



## Office of the Inspector-General of Intelligence and Security

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Report into the release of information by the New Zealand  
Security Intelligence Service in July and August 2011

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**Public Report**

Cheryl Gwyn  
Inspector-General of Intelligence and Security

25 November 2014

## **NOTE ON REPORT**

This report is an unclassified version of a report that has been provided to the Prime Minister who was at the relevant times the Minister in Charge of the New Zealand Security Intelligence Service and is now the Minister for National Security and Intelligence; the Minister in Charge of the New Zealand Security Intelligence Service and the Director of the New Zealand Security Intelligence Service.

This version of the report is intended for public release. It omits only information (contained in one Appendix) that would disclose the identity of any person who is or has been an officer, employee, or agent of an intelligence and security agency (other than the chief executive), or any information from which the identity of such a person could reasonably be inferred, as required by s 25A(2)(c) of the Inspector-General of Intelligence and Security Act 1996 (IGIS Act) and s 13A of the New Zealand Security Intelligence Service Act 1969.

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## INTRODUCTION

1. In July-August 2011, the New Zealand Security Intelligence Service (NZSIS) disclosed information concerning consultations between the then Director of the NZSIS, Dr Warren Tucker, and the then Leader of the Opposition, the Hon Phil Goff MP. In this inquiry, I have investigated whether the NZSIS acted lawfully and with propriety in relation to those disclosures.

### *Background to this inquiry*

2. In July 2011, the *Southland Times* published allegations that there had been Israeli intelligence activity in Christchurch at the time of the February 2011 earthquake. In response to those allegations, the Prime Minister made a public statement that there had been a thorough investigation of certain suspicious behaviour by Israeli nationals at that time, which had found no evidence of intelligence activity.
3. The then Leader of the Opposition made public statements in which he criticised the government's handling of the allegations, including that he had not been briefed on the issue. In response to a query from the Prime Minister's Office (PMO), the NZSIS advised the Prime Minister that the Leader of the Opposition had been briefed, and the Prime Minister said so publicly on 24 July.
4. The then Leader of the Opposition called a meeting with the Director of the NZSIS and, as a result of that meeting, said on 25 July that he accepted the Director's word that the Director had raised the issue briefly and in passing at a meeting on 14 March. The Leader of the Opposition also stated that while the Director may have had with him an initial briefing paper on the Israeli investigation, he had not seen or read that paper at the meeting.
5. As a result of the Prime Minister's statement on 24 July and the Leader of the Opposition's statement on 25 July, numerous journalists and the prominent blogger Cameron Slater made requests of NZSIS for information and/or comment as to whether and how the Leader of the Opposition had been briefed. Mr Slater was provided with three redacted documents, which he received on 4 August. Media requests were refused until 5 August.
6. The Prime Minister's Office also requested and received further information from the NZSIS from 25 July to 4 August. The Prime Minister and Deputy Prime Minister made statements on the basis of that information, most notably on 4 August. A staff member of the Prime Minister's Office also provided some information to Mr Slater.

### *Cooperation with the inquiry*

7. I have had full cooperation in carrying out the inquiry from the former Director, current Director and current and former Service officers at all levels. The former Director has, from the outset, emphasised his responsibility as chief executive for his actions and for those of his staff. With the benefit of hindsight, the Director and senior staff have accepted that mistakes and some significant errors of judgement had been made, with unanticipated and serious consequences.

8. I have also had full cooperation from the Prime Minister's Office.

## SUMMARY OF FINDINGS

### *Findings in relation to the release of information*

9. The NZSIS disclosed incomplete, inaccurate and misleading information in response to the Official Information Act requests by Mr Slater and others. It also provided much the same information, along with some further detail, to the Prime Minister and the Prime Minister's Office. These errors resulted in criticism of the then Leader of the Opposition, not only by Mr Slater and other commentators but also by the news media and others, such as the Public Service Association. The Prime Minister and Deputy Prime Minister made public comments in reliance on information provided by the NZSIS, and that information was at least partially incorrect.
10. The Director and the NZSIS also failed to provide any clarification or correction once the effect of these errors became apparent.
11. The NZSIS also made a significant error in considering information requests by the news media. Such requests were, from 25 July to 5 August, not treated as OIA requests but simply denied. This was in direct contrast to the positive response to the request made by Cameron Slater on 26 July, which resulted in Mr Slater effectively receiving an exclusive news story.
12. The NZSIS process for handling OIA requests proved inadequate. The NZSIS also applied a mistaken understanding of OIA obligations, particularly in relation to the need for consultation with the Leader of the Opposition as to the accuracy of the information to be disclosed and whether and how to release that information.
13. The documents released to Mr Slater and others were not, however, improperly declassified. The NZSIS determined that the unredacted parts of those documents were not of national security concern and I accept that determination.

### *Political neutrality findings*

14. I have not found any partisan political motive on the part of the NZSIS or its Director. I have found, however, that the Director made a number of serious errors of judgement in dealing with the controversy that arose over his consultation with the Leader of the Opposition over the Israeli investigation.
15. Those errors of judgement were the principal reason for the provision of incorrect and incomplete information. Because the information related to the Director's duty to consult the Leader of the Opposition and because of the adverse consequences for the Leader of the Opposition, there was a consequent failure on the part of the Director to take all reasonable steps to safeguard the political neutrality of the NZSIS, as required by s 4AA(1) of the New Zealand Security Intelligence Act 1969. The Director also failed to maintain a relationship of trust and confidence with the Leader of the Opposition, as necessary under s 4AA(3).
16. I also found that the Director and the senior staff of the NZSIS did not appreciate that the obligations under s 4AA on occasion require positive and independent action by the Director to uphold or restore political neutrality. In particular, I found that the Director



and – so far as they were aware of it – the senior staff should have recognised that they had provided incomplete, inaccurate and/or misleading information that caused harm to the Leader of the Opposition and that the Director ought to have acted to correct that error.

17. I have not found any political collusion by or direction of the NZSIS in its disclosure of information, or any unauthorised disclosure of information by NZSIS staff, as had been alleged. I did find that NZSIS information was disclosed by a member of the staff of the PMO to Cameron Slater for political purposes, but that disclosure did not breach any obligations of confidentiality owed to the NZSIS on the part of that PMO staff member.
18. The disclosure did, however, demonstrate that NZSIS had not put in place appropriate processes and protocols for the maintenance of security and political neutrality in its relationship with PMO.

#### *Propriety findings*

19. The legal obligations under the Official Information Act and under s 4AA of the NZSIS Act are supplemented by the broad principles of s 4AAA and my jurisdiction to consider the propriety of particular activities of an intelligence and security agency under s 11(1)(ca) of the Inspector-General of Intelligence and Security Act 1996.
20. I have found that the Director and senior staff of the NZSIS failed to act consistently with those requirements by failing to recognise the gravity of the situation and the potential for political exposure and so failing to engage appropriately with the Leader of the Opposition and with the Prime Minister's Office.
21. I would have expected the Director to take a much more rigorous and careful approach to these issues and to seek appropriate advice. I would also have expected staff in such senior roles to recognise the difficult and isolated position of the Director, although I acknowledge that they were hindered in providing advice and assistance to the Director by an absence of complete information.

## RECOMMENDATIONS

### *Official Information*

#### **Recommendation 1**

NZSIS should work with the Office of the Ombudsman to ensure that relevant NZSIS staff have a full understanding of, and training on, the substantive and procedural requirements of the Official Information Act 1982.

#### **Recommendation 2**

NZSIS should review its structures and processes, in consultation with the Office of the Ombudsman and with an opportunity for comment to those individuals and news media organisations who made Official Information Act requests here, to ensure that there is a consistent and workable approach to Official Information Act requests and media inquiries.

### *Understanding and applying obligations of political neutrality*

#### **Recommendation 3**

NZSIS should work with the Government Communications Security Bureau, State Services Commission, the Department of the Prime Minister and Cabinet and others, to develop written guidance for ministerial office staff who deal with intelligence and security matters, on issues such as media comment, information security and political neutrality.

#### **Recommendation 4**

NZSIS, together with the Government Communications Security Bureau and the Department of the Prime Minister and Cabinet, should consider locating a departmental adviser (representing the Intelligence Community) in the Minister's office and/or in the Policy Advisory Group in the Department of the Prime Minister and Cabinet, to be the principal point of liaison between the Intelligence Community and the Minister's office, and should work with the State Services Commission to develop best practice guidelines for those advisers.

#### **Recommendation 5**

The Director should work with the office of the Leader of the Opposition, in consultation with the responsible Minister, to set express expectations for consultation with the Leader of the Opposition. These expectations should include provision for the Leader of the Opposition to have secure access to classified material and for a member of the Leader of the Opposition's staff (with the necessary security clearance) to attend consultation meetings.

**Recommendation 6**

NZSIS should work with the Government Communications Security Bureau, with such assistance as is appropriate from the State Services Commission, the Department of the Prime Minister and Cabinet and others, to develop published guidance on the political neutrality obligations in s 4AA of the New Zealand Security Intelligence Service Act 1969 and s 8D of the Government Communications Security Bureau Act 2003.

*Promoting wider engagement by the New Zealand Intelligence Community***Recommendation 7**

NZSIS, together with the broader Intelligence Community and the State Services Commission, should consider whether, as part of the Intelligence Community's leadership development, increased opportunities can be identified for secondments of Intelligence Community staff into the wider State Services and vice versa, to facilitate a broader understanding of the state services and of the political environment in which state servants carry out their role.

*Apology***Recommendation 8**

NZSIS should provide an apology to the Hon Phil Goff for failing to adequately consult him in relation to Mr Cameron Slater's Official Information Act request; for releasing incomplete, inaccurate and misleading documents relating to the meeting between Mr Goff and the former Director on 14 March 2011 and for failing to recognise and seek to correct the harm that ensued from those errors.

The Director of the NZSIS has accepted all recommendations.

## COMMENCEMENT OF THE INQUIRY

### *The complaint*

1. On 19 August 2014, I received a complaint from Metiria Turei MP, Green Party Co-leader, regarding allegations that NZSIS documents were declassified in order to be used for political purposes. The complaint relied on allegations made in Nicky Hager's book *Dirty Politics*, published on 13 August 2014. Mr Hager had alleged that the NZSIS had acted improperly in releasing information that would not usually have been released in response to an Official Information Act request from Cameron Slater. Ms Turei requested that I investigate the allegations in the book. A copy of the complaint is at [Appendix A](#) to this report.
2. Under section 11(1)(b)(i) of the Inspector-General of Intelligence and Security Act 1996 (IGIS Act) I have jurisdiction to inquire into a complaint by a New Zealand person that that person has or may have been adversely affected by an act, omission, practice, policy, or procedure of an intelligence and security agency. I concluded that the complaint did not, on its face, demonstrate that Ms Turei had been adversely affected by the alleged conduct. However, I was satisfied that there was a sufficient public interest justifying the commencement of an own-motion inquiry into the legality and propriety of the actions raised in Ms Turei's complaint. A copy of my response to Ms Turei is at [Appendix B](#) to this report.

### *Terms of reference*

3. On 20 August 2014, as required by s 19(1)(a) of the IGIS Act, I advised the Director of the NZSIS that I had initiated an inquiry under section 11(1)(a) and (ca) of the Act and that the inquiry would consider whether:
  - the NZSIS acted properly and within the law when it considered and responded to an Official Information Act request from Cameron Slater in July and August 2011;
  - the documents released to Mr Slater were properly declassified;
  - other requests for similar information were treated in a manner consistent with Mr Slater's request; and
  - there is any evidence the NZSIS acted in a manner inconsistent with its obligations of political neutrality.
4. I also published these terms of reference and advised the Prime Minister (as the Minister then in charge of the NZSIS) on 20 August 2014 that the inquiry was being commenced.

### *Jurisdiction*

5. Jurisdiction for the inquiry is contained in s 11 of the IGIS Act. Under s 11(1)(a) I may, of my own motion, inquire into "any matter that relates to the compliance by an intelligence and security agency with the law of New Zealand". Under s 11(1)(ca) I may,

of my own motion, inquire into “the propriety of particular activities of an intelligence and security agency”. The jurisdiction in respect of propriety is qualified by s 11(3), which states that “it shall not be a function of the Inspector-General to inquire into [the propriety of] any action taken by the Minister [in Charge of the New Zealand Security Intelligence Service]”.

6. “Propriety” is not defined in the IGIS Act but s 11 draws a clear and deliberate distinction between “compliance with the law of New Zealand” and “propriety”. If everything that was lawful under the law of New Zealand also was “proper” there would be no need for such a distinction: lawfulness would cover all. Clearly, some actions may be lawful, but still be improper. I have discussed the requirements of propriety in the context of this inquiry at paragraphs 245 to 247.
7. In the course of my inquiry, I considered a submission made by counsel acting for several of the current and former staff of the Prime Minister’s Office (PMO) that the actions of PMO staff in relation to Mr Slater’s OIA request were beyond the jurisdiction of the inquiry, except to the extent that those actions affected or reflected the maintenance, or failure, of political neutrality on the part of the NZSIS.
8. In part the submission relied on s 11(3) of the IGIS Act, noted above. That submission conflated Minister with Minister’s staff and suggested that I could not examine the actions of PMO staff. I do not accept that is a correct interpretation of the provision.
9. Both on the information available to me at the start of this inquiry and, now, after reviewing the totality of the evidence, I conclude that the actions of PMO staff did fall within the issues before this inquiry in three respects.
  - The first relates to the maintenance, or failure to maintain, political neutrality on the part of the NZSIS. The then Deputy Chief of Staff in the PMO, Philip de Joux, was the principal point of liaison between the Prime Minister and the Director of the NZSIS and other NZSIS staff. In that role, he was regularly briefed by the Director and by NZSIS staff and had substantial discussions with them, including discussions that bore on the OIA request and the subsequent release of information. At the same time, in his role as a senior political adviser in the PMO, Mr de Joux was involved in the political management of these events. Information which he received from the NZSIS was used by Jason Ede, a senior adviser within PMO, to assist Mr Slater in making the OIA request. In both of these roles, Mr de Joux’s actions had the potential to affect the maintenance or failure of political neutrality by the NZSIS.
  - The second connection between the actions of PMO staff and the issues before this inquiry relates to the disclosure of NZSIS information through the OIA request. It had been alleged by commentators that the OIA request by Mr Slater was instigated, or materially assisted, by the provision to him of some details of the relevant NZSIS documents prior to their declassification and release. Mr Slater himself had also made the allegation publicly and in evidence before this inquiry that he was contacted by an NZSIS officer directly in relation to this issue. In order to determine whether an NZSIS official had acted unlawfully, improperly and/or for a political purpose, it was necessary to determine whether Mr Slater

had received such details and from whom. Those details were known to only a small number of NZSIS officials and to PMO, such that it was necessary to investigate both.

- Last, release of information by NZSIS extended to the provision of some information to PMO. That was material both because of the potential impact of that information upon political neutrality and because as it transpired, some information provided by NZSIS to PMO was also inaccurate.

10. All three points raised questions of whether NZSIS had acted consistently with its duty of political neutrality.

#### *Procedure*

11. I issued summonses under s 23 of the IGIS Act to 22 individuals, requiring them to appear and answer questions under oath or affirmation. A list of witnesses is at Appendix C to this report and a copy of the form of the summons is at Appendix D. I also issued summonses requiring production of documents, including telephone and email records of specified individuals.

12. On 20 August 2014, I wrote to NZSIS Director Rebecca Kitteridge requiring her to produce the following:

- Copies of all requests for information received between 19 July and 8 August 2011 (inclusive) by any person, including news media and private citizens, in respect of NZSIS briefings to Mr Goff about Israelis in Christchurch, whether formally conveyed as requests under the Official Information Act or otherwise;
- All internal NZSIS correspondence (including emails, notes of phone conversations, records of any meeting, general guidance for responding to media enquiries) in respect of those requests;
- The response by NZSIS to those requests;
- All correspondence between NZSIS and Cameron Slater and/or the Office of the Prime Minister between 19 July and 8 August (inclusive) in respect of those requests;
- All internal policies and procedures applicable to the “declassification” of documents at that time, and any evidence of their application to the documents released to Mr Slater; and
- Dates of and notes from any oral briefings provided to the Prime Minister (or Prime Minister’s Office) between 19 July and 8 August 2011 (inclusive) on the subject of Mr Goff’s March 2011 meeting with the NZSIS Director, including a list of all persons present for any briefing.

13. The NZSIS routinely recorded all incoming and outgoing telephone calls for security purposes and sometimes transcribed those calls. My inquiry benefited from the production of relevant transcripts which had been prepared in 2011. A practice of

routine recording is not unusual, but I recognise that in this context the recording and transcription of telephone calls involving the Prime Minister's Office and Leader of the Opposition may raise questions. It was not within the parameters of my inquiry to investigate whether there were appropriate policies, safeguards and notifications in place to regulate the process, but I will discuss that question with the Director separately from this inquiry.

14. Following the initial production of documents, my staff worked with the current Director to refine and expand search parameters to include detailed searches of emails and phone records in respect of particular staff involved, and included correspondence through to the end of December 2011. As Mr Slater made allegations that NZSIS staff had contacted him directly about the issue, searches were conducted of phone records of staff with knowledge of and access to particular information pertinent to this inquiry. My staff also retrieved and reviewed further paper files.
15. I also made a production order to the Chief Executive of the Department of Internal Affairs (DIA). DIA provided the information technology and telephone systems for the Prime Minister's Office during the relevant period. I required the Chief Executive to produce all relevant emails, electronic documents, and telephone logs for the staff in the Prime Minister's Office. This order was executed in consultation with the Speaker, the Parliamentary Service, and the Office of the Clerk, and with notification provided to the Prime Minister, in accordance with the protocol set out in the Privileges Committee report on *Questions of privilege regarding use of intrusive powers within the parliamentary precinct*.
16. Witnesses appearing before this inquiry also produced documents. Documents were provided voluntarily by Mr Hager and Mr Slater. I issued a production order to Mr Ede in respect of his personal email accounts after it became apparent from evidence, including evidence provided directly by Mr Ede, that some of the correspondence pertinent to this inquiry was conducted from non-official email accounts. Upon receipt of the production order, Mr Ede provided a supplementary written statement to the inquiry in which he advised that the emails had been permanently deleted prior to the commencement of the inquiry and could not be recovered. I made my own enquiries and confirmed this was the case. Mr Slater was, however, able to provide the inquiry with some of the relevant correspondence. I also issued production orders to telecommunications providers in respect of particular phone records.
17. The inquiry benefited from a full and substantial documentary record. However, I was concerned to discover the use of personal email and telephone accounts by Mr Ede for some of his PMO work and indications that he did so in order to avoid any public record. Whether or not it is in general permissible for political advisers such as Mr Ede to adopt such practices, I observe that:
  - The use of personal accounts meant that some records of Mr Ede's actions in relation to NZSIS information were not readily available, as noted above. It was possible to reconstruct those actions, including through other records and through Mr Ede's own evidence, but had others adopted similar practices, my

inquiry would have required far more extensive investigations and could even have been denied material information.

