

Inquiry into complaint against NZSIS from Yuan (Jason) Zhao

Public report

Brendan Horsley
Inspector-General of Intelligence & Security
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BACKGROUND

1. In December 2022, I received a complaint from Mr Yuan (Jason) Zhao against the New Zealand Security Intelligence Service (NZSIS or the Service). I conduct complaint investigations in private and so do not normally identify complainants publicly when reporting. The law does not, however, prevent a complainant from speaking publicly about their complaint. Mr Zhao publicly stated that he had complained to me about NZSIS activities, prompting news media attention and requests to me to confirm this. With Mr Zhao's agreement I publicly confirmed my inquiry. I now report on that inquiry as required by law. While I would not normally identify a complainant in a public report, in this case it is impracticable to anonymise Mr Zhao.

MR ZHAO'S COMPLAINT

2. In December 2022, I received a complaint from Mr Yuan (Jason) Zhao against the New Zealand Security Intelligence Service (NZSIS). Mr Zhao complained about:
 - 2.1. the NZSIS advising his employer, the Public Service Commission (PSC), that he was an "insider threat" due to his relationships with foreign government officials;
 - 2.2. NZSIS's interaction with him at Wellington Airport on 20 October 2022, when he felt he had been detained for an involuntary interview; and
 - 2.3. the "prolonged" retention of his electronic device by NZSIS, after he provided it at the airport, and his inability to get clear advice on when it would be returned.
3. Mr Zhao was concerned that he had been unfairly targeted by the Service due to being a China-born Chinese New Zealander who had social relationships with other Chinese people. He alleged this unjustifiably limited his freedom to associate with other Chinese people.

MY INQUIRY AND REPORT

4. I decided to inquire into Mr Zhao's complaint and wrote to the NZSIS seeking all relevant information. NZSIS cooperated fully and provided the relevant records in a timely manner, including an audio recording of the interaction with Mr Zhao at Wellington Airport.
5. My inquiry focused on the actions of the NZSIS in relation to Mr Zhao. Given the involvement of the PSC I also spoke with a PSC staff member involved with the matter.
6. Much of the information my inquiry has considered is highly classified, which significantly limits the information I can provide to Mr Zhao to explain my findings. I acknowledge that this puts Mr Zhao and his representatives in a difficult position, as is often the case when people's lives are affected by reporting of classified intelligence.

THE ROLE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

7. As Inspector-General I oversee the activities of New Zealand’s intelligence and security agencies, the NZSIS and the Government Communications Security Bureau. This includes investigating complaints against them. I am completely independent from the agencies.
8. I have extensive powers to require information for my inquiries and have direct access to the central record systems of the agencies.
9. When conducting an inquiry I assess the legality and propriety of the relevant agency’s actions. I do not generally see my role as being to substitute my opinion for that of the Service when it comes to intelligence assessments. Instead, I consider whether the conclusions reached by the Service were reasonably open to it in the circumstances.
10. While I have spoken to the PSC about its engagement with the Service, I do not have jurisdiction over the PSC. I have not examined or assessed any actions of the PSC or its employment relationship with Mr Zhao.

THE SERVICE’S ROLE IN INVESTIGATING MATTERS RELATING TO NATIONAL SECURITY AND “INSIDER THREATS”

11. Under the Intelligence and Security Act 2017 (ISA) it is a function of the Service to:
 - 11.1. collect and analyse intelligence in accordance with the New Zealand Government’s priorities;¹ and
 - 11.2. provide any intelligence collected and any analysis of that intelligence to any person or class of person authorized by the Minister responsible for the agencies to receive the intelligence and analysis.²
12. One of the Government’s published National Security Intelligence Priorities is “Foreign interference and espionage”, which is described as involving “understanding foreign activities used to exercise malign influence, interference, and espionage in or involving New Zealand, and intentions, capabilities, drivers and the extent and impact of these activities”.³
13. In addition to intelligence gathering, it is a function of the Service to provide protective security services, advice and assistance to (among others) New Zealand public authorities, such as the PSC.⁴ This function includes providing advice about personnel security as well as national security risks.⁵ It includes working to counter “insider threats”. The Service describes an insider threat as:⁶

¹ ISA, s 10(1)(a).

² ISA, s 10(1)(b)(iii).

³ Department of Prime Minister and Cabinet “National Security Intelligence Priorities” Retrieved from www.dpmc.govt.nz/our-programmes/national-security/national-security-intelligence-priorities on 24 July 2023.

⁴ ISA, s 11.

⁵ ISA, s 11(3).

