with Dr Fong, he never had any reason to doubt the latter's honesty. He added that was still his view:

"...given the volume of factual information that goes backwards and forwards between the health department and myself, between Neale Fong and myself, he and I will from time to time make mistakes. I regarded the email thing as a mistake. I may be naive, but that's how I regarded it, and there has been nothing that has transpired between us which would cause me to doubt his honesty, and we have been working together now for approximately four years and it has been a very, very close working relationship during that time." 31

<sup>&</sup>lt;sup>29</sup> Transcript of private examination of Mr McGinty 17/12/07, p 28

Transcript of private examination of Mr McGinty 17/12/07, p 28

<sup>&</sup>lt;sup>31</sup> Transcript of private examination of Mr McGinty 17/12/07, p 31

In examination by Mr Zelestis QC, Mr McGinty agreed that one central concern of his was to understand, from his point of view as the Minister, whether Dr Fong had any dealings in his official capacity with Mr Burke. Another concern was whether there was a personal friendship. The examination continued:

"Was your concern there to understand whether there might be an ability of Mr Burke to influence Dr Fong arising from a personal friendship?---And if that existed that would have been a disaster from my point of view; so, yes, that was my concern.

So there was what we might call the business or the professional relationship. Correct?---Yes.

There's the personal friendship relationship. Was there any other aspect of a potential relationship between Dr Fong and Mr Burke that was of concern to you in getting to the bottom of his dealings and contact with Mr Burke?

---No, it was either of those two relationships which could have put Brian Burke in a position where he might have been able to influence outcomes on any range of matters through the Health Department. That was my sole concern.

So a wider, looser occasional kind of conflict didn't matter to you?---Not at all.

It was anything which established a relationship that gave either a potential to influence or an apprehension of a potential to influence?---Yes."<sup>32</sup>

The nature of Mr McGinty's concerns was canvassed further in re-examination by counsel assisting:

HARRIES, MS: "Mr McGinty, you said that a friendship between Dr Fong and Mr Burke you would have considered that to be a disaster. Why is that?---Because of the capacity to be able to influence. I don't mind who people talk to. Perth is still a relatively small place, people have to get along with people and they do from time to time talk to each other. What I would have regarded as totally unacceptable was any influence or perhaps even as Mr Zelestis just put it, the appearance of influence of Brian Burke over anything to do with the Health Department. That partly because of my own relationship with Brian Burke it would have been totally unacceptable. More importantly, I've known Brian Burke for a very, very long period of time and I know what he gets up to and it just would have been unacceptable for me as minister to have my Director-General relating in that sort of a way to Brian Burke. Now, if Neale in his other capacity as

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 $<sup>^{\</sup>rm 32}$  Transcript of private examination of Mr McGinty 17/12/07, p 33

chairman of the Football Commission wanted to have him in the box at the Football Commission through his company or whatever, well, that's - that's his business, but any - any relationship which gave rise to the Burke influence I would regard as unacceptable and I was assured that that relationship did not exist.

And you're not suggesting, Mr McGinty, are you, that there would have to be a personal friendship between Dr Fong and Mr Burke in order for there to be an ability to influence? There could be something less than a friendship in order for there to be an ability to influence. Is that not correct?---Indeed. In fact, I think the words of a personal relationship or a business relationship were in fact Neale's words, but what that was meant to convey was the opportunity to influence."

During its Smiths Beach investigation the Commission had lawfully seized Mr Burke's and Mr Grill's computers, pursuant to section 101 of the CCC Act, and lawfully intercepted his telephone services pursuant to the TI Act. Through forensic analysis of the lawfully seized computers the Commission became aware of at least 33 email contacts between Mr Burke and Dr Fong. The full texts of the majority of the 33 emails were recovered, however seven were unrecoverable. Of those seven, the headers of five had been captured in the list of nine emails supplied to the Commission by the DOH. Twenty-four of the thirty-three emails fell within the FOI request period. It is improbable that the emails recovered by the Commission are all of the emails between Mr Burke and Dr Fong as the emails that have been recovered infer, or refer to, other emails that were exchanged.

The general content of these emails included an invitation to attend a luncheon with Mr Burke at Perugino Restaurant on 11 October 2005 for a presentation on Smiths Beach, a request from Dr Fong seeking assistance from Mr Burke for payment of a dinner, Dr Fong and Mr Burke being in Melbourne, a request from Mr Burke regarding Mr Andrew Macnish, the Chief Executive of the Shire of Busselton, requests from Mr Burke regarding medical matters, advice from Mr Burke regarding Dr Fong's employment at DOH and handling the media.

# 3.2 Dr Fong's evidence to the Commission

Dr Fong was to depart Australia on Friday 6 July 2007 and a decision was made to summons him for a private hearing on Thursday 5 July 2007 to seek clarification surrounding his relationship with Mr Burke and the extent of email and other communication between the two. During his appearance the Commission sought to ascertain what Dr Fong would volunteer regarding his email and other communications with Mr Burke.

<sup>&</sup>lt;sup>33</sup> Transcript of private examination of Mr McGinty 17/12/07, pp 33-34

Dr Fong explained his relationship with Mr Burke and maintained the position that he did not recall any email contact with Burke even after the discovery of the 'nine logs and headers'.

The following transcript extracts indicate Dr Fong's position at the initial examination:

"Prior to the media attention regarding your relationship with Mr Burke that has arisen fairly recently, what was the level of your contact with Mr Burke and if we can just step through, firstly, your email contact with Mr Burke, how regular would that have been to your recollection?---Well, my recollection was that I didn't have email contact with Mr Burke. That did not come to my mind - when the Freedom of Information application was received by the department, my exact words were, "Well, I don't recall email contacts but, you know, please go ahead and go through the process." (emphasis added)

I have never denied the fact that I have had occasional contact with Mr Burke, telephone conversations, but they would be few..."

#### And further:

"Okay. So your recollection was no email contact, a few or occasional telephone contact, is that correct, and what do you define by occasional telephone contact?---I would be - I would be surprised if there was (sic) more than a dozen contacts in my whole lifetime of knowing Mr Burke but, you know, I can't be precise about that but it is not something - telephone conversations with Mr Burke is not - has not been frequent in my recollection." (emphasis added)

#### And later:

"Did you receive any other communications from Mr Burke relating to Management Information Systems?---Well, <u>I have no recollection of receiving the nine emails that are previously known, nor the 10th, so I don't have any recollection of receiving any other emails." (emphasis added)</u>

Evidence from both Dr Fong and his staff was consistent in that Dr Fong is pro-active in the management of his emails. He manages his emails primarily from his handheld Blackberry PDA device.<sup>37</sup> Whilst various members of his

Transcript of private examination of Dr Fong 05/07/07, p 34

<sup>&</sup>lt;sup>34</sup> Transcript of private examination of Dr Fong 05/07/07, pp 13-14

<sup>&</sup>lt;sup>35</sup> Transcript of private examination of Dr Fong 05/07/07, p 14

<sup>&</sup>lt;sup>37</sup> PDA is a personal digital assistant that enables phone calls, access to the internet and emails.

staff have access to his emails he is the only one who deletes messages, other than those which are clearly inconsequential.

On 6 June 2006, Mr Burke telephoned Dr Fong.<sup>38</sup> In this phone call Dr Fong referred to an email that Mr Burke had sent him, and he asked Mr Burke to resend it, as he had deleted the previous copy.

As Dr Fong is responsible for managing and deleting his own emails it can be inferred that logically he is the individual most able to verify not only their existence, but their content and the number of them.

Prior to further examination Dr Fong was given an opportunity to reconsider his recollection. Dr Fong re-appeared at the Commission for a further private hearing on 14 September 2007. At this time he was questioned as to his recall about his communication with Mr Burke:

HARRIES, MS: "Dr Fong, before you left the Commission on a previous occasion you were asked to consider your position over the break and my first question to you is: are there any additional communications between yourself and Mr Burke that you have now had the opportunity to recall or reflect on and remember that you wish to tell the Commission about?---There - I have had occasion to reflect. I do not recall any other conversations. I'm not saying that I may not have had conversations. I certainly have no recollection of emails or any other dealings with Mr Burke." (emphasis added)

Dr Fong told the Commission that he wrote to Mr Burke, his local member, in 1973 or 1974 when he was still a schoolboy and had seen him a couple of times in his local church community. Dr Fong later wrote and requested that Mr Burke (then the Premier), as patron of the Nollamara Amateur Football Club, write a foreword for a 21<sup>st</sup> anniversary history book of the club.

On 11 February 2000, whilst Chief Executive at SJOG Dr Fong was invited to join the Board of a virtual medical company B2B.net by Mr Simon Trevisan, the son of Mr Anthony Trevisan, the Chairman of Capricorn Resources and Trans Continental Resources.

Dr Fong was appointed as non-executive Director before resigning in 2004. Dr Fong informed the Commission that B2B.net was an electronic health company attempting to get into that electronic health space and the Trevisans:

"...were looking to form a board to do an IPO, a float, and where they obviously knew - got to know me, about my role at St John's; I was reasonably high-profiled at the time in terms of being a senior health executive; invited me to join the board."<sup>40</sup>

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<sup>38</sup> T1340

<sup>&</sup>lt;sup>39</sup> Transcript of private examination of Dr Fong 14/09/2007, pp 52-53

<sup>&</sup>lt;sup>40</sup> Transcript of private examination of Dr Fong 05/07/07, p 10

Mr Burke's family investment company Abbey Lea Pty Ltd was the fifth largest shareholder in AHTL (formerly B2B.net).<sup>41</sup>

Dr Fong met Mr Trevisan for the first time when interviewed for the Board position. Mr Trevisan informed him, "... well I've done some checking out of you with my friend Mr Brian Burke".<sup>42</sup> Dr Fong believes this was when he first became aware Mr Trevisan and Mr Burke had any connection and this was also the first time he had heard that Mr Burke had an opinion about him.

Dr Fong recalled being asked to set up a meeting between the CEO of Australian Healthcare Technology, Mr Debeyer, with the then Director General of DOH, Mr Dawbe, which he did. The meeting was also attended by Mr Burke.

Dr Fong was informed at a later date that Mr Burke had been retained as a consultant for Trans Continental Resources but to the best of his knowledge there were no dealings between the company and the DOH other than the meeting with Mr Dawbe. Dr Fong claims that whilst Mr Burke and he attended various company lunches and the like, there were no discussions indicating that Mr Burke had any financial involvement in the company.

In 2002 there was email communication between Mr Burke and Dr Fong, in his capacity as Chairman of the Western Australia Football Commission, regarding government funding for football in Western Australia. In an email to Dr Fong on 29 August 2002, Mr Burke confirmed a lunch at Perugino Restaurant for 4 September 2002. Mr Burke also included Dr Fong's personal assistant at SJOG Hospital in the mailing group. Mr Burke informed Dr Fong that Mr Norm Marlborough MLA and Mr Graham Giffard MLC would be attending the lunch. Mr Burke made a somewhat cryptic reference to the Premier and Mr McGowan, who was at that time the Minister for Education, Sport & Recreation and Indigenous Affairs. 43

## 3.3 The emails

In the following email from Mr Burke – and others set out in this report – the Commission has deleted his contact details appearing under his name, as well as the contact details of other individuals.

<sup>43</sup> Appointed in February 2001.

<sup>&</sup>lt;sup>41</sup> Australian Financial Review article "Fong business links with Burke" 8 March 2007, p 6

<sup>&</sup>lt;sup>42</sup> Transcript of private examination of Dr Fong 5/07/2007, p 10

	Forwarded Message
Subject:	Football funding
From:	Brian Burke
Date:	29/08/2002 10:09:00 AM
To:	Neale Fong
CC:	
cc.	Message Body
Dear Neale	niessage Dody
Dear Neare	
This is to confirm that	at I arranged lunch at
	Outram Street West Perth
at 12.30pm	
on Wednesday Sept	tember 4th.
	be Graham Giffard MLC; Norm Marlborough MLA and John Fiocco. I have not
discuss	owan MLA (who is close to Alan Carpenter) on advice and for reasons we can
discuss.	
I briefly mentioned to	o each of them (in very broad terms) the discussion we had. And I have started to
	approach to the problem.
Final Arrangement	
	point may be a clear view of the Final Arrangement the commission wants to
	allow us to say to government that:
	ement is in the public interest; and
	and disastrous developments, football would not be "back for more".  developing the Final Arrangement will fall to the commission
in the first histance,	developing the Final Arrangement will rail to the commission
Interim Relief	
	ened me a bit - it will take time to bring the government gently and generously to
	s that there should be a range of interim measures that reflect the positive progress
	nal Arrangement and the growing view among all parties that a positive outcome i
	elief should be part of and a natural progression to the Final Arrangement.
Its Support base	
94 1883 SX 2535 FOX	ent should have the broadest possible support within football and this support base
	coopted into the strategy we develop to persuade government. The role to be
	int or a single role (or both) but it must be properly and comprehensively
	ample: An approach by representatives of the commission, the AFL clubs and the
	d by Ron Alexander might be desirable as might an individual approach by the
	Ginty or to Mark McGowan etc. This is really the critical challenge: By the time
The second second	e minister's door you should have a fair idea that he is going to accept your
	uld have a fair idea that his ministerial colleagues will support him in cabinet. This
33.73	rehensive and well thought out strategy that maximises the influence and pressure by casting a very wide net starting with the backbench in their electorates and
including opposition	(Horizon) H.
oppositoir	770-7770 2003 C003
And Executive Tean	1
You may think a sma	all Executive Team is best suited to direct the drawing together of the support base
Regards	

Mr Burke emailed Mr Grill on 30 August 2002 outlining he had been approached by Dr Fong regarding problems confronting football in Western Australia. Mr Burke alluded to the possibility of a future consultancy role for them. Mr Burke makes

Brian Burke

reference to remittance of revenues in relation to another matter: "as per the Smiths Beach model":

Subject:	
From:	Brian Burke
Date:	30/08/2002 4:30:00 PM
To:	Julian Grill
	Message Body
The Chairman of the l problems confronting (see attachments), wh	about [REMOVED] and the copy of the letter from Rockingham. How do you roicing etc of these matters? I am perfectly happy to do that work and remit 50% of all s Smith's Beach model or to help in any other appropriate way.  Football Commission, Neale Fong, asked me to meet with him to assist him with football in Western Australia. I did so, arranged a hunch and sent him a subsequent note ich will save me explaining things. Unfortunately, there is no talk of a consultancy yet but any well come. If you are interested you might like to come to hunch.

On 27 September 2002 Dr Fong emailed Mr Burke and stated, "Thanks for that, I'll stay in touch". It is unknown what this relates to but it indicates that there was ongoing contact between Dr Fong and Mr Burke.

On 2 April 2003 Mr Burke emailed a Crikey media article to bulk recipients regarding him and Mr Grill being retained by the WA Trotting Association. The article related to lobbyists and the political process and Dr Fong was just one of numerous recipients.

On 9 April 2003 Mr Burke forwarded a further Crikey article and again Dr Fong was just one of a large number of addressees. The article also related to the use of lobbyists in the political process and was titled "Lobbyists create a furore out West".