- The use of such personal accounts in relation to NZSIS information poses significant risks for information security. While the information dealt with by Mr Ede was not classified security information, there would have been serious consequences had it been. I have made a recommendation in this report that staff in Mr Ede's position should in future receive express guidance in relation to security information and related matters, and this should include information on the use of unofficial means of communication.

18. Each witness (and legal counsel, where the witness was represented) was subject to a Confidentiality Order which required that the witness and counsel not disclose the content of the examination before the Inspector-General until further notice from me. I decided such an order was necessary to ensure that the inquiry was conducted with fairness and integrity, that the privacy of witnesses was not compromised and to give effect to the requirements of privacy and non-disclosure under ss 19(6) and 29 of the IGIS Act. A copy of the Confidentiality Order is at Appendix E to this report. Those witnesses and counsel who were required to sight classified documents during the course of the examination and who did not have the requisite security clearance were also required to sign a Deed of Emergency Access to Classified Material.
19. All witness interviews were conducted under oath or affirmation by me, the Deputy Inspector-General Ben Keith and a Senior Investigating Officer in my office.
20. I provided the Director with a draft report and offered her the opportunity to make submissions to me about matters of which I was likely to be expressly or impliedly critical and to comment on my draft report and recommendations, in accordance with s 19(7) of the IGIS Act. I have taken the Director's comments into account in finalising this report.
21. I also provided witnesses who might be adversely affected by the report with a copy of the draft report and offered each of them the opportunity to correct matters of fact and make any comment, in accordance with s 19(7) of the IGIS Act. I have taken those comments into account in finalising this report. As a result of that process, I also took further evidence.



## *Chronology, March-August 2011*

This chronology is drawn from the evidence and documents presented to the inquiry.

<b>Tues 8 March</b>	NZSIS prepares initial Security Intelligence Report (SIR) on Israeli issue  Director's meeting with Prime Minister; SIR included in Director's agenda.
<b>Mon 14 March</b>	Director's meeting with Leader of the Opposition; SIR included in Director's agenda.
<b>Wed 20 July</b>	<i>Southland Times</i> article alleging Israeli intelligence activity following the Christchurch earthquake.  Prime Minister initially refuses any media comment, then states that NZSIS had thoroughly investigated and found no evidence of intelligence activity.  Leader of the Opposition makes media statement criticising government handling of the Israeli issue and comments that he had not been briefed on the investigation.
<b>Fri 22 July</b>	Prime Minister's Office (PMO) query to NZSIS whether Leader of the Opposition briefed; NZSIS advises that Director's records show SIR on March meeting agenda.  Director advises Prime Minister directly that Leader of the Opposition received the same briefing that he had had.
<b>Sun 24 July</b>	Prime Minister makes media comment that Leader of the Opposition received the same briefing; Leader of the Opposition contacts Director seeking clarification.
<b>Mon 25 July</b>	First requests for information/comment on Leader of the Opposition briefing made to NZSIS (Felix Marwick (Newstalk ZB) and Jessica Mutch (TVNZ)); all media requests declined until 5 August.  Director's meeting with Leader of the Opposition, followed by Leader of the Opposition press conference at which he states that he accepts the Director's assurance that the Israeli issue was raised in passing but did not see or read the SIR.  PMO discusses Leader of the Opposition statements with Director; Director states that he gave the Leader of the Opposition the SIR and spoke briefly to it.  PMO staff member gives details of NZSIS briefing record to Cameron Slater.
<b>Tues 26 July</b>	Cameron Slater OIA request received by NZSIS; Director decides to release copies of his meeting agendas and the SIR; NZSIS prepares response and redacts the documents.
<b>Wed 27 July</b>	Director discusses response with PMO and with Leader of the Opposition.  Leader of the Opposition requests copies of proposed response and, when declined, requests time to seek advice; Director agrees to a few days delay. Leader of the Opposition later makes his own urgent OIA request for the same information.

<b>Mon 1 August</b>	OIA response sent to Leader of the Opposition and PMO.
<b>Tue 2 August</b>	OIA response sent to Mr Slater.
<b>Thu 4 August</b>	<p>Mr Slater receives OIA response and releases it in a series of blog posts and in conjunction with TV3 news.</p> <p>Leader of the Opposition media comment that Director's briefing record, as released, mistaken and wrong.</p> <p>PMO seeks comment from NZSIS/Director; Prime Minister and Deputy Prime Minister make media comments defending the Director's integrity.</p>
<b>Fri 5 August</b>	NZSIS begins responding to media requests for information.

The inquiry scrutinised these events with three broad questions in mind:

- Was there a breach of the Official Information Act by the NZSIS?
- Was there a breach of the obligation to be politically neutral by the NZSIS?
- Even if neutral, were the actions of the NZSIS improper?

Some events were relevant to more than one of these questions and are therefore examined in several parts of the report.

## THE OFFICIAL INFORMATION ACT REQUESTS

### *Issues arising under the Official Information Act*

22. This inquiry encompasses two decisions made by the NZSIS under the Official Information Act 1982 (OIA):
- The request made by Cameron Slater on 26 July 2011 for certain records of any briefing given by the Director to the Leader of the Opposition on the Israeli investigation in March 2011, and the release to Mr Slater of three heavily redacted documents; and
  - The decision by NZSIS to decline numerous news media requests, made from 25 July onwards, for various information related to any such briefing. Some information was provided to news media from 5 August onwards.

### *Information provided by NZSIS on consultation with the Leader of the Opposition*

23. As part of the provision for political neutrality in s 4AA of the NZSIS Act, the Director of the NZSIS is required under s 4AA(3) to consult with the Leader of the Opposition for the purpose of keeping him or her informed on matters of national security. I have discussed the function of that requirement as a means of safeguarding political neutrality and its practical implications for the Director in the next section.
24. Here, the release of information by NZSIS concerning whether and how the then Director, Dr Tucker, did consult with the then Leader of the Opposition, Mr Goff, arose in response to the 20 July 2011 *Southland Times* article concerning an NZSIS investigation of suspicious activity by Israeli nationals in Christchurch following the 8 February 2011 earthquake. In response to the article, the Prime Minister had (as Minister responsible for the NZSIS) initially declined to comment, citing national security concerns. Later that day he provided substantive comments in which he stated that there had been a thorough security intelligence investigation of that suspicious activity and that no evidence of intelligence activity had been found.
25. In response to the Prime Minister's statements, Mr Goff made a number of public statements, such as in the following interview:<sup>1</sup>

PG [The Prime Minister initially said] that he wouldn't comment and it wasn't in the national interest to do so. What people understandably took from that was [that] he didn't want to comment on it, because obviously there was substance to the allegations and it was an intelligence matter. Now he has a totally different story, 12 hours later, saying it has been fully investigated and no evidence. God knows why he didn't say that at the start of the day, and by not saying that at the start of the day, many people will still feel "are we even now being told the truth?" It has been badly handled.

Q Another claim - that the investigations are ongoing. If the SIS is still investigating this matter, would you as Leader of the Opposition and being on the committee that oversees the SIS expect to be told?

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<sup>1</sup> Interview by Mary Wilson, Radio New Zealand, 20 July 2011; accessible at <http://www.radionz.co.nz>.

PG I would, actually. I get briefed, regularly, by the Security Intelligence Service and sit on the Committee that oversees the Security Intelligence Service. We maintain confidentiality around those briefings, but we do so on the basis that the Government will be quite full and frank with us, and we will maintain confidentiality where that is required in the national interest. This hasn't come before the select committee. It's not been part of any briefing to me.

26. Mr Goff's statements concerning whether the Director had consulted with him led to requests for information by the Prime Minister to the NZSIS Director on 22 July, by PMO from 22 July onwards and by requesters under the Official Information Act from 25 July.
27. The NZSIS responded to these requests for information as follows:

<b>Date</b>	<b>Source and recipient</b>	<b>Summary of information provided/disclosed</b>
<b>22 July</b>	DDROC <sup>2</sup> to PMO	Advice that NZSIS had a document that recorded the Leader of the Opposition (LO) having been briefed in their 14 March meeting
	Director to PM	Advice that LO "received the same briefing" as PM
<b>25 July</b>	Director to PMO	Advice that NZSIS had a document that recorded the LO having been briefed in their 14 March meeting
	Director to PMO	Advice that: <ul style="list-style-type: none"> <li>- LO had been given an NZSIS report ("the 8 March SIR") and had held it while the Director spoke to it at the 14 March meeting; and</li> <li>- The LO had made incorrect statements in his media conference earlier that day.</li> </ul>
<b>25 July – 4 August</b>	NZSIS to media	Requests for information refused / no comment provided
<b>27 July</b>	Director to PMO	Advice that: <ul style="list-style-type: none"> <li>- The NZSIS held, and would shortly release, a document recording that the 8 March SIR had been "read by/discussed with" LO; and</li> <li>- The document would show the LO to "have credibility problems".</li> </ul>
<b>1 August</b>	NZSIS to PMO	Copy of OIA release: <ul style="list-style-type: none"> <li>- Annotated/redacted copy of 8 March SIR;</li> <li>- Two redacted agenda documents; and</li> <li>- Accompanying letter from the Director.</li> </ul>
<b>2 August</b>	NZSIS to Mr Slater	OIA release (as above) sent to Mr Slater and

<sup>2</sup> Deputy-Director - Relationships, Outputs and Communications, NZSIS.

<b>4 August</b>	Director/NZSIS to PMO	received 4 August Advice that the LO's public statements that "read by/discussed with" document wrong/mistaken were false and amounted to an attack on the Director's integrity
<b>5 August</b>	NZSIS to various media/others	OIA releases (as above) to other requesters

28. The disclosures under the Official Information Act are discussed in this section. The other responses, parts of which became public through ministerial comment and also when provided by Mr Ede to Mr Slater, are discussed in the following section.

#### *The statutory framework*

29. The NZSIS is an "organisation" subject to the OIA.<sup>3</sup> Several aspects of that Act are material here.

30. Decisions to release information are governed by the principle of availability set out in section 5 of the Act:

The question whether any official information is to be made available ... shall be determined ... in accordance with the purposes of this Act and the principle that the information shall be made available *unless there is good reason for withholding it*. (emphasis added)

31. The OIA encompasses all information held by NZSIS and is not limited to written documents.
32. Every department, Minister of the Crown and organisation has a duty to give reasonable assistance to a person who wishes to make a request under s 12,<sup>4</sup> or to a person who is making a request under s 12 but has not made it in accordance with that section.<sup>5</sup> A request for information, including a request from news media, that is not specifically framed in terms of the OIA, shall nevertheless be treated as an OIA request. The key test is whether there is a request for information.<sup>6</sup>
33. Sections 6 and 9 of the OIA set out reasons to withhold information. Section 6 provides for non-disclosure of information on grounds that include national security; section 9 provides for presumptive non-disclosure on various grounds, including maintenance of political neutrality of officials, the confidentiality of officials' advice and the maintenance of the effective conduct of public affairs through the free and frank expressions of opinions.
34. There is a duty to make a decision on a request, and communicate that decision to the requester, as soon as reasonably practicable and in any event no later than 20 working

<sup>3</sup> Section 2 and Schedule 1, Official Information Act 1982.

<sup>4</sup> Section 13(a), Official Information Act 1982.

<sup>5</sup> Section 13(b), Official Information Act 1982.

<sup>6</sup> "How the official information legislation works", Office of the Ombudsman, 26 October 2012 ([www.ombudsman.parliament.nz/resources-and-publications/guides/official-information](http://www.ombudsman.parliament.nz/resources-and-publications/guides/official-information)).

days after the date on which the request is received.<sup>7</sup> If the decision is to release information, the information must be provided to the requester without undue delay.

35. Once it is decided that some or all of the information requested should be released, there are a number of different ways in which the agency can make the information available, ranging from release of the information in its entirety to, for example, partial disclosure with an accompanying contextual statement. The Ombudsmen provide guidance on this question.<sup>8</sup>
36. Where information requested under the OIA concerns the actions of a named individual it is good practice to consult that individual to ascertain any relevant view on whether and in what terms to release that information. While the practice of consultation is strongest where there is, for instance, a privacy or commercial interest, it is also usual practice for a department or agency answering an OIA request that encompasses information relating to another department or agency to consult that department or agency. That practice serves to ensure that the agency answering the request makes a fully informed decision as to both the content of the information and any relevant considerations in favour of release or withholding any part of the information.

*NZSIS practice for handling official information requests*

37. During the relevant period, OIA requests were dealt with by two distinct sections of the NZSIS:
  - Requests for information identified as coming from the news media were usually received by NZSIS communications staff, who reported to the Deputy Director, Outputs, Relationships and Communications (DDROC). The communications staff also administered a general inquiries email address, but forwarded on any non-media request received by email.
  - Non-media requests for the release of information were dealt with by the NZSIS OIA/Archives Officer, who reported to the Deputy Director, Resources and Capability (DDRC).
38. It was explained by several NZSIS staff in evidence that the handling of media queries by the communications staff was intended to enable the provision of a rapid reply, where possible, while the separate non-media OIA process was more deliberate but also slower.
39. NZSIS had instituted a standard and documented procedure for OIA requests, based on an “action sheet” signed off by the relevant managers, with the decision and the substantive response ultimately approved by the Director.
40. It is important to note that although the NZSIS was and is subject to the Official Information Act, it operates in a covert environment which necessarily impacts on what information can properly be released. At this time the NZSIS was in a state of evolution as Dr Tucker sought to move from a culture of “no comment” to a more open and

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<sup>7</sup> Section 15(1), Official Information Act 1982.

<sup>8</sup> “How the official information legislation works”, Office of the Ombudsman, 26 October 2012, pp 10 and 11.

transparent approach and greater public engagement. The tensions caused by that evolution are reflected in these events.

*News media requests for information concerning the Israeli briefing issue*

41. The question of whether the Leader of the Opposition had received a briefing on the Israeli investigation was first raised by Mr Goff's statement on 20 July that he had not been briefed. That statement was then contradicted by the Prime Minister in a television interview broadcast on 24 July, in which the Prime Minister said that the Director had told him the Leader of the Opposition had received the same briefing that he, the Prime Minister, had received.
42. From the morning of 25 July onwards, the NZSIS received many news media enquiries on this point. While many enquiries were requests for interviews or comment, some were requests for specific information:

**From:** Jessica Mutch  
**Sent:** Monday, 25 July 2011 8:57 a.m.  
**To:** [Enquires@nzsis.govt.nz](mailto:Enquires@nzsis.govt.nz)  
**Subject:** TVNZ enquiry

Good morning.

I want to confirm whether Phil Goff was briefed on the investigation into Israeli nationals in Christchurch? From The Dominion Post article I understand Warren Tucker gave the briefing.

What date was the briefing?  
- What was the nature of that briefing? (was it a report, verbal briefing etc)

I understand the sensitivity of the issue and am not asking for any details about the content of the briefing, just whether it took place.

**From:** Felix Marwick  
**Sent:** 25 July 2011 9:01 a.m.  
**To:** enquiries  
**Subject:** Goff briefing

To whom it may concern,

I would very much appreciate your help in clearing up apparent conflicting stories around a briefing for the Leader of the opposition regarding suspected Israeli activities in Christchurch following the earthquake of February 22nd.

Labour Leader Phil Goff has told us on two separate occasions that he has never been briefed about the incident. However Prime Minister John Key tells us that Mr Goff did in fact receive a briefing.

I would be most grateful if the SIS could tell me if in fact Mr Goff was briefed, when it happened, and what form the briefing took (i.e. verbal, via phone, via document etc).

Thank you for your assistance

43. The Mutch and Marwick requests were both received by the Assistant Communications Advisor. He immediately referred both requests to Dr Tucker's office at 09:08 on 25 July. The Head of the Director's Office (HDO) responded at 09:14 "Warren will not be saying anything (his words)." The Assistant Communications Advisor conveyed a "no comment" response to both requestors.
44. Following Mr Goff's meeting with Dr Tucker on the morning of 25 July and his subsequent press conference, at which he set out what he said that Dr Tucker had said at that meeting (see paragraphs 73 and 89) specific requests were received for confirmation of that detail. These were again referred to Dr Tucker and declined by him.

45. Further requests were received from news media over the next eleven days, and all were met with a “no comment” response.
46. Both Mr Marwick and Television New Zealand (on behalf of Ms Mutch) later queried the treatment of their requests. The NZSIS sought to explain the distinction between media enquiries and OIA requests and also noted that the requestors had not referred to the OIA or “official information” in their requests. Mr Marwick also complained to the Ombudsman and the then Inspector-General in relation to the matter. It was found the NZSIS had not properly treated his inquiry as a request under the OIA because of the separate procedures for media and OIA queries. The NZSIS accepted that its approach was incorrect. The wider scope of this inquiry allowed me to take this point further.
47. While I accept there was an institutional weakness and that was a contributory factor, in this specific case it does not provide a satisfactory explanation for differential treatment. The request by Mr Slater was sent to the same email address (enquiries@nzsis.govt.nz) as the media enquiries. All of these queries were referred to the Director’s office and all were also known to the DDROC and/or his staff. It is clear Dr Tucker and the DDROC in particular had knowledge of both Mr Slater’s request and the media enquiries, but the anomaly created by declining media enquiries while providing information to Mr Slater did not occur to them.
48. The inconsistency in approach led, shortly after the release of documents to Mr Slater, to inferences of political partisanship. I have seen no evidence to support this, and accept it was a result of poor judgement and process, inadequate resources, and lack of political awareness.
49. I have also found that the inconsistency on the part of the NZSIS caused material disadvantage. Two journalists who had made substantively similar requests to that made by Mr Slater, but the day before, were effectively denied a fair opportunity to advance the same news story.
50. I took evidence from both journalists:
- Mr Marwick explained that while he understood that often the NZSIS would not be able to provide information, he did expect to be treated fairly and that the NZSIS had failed to do so.
  - Ms Mutch said all media expect is to be treated “fairly and equally” but that did not occur.

*Receipt of Mr Slater’s OIA request*

51. Mr Slater’s OIA request was received by the NZSIS public enquiries email address at 10:12am on Tuesday 26 July 2011. Because Mr Slater was not obviously a member of the news media, the request was referred to the OIA Officer. As with all queries at that time related to the Israeli issue, a copy of the request was also forwarded to the Director’s office.
52. The request was then dealt with by both the OIA Officer and the Director himself. The OIA Officer advised the Assistant Communications Advisor to send Mr Slater a standard



acknowledgement saying that the Service anticipated responding to the request within the statutory 20 working day timeframe. He then started a standard OIA action sheet and, after considering the request, drafted a response declining it on the basis of protection of confidentiality of advice tendered by officials (s 9(2)(f)(iv) OIA) and prejudice to the security of New Zealand (s 6(a) OIA).