⁶ New Zealand Security Intelligence Service “Protective Security” Retrieved from www.nzsis.govt.nz/our-work/protective-security/

...any person who exploits, or intends to exploit their legitimate access to any agency's assets to harm the security of their agency or New Zealand, either wittingly or unwittingly, through espionage, terrorism, unauthorised disclosure of information, or loss or degradation of a resource or capability.

14. At law it is not a function of an intelligence and security agency to enforce measures for national security.⁷ Therefore the Service's role generally is to collect, analyse and report intelligence, for others to act upon.

THE NZSIS INVESTIGATION OF MR ZHAO

15. In my classified report I detail my understanding and analysis of:
- 15.1. the background to the Service's investigation and how it was commenced;
 - 15.2. the activities undertaken by the Service;
 - 15.3. the Service's engagement with the PSC, including the intelligence assessments and advice it provided to the PSC; and
 - 15.4. the Service's preparation for and conduct of its interview with Mr Zhao and the search and seizure of his personal items.
16. In assessing this part of the complaint, I reviewed Service records and questioned the Service on various issues that arose from the records. I also spoke to a staff member at the PSC who was involved in briefings from the Service.
17. Having reviewed the Service's records, I find it had reasonable grounds for investigating Mr Zhao in accordance with its functions under the ISA and its own policies. The intelligence supporting this finding is highly classified and I cannot report it here. I found nothing to suggest Mr Zhao was investigated on the basis of irrelevant or unreasonable considerations, such as the mere fact he is a China-born Chinese New Zealander.
18. It was also reasonable that the Service sought to engage with the PSC about Mr Zhao. Given the intelligence collected by the Service, it was justified in seeking information from the PSC to determine what, if any, risk he might present to the PSC. It was appropriate for the Service to advise the PSC about its intelligence on Mr Zhao and provide protective security advice.

19. I do not uphold Mr Zhao's complaint that the NZSIS' investigation of him was unjustified or based on ethnic discrimination.

INTERVIEW AND WARRANTED SEARCH AND SEIZURE

20. In assessing this aspect of the complaint, I have reviewed NZSIS records, including the recording of the interview, and questioned the Service on matters arising. In my classified

⁷ ISA, s 16.

report I considered how the Service planned for the interview and search and seizure of Mr Zhao's items. This information is classified and cannot be detailed in this report.

21. On the afternoon of Thursday 20 October 2022, Mr Zhao, his spouse and three children arrived at Wellington International Airport from a holiday in Australia.
22. An NZSIS officer approached Mr Zhao, introduced themselves, showed identification and presented Mr Zhao with a warrant certificate, signed by the Director-General of NZSIS, stating that the agency had an intelligence warrant authorising search and seizure of places and things owned or used by him (including things previously owned).
23. According to NZSIS records the NZSIS officer explained the Service's powers of search and seizure to Mr Zhao and told him he was not under arrest or being detained. The family's belongings were searched, as, by Mr Zhao's own admission, items were checked in under Mr Zhao's name and he had personal items throughout. Two electronic devices were searched: Mr Zhao's device (which was later seized), and another he had previously used.
24. The NZSIS officer asked Mr Zhao if he would speak voluntarily with two other NZSIS officers and explained this was separate from the warranted search of his belongings. The records state that Mr Zhao voluntarily agreed to speak with them. Mr Zhao's family were told they could leave but they chose to remain while Mr Zhao attended the interview.
25. For the interview, Mr Zhao was introduced to two NZSIS officers, who showed identification and explained the roles and functions of NZSIS. The interview was audio recorded by the Service. The officers explained again that the interview was separate to the warranted search of Mr Zhao's items and was "100 percent voluntary." They restated that Mr Zhao was not being detained and NZSIS had no powers of arrest.
26. Mr Zhao was asked to read and sign an interview information sheet, provided in English and Mandarin Chinese. This was a version of an interview sheet which is available on the Service's website, stating:

NZSIS's role

You have been given this information sheet because an officer of the New Zealand Security Intelligence Service (NZSIS) wishes to speak to you. The role and function of the NZSIS is to gather and pass on intelligence in the interests of security. The NZSIS has no power to take enforcement action.

You are free to decide whether or not to speak with the officer. You are not under arrest or under charge and the officer cannot arrest, detain or charge you. There is no requirement to speak with the officer and no penalty for not speaking with him or her. If you decide to speak with the NZSIS officer, you may decide to stop at any time.

Warrant Powers

The NZSIS is conducting a search under warrant in respect of you and your property and you may not obstruct that search. However, you are still free to decide whether or not to speak with the NZSIS officer. If you decide not to speak with the officer, he or she must leave as soon as the search is complete.

