



## *Inspector - General of Intelligence and Security*

### **REPORT ON THE INQUIRY INTO THE PROPRIETY OF THE ACTION UNDERTAKEN BY THE NEW ZEALAND SECURITY INTELLIGENCE SERVICE FOR THE DEPARTMENT OF SOCIAL WELFARE**

- 1 This inquiry was made at the request of the Rt Hon J B Bolger, Prime Minister, pursuant to Section 11C of the Inspector-General of Intelligence and Security Act 1996. The initiative for the request arose from a letter from the Matt Robson MP in a letter to the Prime Minister dated 6 December 1996 which concisely stated the concern on his part in this way.

“It has recently been reported that the Social Welfare Department use the Security Intelligence Service to sweep for bugs”.

- 2 In 1996 the Director-General of the Department of Social Welfare became concerned about the apparent leaking of sensitive information concerning the operations of the Income Support Group. Early in May 1996 the Department Security Officer, Rod McMillan, made a request to the NZSIS for advice and assistance. It was immediately clear that no formally classified information or its unauthorised release was involved nor was there any question of national security within the definition of security under the NZ Security Intelligence Service Act 1969. The NZSIS therefore advised that it could not be involved in the matter as it was outside the functions and authority of the Service, but that it would be willing in accordance with its normal procedures to provide some general security advice and some security awareness education. As a result on 13 May there was a short briefing of a number of senior staff of the Income Support Group in the Department. Later and in accordance with the arrangements made in May, an arrangement was made for a more lengthy course. This was undertaken on 28 August 1996. The course included some eight members of the Income Support Group including the General Manager. It was a 1/2 day course on general protective security.
- 3 On 9 May 1996 the DSO of the Department sought the assistance of the Government Communications Security Bureau to inspect the Director-General's office and boardroom so that he could assure her that there were no electronic listening devices operating in the two rooms. That inspection or sweep was undertaken by an officer of the GCSB on 28 May 1996. That was undertaken after office hours, after an appropriate arrangement had been made for entry to the building under the authority of a department security officer. That inspection was negative, nothing was found, and the GCSB had no further interest or involvement in the matter.
- 4 In July and August 1996 there was concern by the Director-General of Social Welfare about what appeared to be a concerted approach by members of the Alliance Party encouraging employees of the Department in the Children and Young Persons Service to give information. This had been the subject of some correspondence between the State Services Commissioner and Mr Jim Anderton MP in July and August 1996.

- 5 On 6 September 1996 the DSO of the Department sought urgent assistance from the SIS. This was to deal with what the Department had perceived as a planned attack on the Department arising out of a series of many Parliamentary questions. When these had been analysed the Department came to the conclusion that the information upon which the questions were based must have come from staff involved in the Income Support Group. The General Manager of the Group then discussed with a number of her staff, in small groups, her intention to investigate these apparent leaks of information, to uncover the person or persons responsible and to take disciplinary action against them. It was indicated in the course of these interviews that the NZSIS would be giving assistance. No such assistance was offered or given.
- 6 Again it was clear that no formally classified information was involved, nor was any national security interest at issue. The officers of the NZSIS advised that they could not take part or become involved in any inquiry, but, that as before, they were prepared to give general advice relating to security. Some brief guidance and recommendations were made as to the way in which such an inquiry might be undertaken by the Department and its officers. The NZSIS had no further involvement with the Department.
- 7 Although neither the NZSIS nor GCSB were involved in any further inquiry or indeed any other action in relation to the Department it appears that some of the staff, hearing of the likelihood, inaccurate as it was, that the NZSIS was to take part in some inquiry, made a complaint about that to the Public Service Association. Later the matter became known to the Press and from 15 November when an article appeared in the National Business Review, there was a flurry of reports about the matter which continued until 23 November, when there was a feature of a satirical nature in the Dominion. In the course of this publicity the Director-General was reported as confirming that the NZSIS had been called in. Reference was made to sweeping for bugs and Ms Bazley was reported as saying that her office had been checked for listening devices several times.
- 8 Neither of the Services took any part in any investigation into the alleged leaks or to identify those who may have been responsible for it. It did not take any steps to enforce any security arrangements or to act as an inquiry or other agency to police or to uncover any apparent infractions of general confidentiality or departmental security in a broad sense. Their role was limited to the giving of general advice about protective security, short advice on the procedure for carrying out an inquiry, and on the part of the GCSB an investigation and sweep of the premises.
- 9 Since the report of the Committee on Official Information, the Danks Committee Report, in 1981, there has been a great change in attitude toward and the focus on the disclosure of information by public servants. Before the passing of the Official Information Act 1982 and the consequential alterations to the rules and conventions of the Public Service every public servant solemnly and formally undertook an obligation not to disclose official information at all. The emphasis now is on openness but with appropriate safeguards for the protection of information which ought to remain confidential and should not be disclosed. At the same time the disclosure of information under the Act though open, is subject to limitations and only authorised employees are entitled to make the disclosure and in accordance with the regulated procedure.
- 10 The Public Service Code of Conduct issued by the State Services Commission in 1995 at

