Office of the Inspector-General of Intelligence and Security

Inquiry into New Zealand Security Intelligence Service applications for sensitive and complex warrants

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Cheryl Gwyn
Inspector-General of Intelligence and Security
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INTRODUCTION AND SUMMARY

1. This report concludes an own-motion inquiry into the lawfulness and propriety of a significant category of warrant applications made by the New Zealand Security Intelligence Service (NZSIS), as outlined in my 2014/2015 *Annual Report*.[1] I remain satisfied, as at the time of that report, that public disclosure of the particular operational detail of those warrant applications would cause harm to national security if publicly disclosed but that it is nonetheless possible to give an account of the inquiry, the problems identified and the changes made.[2]

2. I have found that:

   2.1. Warrants of this kind do, in principle, fall within the lawful scope of the warranted powers provided by the NZSIS Act, subject to the approval of the responsible Minister (Minister) and, where New Zealanders are involved, the Commissioner of Security Warrants (Commissioner).[3] I consider that it is also consistent with propriety for NZSIS to seek warrants of this kind.

   While it is material that the warranted activities are complex and sensitive, it is open to the Minister to exercise broad judgement as to the risks and benefits under the NZSIS Act, provided that the threshold condition of necessity for national security under s 4A(3)(a) is met.

   2.2. However, the ability of the Minister and the Commissioner to exercise their judgement is dependent upon the NZSIS providing comprehensive and reasoned warrant applications. In the 2014 warrant applications, there were several significant shortcomings: the applications had not set out all material and available information relevant to the benefits and risks of the proposed activities; they had not set out specifically how the proposed activities met the requirements of the NZSIS Act; and they had not specifically demonstrated how those activities were primarily directed towards the statutory purposes of the Act, as distinct from other ancillary purposes.

   I acknowledge that some further information might, perhaps, have been provided to the responsible decision-makers in discussion of these or previous warrant applications or at another time. However, I do not consider that such informal or prior advice could have provided significant assurance, both because of the need for a substantial amount of

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1 *Annual Report for the year ended 30 June 2015*, 21-23.

2 See below at paragraph 6.

3 The relevant warrants comprise both "domestic intelligence" warrants under s 4A(1) of the New Zealand Security Intelligence Service Act 1969 (NZSIS Act), which may apply to New Zealand citizens and permanent residents and may be issued only with the concurrence of the Minister and the Commissioner, and "foreign intelligence" warrants, which may not apply to New Zealand citizens or permanent residents and may be issued by the Minister alone. Because some of these warrants were domestic intelligence warrants and so were considered by the Minister and the Commissioner, this inquiry canvassed both categories of warrant and this report refers to both office-holders.

additional information and analysis and because each warrant application must specify the particular and current information and analysis relied upon at that time.

3. In light of the shortcomings in the NZSIS applications, it was necessary to consider two further and related questions concerning appropriate next steps:

   3.1. The first was whether the shortcomings I had identified meant there was a real risk that the warrant applications had materially misinformed the Minister and Commissioner as warrant issuers and, on that basis, that I should then recommend to them that they consider whether, in light of the outstanding information and analysis, they might have come to a different decision on any of the applications. To address that question, I reviewed relevant background material, including the further relevant material that had been available to NZSIS but had not been included in the warrant applications.

   I concluded that none of the material omitted by NZSIS contradicted the applications as made, that the omissions were made in good faith and that, in substance, there was a basis on which warrants could have issued.

   However, in light of the broad scope for judgement afforded to the Minister as an elected decision-maker, it would not be possible or appropriate to conclude whether the applications might have led to different conclusions had the omitted information and analysis been included. For that reason, I advised the Minister of my conclusions and the Commissioner was also informed.

   3.2. The second arose from my advice to the Director of Security of my provisional recommendations in December 2014. NZSIS advised that it accepted these recommendations as necessary and constructive. NZSIS also advised that, while some of the work to address the recommendations was straightforward, other work required some months. In light of the relevance of that work to the questions that I had raised, I decided to defer completion of this inquiry until that work had been completed and have included an assessment of that work in this report. In the interests of transparency, however, I also reported my broad findings to that point in my 2014-2015 *Annual Report*.