On 3 November 2003 at 9:06 am, Mr Burke emailed Dr Fong as Chief Executive at SJOG. The content of this email indicates that Mr Burke was approaching Dr Fong on behalf of Management Information Systems (MIS).

Subject:	IT
From:	Brian Burke
Date:	3/11/2003 9:06:00 AM
To:	Neale Fong
BCC:	Chris Wallace; Julian Grill
	Message Body
to you) and a compan	caging (which has just won the Health dept tender — about which you may recall I spoke by called Management Information Systems (see attachments in confidence) would like s with your group. Can I refer them to someone on your organisation, please?
BRIAN BURKE	
	Attachment
MIS - To Norm Mar	51 ATTOMIC TO 10
MIS - To Norm Mar	51 ATTOMIC TO 10

The attachments were a confidential Management Brief regarding the company and a letter from the company to Mr Norm Marlborough who was at the time Parliamentary Secretary to the Minister for Consumer and Employment Protection; Indigenous Affairs; Minister Assisting the Minister for Public Sector Management and Leader of the House in the Legislative Assembly.

Dr Fong responded to Mr Burke's email at 11:03 am on 7 November 2003.

Subject:	Re: IT
From:	Neale Fong
Date:	7/11/2003 11:03:34 AM
To:	Burke, Brian
	Message Body
Sorry I took a while to who also looks after p	o get back. The person would be Ian Oakley, National Director of HR for SJGHC, payroll.
Cheers	
Neale	

The response from Dr Fong indicates he had no issue with the request from Mr Burke. On the face of it there is no reason why he should have had. As the email fell outside the period of time that Dr Fong was employed by the DOH inquiries were not made by the Commission with SJOG to determine whether the emails were printed and filed. What is known is that MIS were not successful in their endeavours to enter into a business arrangement with SJOG.

On 2 January 2004 Mr Burke again emailed bulk recipients including Dr Fong. This email related to Mr Burke changing his Internet Service Provider (ISP) from Telstra and provided his new email address.

On 27 March 2004 Mr Burke sent an email to bulk recipients, again including Dr Fong. The email referred to a report regarding Western Power and a payment from the Australian Services Union (ASU) in *The West Australian* newspaper. Mr Burke's involvement in the matter is outlined within a Commission report 'Report on Western Power Corporation payment to ASU', tabled in Parliament on 17 December 2004.<sup>44</sup>

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<sup>&</sup>lt;sup>44</sup> Available from <u>www.ccc.wa.gov.au</u>.

Subject:	Western Power: newspaper report
Date:	27/03/2004 5:21:00 AM
BCC:	
	Message Body
See the story in today	's (Sat March 27) West.
I have no knowled     The Western Power pany Western Power p	vices Union has retained me for more than 3 years; ge of any account from which the ASU pays me; er payment to the ASU was unknown to me but my consultancy with the union predates bayment by a year or more; and d (or asked) to oppose disaggregation.
I am nevertheless resi	gned to accepting that my involvement any story makes it more interesting.
any campaign against Power makes many s	Paul Burlinson tells me (yesterday evening) the Western Power payment was unrelated to disaggregation and that it was to fund research into energy reform. He said Western imilar grants to a range of community groups. I have no idea of any of this. Paul also uformation from the union's records was released by a disgruntled former employee e union.
Regards	

On 5 July 2004 Mr Burke forwarded an email to Mr John Theodorsen regarding Health Care with a blind copy of the email to Dr Fong. In the email Mr Burke indicates that he had approached Dr Fong on behalf of Mr Theodorsen and Dr Fong was happy to meet with Mr Theodorsen and discuss various matters.<sup>45</sup>

BRIAN BURKE

 $<sup>^{\</sup>rm 45}$  Mr Theodorsen is listed on the lobbyists register on the DPC web site.

Subject:	Health care
From:	Brian Burke
Date:	5/07/2004 5:20:00 PM
To:	'john'
CC:	Mark Riseley
BCC:	Neale Fong (neale.fong@sjog.org.au)
	Message Body
Dear John	
days (I'd ring him on 'you. Neil is unsure that Mark (and others so it for treatment. I indicat agreement" was requibut you can form your Regards	today and gave him your briefing note. Neil is expecting a call from you in the next few Wednesday at St John's) and I think he will be happy to talk the matter through with at the central thrust of Mark's position is correct: That is, he believes it is possible for inclined) to now make arrangements for patients to come to Perth from the Middle East ted to him that Mark was of the view that some "Government to Government umbrellated for referrals to be acceptable in the client countries. I am not sure Neil is convinced own view. He will certainly give you a hearing.
BRIAN BURKE	

The Commission considered conducting analysis of the email systems at SJOG, but as this would have fallen outside the period of the initial FOI request, it was determined that this would not add value to the investigation.

# 3.4 Dr Fong's Representation of his Relationship with Mr Burke

Whilst Dr Fong continually sought to convey that there was no relationship between him and Mr Burke going beyond mere casual acquaintance and social contact, there obviously was some particular connection more than that between the two prior to Dr Fong's appointment to the HRIT in 2004. Dr Fong had approached Mr Burke regarding football funding in Western Australia and the emails clearly indicate there was additional communication between the two separate to those detailed above. The communications suggest more than a casual relationship.

When invited by the Minister in 2004 to take up the role of the Executive Chairman of the HRIT, Dr Fong attended Mr Burke's home to discuss the possibility of taking up the new role and seeking advice as:

"At that time it was a big move for me to move into the public sector into a very significant role. I sought advice from many people in the community at that time about making that move into this role. One of my - one of the people that I took advice from was Mr Ian Taylor, former Minister for Health and a fellow Commissioner with me on the WA Football Commission, who suggested to me that it would be a good idea that I actually run that by Mr Burke, which I subsequently did and asked his - his view on - on that side of the politics and moving into a public sector role again at such a senior level."

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<sup>&</sup>lt;sup>46</sup> Transcript of private examination of Dr Fong 5/07/07, pp 8 - 9

Under examination before the Commission on 5 July 2007 Dr Fong was asked to describe his relationship with Mr Burke.

"But if we can just start - how would you characterise your relationship with Brian Burke? What label would you give it?---I would call him someone that I've had personal contact with. I don't - I would not, in my view, class it as a personal friendship or relationship."

The original FOI request from the Opposition had been initiated in response to an article appearing in *The Australian Financial* Review on 7 March 2007 entitled 'Fong gives himself a clean bill of health', reporting that Dr Fong had stated he had 'no personal or business relationship with Brian Burke'.<sup>48</sup>

During the second examination on 14 September 2007 Dr Fong was questioned in relation to the representations he made to the media. Dr Fong was shown a series of emails between himself and the DOH media representative, the first dated 6 March 2007.

HARRIES, MS: "This is an email between (name removed) and Dr Neale Fong dated 6 March 2007...

Dr Fong, you have, it would appear, replied to some questions that have been provided to (name removed) by Andrew Burrell from The Australian Financial Review. Does that accurately reflect what - --?---Yes, this is - this is following the Rudd story.

Yes. So it would appear that there is a series of questions that you have been asked, "What is the nature of your relationship with Brian Burke?" and so on...

## Question 3:

Have you had any private dealings with Brian Burke? ---No.

Has Mr Burke ever acted as a lobbyist for you, your private interests or the Health Department?---No.

Did you inform health minister Jim McGinty at the time that you had met Brian Burke - that's a reference to the Rudd dinner ---- No, I was not meeting Mr Burke, I was meeting Mr Rudd."49

### And later:

"You have also said in that email, "I do not have any personal or professional dealings with Brian Burke." Do you stand by that statement?---No. I said I do not have any personal or professional business dealings with Brian Burke, referring to personal business or professional business dealings.

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<sup>&</sup>lt;sup>47</sup> Transcript of private examination of Dr Fong 05/07/07, p 8

Atticle: The Australian Financial Review, 07/03/2007, p 6

<sup>&</sup>lt;sup>49</sup> Transcript of private examination of Dr Fong 14/09/07, pp 103 - 104

Okay. So you are drawing a distinction there?---I've never - I've never said that I have not had contact with Mr Burke. I mean - or known Mr Burke for - you know, off and on as has been a matter of public record.<sup>50</sup>

HARRIES, MS: Dr Fong, did that information come from you? "I do not have any personal or business dealings - professional business dealings with Brian Burke"?---They related to business dealings, yes. I've never denied I've had personal contact with Mr Burke." <sup>51</sup>

In relation to private business dealings Dr Fong stated:

"Well, I've said what I said. I've never had private business dealings with Mr Burke. I've never, you know, done deals with Mr Burke." 52

Dr Fong was asked to clarify his representation of personal dealings:

"What you mean by the - what's the distinction that you're drawing between personal dealings and personal relationship?--- Well, someone that I might ask them advice about something on a - at a personal level; whether I accepted, you know, this role that what - you know, a role in government in the - in the public arena.

So that's personal dealings?---Yes.

And what is personal relationship, what would be an example?---Well, you know, how is - "How is your mother-in-law?" or something like that or, you know, "How are you coping with life?" or something like that."<sup>53</sup>

#### And further:

"This distinction that you're drawing between personal dealings and a personal relationship, is what you're describing a relationship of simply a relationship of two high-profile public figures who deal with one another from time to time? Is that what you're describing?---Well, yes.

So that fits within your definition of "personal dealings"?---Yes, and - - -

That's what it is?---Yes.

<sup>&</sup>lt;sup>50</sup> Transcript of private examination of Dr Fong 14/09/07, p 106

<sup>&</sup>lt;sup>51</sup> Transcript of private examination of Dr Fong 14/09/07, p 108

Transcript of private examination of Dr Fong 14/09/07, p 108

<sup>&</sup>lt;sup>53</sup> Transcript of private examination of Dr Fong 05/07/07, p 110

Okay, and these two high-profile public figures may come across each other in public life. Is that what you're describing?---Well, that is what has happened.

Inevitably come together in public life?---It is - it is what has happened. I mean, it's not about "may" - it is exactly how I would describe the relationship with Mr Burke over the past, you know, couple of decades. I mean, you know, there was a time - there were times when he has contacted me and there's been times when I've contacted him deliberately but not - not out of a - not out of a ongoing relationship."<sup>54</sup>

# 3.4.1 The Dinner at Perugino Restaurant

Mr Ian Taylor was summonsed to appear before the Commission for a private examination on the 19 July 2007. During the examination Mr Taylor stated he invited Dr Fong to a dinner at Perugino Restaurant on 1 August 2005 at which the then Federal Opposition Foreign Affairs Spokesman, Mr Kevin Rudd, was to speak. Mr Burke organised the dinner. Issues surrounding the attendance of Mr Rudd and Mr Burke at the dinner were the subject of nationwide media coverage at the time of the Commission public hearings on Smiths Beach.

In evidence to the Commission, Mr Taylor explained how he came to invite Dr Fong:

"--- when you were aware of Dr Fong and Mr Burke meeting?
---As I've said before, obviously Neale and I talked about this and
I've looked at my diary. The next one that I could - I can
remember and find in my diary was Brian Burke contacting me
and saying he's having this function for Kevin Rudd at Perugino's
and that was on - I will just make sure - that was on Monday, 1
August at 7 o'clock - - -

2005?---2005, yeah, and he just said to me, "Do you want to bring someone along?" and that was anyone. I mean, I could've brought my wife or I could've brought anyone, I suppose, and I thought about it. I know that - knew that Neale was interested in politics and I thought, "Well, I'll ask Neale if he wants to come along," and so Neale actually came along to that function.

As your guest?---Yeah. Really as my invitee, I suppose, yeah; yeah."55

<sup>55</sup> Transcript of private examination of Mr Taylor 19/07/07, p 9

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<sup>&</sup>lt;sup>54</sup> Transcript of private examination of Dr Fong 05/07/07, p 111

# 3.4.2 Lobbying approaches on behalf of Management Information Systems

In September 2005 Mr Burke again emailed Dr Fong in relation to a particular company, Management Information Systems (MIS). Dr Fong was now a public officer. Similar to the emails regarding the company when Dr Fong was the Chief Executive at SJOG, it would appear that Mr Burke was approaching Dr Fong on behalf of the company and its product, although MIS was not awarded a contract at the DOH.

The DOH was conducting a tender process for the 'provision of Printing and Distribution of Staff Payslips' which Mr Burke referred to in his email. As the email clearly relates to a DOH process, it should have been classified as a business record and dealt with appropriately as required by DOH's own policies and the SR Act.

From:	Brian Burke
Date:	22/09/2005 5:16:20 PM
To:	neale fong
	Message Body
Dear Neale	
cost of implementing l	ous e-mail abolut the use of Empower-HR at Health, in particular, likelihood that the Empower-HR would be repaid in savings provided by the software within the first 12- tample of where savings can be achieved.
Staff Payslips. Health Summary for all emplo	oply issued a tender (HSWA 204405) for the provision of Printing and Distribution of currently produces of 34,100 payslips for 26 pays per annum, plus an annual PAYG oyees. Based on Australia Post's pricing model for this service, the production and lealth (approx.) \$ 587,000 annually.
Empower-HR allows	individual employees to nominate whether they receive their payslip:
1. via e-mail (to either	r their business or home address);
	oyee Self-Service facility; or,
3. a printed payslip.	
Even assuming 10% of	hile some employees (< 5%) still like a printed payslip - most prefer the electronic form of Health employees wished to maintain their printed payslip, the savings to Health (over m) would be \$2.5 million.
Incidentally, Health ha	as issued this tender to reduce its costs by outsourcing the processing of pay slips, so the
actual savings over cu	arrent practices is likely to be even greater.
I appreciate how busy	y you are but look forward to your reply to my emails in due course.
Regards	
BRIAN BURKE	

Subject:	00
From:	Brian Burke
Date:	25/10/2005 5:58:00 AM
To:	'Neale Fong'
	Message Body
Dear Neale Pardon the timing but matter about which I o	do you have any advice about the use of Empower-HR at Health which was that IT contacted you?
Regards	

During the FOI and FOI Review process, and during his evidence to the Commission, Dr Fong said he did not recall these emails.

Given that Dr Fong stated that he has no recall of the emails it is therefore unknown whether he referred the matter to his executive assistant who was responsible for dealing with his correspondence, or to any other person.

Dr Fong and Mr Taylor both provided evidence to the Commission that whilst in Melbourne for the 2005 AFL Grand Final they unexpectedly ran into Mr Burke and his family at a restaurant. During conversation it was suggested that they (Mr Burke, Mr Taylor and Dr Fong) meet up for lunch in Perth when they all returned. Whilst the meeting at the restaurant may have been unexpected, Dr Fong had sent an email to Mr Burke while Mr Burke was in Melbourne, and subsequently received a response. It is noteworthy that in the response Mr Burke refers to his children by their first names, indicating that he believed Dr Fong was aware who they were.

Subject:	RE:
From:	Brian Burke
Date:	23/09/2005 3:17:31 AM
To:	'Fong, Neale Dr'
	Message Body
Dear Neale	
Thanks.	
share in a well deserve	e and I are also in Melbourne hoping (and expecting) to ed victory. And you must be quietly pleased to have ant part in the success we've all enjoyed.
Regards	
BRIAN BURKE	
Original Message From: Fong, Neale D Sent: Thursday, 22 Se To: brianburke	
Subject: Re:	<u></u>
	ole heap of info re the issues you raise. I Will the next 2 weeks. Am I Melb now for what we hope is
Neale	

Dr Fong was questioned in relation to these emails during his second appearance before the Commission:

"Who are Sarah, Sue, Mary and Joe?---I don't know. I do know Brian Burke's wife is Sue. I do not know who the other names are.

