

**Supplementary
Submission**

No 6a

INQUIRY INTO THE 2009 MT PENNY RETURN TO ORDER

Organisation: NSW Trade and Investment
Name: Mr Mark Paterson AO
Position: Director General
Date Received: 30/07/2013



Trade & Investment



Office of the Director General

DGTO13/297

Privileges Committee
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000
Attention: Stephen Frappell

Dear Mr Frappell

Inquiry into the 2009 Mt Penny return to order

I refer to previous correspondence regarding the above Inquiry and to my statement to the Privileges Committee that I would provide a copy of the Independent Review Report by Maddocks Lawyers.

I now enclose:

1. Report of the Independent Review of response to Mt Penny call for papers under Standing Order 52 ("the Report");
2. Annexure A to the Report; and
3. Annexure B to the Report.

Please note that Departmental staff are not named in the Report, but are named in the Annexures. I note the Committee may wish to make the Report publicly available. Personal details about Departmental staff may be relevant to the Committee however I would request that Annexures A and B, which include names of staff, are not made publicly available.

The Department will use the outcomes of the independent review to undertake further searches for documents, in order to address part 2(b) of the Inquiry's terms of reference.

Yours sincerely

Mark I Paterson AO
Director General

30.7.13

Encl



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Independent review of response to Mt Penny call for papers under Standing Order 52

Final Report

July 2013

PRIVATE & CONFIDENTIAL

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1. Scope of review

- 1.1 On 12 November 2009, the NSW Legislative Council resolved, under Standing Order 52 of the Rules of the House of Parliament of NSW, to require, inter alios, the Department of Industry and Investment (**the Department**) to produce documents in relation to Mt Penny mining exploration licence 3771 (now exploration licence 7406) (**the Order**).
- 1.2 In response to the Order, the Department produced 46 documents on or about 23 November 2009.
- 1.3 In late 2012, following the publication of certain documents by the Independent Commission Against Corruption (**ICAC**) as part of Operation Jasper, concerns were raised whether the Order had been fully complied with. The Legislative Council subsequently referred the matter to the Privileges Committee in March 2013. Following an inquiry, the Privileges Committee concluded on 30 April 2013 that certain documents identified by ICAC should have been provided to the Legislative Council in response to the Order.
- 1.4 The Privileges Committee is currently conducting an inquiry into the failure to provide documents in response to the Order.
- 1.5 We have been engaged by the Department to undertake an independent review of its response to the Order (**Review**). Specifically, the terms of reference for the Review are to:
- 1.5.1 document the policies and procedures that applied to the Order (see **section 3**);
 - 1.5.2 investigate and document the actions taken by the Department in response to the Order (see **section 4**); and
 - 1.5.3 in relation to the documents that were not produced, examine and report on where and how these were held (see **section 5**).
- 1.6 At **section 6** of this report, we have set out our conclusions as to the reasons for the incomplete production of documents in response to the Order.

2. Methodology

- 2.1 In undertaking the Review, we interviewed all Departmental staff we could identify as being involved to any degree in responding to the Order. We interviewed the following (current or former) Departmental staff:
- 2.1.1 Witness A – in person;
 - 2.1.2 Witness B – in person;
 - 2.1.3 Witness C – in person;
 - 2.1.4 Witness D – in person;
 - 2.1.5 Witness E – in person;
 - 2.1.6 Witness F – in person;
 - 2.1.7 Witness G – by telephone and email;
 - 2.1.8 Witness H – by telephone and email;

- 2.1.9 Witness I – by telephone and email;
 - 2.1.10 Witness J - by telephone and email;
 - 2.1.11 Witness K – in person;
 - 2.1.12 Witness L – in person;
 - 2.1.13 Witness M – in person;
 - 2.1.14 Witness N - by telephone and email;
 - 2.1.15 Witness O – by telephone and email.
- 2.2 A list of these witnesses forms confidential annexure A to this report.
- 2.3 At each interview with a current Departmental employee, the interviewee signed a confidentiality undertaking and was informed of the Department's Employee Assistance Program.
- 2.4 The events the subject of the Review occurred in November 2009, some four years ago. Since that time, many Departmental staff have been involved in producing documents to ICAC pursuant to several Notices issued to the Department. Accordingly, the Departmental staff we interviewed uniformly had very limited memory of their involvement in responding to the Order in 2009. In fact, not one of those staff members could actually recall their involvement in that process.
- 2.5 We also made a number of enquiries with the Department's IT section (IT). These consisted of the following:
- 2.5.1 IT providing the inboxes and sent items for the period 12 November 2009 – 23 November 2009 inclusive for the Departmental staff listed in paragraph 2.1. The emails were then reviewed by us to determine whether there were any relevant emails – additional to those briefed to us - which demonstrated what actions were taken in response to the Order.