53. The OIA Officer also explained in evidence that, to his knowledge, there was no precedent for releasing briefing material provided to the Prime Minister or the Leader of the Opposition. He noted by analogy that, in the past, post-election OIA requests for the NZSIS Briefing to Incoming Minister (BIM) had been refused, and so he felt that the information should be withheld on the confidentiality and security grounds. The request, action sheet and draft response were then sent to the NZSIS legal staff.
54. At the same time, the Director had himself considered the request and believes that he had discussed it briefly with the NZSIS General Counsel (DGC) and/or the DDRC. The Assistant Communications Advisor then indicated that “Dr Tucker’s thoughts [were] that [NZSIS] might release the information.” The Director annotated a printed copy of Mr Slater’s request and forwarded it to the DDRC and the DGC for their consideration and action, leading to the preparation of a response releasing the three redacted documents, as described below. The Director also had a copy of the request sent to Mr de Joux.

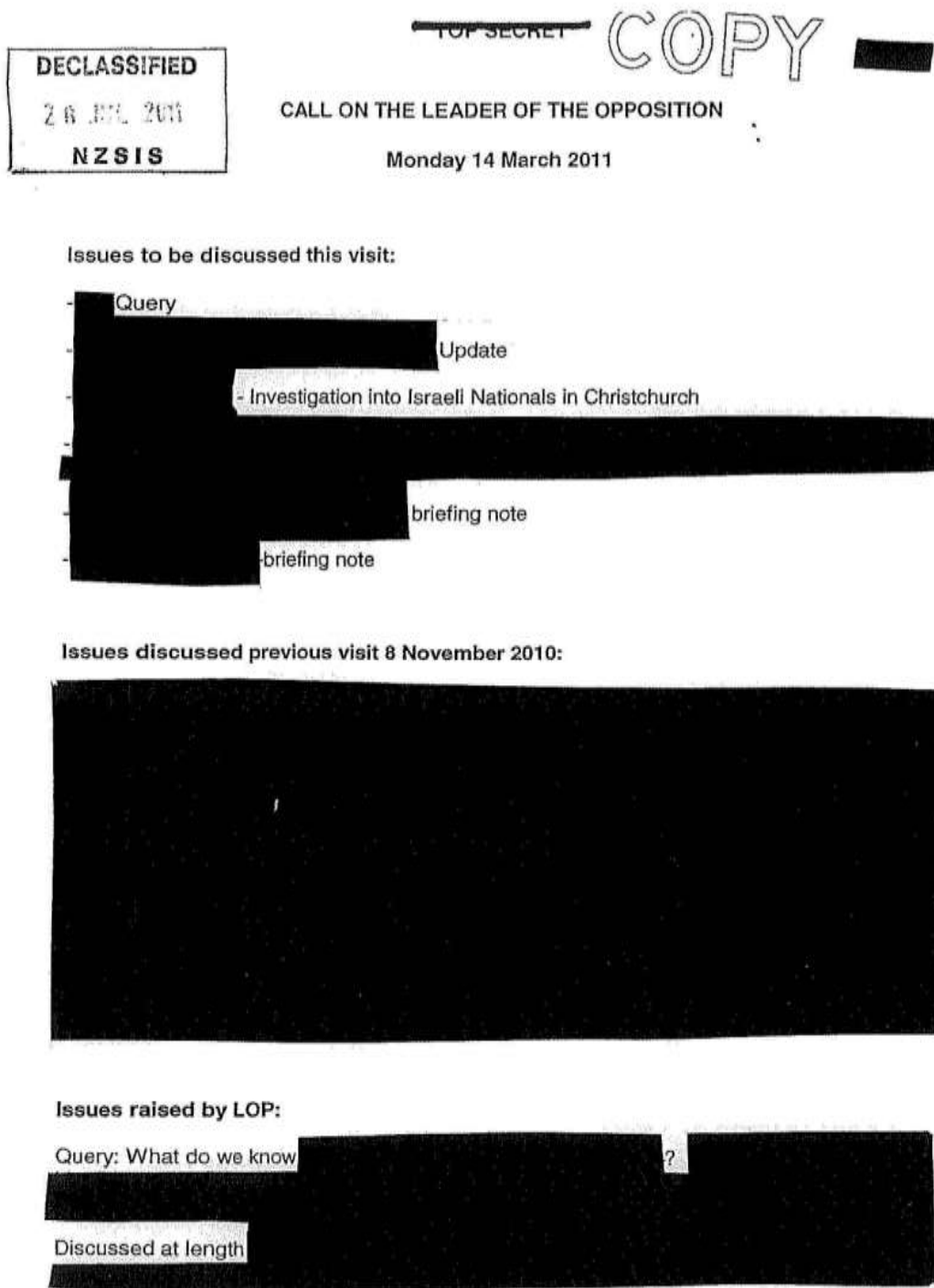
#### *Coordination of issues*

55. At no point did the Director assign responsibility for management of all the issues raised, including responses to the OIA requests and media enquiries and media monitoring. No one person assumed responsibility for that management. Given this was a high profile and politically sensitive issue I would have expected a coordinated approach of this kind.

*Was the information disclosed under the OIA inaccurate, incomplete and/or misleading?*

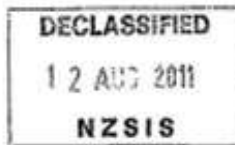
*Redaction of agenda notes*

56. The Director's 14 March agenda note was disclosed in redacted form. The redacted document was as follows:



57. The Director's accompanying letter explained that information had been withheld both for reasons of national security and where not relevant to the request. However, only one line of the agenda document related to the Israeli issue. The agenda note was not correctly redacted for relevance. Had it been, it would have resembled the agenda note

later released from the Director's meeting with the Prime Minister, which also had listed the Israeli issue:

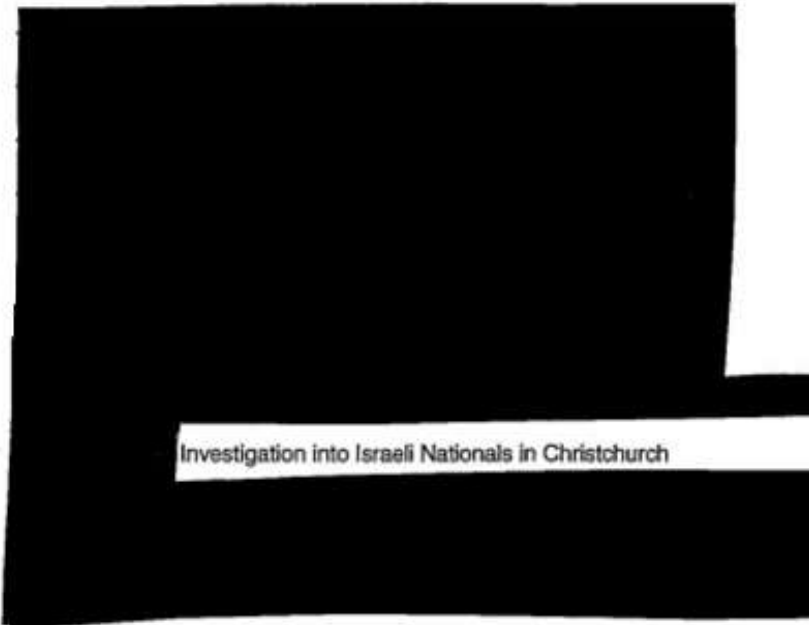


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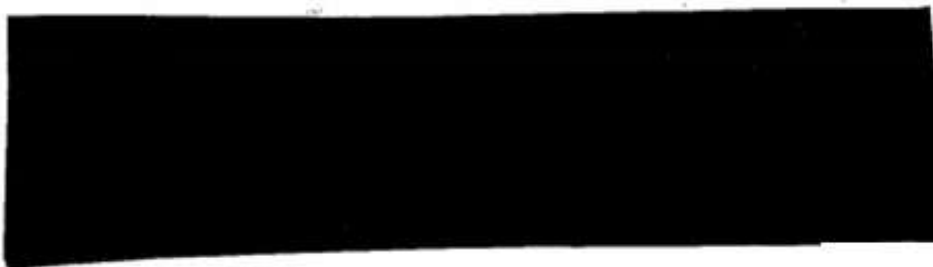
D's CALL ON THE PRIME MINISTER

Tuesday 8 March 2011

Issues to be discussed this visit:



Issues discussed on previous visit: 22 February 2011



Issues raised by the Prime Minister this visit:

58. The then DGC explained to me that the irrelevant words had been retained to show the overall shape of the 14 March meeting – that is, that other issues were discussed. However, the agenda note as redacted did not adequately meet that purpose either. Other words, which would have shown the shape of the meeting and that were not of security concern, were still redacted. That can be seen in this fuller but still redacted version, prepared solely for the purpose of this inquiry:



*Lack of necessary context for agenda notes*

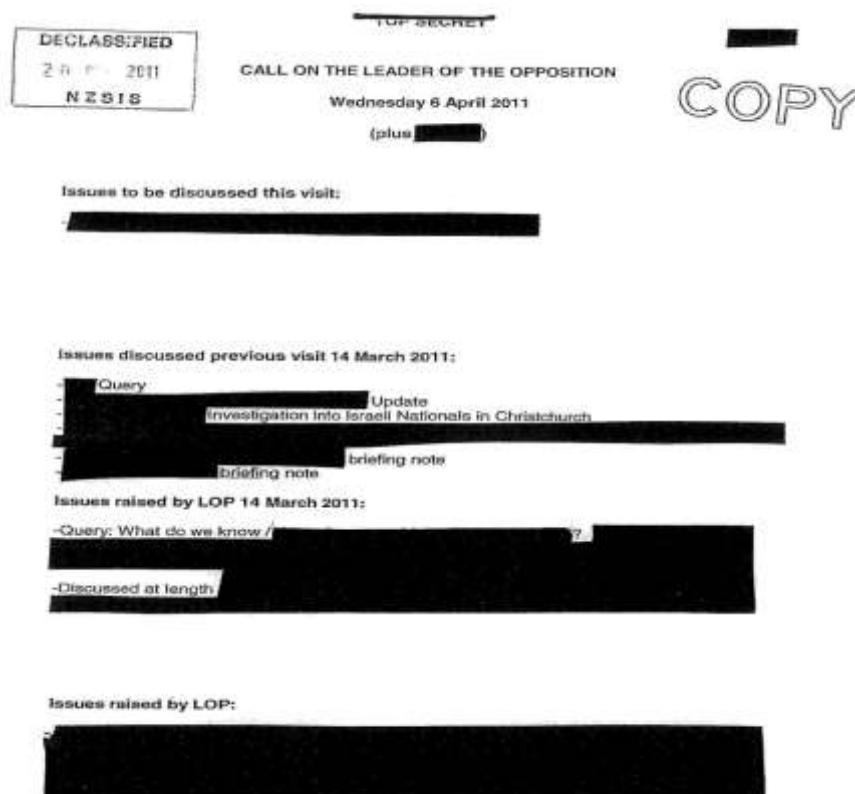
62. The March and April agenda notes also lacked the explanations necessary to understand their nature and purpose:

- The agenda notes were not, as they would appear, an agenda in the conventional sense of a document provided, possibly in advance, to all participants. Instead, the notes were a form of record used by the Director during and after such meetings and were not shown at any point to the Leader of the Opposition.
- It was not explained that these agenda notes were not, in contrast to the practice at the time for meetings with the Prime Minister, ticked off and countersigned at the meeting. The Prime Minister himself was evidently not aware of that difference, as illustrated by his own comment on the point at the time of this controversy:<sup>9</sup>

“[Dr Tucker] is meticulous in the way he operates. He always runs an agenda and ticks it off in front of you. I have to sign the documentation when it’s finished.”

Instead, the Director made short notations on individual briefing documents only after the meeting, in this instance the following day: see, further, paragraph 68 below.

- Similarly, the list of “[i]ssues discussed previous visit”, as here in the 6 April agenda note:



<sup>9</sup> See, for example, Dominion Post, 6 August 2011.

was not a form of summary record of that discussion. Instead, such listing occurred by default, with the list of issues for discussion from the previous meeting simply transposed to the next meeting's agenda note, whether or not a given issue had in fact been discussed.

63. Two points arise from the lack of explanation of the content:

- The first is that the form of the agenda notes was open to misinterpretation. The notes could reasonably be understood, and were understood by the press<sup>10</sup> and also by the Prime Minister,<sup>11</sup> as a record that the issue had been discussed and as indicating that the record was prepared in the presence of the Leader of the Opposition. Neither of these points was correct.
- Second, even leaving aside how the documents could be and were understood, it was necessary to explain that the disclosed agenda documents did not correspond directly to the categories of document sought in Mr Slater's OIA request. The agenda notes were not a "briefing [note] and/or [document] given and/or shown to The Leader of the Opposition", a "diary [note]" or an "acknowledgement by the Leader of the Opposition". Because of the terms of the request and the lack of explanation the documents were susceptible to misunderstanding.

#### *Annotated SIR*

64. The third document released in response to OIA requests was a copy of the 8 March SIR paper, with Dr Tucker's handwritten annotation "Read by/discussed with Mr Goff".



65. As outlined more fully in the following chapter, this annotation became the focus of the public controversy involving Mr Goff and Dr Tucker:

- Mr Goff had, following his 25 July meeting with Dr Tucker, said to news media that while he did not doubt Dr Tucker's assurance that he had "flicked" the Israeli issue past him, he not read or seen the document:

<sup>10</sup> See below at paragraph 234.

<sup>11</sup> See above at paragraph 62.

Q: [W]ere you briefed about the Israeli nationals issue?

PG: No, not as such. It was alleged by Mr Key that I had received a document. I called Mr Tucker in this morning to raise questions about that. He showed me a document which I had never seen before. There [were] three documents that have been produced by the intelligence service. I haven't seen any one of those three.

[Dr Tucker] said that he had flicked the issue past me and mentioned it in passing but there wasn't much to it. I don't recall that comment but I am not questioning his integrity in saying that. But there was no briefing per se.

... I don't recall at all seeing the document. I asked to see the document today. I saw it. I have no recollection of seeing it. Three documents were produced. Two ... never came near my office. One the Director may have had with him but I did not see it at the time, no. ...

Q: Mr Tucker obviously briefed the Prime Minister and told him that you had been briefed on this issue. Was he simply mistaken in your opinion?

PG: He said that he hadn't briefed the Prime Minister personally, his office had briefed the Prime Minister. We agreed that I had not seen the document. He said that he had flicked the issue past me in the midst of other issues, saying that he had not dwelt on it and that there was probably nothing to it. I don't even recall those comments but I'm not questioning Mr Tucker's integrity in saying what he did. ...

... The briefing contained probably about a dozen items. We focused on two of them. Mr Tucker cannot say for certain that I saw the document. I can most certainly say for sure that I didn't. And he said, as I said before, he flicked the issue past me, saying that there was probably no substance and didn't dwell on it.

- Dr Tucker recognised, prior to its release, that the annotation contradicted Mr Goff's public statement and advised PMO of that contradiction: see paragraph 193 below;
- Once the documents were publicly released, Mr Goff made press statements in which he said that the annotation was wrong and mistaken:

"The head of the SIS, Warren Tucker, has released a note under the Official Information Act ... that has a notation on it showing he believes he showed me a document relating to the investigation during one of our regular meetings.

I was not shown the document. I never read that document. Warren Tucker is wrong. He may have brought the document to the meeting but he never showed it to me. Mr Tucker acknowledges that I was never briefed on or shown two other documents the SIS compiled on the issue ...

He has since shown me the first document and I know I have never seen it before. ...

I was never 'briefed' by the SIS. When asked to explain, Warren Tucker says he 'flicked' over the issue during a regular meeting with me but 'didn't dwell on it'. He says he probably suggested to me that it was not significant. That is not a briefing or a discussion. ...

I will not stand by and have my credibility questioned over this issue.”

- In response to those press statements, Dr Tucker asked PMO to emphasise his integrity, suggesting that Mr Goff’s comment on the annotation had impugned Dr Tucker’s honesty: see paragraphs 200 and 207 below.

66. Mr Goff’s evidence to this inquiry was that:

- He was emphatic that he did not ever read or even register the 8 March SIR. He commented that he was quite certain that, other than being shown the document by the Director at their 25 July meeting, he had never seen it;
- He accepted, however, that it was possible that Dr Tucker had mentioned the SIR in passing and may have handed the SIR to him or put it on a table in front of him; and
- Mr Goff also commented that he was quite sure that he would have recalled the document, given his extensive involvement as Minister of Foreign Affairs with other allegations of Israeli intelligence activity in 2004-2005, involving the conviction of Israeli nationals for passport fraud, an incident which led to the suspension of high level diplomatic relations and eventually to an Israeli government apology.<sup>12</sup> Mr Goff considered that, had there been any substance to the 2011 allegations, that would have been particularly serious as it would have undermined the earlier apology.

67. Dr Tucker stated to the inquiry that:

- He sincerely believed, and continues to believe, that Mr Goff read the front page summary of the 8 March SIR. In particular, he believed that he had seen Mr Goff’s eyes “move over” the front page of the SIR;
- However, he accepted that Mr Goff could at the most have read only the first page;
- Dr Tucker explained in evidence, and I accept, that the words “Read by/discussed with” were his own private notation or *aide memoire* and meant simply that he had provided the document and spoken to it. He accepted that the words “shown to” would have been more accurate than “read by”;
- He recalled that Mr Goff did continue speaking on another topic at the same time that Dr Tucker raised the SIR, but he attributed that to Mr Goff “multi-tracking”; and
- He explained that the words “discussed with” meant that he had spoken briefly to the key points in the summary and did not mean that Mr Goff had made any comment, asked any question or otherwise reacted to the document.

68. The relevant file and other information concerning the meeting indicated that:

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<sup>12</sup> See, for example, F O’Sullivan “Passport to a World of Trouble” *New Zealand Herald*, 21 September 2004, A16-A17.



- Six written documents, totalling approximately thirty pages, were prepared for discussion at the 14 March meeting, alongside other issues;
  - Those two other issues occupied approximately three-quarters of the 14 March meeting, leaving approximately 7-8 minutes to discuss the six documents; and
  - Of the six, two were subsequently annotated by Dr Tucker as having been “noted” and the other four “read by/discussed with Mr Goff”.
69. As reflected by the emphatic evidence from Mr Goff and Dr Tucker and as also reflected in the conflicting statements summarised at paragraph 65 above, the question of whether the words “Read by/discussed with” were accurate was, and remains, central to the controversy that surrounded these events. At this remove, however, it may not be possible to resolve the apparent dispute between the two witnesses and it is not necessary to do so.
70. Leaving aside the narrow point that the two accounts are not necessarily in conflict – Mr Goff may well not have read the SIR notwithstanding Dr Tucker’s sincere belief, while that belief could be sincere, even if mistaken – this inquiry is concerned with the compliance by Dr Tucker and the NZSIS with obligations under the Official Information Act and under s 4AA of the NZSIS Act. In that regard, it is undisputed that:
- Dr Tucker made the written annotation “read by” meaning only “shown to” and, even then, only the first page;
  - There were, notwithstanding Dr Tucker’s sincere belief that Mr Goff had in fact read the SIR, objective indicia that he might well not have done so: see paragraph 67 above, as well as Mr Goff’s unequivocal statements that he had not read the document, made both to Dr Tucker and in a public statement immediately after their 25 July meeting. Mr Goff was also known to Dr Tucker as a senior politician with significant prior experience in intelligence matters;
  - Dr Tucker made the written annotation “discussed with” meaning only that he had spoken briefly to the summary points, not that there had been any discussion between himself and Mr Goff; and
  - Dr Tucker was aware that the annotation contradicted Mr Goff’s public remarks made following their meeting and that its release would undermine Mr Goff’s credibility.
71. The result was that the annotation, as released to PMO and publicly, was incorrect. While Dr Tucker stated that he had explained to PMO that he had shown Mr Goff the front page summary while speaking briefly to it, that explanation did not cover all of these necessary corrections and qualifications. That explanation does not in any case appear to have registered with PMO and was not provided to the public as part of the OIA release.

