22 March 2009

90 Ruawai Rd
Mt Wellington
Auckland

Mike Flahive
Assistant Commission (Investigations)
Privacy Commission
PO Box 10094
Wellington

Fax: 04 474 7595

Dear Mike Flahive

Ref: C/21022

I am shocked by your endorsement of the SIS Director's decision to withhold all information on my security file and it is of no assistance to me whatsoever to know that you have conducted an independent review of the information.

Your opinion fails to address the following legal matters.

1. Review of each piece of information is required

The two documents released to me by the Director make it clear that information on my file dates back at least to 1988 and probably earlier. The position taken by the Director plainly suggests that the file is still active or involves recent, not only historic, information. The attempt to suppress the entire file, first under Section 32 and subsequently under Section 27(1)(a), means all the information it contains must fall within the justification to withhold. The presumption under the Privacy Act in favour of release of information requires this assessment to be reached after an active review of each individual piece of information and consideration as to whether that particular piece of information should be released. This obligation applies to both the NZSIS assessment and your review. Neither the Director's decision nor your review was made using this procedure.

2. Independent review is required of the Privacy Commissioner

Your letter states on page 2, paragraph 3, that the NZSIS 'has satisfied you' that the release of information would be likely to prejudice the security or defence of New Zealand. This is astonishing. From my knowledge of my own activities there is no conceivable basis on which this conclusion could have been reached and I can barely speculate on which of my wholly lawful activities have been or are considered a threat to the security of New Zealand and therefore to justify the SIS spying on me.

I strongly believe that the SIS has operated beyond its legal mandate in collecting information on me. The two documents released from my file relate to human rights violations in the Philippines, a matter that does not relate to New Zealand's domestic security. I also note that the reference to acts that impact negatively on New Zealand's economic wellbeing was only added to the definition of 'security' under the SIS legislation in 1999 and its scope was subsequently restricted.

It appears that you have relied heavily on the NZSIS on this matter. However the presumption in favour of the release of personal information imposes an obligation on you to undertake a fully independent review of the matter, without heavy reliance on the views of the NZSIS.

<u>3. Blanket withholding is not justified in light of the two documents disclosed</u>

The two documents that were disclosed to me by the Director obviously do not satisfy that test now relied upon as they were previously released to Keith Locke. However, it is clear from the Director's letter that these documents were only disclosed to me because of that prior disclosure to another person. If they had not been released to Mr Locke, it seems clear they would have been withheld with the rest of my file pursuant to Section 27(1)(a). This would clearly have been an abuse of that exception. It seems untenable that there are no similar documents on my file.

<u>4. Grounds must apply to each individual information.</u>

It is apparent from the ground relied upon by the SIS that it has been collecting information on me for a very long time. The grounds that are relied on by the Director and supported by you, which relating to the disclosure of SIS methodology, must be justified in relation every document on that file. In other words, every piece of information not released must have been collected in such a manner, or from such a source, to fall within the exception. Further, there must be a justifiable basis for believing that the disclosure of that information would prejudice New Zealand's security (as discussed below).

<u>5. The propriety of the NZSIS collecting the information</u>

On Page 2 paragraph 2 you state that the functions of the NZSIS include the obtaining, correlation and evaluation of intelligence relevant to security. You then convey your satisfaction that the information held by the NZSIS is information collected within that broad function. I find that absolutely extraordinary. However, you do not indicate what legal obligations you considered when reaching that view.

It is clear from the two documents already released, and from the nature of my public activities, that information on the file relates to my activities as an academic since I was first appointed as a lecturer in law at the University of Auckland in June 1979. I draw to your attention the relevant parts of Section 161(4) of the Education Act 1989:

Section 161: Academic Freedom

(1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced.

(2) For the purposes of this section, academic freedom, in relation to an institution, means—

(a) The freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions: …

(4) In the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respects so as to give effect to the intention of Parliament as expressed in this section.

The NZSIS is an agency of the Crown. When performing the functions you describe it must therefore give effect to the intention of the section, being to preserve and enhance academic freedom, as defined in subsection 2. The same obligation applies to the Privacy Commissioner.

You have not examined whether the NZSIS considered and gave effect to this statutory obligation when 'obtaining, correlation and evaluation of intelligence relevant to security' before reaching your conclusion that the information was collected within its broad function. You are therefore obliged to reconsider your conclusion. If the information or any part of it was not collected in compliance with the statutory obligations of the NZSIS, the Service cannot protect that failure by invoking Section 27(1)(a).