We were not provided with any emails in the relevant period for Witness E and Witness G. We were informed by IT that those witnesses' archived inboxes located on the Department's archive server had been searched and no emails for the relevant period had been found. We were told that the explanation for the lack of emails on the archive server is that those individuals or someone with access to their account must have personally deleted emails before they ceased employment with the Department. We were informed by IT that there is now a compliance archiving system which automatically captures emails in the Department's vault (even if deleted by a user) but that this system was not in place at the relevant time (it commenced June/July 2012).

We were informed on 12 July 2013 that IT had ascertained, after further inquiries, that Witness G had been using an email archive located on the IT system of another Department at the relevant time (Department of Water and Energy). Email files recovered from a search of this Department's archives and point-in-time backups were provided to us on 12 July 2013. IT informed us that they were unaware of any other witnesses using an email archive located on the IT system of another Department at the relevant time, however there is no way to confirm this.

IT also performed a search of point-in-time backups of the email inboxes of all witnesses and failed to find any emails for the relevant period for Witnesses E and G. We were told that prior to 2011, monthly point-in-time backups were kept in a 7-

year pool. The records contained in these pool tapes are missing some months due to failures in the backup system.

On 15 July 2013, we were informed that further point-in-time backups, made at a date closer in time to the relevant period, had been found in the 7-year pool for five witnesses. These further point-in-time backups contained additional emails for the relevant period for all five witnesses, including Witness E.

2.5.2 in relation to the 139 documents which were not produced in 2009, we asked IT on 18 June 2013:

- (a) to ascertain which of the documents are on TRIM. If a document was on TRIM, we asked whether it could be determined when it was added to TRIM. On 3 July 2013, IT informed us that only 22 of the 139 documents were registered on TRIM prior to the Order and provided us with the TRIM references; and
- (b) to determine if any of the documents were accessed during the period 12 November 2009 to 23 November 2009. By "access", we mean that, for example, somebody opened up the document or otherwise dealt with it in some way. On 3 July 2013, IT provided audit logs for each of the 22 documents that were on TRIM. Only one document was accessed in the relevant period (by Witness A).

These enquiries were relevant to determining:

- where the documents that were not produced in 2009 were held within the Department;
- whether the documents could have been located using a TRIM search; and
- if someone within the Department accessed those documents but failed to produce them.

2.5.3 in relation to the fax from Department of Premier and Cabinet (DPC) to Witness M dated 13 November 2009 which sets out the Order, we asked IT:

- (a) whether it was on TRIM. This was confirmed by IT.
- (b) when was that document added to TRIM and by whom. We were informed that Individual 1 registered the document on TRIM on 16/11/2009 at 8:27am.
- (c) if it could be determined who accessed that document and when. IT provided us with an audit log which records access to the document on TRIM.

These enquiries assisted us in ascertaining the actions taken by the Department in response to the Order.

2.5.4 IT providing us with a copy of the documents that were attached to, or referred to in, the emails that record how the Department responded to the Order (e.g. TRIM INT08/62117, TRIM folder 09/5739, EOI information packs). The purpose of this enquiry was to determine which documents were provided to Witness A by various employees in responding to the Order and to then compare these documents with those that were provided to DPC in November 2009.

2.6 In this report, we have relied upon information provided to us by IT, which we assume to be accurate and complete, without independent verification.

3. The policies and procedures that applied to the Order

- 3.1 The Department did not have a written or formal policy for responding to Standing Order 52 in place at the time (November 2009).
- 3.2 From the evidence gathered by way of the interviews (see paragraph 2.1), Witness A was considered by those within the Department to be responsible for coordinating responses to requests for information, be it Standing Order 52 or GIPA requests. The usual practice consisted of Witness A sending the request to those areas of the Department which were relevant to the request, invariably with guidance from Witness L as to the most appropriate recipients.