*Non-disclosure of 25 July meeting note and Dr Tucker's annotation on it*

72. By the time of the Slater OIA request and the preparation of a response, Dr Tucker also had a copy of a handwritten note prepared by Mr Goff at the conclusion of their meeting on 25 July, which Dr Tucker had subsequently annotated as "our agreed position". The note and annotation were also recorded in Dr Tucker's typed agenda note from the 25 July meeting. The meeting itself is discussed in the following section at paragraphs 161 - 167.
73. The handwritten note is reproduced here and transcribed below:<sup>13</sup>



Note made by  
Mr Goff during our  
meeting on 25 July  
This is our agreed  
position. Lc  
25 July

Mon 11 March.  
14 March 2011

Report 8 March 2011.

Mr T. Recollected - flicked thru a number of issues which included looking at Israelis in Chch at time of EQ but not dwelt on it.

Mr Tucker said he had a report on the Israelis but having now looked at it I am certain I had never read it.

It was an initial report dated 8 March which was inconclusive about the activities at that stage of the investigation.

I have not seen nor been offered the subsequent reports on the matter.

<sup>13</sup> Note made by Mr Goff during our meeting on 25 July 11. This is our agreed position. WT, 25 July.

Monday 11 March

14 March 2011

Report 18 March 2011

Mr T Recollected – flicked thru a number of issues which included looking at Israelis in Chch at time of EQ but not dwelt on it. Mr Tucker said he had a report on the Israelis but having now looked at it I am certain I had never read it. It was an initial report dated 8 March which was inconclusive about the activities at that stage of the investigation. I have not seen nor been offered the subsequent reports on the matter.

74. The agenda note from the 25 July meeting referred to the handwritten note and the annotation as follows:<sup>14</sup>

**CALL ON THE LEADER OF THE OPPOSITION**

**Monday 25 July 2011**

**Issues to be discussed this visit:**

-Operation [REDACTED] *See handwritten note by Mr Goff attached. This is our agreed position in regard to the meeting on 14 March 2011.*

75. The question of whether these documents should have been considered for release under the OIA is discussed below at paragraph 88.

*Other relevant context to 8 March SIR*

76. Three further contextual points were also relevant to the release of the 8 March SIR but not disclosed:
- Dr Tucker had agreed at their 25 July meeting that Mr Goff had not received a “briefing as such”: the Israeli issue had been raised only in passing, as one of a large number of agenda items canvassed in a short space of time, and not dwelt upon.
  - The 8 March SIR was only a preliminary document, and that fact was material in two respects. First, and consistent with comments by Mr Goff such as that set out at paragraph 65 above, any reference to that SIR by Dr Tucker at the 14 March meeting may well have been in terms that there was little or nothing to be said at that stage.
  - The preliminary nature of the SIR and the timing of the 14 March meeting also meant that the further information concerning the Israeli issue, as disclosed in the Prime Minister’s statements on 20 July, had not been available to the Leader of the Opposition when he said (in response to the Prime Minister’s statements) that he had not been briefed. He had not received that further information, that there had been an extensive investigation that had clarified some of the matters later raised by the *Southland Times* and that had found no evidence of Israeli intelligence activity.
77. Had they been disclosed as part of the OIA release, all three points would have contributed to a more accurate explanation of what the Director had and had not done at the March meeting.

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<sup>14</sup> The same statement was also recorded on the Director’s next agenda note for his 19 September 2011 meeting with the Leader of the Opposition as part of an “[issue] discussed previous visit”.

*Overall conclusions on whether information disclosed under the OIA was inaccurate, incomplete or misleading*

78. The information disclosed or omitted under the OIA can be summarised as follows:

8 March SIR, including annotation

**Annotation incorrect:**

- “read by” meant at most “read first page” and/or “shown first page”;
- “discussed with” meant briefly mentioned by Director without response; and
- no reference to contradiction by Leader of the Opposition or accepted plausible grounds for that contradiction.

**Potentially misleading**, because only a preliminary paper, which did not contain conclusions or other details as released by PM on 20 July, and not a “briefing as such”.

14 March agenda note

**Misleading** because of:

- unexplained retention of irrelevant passages;
- related lack of explanation that Israeli issue one of numerous topics raised in a few minutes; and
- lack of necessary context to understand the nature of the document.

8 April agenda note

**Misleading**, as above and also because record of “issues discussed at previous meeting” not in fact a record of that.

25 July meeting note, including annotation, and 25 July typed agenda note (not disclosed)

**Omission meant that OIA response was incomplete:**

- Both documents were a record of the 14 March meeting;
- The meeting note was an acknowledgement of the Israeli issue having been raised and recorded Mr Goff’s statement that he had not read the SIR; and
- The events of the 25 July meeting were necessary context.

79. I have found the redactions to be objectively misleading. The reasons given by the NZSIS staff for the redactions are discussed below at paragraphs 100-106. The reasons for the

other shortcomings, which largely turn upon information and actions known only to the Director, are discussed in the following section.

*Decision to release the redacted documents*

80. Other than the annotations on the Director's printed copy of Mr Slater's request and drafts of the OIA response, NZSIS did not have a contemporaneous record of the process followed or reasoning relied upon in the decision to release the redacted documents. I would have expected such a record, given the significance of the decision.
81. The Director reached his initial view that redacted copies of the three documents should be released because the fact of the briefing to the Leader of the Opposition on the Israeli investigation was in the public domain following the media statements by the Leader of the Opposition and the Prime Minister, noted at paragraph 41 above. For that reason, he concluded the documents could not be withheld. It is possible, but could not be confirmed, that the Director reached that view following discussion with the DGC on the morning the request was received (26 July). The Director was then out of Wellington on NZSIS business for the remainder of the day.
82. Later on that day, the request was discussed between the DDRC and the DGC. The DGC amended the draft response forwarded by the OIA Officer to provide for release of the three documents. The three documents themselves, which had been retrieved by staff in the Director's office, were provided to the DGC. The DGC made the decision about how the documents were to be redacted (see paragraphs 100-105 below) and the physical removal of redacted passages from the documents and the marking of the redacted documents as declassified was undertaken by the OIA Officer.
83. The draft response, as amended by the DGC, and the redacted documents were considered by the Director on the morning of 27 July. The Director believed that, as the response had been completed, it should be released immediately. He briefly mentioned the request and his intention to release the response immediately at a scheduled meeting with DPMC and then notified the Leader of the Opposition and Mr de Joux by phone. The Leader of the Opposition expressed a number of concerns about the proposed release and asked first for a copy of the proposed release, which the Director declined to provide, and then for a few days in which to seek advice, to which the Director agreed: see paragraphs 95-99. The response was then posted to Mr Slater on 2 August and received by him on 4 August. A copy of the release was also urgently requested under the OIA by the Leader of the Opposition and was provided to him, with a further copy provided to PMO, on 1 August.
84. There were some concerns expressed within the NZSIS over aspects of the release to Mr Slater:
- On becoming aware of the Director's initial view that the documents should be released, the OIA Officer expressed two concerns about release, commenting to the DGC and the DDROC by email that:

"... it would set a precedent that we might not wish to follow in many cases, and would need to be run past Mr Goff."

There was no response to the email. It appears it was simply overlooked by DDROC, but DGC dismissed the concerns as unduly conservative and believed that consultation with Mr Goff would not have been politically neutral.

- The DDRC expressed some concern that the speed of the preparation of the response might be perceived as not politically neutral. However, the DGC indicated that, in her view, the NZSIS should continue to process the request (given progress was already advanced), regardless of the potential political outcomes as this was the best way to stay truly neutral.
- The DGC advised against also publishing the release on the NZSIS website, as occurred for some high profile OIA releases. The DGC considered that such publication was inappropriate in this instance because of the political nature of the controversy.
- The Director himself was uncertain about the process to follow with the Leader of the Opposition. In particular (see paragraphs 92-99 below), the Director did not recognise that he was obliged to consult Mr Goff about the proposed release, rather than simply notify him. For that reason, when Mr Goff requested some delay in the OIA process to seek advice on the proposed release, the Director perceived the request as simply allowing Mr Goff some time to manage the political consequences of the release.

#### *Identification of information relevant to requests*

85. Mr Slater's request sought:

"Copies of briefing notes and/or documents given and/or shown to The Leader of the Opposition during any briefing held in March 2011 regarding Israeli nationals.

Copies of diary notes made at the time or subsequent to the March briefings to The Leader of the Opposition.

Details of any acknowledgement by The Leader of the Opposition of having read or received any of the aforementioned briefing notes and/or documents.

[and] a list of [any] documents withheld."

86. The documents released were heavily redacted copies of:

- The Director's agenda note for his meeting with the Leader of the Opposition on 14 March 2011, which listed the Israeli investigation as an issue to discuss;
- The Director's agenda note for his subsequent meeting with the Leader of the Opposition on 6 April 2011, which listed the Israeli investigation as an "[Issue] discussed previous visit"; and
- The first page of a five page NZSIS report, "Investigation into Israeli nationals in Christchurch" dated 8 March 2011 and annotated by the Director as "[r]ead by/discussed with Mr Goff 14 Mar 11."

87. It appears that these three documents were identified by the Director's office on 25 July, in his absence from the office, in order for the Director to confirm to PMO that

he had a record of having briefed Mr Goff. There was no further assessment of whether that information corresponded to the terms of Mr Slater's request or any attempt to locate, compile and consider for release all relevant information held by NZSIS.

88. The 25 July written note and the typed agenda note were not compiled or considered in the course of preparing the response to Mr Slater. Both were, however, within the scope of Mr Slater's request: the 25 July note was Mr Goff's record of that day's discussion about the March briefing and was annotated by Dr Tucker, although his evidence was that it did not in fact represent an "agreed position". These records were also not considered in relation to later requests.

89. The failure to release or even acknowledge the 25 July written note and the Director's annotation that this was an "agreed position" – which was recorded only on his own copy – was also significant because the Leader of the Opposition's public statements, later on 25 July and on 4 August, were made in terms of the position set out in the note:

"We agreed that I had not seen the document. He said that he had flicked the issue past me in the midst of other issues saying that he had not dwelt on it and there was probably nothing to it. ... I don't even recall those comments but I'm not questioning Dr Tucker's integrity in saying what he did."

90. The result of the release of the redacted documents, including the "Read by/discussed with" annotation, and the failure to release or acknowledge the position as recorded in the 25 July written note was that:

- The "Read by/discussed with" annotation was taken as accurate, even though the Director knew Mr Goff disputed having read it and there had been no discussion in the usual sense of the word; and
- Later public statements by the Leader of the Opposition, although consistent with the 25 July written note, were taken to contradict the Director and to amount to an attack on the Director's integrity: see further, paragraphs 199-201.

91. I asked the Director why the 25 July written note and the typed agenda note were not considered for disclosure:

- His evidence was that he simply did not consider the documents, while the DGC and others do not appear to have known that the 25 July note existed. Dr Tucker did comment that he would in any case have been reluctant to release the document out of concern to keep the confidence of Mr Goff, but that seems an unconvincing argument in light of two factors. First, Dr Tucker was releasing other material relating to his briefing of Mr Goff. Second, Mr Goff had in effect made the content of this note public in his press conference on 25 July.
- The Director also commented in evidence that, had he had the file copy of the 8 March written report, with his "Read by/discussed with Mr Goff" annotation, with him at the 25 July meeting with Mr Goff, he might have been firmer in saying that he thought Mr Goff had in fact read the briefing paper.

*Pre-release notification to, and lack of consultation with, the Leader of the Opposition*

92. The Director called the Leader of the Opposition twice on Wednesday 27 July to advise him of the forthcoming release of the redacted documents.
93. As noted above (paragraph 36), consultation in this situation was appropriate. It would have afforded some safeguard against the errors already outlined. It would also have reflected and supported the critical relationship between the Director and the Leader of the Opposition, acknowledged by the Director to be dependent upon mutual trust and confidence, under s 4AA(3) of the NZSIS Act.
94. As noted above, the NZSIS OIA Officer had expressed a view that any release of records from consultations with the Leader of the Opposition “would need to be run past” the Leader. However, DGC’s view at the time was that notification only, rather than consultation, was appropriate, because consultation with Mr Goff may have exposed the Director to allegations of political partiality or lack of neutrality. The Director’s view was that he need only inform the Leader of the Opposition of the request and response.
95. As a result, the Leader of the Opposition was told of the proposed release in two calls to him on his mobile phone on 27 July, when he was out of Wellington and away from an office. The Director told Mr Goff that he would be releasing the three documents later that day:
- The Director attempted to describe the documents concerning the March meeting that were to be released – two of which Mr Goff had never seen and the third of which he either had not seen or seen only in passing four months earlier. Mr Goff requested a copy of the information proposed to be released, but the Director declined, apparently in the belief that to provide it would be inconsistent with the OIA;
  - The Leader of the Opposition expressed significant concerns over the lack of precedent for the release of such documents, the likelihood of misinterpretation of the documents and the adverse effect of such release upon future consultation between Directors and Leaders of the Opposition. He asked the Director to delay the response for a short time to allow him to obtain his own legal advice and also to give the Director an opportunity to consider the issue further.
96. The Director appears to have regarded that request simply as a means of delaying the release and allowing Mr Goff some time to resolve the issue, although he did agree to a few days delay.
97. On 30 July, not having heard further from the Director, the Leader of the Opposition made his own urgent request for release of the information that would be provided to Mr Slater. This was provided on 1 August.
98. For the reasons already given, I consider that the Director and the DGC made an error in concluding it was not appropriate to consult the Leader of the Opposition before making a decision on the release of information. As part of that consultation:



- The Director should have offered, and should not have refused to provide, access to a copy of all of the relevant documents both in unredacted and redacted form. The attempt to describe the documents to Mr Goff on a call to his mobile phone was, patently, inadequate;
- The Director should have accepted that the Leader of the Opposition was entitled to seek advice, including taking reasonable time to do so; and
- The Director should himself have given thorough consideration to the serious points raised by Mr Goff, and possibly sought further comment and advice on the issue.

99. I note that commentators, including Mr Slater, have subsequently suggested that Mr Goff acted improperly or unlawfully in requesting that release to Mr Slater be deferred so that he could take advice. That suggestion is not correct.

#### *The redaction of the documents*

100. The documents released were heavily, but in the case of the two agenda documents, selectively redacted: see paragraphs 56 to 59.

101. The decision to retain parts of six wholly unrelated items in the redactions is also striking when compared to the redaction of the Prime Minister's equivalent briefing (see paragraph 57), which was released in response to other OIA requests only two weeks later.

102. I considered it critical to ascertain how and why the decision to retain these words in the redacted document was made. Some of the NZSIS staff involved in the release of the document said that they would have been concerned about compliance with their legal obligations under the OIA, which, in their view, provided no basis to withhold the various retained words. They considered that to do so would only result in an adverse decision by the Ombudsmen. That would not have been a valid reason:

- The words were not relevant to the request made, and could therefore be properly withheld as not within the scope of the request;
- The middle section "Issues discussed previous visit 8 November 2010" was completely redacted, yet there were words or phrases in that section that ought to have been retained on that reasoning; and
- The approach to the redaction of this document was inconsistent with that taken to the 8 March written report, which was comprehensively redacted despite being concerned wholly with the Israeli issue, and with the record of the Prime Minister's equivalent meeting, reproduced above.

103. The DGC made the decision about how the documents would be redacted. She recalled that, having concluded that there was no proper basis for withholding the documents, her overriding concern was to "do the right thing" by accurately reflecting the overall content of the 14 March meeting as far as possible. Her evidence was that she was

aware that Mr Goff had said publicly that Dr Tucker had only “flicked the issue past him” and she intended to reflect that in the redactions.

104. The DGC concluded that as many of the other agenda items as possible should be left in the redacted document, with some relevant text where possible. Her aim was to show that matters other than the Israeli investigation were discussed. “Discussed at length”, for example, was retained to show that the matters under the heading “Issues raised by LOP:” were the focus of the meeting for Mr Goff.
105. The DGC recalls that she did discuss this approach with the Director but that discussion probably did not occur until after the documents were actually redacted on 26 July. The Director could not specifically recall how the redaction decision was made, but also suggested in evidence that the intention may have been to provide context to show that there were other issues discussed.
106. That explanation is consistent with Dr Tucker’s call to Mr Goff on 27 July to notify him of the release, for which I was able to obtain a transcript. The transcript records Dr Tucker appearing to describe the redacted 14 March document:

TUCKER: There’s no subject matter. There is an outline of, you know, a query, an update, a briefing note, issues raised completely blanked-out, issues raised by you, query, what do we know, question mark and then discussed at length blanked out, so that’s all that been covered ...

GOFF: .... That meeting was a half hour meeting I think we had ..

TUCKER: It went a bit over that, but not a huge amount. It was a particular (sic) fulsome meeting ... discussed at length that [issue] you had raised, so that, I think adds credence to the point you’ve raised. That’s why I wanted to get that clear.

GOFF: No, that’s not how it will be interpreted at all. ....

#### *8 March SIR*

107. The final document was the NZSIS detailed report into the investigation into Israeli nationals in Christchurch. Of the five page report only the first page was released, in a heavily redacted form.
108. The substantive content of the report is fully redacted on national security grounds, and there was a proper basis for that redaction. There was, as a result, an appearance of inconsistency between the retention of numerous fragmentary words and phrases in the two agenda notes and the complete redaction of the report. I accept that that difference reflects the intention to use the agenda note redactions to show the overall context of the meeting, though that should have been explained.

#### *Comment on the redactions*

109. I have established that the documents in relation to Mr Slater’s OIA request were dealt with at various points by the Director and a small number of the senior staff of the NZSIS – it appears the DDRC, the DDROC, the DGC and the Head of the Director’s Office. It is clear from the documentary record that DDROC was not included or consulted on the

OIA process. The physical redaction of the documents was carried out by the OIA Officer, the DGC having decided which words to leave in and which to redact.

