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OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

28 May 2014

Report – 2013/2014-01

The attached report is the result of an inquiry by the Inspector-General of Intelligence and Security (IGIS) into a complaint received from [REDACTED] [the complainant] relating to the conduct of the New Zealand Security Intelligence Service (NZSIS). The complaint was received on 19 July 2012 by the Ombudsman and subsequently transferred to the IGIS.

In accordance with section 25A of the Inspector-General of Intelligence and Security Act 1996 (the "Act"), a copy of this report is being published on the IGIS website. Parts of this report have been redacted in accordance with section 25A(2)(a)-(e) of the Act and to protect the privacy of the complainant.

Paragraphs 30 and 33 of this report raise questions concerning the ability of the NZSIS to issue warnings regarding criminal conduct, and recommends that the practice be suspended until an advisory opinion from Crown Law is obtained.

In accordance with s 11(1)(a) and (ca) of the Act, I have decided to institute an inquiry of my own motion to clarify the legality and propriety of this practice. The results of my inquiry will be published in due course on the IGIS website.

I am advised by the Director of the NZSIS that she has suspended the practice pending final clarification.

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INSPECTOR-GENERAL OF
INTELLIGENCE AND SECURITY

THE HON R ANDREW McGECHAN QC

2 May 2014

The Prime Minister Minister in Charge of the New Zealand Security Intelligence Service Parliament Building WELLINGTON	The Director New Zealand Security Intelligence Service P O Box 900 WELLINGTON
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Dear Prime Minister

NZSIS COMPLAINT: [REDACTED] [the complainant]: **REPORT**

The Complaint:

1. This complaint arises out of an entry under Warrant by NZSIS Officers into [REDACTED] [the complainant's] premises on 17 July 2012. As distilled in his letter to me of 26 September 2013 it questions:

- (1) Why the Authorities failed to provide a copy of the Search Warrant?
- (2) Why the Authorities seized my daughter's computer without a separate Warrant or proper consent from her prior to taking the property and why were they disrespectful with her privacy in the room?
- (3) Why certain text messages were removed from my mobile phone (when

my phone was returned by NZSIS) [REDACTED]

[REDACTED]

- (4) Why were the NZSIS Officers making political statements during the raid regarding my personal objections to [REDACTED]?

The complaint continues:

"As a consequence of the action of NZSIS, I have personally suffered, my business has been severely afflicted and therefore after the inquiry, I will determine my next course of action. I state that all my rights under the law are preserved in the circumstance".

Delays:

2. This complaint has an unfortunate history. An initial complaint dated 19 July 2012, more widely drawn, was lodged with the Ombudsman, followed by a further letter dated 24 July 2012. The Ombudsman, appropriately, suggested transfer to the IGIS and IPCA. [REDACTED] [the complainant] so requested. Unfortunately, due to an administrative oversight in the Ombudsman's Office that was not done. Following questions [REDACTED] [REDACTED] seemingly predicated on this complaint having been transferred to the IGIS, that situation came to light. The complaint was then transferred by the Ombudsman as intended, and confirmed by [REDACTED] [the complainant] to myself in the terms quoted. An unfortunate outcome of this delay has been that memories of those involved are not as fresh as desirable.

Police:

3. Two plain clothes Detectives attended with the NZSIS Officers. They were in a passive supportive role. A separate complaint by [REDACTED] [the complainant] as to their involvement has been rejected by the IPCA. I see no reason to differ.

The Warrant:

4. The Director of the NZSIS applied for a Domestic Intelligence Warrant against a number of individuals, including [REDACTED] [the complainant]. It arose out of suspicions of a plan to inflict violence against [REDACTED]. It was part of a wider operation. The application sought various powers including seizure and entry. [REDACTED]
[REDACTED] The application satisfied statutory criteria, and advanced grounds based on personal connections and possible general motive which could justify this issue in respect of [REDACTED] [the complainant] and the premises concerned. As is permissible, the grounds justifying a Search Warrant fell very considerably short of establishing any criminal conduct on his part.
5. The Warrant document was valid and current. It specifically authorized seizure of anything in the possession or control of [REDACTED] [the complainant] at the premises concerned. There were associated powers of entry.