4. The process followed in responding to the Order

- 4.1 We have documented the actions taken by the Department in responding to the Order. This forms confidential annexure B.
- 4.2 This chronology has been generated by reference to the emails that record how the Department responded to the Order and by evidence gathered in the interviews referred to in paragraph 2.1. There was no central document created at the time which records:
 - 4.2.1 which Departmental staff were involved in identifying documents; and
 - 4.2.2 the searches performed (including both search terms used and which records were searched).
- 4.3 Further, one of the Departmental staff interviewed suggested that it was quite deliberate to limit the emails sent about the Order as it was known that these would then need to be produced (adding to the burden of complying with the Order).
- 4.4 For these reasons, it is impossible to determine definitively what actions were taken by the Department in responding to the Order. Accordingly, the chronology is based upon the available emails that evidence the steps taken by the Department and any information provided by Departmental staff in our interviews. There may have been communications between Departmental staff in response to the Order which are not captured, for example, telephone calls or emails which were deleted.
- 4.5 Where there is documentary evidence available to us which demonstrates that a certain fact occurred, this is coloured in black in the attached chronology. Where the facts outlined are based on evidence given by Departmental staff which cannot be independently verified, this is coloured in red.

5. The documents that were not produced in November 2009

- 5.1 One of the terms of reference of the Review was to examine and report on where and how the 139 documents that were not produced were held by the Department. We note that ICAC identified 139 documents in its "document comparison matrix" which were not provided to the Legislative Council in response to the Order but were produced to ICAC. The Privileges Committee, on the advice of Bret Walker SC, was satisfied that at least 124, if not all, of the documents identified by ICAC in the document comparison matrix should have been provided in response to the Order. However, for the purposes of the Review, we have relied upon ICAC's identification of 139 documents in its document comparison matrix as being the number of additional documents that ought to have been produced by the Department in response to the Order.
- 5.2 Of the 139 documents that were not produced in answer to the Order in November 2009, 106 of the documents are emails and:

- 6.2 The reasons for the incomplete production of documents in November 2009 include the following:
- 6.2.1 there was no written policy or guidelines which clearly articulated how Departmental staff were to respond to orders for the production of documents pursuant to Standing Order 52, including the procedures by which relevant documents were to be identified.
- 6.2.2 it is clear from the interviews referred to in paragraph 2.1 that Departmental staff understood Witness A, as information officer, to be responsible for co-ordinating the response to the Order. There was some confusion, however, as to the extent of his role. Witness A considered himself a mere conduit or facilitator of the response, whereas some others within the Department believed he was conducting searches and collating material.
- 6.2.3 it was unclear to Witness A which people within the Department were to be sent a copy of the Order and how he was to determine which areas or people were relevant to the Order. There was no clear policy or guidelines setting out who was responsible for determining which people within the Department were to receive the Order. Witness L provided some guidance to Witness A in this respect but this was *ad hoc* and informal.
- 6.2.4 witness A sent the Order by email directly to the Division Head, Witness G (DDG for Energy and Minerals). However, it is not clear what action was taken by Witness G in responding to the Order, apart from forwarding the email from Witness A containing the Order to Witness O requesting her advice. Witness O does not recall the specific email but considers it likely that she would have orally given Witness G general advice about responding to standing orders. This was because she had previously been in a legal role and dealt with standing orders regularly in the Energy division of the Department and Witness G was aware of this. The general advice was based on Witness O's experience in responding to standing orders, rather than in accordance with some written or formal policy.
- There is no evidence that Witness G forwarded the email containing the Order to Witness N. Witness N was the Executive Director of Minerals. Given his role and the terms of the Order, many of the people interviewed at paragraph 2.1 were surprised that Witness N was not involved in the Department's response to the Order (i.e. not copied in on the email from Witness A on 19 November 2009 or was not forwarded the email by Witness G).
- Witness N agreed that ideally the Order ought to have been brought to his attention. However, he noted that Witness G worked in a different office (in Sydney) and may have taken comfort in the fact the Order had been copied to Witness B, who was also located in Sydney and was the Chair of the Mt Penny EOI evaluation panel.
- 6.2.5 the timeframe for responding to the Order was very tight. The fax was sent by DPC to the DG on Friday, 13 November 2009 and specified Friday, 20 November 2009 as the deadline for providing documents. Witness A was not notified that he/she was to co-ordinate the response to the Order until Thursday, 19 November 2009. As one of the persons interviewed at paragraph 2.1 explained, to the extent that there was an informal policy on responding to Standing Orders and other requests for information, it was simply to comply on time. The focus was on providing a response on time rather than on ensuring that the production was complete.
- 6.2.6 the requests made by ICAC to the Department for documents in 2012 and 2013 were very specific and identified that particular categories of emails were to be provided. For example, a request for all emails sent or received from X in a certain time frame. From our interviews referred to in paragraph 2.1, it appears that some