NZSIS has shown you a copy of the confirmation of warrant. This warrant authorises NZSIS to:

- a. Search places occupied, used, visited or controlled by you, and of things used by you including mail, personal belongings, and infrastructure you own, use or have owned or used; and
- b. Seize documents, electronic devices, communications, information and things relevant to security created, used, owned or obtained by you.

[...]

You are not compelled to speak to NZSIS.

Before agreeing to speak with the NZSIS officer and at any time during any interview:

If there is anything you do not understand, or you have language difficulties, please say so. You may ask the officer any questions;

You may ask the officer for identification and may confirm that identification by calling 0800 747 224.

This interview is voluntary. You can choose not to participate, to speak with the officer another time or speak with the officer but end the conversation at any time.

27. Mr Zhao confirmed he understood the information sheets. He signed both of them. The conversation moved on to why the NZSIS was interested in meeting him and the delivery of a warning.
28. The interview lasted 1.5 hours and was conducted in English.
29. At the end of the interview, the NZSIS told Mr Zhao it was seizing his device. When he asked how long it would be held, an NZSIS officer said they were unable to say.
30. In my classified report I detail what NZSIS did with the device, which I cannot discuss in this report.
31. Mr Zhao rang NZSIS on 28 October and 1 November to ask about the return of his electronic device. On 10 November an NZSIS officer telephoned Mr Zhao in response. That same day Mr Zhao's lawyer wrote to the NZSIS asking for the return of the electronic device. The Service internally agreed the electronic device should be returned. On 14 November an NZSIS officer hand-delivered the electronic device to Mr Zhao's lawyer's office.
32. In total, Mr Zhao's electronic device was held by the NZSIS for about three and a half weeks, or 15 working days.

ASSESSMENT OF THE SERVICE'S ACTIONS

33. Mr Zhao complained that he and his family were detained at the airport and his family's belongings were searched and seized by the NZSIS. As his items had been taken and he was

tired, he felt obliged to speak to the NZSIS and did not believe he had participated in a voluntary interview.

Interview

34. As the Service has no enforcement function, it had to make sure it did not give Mr Zhao the impression it was detaining him. It had to be clear that his participation in an interview was voluntary.
35. In the NZSIS' interaction with Mr Zhao at the airport:
 - 35.1. Mr Zhao was told clearly by the NZSIS officer who first stopped him that, although the Service had the power to search his possessions, his participation in an interview would be voluntary. This was repeated by an interviewing officer;
 - 35.2. The interview information sheet, provided to Mr Zhao in English and Mandarin Chinese, which he was given to read and which he signed, stated that the interview was voluntary, he was not under arrest, charged or being detained and the NZSIS had no enforcement powers. He could cease talking to the NZSIS at any time or, if he wished, he could speak to the NZSIS at a later date; and
 - 35.3. The recording shows Mr Zhao verbally agreed to speak to the Service.
36. A person must comply with the exercise of warranted search and seizure powers. In this case the interview was carried out in conjunction with the warranted search and seizure. This can give the impression that the request to interview must also be complied with. This risk was addressed in the Service's planning for this interaction. In addition to the repeated statements to Mr Zhao that the interview was voluntary the Service used different staff for the interview and the search, to attempt to distinguish between the two processes.
37. Despite concerns Mr Zhao raised, I found it reasonable in the circumstances that:
 - 37.1. Mr Zhao was not advised that he could seek legal advice at the interview. The NZSIS was not required to inform Mr Zhao he could seek legal advice, given the voluntary nature of the interview and that the Service does not have a law enforcement function (in contrast with, for example, the Police).
 - 37.2. The conversation was recorded without Mr Zhao's knowledge. There is no legal requirement for a party to a conversation to inform the other party they are recording the conversation.
 - 37.3. The Service chose to carry out the interview, search and seizure at the airport when Mr Zhao was returning with his family. Alternatives such as approaching him at home or work would have had potential disadvantages for both the NZSIS and Mr Zhao.
38. I was also satisfied that the Service's warning to Mr Zhao was specific to the sharing of official information with representatives of a foreign government, rather than more general social

interaction. This was supported by the surrounding discussions at the interview. The warning appropriately respected Mr Zhao's right to freedom of association.

39. Mr Zhao alleged some inappropriate comments were made to him during the interview, such as implicit threats to coerce him into participating and advice that he could not contact anyone or disclose the interview to anyone. The Service denied these comments were made. They are not on the audio recording. They are at odds with statements that were made and with the manner in which the Service interacted with Mr Zhao in the records I have reviewed.
40. It is understandable that a person invited to speak to the NZSIS might feel they have no real choice in the matter. This view might persist no matter how many times the NZSIS tells the person an interview is voluntary. This was apparently the case for Mr Zhao.
41. I find that the NZSIS made it sufficiently clear to Mr Zhao that he was not detained or compelled to participate in an in interview.