110. I accept that the DGC acted in good faith and did not have an improper purpose in redacting the documents as she did. I also acknowledge that her decisions were made under some time pressure and without knowledge of the full context (which was known only to the Director). Despite those factors, I do not think it was a sound or prudent approach and did not reflect good practice:

- The decisions to redact and retain particular passages in the two agenda documents were unusual and were not reflective of standard NZSIS practice under the OIA.
- The risk of misinterpretation was increased by a failure to follow good practice in redacting documents for release, under which redacted documents are annotated to show the ground(s) on which each redaction was made. Had each redaction been marked either with “s6(a) of the OIA”, or “not in scope/ not relevant”, that would have given some indication that the various extraneous words were not relevant to the request. The NZSIS OIA Officer – who did not make any decision concerning the redactions - explained that such annotation was often done for NZSIS OIA responses. The DGC accepted that it should have been done here but did not recall why it had not been.
- The reasons for, and legal advice supporting, the redaction decision was not properly documented at any time.

111. Overall, although well-intended, the redactions were, on their face, misleading. Taken together with the Director’s failure to explain the “Read by/discussed with Mr Goff” annotation on the SIR, the complete omission of reference to the 25 July handwritten note and the reference in the covering letter to Mr Slater to redactions for relevance, they led to a damaging and misleading interpretation of the information released by the NZSIS.

#### *Failure to follow good practice*

112. The coordination of the response to this OIA request by the NZSIS was poor. Important information was compartmentalised and not appropriately shared within the senior leadership. This was a high profile and politically sensitive issue. I would have expected a coordinated approach with leadership of the substantive issue assigned to a designated individual within the leadership team. A number of decisions were taken with respect to the release of the documents that departed from usual practice, particularly the decision to leave irrelevant information to provide “shape” to assist Mr Goff’s version of events. The reasons and legal advice for these decisions should have been properly documented at the time. In the end, the response to the OIA request was poorly executed, completed with undue haste, and without proper care.

### *Declassification*

113. One of the questions for the inquiry related to the “declassification” of classified information released to Mr Slater. The documents released to him were stamped “declassified” on 26 July.
114. The use of the “declassification” stamp does not mean a decision was taken to release classified national security information. Within the NZSIS and wider New Zealand government, documents are given a national security classification in the header and footer. The classification is derived from the most classified piece of information in the document, and in some cases this may be only one or two sentences contained within a document.
115. A “declassified” marking was stamped on the documents by the NZSIS OIA officer. This is standard NZSIS practice, and can be considered akin to “Released under the Official Information Act” watermarks used by some government departments. The purpose is to provide an official NZSIS marking that the documents released were not leaked and that, despite the classified marking, no classified information remains in the documents. Based on the evidence before me, I accept that no classified information was contained in the redacted documents released to Mr Slater.
116. Accordingly, I find that the documents released to Mr Slater were not improperly declassified.

## POLITICAL NEUTRALITY

117. The further question for this inquiry is whether the NZSIS acted consistently with its duty of political neutrality in dealing with the OIA requests made by Mr Slater and others and, in providing information to PMO in respect of consultations between the Director of the NZSIS and the then Leader of the Opposition.

### *The statutory framework*

118. All public servants are required to act in the course of their duties in a politically neutral manner. Political neutrality is one of the established constitutional conventions in New Zealand:<sup>15</sup>

“Officials must perform their job professionally, without bias towards one political party or another. Employees in the state sector are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is a key element of impartial conduct. It provides the basis on which officials support the continuing process of government by successive administrations”.

119. The NZSIS, while not a department of the Public Service, is part of the State services<sup>16</sup> and the general obligation of political neutrality applies to NZSIS staff.

120. In addition to that general obligation, section 4AA of the NZSIS Act applies. Section 4AA is headed “Political Neutrality of New Zealand Security Intelligence Service” and imposes duties on both the Director and the Minister to ensure that the Service is not used for political purposes:

#### **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.

...

121. Section 4AA was inserted by s 4 of the New Zealand Security Intelligence Service Amendment Act (No. 2) 1999, passed with multi-party support. The Rt Hon Sir Douglas

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<sup>15</sup> Cabinet Manual, 3.51. The obligation is reflected in the *Code of Conduct for State Services*: public servants must “maintain the political neutrality required to enable us to work with current and future governments”) and in the *Political Neutrality Guidance* issued by SSC: “New Zealand’s state sector is founded on the principle of political neutrality.”

<sup>16</sup> State Sector Act 1988, s 2.

Graham, the then Attorney-General, said in the Parliament when considering the Report of the Intelligence and Security Committee on the Amendment Bill:<sup>17</sup>

“New section 4AA is designed to highlight the political neutrality of the Security Intelligence Service. The original draft legislation stated that ‘the Security Intelligence Service is not to further the interests of any political party’. That requirement has now been widened and the director is also required to take all steps to ensure that the service does not take action for the purpose of harming any political party.

“The section also includes the requirement that the Minister may not direct the service to institute the surveillance of any person or entity or class of person or entity within New Zealand. As a further issue in political neutrality, the director is required to consult with the Leader of the Opposition, to keep him or her informed about matters relating to security. I should note that such consultation already takes place and has done for many years. The new Bill will make what is already a matter of practice a matter of law.”

122. The obligation is unique in its terms in New Zealand, although a similar obligation applies to the Government Communications Security Bureau.<sup>18</sup> The essence of the obligation of political neutrality is that the NZSIS should not promote or damage the interests of particular political groups, use its intrusive powers to target lawful political activity, or act in a politically partisan way.
123. Section 4AA is consistent with international best practice: see for example the *Compilation of Good Practices on Legal and Institutional Frameworks for Intelligence Services and their Oversight*,<sup>19</sup> particularly Practices 11, 12 and 13.
124. The particular requirements in s 4AA reinforce the broader principles in s 4AAA of the Act, that the NZSIS is to act independently and impartially, with integrity and professionalism and in a manner that facilitates effective democratic oversight.
125. This inquiry focused on three aspects of the political neutrality obligation:
  - The specific requirement that the Director consult regularly with the Leader of the Opposition “for the purpose of keeping him or her informed about matters relating to security”;<sup>20</sup>
  - The obligation of the Director to take all reasonable steps to ensure that the Service not take any action for the purpose of furthering or harming the interests of any political party;<sup>21</sup> and
  - How, in its relationship with PMO and with the Leader of the Opposition, the NZSIS did or did not safeguard its political neutrality.

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<sup>17</sup> (24 August 1999) NZPD 18744.

<sup>18</sup> Government Communications Security Bureau Act 2003, s 8D.

<sup>19</sup> Geneva Centre for the Democratic Control of Armed Forces (DCAF), “Report to the UN Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism”, 2011 ([www.dcaf.ch/content/download/73465/1123242/version/1/file/A\\_HRC\\_14\\_46\\_english.pdf](http://www.dcaf.ch/content/download/73465/1123242/version/1/file/A_HRC_14_46_english.pdf)).

<sup>20</sup> NZSIS Act 1969, s 4AA(3).

<sup>21</sup> NZSIS Act 1969, s 4AA(1)(c).

### *Consultation with the Leader of the Opposition*

126. Consultation between the Director and the Leader of the Opposition is an important safeguard for the work of the NZSIS as a security and intelligence agency in a free and democratic society. A bipartisan approach to security and intelligence is more likely to be maintained if leading opposition parliamentarians do not feel that they have been wholly excluded from security and intelligence matters. Australian intelligence legislation similarly includes a provision requiring the Director-General of the Australian Secret Intelligence Service to consult regularly with the Leader of the Opposition.<sup>22</sup>
127. As the former Director noted in his evidence to this inquiry, the obligation is about keeping the Leader of the Opposition “broadly comfortable” with the competence and activities of the NZSIS. The regular meetings which are held between the Director and the Leader are a vehicle for building a relationship of trust and confidence with the Leader and his or her party as a “government in waiting.”<sup>23</sup>
128. Such consultation serves three important purposes:
- A direct check against any misuse of the considerable powers and resources of the NZSIS;
  - Maintenance of the principle that matters of national security should, so far as possible and appropriate, be non-partisan; and
  - Political accountability in security and intelligence matters (along with oversight by responsible Ministers and by the Intelligence and Security Committee).
129. These purposes are also reflected in the special status of the Leader of the Opposition in other intelligence and security matters. He or she is always a member of the Intelligence and Security Committee.<sup>24</sup> The Leader of the Opposition must also be advised by the Prime Minister and the Attorney-General whenever an entity has been or is to be designated as a terrorist entity and must, if he or she requests it, be briefed on the factual basis for the designation.<sup>25</sup>
130. The Director’s obligation to consult regularly with the Leader of the Opposition requires more than the mere provision of information or briefing by the Director: there must be a genuine openness on the Director’s part to engage with questions or concerns that he or she may have. The effective discharge of the obligation of consultation is also dependent upon the maintenance by the Director of a relationship of trust, confidence and candour. Mutual trust and confidence is important so that the Director can disclose very sensitive information and so that the Leader of the Opposition feels able to raise all matters of potential concern and to discuss those matters candidly. It is important for the Director to recognise the inherent imbalance between him or herself and the Leader of the Opposition: the Leader of the Opposition does not know the full range of national security matters and is dependent upon the Director to identify those issues. More concretely, the Leader of the Opposition does not keep or have access to any record of

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<sup>22</sup> Intelligence Services Act 2001 (Aust), s 19.

<sup>23</sup> McGee, “Parliamentary Practice in New Zealand” (3<sup>rd</sup> Edition, Government Printer, Wellington), p 85.

<sup>24</sup> Intelligence and Security Committee Act 1996, s 7(1)(b).

<sup>25</sup> Terrorism Suppression Act 2002, s 20(5).

briefings or have access to independent expert advice, but must depend upon the Director for both.

131. The result is that the obligation to consult, together with the overarching s 4AA(1) obligation on the Director to take all reasonable steps to maintain political neutrality, entails more than restraint on the part of the Director from politically partisan actions or mechanical even-handedness. As the former Director accepted in evidence, those obligations will on occasion require the Director to take some positive and independent steps to ensure that the consultative relationship, and the wider neutrality of the NZSIS, is maintained.

*Director/Leader of the Opposition consultation in practice*

132. There is no express policy or formal description of the practice of consultation in this context and there is next to no commentary or other public information on how it works in practice. However, the evidence given by those involved in the events in issue in this inquiry, together with meeting records held by NZSIS, indicate that at that time:

- Consultation meetings occurred, on average, every two-to-three months. The meetings were sometimes general briefings, sometimes about specific issues and could be arranged at short notice where necessary, for example where there was a particularly pressing issue that could not wait or a particular issue that required more time. Meetings were usually arranged at the Director's initiative but could also be convened at the request of the Leader of the Opposition or by referral by the Prime Minister, should the Prime Minister consider that a particular issue warranted consultation.
- Meetings usually covered a number of issues identified by the Director, together with any additional issues raised by the Leader of the Opposition. Leaving aside issues raised by the Leader of the Opposition or referred by the Prime Minister, the identification of issues by the Director was based upon the Director's assessment of whether an issue was potentially controversial or otherwise significant.
- Meetings were usually attended only by the Director and the Leader of the Opposition. The Director was on occasion accompanied by relevant NZSIS staff where specialist knowledge was required. Meetings were usually a half hour long.
- An agenda note and supporting documents were brought to each meeting by the Director. The agenda comprised issues to be discussed together with a record of issues discussed at the previous meeting. A short record of any additional issues raised by the Leader of the Opposition was added afterwards by the Director and the Director also, on occasion, annotated copies of supporting documents after the meeting as a record of discussion. The Director's office maintained a dedicated file, with very limited access within NZSIS, for all records of meetings with the Leader of the Opposition.



- Because of the security classification of material covered in meetings and the unavailability of any appropriately secure storage, the Leader of the Opposition was not permitted to take notes or retain any other record. Neither the agenda, the added record of issues raised nor any supporting documents or annotations were provided before or after meetings. The Director sometimes provided a copy of a supporting document for the Leader of the Opposition to read at the meeting. The agenda was not shown to the Leader of the Opposition.
133. There also appears to have been mutual acceptance by the then Director and the then Leader of the Opposition that either could contact the other informally if warranted.
134. Both Dr Tucker and Mr Goff saw consultation with the Leader of the Opposition as promoting the bipartisan and/or apolitical nature of NZSIS matters in two particular respects, beyond those already noted:
- Consultation ensured that the Leader of the Opposition was aware of potentially controversial or otherwise sensitive issues and adequately informed about them, so that the confidentiality of NZSIS matters did not lead to undue controversy or speculation by the Opposition; and
  - Consultation ensured that in the event of the Leader of the Opposition becoming Prime Minister, he or she would already be engaged with critical NZSIS matters.
135. The then Director and the then Leader of the Opposition both indicated that they saw the discussion in such meetings as confidential, not only because of the classified nature of the matters covered, but also because they recognised that the relationship required mutual trust and confidence.
136. Following the events considered in this inquiry, consultation meetings changed in two respects.
- First, NZSIS instituted a practice of annotating the agenda document itself to record whether issues had or had not been discussed (this was the practice that was already followed at the Director's meetings with the Prime Minister). It was also suggested that the Leader of the Opposition should be asked to countersign the agenda document, but it is not clear whether that suggestion was ever taken up.
  - Second, at the request of Mr Goff, with the agreement of NZSIS, the Leader of the Opposition was thereafter accompanied by a second senior opposition MP.

*Wider structure and content of the relationship between NZSIS and PMO*

137. Before considering specific issues relating to political neutrality, it is necessary to set out the wider structure of the relationship between NZSIS and PMO. The primary point of contact between the Director and the NZSIS and the Prime Minister at relevant times was Philip de Joux, the Prime Minister's Deputy Chief of Staff. His primary employment relationship was with the Department of Internal Affairs as a political adviser to the Prime Minister, but he was also employed by the Parliamentary Service to cover his

work on Leader's Office matters. Mr de Joux effectively also had a third role as the staff liaison between the NZSIS and the Prime Minister.

138. The nature of the relationship between PMO staff and the Director and other responsible NZSIS staff changed with the change of government in 2008-2009. Under previous administrations, the relationship between the NZSIS and the Prime Minister was conducted almost exclusively between the Prime Minister and the Director, with very little involvement by officials or advisers. After the change of government, the contact between the Service and the Prime Minister's Office became more diffuse and Service staff engaged directly with political advisers in PMO.
139. This was a significant change, but there was no guidance given to Mr de Joux or other PMO staff concerning their interactions with the NZSIS, other than a brief induction for the specialist press staff, or to the Director and NZSIS staff concerning their interaction with PMO. It appears that, in general, there was only infrequent contact.
140. There was no departmental secondee from the NZSIS or the GCSB in the Prime Minister's office or in DPMC before or after the change of government.

#### *Status of personal appointees/political advisers*

141. Personal appointees in Ministers' offices generally have a primary employment relationship with the Ministerial Services branch of the Department of Internal Affairs under the State Sector Act 1988, but may also, in the case of staff in the Prime Minister's office, have an employment relationship with the Parliamentary Service to cover, for example, work in the Leader's Office. The personal appointee is not subject to the direction of the Secretary of Internal Affairs, as a departmental secondee in a Minister's office is subject to the direction of that department's chief executive. Nor is the personal appointee subject to the principles of loyalty, neutrality and anonymity as the secondee is. The personal appointee works directly to the commands of the Minister, either as a special policy adviser or as a political adviser and agent or both.<sup>26</sup>
142. The important role that personal appointees play is recognised in the Cabinet Manual, which also emphasises the importance of the Minister and the chief executive establishing a clear understanding to ensure that departmental officials know the extent of the political advisers' authority.<sup>27</sup> New Zealand does not have written guidance for officials and political advisers on this question, unlike the United Kingdom where there is a Code of Conduct for Special Advisers.<sup>28</sup> That Code sets out the kind of work special advisers may do if their minister wants it, and their relationship with the permanent Civil Service, including that special advisers must not ask civil servants to do anything that is inconsistent with their obligations under the *Civil Service Code*.
143. The distinct role and status of political advisers in this instance had three material consequences:

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<sup>26</sup> Colin James, *The Tie that Binds: The Relationship between Ministers and Chief Executives*, Institute of Policy Studies & the New Zealand Centre for Public Law, 2002, at p 60.

<sup>27</sup> *Cabinet Manual 2008*, 3.19 & 3.20.

<sup>28</sup> Cabinet Office, June 2010, made pursuant to the Constitutional Reform and Governance Act 2012 (ss 8 & 15) ([www.gov.uk/government/publications/special-advisers-code-of-conduct](http://www.gov.uk/government/publications/special-advisers-code-of-conduct)). The Code includes, eg that special advisers "...should not, without authority, disclose official information...".

- First, Mr de Joux was not – and would not have been expected to be – politically neutral.
- Second, as part of his role as Deputy Chief of Staff, Mr de Joux was involved in the media work of PMO, as was Mr Ede, who was also a political adviser. Consistent with those roles, Mr de Joux and Mr Ede treated information that they were given as available for release for political purposes unless they had been advised otherwise. This was contrary to the assumption by NZSIS that the information that it provided would be held in confidence unless expressly approved for release. There is evidence that, during this period, Mr de Joux did receive at least one classified briefing, for which he held the necessary security clearance, understood that he could not disclose that information and did not disclose it. In respect of the particular information in issue here - the 22 July confirmation that the Leader of the Opposition had been briefed on the Israeli issue and the description of the records said to substantiate that confirmation – NZSIS did not indicate that the information was classified or otherwise should not be released. In fact, NZSIS did not consider it classified information.
- As a result, neither Mr de Joux nor Mr Ede acted inconsistently with any obligation to the NZSIS when Mr Ede disclosed this information to Mr Slater for political purposes after being told it by Mr de Joux.

144. The events in issue in this inquiry do, however, demonstrate the lack of any steps by the NZSIS to ensure that its reporting relationship to the Prime Minister was consistent both with the requirements of security and with its obligations of political neutrality. In particular:

- Leaving aside specific classified briefings, the NZSIS did not communicate to PMO its overall expectations as to the confidentiality of information that it provided; and
- The Director and the other responsible NZSIS officials did not appear to appreciate that Mr de Joux had a political role that could, potentially, create some difficulty in maintaining political neutrality (as for instance in his 27 July conversation with the Director, at paragraphs 193-194).

*Comment on NZSIS/PMO current arrangements*

145. Liaison between NZSIS and PMO is still managed, on behalf of PMO, by a senior member of the Prime Minister's staff. There is now greater clarity about what PMO can and cannot do with information provided by the Service. The evidence before me was that the relationship is managed carefully and, in a day to day sense, has worked well to ensure that NZSIS has a single identified point of contact and the Prime Minister has a consistent and experienced conduit for information and advice from both NZSIS and the GCSB.