Departmental staff may not have understood the Order to require the production of emails and therefore did not undertake searches of inboxes.

- 6.2.7 on 13 November 2009, DPC sent a fax to Witness M informing the Department of the terms of the Order. It is this fax which was then attached to an email from Witness A to Witness G and others on 19 November 2009 requesting that necessary enquiries be made and documents provided in response to the Order. We note that the fax from DPC refers several times to the provision of "papers" and does not define what is meant by "papers" or "documents". This may have contributed to the way the Order was interpreted by at least some Departmental staff as referred to in paragraph 6.2.6. That is, that the Order did not require the production of emails. Given that DPC co-ordinates the return of documents in response to an order for production under Standing Order 52, it may be useful to review the directions and guidance it provides to departments and agencies in complying with such orders (as well as the Department's own policy).
- 6.2.8 the terms of the Order are very broad requesting all documents "*in relation to Exploration Licence 3771... - Mt Penny, including any documents relating to the tender process...*" From the interviews conducted in paragraph 2.1, one may infer that some Departmental staff tended to overlook the word "*including*" in interpreting the Order and focussed on tender documents only. We note the Privileges Committee's interpretation of the Order in its report was that it called for the production of all documents that could be said in any way to bear upon or inform an understanding of the 2008/2009 "tender process", that is, the 2008/2009 EO process.
- 6.2.9 although documents appear to have been provided from the TRIM system and some searches of that system *may* have been conducted (there is no evidence to the effect), the TRIM system is not infallible. It relies upon Departmental staff registering documents on TRIM. At the time of the Order in 2009, the use of TRIM by Departmental staff was variable and certainly not universal. This is established by the fact that only 22 of the missing 139 documents appear to be registered on TRIM.
- 6.2.10 according to many of the people we interviewed at paragraph 2.1, the Mineral Resources division of the Department was under-resourced and had been stripped of senior management. The lack of adequate resourcing may have made locating documents and undertaking thorough searches more difficult. That is, already busy people were asked to identify relevant documents.
- 6.2.11 the Department had offices in Sydney, Orange and Maitland. This meant that staff were not all situated in one place and could not communicate as easily with one another. In these circumstances, the production of documents is more difficult and the process is more susceptible to failures. Accordingly, there was even more need for clear guidelines as to who was responsible for each part of the production process.
- 6.2.12 there was no verification process. By that we mean that no one within the Department was clearly responsible for overseeing compliance with the Order and there was no critical questioning or analysis to ensure that production was complete. There was no review by the Division Head or any other appropriate director of the search records and documents and no certification that appropriate searches had been undertaken and all relevant documents provided.
- 6.2.13 the DG did not consider it his role or responsibility to review the documents produced and personally verify that the correct searches had been conducted and the production was complete. Given his position, it is unsurprising that the DG signed off on the response to the Order without reviewing the documents and instead relied upon a proper search and collation process having been undertaken.

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But where the process undertaken was defective, it necessarily impinges upon the veracity of the DG's certification.

Please do not hesitate to contact us if you would like to discuss our report.