4. The NZSIS has now acted on the recommendations set out in the provisional findings and it has been possible to review the substantial work undertaken as part of bringing this inquiry to its conclusion. I have concluded that it is of concern that the 2014 warrant applications omitted significant information and analysis but:

   4.1. Having considered the substantial work undertaken, I remain of the view that the omitted material did not contradict the applications or indicate any lack of good faith and that the applications could have met the requirements of the NZSIS Act.

   4.2. The work undertaken by NZSIS should avoid any recurrence of the shortcomings identified in the 2014 warrant applications and no further recommendation is needed in this report.

In particular, the work should ensure not only that the responsible decision-makers are fully informed but also that the connection between complex warranted activities and NZSIS statutory functions is clear.

5. As required by s 19(7) of the Inspector-General of Intelligence and Security Act 1996 (IGIS Act), I have provided this report for comment to the Director of the NZSIS and have taken the Director's comments into account in this report. As noted, the Director has already acted upon the provisional findings and recommendations made earlier in this inquiry and no further recommendation is needed.

6. I have also determined the security classification of this report, having consulted with the Director as required by s 25(8) of the IGIS Act. I have determined that some details of the relevant operations were and remain sensitive and would cause harm to national security if disclosed.[4] For that reason, those details and my findings about them have not been included in the public report of this inquiry. It is nevertheless still possible to give an adequate account of this inquiry, the problems identified and the changes recommended and made.

7. I also observe that the requirements identified here – that is, to ensure comprehensive disclosure of material information; to address the specific requirements of the empowering legislation; and to ensure that actions are directed principally at the NZSIS's own statutory purposes – apply to all warrants. As a result of this inquiry, NZSIS has already instituted some changes to other categories of warrants. My office is also working to identify and address any issues of this kind as part of our ongoing review of all NZSIS and Government Communications Security Bureau warrants under s 11(1)(d)(i) of the IGIS Act.

[4] Under s 25A(2)(d)(ii) of the IGIS Act, I may not publish any information in an inquiry report that would be likely to prejudice the security or defence of New Zealand.

OUTLINE OF INQUIRY

8. This inquiry was initiated by the previous Inspector-General, the Hon Andrew McGechan QC, in April 2014 on the basis that the warrants raised issues of sufficient importance to require an own-motion inquiry. The inquiry has proceeded in four stages:

8.1. **Initial evidence-gathering and analysis:** The inquiry was commenced on the basis that the warranted activities raised a question of propriety in terms of s 11(1)(ca) of the IGIS Act. As a result, we compiled and reviewed relevant material and held several discussions with the Director and her staff. In the course of that work, we identified three further questions about the adequacy of the warrant applications and the consistency of those applications with the NZSIS Act.

8.2. **Provisional conclusions:** All four issues were addressed in our provisional conclusions, which were provided by letter to the Director on 5 December 2014. Those provisional conclusions indicated that while it was, in principle, lawful and proper for NZSIS to seek such warrants and lawful for the Minister to issue them, there were material shortcomings in the applications made for warrants in force at that time.

8.3. **Effect of shortcomings on decisions to grant warrants then in force:** As there were warrants in force at the time of the provisional conclusions, it was necessary to consider whether the deficiencies in the warrant applications had materially misinformed the Minister and Commissioner as warrant issuers to the extent of raising any question over the validity of those warrants. If so, it would then be necessary to recommend to the decision-maker that they consider whether, in light of the outstanding information and analysis, they might have come to a different decision on any of the applications. To address that question, we reviewed all of the file material and required NZSIS to provide what further information and analysis it could at that time. On the basis of that material, I concluded that there had been a substantive basis on which the Minister and Commissioner could nonetheless have issued the warrants. As the question of whether the warrants should have issued or should now be rescinded was for the Minister and the Commissioner, however, both were informed of the provisional conclusions.

8.4. **Assessment of recommended steps undertaken by NZSIS and new warrant applications made in light of those steps:** NZSIS accepted the provisional conclusions as constructive and agreed that the steps recommended were necessary. As set out below, some of that work required some time and I decided to defer completion of the inquiry and preparation of this report so that the inquiry could take account of the additional material produced as a result of those steps.