Why would Brian Burke use those names if he thought you wouldn't know who he was talking about?---You'd have to ask him that. I don't know who those other people are. Sarah, I do now know is his daughter, who I've met on one occasion.

This is an indication, is it not, of a level of familiarity between you and Brian Burke?---No, it's the level of assumed familiarity he might have with me.

And he seems to be complimenting you? "You must be quietly pleased to have played such an important role, part, in the success we have all enjoyed"?---I think he's relating to football on this occasion.

Yes, I think he is?---And I think he's probably saying that, having got the Eagles to a grand final in 2005 and football doing well, he's, you know, recognising the small part that I played. I'm

assuming that's what he said, but you will have to ask him what he meant.

Again, an indication of the level of familiarity between the two of you, is it not?---You could call it that, but I'd say it was someone just being pleasant."56

Mr Burke extended Dr Fong an invitation by email on 29 September 2005 to attend a meeting at Perugino Restaurant on 11 October 2005 with Mr Julian Grill, Mr Ian Taylor, Mr David McKenzie and possibly Mr Malcolm McKay. Mr Norm Marlborough was also invited to attend the lunch.

The date of the email follows six days after Dr Fong, Mr Taylor and Mr Burke met in Melbourne and agreed to catch up for lunch. In his email Mr Burke refers to Dr Fong's 'interest' and 'view' about Smiths Beach. This suggests that Mr Burke and Dr Fong had some previous discussion regarding the proposed development. Dr Fong owns property in the Yallingup area approximately five kilometres from Smiths Beach.

Mr Burke had emailed and confirmed that lunch had been arranged. This email also advised Dr Fong that a brief presentation on Smiths Beach would be provided at the lunch.

Subject:	Lunch	
From:	Brian Burke	
Date:	29/09/2005 10:41:36 AM	
To:	'Neale Fong'	
CC:	'David McKenzie'; 'Ian Taylor'; Julian Grill	
	Message Body	
Dear Neale		
This is to confirm lunc	h on:	
[[요일][[[]][[]][[]][[][[]][[][[]][[][][[][][]		
Have a good break.		
Regards	Regards	
BRIAN BURKE		

The Commission notes that the copy addressees were not 'blind copies'.

<sup>&</sup>lt;sup>56</sup> Private examination of Dr Fong 14/09/07, pp 130-131

******	Brian Burke
Date:	29/09/2005 12:06:11 AM
To:	'Neale Fong'
	Message Body
I rang you to ask you	if you would have time to meet with me and my friend David McKenzie who is
treated very badly by	each. I know you have an interest in this and a view about it. I believe David has been people who are poorly motivated and I will settle for the chance to explain his new an make your mind up about them.
treated very badly by	each. I know you have an interest in this and a view about it. I believe David has been people who are poorly motivated and I will settle for the chance to explain his new

In an email on 2 October 2005 Mr Burke makes it quite clear what the purpose of the lunch was and why Dr Fong is being invited to attend. In it, he also refers to an earlier telephone conversation with Dr Fong in which he had explained his purpose.

Subject:	Assistance
From:	Brian Burke
Date:	2/10/2005 11:36:15 AM
To:	'Neale Fong'
7	Massage Rody

#### Dear Neale

When I rang you, I explained to you that I thought David McKenzie was being treated very harshly by an increasingly small number of people (led by Kevin Merifield) seeking – for a collection of, mostly unworthy, reasons – to destroy his project as Smiths Beach. Uniformly, these people will say they are not opposed to development but the truth is that "no development" is the logical and only outcome of their demands for change.

One of the key means by which Kevin and his cohorts hope to achieve the destruction of this project is by delaying it until maximum angst can be generated by advertising it over the Christmas Holiday period. This is obviously not in the Government's interests or the community's interests but, equally, it is a certain way to distort the result of any public submission period. In an effort to counter this delaying tactic, representations are being made to start the advertising earlier that planned by Kevin and a motion to achieve this will be debated at Council, I think, on October 12.

The CEO at Busselton – Andrew MacNish – has been less than helpful. Like most other people down there, I believe he is thoroughly intimidated by Kevin and by Bill Mitchell, amongst others. I know you know Andrew well and I was hoping you might oblige me by speaking to him about how he might help and not hinder the achievement of a public submission period that gave everyone a fair chance. No one wants to advertise this project over Christmas but, equally, no one appears to have the courage to stand up to Kevin and company.

My request of you is not made lightly and I know I am making it ahead of the lunch at which you will be able to question various aspects of what is proposed in circumstances that will depend on your trust of me in this matter. Please be assured that I have very carefully considered all of the various aspects of the question and that I am very confident that my judgement is sound in both a practical and moral sense. However, I am also conscious that I am not seeking support for the proposal simply that it be advertised in as fair a context as can be achieved.

I am attaching:

i. A Brief that rebuts the presentation the Smiths Beach Action Group is making to different organisations and individuals. The Brief sets out all of the usual misleading arguments that the SMAB prosecutes and we are intending when it is settled to use it as the basis of an insert in the newspapers next week. The reverse side of the insert will have informative maps and diagrams that support our position on scale and density; and a

ii. Press Release that deals with the Merifield led critics and is self

explanatory.

Regards

#### BRIAN BURKE

	Attachment	
CR33071-01_4pp_wrap.pdf		
	Attachment	
Smiths Berach - SBAG Oct 1.doc		
	Attachment	
Smiths Beach - Press Release Oct 1.doc		

Subject:	Lunch	
From:	Brian Burke	
Date:	11/10/2005 9:04:00 AM	
To:	'Neale Fong'; 'Ian Taylor'; 'Julian Grill'; 'David McKenzie'; 'brianburke '; 'allan	
	Message Body	
This is a reminder abo	out lunch:	
Today (Tuesday Octo At 1pm Perugino Restaurant Cnr Murray and Outr WEST PERTH		
Regards		
BRIAN BURKE		

During his first appearance before the Commission on 5 July 2007, and before the fact the Commission had these emails was disclosed to him, Dr Fong was questioned at length about the lunch of 11 October 2005<sup>57</sup>:

"Dr Fong, if I told you that the Commission has received information that David McKenzie was also present at that lunch with you at Perugino's on 11 October 2005, what would you say?---Yes, Mr Taylor and I discussed this in the last two weeks and I would confirm that Mr David McKenzie was at that lunch, as was I believe Mr Norm Marlborough.

What was the purpose of having Mr McKenzie at the lunch? --- That was curious to Mr Taylor and I because we both left that lunch asking the same question.

So Mr McKenzie didn't make any submissions to you or any comments to you about the Smiths Beach development?---The Smiths Beach development, among other things, was discussed at that lunch meeting but the relevance to Mr Burke - Mr Taylor and myself we did find puzzling.

So it hadn't been discussed with you that Mr McKenzie was going to be at the lunch?---I don't recall that he was - I was being told that he was going to be at the lunch but, you know, I - I've met Mr McKenzie once many years ago on a deck at a holiday place and I've - that's the only time I'd met Mr McKenzie. So whether that - the name David

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<sup>&</sup>lt;sup>57</sup> Transcript of private examination of Dr Fong 5/07/2007, p 36

McKenzie meant anything to me or not would have - would have been beyond me.

Earlier today when you were telling us about this lunch on 11 October, you mentioned yourself and lan Taylor being in Melbourne, seeing Mr Burke at a restaurant and the comment made that you were just going to catch up over lunch?
---That's correct.

But it was something more than that, wasn't it?---No, the - well, my - my understanding of the lunch was that it was a catch-up, that Mr McKenzie attended the lunch. As I said, it was a - it was a puzzle to us. I mean, we did talk about his Smiths Beach development but, again, Mr Taylor and I have got, you know, no jurisdiction over that issue.

It's not the case, Dr Fong, that this is an area that you knew that the Commission was interested in, has been conducting an investigation in respect of, the Smiths Beach development, that is, and that that was information that you were seeking not to be forthright about with the Commission?---No. not at all.

Has Mr Burke ever asked you any other requests in relation - or ever asked you for any favours or assistance in relation to the Smiths Beach development?---When we left this lunch - Mr Taylor and I have been talking about this, you know, a fair bit in the last couple of weeks trying to remember what was the purpose of the lunch and we've assumed that it following the Melbourne meeting because he can remember that quite succinctly. The only thing that we can assume that they were trying to maybe influence or set up was my relationship with Mr Andrew Macnish, who is the CEO of the Shire of Busselton.

On what basis did you form that view?---Well, we said - what were we seeing that presentation about Smiths Beach about? I mean, none of us had any property interests in that area. I own a house there but not in Smiths Beach, you know, kilometres away and that was the only thing that we, you know, surmised in the last few days.

Sorry, sir, just to clarify, you weren't expecting to have the presentation on Smiths Beach when you went to this lunch - got to the lunch?--- That's not - <u>it's not my recollection that we went there to intently hear about a presentation about Smiths Beach.</u>

# Okay.

THE COMMISSIONER: Is that what you got?---We had a - we had a discussion on a number of things and Mr McKenzie did give information about Smiths Beach but, you know, we - again both were puzzled by, you know, why on earth other than interested, you know, citizens and I must admit I think the Smiths Beach area and whether it's the current one or the future one, you know, seems like a good idea.

I was just interested in the use of the word presentation which I think was your word?---No, I think - well, I stand to be corrected but I think it was a word Ms Harries used but - - -

I think you used it first. I may be mistaken but that's my recollection at the moment, Dr Fong.

HARRIES, MS: Just going back to the association that you - the dots that you joined in relation to that presentation and your relationship with Andrew Macnish, just to clarify Andrew Macnish is the CEO of the Busselton Shire Council or was at that time. Is that correct?---Still is.

Still is. Was Mr Burke aware of your friendship - <u>I assume you have a friendship with Mr Macnish</u>. Is that what you were referring to?---That's correct.

Was Mr Burke aware of that friendship?---I'm not aware whether he is or - whether he was or wasn't.

Is Mr Taylor - does Mr Taylor have a friendship with Mr Macnish?---Mr Taylor would know Mr Macnish through football contacts.

Are you aware whether Mr Burke was aware of that friendship?---No, I'm not aware of that.

So what made you and Mr Taylor assume that that was the reason that David McKenzie had been invited to the lunch where you were?---Well, as I've said, we were puzzled as to what our connection with the lunch other than a catch up and the subsequent discussions over, you know, Smiths Beach. Mr Marlborough was there, we didn't know Mr Marlborough was going to be there at that lunch and again we didn't know what he was doing there or Mr Grill for that matter.

But just to answer the question, <u>what made you think that it was your friendship with Andrew Macnish that was the reason you had that presentation when you're not even sure whether Mr Burke knew that you had that friendship or not?</u>

---Well, we've - I've been trying to construct in preparation for this hearing about - you know, and again I'm not trying to hide anything whatsoever about why on earth would it appear that we went to a lunch in October of 2005 and, again, I'm only - I'm speculating.

So this is a conversation that yourself and Ian Taylor have had since your relationship with Mr Burke has become public?---That's correct. We - he reminded me 10 days ago, he said, "I do remember coming out of that meeting - that lunch meeting and saying, you know, what was that about?"

So you didn't have the questions at the time? You didn't say, "Why is David McKenzie telling us about Smiths Beach?" or you didn't talk to lan Taylor afterwards and say, "What was that all about?" You didn't have those discussions at the time?---The only thing that comes into our mind now is that, you know, they were potentially, you know, and I - again. I had no knowledge of Mr Burke's activities which have now come to light in terms of the last 12 months so we're now putting those

two and two together, we speculated again that perhaps this was another one of his opportunities or networks to try and influence so that's why we have come to that conclusion." (emphasis added).

The Commission is satisfied that the evidence Dr Fong gave to the Commission demonstrates that he was seeking to distance himself from the fact that the purpose of the luncheon was to be given a presentation regarding Smiths Beach. He stated positively he was puzzled immediately following the luncheon as to the reason for it, whereas the emails from Mr Burke clearly stated the luncheon's purpose, which had also been explained to him by Mr Burke in a telephone conversation. In light of that, it simply could not have been the case that he and Mr Taylor were puzzled about that purpose when they left the lunch. So too, it is patently clear that Dr Fong well knew that Mr Burke was aware of his friendship with Mr Macnish. Mr Burke was seeking Dr Fong's support specifically on that basis. When he gave this evidence, Dr Fong was unaware of the emails in the possession of the Commission.

Of note is Dr Fong's use of the word 'presentation' in relation to the luncheon. The email invitation had explicitly stated the attendees would receive a 'presentation' regarding Smiths Beach.

It is difficult to accept Dr Fong did not recall the content of these emails, particularly given the sender, the subject matter and detail of Mr Burke's email and the fact it was followed by a lunch at Perugino Restaurant at which a presentation on Smiths Beach (as foreshadowed by Mr Burke) was given. The Commission's Smiths Beach investigation had been the subject of media coverage since mid-January 2006, well before the FOI request in March 2007.

Mr Burke's mention of Mr Macnish's name in the emails is important. Prior to becoming the CEO at the Shire of Busselton, Mr Macnish was a football player firstly with the Subiaco Football Club and then with the West Coast Eagles. Dr Fong is known to have close ties to Mr Macnish through the West Australian Football Commission. Dr Fong is the Chairman of the West Australian Football Commission and is the Pastor for the West Coast Eagles. Both Mr Macnish and Dr Fong own properties in close proximity on the same street in Yallingup. Mr Macnish is a friend of Dr Fong's and was a passenger in Dr Fong's government Landcruiser with Dr Fong and his wife when she was arrested for a driving offence in Dunsborough in September 2005.

During his appearance before the Commission Mr Taylor was asked to explain how the Smiths Beach lunch at Perugino Restaurant was arranged. Mr Taylor was also shown the emails, having been sent a courtesy copy of the same email.

"Okay, so because you recall that conversation it's - - -?
---But I know - sorry, could I just say - I mean, I knew Neale was
coming along because obviously when Brian asked me he said,
"I'm asking - Neale's coming along for lunch, will you come along
too?" I said, "Yes," but I don't think Neale knew that I was
coming along.

Okay. How did Brian Burke contact you about the lunch?---Look, he could have rung me, could have emailed me, I don't know, I can't remember that. Probably rang me I suppose." <sup>58</sup>

Mr Taylor was then shown a copy of the relevant email and was also asked about the attendance of Mr McKay at the lunch.

"Commissioner and Mr Taylor, this is a copy of an email - I will just wait for it to come up on the screen. This is a copy of an email sent from Brian Burke to Dr Fong and you will see, Mr Taylor, that you are one of the persons that's cc'd in on the email?---Right...

It's dated 29 September 2005?---Yeah; yeah.

You will see the other people that are cc'd in on the email are David McKenzie and Julian Grill?---Yeah.

And it's a confirmation about the lunch on Tuesday, 11 October?---Mm'hm.