146. Three wider changes have occurred since 2011. First, the New Zealand Intelligence Community (NZIC) now operates in a more coordinated fashion. Second, the role of the DPMC within the NZIC has been enhanced, with the appointment of a Deputy Chief

Executive Department of the Prime Minister and Cabinet, Security and Intelligence (DCE). The DCE, and the Security and Intelligence Group he heads, provide leadership on strategies, policies and operations for strengthening national security and provide a degree of coordination and liaison between PMO and the intelligence and security agencies. The DCE is also available as a sounding board for both Directors, including in relation to OIA requests. Third, after the commencement of this inquiry, the Prime Minister created a new ministerial portfolio called the Minister for National Security and Intelligence. The Prime Minister has assumed that portfolio and the Hon Christopher Finlayson MP has become the Minister in Charge of the New Zealand Security Intelligence Service and Minister Responsible for the Government Communications Security Bureau.

147. Although the current arrangement between NZSIS and PMO appears to work satisfactorily, without more structure and guidance it still leaves the PMO (or other ministerial office) staff member and NZSIS officers in a potentially vulnerable position.
148. In addition to documenting a protocol which clarifies the respective responsibilities and authorities of NZSIS and PMO/Minister's Office staff, I have recommended that NZSIS consult with the Government Communications Security Bureau about appointing a departmental adviser or advisers (to represent the Intelligence Community) to the Minister's office and/or located in the Policy Advisory Group (PAG) within DPMC, possibly co-located there with the adviser from the Ministry of Foreign Affairs and Trade.
149. The number and location of such advisers will need to reflect the new ministerial responsibilities. The creation of this position or positions would have a number of potential benefits: it would ensure greater clarity about the respective roles of NZSIS and the Minister's office; provide a technically expert and politically neutral link between Ministers and the NZIC; provide a development opportunity for NZIC staff and, over time, create a layer of staff within the NZIC with broader experience of the public sector and the political environment. It would also support the NZIC's plan to develop one coordinated workforce.

#### *14 March briefing and subsequent events*

150. I have set out the events of the 14 March 2011 meeting, including findings on the question of whether and to what extent the Israeli issue was discussed in the previous section.

#### *July 20-22 briefings in response to allegations of Israeli intelligence activity in the Southland Times*

151. Following the publication of the *Southland Times* article on 20 July, NZSIS worked with officials of several other agencies and staff of the PMO to provide several substantive briefings to the Prime Minister and PMO staff in response to that article.
152. Despite the high level of public controversy, there was no consideration of whether the Leader of the Opposition should receive a briefing at that time and none was given. The NZSIS staff interviewed during this inquiry were also unaware of the statement made by

Mr Goff later on 20 July that he had not received any briefing on the issue until that statement was raised by PMO on the afternoon of 22 July.

*July 22 queries by PMO/Prime Minister concerning briefings to the Leader of the Opposition*

153. The question of whether the Leader of the Opposition was briefed was raised by PMO with the DDROC on the afternoon of Friday 22 July and then by the Prime Minister directly with the Director later that day.
154. Following a detailed briefing on 22 July, Mr de Joux contacted DDROC to note Mr Goff's public statement that he had not been briefed on the alleged Israeli intelligence activity and to ask whether any briefing had taken place and, if so, whether there was a record of it.
155. The DDROC asked NZSIS staff to retrieve the relevant file and located at least one document that appeared to indicate that such a briefing had occurred in March. However, the DDROC was concerned that the question was potentially political in nature and raised it with the Acting Director. The DDROC and the Acting Director decided to call the Director, who had returned from overseas and was on leave at home. The Director decided that because Mr de Joux was asking a factual question on behalf of the Prime Minister, it was appropriate for NZSIS to answer that question.
156. The DDROC then conveyed the available information to Mr de Joux, explaining in response to several questions from him that there had been a briefing given and that there was a written record to that effect. The date and overall format of the written record was explained to Mr de Joux either at this time or in a telephone conversation between Mr de Joux and the Director on Monday 25 July.
157. The Prime Minister, who was travelling overseas on official business, later spoke to the Director by telephone and asked whether the Leader of the Opposition had received a briefing. The Director said that he had received the same briefing as the Prime Minister.
158. Neither the DDROC nor the Director gave any indication to PMO or to the Prime Minister as to whether the information about the briefing could be publicly disclosed. There was also no indication given that the question raised an issue of political neutrality or possible sensitivity. The Prime Minister later stated in a television interview, broadcast on 24 July, that the Director had told him that the Leader of the Opposition had been briefed and had been "shown the same note and report" as the Prime Minister.
159. In evidence before me the DDROC said he expected that any information provided by NZSIS to Mr de Joux would be treated in confidence and would not be publicly disclosed without first being discussed with NZSIS. Other NZSIS officials, including DDRC and DGC, expressed similar expectations about information provided by NZSIS. It was accepted, however, that NZSIS had not explained that to PMO either at this time or at any time before. The Director said that he was "taken aback" by the Prime Minister's statement, but he explained that was not because the information was classified but because he saw the statement as continuing a public controversy over the issue.

160. There was no consideration by NZSIS of whether the Leader of the Opposition should be told of the query or of the response given by NZSIS. Mr Goff became aware that NZSIS had briefed the Prime Minister and PMO only through the Prime Minister's statement in the television interview.

*July 25 meeting between the Director and the Leader of the Opposition*

161. The Leader of the Opposition contacted the Director shortly after the broadcast of the Prime Minister's statement on 24 July and the Director arranged a meeting for the morning of Monday 25 July. Mr Goff's written note of the meeting is set out above at paragraph 73.

162. In evidence to this inquiry, Dr Tucker explained that he believed that the 25 July meeting had broadly resolved the controversy. Dr Tucker also described the willingness of the Leader of the Opposition to prepare and provide the written note as reflecting that resolution. He also said, however, that he had not had the annotated SIR with him at the time of the meeting and that, had he done so, he might have been "firmer" with Mr Goff about whether the latter had read the SIR.

163. Mr Goff proceeded to give a press conference in the course of which he set out the conclusions that he had reached with Dr Tucker, including the following comments:

Q: ... were you briefed about the Israeli nationals issue?

GOFF: No, not as such. It was alleged by Mr Key that I had received a document. I called Mr Tucker in this morning to raise questions about that. ... He said that he had flicked the issue past me and mentioned it in passing but there wasn't much to it. I don't recall that comment but I am not questioning his integrity in saying that. But there was no briefing per se. ...

Q: Mr Tucker obviously briefed the Prime Minister and told him that you had been briefed on this issue. Was he simply mistaken in your opinion?

GOFF: ... We agreed that I had not seen the document. He said that he had flicked the issue past me in the midst of other issues, ... he had not dwelt on it and said that there was nothing to it. I don't even recall those comments but I'm not questioning Mr Tucker's integrity in saying what he did.

164. In evidence before me Dr Tucker agreed that Mr Goff's remarks at the press conference were consistent, other than in some limited passages, with the conclusions reached at the meeting.

165. However, in submissions to this inquiry on the draft report, Dr Tucker sought to clarify the meaning of both his annotation and the note:

- He explained that, although he had annotated the 25 July meeting note as an "agreed position", that annotation did not mean that he accepted Mr Goff's statement that he had not read the 8 March SIR. Instead, Dr Tucker explained that he maintained his belief that Mr Goff had read the first page of the SIR and that he had agreed only with Mr Goff's statement that Dr Tucker "flicked" the

issue past him. The meeting and the note were only an “agreement to disagree”; and

- Dr Tucker suggested that the note was a document prepared by Mr Goff for his own purposes, rather than reflecting an overall resolution.

166. This was not entirely consistent with Dr Tucker’s earlier description of the 25 July meeting and the note as having resolved the controversy with Mr Goff. That said, I accept that Dr Tucker made his annotation on the note and the typed agenda note for his own purpose, not anticipating publication of it to others.

167. As to Dr Tucker’s obligations under s 4AA:

- As set out above, it is unclear whether Dr Tucker did seek to reach or did in fact reach a mutually acceptable resolution of the controversy at the 25 July meeting. If he did so, that effort was consistent with the obligations and purpose of s 4AA;
- The willingness of the Leader of the Opposition to make a public statement that he accepted Dr Tucker’s word that the Israeli issue had been raised was consistent with the purpose of s 4AA;
- In making that and other public statements, the Leader of the Opposition was reliant upon Dr Tucker’s advice and acceptance. Mr Goff made numerous and detailed references to points as set out in the handwritten note – including the statements positive to Dr Tucker – and which he described as having been accepted by Dr Tucker. Mr Goff had told Dr Tucker at the meeting that he was intending to make media comment immediately afterwards. Mr Goff would not have made such statements had he thought that Dr Tucker might later contradict them either publicly or in his advice to PMO; but
- Dr Tucker did not disclose to PMO that there had been any level of agreement at the 25 July meeting or that Mr Goff had made his public statements in reliance on his note prepared at that meeting, despite having annotated that note as stating – even if only in part – an agreed position.

#### *Discussions between the Director and DPMC officials, 25 July*

168. The Director discussed the question of the March briefing with DPMC on two occasions. He spoke to Roy Ferguson, the Director of the Intelligence Coordination Group, on 25 July shortly before his meeting with Mr Goff. In that conversation, Dr Tucker advised that he was to meet with Mr Goff in response to Mr Goff’s query sent the previous day. Dr Tucker indicated to Mr Ferguson that it could well have been that Mr Goff had not registered the Israeli issue because of the other issues under discussion and the “low key” nature of the information available at that time. Dr Tucker did not seek any advice from DPMC and none was given.

#### *25 July discussions between the Director/NZSIS and PMO officials*

169. Dr Tucker spoke to Mr de Joux by telephone three times on 25 July. In the first call, Dr Tucker advised Mr de Joux of the meeting he was about to have with Mr Goff. Mr de

Joux sought confirmation that Mr Goff had seen the 8 March SIR, and explained that he had checked that point repeatedly with NZSIS staff on 22 July. Dr Tucker confirmed that point.

170. Dr Tucker indicated to Mr de Joux that he didn't know what they would do if Mr Goff did not accept that he had received a briefing, including the March SIR and that it might well be that he, Dr Tucker, would simply have to "wear" the allegation. Mr de Joux told Dr Tucker that because there was a written record of the briefing having occurred and because it was a matter of Dr Tucker's statutory responsibility, PMO and/or the Prime Minister would not let that happen.
171. Dr Tucker indicated that he did not propose to make any media comment, and Mr de Joux commented that they would need to work through how to handle media issues. Mr de Joux asked for an update following the meeting with Mr Goff. Mr de Joux also expressed concern over the Director's intention to release the information immediately but stressed to Dr Tucker that that was his decision.
172. The second and third conversations followed Mr Goff's press conference, as noted at paragraph 65 above, and Mr de Joux forwarded an audio recording of the press conference to Dr Tucker. While neither Dr Tucker nor Mr de Joux could recall the content of these conversations in any detail, Dr Tucker believes that there would have been some thorough discussion of Mr Goff's remarks and accepted that there was an apparent inconsistency between the response that he and NZSIS had provided to PMO and the Prime Minister on Friday 22 July and the remarks by Mr Goff. He did not, however, mention any agreement or resolution reached with Mr Goff at the 25 July meeting or explain that Mr Goff had made some of his remarks on the basis of that resolution.

#### *Mr Slater's 26 July OIA request and political neutrality*

173. The question of whether the NZSIS complied with its duty of political neutrality under s 4AA and with the s4AAA principles raises issues of both the content of the information disclosed and the process followed by the Director and the NZSIS in making that disclosure.
174. The serious shortcomings in the identification, redaction and release of information by the NZSIS are described in the previous section on the Official Information Act requests.
175. The process followed in receiving and responding to Mr Slater's request is also discussed in detail in that section. Several aspects of that process raise questions in respect of political neutrality.
176. As already noted, management of the Israeli issue and the OIA was poorly coordinated and unnecessarily compartmentalised, with no one senior NZSIS officer having responsibility or knowledge of the issues as a whole.
177. As a result, the Director acted with only very limited advice, given in haste and without senior staff having all relevant information. The DGC provided legal advice to the Director and also had specific responsibility for the OIA response, but the Director had not advised her of the outcome of his meeting with the Leader of the Opposition only



the day before, the existence of the handwritten note and the Director's annotation on it or any of the other additional information outlined above. Her advice and the work on the OIA response were undermined by that omitted information.

178. As discussed more fully at paragraphs 54 and 81, the Director almost immediately gave his preliminary view that the request should be granted and the response was then finalised within the next 24 hours.
179. The Director was, unavoidably, making a decision in his own case: the suggestion by the Leader of the Opposition that he had not been briefed reflected on the Director's discharge of his duties and was also viewed by the Director as a personal criticism of his own honesty and integrity. Properly informed and considered advice from senior NZSIS staff, or external sources, would have given the Director greater assurance and perspective.
180. The Director and DGC were acutely aware of their obligation of political neutrality but took a formal and restrictive approach to what it required of them. There was a failure to recognise that the OIA response could damage the political neutrality of the NZSIS and so to take appropriate additional steps to manage that risk. The OIA Officer, the DDROC and the Leader of the Opposition all raised concerns that the release of documents from meetings with the Leader of the Opposition was unprecedented and/or could cause lasting difficulties. Despite those warnings and the obvious gravity of the issue, the obligations and the risks involved were not adequately considered.
181. Similarly, while it was recognised that the speed of the response might itself create a perception of partiality, there was no effort to address that perception or any recognition that it was inconsistent with the refusal to respond to materially identical requests made by numerous media organisations.
182. A further issue of potential concern from the perspective of political neutrality was Mr Slater's own political motivation. Several NZSIS staff were aware of Mr Slater's work as a prominent political blogger, although both the Director and the DDROC, who had responsibility for the communications team, were not. Nor was the DGC at the time she drafted the response to Mr Slater. The Director was given some indication of Mr Slater's work in internal discussion of Mr Slater's OIA request on 26-27 July and a fuller indication, and expression of concern, by the Leader of the Opposition on 27 July.
183. While Mr Slater's identity was not relevant to the question of whether information should be released to him, it should have led to some consideration of how that released information would be presented by others. At the very least, NZSIS should have recognised that the provision of information to Mr Slater at the same time that news media requests were being denied outright would be readily perceived as partisan.
184. These issues were not addressed further and no one within the NZSIS appears to have considered how Mr Slater would present the information disclosed to him or to have registered, once it was disclosed, how that information was interpreted.

*Director's notification to DPMC*

185. In a meeting on 27 July (called for another purpose) with Maarten Wevers (now Sir Maarten), the then Chief Executive of DPMC, and Mr Ferguson, Dr Tucker mentioned Mr Slater's OIA request and indicated his intention to respond to the request expeditiously. The request was not discussed in any detail. Dr Tucker did not specifically seek any advice, but explained to me that he was confident that Mr Wevers and Mr Ferguson would have taken his reference to the request as an opportunity to raise any objection or concern. Dr Tucker inferred that they agreed with his intention to respond to the request expeditiously.

*Discussions with the Leader of the Opposition arising from Mr Slater's OIA request, 27 July*

186. On 27 July, as discussed above at paragraphs 92-99, the Director called the Leader of the Opposition to inform him of the OIA request by Mr Slater and the response by NZSIS. The issue of political neutrality arises in respect of four aspects of that discussion.
187. First, the discussions proceeded on the assumption by the Director that he need only inform the Leader of the Opposition of the request and response. Further, the Director does not appear to have considered there to be any material question under s 4AA.
188. Second, as detailed at paragraphs 92-99 above, the Director engaged with the Leader of the Opposition in a functionally inadequate way.
189. Third, the Director indicated to the Leader of the Opposition that he understood Mr Slater to be a "private individual" and, while Mr Goff explained that Mr Slater was a prolific and politically active blogger who was pursuing the issue for a political purpose, the Director did not act on that information. If he had done so:
- it would have indicated that Mr Slater was either part of or closely engaged with the news media, and that would have been a further cause to question the differential treatment of media inquiries and Mr Slater's request;
  - the knowledge that Mr Slater was likely to be pursuing political purposes would have provided a further cause to question whether he and/or the NZSIS might need to take steps to maintain the political neutrality of the NZSIS.
190. The Director ought then to have recognised that it would not be consistent with political neutrality to give Mr Slater what was in effect an exclusive story while denying a large number of parallel news media requests.
191. The Director ought also to have responded to the Leader of the Opposition's concern that the information to be released would be misinterpreted. The Director said that he thought at the time that Mr Goff's concern was "fanciful". That was not a sound conclusion when the information is considered objectively. Dr Tucker did not check the point after the conversation or ask any of his staff to do so. No advice or further inquiry – such as reading the blog posts that Mr Slater had already made in respect of Mr Goff – was made.

192. Finally, the Leader of the Opposition raised the concern that the disclosure of details of a meeting between himself and the Director would be without precedent and, given the differences in their recollections of that meeting, would be damaging both specifically and to the overall practice of such meetings. This was not considered further in any way by the Director, despite the obvious gravity of the issue.

*Further discussion with PMO*

193. Following his conversation with the Leader of the Opposition, the Director advised Mr de Joux of the delay in the OIA release to Mr Slater and went on to discuss the wider context of that release. I was able to obtain a transcript of that conversation:

TUCKER: [Mr Goff] said 'Can I have a few days, please, to think about it?' I said, 'Well, I could give you a couple of days' ...

DE JOUX: Look, Warren, I think we should give him some space.

TUCKER: Well, what I said was ... 'I wouldn't want to leave it much beyond about close of play Monday, but let's do that. I'll hold it until then.' So, I've agreed to do that, I wanted to inform you about that.

DE JOUX: Ok.

TUCKER: ... He's going to consult with his own team. I think what it does mean, though, is that he is clearly very nervous about where this puts him.

DE JOUX: Well, he shouldn't have lied.

TUCKER: No, no, I know, but now he's in a hole. Anyway, but what it does mean is he will call off the Annette Kings and Marian Streets ... (sic)

DE JOUX: He's going to have to.

TUCKER: And he won't be using it politically in the House, either – parliamentary questions – so, I think, part of his you know, can I have a few days please, gives him order to, sort of, reign (sic) in his own ...

DE JOUX: Absolutely but he will have wider problems.

TUCKER: Yeah, he will in terms of overall credibility. ... But anyway, I have agreed to hold it till Monday, and if he still needs another day or two, I will do that, but I don't want to leave it ... Are you happy with that?

DE JOUX: Yeah, I am happy with that.

TUCKER: Very good. Thanks, Phil.

194. I have discussed the specific point of the delay above at paragraphs 95-99. Two further significant points arise from the standpoint of political neutrality:

- Again, the Director did not mention the apparent resolution at the 25 July meeting with Mr Goff or that Mr Goff's public remarks were consistent with the outcome of that meeting. He also did not contradict Mr de Joux's description of Mr Goff as having "lied". The published comments by Maryan Street MP, to which Dr Tucker refers, were also consistent with the outcome of the 25 July

meeting, including comments that she too did not question Dr Tucker's word that the Israeli issue had been raised at the 14 March meeting.

- Dr Tucker went on to comment specifically that Mr Goff would have problems "in terms of wider credibility", that he would now be unable to pursue the Israeli point in the House and that he would need to "call off" and "rein in" Ms Street and the Hon Annette King MP.