page 17 contains this provision.

“It is unacceptable for Public Servants to make unauthorised use or disclosure of information to which they have had official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of information may lead to disciplinary action, including dismissal”.

- 11 In the document entitled “The Public Service and Official Information” also issued in 1995, in the general guidance series “Public Service Principles, Conventions and Practice”, (at p.13) it is said

“The Official Information Act 1982 is not a licence to ‘leak’ information, or disclose information in an unauthorised way. Leaking, as explained in the companion paper in the guidance series, “The Senior Public Servant” cannot be condoned in any circumstances. Those who may be tempted to indulge in leaking official information to the media, opposition parties or to others, should be reminded of the Public Service Code of Conduct”.

The Code of Conduct of the Social Welfare Department states again in similar fashion the same principles, noting that in relation to the release of official information that it must only be released by authorised employees and in accordance with the procedures of the Act.

- 12 The principal express functions of the NZSIS as stated in its Act in s.4(1) are threefold. The first is the gathering of intelligence relating to security and its dissemination to those who need to know. The second is the advising of Ministers on matters of security relevant to the Departments and State Services of the Crown. The third is cooperation with such State Services and other public authorities in New Zealand and abroad as are capable of assisting the NZSIS in performing its functions. There is a specific prohibition against furthering the interests of political parties or enforcing measures for security.
- 13 Security is redefined for the NZSIS in the 1996 Amendment Act in an exclusive way which means that what is expressed is the only meaning or meanings of the word. The definition includes the traditional and previously expressed topics of protection of NZ from espionage, sabotage, terrorism and subversion of the Government or the authority of the State. It now includes the making of a contribution to New Zealand’s international or economic well-being. The intention behind that addition in terms of issues of security was expressed by Mr Bolger in his speech in moving that the House of Representatives take note of the report of the Committee on the Bill as follows:

“The intention in amending the definition of “security” is to enable the New Zealand Security Intelligence Service to function more effectively in the more complex security environment with which we are faced in the post-cold war period. Issues such as weapons, proliferation, threats to sensitive proprietary and strategic information and technology, and international organised crime involving drug trafficking and money-laundering, all have an international reach with the potential to affect New Zealand”.

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- 14 It is a necessary and well established principle of statutory construction that statutory authority extends to empower a body or service to carry out such other acts and things as are inevitably or reasonably incidental to its express functions and powers.
- 15 It may be a difficult question, in any particular case, to decide whether a particular act or activity is either within the ambit of the express powers and functions, when properly construed, or the incidental implied powers. It is not possible or sensible to state other than the most general principles because each situation has to be considered in light of its particular facts. Operations to find out about suspected foreign terrorism and tell the Police about it are clearly directly and expressly included. Likewise the renting of office accommodation for the use of the Service though not referred to directly in its Act would be an incidental and necessary power.

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- 16 Personnel security vetting in the State sector is a well established and publicised function of NZSIS in assisting government departments to assess the trustworthiness of employees or prospective employees who may have access to classified information. The practice of vetting and the manner in which it is undertaken by the NZSIS was described in the unclassified Cabinet document which was published in the Public Service Official Circular on 15 June 1983 (for the text and commentary see Security in Government Departments and Organisations, A Handbook for Staff, issued by the State Services Commission August 1983).