At 1 pm at Perugino's?---Mm'hm.

If we could just scroll down the screen. You will see that sentence there:

I have asked David McKenzie to see if Malcolm McKay can come along to show you his brief presentation on Smiths Beach and I have also asked Ian Taylor and Julian Grill?---Yeah.

It's clear from that email, isn't it, Mr Taylor, that both Dr Fong and yourself were advised prior to the lunch that David McKenzie would be at the lunch?---Yeah.

And that the purpose of the lunch was for a brief presentation of Smiths Beach?---Yeah.

And that to assist Mr McKenzie, Malcolm McKay - - -? --- Yeah.

- - - will be present?---Yeah.

Can you confirm that Malcolm McKay was in fact present? ---Well, he was probably one of the other people but I don't know the name, yeah; yeah.

I see. Do you recall this email?---No, I don't actually; no, no.

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<sup>&</sup>lt;sup>58</sup> Transcript of private examination of Mr Taylor 19/07/2007, pp 14 & 22.

If we could just scroll back to the top of the page. It would appear from the email that Mr Burke had also had some other contact with you about the lunch?---Yeah". 59

The Commission is of the view that it is highly unlikely (and does not accept) that Dr Fong had absolutely no recollection of this email correspondence in early 2007 and subsequently, given that:

- the express purpose of the lunch was quite specific it was about the proposed development at Smiths Beach;
- Smiths Beach was in the media spotlight at the time;
- Dr Fong and Mr Macnish were friends and Mr Burke had made disparaging remarks about Mr Macnish;
- Dr Fong and Mr Macnish were neighbours in Yallingup;
- Dr Fong had stated under examination that he was interested in what
  was to be presented about Smiths Beach<sup>60</sup>, presumably as it could
  potentially have an impact on his property in Yallingup;
- The likely purpose of Dr Fong's attendance was to persuade him to personally intercede with his friend Mr Macnish on behalf of the developer, at Mr Burke's instigation; and
- The activities of Mr Burke and others in relation to the Smiths Beach development became the subject of intense and protracted public interest as a result of the Commission's public hearings in November 2006.

During his second appearance at the Commission Dr Fong was shown the various emails regarding the Smiths Beach lunch meeting. He was questioned regarding Mr Burke's comment in relation to having an 'interest' in the October 2005 email:

"Did you inquire as to whether Burke was engaged in a professional capacity by Mr McKenzie?---No.

He said, "I know you have an interest in this," and by "this" he is referring to developments at Smiths Beach. What is your interest?---I've got property about five kilometres inland from there and I've met Mr McKenzie four or five years ago and that's about it. I have no other interest. You'd have to ask him what he means by that but I - other than I'm an interested citizen, nil interest in terms of commercial or pecuniary.

Again he is lobbying you, isn't he?---I don't know why he was - I did not know he was being retained by anybody at this point and I don't think anybody in Western Australia did. I mean, if they did clearly the embargo of ministers on Mr Burke would not have been lifted in February 2006."

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<sup>&</sup>lt;sup>59</sup> Transcript of private examination of Mr Taylor 19/07/2007, p 22

<sup>&</sup>lt;sup>60</sup> Transcript of private examination of Dr Fong 14/09/2007, p133

<sup>&</sup>lt;sup>61</sup> Transcript of private examination of Dr Fong 14/09/2007, p 133

In relation to the purpose of the lunch at Perugino Restaurant:

"It's clear from this email, isn't it, that the purpose of the lunch was to see a presentation on Smiths Beach?
---Well, reading the email, yes."62

In relation to contacting Mr Macnish;

"In the middle of that page you will have noticed:

'I know you know Andrew well and I was' -

and speaking of Andrew Macnish there -

'and I was hoping you might oblige me by speaking to him about how he might help and not hinder the achievement of a public submission period that gave everyone a fair chance.'

Then the next paragraph:

'My request of you is not made lightly and I know I'm making it ahead of the lunch at which you will be able to question various aspects of what is proposed in circumstances that will depend on your trust of me in this matter.'

You were given quite a specific request in relation to contacting Andrew Macnish, weren't you?---Reading this email, yes, absolutely." <sup>63</sup>

In relation to his attendance at the lunch:

"But you went to the lunch, didn't you, Dr Fong?---I did go to the lunch but I certainly didn't go to have to - you know, to - I went because I was interested in Smiths Beach.

But you're not suggesting that at the time you went to the lunch you didn't recall this email, are you?---I don't recall this email.

Hold on though; the email was sent on 2 October 2005 and the lunch occurred on 11 October 2005?---Sure.

You're not suggesting you didn't remember it at the time, are you?---No doubt if I had received the email and read it I would have remembered it at the time but going to a lunch doesn't mean I'm going to be influenced by what Mr Burke would have said to me at all, and I do know Mr Macnish well enough to know there's absolutely no way he would be either influenced by me and nor what someone like Mr Burke might suggest."

<sup>&</sup>lt;sup>62</sup> Transcript of private examination of Dr Fong 14/09/2007, p.134

<sup>&</sup>lt;sup>63</sup> Transcript of private examination of Dr Fong 14/09/2007, pp 134-135

On 4 August 2006, some 10 months after the lunch of 11 October 2005, Mr Burke left a message on Dr Fong's message bank regarding Mr Macnish<sup>64</sup>.

RECORDED MESSAGE: Hi this is Neale Fong, sorry I can't take your call, please leave a message and I will get back to you. Thank you. BURKE: Neale it's Brian Burke speaking, I'm really really worried you haven't been in the paper for a few weeks. You must be mor.., feeling almost normal. Neale uhm I wonder if you could give me a call about uhm, a particular matter, I'm wanting to catch up with Andrew Macnish next time he's in Perth. I'm on (removed). Thanks Neale.

At 4:06 pm on that day Dr Fong tried to contact Mr Burke and left his telephone number on Mr Burke's message bank. At 4:29 pm Mr Burke returned Dr Fong's call<sup>65</sup>.

FONG: Hello?

BURKE: Yeah. It's Brian Burke, Neale.

FONG: Oh g'day Brian.

BURKE: Neale, have you got one second?

FONG: Yeah, I have, mate. Yep.

BURKE: Neale, uhm, firstly I am a bit disappointed that you haven't been on

the front page lately.

FONG: Yeah, I know I heard that (laughs). BURKE: Could you lift your game a bit?

FONG: Yeah, I know. It's a bit boring without me there, isn't it?

BURKE: Well, mate, pretty soon they're gunna latch back on to me which is something that's not to be encouraged.

FONG: (laughs)

BURKE: Uhm, I wanted just to ask this. At some time in the next little while would it be possible when Andrew Macnish comes to Perth that you and I might have a five-minute cup of coffee with him?

FONG: Yeah, yeah, and he's coming up on the uhm, twenty, on the weekend of the, on Friday the twenty-fifth to the twenty-eighth of August so, dunno if that's too far away.

BURKE: No, that's just fine. Ah, nothing controversial or, or worrying, I just want to put a point of view to him about Nigel Bancroft and Smiths Beach, er, none of which he won't have heard before,

FONG: Mm.

BURKE: but it's just a point of view that I've formed following discussions at very senior levels with Planning and Conservation and Land Management. FONG: Yep.

BURKE: Just to tell him where I think their heads are at on this issue.

FONG: Yeah, what, heads in the sand?

BURKE: No, no, they're uhm, it might surprise him to know that, for instance the, you won't know about this but, or, or be interested but DPI is about to do a report on the developable area,

FONG: Yep.

BURKE: and CALM has come to agreement with David McKenzie and others about how best to manage the development in a subdued way.

FONG: Good.

<sup>65</sup> T1343

54

<sup>&</sup>lt;sup>64</sup> T1342

BURKE: Yeah. And, and I think you'd be absolutely amazed at what's gunna come out of this in terms of world's best practice.

FONG: Mm, mm.

BURKE: It's a really, really lovely development now.

FONG: Mm. Oh, good. Good.

(Removed portion: General conversation continued regarding West Coast Eagles players.)

BURKE: Anyway. How're you going on the stadium? FONG: Oh, (name removed) got a very big ego.

BURKE: ..... just. FONG: Hey?

BURKE: Hasn't he just?

FONG: And (name removed), I mean I dunno where he's at on it, quite frankly, one minute he says we'll spend whatever it takes, the next minute he kind of works out he's not, maybe not have as much as he thinks he has in capital and, you know I I just think if they've, y'know and and our, our view is that we've, ours is still much a better option. I think they'll, they're either looking for a way out so they'll just blame footy cause we're not gunna give up control of the stadium, uhm, or, or uhm, or they'll do, I dunno, I've just I don't know it's all over the place at the moment.

BURKE: Well let me just tell you, my view is that in large part because of the weakness of the alternatives,

FONG: Mm.

BURKE: your position remains very strong and

FONG: Mm.

BURKE: properly handled you'll win,

FONG: Mm.

BURKE: but you really have to, ah almost do a character rebuild on how some people regard football and its sort of elite nature.

FONG: Yes. I agree, I agree. That's why we've come out in the last week or two and y'know, not backing down, but we're saying we'll participate, we'll cooperate, we'll talk to people, dah dah dah dum. Trying to position ourselves a bit more friendlier.

BURKE: Yeah. The other thing is this, and it's hard for people like me and you, but what you've told me about (name removed) is something I know which immediately tells you how to handle him, doesn't it.

FONG: Mm, yep. BURKE: Mate

FONG: ...

BURKE: flat, flatter him into friendship.

FONG: Yeah, ...... BURKE: Anyway. FONG: Alright mate.

BURKE: Are you in, are you in Perth or you over at the air...

FONG: Yeah I'm in Perth, no in Perth, yeah. Yeah.

BURKE: Alright. Er if

FONG: Okav.

BURKE: if you need anything at any time just give me a call and if you could let me know if Andrew's prepared to have a cup of coffee I'd really appreciate FONG: I'll get back to you. Will do. Okay mate.

BURKE: Okay. Ta-ta.

FONG: Cheers. BURKE: See you.

The nature of this and other telephone conversations between Dr Fong and Mr Burke reveals a relationship, that is to say, a personal connection that was of long-standing and more than casual. It had elements of personal and professional interaction, familiarity and shared confidences. This in turn illuminates the question whether Dr Fong would later genuinely have no recollection of any email communication between them whatsoever, or those matters which were the subject of the emails.

According to Mr Macnish, Dr Fong did telephone him and suggested he meet Mr Burke, but he declined to do so.

Under examination Dr Fong was questioned about Smiths Beach, the October 2005 lunch and also the phone call of 4 August 2006

"Your conversation that you spoke about in your evidence last time - the conversation you had with Mr Taylor where you both formed the view that perhaps it was your friendship with Andrew Macnish as the reason that you had been invited to a Smiths Beach lunch, when did that happen, that conversation with Taylor, immediately after the lunch?---Yeah. Well, we basically both came out of the lunch and said, "What was that about?" and then, you know - I don't believe we talked about Mr Macnish at that point but then Mr Burke called me, as you have got record of, on 4 August and suggested to me - then the penny dropped that that's what he was trying to potentially set up." 66

Dr Fong indicated in his evidence that following the October 2005 lunch and the telephone call of 4 August 2006 the 'penny dropped' in relation to Mr Macnish and what Mr Burke was trying to achieve. It is difficult to understand how, when Smiths Beach and Mr Burke had hit national prominence in the media, Dr Fong could not recall the emails at all in 2007, including during the FOI and FOI review process, and the Commission's investigation. Whilst there appears to be nothing untoward about the lunch itself, it would seem rather extraordinary that Dr Fong could not recall the real substance of it.

The Commission is positively satisfied, on the balance of probabilities, that Dr Fong did in fact have such recollection at all relevant times and still does.

On 21 June 2007 the Minister suggested that the Manager, Director General Support DOH, prepare documentation in relation to the FOI and FOI Review. In consultation with Dr Fong she prepared a chronology of 'Key Events'. Table 1 is a snapshot of the first page.

<sup>&</sup>lt;sup>66</sup> Transcript of private examination of Dr Fong 14/09/2007, p 118

1.	2 August 2004	Fong commences as Executive Chairman, Health Reform Implementation Taskforce / Chief Executive, North Metropolitan Area Health Service
2.	24 November 2004	Fong commences as A/Director General of Health
3.	Monday 1 August 2005	Rudd dinner at Perugino's
4.	11 October 2005	Fong attended lunch with Burke, Ian Taylor, Julian Grill (this was the first time they had met)
5.	Monday 31 October 2005	Letter from Eddy Lee - amcom received in Minister's Office. Exact date actually received in Department unknown but was after 1 November (see Minister's handwritten comment dated on BN coversheet).
6.	Monday 21 November 2005	Briefing Note (4-34966 re amcom) submitted to Minister's Office
7.	Monday 5 December 2005	[DELETED] commences maternity leave (replaced by [DELETED])
8.	Tuesday 7 Feb 2006	Briefing Note (4-34966 re amcom) resubmitted to Minister's Office
9.	Tuesday 21 Feb 2006	Email: Fong to Burke "Brian can meet 11 weds"
10.	Thursday 23 Feb 2006	Meeting: Fong & Burke – NO MEETING NOTES ON FILE
11.	Wednesday 1 March 2006	Response to Eddy Lee – amcom signed by Minister
12.	Saturday 11 March 2006	Fong travels to UK/Europe with Minister and others
13.	Monday 20 March 2006	Email from Marivic Merritt, (Executive Assistant to Mr Eddy Lee) to [DELETED] requesting meeting with Fong
14.	Monday 27 March 2006	Fong returns to office
15.	Thursday 6 April 2006	Fong travels to NZ for AHMC meeting
16.	Friday 7 April 2006	Fong travels from NZ to USA Bio 2006 conference in Chicago
17.	Wednesday 12 April 2006	Email Burke to Fong "Appointment"  Email Fong to Burke "RE: Appointment"
		Outlook meeting request amended by [DELETED] to add Michael Moodie as required attendee
18.	Thursday 13 April 2006	Fong returns from US and continues on annual leave
19.	From Friday 12 April 2006	"week from hell" in Dunsborough intense media relating to DG KPI's, loss of license, Fong's pay increase.
20.	Thursday 20 April 2006	Email Burke to Fong "Assistance"
		Email Fong to Burke "Re: Assistance"
		It would appear this is the e-mail referenced (verbatim in parts) in p9 article in The West on 26.06.07 by Robert Taylor
21.	Monday 24 April 2006	Fong returns to office
22.	Monday 1 May 2006	[DELETED](covering for [DELETED]) commences 6 months leave (replaced by [DELETED])

Table 1: Chronology of "Key Events".

Of importance is the entry at #4 for the lunch of 11 October 2005. As indicated by the emails between Mr Burke and Dr Fong and the evidence of Mr Taylor and Dr Fong, one of the purposes of the lunch, if not the primary purpose, was to enable a Smiths Beach presentation on behalf of Mr McKenzie, who was present as was Mr Marlborough. Any reference to Smiths Beach and the attendance of Mr McKenzie, Mr Marlborough and others has been left off the chronology. It is a reasonable inference that the omission indicates a deliberate attempt to conceal the purpose of the lunch. This again goes to the credibility of Dr Fong's denials of any recollection of the emails concerning the lunch.

