Inspector - General of Intelligence and Security

10 March 2009

Prime Minister

1. Your letter of 10 February sought an inquiry into:

(i) The adequacy and suitability of the NZSIS policies relating to the creation, maintenance and closure of files on New Zealand persons and in light of the Services' functions under the New Zealand Security Intelligence Services Act 1969.;

(ii) The adequacy and suitability of the Service's compliance with such policies in light of matters raised in the public domain.

Index:

General:

2. The matter has arisen out of comments by Mr Keith Locke, M.P after disclosure to him by the Service of information held relating to him. Disclosure of information held by the Service is available to a person concerned under two general principles of the Privacy Act 1993 unless there are good reasons, within the statutory provisions, for withholding. Concern was expressed about the collection and retention of information over most of Mr Locke's lifetime, and particularly since he was elected to Parliament at the end of 1999. Generally I have concentrated on the inquiry questions in the context of current activity, not the past when matters of interest in relation to security may well have been different from what is seen as of security significance now. In any event, few of the people involved in past decision-making are available to comment on the judgments underlying those decisions.

3. The central point of the inquiry concerns any N.Z person, but Mr Locke's comments have particularly raised whether there are or should be special rules about Members of Parliament.

4. I have with his agreement, read the papers supplied to Mr Locke, and have made enquiries about some matters where information was withheld on the grounds that the information mentioned Mr Locke only in passing. I have had discussions with a number of Service officers, the Privacy Commissioner and Mr Locke. I have also been in touch with my counterpart in Australia, Mr Ian Carnell, and received information from the U.K. I also invited and received further comments from Mr Locke about the second part of this report.

5. To provide the context of the enquiry the full text of the relevant sections in the N.Z Security Intelligence Service Act has been attached as an appendix.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

Background:

6. The New Zealand Security Intelligence Service has tasks which are set out in the N.Z Security Intelligence Service Act, 1969 s.4 [Appendix].

7. The core work is the collection, evaluation and reporting of information relevant to security as defined in the Act. [Appendix].

8. The Service does not collect information at random, although there may be an element of randomness in the Service becoming aware of some matters of potential concern. It periodically generates statements of security intelligence requirements. The work and allocation of resources are affected by those requirements. The document which sets out the requirements states at the outset the provisions as to 'security' in the Act as the focus of the Service's work.

9. Although the emphasis in this report is on present and future practices, it is necessary in the context to refer to past practices. Without that there will be no explanation about the files which gave rise to the issue.

10. A particular task is vetting people for security clearance when government rules as to employment so require. That task will produce names of those vetted and referees. Security clearances in many cases require renewal after a period, and information provided may be kept for that reason

11. The sources of information available include for security intelligence investigations (but not vetting work) open material, including news media and Internet information, information offered to the Service, information actively gathered by the Service in various ways in respect of persons or bodies or subjects of interest within the Service's statutory mandate, and information made available under widely accepted reciprocal agreements and procedures from Services of

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

countries with which N.Z has established links. Under statutory authority, with a decision particular to each case, the Service may obtain information by interception of communications or seizure of things. The Service has no mandate to collect information about N.Z citizens unless their activities alone or with others are relevant to security.

12. If material or information obtained by interception or seizure is not related to the detection of activities prejudicial to security or to serious crime, there is a statutory requirement that it be destroyed. Compliance with that requirement has been under examination.

13. The Service may receive from any of the sources mentioned above, information which can be related to activity falling within one or another of the collection requirements. A decision is made whether that information is worth recording and pursuing. If the information justifies attention being paid to an individual, organisation or activity or possible activity of which the Service has become aware, a record is opened in respect of that person, organisation or activity. Many records are person-related.

14. When it was established, the Service received files from those bodies previously responsible for security work. The files were paper files, and contained information about people and activities which were then, but might well not be now, judged to be of security concern. The Service continued with paper files with an elaborate cross-referencing system.

