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

Report into a complaint against the NZSIS

Public report

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THIS REPORT

1. This is a public, unclassified version of a report on an inquiry into a complaint against the New Zealand Security Intelligence Service (NZSIS or the Service).
2. Under the Intelligence and Security Act 2017 (ISA) the Inspector-General must prepare a written report on an inquiry, with conclusions and recommendations.¹ Usually, given the nature of inquiries into intelligence-related matters, that report is classified. After sending the report to the relevant Minister and agency Director-General, however, the report must be published on the internet, subject to certain restrictions.² It must not disclose (in summary) any information likely to prejudice the entrusting of confidential information to the New Zealand Government by another government; endanger the safety of any person; identify current or former New Zealand intelligence officer or agent; prejudice the New Zealand agencies' performance of their functions; prejudice New Zealand's security, defence or international relations; or disclose any information about employment matters or security clearance issues. In addition, to protect the privacy of the complainant, the Inspector-General usually omits their name and identifying details.
3. In consequence of these limitations this report omits most details of the complaint and subsequent inquiry and does not identify the complainant.

COMPLAINT

4. The complainant alleged that in an historic operation the NZSIS found information indicating that a serious crime was being committed, but did not pass it to the Police, despite at least one NZSIS officer proposing that the Police should be informed. A subsequent prosecution and conviction of the alleged offender, years later, confirmed that serious offences had been committed.

INQUIRY

5. My office received the complaint in mid-2020 and I determined that I should inquire into it. The Service was prompt and cooperative in providing access to relevant records.

NZSIS internal review

6. Before I received the complaint the NZSIS Director-General had ordered an internal review of the matter, after a different person raised the same allegation directly with NZSIS.
7. The Service provided me with the report on the internal review. It confirmed an historic instance of Service acquiring information effectively confirming serious criminal offending. It found that, in that case, allegations of such offending had been known to other agencies, including the Police, before or by the time the Service obtained its information.

¹ ISA, s 185(1).

² ISA, s 188.

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8. The internal review found that NZSIS had almost certainly discussed the allegations with the Police. There was no record of this but the review commented that Service practice at the time meant any information provided to the Police would likely not have been formally recorded.
9. I take no issue with the conclusion of the internal review, as far as it goes. There is good reason to believe that, in the case concerned, allegations of serious offending were known to both NZSIS and the Police before the Service acquired its information. That does not however squarely address the question raised by the complainant, which is whether NZSIS informed the Police when it obtained information effectively confirming the allegations.

Did the Service inform the Police?

10. As a result of my inquiry I am satisfied that NZSIS did not inform the Police of what it had learned. There is no record of its having done so. I do not wholly accept the comment in the internal review report that any information provided by NZSIS to the Police would likely not have been formally recorded. Other information sharing with the Police at the time was recorded. Information might well have been shared informally in some situations. But I consider that a decision to disclose information in the relevant circumstances would have been unusual enough to have required analysis of the possible risks to the Service, careful consideration of exactly what would be passed on, and approval at a senior level. At the relevant time, when a considerable amount of Service internal communication was on paper, I think it most unlikely that any sharing with the Police could have occurred without leaving any trace whatsoever in Service records. I conclude that no such sharing occurred.

Should the Service have informed the Police?

11. At the relevant time the NZSIS Act 1969 (since repealed and replaced by the ISA) did not expressly address disclosure of information acquired by the Service about criminal offending. The Service's functions under the Act included to obtain, correlate and evaluate intelligence relevant to security and communicate it to such persons, and in such manner, as the Director considered to be in the interests of security.³ "Security" was defined as the protection of New Zealand from acts of espionage, sabotage, and subversion.⁴ The Service could only retain communications obtained through warranted interception and seizure to the extent they were relevant to the detection of activities prejudicial to security: irrelevant communications had to be destroyed.⁵ There was no equivalent provision dealing directly with the retention or disposal of information (besides communications) obtained by other means, as relevant here.
12. In sum the NZSIS Act at the time provided no clear direction on whether and in what circumstances the Service might pass information to the Police. If the Service obtained

³ Section 4(1)(a).

⁴ Section 2.

⁵ Section 4B.

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information about possible criminal activity, but it did not concern the detection of espionage, sabotage or subversion, it had no clear mandate to share it with the Police. Nor however was it prohibited from doing so if the information was acquired by means other than warranted interception and seizure.