Prior to the chronology being prepared the Commission's investigation into Smiths Beach had been subject to extensive media coverage. Mr Marlborough had resigned from the Cabinet over his role in allegedly leaking confidential Cabinet information to Mr Burke and two other Ministers had also lost their portfolios for their role in associated matters.

Dr Fong was questioned on the omission of McKenzie's name from the 'Key Dates' chronology:

"I think I can guess your answer to this given your recent clarifications, but in the Key Dates document on 11 October 2005 why did you not include David McKenzie's name as attending that lunch?---I don't know, because, I mean - I don't know.

Were you trying to hide the fact that it was a lunch about Smiths Beach?---I don't believe so. I didn't recall at that time when we put the document together. I mean, I've spent a lot of time trying to reconstruct events and times and dates and people and it's been - you know, it has - it has moved as you can see, so I'd ask you to appreciate that."

## 3.4.3 RAC

On 4 October 2005 Mr Burke forwarded an email to bulk recipients regarding a friend of his who was seeking re-election to the Council of the RACV [sic]. Mr Burke requested that the recipients consider her when casting their votes. Dr Fong was just one of a number of recipients on the mailing list. Dr Fong stated he is unaware why Mr Burke included him on this mailing list. 'RACV' was believed to be a typographical error as the email further refers to members of the RAC and the attachment from (removed) indicates that she resides in Perth and the election was for the RAC. Dr Fong has RAC membership.

## 3.4.4 Amcom

Mr Eddy Lee, the previous Chief Executive Officer of Amcom, a telecommunications carrier, featured in emails between Mr Burke and Dr Fong included in the nine 'logs and headers' recovered by DOH.

Amcom had two contracts with the DOH which pre-dated Dr Fong's appointment and a third common user contract still in existence.

Mr Burke was retained by Amcom as a lobbyist, and Commission material indicates that Mr Burke contacted Dr Fong by telephone to arrange a meeting. Dr Fong responded to Mr Burke in an email dated 21 February 2006 asking if they could meet the following Wednesday. However, a week after the meeting the Minister wrote to Amcom outlining the tender process had ended.

# 3.4.5 Medical assistance

On 24 May 2006, Mr Burke emailed Dr Fong regarding an email he had received from a Perth businessman requesting medical assistance for a relative. On 25 May 2007 Dr Fong emailed Mr Burke in response stating he was happy to assist and made reference to the "..unrelenting 'BS' from Channel 7".

Some forty minutes later Mr Burke replied by email, saying:

'I'll call you on Monday...following the Eagles win. Thought the
Drummond piece was very positive...I'll think about 7.'

On 6 June 2006, Mr Burke telephoned Dr Fong and during a lengthy phone call discussed what had been raised in these emails.

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<sup>&</sup>lt;sup>67</sup> Transcript of private examination of Dr Fong 14/09/2007, p 120.

FONG: (A side conversation) Hang on I'll come back to you.

Hello?

BURKE: Oh Neale it's Brian Burke.

FONG: Oh g'day Brian.

BURKE: Neale.

FONG: How you going?

BURKE: Yeah good how you going is more to the point?

FONG: Good thanks, yeah okay.

BURKE: Everything seems to be disappearing a bit?

FONG: Yeah it has yeah. Uhm yeah I'm I'm I'm you know, I think we're ah, we're getting on top of things a bit yeah.

BURKE: I think you are and ah I think it's important just to keep on the front foot if you can by just pumping out more stuff as quickly as you can you know.

FONG: Yeah yeah.

BURKE: Uhm, I sent you that stuff about (name removed).

FONG: Yes.

BURKE: It's all a bit distressing. Would you take a call from him?

FONG: Sure. BURKE: Good. FONG: Mm.

BURKE: He's ah, he's the genuine article, he's (removed), do you

know him at all?

FONG: No I haven't met him Brian no.

BURKE: Yeah uhm and he's a very sort of foppish but well read and

well educated man FONG: Mm mm

BURKE: driven to distraction by (removed) so

FONG: Mm

BURKE: What I might do, how would you like me to handle it?

FONG: Uhm well he can he can well if he calls me or my office he can, or my mobile I mean if I can't take the call I'll, he can leave a number if that's possible. Is that the way he operates? (laughs)

BURKE: Yeah no that's fine, I'll I'll give him your mobile and get him to get in touch with you and then leave it with you uhm, I'm going away on Saturday to the World Cup

FONG: Yep.

BURKE: Uhm so I'll be away for a couple of weeks.

FONG: Right.

BURKE: Maybe when I get back we might get together? FONG: Yeah that would be good, that would be good.

BURKE: Did you give any thought to the appointment of some ah media or personal ... in that area

FONG: well I'm still I'm still, look I am still thinking about it uhm, a name came across my desk the other day but I don't think she's going to be available now, it was (name removed) (laughs)

BURKE: Yeah

FONG: Think she's going to work for (name removed).

BURKE: Is she? FONG: I think so.

BURKE: She's from (removed)?

FONG: Mm. BURKE: Yeah.

FONG: Do you know her?

BURKE: I do.

FONG: She's the (removed) too for a while. BURKE: Yeah she was but she's fairly inflexible.

FONG: Mm.

BURKE: Uhm she's got some ability as a reporter.

FONG: Mm.

BURKE: Uhm I'm not sure how well liked she is amongst the sort of journalists you know.

FONG: Yeah yeah.

BURKE: Uhm now I don't.....

FONG: I don't think she's av, don't think she's available anyway, I said that was just a name that came across my my desk but uhm.

BURKE: What's (name removed) doing now?

FONG: I don't know, he's still consulting isn't he with his ah lobbying and consulting.

BURKE: I guess he is I never see much of him. FONG: Yeah no he's around, he's around.

BURKE: Is he? FONG: Mm.

BURKE: Yeah. Uhm yeah someone of that sort of thing but you need a political operative a bit too Neale you know.

FONG: Yeah yeah.

BURKE: I mean you know who would be good?

FONG: Who.

BURKE: (name removed).

FONG: (laughs)

BURKE: Not as a lobbyist ha, and I'm not seriously suggesting him but

FONG: Yeah

BURKE: he's got the sort of political ah, antennae.

FONG: Yeah.

BURKE: Now he's not very well liked and so you'd never, you'd never use him but someone who's got that political side as well as having a sort of uhm, media or savvy you know.

FONG: Mm mm.

BURKE: It's hard isn't it

FONG: Oh well we'll keep thinking, we'll keep thinking about it, I I'm going to make a call to Armstrong if we can catch up for lunch.

BURKE: Good.

FONG: But I haven't done that yet, that was just waiting until uhm things settle down a bit but uhm but I I think that.

BURKE: I thought the ah football stuff went over well.

FONG: Well where do you think that's at?

BURKE: Uhm, ......

FONG: I think that I mean (name removed) slashing around the place ah like a you know uhm, you know like a you know a spoilt child a little bit.

BURKE: Isn't he just.

FONG: On a number of issues.

BURKE: But not only that, for a man supposedly of some intellectual clout he ah, he shows a tendency to pre judge things a great deal.

FONG: Mm, mm. Where do you think it's at, I think they're gonna, not going to do anything.

BURKE: I think they're not going to do anything, there's no money in the budget for it.

FONG: Mm.

BURKE: You know.

FONG: I mean I, our only our only hope I think of getting, I mean this Government's kind of gone to ground a little bit in terms of taking ah, you know making a few decisions I think.

BURKE: Yeah. FONG: Uhm.....

BURKE: But you know you've got the worst Minister in the world for

that now too, he's a very nice boy and everything but

FONG: yeah

BURKE: Kobelke's not a fire eater.

FONG: No I know, but it's just that's an elegant solution and you know he did this, even if it was three hundred million, we're not talking about the State putting up three million we're just talking about the footy and AFL, the only sport that actually puts money into infrastructure

BURKE: Yeah

FONG: no other sport puts money into infrastructure.

BURKE: Yeah

FONG: you know plus the feds and the feds are, the feds you know will definitely throw something in, they probably won't throw half but they might throw you know twenty, twenty, somewhere between maybe twenty and forty, and maybe a bit more if we worked hard enough on em.

BURKE: Somehow or other Neale you've got to break the mould that prejudices people towards ah AFL and which causes them presently to say well they're just wilful and out, after their own interests.

FONG: Mm.

BURKE: You tha, the problem is that people are not seeing the merit in the argument because they're being distracted by the proponent.

FONG: Yeah, yeah well I guess so and footy is still perceived as being rich and these rich players and all the rest of it, even though you know, even though all the money that we make goes straight back into, into grass roots.

BURKE: Yeah.

FONG: And if we, I mean if we and if we don't have that stadium bringing in that money then you know, you know we're only going to go somewhere else if the Government then compensates us so

BURKE: Yeah

FONG: they're going to pay ei, either way, you know.

BURKE: You know it almost be worthwhile the Commission sitting down and working out whether they wanted to run some sort of campaign to reposition themselves in the public psyche sort of.

FONG: Yeah yeah. BURKE: You know and

FONG: Yeah.

BURKE: ...... and decide to put aside a significant amount of money and run a proper campaign that sort of wakes people up to what you really do.

FONG: Mm yep.

BURKE: Because you won't, you're you're just suffering under this sort of rich players and powerful people.

FONG: Yeah.

BURKE: being able to bend the public to their will.

FONG: Yeah. BURKE: Anyway. FONG: Alright mate.

BURKE: Alright thanks for that, thanks ...

FONG: Well look look if if if you've still got that, look I, if you've got that

email on ah, (removed)

BURKE: Yeah

FONG: that you sent me, if you can find it in your archive can you shove it to me again, cos I've I've just tried to find it I've deleted it

BURKE: Yeah.

FONG: just the background on it so that would be useful.

BURKE: Yeah I'll do that, I'll send that to you and he'll give you a call.

FONG: If you can find it that would be great.

BURKE: Okay.

FONG: Thanks mate.

BURKE: Thanks see ya Neale. FONG: See ya have a great time.

BURKE: You too. FONG: Cheers. BURKE: Ta.

(emphasis added)

Once again, this conversation includes express reference to a particular email from Mr Burke, but also, importantly, informs an appreciation of the relationship between Dr Fong and Mr Burke, which in turn puts their email communications and the likelihood of Dr Fong recalling them in context.

The Commission notes Dr Fong's request that Mr Burke re-send the email about the businessman's problem, explaining that he had tried to find it but had deleted it. This supports the evidence of his staff that Dr Fong manages his own emails and deletes them himself.

#### 3.4.6 The Media

In evidence before the Commission Dr Fong referred to a week he spent with his family on holiday in the South West in April 2006 as his "week from hell". Within one week there was media attention on his pay rise, his Key Performance Indicators, the loss of his driving licence and the Channel Seven helicopter hovered over his house in Yallingup for photographs.

On 19 May 2006, Mr Burke further telephoned Dr Fong to discuss media and *The West Australian*. The following is the transcript of this call:

FONG: Hello.

BURKE: Yeah, it's Brian can you talk?

FONG: Ah, yeah, hi Brian.

BURKE: Yeah, just very quickly uhm that was a really deft move to

give that thing to err Mark Drummond about Subiaco.

FONG: Okay.

BURKE: He's really grateful and err that's exactly the sort of thing that I think will help err and I think it's probably about time to go and see Armstrong if you wanted to or haven't done it.

FONG: Yeah, no, okay I'm in Sydney err at the moment but I've what next week give him a call and catch up with him.

BURKE: Yeah well things have settled down a fair bit and for example I think they are going to try start treating stories maybe a little bit differently but once you get a couple of err sort of days of clear air.

FONG: Uhm.

BURKE: Then I just think that err you're straight in to see him mate.

FONG: Okay.

BURKE: Or maybe in coordination, if they use that stuff next Thursday

morning, FONG: Mmm

BURKE: I'll make sure Drummond tells him how they got it, so maybe

the Monday or Tuesday after that.

FONG: Yeah, okay. BURKE: Alright. FONG: Alright, alright.

BURKE: Okay, you going okay?

FONG: Yeah no, just another, that other little hiccup this week that's

all.

BURKE: No it's not a hiccup mate its just bullshit mate, that's just

salary packaging, listen. FONG: Bad advice.

BURKE: If all the worries I had were what your got I'd be doing

summersaults. FONG: (laughs). BURKE: See you later.

FONG: Alright

Mr Drummond is a reporter for *The West Australian* newspaper.

# 3.4.7 The Surgeons' Dinner

On 30 May 2006, Dr Fong hosted a dinner at Perugino Restaurant for a number of prominent Perth surgeons to discuss various matters in Western Australian teaching hospitals.<sup>68</sup>

Whilst Dr Fong was to pay for the dinner he wanted to avoid media scrutiny of the level of expenditure on his corporate credit card and thus sent an email to Mr Burke on 29 May 2006 requesting his assistance in speaking to the owner of the restaurant and making arrangements for the DOH to be invoiced directly. 69

Mr Burke responded via email the same day indicating that he had spoken to the owner and the arrangement for DOH to be invoiced directly had been made.

Whilst the Commission is of the view that the Surgeons' dinner and the events surrounding it are in themselves unremarkable and it is not suggested that there is anything improper about this, of note is Dr Fong seeking Mr Burke's assistance. The fact that Dr Fong in the first instance would contact Mr Burke to approach the owner of Perugino Restaurant suggests not only that Dr Fong was aware of Mr Burke's relationship with the owner but that he was comfortable enough in his relationship with Mr Burke to make such a request.

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<sup>&</sup>lt;sup>68</sup> As evidenced by DOH electronic records

<sup>&</sup>lt;sup>69</sup> Email from Dr Fong to Mr Burke dated 29 May 2006

## 3.5 The Release of Confidential Cabinet Information

On 14 September 2007, in a private examination Dr Fong was asked whether he had ever been provided with confidential cabinet information from Mr Burke.

"Did Burke ever provide you with information from Cabinet discussions? ---Never"

Following Dr Fong's denial the Commission played various intercepted communications to Dr Fong.

On 21 April 2006, Mr Burke left a message on Dr Fong's mobile message bank at 8:54am. The following is the transcript of that call:

RECORDED MESSAGE: Hi this is Neale Fong sorry I can't take your call please leave a message and I will get back to you. Thank you. BURKE: Neale it's Brian Burke could you call me as soon as possible on (removed). I've just got an interesting piece of information for you. Thanks.

On the same date at 9:23 am, Dr Fong telephoned Mr Burke<sup>71</sup>. During the call, Mr Burke made Dr Fong aware of information that Mr Burke claimed he had received from a Parliamentary Cabinet meeting in which the Premier of Western Australia discussed Dr Fong.

BURKE: Hello. Brian Burke.

FONG: Oh, hi Brian. It's Neale here.

BURKE: G'day. How are you?

FONG: Yeah, yeah, no, doing okay.

BURKE: Yeah, you'll be okay. Uh, listen, uh, did you spend some time

in Chicago with the Premier?

FONG: I did.

BURKE: Yeah. Now, I want to tell you something, but Neale, it cannot

go one inch past you and me.

FONG: Okay.

BURKE: I think they must have had a Cabinet meeting yesterday or

the day before. I'm in Canberra.