15. Historically, because of the extensive cross-referencing system, when a personal file existed information from any source about that person could find its way to the file. I was told that another reason for creation of a personal file was that a person not a target could appear in a number of reports about persons who were, and that it was a matter of

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

convenience to collect such information in a separate file. I was told that information gathered into a file was not necessarily adverse; part of the Service's approach was to put material on a file which would provide a rounded picture of the person of interest. I have seen information of that kind. Thus, information not directly evidence of a breach of security could be relevant to a total picture, for example, helping in the assessment of accuracy of other information. That could have fitted the Service's responsibility not just to collect information, but to assess its significance. However, it could produce a vacuum cleaner approach to collecting.

16. Whilst there is some overlap between the purposes of collection of information by enforcement and intelligence agencies, they are not the same. It seems to be accepted, not just in N.Z, that gathering information for security related purposes may be done to paint a picture over a period of time about activity which may lead to adverse consequences for the security of the country, as 'security' is defined. Enforcement agencies (of which the NZSIS is not one) may seek wide information about criminal offending, but as a generality they are more concerned with obtaining material which can be used as evidence for the purpose of prosecution of particular offences

17. Since 2005 electronic record keeping has been replacing the paper files, many of which still exist, but physical retention of them by the Service is being reviewed. The electronic records system has links which make cross-referencing easier, but has an elaborate system of internal limitations which control access within the Service to information held about individuals. The technical changes mean that little physical material relating to individuals will be created, but the basis of collection and retention in my view is more significant than the mechanics of storage.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

18. Information obtained by intelligence agencies, however it might appear at the outset, may produce nothing by way of information of immediate threat, but it may be returned to if a new event or new information makes it again appear to be a live issue. The information may not always relate to a threat in N.Z; for instance, terrorism: for the Service's purposes, terrorism may have local significance notwithstanding that its main manifestations are outside New Zealand.

19. To dispose of a point: it could be suggested that the preservation of an intelligence record may provide a useful source of knowledge about past activity or a useful source of material about people or events who or which were of interest in N.Z. history. In my view neither of those propositions justifies the retention of information by a security intelligence agency, which collects information for a statutory purpose. The NZSIS does not contend that it does.

20. Many people whose names appear in the Service's index are not the subject of a personal file. The security clearance process alone produces many names of the vetted, and referees and others in a comparable situation. These people are not and never have been of interest to the Service beyond the event in relation to which their names surfaced. No personal file or like record exists in respect of them.

Creation and destruction of personal files:

Opening:

21. The Service addressed the opening and closing of personal files in 1995 and produced a documented policy and procedures about it. That document said that no new file would be opened unless certain criteria had been met, the criteria differing according to the type of file to be opened. A formal request was required for a file to be opened. For personal files, one of three criteria had to be met to justify opening:

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

(a) The individual must fall within the annual information collection requirements and a valid reason must exist for obtaining detailed information about the particular person

(b) The individual might be able to assist the Service

(c) Information available to the Service indicated that the activities of an individual were relevant to security to justify further investigation.

Those criteria in my view would be within the statutory provisions of how the Service was to act. The criteria, somewhat differently worded, but essentially the same, were reproduced in a later operations manual, which is now under revision.

22. In the latter half of last year, the Service produced internally what are described as templates for particular stages of activity by branches of the Service. They are sub-documents of a general document referring to the investigative framework, which is in turn related to a standard format of:

- Identifying threats [which are related amongst other things to the definition of "security"].
- Setting objectives.
- Collecting information.
- Investigating and analysing information.
- Accessing and reporting information.
- Reassessing threats.

23. The new policy and procedure will give or add form to (and a record of) the commencement of an investigation and reasons for it and its projected course. They will provide for periodic review of an investigation and the need to continue it. These documents are not prescriptive of when or how or about what the Service may seek information, and because of the variety of topics which may have to be

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

considered, in my view they cannot be, but the documents serve two purposes:

(a) They ask the questions which should be addressed and about which a judgment should be formed in each case to ensure that the Service acts within its statutory mandate.

(b) Although not prescriptive, they help to provide a yardstick of propriety for officers engaged in investigation/collection activity.

Focus of contents of records:

24. With the new investigations framework, collection of information is closely related to prescribed security intelligence requirements and the relation of persons, organisations and activities to those requirements. The focus of collection and retention of information is intended to be governed by the objectives and investigations in hand.