Steps taken following provisional conclusions

9. NZSIS advised that while some of the changes sought by the provisional findings could be effected quickly, others required some months, particularly the compilation and assessment of information relevant to the justification for the warranted activities, before it would be possible to prepare revised applications for warrants in this category.

10. I therefore decided to complete this inquiry once that further work had been undertaken, for two reasons:

    10.1. I had made an assessment of the question of the validity of the earlier warrants on the basis of the supporting material that NZSIS had been able to provide following my provisional conclusions. The further work would provide additional information and analysis relevant to warrant applications of this kind. I expected that material would allow a still better informed assessment of the effect of the shortcomings in the preceding applications. That material has proved useful.

    10.2. I also considered that as the Minister and the Commissioner were aware of the provisional conclusions and I had also reported publicly on those conclusions, it was appropriate and constructive to include an assessment of NZSIS's further work in the inquiry report.

ASSESSMENT

Questions of legality and propriety concerning warrants of this kind

11. In the course of the inquiry, we identified three central questions:

    11.1. Whether and, if so, under what circumstances, it was lawful and proper for the Director of Security to seek these warrants.

    11.2. Whether NZSIS met its legal obligations in respect of the warrant applications and, in particular, whether the applications were comprehensive in their disclosure of material information to the Minister and the Commissioner, and demonstrated how the requirements for the issue of a warrant are said to be met.[5] While those requirements apply to any warrant application by any public agency, they were of particular importance here because of the complexity and sensitivity of the contending interests that the Minister and Commissioner were required to weigh and the need for the Minister to be fully informed as to the national interest.

    The inclusion of thorough information and analysis in each warrant application also serves a broader public interest: it ensures that each of the participants in the warrant process are, and can be shown to be, confident in and accountable for their part in assessing the needs of national security against the criteria prescribed by the NZSIS Act.

    11.3. Whether the objectives of some of the warrants, as sought and issued, fell outside NZSIS's functions in respect of national security in terms of ss 2, 4 and 4A of the NZSIS Act. The reason for doubt was that the objectives of some of the warrants were valuable principally to other agencies and for purposes beyond NZSIS's purposes in respect of New Zealand's national security, as set out in the Act. While it is permissible for NZSIS's activities to serve ancillary purposes as well as its own, it is not lawful to act solely or principally for another purpose.[6]

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5 See, for the requirements for issue of a warrant, s 4A NZSIS Act and, for applicable warrant principles, *R v Williams* [2007] 3 NZLR 207 (CA), [224](b), (k), (l) & (m) (warrant applications must be as specific as the circumstances allow; must disclose all relevant information, positive and negative, and give reasons for any statement of belief; and set out how the application meets the statutory criteria, including any countervailing arguments).

6 *Unison Networks v Commerce Commission* [2008] 1 NZLR 42 (SC), [53] (statutory powers must be exercised for their statutory purpose but may serve additional purposes provided that the statutory purpose is not compromised).

Legality and propriety in principle

12. The activities to which these warrant applications applied were particularly sensitive. The applications were also complex because the information-gathering to which they related had been proposed and undertaken in cooperation with other agencies. Further, some of the intelligence material sought was principally useful, at least in a direct sense, to those other agencies rather than to NZSIS itself.

13. Such warrants may be lawful provided that the NZSIS warrant applications meet the requirements of the Act, including the general requirements for comprehensive information and analysis that apply to all applications for the exercise of intrusive powers under warrant.[7] Those requirements are considered below in relation to the NZSIS warrant applications.

Assessment of 2014 warrant applications

Whether all material information provided in the applications

14. The applications contained a substantial description of the practical utility of the information sought. However, the applications did not quantify or state in concrete terms the benefit (or lack of benefit) derived from the information obtained to date. They also did not differentiate between the direct benefits to NZSIS and the benefit to other purposes, which is important for the reasons given below. More detailed and more comprehensive information was available to NZSIS but not included in the applications.