That is an example of an activity which falls within the express powers and certainly implied powers because security includes the protection of information from unauthorised and improper release. In the case of classified material improper release might give rise to a breach of security as defined in the statute and would certainly raise an issue of security. So personnel security vetting is a necessary ingredient in the protection of information and is one aspect of protective security. NZSIS has a proper place in this in advising Ministers and cooperating with State Services in the general interests of security, including potential security, as strictly defined.

- 17 Another aspect of protective security is physical security. That will extend to the safe and secure storage and handling of classified material. It will include the control of entry to buildings and parts of buildings where classified material may be, so that unauthorised persons may be prevented from entering and from obtaining unauthorised access to that material. This is the passive side of improper release. Such protective security can extend to non-physical entry to secured premises and access to classified material by electronic and other means.
- 18 Personnel security vetting and the system of security classifications, as examples of security matters, have been promulgated as uniform principles and procedures because they provide for situations which are common to all state services in relation to classified material including such as is of national security importance. These examples are each proper subjects of the attention of the security services. It is I believe common sense to have uniform standards of security protection and common and consistent policies applicable to all parts of the State Services. It is likely that such uniformity will tend to make economic sense avoiding duplication of effort and expense and tending toward cost efficiencies. Good housekeeping in the security area requires continuing alertness to existing and developing problems and improvements in defensive attitudes and facilities. Education and training of staff will be a continuing task.

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19 There can be little argument that NZSIS has a proper function in this area of protective security at least by way of advice, education and training in circumstances where national security is or may be in issue. Even if national security is not in issue or may not be likely to be in issue NZSIS has I think a proper function to advise, educate and train as incidental to its advisory and cooperative functions in light of the requirements for protective security and the existence and application of uniform and common policies about such security throughout the State Services. The progression from confidential, to sensitive, to classified material is evolutionary and ever changing. Any piece of such material may potentially become a matter of national security because of its intrinsic meaning and value or because of some occurrence or connecting events.

20 The GCSB does not have a statutory base. It is not established by statute. Its functions and powers are not expressed in an Act of Parliament. A broad description of its powers was given by the Rt Hon J Bolger, Prime Minister, in introducing the Bill which became, among others, the Inspector-General of Intelligence and Security Act 1996 as follows:

“The Government Communications Security Bureau is responsible for the provision of advice and assistance on signals intelligence and on all aspects of information systems security. The signals intelligence function relates to the production of foreign intelligence to meet approved national foreign intelligence requirements. The information systems security function relates to the protection of official information that is processed, stored or communicated by electronic or similar means, and to the provision of defence against eavesdropping and other forms of technical attack against New Zealand Government premises worldwide”.

Security is not defined for the GCSB but the definition applying by its Act, to the NZSIS must equally apply to the GCSB at least for the purposes of this enquiry. Everything that I have said in the last paragraphs as to this express and implied functions of the NZSIS will apply to the GCSB with all the more force because its functions are not subject to any rule of statutory interpretation.

21 The NZSIS must not act to enforce measures for security. That must mean for example that it cannot act as a police force outside its investigatory role in gathering and evaluating security intelligence. It may not act to apprehend or to prosecute those who may have committed an offense in breaching security such as acts of terrorism or other acts of international criminality. The NZSIS may not enforce measures for security by requiring, by demand, any area of State services to adopt or to maintain any particular form or system of protective security. Giving advice or assistance is not enforcing measures for security. Undertaking an inspection of premises physically or electronically for the purpose of protective security is not enforcing measures for security.

22 In my view it is part of the function of the NZSIS to provide advice and assistance to government departments on questions of protective security. That includes the system of personnel security vetting. Within this area and as an adjunct to it, and in support of it, the Service provides education and training for the departmental security officers and departmental officers in general. Equally, with its experience in matters of physical security, the NZSIS properly may provide assistance to departments and their officers as to security arrangements and requirements. That is not limited to situations where national security, or security as defined in the Act, is in issue. It will extend to any situation where there is potential for issues of national security to arise. GCSB may

properly advise and assist, on invitation by a State service, in the protection of official information against unauthorised disclosure. It has a particular expertise in both computer security and security against electronic and other means of unauthorised interception of private communication.