25. The proper test of collection and retention is not simply reference to the person but relevance to the task in hand.

The concept of relevance can be a source of difficulty;

- immediate relevance is not a problem but;
- a threat which is presently no more than potential may be the subject of information;
- an enquiry may show no immediate danger but may provide a reference point for future enquiries or information of use in future enquiries if the situation should change, or information which throws light on a general issue.

26. For those engaged in intelligence collection, there is an ever-present concern that if material once gained is disposed of its loss may later prove to be harmful in various ways. That is an arguable, but not absolute, reason for retention.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

Disposal of Files:

Old Records:

27. There are two issues. The first relates to old files which are now of no present intelligence interest. Until 2005 many Service files had been destroyed. None has been since.

28. The Public Records Act 2005 included the NZSIS as a public office. The Act's provisions extended to records in any form created or reviewed by a public office in the conduct of its affairs. Under s.87 of the Act no person may dispose of, or authorise the disposal of, public records except with the authority of the Chief Archivist, given in accordance with the provisions of the Act. Arrangements for removing old NZSIS records out of the Service's custody and how they will be held are under discussion and action with NZ Archives. It appears to be a slow process because declassification principles are applied to each document and arrangements have to be made for the conditions under which retained files will be held. A general destruction authority which is in the process of negotiation with Archives NZ should speed up the total task.

Current Records:

29. The second issue is two-fold: what current information should be placed in records and whether there is a case for destroying it related to the purpose for which it was collected i.e. should it have a shelf life? The second part, as to actual destruction may be affected by the Public Records Act. This issue relates to that part of your reference which refers to the maintenance and closure of files,(or records, which is the term the Service now uses), which may be differentiated from physical disposal of them by the NZSIS.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

30. The 1995 document emphasised, what is still a requirement of the Service, that identification of a person, when a personal record is made for inquiry, must contain enough personal details to establish the identity of the subject and to avoid confusion with anyone else.

31. A pattern was established whereby, whatever its original justification, the life of a personal file would be determined by the value of the material collected in relation to Service requirements. There was to be a three yearly review which would take into account –

i. Whether retention of the file was important to the continuing coverage of the operational target;
ii. Whether the subject of the file played an integral part in the target;
iii. Whether the contents of the file were such that there was likely to be future interest in them;
iv. Whether there was a possibility of long-term implications in a particular investigative area.
v. Whether there were legal or archival requirements to keep any material.

32. Every three years a decision would be made whether a file should be maintained or not, the overriding principle being the consideration of intelligence requirements. On review, a file could be left open for collection but subject to future review; cancelled and contents other than "relevant" information destroyed; closed but with retention of intelligence which ought to be retained eg information from a liaison service – but not added to. If a file had not been referred to within 5 years it was to be reviewed.

33. Regular review of holdings is valuable and consistent with the pattern related to the opening of files: the Service gets what is necessary and keeps what is necessary for the performance of its statutory mandate. Some of what is obtained is likely to prove to be of temporary value but

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

some may show a bigger picture or may have the potential to become live again.

34. One of the difficulties with the 1995 criteria, is that they leave open a number of choices on which retention can be justified but do not counter-set those with consideration of how a personal privacy factor ought to be weighed in relation to the decision.

35. The 1995 instruction has been subsumed into the Archives-related activity as to storage and even with the new investigative framework there is now no systematic process for deleting records of information from the database. The framework provides for review of an investigation, but not of information collected. The Public Records Act provisions could provide a stumbling block to disposal, although as noted a general destruction authority is presently under consideration. The Act would not stop further controlling of access to files and internal limitations in respect of what should be put on them.

36. The Service has procedures to control access to information It should in my view, subject to costs and resources, also consider on a regular basis what is held by way of personal information, from whatever time, taking into account the interest of personal privacy. The yardsticks could be based carefully on what information is usefully kept, (as to person, subject and event) and for how long. Key issues to be weighed would be the Service's statutory functions, the way it works to carry them out properly, personal privacy, and how to deal with information from liaison services which keep control of what is done with classified information provided by them. There will be an unavoidable issue of proportionality between usefulness and privacy.