Search and seizure

42. At the time of the search and seizure of Mr Zhao's belongings he was a target of an intelligence warrant that authorised these activities.
43. At the airport, Mr Zhao was shown a redacted version of the warrant, which informed him that the NZSIS was authorised to search and seize his belongings, including things previously owned or used by him. I am satisfied that Mr Zhao was given sufficient verbal and written explanation of NZSIS's search powers in both English and Mandarin.
44. All of the belongings searched by the Service came within scope of the warranted search. The seizure of Mr Zhao's electronic device also came within scope of the NZSIS' powers under the intelligence warrant. The search was conducted reasonably.
45. I find that the search and seizure of Mr Zhao's belongings was lawful.

Was Mr Zhao's family detained?

46. In planning for the airport interaction, the Service considered the welfare of Mr Zhao's family and the options available to them, including how to ensure they waited the least amount of time possible at the airport.
47. NZSIS records state that at the airport Mr Zhao's family were twice given the option of going to the arrivals area to wait for him. On both occasions they chose to remain. A Service officer offered to arrange transport for the family to leave the airport. Mr Zhao said his family would be fine waiting for him. The NZSIS provided food and water to the family while they waited. An officer routinely checked on their welfare and provided updates on the process.
48. I find that Mr Zhao's family were not detained by NZSIS.

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| <ol style="list-style-type: none"> 49. I do not uphold Mr Zhao's complaint that the NZSIS detained him and his family and subjected Mr Zhao to an involuntary interview. |
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Retention of Mr Zhao's electronic device

50. The NZSIS can retain a physical item seized under an intelligence warrant only for as long as is "reasonably necessary to enable the agency to conduct a search or analysis of the item."⁸ What is "reasonably necessary" will depend on the circumstances.
51. The Service completed analysis of Mr Zhao's device 12 working days after it was seized. The analysis was not straightforward. The Service told me triaging Mr Zhao's device was a high priority and was handled with corresponding urgency and I am satisfied this is what occurred.
52. The Service held the electronic device for a further three working days while it planned for a potential second interview with Mr Zhao, at which it intended to return his device. On 11 November it abandoned this plan on learning that Mr Zhao did not want to meet for another interview. The device was returned on 14 November.
53. I find the NZSIS met its statutory obligation to retain the electronic device only as long as reasonably necessary.
54. The Service took nine business days to return Mr Zhao's phone call. In response to my inquiry, the Service acknowledged that his phone calls should have been returned sooner. In light of that I make no further comment.
55. I do not uphold Mr Zhao's complaint that the NZSIS held on to his electronic device for an unnecessary length of time.

NZSIS engagement with the PSC

56. While I have found the NZSIS had cause to investigate Mr Zhao, report on him to the PSC and seek information from the PSC about him to further its investigation, I had some observations on aspects of the NZSIS' engagement with the PSC.
57. I found that one key briefing to the PSC included an overstatement of confidence in a specific assessment. I did not consider it was reasonable for the NZSIS to state its opinion with such certainty in the circumstances. I do not consider that this was done to misrepresent the case against Mr Zhao. Rather it was a flaw in the drafting of the assessment. The overstatement was somewhat mitigated by information elsewhere in the briefing. The Service disagreed with this finding on the basis that the briefing as a whole was not overstated. I maintain my view.
58. I was also somewhat concerned that the Service was not always entirely clear about its role in briefing the PSC.
59. Where the NZSIS identifies a security risk it has a legitimate interest in what mitigations might be available. It needs to be careful, however, particularly when employment rights

⁸ ISA, s 105(1).

and processes are involved, that it is not pushing an agency down a particular path. In this case it appeared at times the Service was considering how it might support the PSC's employment investigation, towards its own end of threat mitigation.

60. In my view the NZSIS' engagement with the PSC in relation to Mr Zhao was not as organised and careful as it should have been. Its engagement with the PSC regarding Mr Zhao would have benefited from more thorough consideration of timing; legal risks; who would be involved and informed within NZSIS; how the PSC was likely to respond; and what the Service could and could not do in return. It might also have benefited from the involvement of more senior staff.

61. I **recommend** the Service adopts a planned approach to how and when it briefs employers about security investigations and risks relating to employees, including consideration independent of the investigative team involved, legal advice, and proportionate engagement with senior NZSIS staff.

62. The Service has accepted that providing further guidance to staff would be beneficial. I expect the NZSIS to propose, within a reasonable timeframe, how it will achieve the necessary improvement.