FONG: Yep.

BURKE: Hum, anyway, Carpenter came in, McGinty then explained how he'd door-stopped, or had been door-stopped, and he'd accused

Reporters of being despicable and misquoting him, etcetera, etcetera. And, apparently it was shown on TV, I'm told.

FONG: That's correct, yep.

BURKE: Yeah, okay, well I didn't ...

FONG: He gave The West; he gave The West a pasting, uh, before

BURKE: Okav.

FONG: they started, err, the official press conference.

BURKE: And when was this?

<sup>71</sup> T1334

Transcript of private examination of Dr Fong 14/09/2007, p 117

FONG: Tue, Tuesday.

BURKE: Tuesday. Okay. Now, Carpenter said at Cabinet, err, first of all, Carpenter didn't cop from McGinty, any of the explanations he was making. Then he said at Cabinet, he said, look. I'm very disappointed about all of this, but the one thing that has to be front and centre is the protection of Neale Fong. He's an outstanding public servant, and we've got to make sure that this comes out alright for him, but expect a lot more of it. Now, I just tell you that, because it's, was very comforting for me.

FONG: Mmm.

BURKE: But also, I think that it's starting, this bloke's starting to show a bit of leadership

FONG: Mmm hmm.

BURKE: that Gallop never could show, and one of the first things you'd expect to see in a display of leadership was a distancing and a cutting down to size of McGinty. Now, Gallop could never do it, Neale.

FONG: Mmm hmm.

BURKE: But this bloke's starting to show the signs of being

FONG: Mmm hmm.

BURKE: prepared, not because of McGinty, but because ... any potential

threat to his control FONG: Mmm.

BURKE: to put it in its

FONG: Mmm.

BURKE: place, d'you know? FONG: Mmm. Mmm. Mmm. BURKE: That's what he

FONG: Okay ...

BURKE: That's what he said about you, and my informant was uh

FONG: Mmm hmm. Mmm hmm. BURKE: <u>you know, very pleased.</u> FONG: Oh, well, that's nice to know.

BURKE: Yeah ...

FONG: Yeah, no, well I, oh look I do get on very, I respect Alan and I got on very well with him, and, and, you know, we had good, good meetings in Chicago with all sorts of people and, I would think, you know, ... he does realise that

BURKE: Yeah. well

FONG: you know, I know what I'm doing.

BURKE: he said it, he said it to, he said it to all of the Ministers in Cabinet, he sang your praises and said, the primary object was to make sure that nothing damaged you, because you're an outstanding public servant.

FONG: Well, that's nice to know.

BURKE: Er, and that, and I didn't know you were in Chicago with him even, but

FONG: Yeah, yeah.

BURKE: but, the other thing is this, I've always warned you about Jim, and I don't, I don't encourage you to be disloyal or anything

FONG: Yeah, yeah, yeah, yeah

BURKE: ... never

FONG: Yeah, yeah, yeah.

BURKE: but, just understand and be sure of your points of, sort of focus, you

know what I mean? FONG: Yep. Yep.

BURKE: Yeah. But apart from that, mate, the other thing is, you've gotta be like a waterbed. They jump on one side, you pop up on the other.

FONG: (laughs) BURKE: Alright?

FONG: Yeah, I'll try and do that. (laughs) BURKE: Yeah, so you've got plenty of friends. FONG: Yeah, no, I appreciate that. Nah, nah, well

BURKE: Alright?

FONG: hopefully, the front page today with the license issue and then,

hopefully that'll be out of the way and, ... can get with on with life.

BURKE: You just, just grit your teeth, and just keep going straight ahead, and

you'll find that when they see it not having an effect, they'll ... off it.

FONG: Yep. Exactly BURKE: Alright? FONG: Yep. BURKE: Alright. FONG: Alright mate.

BURKE: God bless, see ya. FONG: Thanks for that. BURKE: No worries

FONG: Good on you, Brian.

BURKE: and, and Neale, just very confidential that (emphasis added)

Mr Burke then attempted to contact Dr Fong half an hour later<sup>72</sup>.

RECORDED MESSAGE: Hi this is Neale Fong. Sorry I can't take your call please leave a message and I will get back to you. Thank you. BURKE: Neale it's Brian, Neale it's Brian I'm sorry to bother you again but I just wanted to stress that's very, very confidential that inf that advice and also to let you know that I'll be barracking for the Eagles, here in Canberra for you on Sunday. Thanks.

After providing Dr Fong with the opportunity to listen to the intercepted communication the Commission again questioned Dr Fong on whether he had ever received confidential Cabinet information from Mr Burke:

HARRIES, MS: "Mr Burke's given you information that he says comes from Cabinet, hasn't he?---He does."

HARRIES, MS: Did you think it was appropriate for Mr Burke to pass on information about proceedings in Cabinet?---No.<sup>74</sup>

HARRIES, MS: Did you advise the minister that Burke had provided you with information from Cabinet?---No, I didn't. I don't believe I did.

Do you consider that you are under a duty to report any leaks from Cabinet?

<sup>&</sup>lt;sup>72</sup> T1335

<sup>73</sup> Transcript of private examination of Dr Fong 14/09/2007, p 144

<sup>&</sup>lt;sup>74</sup> Transcript of private examination of Dr Fong 14/09/2007, p 146

THE COMMISSIONER: Particularly those perhaps affecting your own minister's portfolio?---Yeah, I've not - I've not thought about that, sir."<sup>75</sup>

Dr Fong was further questioned about his position and what actions he should have undertaken regarding the information supplied from Mr Burke relating to confidential Cabinet discussions:

HARRIES, MS: "Now that you are thinking about it?---In hindsight, I mean, the contacts that he's made with me to, you know - you know, during that week, you know, are self-serving I think and, you know, I - as I have said, that was a very difficult week and, you know - you know, him ringing up and saying that kind of stuff probably made me feel a little bit better, but in hindsight and - you know, it's - it's not good and I - and I don't appreciate it.

But in terms of your duty to report if such a thing were to exist, do you think you had one?---Well, I - you know, I don't - didn't know whether to necessarily believe it. I must admit there's a bit of, you know - you know, Mr Burke more so in hindsight I realise, you know, did have the ability to kind of very much sweet-talk and, you know, make - make you feel you could be anything and all the rest of it and pump your tyres up, as they say. So, you know, whether I actually believed what he was saying or whether he was just saying something to me I'm not sure.

But that's not the question, with all respect. What I'm asking you is the Public Sector Management Act as you know sets out the principles for official conduct, the Public Sector Code of Ethics sets out the principles for conduct in more detail, including the duty to report fraud or corruption or maladministration. You have a code of conduct within the Department of Health that places a responsibility to report misconduct or suspected misconduct. Do you consider now, with hindsight, that a breach of Cabinet confidentiality is something you should have reported at least to your minister?---In hindsight, if I could be sure that that was something that was said in Cabinet. I mean, it was just Mr Burke saying it second or third-hand, or third-hand to me. Other than that, he could have been just making something up to make me feel good.

So your answer is yes?---No, my answer is, you know, if it was a - if I knew that it was a - you know, a validated or verified, you know, Cabinet, it is my duty - something from Cabinet, it is my duty to report it."<sup>76</sup>

<sup>76</sup> Transcript of private examination of Dr Fong 14/09/2007, p 147

<sup>&</sup>lt;sup>75</sup> Transcript of private examination of Dr Fong 14/09/2007, pg 147

On 26 April 2006, Dr Fong telephoned Mr Burke and during the conversation again made him aware of information he said he received from a Cabinet Meeting in which the Premier stated that he was going to "take on" the papers<sup>77</sup>. During the course of the conversation Dr Fong referred to pressure he was receiving from the media and that because of it all he was considering quitting his position as Director General.

BURKE: Hello Brian Burke

FONG: Oh g'day Brian it's Neale Fong here.

BURKE: G' day, how are you? FONG: Oh, still, had better days still

BURKE: Have you?

FONG: Oh they're still chasing me mate, it's unbelievable

BURKE: What's happened today?

FONG: Oh, photographers one hundred metres from my house on Monday afternoon, this morning and whenever I get out of bed to go to work. And then more questions about the contract and bullshit, you know the KPI's and oh it's just goes on and on mate.

BURKE: Yeah.

FONG: .... There's something going on.

BURKE: What do you think it is?

FONG: I don't even know what it is, other than is someone trying to get rid of me for some reason or is it they're trying to get rid of McGinty...Don't know.

BURKE: Hmm

FONG: Just I'm very depressed. I want out.

BURKE: Don't be.

FONG: I want out, it's just just too hard

BURKE: Well I think think that would be absolutely the wrong thing to

contemplate FONG: Hmm

BURKE: and it's my view that there isn't anything going on.

FONG: Hmm

BURKE: What there is, is a reaction to a criticism of the paper's integrity. Now that's what it's all about. It's not about you. It's not personal

FONG: So it's about getting back at Jim having a swipe at the West.

BURKE: Exactly.

BURKE: Exactly. And that's what, this young bloke Armstrong, I don't know if I told you that he asked me to come to lunch with him and he asked me to write a column for his paper

FONG: Hm hm

BURKE: and I sat with him for about 2 hours. He's not a bad young boy

FONG: I know I've had ......
BURKE: But he's got no balance.

FONG: Hmm

BURKE: He thinks he's running a tabloid newspaper in a competitive market where he's got two or three other papers publishing each morning.

FONG: Hmm

BURKE: And I was speaking to D'Orazio the other day and said exactly the same thing to him. It's not about D'Orazio. What it's about is the fact that he dared to impugn the papers integrity.

<sup>&</sup>lt;sup>77</sup> T1337

FONG: Hmm

BURKE: And that's what it's all about. Now this must remain absolutely

confidential too, but Carpenter.

FONG: Yeah I got your message the other day.

BURKE: Yeah.

FONG: I haven't said anything to anybody

BURKE: No please don't, because

FONG: No no ......

BURKE: I mean they'll cut my throat mate.

FONG: Yep, yep.

BURKE: Uhm, Carpenter said in cabinet, last Tuesday they met I think uhm ,

Tuesday of last week I mean.

FONG: Yep, yep.

BURKE: Uhm said in Cabinet that he was going to pull the paper on, and he proceeded to say to the Cabinet Ministers that he didn't want them to interfere or to be involved, but he's going to sort it out. He blamed (name removed) for the paper's attitude. Now that tells me a couple of things. Firstly, he's very immature ah you can't win fighting City Hall and secondly (name removed) not behind any of this.

FONG: Hmm

BURKE: He may have had a few things to say about (name removed) for whom he's got a special sort of dislike. But that's not the case in this matter at all

FONG: Hmm

BURKE: And for Carpenter to think he's behind it shows that he's sadly out of touch. Now, I I really think that it's about McGinty firstly and McGinty's criticism of the press.

FONG: Hmm

BURKE: That's what it's about.

FONG: Yeah, well they certainly aren't going into details about who said what, when and all the rest of it. So they're trying to nail some, you know nail you know incompetence or or whatever on behalf of McGinty and Carpenter and myself

BURKE: Yeah

FONG: you know about trying to get the, you know that's why they seem to be going into such detail about you know this time last year and I got, you know and all the rest of it so.

BURKE: It goes back to when McGinty sued the

FONG: Hm hm

BURKE: newspaper for contempt, do you remember?

FONG: Yeah, yeah.

BURKE: He took the editor to court.

FONG: Yep.

BURKE: They've never forgotten that.

FONG: Yeah.

BURKE: And the other thing is, I've told you before, McGinty has got his enemies you know.

FONG: Yeah.

BURKE: Uhm Jon Ford who is, I don't know, have you met Jon Ford?

FONG: I don't, I don't think I have, I know who he is yeah.

BURKE: Yeah, he, at Cabinet, when they were talking about the KPI's, it went on for a while and Norm said look this is just bullshit and Ford came in and said in my previous job for Woodside I spent all day dealing with KPI's and I have never seen any KPI that wasn't just a load of shit.

FONG: (laughs) Yeah

BURKE: They're all subjective, they're all elastic, don't pin your confidence in

them because they don't work.

FONG: Hmm

BURKE: You know. But listen

FONG: Anyway.

BURKE: Mate you can handle this, I mean shit this is nothing.

FONG: Yeah. Yeah well that's probably what I need to hear you know.

BURKE: Well mate Christ almighty, I mean you'd never get back into the

team if you bloody ratted the first fuckin pulled hamstring.

FONG: No I'm not ratting, I'm not ratting, I'm just, I'm just, I'm just pissed

that's all you know.

Dr Fong was directly questioned in relation to the phone call as the call appeared to indicate that he was prepared to have quite personal discussions with Mr Burke:

"Dr Fong, that is certainly quite a personal discussion that you are having with Mr Burke, isn't it?---Well, it's him giving me advice about how to handle, you know, the situation that I was going through; a very low time in my life and, you know, quite emotionally flat.

So it's guite a personal discussion with Mr Burke, isn't it?---Well. it's of a personal nature, yes.

Just, "I'm very depressed, I want out." "Don't be." "I want out, it's just too hard"?---Mm.

THE COMMISSIONER: Would it be fair to say that there would have been at that time very few people with whom you would have had a conversation of that kind?---My wife, you know, close friends like that.

Yes?---Certainly no-one in my department nor my colleagues, you know, but personal friends, you know, had many conversations about it."78

Premier's Circular 2003/14, entitled 'Cabinet Confidentiality' states that "the confidentiality of Cabinet documents, discussions and decisions is a long established principle and had been regarded as essential for the maintenance of Cabinet's collective responsibility". <sup>79</sup> Further, in his role as a senior public officer Dr Fong is obliged to report any genuinely held suspicions of instances of misconduct or corrupt behaviour. Having received what was purportedly confidential Cabinet information from an ex-Premier of the State acting as a lobbyist the only conclusion that could be drawn was that the information came from a source within Cabinet. Indeed, Mr Burke had expressly referred to his "informant", who was apparently present, because the informant was

<sup>79</sup> See West Australian Public Service Code of Ethics – explanatory notes (2002)

<sup>&</sup>lt;sup>78</sup> Transcript of private examination with Dr Fong 14/09/07, p 149

"very pleased" with the Premier's praise of Dr Fong. That would infer at least possible misconduct on the part of the informant.

In that circumstance – as he acknowledged – Dr Fong would have had a duty to report it. He qualified that answer by saying in effect that he would have been under no such duty unless he was "sure" the information had in fact come from Cabinet, and that Mr Burke could have just been "making something up". Those answers were given with the benefit of hindsight and the terms and tone of the conversations do not suggest Dr Fong had any such doubt at the time.

That might give rise to a possible conclusion that Dr Fong's evidence that he had never received confidential cabinet information from Mr Burke was false.

Nonetheless, having considered representations made by Dr Fong's lawyers in respect of this following notification under section 86 of the CCC Act that the Commission might express an adverse opinion to that effect, and recommend the Director of Public Prosecutions consider a prosecution against Dr Fong for giving false evidence, the Commission has concluded that to do so would not be appropriate. That aspect was not the focus of the inquiry and it was not pursued in evidence. Accordingly, although Dr Fong appeared to accept at the time that what Mr Burke was telling him was in fact information from confidential Cabinet discussions, there was no independent evidence that was so. Furthermore the mere assertion by Mr Burke that the information had come from inside Cabinet, cannot be regarded as reliable.