37. How controls on retention or use of retained information by the Service would operate now that computerisation is the order of the day, I have not the knowledge to say. However, I have had demonstrated to me

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

controls by way of allowing access to information only by selected people and I have no doubt a way can be found to put similar things in place for the purpose discussed here. How electronically stored information will be reviewed to decide on its retention will require consideration amongst technical experts and those who will establish the need for retention from their own experience.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

Formal Report:

38. On the first term of reference I ***report*** that in my view, the Service's recently introduced templates and procedures are suitable in respect of the starting of an investigation and collecting information. The only question which I recommend should be given further consideration is whether criteria can and should be developed to help determine whether there should be limits to what is put into the Service's records. That will always involve judgment, but it may be possible to express guidelines. That would best be worked out in my view by those who know what the Service needs to be able to do to carry out its functions, with involvement of the Inspector-General on your direction and the Privacy Commissioner, who has special expertise in her area, as consultants to add independent views.

39. Second, I ***report*** that in my opinion, attention should be paid to the periodic review of personal records, paper or electronic, to determine whether the information in them remains reasonably necessary for the Service's function, including reference and research, or whether information relating to a particular person should be destroyed or in effect closed and neither referred to nor added to. The exception to that would be something coming to light which would justify establishment of a new file and is accepted by an officer of appropriate seniority as a justification for action. The review would also check when necessary that appropriate caveats on any information passed to a liaison body were in place.

40. The change to electronic recording seems likely to make such a review a more difficult exercise that it would be with paper files. The starting points for the task could be a revision of the 1995 document and the relevant part of the operations manual and a separate culling or control operation for any irrelevant material from the past which has carried

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

over into the electronic system. Getting an acceptable result will I am sure require resources and is likely inevitably to a long term exercise. The operations manual is already under review.

41. A periodic review process of live files, if instituted, could be monitored by the Inspector-General under a work programme approved from time to time by the Minister in charge of security services. A programme which was approved in 2008 by the Rt Hon Helen Clark as Minister, already includes the item "Review of the Service's in-house rules about retaining and disposing of information, will be at least yearly".

42. Mr Locke suggested that there should be a broader enquiry with invitation of public submissions, particularly from people and organisations who have received files under the Privacy Act and think there are matters to be addressed. If those people had views based on experience which would enlighten what should be current practice, those views should be welcome, but I do not myself see the value of setting up a wide inquiry about the past when what is wanted is continued development of a principled design of current and future practices.

43. As to the second term of reference, I ***report*** that it is difficult to make sensible assessment of exactly what policies in respect of collection and retention were applied at various times in the past. Material arising before the Service was instituted came from collectors who may have been applying other criteria As to disposal, the Service's practice of disposing of files before 1995 (subject to how the choices were made) would in my view have been proper. What has been done since then appears to comply with current legal requirements. If current activity is continued, I expect that the Service will within a reasonable time release from its custody, one way or another, all records of no current relevance.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

Members of Parliament:

44. First, Mr Locke's personal position. There are very few papers on his file post-dating his election as a Member. One of those is a note of a discussion he and another Member had with the Service as an exchange of views. That may well not have happened if Mr Locke had not been a Member of Parliament. One is a reference to a speech in Parliament by Mr Locke on the Intelligence and Security Committee Act Repeal Bill in 2000. Four others are newspaper clippings which seem to be of no security significance and might be thought to have been included for no better reason than because the file existed. Another document relates to overseas travel by Mr Locke for a purpose he explained to me related to a matter he hoped to be able to advance. Another is a programme of a symposium in 2002 at which Mr Locke was one of many speakers. Mr Locke suggested that some at least of this material might have been gathered because of his critical stance in Parliament on intelligence issues. All I can say is that one notation which could have given that impression was certainly unprofessional and ought not to have appeared on a file of a neutral intelligence service.

45. Three other references were in documents, the contents of which were not disclosed verbatim to Mr Locke although a description of contents was. Nevertheless, he said he believed that they could be related to the travel issue. He objected to any reporting on these matters because the people concerned were his constituents.

