



Office of the Inspector-General of Intelligence and Security

Report into a complaint by Nicky Hager against the NZSIS

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Note: The inquiry into this complaint was substantially completed during the tenure of Cheryl Gwyn as Inspector-General of Intelligence and Security.

COMPLAINT

1. Nicky Hager, an investigative journalist, complains that the New Zealand Security Intelligence Service (NZSIS) unlawfully assisted the New Zealand Defence Force (NZDF) in efforts to identify his journalistic sources for his book *Other People's Wars*.¹ Specifically Mr Hager complains that any such assistance provided by NZSIS was unlawful given the definition of "security" under the NZSIS Act 1969, which obtained at the relevant time and was instrumental in defining the lawful scope of NZSIS activity.

FACTS

2. *Other People's Wars* was published in September 2011. It concerns New Zealand's involvement in the 'war on terror' after 11 September 2001, including New Zealand military and intelligence activity. Much information in the book is attributed to confidential sources.
3. NZDF determined that *Other People's Wars* contained Defence information, some of which might have been disclosed without authorisation by a Defence Force officer. It came to suspect a particular officer, but its inquiries were inconclusive. It sought assistance from NZSIS to take the investigation further.
4. NZDF agreed to provide NZSIS with a summary of the grounds for investigation, on which the Service would seek internal legal advice. Neither I nor NZSIS have been able to find any record of any such document, or any NZSIS legal advice on the matter.
5. NZSIS conducted a 'preliminary investigation' for NZDF. It analysed *Other People's Wars*, without any conclusive result. It acquired three months of telephone call metadata for the NZDF officer's home and mobile numbers and two months of call metadata on Mr Hager's home telephone line. Analysis of this data did not establish any connection between them.
6. NZSIS advised NZDF that its inquiries were inconclusive as to any connection between Mr Hager and the NZDF officer. NZDF decided against any further investigation.

LEGALITY OF NZSIS ASSISTANCE TO NZDF

Statutory context: "security" and "espionage"

7. Under the NZSIS Act 1969, as in force at the time of NZSIS' assistance to NZDF, the Service's relevant functions under s 4(1) included:
 - (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;
 - ...
 - (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:

¹ Nicky Hager *Other People's Wars: New Zealand in Afghanistan, Iraq and the war on terror* (Craig Potton Publishing, Nelson, 2011).

- (ii) public authorities
- (iii) any person who, in the opinion of the director, should receive the advice:

...

- (b) to co-operate as far as practicable and necessary with such State services and other public authorities in New Zealand and abroad as are capable of assisting the Security Intelligence Service in the performance of its functions:

8. The immediately obvious provision under which NZSIS might lawfully have been able to assist NZDF in the manner requested (ie by investigating a suspected security risk) is s 4(1)(a). Whether a matter was “relevant to security” depended however on the definition of “security”, which under s 2 was:

- (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 of facilitating of any terrorist act.

9. NZSIS has advised me that it considered its assistance to NZDF fell within paragraph (a) and related in particular to identifying whether espionage was occurring.

10. Under s 2 espionage was defined by reference to s 78 of the Crimes Act 1961, which at the relevant time read as follows:

78 Espionage

Every one is liable to imprisonment for a term not exceeding 14 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand,—

- (a) with intent to prejudice the security or defence of New Zealand, communicates information or delivers any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation; or
- (b) with intent to prejudice the security or defence of New Zealand and with the intention of communicating information or delivering any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation,—
 - (i) collects or records any information; or
 - (ii) copies any document; or
 - (iii) obtains any object; or
 - (iv) makes any sketch, plan, model, or note; or
 - (v) takes any photograph; or
 - (vi) records any sound or image; or
 - (vii) delivers any object to any person,—

if the communication or delivery or intended communication or intended delivery under paragraph (a) or paragraph (b) is likely to prejudice the security or defence of New Zealand.