But even if Dr Fong had doubts that the information had in fact come from confidential discussions in cabinet, that would not mean he had no duty to report the matter to his Minister.

There are two possibilities.

The first possibility is that the information Mr Burke disclosed did in fact come from a confidential Cabinet discussion, and Dr Fong believed that to be so (or at least thought it to be likely). In that event, the situation would have been that he, as Director General of a government department, was being given information that showed a private citizen, and specifically Mr Burke, (about whom his Minister had particular concerns) had access to confidential Cabinet discussions, presumably by a member of Cabinet or someone properly privy to them, "leaking" such information to him. That would be a very serious matter going to the integrity of persons privy to confidential Cabinet discussions. It would also give rise to a reasonable suspicion that a public officer may have engaged in misconduct.

The second possibility is that the information Mr Burke claimed to have come from a confidential Cabinet discussion, did not in fact do so, and Dr Fong believed (or thought it likely) that it did not. That would put one on inquiry as to why Mr Burke would claim that it did. In light of what Mr Burke said the information was, looked at objectively there was an obvious risk that Mr

Burke's purpose was to cultivate, or ingratiate himself with, Dr Fong so as to be able to exercise some influence over him in the future.

That Dr Fong's relationship with Mr Burke was such that Mr Burke felt sufficiently confident in Dr Fong as to disclose purported cabinet discussions to him, then expect him to maintain Mr Burke's confidence about that by not revealing the fact, is the issue. This is the very type of relationship that was the focus of Mr McGinty's concern when subsequently questioning Dr Fong about his links to Mr Burke.

In this respect it matters not whether Mr Burke had actually disclosed confidential Cabinet information. The concern is that he was prepared to purport to do so to a Director General of a government department, representing a degree of knowledge and influence inappropriate for someone who was neither a Cabinet member nor indeed a public officer of any description. General knowledge that Mr Burke had access to such information, apparently as a matter of course, could lead to a loss of confidence in government processes generally and to those of Cabinet specifically. As a senior public officer Dr Fong's obligation to report Mr Burke's conduct outweighed any obligation he had to Mr Burke to respect his confidences. In serving his Minister and the public of Western Australia as a Director General, Dr Fong had a duty to act with integrity in the public interest.

The obligation to disclose the conversations of 21 and 26 April 2006 to his Minister arose immediately. It was a continuing obligation which became even stronger about May 2007 when Dr Fong's relationship with Mr Burke became the subject of media and public interest, and his Minister specifically sought assurances from him about it. Whilst by then Dr Fong may not have had an accurate recall of the detail of the conversations, it cannot be accepted that he had no recollection whatsoever that conversations of that general nature had occurred.

The Commission does not accept the submission that the substance of the conversations was inconsequential and trivial, and could in no circumstances be considered a breach of Cabinet confidentiality. Even if the sentiment said to have been expressed by the Premier about Dr Fong was not 'confidential' (in the sense that it was one he had publically expressed), the gravamen of the concern here was the claim by Mr Burke that he had an informant within Cabinet through whom he had access to confidential Cabinet discussions. That was the critical aspect of what Dr Fong was obliged to report to his Minister.

The Commission has formed the opinion that on either possibility, in the context particularly of Mr McGinty's expressed concerns about the possible relationship between Dr Fong and Mr Burke (as they were known to Dr Fong), his failure to disclose those conversations to his Minister (or at all) involved a breach of the trust placed in him as Director General, and could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public servant under the PSMA. That is an opinion of misconduct under section 4(d)(iii) and (vi) of the CCC Act.

## 3.5.1 Issues of Parliamentary Privilege

One of the allegations received by the Commission was that Dr Fong had lied to the Minister, the Hon Jim McGinty MLA, during an Estimates Committee Hearing in relation to his association and communications, including email correspondence, with Mr Burke.

As explained above, the Commission is unable to investigate this component of the allegations as, pursuant to section 3(2) of the CCC Act the powers of the Commission are subject to parliamentary privilege.

The most fundamental tenet of parliamentary privilege is freedom of speech<sup>80</sup> and as per section 1 of the *Parliamentary Privileges Act 1891* debates or proceedings in Parliament must not be impeached or questioned in any court or place out of Parliament.

Section 3(2) of the CCC Act stipulates that nothing in the Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.

The Commission is accordingly unable to pursue this aspect of the investigation, or to express any opinion about it.

## 3.6 Lobbying and Mr Burke's Influence

During his first examination at the Commission on the 5 July 2007 Dr Fong was questioned directly regarding being lobbied by Mr Burke:

"Have you been lobbied by Mr Burke?---If you class the meeting which I believe was about setting up a meeting with Eddie Lee from Amcom as lobbying, you know, setting up a meeting, yes.

Is that the only occasion that you've been lobbied by Mr Burke?--To my recollection it is the only time he has actively or passively lobbied me to actually do something..."81

The Commission is aware of at least one other instance of Mr Burke lobbying Dr Fong:

 On 3 November 2003, Mr Burke emailed Dr Fong as Chief Executive at St John of God Hospital. The content of this email indicates that Mr Burke approached Dr Fong on behalf of MIS. (Note: this email fell outside the time frame of the FOI request and nor did it concern Dr Fong's later role as a public officer).

<sup>&</sup>lt;sup>80</sup> Erskine May *Parliamentary Practice* 23 Ed, 2004

<sup>&</sup>lt;sup>81</sup> Transcript of private examination of Dr Fong 05/07/07, p 17

 In September 2005, Mr Burke further emailed Dr Fong in relation to MIS, appearing to be lobbying Dr Fong on behalf of its product Empower HR<sup>82</sup>. Although the contract at DOH was not awarded to MIS, the DOH was conducting a tender process for the 'provision of Printing and Distribution of Staff Payslips'. The email, as per the DOH's record keeping policies, should have been classified as a business record.

Whilst it is evident that Mr Burke lobbied Dr Fong as a public servant on two occasions, in direct contradiction to Dr Fong's representations that there was only one, there is nothing in the response to the lobbying that can be classified as improper on Dr Fong's behalf as he did not take any direct action in response to Mr Burke's requests. However, the nature of their relationship is the context in which Dr Fong's claimed inability to recall email contact between them falls to be evaluated.

HARRIES, MS: "So was Burke at the time someone you regarded as a personal friend?---Well, Burke had that ability to needle his way into, you know, your life or matters and very clearly that's what he did. He - some of the things he says, you know, made sense, so you actually did listen to them, but in hindsight, you know, I had no idea what he was up to or what his motivations were, and that's the way he clearly operated.

THE COMMISSIONER: I suppose that might be part of the problem, mightn't it, from a wider perspective, and not specifically him but people who operate in the sort of way you have just described might, I suppose, not actually want anything at that particular time, but are simply setting up a scenario which, when they do, will be favourably received?---Yeah, I think that's right, sir."

#### 3.7 Disclosure of Commission Information

In June 2006 the Commission carried out an investigation into allegations of serious misconduct by Mr Michael Moodie, a Senior Department of Health Executive.

Throughout this time the Commission had purpose to contact Dr Fong in his role as Director General of Health to assist with the Commission's enquiries.

On 20 June 2006, Dr Fong was served with a notice pursuant to section 95 of the CCC Act. The notice served on Dr Fong included an explicit notation prohibiting disclosure of the notice itself, or any official matter connected with it. The subject of the notice was Mr Michael Moodie.

<sup>&</sup>lt;sup>82</sup> Referred to as the '10<sup>th</sup> email'

<sup>&</sup>lt;sup>83</sup> Transcript of private examination of Dr Fong 14/09/2007, p 149

In the private hearing on 5 July 2007, Dr Fong was asked whether he had ever disclosed confidential DOH information to Mr Burke:

"Just to make sure we've got this certain have you given Mr Burke information about any confidential matter that came to your knowledge by virtue of your position at the Department of Health?---I am not aware of giving Mr Burke any confidential information about Health Department matters.

It's not something you would do?---It is not something I do. If it was inappropriate, I would not do it."84

Dr Fong was questioned concerning the disclosure and information relating to the Commission's investigation of Mr Moodie. The following is an extract from the examination:

#### And further:

"What did you say to Mr Burke? Does that jog your memory at all?---I don't recall what I've said to Mr Burke but I'm - I'm quite certain that I wouldn't have given him any information even the fact that there was even an investigation or an inquiry or whatever, because we were very careful about how we handled this sensitive situation."

In a lawfully intercepted telephone call on 10 August 2006<sup>87</sup> Mr Burke was called at 9:43 am by Mr Mark Drummond who, as has been noted above, is a reporter at *The West Australian* newspaper. Mr Drummond asked Mr Burke if he had any contacts in the DOH to confirm rumours that Mr Moodie was under investigation by the Commission:

DRUMMOND: Now, listen, have you got any contacts in the Health Department?

BURKE: Yeah.

DRUMMOND: Okay, there's a story ... seems to be, there's a lot of ...

BURKE: About Michael Moodie?

DRUMMOND: Yeah.

BURKE: What are you hearing?

DRUMMOND: Well, we're hearing that it's a triple-C investigation that he was just, that he was frog-marched out, uh, and they confiscated computers and all sorts of stuff. Uhm, and there's a suspicion that there might be some private triple-C hearings going on at the moment in relation to it.

87 T7329

<sup>&</sup>lt;sup>84</sup> Transcript of private examination of Dr Fong 05/07/2007, pp 44-45

<sup>&</sup>lt;sup>85</sup> Transcript of private examination of Dr Fong 05/07/2007, p 49

<sup>&</sup>lt;sup>86</sup> Transcript of private examination of Dr Fong 05/07/2007, p 50

BURKE: Oh, well there might be, but all that's very, you can't report any of that.

DRUMMOND: Well, I mean, you know, it's not to say, I mean it ...

BURKE: You can't, no well, you can't.

DRUMMOND: No ...

BURKE: They'll sue you. I mean ... how do I know, because there's,

remember the thing I mentioned to you about Smiths Beach?

DRUMMOND: Yep.

BURKE: There's inquiries going on into that, uhm, and I know because

I was asked questions about it.

Mr Burke kept an open line to Mr Drummond and used his mobile telephone to call Dr Fong at 9:47am. The following is the content of this call (a side conversation)<sup>88</sup>:

FONG: Hello?

BURKE: Yeah, Neale? FONG: Yes, Brian.

BURKE: Yeah, it's Brian, can you talk?

FONG: Yes, go ahead.

BURKE: Yeah, I just want the capacity, if it's appropriate, to be able to jump on something. Uhm, uh, Michael Moodie.

FONG: Yep.

BURKE: Uhm, I'm just coming under some pressure, uh, about what happened or what the score is there. Uh, and I'll just tell you straight up what I've heard, that there's a triple-C inquiry and that uh, he sort of was frog-marched out of the office, they've confiscated computers and things, and they're having private inquiries. Now, none of that can be reported, I've pointed out to people who've asked me, but uhm, I just wonder if there's what, something I can say to them.

FONG: Uhm, that, uh, that's about all you can say, Brian. Yeah.

BURKE: Right, okay.

FONG: ... I mean it's out of ..., it's completely out of my hands.

BURKE: Yeah FONG: Yeah.

BURKE: no. I understand that.

FONG: Yeah, I mean we haven't, we haven't even said that publicly

yet.

BURKE: No, no. No, well, yeah, alright, so

FONG: But ... that's, that's, that's the facts, yeah.

BURKE: Yeah, I understand that. So, I, I'll just say that, that uh, uh, as far as I can find out, there's no, there's nothing can be said, and if people can confirm things that, you know, are able to be written, you see, with the triple-C, Neale, you can't write things, even if you know them.

FONG: Yep.

BURKE: Yeah. Alright.

FONG: Well I can't, I can't, I can't even say whether they're

investigating or not investigating.

BURKE: No, well that's

FONG: I can tell you they are, but

FONG: Mmm

<sup>88</sup> T13764

BURKE: well, you're not even telling me that.

FONG: No.

BURKE: What you're saying to me is that you're unable to say

anything.

FONG: No, that's correct.

BURKE: Okay, well that's what you've told me.

FONG: Okay.

BURKE: Okay, good onya. FONG: Thanks mate. Cheers BURKE: ... see va. Ta Ta

(Mr Burke disconnects from Dr Fong and the conversation to

Drummond continues):

BURKE: Yeah, you're on the money. (emphasis added).

The content of the call was then put to Dr Fong and he was questioned further on the matter.

"You disclosed it to Mr Burke, didn't you?---It appears that I did, Ms Harries.

Why - why would you do that?---I - I have no idea why I did it. I think I was probably - I've certainly said, "I can't even say" - I was trying to deny - deny that there was an investigation or not an investigation. I do not know why I would have then said, "I can tell you they are," other than to close the conversation. So - - -

Do you see the use that Mr Burke then makes of that information? He's on the telephone to a reporter while he's having this conversation with you?---Yes, I was not aware of that "89"

The impact of the release of this information was evident immediately, with Mr Burke passing the information to Mr Drummond. The next day an article indicating the existence and detailing aspects of the Commission's investigation into Mr Michael Moodie appeared in *The West Australian*. <sup>90</sup>

Once again, although a telephone conversation and not an email communication, the call is pertinent to the present inquiry for what it indicates about the relationship between Dr Fong and Mr Burke. It reveals a personal connection between the two men of such a nature that Mr Burke felt able to contact Dr Fong as the Director General of a government department, seeking highly confidential information and expecting that not only would his request be entertained but that the information would be given to him – as it in fact was.

<sup>89</sup> Transcript of private examination with Dr Fong 05/07/2007, pp 50-51

<sup>&</sup>lt;sup>90</sup> Article: *Moodie faces CCC probe into claims of travel allowance rorts* The West Australian pg 9

#### 3.8 Other matters

During the course of the investigation other allegations were received by the Commission concerning the conduct of Dr Fong. As a result, the scope and purpose of the investigation was widened to encompass the additional matters including:

- an allegation that Dr Fong was misusing his corporate credit card; and
- an allegation that Dr Fong was delivering medical samples, supplied to him as Director General of the Department of Health, to a Balinese Medical Clinic, in which Dr Fong had a financial interest.

The Commission investigated these further allegations and has formed the opinion that they were not substantiated.

## 3.9 The Commission's Assessment as to Dr Fong's Relationship with Mr Burke

The Commission has identified 33 emails between Dr Fong and Mr Burke in the period August 2002 to June 2006. They are listed in Table 2 below. It can be seen that 24 of those emails were after Dr Fong took up his role as Executive Chairman of the HRIT on 2 August 2004.