46. It would be idle to suggest that there is not information held by the Service in respect of some people who have become Members of Parliament. The file or collection may exist for various reasons – because the Member was once considered to be of security interest, or was subject to vetting. As a precaution against leakage it has been

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

the custom to transfer any file relating to a person who has become a Member to a special part of the Service's records with limited physical access to files. I have not looked at any apart from what was released to Mr Locke, so I do not know how many such files there are, how old they are, or what stage of the Member's life they might relate to. Mr Locke has suggested that a number of questions about these files should be considered. I do not think it is necessary to go into them to deal with the terms of reference I have been given. If a Member wants to know if there is a file relating to him or her, the same recourse Mr Locke had is available.

47. Mr Locke told me that he is not the only Member who has concerns about the effect of the Service's interest, if it exists, on the performance of a Member's functions. His view is that no SIS personal file (ie one denoting a security interest), should be held or continue to be held on sitting MP's, and, as a corollary, that there should be no intelligence and security surveillance of an MP's activities except in support of a criminal investigation.

48. The argument runs thus:

a) To keep such a file breaches the constitutionally independent status of Parliament requiring Members to be able to conduct their political business freely and without restraint from the executive branch (which includes the SIS). In that respect the holding of such files should be treated as unlawful.

b) MP's must be free to pursue their own approaches and solutions to political problems which may be different from those of the government of New Zealand, as long as they do not breach the laws of New Zealand. These political approaches can include meetings with individuals and groups the New Zealand government would rather not take place. An MP's mandate ranges from being

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

an advocate for a particular person, organisation or cause to playing a problem-solving or mediating role. This covers both domestic and international issues.

c) The existence of a Personal File on a sitting MP results in that MP being interfered with in the performance of his or her important constitutional duties through that MP being kept under surveillance, through means ranging from monitoring their activities in the public domain to more intrusive surveillance which impinges on the privacy and confidentiality of their work as an MP.

d) It is not permissible for the SIS to make decisions on which the MP's political views and activities justify a Personal File and surveillance. This also turns the SIS into a politically partisan body, which is not in accord with the political neutrality of the public service. The existence of such a Personal File also fosters political prejudice towards the work of the MP (and that of the party he or she represents) among those who may know of the file's existence, whether they be SIS staff, those in government or members of the public.

e) If there is any accidental interception of private communications between an MP and a constituent, perhaps through interception of the constituent's communications, then the content of these communications should not be recorded on any file – either that of the MP or that of the constituent. [This parallels the concept of legal privilege prohibiting the use of material from intercepted communications between a lawyer and his or her client]. Mr Locke made it clear that his view is confined to the content of

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

communications, not the fact or circumstances of any meeting which could be recorded on any record about the constituent.

f) It should be noted that this procedure does not allow for a sitting MP to have greater freedom to engage in criminal activity. There is already an established framework, including a memorandum between the Parliament's Speaker and the Police, enabling the Police to gather information on a sitting MP the Police believes is involved in criminal activity. Anyone, including the SIS, who suspects criminal activity by a sitting MP should notify the Police, who would then decide whether or not to conduct an inquiry. The SIS could use its resources to assist the Police on this criminal matter.

49. I agree with Mr Locke that there is a problem in this area, which could well be sorted out, but not with the view that there is a clear cut issue of legality or that the appropriate solution is one that could result in throwing out the baby with the bathwater.

50. As a comparison, there is some limitation on intelligence activity in relation to Members of Parliament and the House of Lords in the United Kingdom under what is called the Wilson Doctrine. That refers to a statement by the Rt Hon Harold Wilson in the House of Commons on 17 November 1966 that there would be no tapping of the telephones of Members of Parliament but if there was a development of a kind which [warranted] a change in general policy he would at such moment as seemed compatible with the security of the country, on his own initiative make a statement to the House of Commons. Subsequently, it was confirmed that the doctrine applied to all forms of communication, to Members of the House of Lords, and to electronic eavesdropping by the intelligence agencies.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

51. In 2007, the Interception of Communications Commissioner (Sir Swinton Thomas, a retired Judge of the Court of Appeal) was strongly critical of the doctrine (mainly in relation to criminal investigation and prosecution) as providing an immunity which was constitutionally wrong, and in any event unnecessary because of warrant requirements and oversight provisions which had been put in place since 1966. That criticism and advice was considered by the Government but on 30 March 2006 the Rt Hon Tony Blair indicated that the Wilson doctrine would be maintained.