195. I address the appropriateness of these remarks at paragraph 247.

*Engagement between NZSIS and PMO following OIA release*

196. Similar issues arise in the further engagement between NZSIS and PMO in the aftermath of the release of documents to Mr Slater on 4 August.

197. Mr Slater's initial blog posts following his receipt of the OIA request prompted the Leader of the Opposition to issue a preemptive press release early on the afternoon of 4 August, in which he stated that the indication in the documents that he had read the written SIR document at the March meeting was wrong.

198. The Director indicated in evidence that he had seen that press release as an escalation of Mr Goff's earlier position and as a personal criticism. However, the press release (see above at paragraph 65) was in large part consistent with the outcome as understood by Mr Goff following the 25 July meeting and as publicly stated by him in his press conference after that meeting.

199. The discussion by the Director and also by the DDROC, acting at the Director's request, of press remarks by the Prime Minister and the Deputy Prime Minister also reflected the Director's perception that Mr Goff was personally criticizing him. The Deputy Prime Minister, following the advice provided by NZSIS, commented that he thought that:

"the Leader of the Opposition is going too far in questioning the integrity of a senior and respected civil servant ... If you were given the choice, I think you would take a senior civil servant ... a man of integrity, I'd believe him."

200. The DDROC discussed that comment with Mr de Joux, as follows:

DDROC: ... is the PM gonna come out in support of Warren, or is what Mr English has said [it]?

DE JOUX: I understand the PM has done media ... he has done TV3 ... So yeah, Bill [English] has done that on the House run. That will be what most media use ... And I would have thought ... I had a chat to Warren before and he wants ... the word integrity to be in, and I would thought that line ... 'senior civil servant ... a man of integrity. I believe him.'

DDROC: ...That's lovely. That's really good. Ok – that's great. Thanks.

201. The Director had released the annotated SIR without any explanation or qualification even though the annotation was accepted by him to be at least partly incorrect and there was a reasonable basis on which the Leader of the Opposition could describe it as entirely incorrect. The Director nonetheless characterised Mr Goff's criticism as a

matter of personal integrity and credibility and advised PMO accordingly, leading to statements in those terms by the Deputy Prime Minister and the Prime Minister.

*Was the information provided to PMO and/or to the Prime Minister inaccurate, incomplete or misleading and, if so, why?*

202. The further information provided to the Prime Minister and to PMO can be summarised and described as follows:

Date	Source and recipient	Summary of information provided/disclosed	Whether inaccurate, incomplete or misleading
22 July	DDROC to PMO (with Director approval)	Advice that NZSIS had a document that recorded the LO having been briefed in their 14 March meeting	<b>Unintentionally inaccurate:</b> advice was based on literal wording of agenda notes and/or annotated SIR in Director's file, reviewed while Director on leave.
	Director to PM	Advice that LO "received the same briefing" as PM	<b>No</b> , but open to misinterpretation because of lack of context – see paragraphs 62 and 67-68.
25 July	Director to PMO (prior to meeting with LO)	Advice that NZSIS had a document that recorded the LO having been briefed in their 14 March meeting	<b>Unintentionally inaccurate:</b> advice based on 22 July statement (see above) and given before retrieving and reviewed Director's file and discussion with LO.
	Director to PMO (following meeting with LO and LO press statements)	Advice that:  - LO had been given an NZSIS report ("the 8 March SIR") and had held it while the Director spoke to it at the 14 March meeting; and  - The LO had made incorrect statements in his media conference earlier that day.	<b>Incomplete:</b> no mention of LO's statements that he had not read or registered the SIR or of the accepted reasons why those statements might well be correct: see paragraph 70.  <b>Incomplete:</b> no mention of any agreement reached on any points at 25 July meeting or of LO's reliance upon the outcome of the meeting in his media remarks: see paragraph 167.
27 July	Director to PMO	Advice that:  - The NZSIS held, and would shortly release, a document recording that the 8 March SIR had been "read by/discussed with" LO; and	<b>Incorrect:</b> see paragraph 70.

		- The document would show the LO to “have credibility problems”; failure to contradict PMO belief that LO had “lied”.	<b>At least partly inaccurate:</b> see paragraphs 70 and 167.
<b>1 August</b>	NZSIS to PMO (with Director approval)	Copy of OIA release:  - Annotated/redacted copy of 8 March SIR;  - Two redacted agenda documents; and  - Accompanying letter from the Director.	<b>At least partly inaccurate, incomplete and misleading:</b> see previous chapter.
<b>4 August</b>	Director/NZSIS to PMO	Advice that the LO’s 4 August public statements that “read by/discussed with” annotation wrong/mistaken were false and amounted to an attack on the Director’s integrity	<b>At least partly inaccurate:</b> see paragraphs 198 & 207.

203. Leaving aside the unintentional errors on 22 July and the misleading character of the redactions, which I accept as unintentional although unsound,<sup>29</sup> the decisions to provide information that was inaccurate, incomplete and/or misleading both here and under the OIA rested almost entirely with the Director:

- Only the Director knew of the outcome of his meeting with the Leader of the Opposition on 25 July and of Mr Goff’s reliance on that outcome in his media remarks later that day;
- Only the Director knew of the reasons that Mr Goff’s statements that he had not read the 8 March SIR might well be correct; and
- Only the Director knew that his annotation “Read by/discussed with Mr Goff” was at least partly incorrect.

204. I explored the reasons for these decisions with the Director in his evidence and submissions before this inquiry. I have found that there were three material reasons:

- The Director characterised the requests for information from PMO – and also the OIA requests – as concerned principally with the question of whether he had met his obligation under s 4AA(3) by “briefing” the Leader of the Opposition on the Israeli issue. The Leader of the Opposition had accepted, publicly and in positive terms towards Dr Tucker, that the issue had been raised in passing. But Dr Tucker’s responses to the information requests were still focused on addressing any doubt about whether he had properly carried out his briefing responsibility,

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<sup>29</sup> See paragraph 111.

even though that was not in issue from 25 July onwards and the various information requested and provided went well beyond that simple point.

- Secondly, the Director did not at the time consider – but in part accepted in submissions to the inquiry – that it was appropriate to include necessary contextual or explanatory information. For example, while the Director accepted that it was not appropriate to disclose the agenda notes without the necessary explanation, he did not accept that it was necessary to explain that his use of the words “discussed with” did not mean, in the ordinary sense of the words, that there had been a discussion between himself and Mr Goff.
- The last and predominant reason for these decisions was the Director’s continuing belief that the Leader of the Opposition had in fact read the SIR, albeit only the front page summary. That belief appears to have been the reason that the Director was not prepared to acknowledge the contrary statements by the Leader of the Opposition or to recognise that those statements might well have been correct.

205. The Director’s continued reliance on his own belief about what Mr Goff had read or not read at the 14 March meeting effectively undermined his ability to comply with the obligations under the OIA and with the duties of political neutrality under s 4AA.

206. I acknowledge that, at the point of his 25 July meeting with the Leader of the Opposition, the Director may have sought to resolve the controversy over the Israeli issue. I also acknowledge that the Director did evidently struggle with what he saw as a contradiction between his obligation to provide information to PMO and under the OIA and the damage that he could see that information causing to Mr Goff and to the s 4AA(3) relationship. As the issue progressed, the Director also increasingly viewed Mr Goff’s statements as an attack on his own credibility.

207. However, as I have found:

- There was no necessary contradiction between Mr Goff’s statements that he had not read the SIR and Dr Tucker’s belief that he had. It was quite possible that Dr Tucker was honestly mistaken.
- Similarly, it was accepted by Dr Tucker – at least in part – that documents that he had released required explanation to provide an accurate account. For example, while I have found that Dr Tucker’s annotation “Read by/discussed with Mr Goff” was not literally accurate, I could also accept that Dr Tucker made that annotation with a particular, personal meaning and without any dishonest purpose. The problem was that that personal meaning was not conveyed and the objective meaning of the words was not accurate.
- There was also no necessary contradiction between Mr Goff’s statements and Dr Tucker’s belief that he had complied with his s 4AA duty to consult. As Dr Tucker acknowledged at the 25 July meeting and in evidence, he had addressed the Israeli issue only in passing. While Mr Goff could, reasonably, have raised the

further question of whether that had been sufficient, that did not raise a question of Dr Tucker's personal integrity or credibility.

208. However, Dr Tucker was not able to recognise or countenance that his belief might be honestly mistaken or that his personal integrity was not being questioned. That inability led to the provision of the inaccurate and incomplete information that is described above. It also reflected a failure to take a measured and objective approach to his obligations under s 4AA.

*Allegations of unauthorised disclosure by the NZSIS*

209. In response to Mr Hager's published allegations concerning the release of information by NZSIS to Mr Slater:
- Mr Slater alleged that he had been assisted in requesting the information by a telephone call from an anonymous source whom he believed to be an NZSIS staff member seeking to embarrass Mr Goff and/or defend Dr Tucker.
  - There were a number of allegations that the NZSIS had released the information either in collusion with or at the direction of the Prime Minister or the Prime Minister's Office.
210. The allegation that an NZSIS officer made such an unauthorised disclosure is very serious and one I was obliged to investigate thoroughly. It would represent a serious undermining of political neutrality of the NZSIS, and would also raise serious disciplinary and potential criminal consequences for any officer concerned.<sup>30</sup>
211. I put the allegation under oath or affirmation to every NZSIS staff member who could be identified as having had access to the relevant records, which were under narrowly restricted access. All denied having made or having any knowledge of such disclosure and they, along with a number of other witnesses, gave their view that it was extremely unlikely that a leak could have occurred as alleged, given the commitment of NZSIS staff to information security and the personal consequences of disclosure.
212. I also undertook thorough searches of landline and mobile phones of all persons with knowledge of the documents relating to Dr Tucker's meeting with Mr Goff and also notified the current Director of the alleged disclosure. I found no evidence of the alleged disclosure to Mr Slater by NZSIS staff.
213. I did, however, find that Mr Ede had provided the details of the relevant documents to Mr Slater and was in fact speaking to Mr Slater by phone at the exact time that Mr Slater submitted his OIA request.
214. Mr Slater also later provided a series of emails to and from Mr Ede, in which Mr Ede expressed his concern that he "might be in the shit" over his use of the NZSIS information. Mr de Joux explained to the inquiry he was not happy Mr Ede had chosen

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<sup>30</sup> See *State Services Code of Conduct* and NZSIS Act 1969, s 12A(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 this connection with the Service otherwise than in the strict course of his official duties or as authorised by the Minister."



to work through Mr Slater rather than mainstream media because it would create an unhelpful perception. Mr Slater's email reply to Mr Ede was that he would simply state that he had an NZSIS source. In the context of Mr Ede's evidence, I interpreted that email to mean that Mr Slater would claim to have an NZSIS source in order to protect Mr Ede.

215. While it is possible that an NZSIS officer could also have disclosed the same information to Mr Slater using an unmonitored phone, I do not believe that an NZSIS officer made any unauthorised disclosure to Mr Slater.

*Allegation of collusion by or political direction of the NZSIS*

216. The further allegation was that aspects of these events – the specificity of Mr Slater's request, the speed with which that request was answered, and the decision to disclose the redacted meeting documents at all and/or initially only to Mr Slater – must have been the result of collusion by the NZSIS with PMO staff and/or must have occurred at the direction of the Prime Minister.

217. These allegations raised serious questions under s 4AA(1), as well under the State Sector *Code of Conduct*. While the allegations were made on the basis of reasoned conjecture – that is, that collusion or direction was the only plausible explanation for these events – rather than any specific evidence, I nonetheless considered the allegations required thorough investigation as part of this inquiry. To that end:

- I reviewed all available records of meetings, landline and mobile telephone conversations and emails between the NZSIS and PMO.
- I reviewed all NZSIS records relating to the OIA request and release.
- I examined under oath or affirmation all staff of NZSIS and PMO who were aware of the OIA request, including the Prime Minister's Chief of Staff and other current and former staff, and also the then Chief Executive of the Department of the Prime Minister and Cabinet and the then Director of the Intelligence Coordination Group, who had been informed of the request by the then Director.

218. From those inquiries, and the wider investigation that I undertook of the actions of NZSIS and PMO, I found the following:

- The Acting Director and the Director each briefed the Prime Minister on the Israeli allegations by telephone on 21 and 22 July respectively. The Prime Minister was, on those dates and until 30 July, in the United States. The Director, as part of the 22 July briefing, advised the Prime Minister that the Leader of the Opposition had received a briefing on the Israeli allegations. The Prime Minister made a public comment that the Leader of the Opposition had been briefed on the Q&A programme broadcast on 24 July.
- Mr de Joux had also sought confirmation of that point and was given that confirmation, including a description of the briefing documents and the date of those documents, by the DDROC on 22 July. He confirmed that point again with the Director on 25 July. On the same day, Mr de Joux provided that information

to Mr Ede with the suggestion that it might prompt an OIA request for those documents. Mr Ede then provided that information to Mr Slater, discussed the terms of the OIA request with Mr Slater and provided Mr Slater with draft blog posts concerning the issue.

- After receiving that information, Mr Slater published a blog post that commented “[a]ll someone has to do now is ask Warren Tucker to produce the briefing notes and [Mr] Goff is a goner”. Mr Slater emphasised that he had decided to make the OIA request himself but that he was assisted by NZSIS information provided to him. As noted above, I have accepted the evidence from Mr de Joux and Mr Ede that it was Mr Ede who provided that information.

219. Mr Slater proceeded to make an OIA request on 26 July. The speed of the NZSIS response, which was all but finalised on that same day, was unusual and has been viewed as suspect. The response to the request was able to be compiled on the same day for three reasons:

- Because the request concerned the Director’s consultation with the Leader of the Opposition, it was immediately drawn to the attention of the Director, who referred it to the DDRC and the DGC;
- The Director considered that the request covered the documents concerning his March meeting with the Leader of the Opposition that had already been retrieved from his safe the previous day and that the relevant information could be disclosed without causing any national security concern, and so could be answered relatively easily. The Director’s notes from the time also suggest that he, and possibly the DPMC officials too, saw it as appropriate, given the controversy, to release the documents sooner rather than later; and
- The DGC dealt with the detail of the request later that day, both because it appeared straightforward and because of other forthcoming commitments, allowing the formal declassification and processing to be done at the end of that day.

220. On 27 July, the Director mentioned the proposed release of information at a meeting with the Chief Executive of the Department of the Prime Minister and Cabinet and the Director of the Intelligence Coordination Group, and then contacted both the Leader of the Opposition and Mr de Joux to advise them of the proposed release. The Director agreed to a request by the Leader of the Opposition to delay the release to allow him time to seek advice. As I have found at paragraphs 95-99, that request was not improper and the Director ought to have sought and considered the view of the Leader of the Opposition before deciding to release the redacted meeting documents. The Director advised Mr de Joux of the delay and that information was then given to Mr Slater through Mr Ede.

221. The released documents were then given to the Leader of the Opposition, in response to an urgent request by him, on 1 August and sent to Mr Slater by post on 2 August.

222. Had it been necessary, I should also have sought the Prime Minister's appearance before the inquiry. However, I have found that the Prime Minister's involvement in these particular events was limited to a briefing given by the Director to the Prime Minister by phone on 22 July, advice of the OIA request and response given only after that response was prepared and sent, and media comments by the Prime Minister published on 24 July and on 4-6 August. There was no disputed factual issue related to those events.
223. It follows from these events and findings that Mr Slater's OIA request for the March meeting documents was instigated or, at least, assisted by Mr Ede's description of those documents given on 25-26 July to Mr Slater. That description was, in turn, provided by Mr de Joux from the information given to him by NZSIS on 22 and 25 July.
224. The decision to release redacted copies of the meeting documents, the timing of the release and the decision to release information solely to Mr Slater were all made by NZSIS. While NZSIS frequently does decline OIA requests or take some time to determine them, it was not unreasonable or inexplicable for NZSIS to deal with this request promptly (provided it did so accurately and comprehensively).
225. I did not find any indication of collusion by or direction to NZSIS over the request. I also observe that, having established the actions of the NZSIS, Mr de Joux and Mr Ede, such collusion or direction appears inherently unlikely to have occurred, for two reasons. First, it was not necessary, as Mr Ede and Mr Slater were able to compile the request from briefing information provided by NZSIS. Second, while I should have expected any collusion or direction to have occurred with some degree of secrecy, I found to the contrary that the provision of the necessary information to PMO was openly discussed and recorded within NZSIS.

#### *Lack of proactive response*

226. Further questions of the maintenance of political neutrality arise from the aftermath of the request by Mr Slater and the response by NZSIS.
227. The Director and the NZSIS did not respond at all to the misinterpretation of the released documents, which arose from the misleading way in which the documents were redacted and the failure to provide necessary contextual information. The Director's evidence was that he contemplated a press release that would set out his version of what happened during his briefing of Mr Goff on 14 March, but he was persuaded by the DGC that to do so would be "buying a public fight" with Mr Goff. The DGC confirms her advice was not to make a public statement, but rather to release the relevant information in response to the other OIA request. In any event, a press release in the terms contemplated by the Director would not have clarified the misunderstandings generated by the documents as released.
228. While the NZSIS did respond to further OIA requests, some wider in their terms, it did not ever release the various omitted information set out in the previous section and did not, in particular, disclose that:
- The annotation "Read by/discussed with Mr Goff" was substantially incorrect;
  - Some irrelevant material was retained in the redacted documents;

- The released information omitted other necessary context; and
  - Many of the remarks by the Leader of the Opposition, which had been characterised as dishonest by the Director, by Ministers acting on the Director's advice and by many others – including the Public Service Association – were made by the Leader of the Opposition as a result of his 25 July meeting and at least partial agreement with the Director and those remarks had a plausible factual basis.
229. The failure to release such information appears to have followed the Director's reasons outlined at paragraph 204 and occurred notwithstanding that:
- The information was within the scope of both Mr Slater's own request and the subsequent requests and was necessary to ensure that the information disclosed by the NZSIS was not inaccurate;
  - The NZSIS was aware, at least by this point, that its obligations under the OIA extended to, for example, the Director's recollections of the content of the March meeting; and
  - The NZSIS was, or should have been, aware that the documents as released had been misinterpreted.

*Awareness of media and political context*

230. Part of the explanation for the lack of engagement by the NZSIS with the media requests and then with the media coverage of the documents released to Mr Slater appears to have been an acute lack of media awareness and varying levels of understanding of the political context on the part of the Director and the NZSIS senior leadership. While media advice and some reporting of news coverage of NZSIS matters was undertaken by the two NZSIS communications staff in the normal course, both of those staff were unavailable during this period and no alternative source of advice or information was put in place.
231. Nor did the Director seek advice from the wider public service, for example from DPMC, the Cabinet Office or the State Services Commission. While he did notify DPMC of his meeting with the Leader of the Opposition and, later, of the OIA release, neither of these were framed as a request for advice.
232. The Director did, in a limited sense, receive some media and/or political advice in his successive conversations with Mr de Joux, but that gave rise to a tension between Mr de Joux's role as a political appointee and the Director's duty of political neutrality.
233. In particular, I find it surprising that the Director thought it appropriate to discuss his conversations with the Leader of the Opposition, in respect of whom he had significant responsibilities under s 4AA(1) and (3), with a political adviser without considering the conflict that that entailed. I consider that the Director ought instead – at least following the serious concerns raised by the Leader of the Opposition – to have sought thorough and fully informed advice, either internally or from DPMC, the Cabinet Office, the State Services Commission and/or the Solicitor-General.