The Visit:

6. On 17 July 2012 at 09:00 hours an NZSIS Officer who I will refer to by an alias "A" and

Detective T arrived at [REDACTED] [the complainant's] premises. After a conversation at the rear door they were invited in. A conversation ensued between A and [REDACTED] [the complainant] until approximately 09:32 am. At that point A produced the NZSIS Domestic Intelligence Warrant concerned, and a Rights Advice Form which [REDACTED] [the complainant] signed and returned. It informed him he was not required to answer questions, or to remain. He chose to do so. Between 09:32 am and 10:15 am approximately the conversation continued between A, now alone, and [REDACTED] [the complainant]. Over that same latter period another NZSIS Officer who I will refer to by an alias "B", and both Detectives searched elsewhere in the premises. They located a laptop and, B says, a cellphone in the [REDACTED] premises. They wished to search a bedroom in which [REDACTED] [the complainant's] adult daughter was sleeping. As [REDACTED] [the complainant] could not wake her, they photographed an item of interest. They did no more in that room. B and Detective M took the cellphone and laptop, giving [REDACTED] [the complainant] a receipt. A and Detective T departed at approximately 10:15 am. B and Detective M departed at approximately 10:30 am.

7. There are some sharp differences on matters of detail as to what occurred during these activities. I will come to those matters where relevant.

Complaint (1): Non Provision of a copy of the Search Warrant:

8. [REDACTED] [the complainant] complains that he requested a copy of the Search Warrant during this visit, and he was not given a copy. The NZSIS Officers deny any such request was made until later in the day, when both [REDACTED] [the complainant's] daughter and [REDACTED]

██████████[the complainant] were in contact requesting return of the items removed. I prefer the more contemporaneous recollections and record made by the NZSIS Officers.

Complaint (2): Seizures of Daughter's Computer:

9. There are differing versions as to knowledge of the daughter's ownership.
10. When Detective T went with ██████████[the complainant] to the front of the ██████████ premises for ██████████[the complainant] to get his glasses to read the Warrant, Detective T noticed a laptop, with a cellphone on top, in ██████████ area. When NZSIS Officer B and Detective M entered shortly afterward, Detective T took B to the front of the ██████████[premises] and showed him those items. Photographs were taken. As NZSIS Officer A was about to leave, Detective T told A of those two items. A's version is that she asked ██████████[the complainant] whether both those items were his and ██████████[the complainant] said "Yes".
11. ██████████[The complainant] denies that he went to the front of ██████████[the premises] to get his glasses at all. However, he does not dispute the laptop was indeed in that part of the premises. ██████████[The complainant's] version is that he told them (meaning NZSIS Officer B and Detective M) that it was his daughter's, and they should ask her whether they could take it, to which they responded they did not have to. Officer B denies this occurred, maintaining that at no time did ██████████[the complainant] say the laptop was his daughter's.

12. The Detectives have no useful recollections at this point in time.

13. I accept the NZSIS Officers record and recollection that [REDACTED] [the complainant] did say the laptop was his. However, I think it likely that he did later say it was his daughter's, and that the Officers should ask her. He would have known the laptop was important to her. It is entirely possible the NZSIS Officers did say, perhaps in an offhand manner, that they did not need to ask his daughter. They believed the Warrant extended in scope to all items on the premises concerned, irrespective of ownership, and would not have wanted to be troubled to speak to a young woman who was hiding under blankets. It is clear [REDACTED] [the complainant] took no steps, beyond saying the laptop was his daughter's, to impede its seizure.

14. The concept of "*possession*", not least in relation to execution of Search Warrants, can be a difficult one. However, I have little doubt that this laptop was effectively under [REDACTED] [the complainant's] "*control*" at the time it was seized by the Officers concerned. The seizure was within Warrant. It is perhaps a pity [REDACTED] [the complainant] did not get his daughter out of bed to endeavor to protect her interests.