52. So far as I am aware, that is as far as the UK restrictions go. I have no reason to believe that any Member of Parliament in New Zealand has been the subject of any interception of communications or seizure under warrant by the NZSIS.

53. The starting point on the legality issue must be that the law as contained in the New Zealand Security Intelligence Act 1969 applies equally to everyone. The only communications excepted from interception under warrant, but not from other collection, are those covered by legal professional privilege (which does not extend to all communications with a lawyer), confessional communications to a priest or communication to a medical practitioner for treatment purposes. Mr Locke's view, set out earlier, is that a Member's communications ought constitutionally to be given at least the same protection. I think there could be problems with that, particularly in knowing what would be covered by the protection, but the general question is beyond my remit, and I think it preferable not to embark on it.

54. Members have the protection of parliamentary privilege, but it may be questionable how far that protection extends to dealing with

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

constituents. For example, Parliamentary Practice in NZ 3rd Ed p.622 says:

> "*Communications involving Members of Parliament.* By no means all actions of a member of Parliament constitute proceedings in Parliament. Proceedings in Parliament covers a much narrower range of activities than those performed by members generally, even actions performed in the capacity of a member. While actions taken in or towards the House are proceedings in Parliament, actions taken in relation to constituents or other persons, or which constituents or other persons take in relation to a member, are usually not proceedings in Parliament. Thus, generally, communications between a member and the public, even a member's constituents, are not proceedings in Parliament. A person sending information to an individual member is not engaged in a parliamentary proceeding. Such a communication is not a proceeding in Parliament, unless the communication is directly connected with some specific business to be transacted in the House, such as the delivery of a petition to a member for presentation to the House, or was solicited by the member for the express purpose of using it in a parliamentary proceeding.
>
> Other than in these circumstances, no parliamentary privilege applies to a communication to a member of Parliament:"

55. Joseph, Constitutional and Administrative Law in NZ 2 Ed p.404 refers to the Clerk of the Australian Senate acknowledging that it is difficult to distinguish in law between constituent's communications that are deserving of protection and those that are not.

56. It is the case that Members of Parliament in New Zealand have well-recognised functions in promoting executive accountability and the

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

airing of grievances, (Joseph p.401), which could be extended to Mr Locke's description of a Member's function. It is also I believe, relevant that they are chosen through the electoral system to serve the public interest at a national level. Unlike most citizens they swear an oath or make an affirmation of allegiance.

57. There is provision in the current NZSIS Act which in my view is designed to protect Members as well as others from political interference: s.4AA, which is designed to ensure the political neutrality of the NZ Security Intelligence Service (see appendix).

58. Whatever the legalities, there is an arguable case for some certainty about the extent to which MP's are the subject of information collection and reporting by intelligence agencies, and room for a discretionary application of the law. It should suffice if there was an agreed understanding between the Government and the House, comparable with the agreements about Police action. Such an agreement would have to allow in my opinion for two possibilities, one of which is unpalatable but must be regarded as a possibility. That is a Member engaging in activity which is likely to or may endanger national security. The other is a constituent seeking to involve a Member in a matter which is properly within the area of national security for reasons the Member may not know about. I have had an analogous experience of a person about whom I was enquiring putting forward a photograph of himself with a retired senior MP as an indication of his bona fides and finding that the MP recognised neither him nor with any certainty, the occasion of the photograph.

59. There is difficulty raised by Mr Locke's contention about a Member's enquiring where and how he or she thinks fit. Acceptance of it leaves Members free to enquire, but it does raise the possibility of each Member in effect acting on his or her own view of what is necessary for the security of New Zealand. It if is accepted that what are current

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

security issues for New Zealand is determined through the processes of the executive government, there is room for collision between the two ideas. Perhaps what is suggested later about Members will provide a practical answer.