11. Mr Hager's complaint, in essence, is that the definition of security did not enable NZSIS to investigate the identity of his journalistic sources for *Other People's Wars* because there was no basis for suspecting that any disclosure to him of NZDF information, including any classified information, could have amounted to espionage.
12. As noted, NZSIS has no record of any consideration given to this question at the time of the decision to assist NZDF, or any conclusions that might have been reached. It has noted however that its "preliminary investigations" were undertaken without any indication of concern that they were unauthorised. It has also proposed some reasoning that might have applied.

A reasonable suspicion of espionage?

13. First, the Service proposes that it was not obliged to establish that the offence of espionage was *prima facie* established and/or completed before it could lawfully begin to investigate it as a possibility.
14. That is correct, and goes without saying. The relevant consideration, however, is whether the Service was obliged to have, at least, grounds for reasonable suspicion that such activity might have occurred (or be occurring). In my view, deployment of the NZSIS' intrusive investigatory powers and capabilities on the basis of anything less than a reasonable suspicion of a relevant

mischief would scarcely have been consistent with its obligation to contribute to “keeping New Zealand society secure, independent, and free and democratic”.²

15. To give grounds for a reasonable suspicion of espionage, the circumstances presented to the Service had to support a reasonable suspicion that the key elements of the offence of espionage under s 78 might be present.
16. The first element is not at issue: the NZDF officer was a person who owed allegiance to the Queen. The key questions as to whether any possible transmission by the officer to Mr Hager of sensitive NZDF information might have constituted espionage arise from the other requirements under s 78 for:
 - 16.1. “intent to prejudice the security or defence of New Zealand”; and
 - 16.2. communication of information “to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation”; and
 - 16.3. communication “likely to prejudice the security of New Zealand”.

Intent to prejudice the security or defence of New Zealand?

17. NZIS notes, first, that the intentions of the officer (if the officer had in fact made any unauthorised disclosure) and/or Mr Hager were not clear. It suggests that at an early stage of investigation, with limited information, it might have been considered too risky for NZSIS to dismiss the possibility of espionage solely on the basis that the criminal offence in s 78 of the Crimes Act could not be immediately established.
18. Again, however, the question is not whether the intentions of the officer and Mr Hager were unclear, or whether any intention to prejudice the security or defence of New Zealand could be immediately established to some level of “proof”, but whether there was any basis for a reasonable suspicion of such an intention on the part of either of them.
19. An intention to prejudice the security or defence of New Zealand is no small matter: it would be a profoundly grievous intention to attribute to any New Zealander and particularly to a member of the Defence Force. It requires *some* foundation. I do not see any reasonable basis in *Other People’s Wars* or the related information reviewed for this inquiry for suspecting that either the officer or Mr Hager might have had any such intention.
20. I would accept that NZDF’s inquiries were capable of supporting a reasonable suspicion that the officer had unwittingly supplied Mr Hager with information. Without reason to suspect any deliberate disclosure to Mr Hager, however, there was no reason to ascribe any malicious intention to the officer’s actions, let alone an intention to prejudice national security or defence.
21. A record of a meeting involving NZDF and NZSIS notes an agreement between them that any investigation of whether the officer was a source for Mr Hager should be “a security

² New Zealand Security Intelligence Service Act 1969, s 4AAA(1)(a).

investigation, not a criminal investigation". The reason for this choice is not recorded. It does not however suggest a suspicion that the crime of espionage might have been committed.

22. Other records do not indicate any perception within either NZDF or NZSIS that NZDF had been subjected to anything other than sceptical investigative journalism.
23. Mr Hager has never made any secret of his intentions. In *Other People's Wars* he writes of his intention to raise questions about the extent to which the military is properly under civilian control; to inform people about the conduct of modern warfare; and "simply to give an account of New Zealand's part in 10 years of war."³ Nobody is obliged to accept Mr Hager's statement of his express intent, but it is a factor that must be considered before an alternative, and negative, inference is drawn. Some might see Mr Hager as a threat to the security of classified and other sensitive government information, given his longstanding pursuit of it as an investigative journalist. But ascribing to him a possible intention to "prejudice the security or defence of New Zealand" by his actions is an altogether different judgement. I do not see any reasonable basis for it.