Yours faithfully



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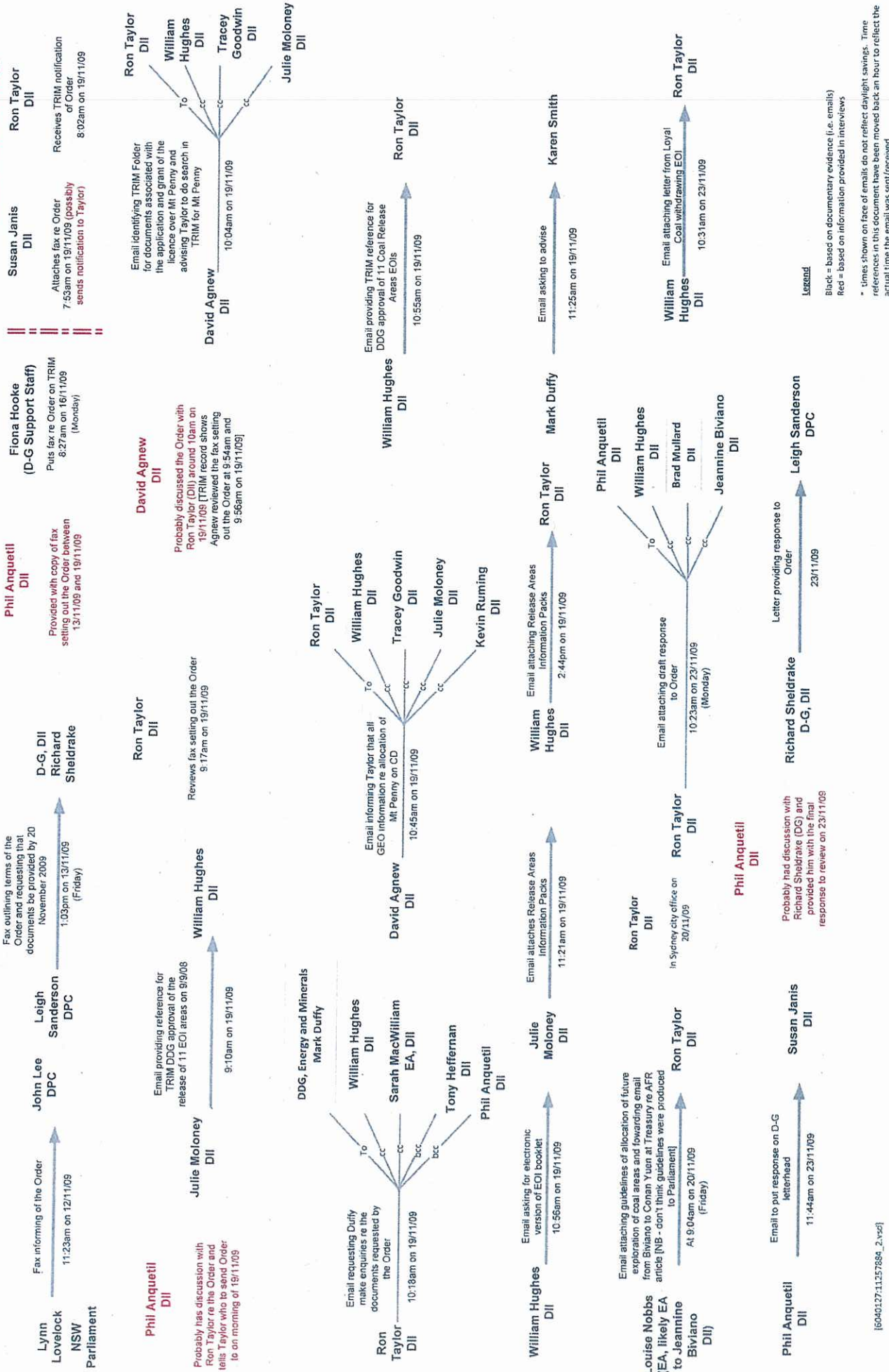
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Confidential Annexure A

Witness Name	Witness Name
Witness A	Ron Taylor
Witness B	William Hughes
Witness C	Julie Moloney
Witness D	Tracey Godwin
Witness E	David Agnew
Witness F	Kevin Rurning
Witness G	Mark Duffy
Witness H	Sara MacWilliam
Witness I	Susan Janis
Witness J	Tony Herferman
Witness K	Vince Fallico
Witness L	Phil Anquetil
Witness M	Richard Sheldrake
Witness N	Brad Mullan
Witness O	Karen Smith
Individual 1	Fiona Hooke

REDACTED

Confidential Annexure B Pictorial Chronology



Legend
Black = based on documentary evidence (i.e. emails)
Red = based on information provided in interviews

* Times shown on face of emails do not reflect daylight savings. Time references in this document have been moved back an hour to reflect the actual time the email was sent/received