60. Whatever the answer to these issues, I have not been able to see why Mr Locke's view of a Member's mandate should provide even the limited immunity from scrutiny for anyone who deals with a Member, since any protection is, at most, justified for the Member in carrying out his or her office.

61. Nor do I agree that the problems are adequately taken care of by simple application of rules or practices about criminal matters, tabled in the House in December 2007, which are of necessity quite detailed. There is I believe, a widely perceived value in keeping intelligence and enforcement activity separate (exemplified by s.4(2)) and a difference in kind between evidence of commission of a criminal offence and intelligence information related to matters of security. An intelligence issue could arise well before the circumstances would warrant investigation even at the level of an attempt to commit a crime. The agreement about criminal matters could, however, provide an approach by analogy.

62. In my view it would be reasonable in New Zealand to regard a sitting MP because of his or her function and standing as not generally a proper subject for intelligence collection or surveillance. Any exception from that rule would I think, be better achieved by an understanding than by legislative amendment. That understanding would be an agreement by the Government, perhaps involving the Speaker's concurrence on behalf of the House, which would reflect the general conscience of Members. As to the exception, it may be enough if occasion arose, for the Service to show the Speaker cause in terms of good grounds to believe that a Member was engaged in

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

activity prejudicial to security that warranted departure from the general rule. To protect the position of the House, no monitoring activity even under the exception, would take place in or of the House premises.

63. The procedure which I understand was followed in respect of the Police agreements, i.e. consultation of the Speaker and reference to the Privileges Committee, might be thought suitable in respect of such an agreement, but that is not an area into which I should venture.

64. If thought necessary, performance under the agreement could be monitored by the Inspector-General under a work programme approved from time to time by the Minister in Charge of Security Services.

65. As indicated, even the narrow suggested constituent protection in my view would go too far. The problem would be dealt with better by accepting that the Service could collect information about a person of interest including the fact of dealings with a Member which came from surveillance of the person concerned not the Member, and record such information as relating to the person of interest, but not the Member, and subject to what is said in para 62, not report in any way on statements by the Member. In that way the Service could work on a fully informed basis, but fears of political interference with or inhibition of a Member's functions should be abated.

Recommendations:

66. I recommend that work be done towards such an agreement on the basis that:

- Any personal file or record existing when a person becomes a Member be de-activated in some appropriate way and not referred to or added to whilst the person remains a Member, with one exception;

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

- That a formula be developed, which will reflect the conscience of the House, for the circumstances in which it would be proper for the Service to collect and act on information on a Member as a person of security interest.

67. In relation to constituent communications, if a proper security case exists in my view they should be open to monitoring within the Act, in the same way as those of others may be, and subject to the Service recording and using information in the exercise of its statutory function. The changes discussed above will close off, other than in exceptional cases, information about Member's dealings.

D P Neazor
Inspector-General of Intelligence and Security

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

APPENDIX

The NZSIS is constrained generally by its statutory mandate set out in (S.4 of the NZSIS Act 1969):

Functions of New Zealand Security Intelligence Service

(1) Subject to the control of the Minister, the functions of the New Zealand Security Intelligence Service shall be –

(a) To obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security:

(b) To advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to Departments or branches of the State Services of which they are in charge:

[(ba) To advise any of the following persons on protective measures that are directly or indirectly relevant to security:

[(i) Ministers of the Crown or Government departments:]]

[[(ii) Public authorities:]]

[[(iii) Any person who, in the opinion of the Director, should receive the advice:]]]

[(bb) To conduct inquiries into whether particular individuals should be granted security clearances, and to make appropriate recommendations based on those inquiries:]

[(bc) To make recommendations in respect of matters to be decided under the Citizenship Act 1977 or the Immigration Act 1987, to the extent that those matters are relevant to security:]

(c) To co-operate as far as practicable and necessary with such State Services and other public authorities in New Zealand and abroad as are

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

capable of assisting the Security Intelligence Service in the performance of its functions:

[(d) To inform the Officials Committee for Domestic and External Security Coordination of any new area of potential relevance to security in respect of which the Director has considered it necessary to institute surveillance.]