Communication of information to a country or organisation outside New Zealand?

24. NZSIS has advised me that it was considered arguable, within NZSIS, that a person could commit espionage if, having the intent to prejudice the security or defence of New Zealand, they communicated classified information to a journalist for the purpose of dissemination into a public forum. Such publication, it is suggested, could constitute communication to a country or organisation outside New Zealand, as hostile foreign intelligence services operating within and outside New Zealand are likely to collect that information for intelligence purposes.
25. I have already said that I do not think there was a basis for a reasonable suspicion that the NZDF officer or Mr Hager had the relevant intention. That effectively obviates the need to ask whether any communication of information by the officer to Mr Hager might possibly have amounted to a communication of that information to a country or organisation outside New Zealand. Even if that was possible, without any reasonable suspicion of the relevant intent the point is moot.
26. On the strict construction ordinarily given to criminal offence provisions, however, I am not sure the interpretation suggested by the Service was available. Section 78 contrasts two potentially culpable means of communication: to a country or organisation outside New Zealand, or to a person acting on behalf of any such country or organisation. Those I think can reasonably be understood as *direct* communication to a foreign country, on the one hand, and communication to an agent of a foreign country on the other. If "communication to a country or organisation outside New Zealand" had been intended to encompass *indirect* means of communication, such as through an agent, the specification of the latter possibility would have been unnecessary. Given that communication of information to a New Zealand journalist for publication in New Zealand would be an even more indirect means of communicating to another country than communication to an agent of that country, I do not think it would have amounted to "communication to a country or organisation outside New Zealand" under s 78. In the present case there was no reasonable possibility that Mr Hager might have been an agent of a foreign

³ At 10-11.

country. I question, therefore, whether (intention aside) there was any basis for a reasonable suspicion that the NZDF officer might have communicated information to a country or organisation outside New Zealand, or to a person acting on behalf of any such country or organisation, in the sense relevant to s 78.

Communication likely to prejudice the security of New Zealand?

27. The final element of the offence of espionage under s 78 was that the relevant communication (to another country or its agent) had to be “likely to prejudice the security or defence of New Zealand”. Section 78C of the Crimes Act provided that this was a question of law.
28. I accept that NZDF and NZSIS were concerned that the NZDF officer, given their position in the Defence Force, was in possession of information that, if disclosed to a foreign power, could have prejudiced the security or defence of New Zealand. Had there been any grounds for a reasonable suspicion of unauthorised communication with the requisite intent, that understanding of the officer’s knowledge and access to sensitive information would have been sufficient, in my view, to support a reasonable suspicion that prejudice to the security of defence of New Zealand was possible. As already explained, however, I do not think those preceding requirements were met.

Espionage v. Wrongful communication of official information

29. Alongside the offence of espionage the Crimes Act specified, at the relevant time, an offence of knowing or reckless unauthorised disclosure of sensitive official information to any person (s 78A(1)(a)):

78A Wrongful communication, retention, or copying of official information

- (1) Every one is liable to imprisonment for a term not exceeding 3 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand,—
- (a) knowingly or recklessly, and with knowledge that he is acting without proper authority, communicates any official information or delivers any object to any other person knowing that such communication or delivery is likely to prejudice the security or defence of New Zealand; ...