15. The description of potential adverse consequences was also limited. There was a broad description of the warranted activities and attendant risk and a reasonably detailed statement of steps to manage that risk. However:

    15.1. The particular description of the activities for which authorisation was sought was not specific. While NZSIS held much more detailed information, the content of the warrant application gave only a limited basis for the Minister and Commissioner to assess the risk of those activities.

    15.2. There was only a broad statement of the consequences if the warranted activities, which were covert in nature, were disclosed. The NZSIS again had much more detailed information.

16. The warrant application simply stated the justification for the proposed activities as a conclusion: it did not set out the reasoning applied by the Director to reach that view, as required by s 4A and as was necessary for the Minister and the Commissioner to make their own comprehensive assessment of the application.

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[7] Above n 5.

Whether applications within scope of NZSIS Act

17. The other legal issue that arises from the cooperative nature of the proposed warranted activities is whether those activities met the requirement in s 4A(3) of the NZSIS Act that they are:

> "… necessary –
>
> (i) for the detention of activities prejudicial to security; or
>
> (ii) for the purpose of gathering foreign intelligence information essential to security; …"

18. Security is defined in s 2(1):

> "(a) the protection of New Zealand from acts of espionage, sabotage, and subversion, where or not they are directed from or intended to be committed within New Zealand:
>
> (b) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being:
>
> (c) the protection of New Zealand from activities within or relating to New Zealand that –
>
> (i) are influenced by any foreign organisation or any foreign person; and
>
> (ii) are clandestine or deceptive, or threaten the safety of any person; and
>
> (iii) impact adversely on New Zealand's international well-being or economic well-being:
>
> (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act."

19. The description of the purposes of the proposed activities in the 2014 warrant applications was principally directed at the benefit of those activities to other agencies and other purposes. While s 4(1)(c) of the NZSIS Act does refer to cooperation with others, cooperation is directed to the performance of NZSIS's functions:

> "… the functions of the New Zealand Security Intelligence Service shall be – …
>
> (a) to obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence …
>
> (c) to cooperate as far as practicable and necessary with such State Services and other public authorities in New Zealand and abroad as are capable of assisting the Security Intelligence Service in the performance of its functions: …"

20. It is permissible for NZSIS to undertake activities for its own permitted purposes that have some ancillary benefit to other agencies, provided those activities are nonetheless directed towards the NZSIS's statutory purposes. In order for a warrant application to fall within the terms of s 4A, it must be directed to the interests set out in the definition of security in s 2(1).

21. This is not to suggest that the NZSIS Act precludes cooperation or that the value of intelligence information for other ancillary purposes is irrelevant to assessments made under the Act. Provided intelligence-gathering does serve the purposes framed by ss 2(1), 4 and 4A:

    21.1. It is permissible for NZSIS's actions to serve other, additional purposes; and

    21.2. In assessing the value of intelligence sought under s 4A and whether that value justifies the proposed activity, it is open to the Minister and the Commissioner to take that overall value into account. That is, while NZSIS must act in accordance with its specific purposes, the assessment of whether intelligence justifies a particular activity can encompass its value both to the NZSIS and to others.

22. In fact, the information and analysis compiled by NZSIS in response to the provisional findings indicated that activities carried out under these warrants did serve purposes within the scope of the Act.

Consequences of shortcomings in 2014 warrant applications

23. The further question that followed was whether, as a result of those shortcomings, there was a real risk that:

    23.1. The omissions from the warrant applications had materially misinformed the Minister and Commissioner as warrant issuers and whether I should therefore recommend to them that they consider if, in light of the outstanding information and analysis, they might have come to a different decision on any of the applications; and/or

    23.2. The omitted information and analysis might, once considered, mean that the warrant applications fell outside NZSIS statutory functions.

24. I acknowledge that the NZSIS may have provided further information to the then Minister(s) and the Commissioner in respect of the 2014 warrants and/or previous iterations of those warrants. For example, I was aware that additional, and in some respects very detailed information, had been provided in a related NZSIS briefing to the then Minister earlier that year and understand that the Minister and/or the Commissioner often pose detailed questions to the NZSIS when considering warrant applications.