[(2) It is not a function of the Security Intelligence Service to enforce measures for security.]
[(3) Repealed.]

Security

Security is defined as:

(a) The protection of New Zealand from acts of espionage, sabotage...and subversion, whether or not they are directed from or intended to be committed within New Zealand.
(b) The identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being.
(c) The protection of New Zealand from activities within or relating to New Zealand that –
    (i) Are influenced by any foreign organisation or any foreign person; and
    (ii) Are clandestine or deceptive, or threaten the safety of any person; and
    (iii) Impact adversely on New Zealand's international well-being or economic well-being.
(d) The prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

Subversion

Subversion means attempting, inciting, counselling, advocating, or encouraging –

(a) The overthrow by force of the Government of New Zealand; or

(b) The undermining by unlawful means of the authority of the State in New Zealand:

[4AA Political neutrality of New Zealand Security Intelligence Service

(1) The Director must take all reasonable steps to ensure that –

(a) The activities of the Security Intelligence Service are limited to those that are relevant to the discharge of its functions:

(b) The Security Intelligence Service is kept free from any influence or consideration that is not relevant to its functions:

(c) The Security Intelligence Service does not take any action for the purpose of furthering or harming the interests of any political party.

(2) The Minister may not direct the Security Intelligence Service to institute the surveillance of any person or entity or any class of person or entity within New Zealand.

(3) The Director must consult regularly with the Leader of the Opposition for the purpose of keeping him or her informed about matters relating to security.

(4) Subsection (2) prevails over section 4(1)].

5. Section 2(2) is also relevant to the Service's activity:

Nothing in this Act limits the right of persons to engage in lawful advocacy, protest or dissent in respect of any matter, and, accordingly, the exercise of that right does not, of itself, justify the Security Intelligence Service in instituting surveillance of any person or entity or any class of person or entity within New Zealand.

[s.4G Destruction of irrelevant records obtained by interception

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

(1) Every person who intercepts or seizes any communication in accordance with an interception warrant must, as soon as practicable after the interception or seizure, -

(a) Destroy any copy that he or she may make of the communication or any part of the communication, and any record, whether in writing or otherwise, of the information obtained by that interception or seizure, except to the extent that the information recorded in the copy or record relates directly or indirectly to the detection of activities prejudicial to security or comprises foreign intelligence information essential to security;

(b) If the communication has been seized from mail in transit, return it to the mail for delivery in the normal course;

(c) In the case of any other letter or document or thing that has been intercepted or seized, return it to the place from which it was intercepted or seized if the Director considers that it is practicable to do so.

(2)...

(3) Every person who knowingly fails to comply with subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding $1,000.]

[s.12A Prohibition on unauthorised disclosure of information

(1) An officer or employee of the Security Intelligence Service, or a former officer or employee of the Service, shall not disclose or use any information gained by or conveyed to him through his connection with the Service otherwise than in the strict course of his official duties or as authorised by the Minister.

(4) A person who, by any interception warrant, is authorised to intercept or seize any communication, or is requested to give any assistance in making any such interception or seizure, or to make the services of other persons

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534

available to the Security Intelligence Service, shall not disclose the existence of the warrant, or disclose or use any information gained by or conveyed to him when acting pursuant to the warrant, otherwise than as authorised by the warrant or by the Minister or the Director.

(5) A person who acquires knowledge of any information knowing that it was gained as a result of any interception or seizure in accordance with an interception warrant shall not knowingly disclose that information otherwise than in the course of his duty.

(4) Every person commits an offence and is liable on conviction or indictment to imprisonment for a term not exceeding 2 years or a fine not exceeding $2,000 who fails to comply with or acts in contravention of the foregoing provisions of this section].

Office: Level 6, Featherston House, Cnr Featherston & Waring Taylor Streets, Wellington, New Zealand
Postal Address: PO Box 5609, Wellington 6145
Phone: (04) 473 8672 Fax: (04) 473 8534