Complaint (2): Disrespectful of his daughter's privacy in [her bedroom]:

15. There is no dispute NZSIS Officer B (who is male) wished to search [REDACTED] [the complainant's] adult daughter's bedroom, in which she was asleep or at least concealed completely under the covers. The particular focus was an item which had been noticed through the doorway. [REDACTED] [The complainant] was asked to wake her, and have her vacate the room. He either could not, or did not. NZSIS Officer B entered and took a

photograph of the relevant item. A Detective stood in the doorway and could observe his actions. [REDACTED] [The complainant's] daughter, by choice, remained completely under the covers.

16. I see no improper invasion of privacy involved in this limited activity.

Complaint (3): Removal of Messages from Mobile Phone:

17. [REDACTED] [The complainant] states that a named [REDACTED] [person] texted him at the time of the NZSIS "raid" and that he texted in reply. [REDACTED] [The complainant] says those messages had been removed when the mobile phone was returned to him late that afternoon.

18. Expanding when interviewed by myself, [REDACTED] [the complainant] stated that during the initial conversation (09:00 – 09:32) with A, he received a text from [REDACTED] saying he would be raided, to which [REDACTED] [the complainant] texted in reply that it already was happening. When A asked him what he was doing during this process, he replied that he was texting. Officer A asked him for the phone, which he gave her, and which he did not get back until late that afternoon. He confirmed he had only one cellphone at the time, a white Nokia, which he still has. He showed it to me.

19. This narrative does not reconcile with that of Detective T, who says there was a white Nokia cellphone in the [REDACTED] front [of the premises] along with the laptop, at the end of the period

during which [REDACTED] [the complainant] says he had the phone on his person, and engaged in texting. It could not have been both in front of the [REDACTED] [premises], and on [REDACTED] [the complainant's] person. It does not reconcile with notes made by A, or with the Detective's statement to this Office that if a cellphone had been produced during interview, action would have been taken. It does not reconcile with what appear to me to be exhaustive investigations made at my request into text activity on that mobile phone over the period concerned, or indeed live calls.

20. I am satisfied [REDACTED] [the complainant's] recollections are incorrect. I do not doubt he believes what he says. His demeanor was convincing. It may be that he is confused with some other occasion.

21. As a cross-check, I have investigated whether any such texts, if sent, were removed. Technically, such would be possible during work undertaken, but very difficult and would leave traces. Likewise, there would be traces if the process had been conducted more simply. After examination of the records and technical assistance, I am satisfied there are no such traces. It did not occur.

Complaint (4): Why were NZSIS Officers making political statements during the raid regarding my personal objections to [REDACTED]?

22. This complaint is best approached in two parts.

i. What, if anything, was said?

ii. Why?

23. The best record of what was said is NZSIS Officer A's "*Record of Conversation*". It was compiled within days and made from contemporaneous or near contemporaneous notes. Detective T has no worthwhile recollection at this point in time. [REDACTED] [The complainant's] recollections are patchy at best.

24. Statements made by NZSIS Officer A (Officer B was not involved) fall into two categories.

25. The first category comprises a series of questions. (i) A asked [REDACTED] [the complainant] about a named individual. [REDACTED] [The complainant] confirmed knowing that individual, and contact with him. (ii) A then asked [REDACTED] [the complainant] about two others [REDACTED] [REDACTED]: [REDACTED] [the complainant] readily agreed he knew them, and had met them and others very recently. (iii) A then asked [REDACTED] [the complainant] whether he knew of any plan involving those two [REDACTED] [REDACTED] (whom I will term "Y") [REDACTED] (iv) A asked [REDACTED] [the complainant] what his views were about another [REDACTED] [REDACTED] whom I will term "Z". (v) A questioned [REDACTED] [the complainant] as to his relationship with Y, which seemed to her ambivalent. (iv) A asked [REDACTED] [the complainant] what he wanted [REDACTED] (v) A asked [REDACTED] [the complainant] what his own future plans and ambitions were.