6. Disclosure would not reveal SIS methods that are not already known

The grounds relied upon for refusing to disclose information from my file are not about the content of that information, but about protecting SIS methods.

The release of information from my file collected using lawful methods that are already known cannot create a real or substantial risk to the security of New Zealand. These methods include:

(i) The right of the SIS, with consent of the Minister, to intercept any communications or documents pursuant to a warrant issued under the New Zealand Security Intelligence Service Act 1969. The number of warrants issued must be reported annually to Parliament. Further, the practice of the NZSIS in placing interception devices in houses was the subject of *Choudry v SIS* in 1988.

(ii) The NZSIS has a statutory entitlement to access information on other government files, including information regarding international travel obtained by the Customs and Immigration Department.

(iii) Information released to other people who have requested their files reveals the NZSIS use of informants who attended and reported on meetings, often of small numbers of people and the collection of media articles.

(iv) It was recently revealed that the Police used a paid informant to infiltrate Greenpeace and many other organisations. It is widely assumed that the NZSIS use

similar practices. There is circumstantial evidence in other personal files released by the SIS that this the case, and evidence in books published by former SIS agents (e.g. George Fraser, Seeing red: undercover in 1950s New Zealand).

(v) I understand that information released regarding Mr Wolfgang Rosenberg reveals that someone in his faculty's common room at Canterbury University was the direct or indirect source of information on his file.

(vi) Criminal cases have revealed the police use of cellphone records to track people's movements and the monitoring of text messaging. It is presumed that the SIS do the same.

(vii) Other forms of routine surveillance, such as the surveillance of people (*Sutch* case), are also well known.

For section 29(1)(e) to be justified to prevent the disclosure of the SIS methodology, the SIS must have used one or more unique forms of surveillance or information collection that is neither publicly known nor was used to collect information on any others whose files have been released, and which cannot be protected by partial deletions as has been the practice with personal files released to others.

6. Protecting SIS Methods is not the same as Protecting the Security of New Zealand

Even if the information about collection and surveillance methods are not publicly known, or were not used to collect information on other people that has been released, the disclosure of that information would need to prejudice the security of New Zealand. Your letter is contradictory in relation to this matter. Page 2, paragraph 2, second sentence says the NZSIS has satisfied you that the release of the information would be likely to prejudice the security of New Zealand. However, the fourth sentence identifies the risk to New Zealand Security as the disclosure of knowledge about NZSIS operations, capabilities or modus operandi, which prejudice 'the endeavours of the NZSIS'.

To reinforce the point made in para 5), the endeavours of the NZSIS that are protected must conform to their legal obligations. Moreover, as noted in para 6) this can only be relied on in my case if the same methodology was not used to collect information that has been released to others (cf. para 3) and that methodology is unique and not publicly known.

If you maintain your position that the use of Section 27(1)(e) is justified in relation to all the information on my file, or even to a substantial amount of it, I must have been subject to a long period of surveillance using unique methods. The only feature that appears unique to me in relation to the two documents already released is that they relate to events took place on the University campus and to the public performance of my academic responsibilities to disseminate my research and act as a critic and conscience of society.

It appears that my status as an academic is the only feature that distinguishes me from others who have received to least partial disclosure of their SIS files. This returns me to the obligations on the NZSIS and yourself to exercise your functions in ways that promote and enhance academic freedom under section 161(4) of the Education Act

1989. A method of collecting information or surveillance that negatively impacts on academic freedom is not consistent with this obligation.

Both the NZSIS and you have a duty to examine (i) whether the information was sufficiently important for the protection of New Zealand's security to justify that violation of academic freedom and (ii) if so, whether there were alternative means by which similar information could have been obtained that did not violate academic freedom.

7. Withholding entire documents cannot be justified

I have taken advice from persons who are familiar with the assessment of requests for the release of personal information that may disclose the methods used by national security agencies in other countries. I am advised that it is common practice to declassify such documents and selectively censor them by removing material that makes the collection methods apparent.

Moreover there is nothing in this defence that would justify withholding the following information, which I now seek:

(i) When was my file opened
(ii) Is it still active?
(iii) When was it last added to?
(iv) How many pages are on the file?

Yours sincerely

Dr (Elizabeth) Jane Kelsey