- 23 As part of the revolution in official information the Government of the day promulgated a Cabinet directive on security classification dated 17 December 1982. The purpose of that was to provide a uniform system of security classification. That also set up the interdepartmental committee on security which was to provide departments and organisations with detailed guidance on policies and administrative procedures necessary to implement in a consistent manner the system of security classifications prescribed in that directive. See para 9.1. The recent manual setting out that Committee's policies and procedures is the "Manual Security in Government Departments 1994". This is in furtherance of what I have said is a common sense policy. There should be uniform principles throughout the State services, including state owned enterprises and crown entities in the protection generally of government information. This is applicable particularly to that which is formally classified but it applies also to what is described as UBS information, that is to say unclassified but sensitive. As part of that uniformity and in order to achieve that, reliance on common advice or advisors is helpful. To that end there is clearly a directed policy that departments should liaise as necessary with the NZSIS and the GCSB for any specialist advice on security problems. The current manual contains many references to both those services and the specific requirement in many cases that reference to and consultation with the SIS or the GCSB should occur on particular matters. It is declared policy that where there are losses and leakages which may indicate the improper use of information by an employee, reference should be made to the NZSIS or to the Police. In particular cases of classified information suspected violations of security must be reported to the GCSB. See Chapter 13. Although there is currently less day to day control of departments Executive Government and chief executive officers have greater control of their own departments under the State Sector Act, there is clearly a necessity more than just desirability, that in dealing with official information there should be common standards and common procedures. Both the SIS and the GCSB are expert and experienced in these fields to obtain and to ensure uniformity in the standards of approach and implementation of security. Those services should properly be the first port of call.
- 24 There is no doubt a question of discretion to be exercised by a chief executive officer to assess the suspected leak and to evaluate its importance and effect. Clearly accidental leaks or losses of information do not require that there should be immediate reference to either of the Services, although that may not be the case where classified information is concerned. If it is clear that the information is, while sensitive, of a relatively unimportant or trivial nature, that its disclosure would have little effect, than there may be no need to refer to the Services. Such matters may properly be resolved internally. But if it is suspected that a crime has occurred or that some classified material is under possible compromise or that questions of national security are involved, then I think there can be no doubt that the proper course must be to refer the matter to the NZSIS or the GCSB. Clearly where important questions arise, the matter has to be referred to the ISC or to the ODESC, the Officials Committee for Domestic and External Security Coordination. It certainly must be appropriate to keep in the forefront of any consideration of the action to be taken on an apparent or suspected leak the government directives as contained in the Security in Government Departments Manual.

- 25 It is not part of my function to judge the propriety of the actions of the Department, or the validity of its decisions in respect to its leaks. It is clear that the department and its officers were satisfied that leaks had occurred and had been repeated. Some of the leaks related to matters which were sensitive and were thought likely to jeopardise the continued operations of part of the departmental system and in particular its internal audit system. The suggestion is that some draft reports had been disclosed in that area. I am satisfied that on the basis of my investigations the department had reasonable grounds to suspect that there had been some leakages and losses of information which had not been disclosed in accordance with the Official Information Act.
- 26 Clearly as at August/September 1996 the department was aware that it was not classified material or related to national security, but it is certainly understandable and reasonable that officers in the Department through the DSO would go back to the officers in the NZSIS who had been advising earlier. I think it may well have been an error of judgment to promulgate to members of the staff in the department the intention to bring in the NZSIS before undertaking any inquiry within the department itself. I think it must be said that the departmental officers concerned must have known that the NZSIS would not take part in any such investigation arising out of what they had been told before namely that it would only give advice. An internal inquiry was all that was required. And in the circumstances if it was thought desirable to obtain outside assistance that could have been done by using an outside security agency rather than a government one.
- 27 There is no doubt in my mind however that reference to and the calling in for assistance of the NZSIS and the GCSB on the earliest occasion was perfectly appropriate. I am satisfied too that the conduct of NZSIS and the GCSB in this matter was entirely appropriate in accordance with their powers and functions and in accordance with the general government policy and directives which have been in force subject to amendments since the enactment of the Official Information Act. I am satisfied of both the lawfulness and propriety of the actions and the conduct of the NZSIS and the GCSB.