25. However, those potential additional mechanisms may assist, but could not completely resolve, deficiencies of the kinds found in the warrant applications here. As well as the extent and detail of the omitted information, some related to changes over time in the conduct of relevant operations, the product of those operations and the wider context. It was necessary for each warrant application to include the relevant information and analysis as it stood at that particular time. It was also incumbent on the NZSIS as the warrant applicant to set out all relevant information and analysis, rather than to seek to identify omitted material through questions or discussion.

26. In order to consider the possible consequences of the shortcomings in the 2014 warrant applications, we reviewed all available background material to those applications and such further material as NZSIS was able to compile at that time. I concluded that while the warrant applications should have included additional material information, there was nonetheless an adequate basis on which the warrants could have been issued; the additional information did not contradict what had been put before the Minister and the Commissioner; and the applications fell within the NZSIS's statutory functions.[8] There was also nothing to suggest that the additional information and analysis had been omitted in bad faith: rather, NZSIS had proceeded on the basis that the warrant applications met its obligations.

27. The further complication was that warrants issued under the NZSIS Act involve assessment by the Minister, as an elected and politically accountable office-holder, alongside – where required – the quasi-judicial role of the Commissioner. Some warrants also involve the Minister of Foreign Affairs through consultation under s 4A(5) of the NZSIS Act. The involvement of one or more elected office-holders has two consequences:

    27.1. It is accepted that those office-holders can and should exercise broad judgement in their respective functions. They are, in essence, making an assessment of broad national interests for which they are accountable to Parliament and to the electorate;[9] and

    27.2. It is necessary to take that element of broad judgement into account when considering the question of the effect of deficiencies in a warrant application.

28. For that reason, I raised my provisional findings with the Minister. The Commissioner was also informed. However, as I had found that the omitted information and analysis did not contradict the applications as made, that there was a basis on which warrants could have issued and that the NZSIS had acted in good faith, it was not necessary for me to recommend to the Minister and Commissioner that they consider whether they might have reached different conclusions.

Assessment of subsequent warrant applications

New applications made following completion of recommended work

29. The warrant applications made after completion of the recommended work are much more substantial than those made in 2014. As a simple illustration, they include almost three times as much specific information and analysis – and do address the concerns raised in the provisional conclusions. In particular, the subsequent applications:

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8 See *Williams*, above n 5, [214] (applicant must "provide all the facts that may be relevant to the issuing officer's decision" and not, for example, omit material that might dissuade that officer) and *Andrews & anor v R* [2010] NZCA 467, [30] (validity of warrant where application contains deficiencies depends upon whether, in fact, statutory grounds are satisfied and no "sufficiently material mis-statements or omissions").

9 See, for example, *R (Lord Carlile of Berriew) v Home Secretary* [2015] AC 945 (UKSC), [26]; *R (Sandiford) v Foreign Secretary* [2014] UKSC 44, [50].

29.1. Set out in considerable detail the anticipated value of the information sought to be obtained;

29.2. Differentiate between direct and indirect benefit to security, in terms of the NZSIS Act, and the benefit secured to cooperating agencies;

29.3. Include concrete descriptions and assessment of those benefits; and

29.4. Set out NZSIS's reasoned assessment of relative risks and benefits.

Further assessment of previous warrant applications

30. In addition to reviewing the new applications, I reviewed my earlier assessment of the consequences of the omissions from the 2014 warrant applications in light of the additional information and analysis produced by NZSIS in response to the provisional conclusions.

31. I concluded that it was of serious concern that NZSIS had not included substantial and material information and analysis, which was either held by NZSIS or available to it, in these applications.

32. I recognise that the terms of the 2014 warrant applications may have reflected a much more limited view of what was required both in terms of the NZSIS Act and under general warrant principles. Having taken this further information into account, I consider that:

32.1. The further material did not contradict the content of the earlier warrant applications;

32.2. There remained nothing to suggest that NZSIS had acted in bad faith;

32.3. It remained that there had been a substantive basis on which the earlier warrants could have been issued, including in terms of falling within NZSIS statutory functions.

33. It was therefore unnecessary to recommend that the Minister and Commissioner consider whether to revisit their decisions on the 2014 warrant applications.

34. No further recommendation is necessary in respect of the NZSIS, which has taken the recommended steps in the subsequent applications and has agreed that they are necessary for the future.