234. It is also of concern that having taken the decision to release the material to Mr Slater, there was no media strategy or communications plan to follow the release. Having searched all relevant NZSIS files and emails, it is clear the NZSIS did not monitor what Mr Slater and other media did with the information once it was released, notwithstanding their acknowledgement that this was a politically sensitive issue. I showed Dr Tucker and other NZSIS witnesses *Whaleoil* posts following the release of the documents, and all said they were unaware of how Mr Slater had interpreted the documents released to him. As noted earlier, the interpretations were entirely reasonable based on the information released. They were shared by other media.<sup>31</sup> Had NZSIS taken any reasonable steps to monitor the media coverage on this issue, it would have been clear that information released by the NZSIS was being misinterpreted in such a way as to damage the Leader of the Opposition and NZSIS could have taken some steps to address this.
235. The Director and the NZSIS were however aware of criticisms made of them over the refusal of media requests for information and proceeded as far as consideration of a press release to rebut that criticism. Given that the Director and the NZSIS were able to recognise and consider proactive steps to address this less substantive issue, they ought also have been able to recognise or address the wider misunderstanding of the information released by the NZSIS.

*Was there a breach of the obligation of political neutrality?*

236. The Director knew that the Israeli allegations had been, at most, touched on briefly at the March meeting with the Leader of the Opposition and that the relevant briefing paper had been available but, the Leader of the Opposition contended, not read or discussed.
237. However, the Director asserted to PMO, the Prime Minister, Mr Slater and other requesters that the briefing had been read and discussed. They were all given an incomplete and incorrect account. The errors of judgement by the Director over the two week period demonstrated an ongoing failure to meet the s 4AA obligations.
238. In addition, the Director and others did not have adequate regard to the importance and sensitivity of the relationship between the Director and the Leader of the Opposition, as reflected in s 4AA(3) of the NZSIS Act. In particular, as discussed above:
- The Director's meeting with the Leader of the Opposition on 25 July had the potential to resolve the overall controversy and to safeguard that important relationship but that did not occur.
  - The Director's engagement with the Leader of the Opposition over the OIA request and the intended response to that request was inadequate. The Director did not appreciate that consultation was required, whether under s 4AA or under the OIA.

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<sup>31</sup> See, for example: "Editorial: Going into battles that we just can't win", Nelson Mail, 6 August 2011, [www.stuff.co.nz/nelson-mail/opinion/editorial/5402083/Editorial-Going-into-battles-that-we-just-can-t-win](http://www.stuff.co.nz/nelson-mail/opinion/editorial/5402083/Editorial-Going-into-battles-that-we-just-can-t-win); David Farrar, "The SIS Document", Kiwiblog, 4 August 2011 [www.kiwiblog.co.nz/2011/08/the\\_sis\\_document.html](http://www.kiwiblog.co.nz/2011/08/the_sis_document.html); Matthew Hooten, "Goff safe as leader despite no credibility on SIS issue" 5 August 2011, [www.electionresults.co.nz/opinion/politicians/goff-safe-leader-despite-no-credibility-sis-issue](http://www.electionresults.co.nz/opinion/politicians/goff-safe-leader-despite-no-credibility-sis-issue).

- When the released documents were misinterpreted and caused political harm, the Director and/or the NZSIS do not appear to have registered those events and did not attempt to remedy them.
239. I consider that the series of errors made by the Director and by the NZSIS, the missed opportunities to prevent, correct or redress those errors and the lack of systemic protections for political neutrality demonstrated a failure on the part of the Director to take all reasonable steps to ensure that neutrality.
240. In particular, the Director did not take all reasonable steps to ensure that the information provided to PMO and in the NZSIS responses to OIA requests was accurate and complete. Had reasonable steps been taken in that regard it is likely that the release of inaccurate and incomplete information, and the consequent harm to the Leader of the Opposition, would have been averted.
241. The Director also did not take all reasonable steps to ensure political neutrality once it became apparent that the form of those redactions had led Mr Slater, the news media and others to a mistaken and adverse understanding of the actions and statements of the Leader of the Opposition. Whether or not the Director was in fact aware of how the release of documents had been interpreted and the role of the particular redactions, the error could again have been readily remedied had NZSIS taken any step to monitor reaction to the OIA release and responded to the misunderstanding.
242. I also consider that the failure to engage effectively with the Leader of the Opposition or to address the risks posed by the partial release of information were inconsistent with the Director's duty towards the Leader of the Opposition under s 4AA(3). While s 4AA(3) provides only that the Director "must consult ... for the purpose of keeping [the Leader of the Opposition] informed", it follows from that duty of consultation that the Director must maintain the confidence of the Leader of the Opposition, so far as possible, and must not undermine the consultation process through unwarranted or inaccurate disclosures. The series of errors by the Director and by the NZSIS, which caused avoidable harm to the Leader of the Opposition, and the shortcomings in the Director's engagement with him were, I conclude, inconsistent with the s 4AA(3) duty.
243. As addressed above, these deficiencies are not only the individual responsibility of the then Director. While the Director was himself primarily responsible for the shortcomings in the provision of information to PMO, as he conducted those discussions himself, he ought to have been able to rely upon the relevant senior staff to take the necessary steps to complete the OIA responses to Mr Slater and others consistently, in accordance with best practice and mindful of the consequences; provide advice and assistance in respect of media queries and media coverage; and identify and engage more constructively with the political sensitivities and risks involved.
244. Notwithstanding those failures, I have not found any partisan political purpose on the part of the Director and/or the NZSIS. The decision to release information to Mr Slater, and the related actions of the Director and of the NZSIS, were based on an incorrect understanding of the NZSIS' obligations, under both the OIA and the NZSIS Act, incomplete or unsound factual understandings and in the case of the Director, significant errors of judgement. I conclude that those reasons were nonetheless sincere.

## PROPRIETY

245. A further question for this inquiry was whether the NZSIS acted with propriety. The standard of propriety is not defined. The value of the propriety standard is that it can allow a broader inquiry that goes beyond specific questions of legality. Here it encompasses whether the NZSIS acted in a way that a fully informed and objective observer would consider appropriate and justifiable in the circumstances. For the NZSIS, that standard is in part clarified by the principles set out in s 4AAA of the NZSIS Act.

246. In the circumstances of this inquiry, four broad principles of propriety are relevant:

- The principles of acting with integrity and professionalism in s 4AAA(1)(c)(iii);
- The principle of acting in a way that facilitates effective democratic oversight in s 4AAA(1)(c)(iv);
- The duty to avoid the appearance of partiality, as well as actual partiality; and
- The requirement of natural justice, as it applies to decisions concerning the disclosure of information to ensure accuracy, proportionality and overall fairness to those affected.

247. Applying these broad principles I conclude that:

- The disclosure of incomplete, inaccurate and misleading information concerning the Leader of the Opposition lacked due professionalism, risked the appearance of partiality and detracted from due democratic oversight of the NZSIS. Although not intended, it had a politically partisan effect. I have already canvassed the substantive and procedural failings that led to that disclosure, but it is also appropriate to stress that, where the NZSIS deals with the disclosure of sensitive information, it must do so with scrupulous care and demonstrable integrity. That did not occur here.
- The form of the Director's engagement with the Leader of the Opposition was also unprofessional and unfair. I have canvassed that issue in terms of compliance with s 4AA(1) and with the OIA, but the wider point is that that engagement did not occur in an appropriately rigorous manner and failed to reflect the seriousness of the issue and the gravity of the Director's obligations towards the Leader of the Opposition. The Director also ought to have acted to assess the serious and, as it transpires, justified concerns that Mr Goff raised but he did not.
- The engagement by the Director with PMO was not consistent with standards of professionalism in the State service. While it may have been understandable that PMO staff commented critically on the Leader of the Opposition, given the limited information provided to them and the political nature of their roles, the Director did to some degree engage with those criticisms. That was not appropriate.

- I have found that the Director dealt with these events with only limited recourse to advice or assistance from his senior staff or others. These events were inherently difficult for several reasons: the Israeli issue and the question around consultation with the Leader of the Opposition were both controversial, the disclosure of consultation records was unprecedented and the issue was (mistakenly) perceived by the Director as turning on his own personal credibility. There were also resource and workload constraints. However, the Director sought only very limited advice or assistance and, critically, did not disclose all relevant information to those advising him.
- Further, I would have expected those in senior roles to have recognised and sought to assist with those difficulties, although I acknowledge that some advice was given, notably by the DGC, and that senior staff were hindered in providing advice or assistance because they did not have some relevant information. However, even such limited steps as undertaking a thorough review of potentially relevant documents for the OIA requests or drawing the Director's attention to the difficulties arising from disparate treatment of those requests could have averted many of the shortcomings that I have identified.



## **ABOUT THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY**

### *Who is the Inspector-General of Intelligence and Security?*

The Inspector-General is an independent statutory officer, appointed by the Governor-General on the recommendation of the Prime Minister and following consultation with the Intelligence and Security Committee.

The Inspector-General is not part of the New Zealand Security Intelligence Service (NZSIS) or the Government Communications Security Bureau (GCSB). The current Inspector-General is Cheryl Gwyn and the Deputy Inspector-General is Ben Keith. A two member advisory panel, to provide advice to the Inspector-General, was appointed in October 2014. The panel members are Chris Hodson QC (Chair) and Angela Foulkes.

Being independent means that the Inspector-General makes his or her own findings based on the facts and the law. He or she does not answer to the NZSIS or GCSB and must ensure that complaints about those agencies are independently investigated.

### *What are the Inspector-General's functions?*

Under the Inspector-General of Intelligence and Security Act 1996, the Inspector-General:

- receives and investigates complaints about acts, omissions, practices, policies or procedures of the NZSIS or GCSB
- undertakes inquiries (at his or her own initiative or at the request of the Minister) into compliance with the law by the NZSIS or GCSB, or the propriety of particular activities of those agencies
- regularly reviews and inspects the NZSIS and GCSB to assess the effectiveness of their procedures and compliance systems and, on an annual basis, certifies the extent to which each agency's compliance systems are sound

On completion of an inquiry into a complaint, or an own-motion or Ministerially-requested inquiry, the Inspector-General must prepare a written report containing his or her conclusions and recommendations. The report is provided to the Minister and the chief executive of the intelligence and security agency to which the inquiry relates and must be published on the Inspector-General's website ([www.igis.govt.nz](http://www.igis.govt.nz)).



**Metiria Turei and Russel Norman**  
Green Party Co-Leaders



**Green**  
Green Party of Aotearoa New Zealand

14 August 2014

The Inspector-General  
c/- The Registrar of the High Court at Wellington  
DX SX 11199  
Wellington



Dear Inspector-General,

I wish to lay a complaint with your office regarding allegations that New Zealand Security Intelligence Service (NZSIS) documents were declassified in order to be used for political purposes.

In Nicky Hager's book *Dirty Politics*, published on 13 August 2014, it is alleged that the NZSIS released information that would not have usually been released, after receiving an Official Information Act request from Cameron Slater.

The book alleges that *"Someone had overruled the usual practice and then fast-tracked the release. The released documents were stamped as being declassified on 26 July 2011, the same day that Slater sent off his request."*

The book also alleges that *"...someone had told Slater that his request would be processed, signed off and sent to him in just a few days. It also seems that Slater had some advance knowledge of what the information said."*

Correspondence between Mr Slater and an associate includes statements that imply this advance knowledge of both the content of the information and the process being used for it to be released, such as *"...it has been expedited, in the public interest. It is devastating for Goff I am told."*

The book states that documents such as NZSIS briefing notes are not usually released to the public. It also states that the information was received by Mr Slater seven working days after the request was lodged.

If these allegations are true, I find it deeply concerning that classified documents could be deliberately declassified for the express purpose of releasing to a prearranged source as part of an orchestrated political attack.

It is also of great concern that Mr Slater appeared to have knowledge of the information and process, both of which should have only been available to those within the NZSIS and the office of the Minister in Charge of the New Zealand Security Intelligence Service.

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*Authorised by Russel Norman and Metiria Turei, Parliament Buildings, Wellington*





Metiria Turei and Russel Norman  
Green Party Co-Leaders



As the officer responsible for ensuring that the NZSIS acts lawfully and with propriety, as well as for reviewing the NZSIS's compliance procedures and systems, I request that your office investigate the allegations laid out in this book.

I urge you to undertake an inquiry into this matter. Oversight of our intelligence agencies is vital to ensure public confidence in the work that these agencies do, and I feel that the allegations in this book threaten to undermine this confidence.

Queries may be directed to my staff, either Maggie Tait (04) 817-6710 or Holly Donald (04) 817-6606.

Yours faithfully,

Metiria Turei  
Green Party Co-leader

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*Authorised by Russel Norman and Metiria Turei, Parliament Buildings, Wellington*



OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

20 August 2014

Hon Metiria Turei MP  
Green Party Co-leader  
P O Box 18888  
WELLINGTON 6011

By email: [metiria.turei@parliament.govt.nz](mailto:metiria.turei@parliament.govt.nz)

Dear Ms Turei

I have received your complaint of 14 August 2014 concerning allegations that New Zealand Security Intelligence Service (NZSIS) documents were declassified in order to be used for political purposes. The complaint was received in my office on 19 August.

It is a function of my Office to inquire into complaints under section 11(1)(b) of the Inspector-General of Intelligence and Security Act 1996 (the "Act") where a person has or may have been adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency. I also have authority to commence an inquiry on my own motion into the legality and propriety of a particular activity of an intelligence and security agency under sections 11(1)(a) and (ca) of the Act. For inquiries concerning propriety, it is not within my functions to inquire into any action taken by the Minister responsible for the relevant intelligence and security agency.

The information provided with your complaint does not on its face demonstrate that you have been personally affected by the alleged conduct, and therefore I cannot address the matter under my complaints jurisdiction. However, I am satisfied that there is a sufficient public interest justifying the commencement of an own-motion inquiry by my Office into the substance of the issues raised in your complaint.

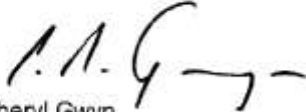
Accordingly, pursuant to section 19 of the Act, I have informed the Director of Security and the Prime Minister that I am commencing an inquiry in accordance with sections 11(1)(a) and (ca) of the Act into the legality and propriety of the release of information by the NZSIS in this case, including allegations that NZSIS documents were declassified in order to be used for political purposes.

Please let me know if you have any further information, including documents, which you would wish me to consider in the course of my inquiry. Please contact my office if you wish to discuss this matter further.

Freyberg House, 2 Altken Street, Wellington, New Zealand  
P O Box 5609, Wellington 6145  
Phone: (04) 439 6721

I will advise you once my inquiry is concluded and the results of the inquiry will be published in due course on the IGIS website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C. Gwyn', with a stylized flourish at the end.

Cheryl Gwyn  
**Inspector-General of Intelligence and Security**





# OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

## Appendix C

Office of the Prime Minister	Position at July 2011
Wayne Eagleson	Chief of Staff
Philip de Joux	Deputy Chief of Staff
Stephen Woodhouse	Senior Private Secretary
Jason Ede	Senior Advisor
Kevin Taylor	Chief Press Secretary
Paula Oliver	Senior Press Secretary

Department of the Prime Minister and Cabinet	Position at July 2011
Sir Maarten Wevers	Chief Executive
Roy Ferguson	Director, Intelligence Coordination Group

Other Witnesses	
Nicky Hager	Author of <i>Dirty Politics</i>
Cameron Slater	Political Blogger
Jessica Mutch	Reporter TVNZ
Felix Marwick	Reporter NewstalkZB

New Zealand Security Intelligence Service	Position at July 2011	Descriptor used in report
Dr Warren Tucker	Director	"Dr Tucker" or "Director"
	Deputy-Director - Resources and Capability	"DDRC"
	Deputy-Director - Relationships, Outputs and Communications	"DDROC"
	Director's General Counsel	"DGC"
	Director's Personal Assistant	Not referred to in report
	Head, Director's Office	"Head, Director's Office"
	Communications Advisor	"Communications Advisor"
	Assistant Communications Advisor	"Assistant Communications Advisor"
	Archives Policy Manager (responsible for OIA requests)	"OIA Officer"
	Assistant Legal Adviser	Not referred to in report
	Legal Administrator	Not referred to in report



**OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY**

**SUMMONS TO BE EXAMINED ON OATH BEFORE THE INSPECTOR-GENERAL OF INTELLIGENCE  
AND SECURITY**

Sections 23(1) and (2) Inspector-General of Intelligence and Security Act 1996

Date:

To:

You are summoned to be examined on oath before the Inspector-General of Intelligence and Security (the Inspector-General) at [time], [date] and [location].

The general scope and purpose of the examination will be as set out in Schedule "A" to this summons.

You are required to bring with you and produce any documents that may be specified to you by the Inspector-General's inquiry team prior to the date of hearing.

The examination before the Inspector-General will be conducted in private. Further information about the examination is set out in Schedule "B" to this summons.

Enquiries about this summons should be directed to [ ] on +64 4 439 6721.

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Cheryl Gwyn  
Inspector-General of Intelligence and Security



## OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

### CONFIDENTIALITY ORDER

TO [insert name in full]

This is an Inquiry pursuant to section 11(1) of the Inspector-General of Intelligence and Security Act 1996 (the "Act"). The Inquiry is a judicial proceeding (section 23(3) of the Act) and the Inspector-General may regulate the proceedings of the Inquiry in such manner as the Inspector-General sees fit (section 19(8) of the Act). Further the Inquiry is to be conducted in private and no account of the Inquiry may be published: Sections 19(6) and 29 of the Act.

Pursuant to those provisions, and in order to ensure the integrity of this inquiry, fairness to those involved and overall confidentiality, you are required until further notice from the Inspector-General to keep confidential the following matters:

1. Questions put to the witness by the Inspector-General and answers to those questions;
2. Requests for documents and documents produced by the witness; and
3. Information provided to the witness, including statements made by other witnesses and the identity of other witnesses.

Failure to comply with this order is an offence pursuant to sections 23(8)(a) and/or (b) and/or 29(4) of the Act.

Notwithstanding the above, you are permitted to:

1. Confirm that you have appeared as a witness and given evidence before the Inspector-General; and
2. Refer publicly to anything you said in your preliminary remarks, provided that doing so does not disclose any classified information.

Cheryl Gwyn  
Inspector-General of Intelligence and Security

September 2014

Received and acknowledged

[insert name in full]

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