30. In my view this offence corresponds more closely to the nature and gravity of the activity suspected by NZDF than does the offence of espionage under s 78.
31. Wrongful communication of official information under s 78A(1)(a) was not however a matter of “security” as defined in the NZSIS Act 1969. If there were grounds for reasonable suspicion that the NZDF officer had acted in breach of s 78A(1)(a) (and I express no view on that), NZDF would have been justified in seeking to investigate the matter further, for example with the assistance of the Police. But a potential breach of s 78A(1)(a) was not sufficient cause for NZSIS to become involved in any investigation.
32. The existence of the “wrongful communication” offence at the relevant time, with its greater relevance to the kind of wrongdoing suspected by NZDF, reinforces my view that there was no

sound basis for suspecting espionage and therefore no matter of “security” for NZSIS to investigate.

Journalistic privilege

33. Given Mr Hager’s occupation it is relevant to consider what regard NZSIS was obliged to have for journalistic privilege when deciding whether to provide the assistance sought by NZDF.
34. At the relevant time, s 4A of the NZSIS Act required that to issue an intelligence warrant, the Minister had to be satisfied that (among other things):
- (3)
...
(d) any communication sought to be intercepted or seized under the proposed warrant is not privileged in proceedings in a court of law under –
- (i) section 58 or 59 of the Evidence Act 2006; or
- (ii) any rule of law that confers privilege on communications of a professional nature between a lawyer and his or her client.
35. Sections 58 and 59 of the Evidence Act covered religious and medical privilege. The NZSIS Act did not refer to s 68, which provided a limited protection for journalists’ confidential sources in criminal and civil proceedings.
36. The effect of section 68 was that a journalist could not be compelled (with certain exceptions) to disclose confidential sources in court. It protected the ability of a journalist to give and maintain an undertaking of confidence to a source, in the interests of protecting the benefits to freedom of expression associated with a free press.
37. Although NZSIS was not expressly prohibited in the NZSIS Act 1969 from targeting (under warrant) information subject to journalistic privilege, in my view its obligations to contribute to keeping New Zealand “free and democratic” and to respect protected rights, including freedom of expression, argued for a cautious approach to any inquiry – whether subject to warrant or not – into a journalist’s confidential sources. This would require care to ensure that any such inquiry had a genuine, important national security purpose and that it was pursued with appropriate restraint, using the least intrusive means available.
38. In this case NZSIS initially showed reasonable caution. Its records show a clear recognition that any investigation into Mr Hager’s possible sources, particularly if focused on Mr Hager himself, would be a sensitive matter requiring legal advice and probably ministerial support. The Service sought from NZDF a statement of the grounds for NZSIS assistance, on which NZSIS would take legal advice (paragraph 4 above).
39. The NZDF request for NZSIS assistance did not however address the legal basis for it and NZSIS has no record of any internal legal advice. As a result it is not possible to know whether, if at all, NZSIS assessed the questions that arise on the facts of this case of “intent” and “communication to a foreign country”. There is no basis now to resolve that uncertainty in favour of NZSIS. The

Service nonetheless went forward with its inquiries. I am unable to find, therefore, that it proceeded with the kind of caution that would have been proper in the circumstances.

CONCLUSION AND RECOMMENDATION

40. For the reasons given I have found that NZSIS unlawfully provided investigative assistance to NZDF in efforts to determine whether a specific NZDF officer had been a source for information published in Mr Hager's book *Other People's Wars*. Specifically, NZSIS provided that assistance despite a lack of grounds for reasonable suspicion that any activity had occurred that was a matter of national "security" as that was defined in the governing legislation of NZSIS at the time. I have been unable to find that the Service showed the kind of caution I consider proper, for an intelligence agency in a free and democratic society, about launching any investigation into a journalist's sources.
41. Mr Hager's complaint against NZSIS is therefore upheld.
42. To the extent that Mr Hager was the subject of NZSIS inquiries that I have found were not within the lawful scope of NZSIS activity at the relevant time, I consider he was adversely affected by the agency's activities. The Service acquired two months of call metadata for Mr Hager's home telephone line. In the circumstances I think an apology from NZSIS to Mr Hager is an appropriate remedy. I recommend accordingly.