Email Date	From	То	Subject Matter	Acquired by CCC	FOI Email
29/08/2002 10:09	BURKE	FONG Other x 1	BURKE confirming a lunch at Perugino's on 04/09/2002 at 12:30pm. Attendees include Graham GIFFARD, Norm MARLBOROUGH and John FIOCCO. Relates to Football Commission seeking government assistance.	Yes, in the body of email sent to GRILL.	
27/09/2002 15:55	FONG	BURKE	FONG saying thanks to BURKE and that he will stay in touch.	YES	
02/04/2003 17:20	BURKE	Bulk recipients including FONG	A Crikey article about himself and GRILL being retained by WA Trotting Association.  1 x attachment	YES	
09/04/2003 16:30	BURKE	Bulk recipients including FONG	A further story by Crikey. 1 x attachment	YES	
03/11/2003 09:06	BURKE	FONG Other x 2	BURKE referring to Paradigm Salary Packaging and lobbying for client MIS. 2 x attachment	YES	
07/11/2003 11:03	FONG	BURKE	Reply to previous email. FONG giving details of lan OAKLEY who looks after payroll.	YES	
02/01/2004 18:01	BURKE	Bulk recipients including FONG	Email advising a change of BURKE's email address.	ail advising a change of YES	
27/03/2004 05:21	BURKE	Bulk recipients including FONG	BURKE's comments about a story in The West Australian relating to his being retained by ASU.	YES	
05/07/2004 17:20	BURKE	FONG Other x 2	BURKE telling [NAME REMOVED] YES that he gave FONG the briefing note and FONG will call [NAME REMOVED]. Email BCC'd to FONG.		
30/08/2005 07:38	BURKE	FONG	BURKE lobbying for Empower-HR payroll system for client MIS	YES	

00/00/0005	חווחויד	FONO	DUDKE Ishbadaa faa Easaan IID	N/EO	1
22/09/2005 17:16	BURKE	FONG	BURKE lobbying for Empower-HR	YES	
	FONC	DUDKE	payroll system for client MIS	Van in bady of	-
22/09/2005	FONG	BURKE	Reply to previous email, FONG	Yes, in body of	
17:26			saying he will get back to BURKE	subsequent email	
00/00/0005	DUDKE	FONO	in the next two weeks.		
23/09/2005	BURKE	FONG	Reply to previous email, expecting YES		
03:17	DUDICE	FONO	footy victory.	\/E0	
29/09/2005	2005 BURKE FONG		BURKE seeking appointment for	YES	
00:06			FONG to meet with David		
00/00/0005	DUDICE	FONO	McKENZIE about Smiths Beach.		
29/09/2005	BURKE	FONG	Confirmation of lunch appointment YES		
10:41		Others x 3	at Perugino's 11/10/2005 at 1pm.		
02/10/2005	BURKE	FONG	BURKE emailing information about	nation about YES	
11:36			Smiths Beach.		
			3 x attachment		
04/10/2005	BURKE	Bulk recipients	BURKE seeking support for a	YES	
17:25		including FONG	friend [NAME REMOVED] who		
			was standing for election onto the		
			RAC Council.		
			1 x attachment		
11/10/2005	BURKE	FONG	Reminder about lunch at	YES	
09:04		Others x 4	Perugino's to discuss Smiths		
			Beach		
25/10/2005	BURKE	FONG	BURKE following up matter of	YES	
05:58			Empower-HR.		
21/02/2006	FONG	BURKE	"Brian can meet 11 weds".	NO	1
08:18			(BURKE requested this meeting in		
			T1331)		
21/02/2006	FONG	BURKE	Unknown (detected this incoming	NO	
10:30			email via BURKE's virus scan log)		
21/02/2006	FONG	BURKE	Unknown (detected this incoming	NO	
17:49			email via BURKE's virus scan log)		
12/04/2006	BURKE	FONG	"Appointment"	NO	2
08:38					
12/04/2006	FONG	BURKE	Reply to "Appointment" NO		3
20:33			.,, ,,		
20/04/2006	BURKE	FONG	"Assistance"	NO	4
16:31					
20/04/2006	FONG	BURKE	Reply to "Assistance"	NO	5
21:38	. 0.10	BOTTILE	reply to redictance		Ŭ
24/05/2006	BURKE	FONG	[NAME REMOVED] health	YES	
15:22	BOTTILE	Other x 1	problem		
25/05/2006	FONG	BURKE	Reply to previous email + FONG	Yes, in body of	
19:08	I ONG	DUNKL	seeking help with unpleasant press		
19.00			from Channel 7.	email	
25/05/2006	BURKE	FONG	Reply to previous email, BURKE	YES	6
	BURKE	FUNG		TES	0
19:48			saying he will think about the Channel 7 problem.		
20/05/2022	FONO	חוחור		Voo in bade of	<del>                                     </del>
29/05/2006	FONG	BURKE	"Perugino's". FONG seeking	Yes, in body of	7
14:49			assistance with arranging payment		
20/05/2002	DLIDYE	FONC	by DOH for a surgeon's dinner.	email	ļ
29/05/2006	BURKE	FONG	Reply to "Perugino's". BURKE	YES	
15:21	=01:5	D. 101/5	saying Guiseppe will invoice DOH.		
29/05/2006	FONG	BURKE	Further to "Perugino's". FONG	YES	8
17:51			thanking BURKE for his		
			assistance.		
06/06/2006	BURKE	FONG	Further email about [NAME	YES	9
16:01	1		REMOVED] health problem.		
	1		FONG requested BURKE resend		
			information in call 06/06/2006		
			(T1340)		

Table 2 – List of all emails identified by the Commission

The major issue of concern resulting from the investigation of Dr Fong into his relationship with Mr Burke is in regard to Dr Fong's representation to his Minister, of his relationship and email correspondence with Mr Burke. Other than Dr Fong's disclosure to Mr Burke that the Commission was investigating

Mr Moodie, and Dr Fong's failure to report that Mr Burke gave him what the latter claimed was confidential Cabinet information from an informant within Cabinet, the Commission does not suggest there is anything untoward in the relationship and contacts between Dr Fong and Mr Burke, but it is Dr Fong's representation of the relationship that is at issue. In the Commission's assessment Dr Fong, in his capacity as Director General of Health, made misrepresentations to his Minister, DOH staff and the media culminating in him maintaining untruthfully in his evidence to the Commission that he had no recollection of any of the 33 email communications between him and Mr Burke identified above.

Dr Fong consistently maintained that there was no personal or professional business relationship between himself and Mr Burke, and that there were no emails.

Witnesses have described Dr Fong as a remarkably astute person with an immense capacity to absorb information, who has excellent recall and can produce facts and figures as required. The Commission accepts that to be so.

In the assessment of the Commission it is inconceivable that Dr Fong had not, could not, and did not recall that there were any email communications between himself and Mr Burke between August 2004 and June 2006. The Commission is positively satisfied on the balance of probabilities that at all relevant times he well knew at least that there had been email communications between them and the general nature of those.

The Commission accepts that in relation to minor or "circular" emails Dr Fong could have legitimately forgotten their content and/or existence, particularly given the communications were sporadic, the 24 emails were spaced over some 22 months and that they were in the main initiated by Mr Burke. What is unlikely is that Dr Fong would forget communications in regards to Smiths Beach, Amcom and approaching individuals on behalf of Mr Burke. The Commission does not accept that he had no recollection whatsoever of any email contact at all between August 2004 and June 2006.

Under examination by the Commission Dr Fong was unable to provide a plausible explanation for his lack of recall. In the Commission's assessment Dr Fong deliberately attempted to remove or distance himself from his relationship with Mr Burke.

The emails in possession of the Commission clearly contradict the recollection of Dr Fong during the FOI and FOI review process that there were no emails and it can reasonably be inferred that Dr Fong, rather than having no recall of the communication, deliberately sought to reduce and minimise representation of his actual contact and his personal relationship with Mr Burke.

Dr Fong had been under considerable media scrutiny and the subject of extensive comment in his role as Director General of the Department of Health ever since his acting appointment to that position on 24 November 2004. Prior to that, he had been Executive Chairman of the HRIT since 2

August 2004. There was a great deal of public interest in him, his performance and that of the department. As his Minister said, the issue of Dr Fong's contact with Mr Burke, in the political climate of the times, was:

"...a very clear-cut example of a matter of very high public profile." 91

It was something which was very important to the Minister, not only as having the potential for political embarrassment given his known very poor relationship with Mr Burke, but also in respect of his expressed concern about potential influence by Mr Burke (or grounds for perception of that). It was also of great concern to the Minister as a matter going to the proper operation of the Department of Health. There can be no doubt Dr Fong was well aware of the importance and concern to the Minister, of any contacts of a personal nature, or any personal relationship between him and Mr Burke.

In these circumstances particularly, the proper performance of his functions as Director General certainly required Dr Fong to act with integrity and be honest with his Minister about his relationship with Mr Burke and about the email and other communications between them. For the reasons already given, the Commission makes no comment about what was, or may have been, said to the Parliament. This is a matter for the Parliament.

Dr Fong's lawyers submitted that in light of Mr McGinty's evidence it was not open to the Commission to form an opinion that Dr Fong had misrepresented his relationship with Mr Burke. That submission cannot be accepted on any of the grounds advanced in support of it. It is clear that Dr Fong told his Minister there had been some contact or communications between him and Mr Burke from time-to-time but it is also clear that whatever precisely that was, it was intended to (and did) leave the Minister with the understanding that there was no friendship, no personal relationship and no business relationship between Dr Fong and Mr Burke. Dr Fong told his Minister initially there had been no email communication between him and Mr Burke at all in the period covered by the FOI request. He told Mr McGinty he could say that positively because the DOH had no record of any. When the existence first of nine, and subsequently a tenth email came to light, he maintained he had no recollection of them – and hence no recollection of any others. Mr McGinty believed what his Director General told him.

In fact there had been much more contact between the two than Dr Fong had revealed, and although not of a close personal friendship it was very much closer and more frequent than conveyed by Dr Fong. It was also of a kind which on the Minister's evidence would have given him cause for concern about the potential exercise of influence by Mr Burke. Thus, the submission (in effect) that the Commission should accept Mr McGinty's understanding that the two did not have a personal or business relationship, is ill-founded, because Mr McGinty was completely unaware of the extent and nature of the contact there had in fact been.

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<sup>&</sup>lt;sup>91</sup> Transcript of private examination of the Mr McGinty, 19/12/07, p 23

For the same reason it is simply incorrect to assert (as Dr Fong's lawyers do) that Mr McGinty is the person best able to cast light on whether he was misled because he is the person best placed to evaluate the substance of what was said to him by Dr Fong in the past and to assess that against such evidence as there may be of the association. Dr Fong has never told Mr McGinty the true nature and extent of his association and contacts with Mr Burke.

A number of the representations made on behalf of Dr Fong argued that there was no evidence of any impropriety on his part in his contacts or relationship with Mr Burke, nor of any benefit received by him nor of any personal business dealings between them. The Commission accepts these representations, except for Dr Fong's disclosure to Mr Burke that the Commission was investigating a DOH employee, Mr Michael Moodie, and his failure to report the disclosure to Dr Fong of what Mr Burke claimed was confidential Cabinet information. But those representations do not go to the issue here, which is whether Dr Fong knowingly misrepresented to his Minister, the true nature and extent of his email and other communications with Mr Burke. In the Commission's assessment, the evidence leads irresistibly to the conclusion that he did.

It was put on behalf of Dr Fong that Mr Burke sought to cultivate and ingratiate himself with Dr Fong, who nonetheless, to all intents and purposes, largely ignored such requests or approaches as were made by Mr Burke and certainly did not do anything of substance for him. The Commission accepts that as so, to a point. However it is evident from the totality of the communications between them which the Commission has been able to identify, that the relationship between them is of a much closer personal nature than Dr Fong was willing to admit to his Minister or publicly.

It is evident that Dr Fong would have no recollection of any email which he did not receive. The Commission has considered that possibility but is satisfied he did receive most of those above in which he is identified as the recipient. In some instances, that fact is evidenced by his subsequent confirmation or acknowledgement of receipt. Others were directed to the same email address as emails of which receipt was confirmed. Emails from Mr Burke addressed to Dr Fong (either as primary addressee or copy addressee) at his correct email address were found on Mr Grill's computer, thus indicating those emails had in fact been sent to all addressees listed. Where emails addressed to Dr Fong were located only on Mr Burke's computer, there is no router message indicating a failed delivery.

With the possible exception of the email of 25 October 2005 in which Mr Burke is following-up earlier emails of 30 August and 22 September 2005 about the Empower-HR payroll system (receipt of which is established), there is nothing to suggest the identified emails were not received by Dr Fong. The email of 25 October 2005 may have been received, but as it was found in an

<sup>&</sup>lt;sup>92</sup> The Commission notes that Mr Burke's position is that he does not accept this to be an accurate reflection of his conversations with Dr Fong about Mr Moodie or the confidential Cabinet information.

archive folder on Mr Burke's computer it is possible it may have been put there without actually having been sent.

# CHAPTER 4 OPINION AND CONCLUSIONS

## 4.1 The Commission's opinion as to Misconduct

Having assessed all the material gathered during the investigation the Commission has formed an opinion in regard to misconduct by Dr Fong.

It is the Commission's opinion that Dr Fong has engaged in misconduct in that his actions, in professing to his Minister that:

- (a) he had no recollection of any email communications between himself and Mr Burke; and that
- (b) he had no personal relationship with Mr Burke

constituted or involved the performance of his functions in a manner that was not honest, and a breach of the trust placed in him by reason of his office and could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office as a public service officer under the *Public Sector Management Act*, contrary to section 4d(ii)(iii) and (vi) of the CCC Act.

The Commission is of the opinion that Dr Fong engaged in misconduct within the meaning of section 4(d)(iii) and (vi) of the CCC Act, in that his failure to report to his Minister (or at all) that Mr Burke had disclosed to him what Mr Burke claimed was confidential information from Cabinet, constituted or involved a breach of the trust placed in him by reason of his office and could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office as a public service officer under the *Public Service Management Act*.

Further, pursuant to section 22(1) of the CCC Act the Commission has formed the opinion that Dr Fong has engaged in serious misconduct within the meaning of section 4(c) of the CCC Act, by disclosing a restricted matter concerning an investigation into Mr Michael Moodie, contrary to section 167 and a notation under s.99 of the CCC Act.

## 4.2 Recommendations

The Commission makes five specific recommendations. They relate to the conduct of Dr Fong, the leaking of cabinet information and the handling of record keeping in Government.

### Recommendation 1

The Commission recommends that the Director General of the Department of Premier and Cabinet give consideration to the taking of disciplinary action against Dr Fong for his lack of integrity in relation to his misleading representations regarding his relationship with Mr Burke, and, in particular, the email communications between them.

#### Recommendation 2

The Commission recommends that the Director General of the Department of Premier and Cabinet give consideration to the taking of disciplinary action against Dr Fong for failing to report the disclosure to him by Mr Brian Burke of what the latter claimed to be confidential information from Cabinet.

## Recommendation 3

The Commission recommends that the Director of Public Prosecutions consider the prosecution of Dr Fong in respect of disclosure of a restricted matter concerning Mr Michael Moodie, contrary to section 167 of the CCC Act.

#### Recommendation 4

The Commission recommends that matters relating to the appropriateness and adequacy of the FOI processes and record-handling of the Department of Health, as detailed in this report, be referred to the Office of the Information Commissioner and State Records Commission.

#### Recommendation 5

The Commission recommends that the Department of Premier and Cabinet in conjunction with the State Records Commission consider a whole of government standard in relation to agencies' archival processes and retention of email communications.