26. While not strictly relevant for present purposes it is due to [REDACTED] [the complainant] to record that he confirmed knowledge of the first three individuals mentioned, and readily agreed meeting them recently. He denied any knowledge of a plan [REDACTED]

██████████, saying it was a surprise or news to him. His views when asked about Y and Z were readily given, ██████████. ██████████

27. The second category of statements by NZSIS Officer A comprised a series of warnings. (i) At outset, A said she not only wanted to talk to him about ██████████, but wanted to convey some messages to him from the New Zealand Government. That is to be considered in the context of an immediate brief following remark that she was from the NZSIS which investigated matters relating to national security and protecting New Zealand interests overseas. (ii) A said she had messages to convey from the New Zealand Government: it would not tolerate ██████████ whether in New Zealand or not ██████████. Anyone involved in planning would be dealt with by the NZ Police. (iii) After a response from ██████████[the complainant] that he knew nothing about any plot, ██████████. (iv) When ██████████[the complainant] asked why A was telling him about it, A responded that the NZSIS had information he knew, ██████████. (v) A referred to possible ██████████ reactions ██████████. (vi) A told ██████████[the complainant] he should be careful who he spoke to about the topics which had been discussed.

28. While not strictly relevant for present purposes, again it is due to ██████████[the complainant] to record certain responses. ██████████[The complainant] said he knew nothing about a plot. He said the people he met simply were friends who visited. ██████████

[REDACTED]

[REDACTED]

29. I have no difficulty with the content of, or motivation behind the first category, which comprised questions. The NZSIS were seeking intelligence, both as to connections between individuals of interest, and as to knowledge of, and therefore the chances of the existence of, [REDACTED]. Other questions relating to [REDACTED] [the complainant's] views, and future plans [REDACTED], had an obvious bearing upon the existence of motivation on his own part.

30. The second category of statements, comprising warnings, were quite different. They did not seek intelligence. They sought to influence conduct. While, in the abstract, no-one can object to warnings not to commit serious crime, I have reached a view that in law these warnings were outside the statutory functions and powers of the NZSIS. S.4(1)(a) creates for the NZSIS a general function of obtaining, correlating, and evaluating intelligence relevant to security, and communicating any such intelligence to such persons in such manner as the Director considers to be in the interests of security. Other specific functions have no possible relevance. That stated function is to be read in the light of s.4(2) which specifically states "*It is not a function of the Security Intelligence Service to enforce measures for security*". I do not accept that giving warnings in the way noted above could come within the concept of communicating intelligence. That is directed at communications to Government and other bodies which require it. This, in my view, was action taken to enforce security and was beyond powers. It was not a spur of the moment thing, or an action on her own initiative by A. It is clear from initiating documentation relating to this

operation that this "*disruption*" was planned from outset. There is no indication any doubts were harboured as to its legality. Every indication is that the NZSIS Officers involved considered it was lawful and proper.

Consequences:

31. [REDACTED] [The complainant] does not hold back on what he considers the consequences of this "*illegal raid*" as he terms it, were. He claims that it has ruined his personal, social, and business life.

32. I have no doubt this claim is overstated, if there is any basis for it at all. [REDACTED] [The complainant] was urged to be careful about who he spoke to concerning the matters involved. It is not at all clear to me how the public, and political, furore which followed originated. [REDACTED]

[REDACTED] There may be some real questions as to causation, let alone quantum. [REDACTED] [The complainant] made it clear when lodging the complaint which eventually reached this office that he was reserving all rights at law. I do not have a sufficient basis before me to consider matters of compensation. I leave that open. He should take legal advice if minded to go further.

Recommendations:

33. I recommend to the Director, to whom a copy of this report is being sent, that any practice of issuing of planned warnings in the way which occurred in this particular operation be

suspended, until such time as an advisory opinion from the Crown Law Office has been obtained.

Footnote:

34. [REDACTED] [The complainant] complains that he has been called a "terrorist" and has been ostracized as a result. I think it fair to record that the issue of the NZSIS Domestic Intelligence Warrant in 2012 does not establish he is or was a "terrorist". There is nothing in the issue of the Warrant in itself, or in the questions and answers which followed between the NZSIS and [REDACTED] [the complainant], which comes even near to approaching proof of criminal activity or participation in terrorism. No Police activity has resulted, or charges been laid. He is entitled to the presumption of innocence.

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Hon R Andrew McGechan QC
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