13. The NZSIS internal review found there was no specific NZSIS policy, at the time, covering whether and in what circumstances NZSIS might share with Police any information about possible criminal activity NZSIS found while carrying out its functions. I have no reason to doubt this.
14. In the circumstances I think the question is simply what would have been a proper response by the Service to its discovery of the information at issue here. Did it learn something that reasonable judgement would have identified as information that should be passed to the Police – or, conversely, that could not reasonably have been withheld from the Police?
15. What is reasonable for an intelligence agency in such circumstances is not necessarily what is reasonable for an ordinary person. The agency has rare powers to acquire information on people’s otherwise private affairs by intrusive means. These powers are balanced by a limited mandate to observe and report.
16. In 1996 Parliament amended the NZSIS Act to establish a threshold for when the Service *could* share information about possible crime with the Police. The Director could do so “for the purpose of preventing or detecting serious crime in New Zealand or in any other country”, with serious crime defined as an indictable offence.⁶ The Service was not therefore obliged, in Parliament’s view, to share with Police any and all information it acquired about possible criminality. Even information about possible serious crime was shareable at the Director’s discretion. A comparable threshold continues to apply, in relation to incidentally obtained information, under the ISA.⁷
17. I take the view that at the relevant time it would have been proper for the Service to at least consider passing information to Police that might have assisted in preventing or detecting serious crime.

The Service perception of what it learned

18. Although the Service clearly considered it had obtained information confirming serious offending, the records also indicate clearly that it did not perceive the full scale and nature of the crimes of which the offender was later convicted. It interpreted the information it had (which was well short of the information that subsequently supported the offender’s conviction) in ways that meant it did not recognise the full gravity of the situation or the particular crimes being committed.

⁶ Section 4C.

⁷ Section 104(3)(a).

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Did the Service act properly?

19. Although the Service had good reason to believe the Police knew serious offending had been alleged, there is nothing on record to suggest it had reason to believe the Police held any information confirming it. I have no difficulty therefore in finding that the Service had cause to consider whether it had obtained information it should pass to the Police.
20. It is unclear whether any such consideration occurred. I am satisfied from my inquiry that at least one Service officer suggested to a superior that the Police should be informed of what the Service had learned. There is no record of that, however, or of any decision in response. The superior officer is unavailable for questioning.
21. Although the Service had reason to consider sharing the information with the Police, it does not automatically follow that it was remiss in not doing so. The law has, for as long as it has addressed the matter, allowed the NZSIS Director (now Director-General) discretion over disclosure of information about serious crime.
22. It is possible that some serious but unrecorded consideration was given, at the time of the relevant events, to the possibility of informing the Police. I doubt it, but I cannot discount it. Some possible reasons against disclosure, in the circumstances, are conceivable. Among them, the Service might have seen little prospect of the Police being able or minded to act on the information.
23. At a distance of some decades, with the limited information available, I do not find myself in a position to reach a firm conclusion that the Service acted improperly by not informing the Police of what it learned in this instance. A Service officer proposed, with good reason, that the Police should be contacted. More senior staff in the Service were entitled to make a decision. The information was not passed on. I find that questionable, but in the absence of any recorded reasoning and considering all the circumstances I cannot be sure it lacked a proper foundation.

CONCLUSION

24. My inquiry confirmed an historic instance of the Service obtaining information about serious criminal offending that it did not pass on to the Police. The Service had reason to believe the Police already knew such offending was alleged, but none to believe they held any information confirming it. The Service therefore had cause to consider whether to disclose its information to the Police. At least one Service officer proposed that it do so. It did not. That appears questionable, but the Service had (and still has) discretion in such matters. There is no record of any reasoning or decision on the matter and no way now to discover what, if any, consideration occurred. Some possible reasons weighing against disclosure to the Police are at least conceivable. The NZSIS did not perceive the full scale and nature of the crimes of which the offender was later convicted. On the limited information available I am unable to find that the Service acted improperly.

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POSTSCRIPT

25. As noted in paragraph 13 above, at the time of the events relevant to this complaint the Service had no specific policy on sharing with Police any information about possible criminal activity discovered by NZSIS when carrying out its functions. It now has a Standard Operating Procedure on the matter. Following its internal review (paragraphs 6-8 above) the Service reviewed and updated this procedure.
26. In the coming year my office will be reviewing information and intelligence sharing arrangements between the NZSIS, the Government Communications Security Bureau (GCSB) and the New Zealand Police.

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