

23 June 2009

Elizabeth Kelsey
90 Ruawai Road
Mt Wellington
AUCKLAND 1060

Dear Dr Kelsey

Privacy Act Complaint: Elizabeth Kelsey and New Zealand Security Intelligence Service (Our Ref: C/21022)

Thank you for your letter of 22 March 2009.

My final view on your complaint is that I am satisfied that the remaining information withheld by the New Zealand Security Intelligence Service ("the Service") is appropriately withheld under the grounds contained in section 27(1)(a) of the Privacy Act ("the Act"). I expect that it is difficult for you to be sure of my judgement in your complaint as you have not been able to examine the withheld documents. Your last letter indicates that you believe there are flaws in my judgement.

Among the matters raised by you are:

That we need to review each and every piece of material in isolation and that we haven't done that.

I assure you that practice has been adopted. It is standard practice for this Office, in all access complaints, to examine both the released and withheld information, and to understand the context within which the information exists.

Blanket withholding is not justified in light of the two document disclosure

I have not indicated in any of my communications that there exists a blanket withholding ground. Your comment is correct in general terms. The reasons for withholding within sections 27 to 29 of the Act are generally applied to information within a document. However, there are instances where withholding a full document or full file is justified upon recourse to one or more withholding grounds. For example, the release of an entire informant statement might not be tenable to ensure the appropriate level of confidentiality to an informant despite there being information within the statement that is already known to the requestor. What has to be done on a review process is to understand all the circumstances surrounding withheld information, along with the circumstances that the information is held, and come to a decision whether or not the information is appropriately withheld.

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The propriety of the Service collecting information.

Section 57 of the Act provides that nothing in principles 1 to 5 (manner of collection and storage) and 8 to 11 (accuracy, retention, use and disclosure) applies to an intelligence organisation. Our review of the Service is limited to its obligations and decisions in relation to access requests and requests to correct information. You quoted section 161 of the Education Act 1989, which falls under part 14 of that Act entitled Establishment and Disestablishment of Tertiary Institutions. Section 160 provides that the provisions are designed to encourage as much independence and freedom to make academic, operational and management decisions as is consistent with the nature of the service they provide, the efficient use of natural resources, the national interest and the demands of accountability. I do not have a view on whether or not the Service's activities have had or will have an impact on the tertiary institutions independence or freedom. That is perhaps a task for the Inspector-General of Intelligence and Security. The Privacy Act cannot be used to scrutinise the collection and use strategies of the Service. What I was trying to convey, was that the information relevant to this review was the type of information that one would expect to be in the Service's files, and that is intelligence or information gathered that has a security focus. In reviewing the withholding of this information, I do not perceive any need for considerations contained in part 14 or section 160 and 161 of the Education Act.

Request for answers. When was my file opened, is it still active, when was it last added to, and how many pages are there?

The Act does not obligate an agency to answer this type of questioning. In some cases the answering of such questions would expose or prejudice the very reason why information was withheld in the first place. In appropriate cases, this Office often suggests that facts such as those eluded to by you, ought to be spelt out to allay fears or better inform access requesters. In this case, the Service is not obliged to answer the questions. It has withheld information and provided a withholding ground under the Act and that is the extent of its obligations. Section 44 of the Act refers. Where an information privacy request is refused, the agency shall give the reason for refusal (section 27 to 29 applies) and if requested the grounds (again 27 to 29 refers), unless the interests would be prejudiced by the release of these grounds and there is no countervailing public interest. I am satisfied that if the Service were to answer the questions you pose, there would be a prejudice to the interests protected by section 27 and I do not believe there is any countervailing public interest, particularly not contained within section 161 of the Education Act, or otherwise.

Background

On 18 November 2008, you made an initial request to the Service for information about you. You received a first response on 24 November 2008. On 2 December 2008, the Service indicated that section 32 applied, and it would neither confirm nor deny that it held information about you.

This Office received your complaint on 5 January 2009, and we notified the Service of that complaint on 8 January 2009. I first visited the Service on 26 February 2009 and commenced a review. Subsequently, I have revisited the Service on several occasions and I have had discussions with various key personal to hear their reasons and explanations for withholding information from you. In the course of those discussions, the Service realised that information about you and held by the Service had been released to another person. Accordingly, the Service released that information to you on 5 March 2009. This comprised three pages of two documents with some information withheld under section 27(1)(a).

On 17 March 2009, I sent you my preliminary view which was that I was satisfied that the Service could rely on section 27(1)(a) to withhold information from you.

The Privacy Act

Your complaint was investigated as one raising issues under principle 6 of the Act. This principle entitles an individual to have access to personal information about them that is held by an agency. This is not an absolute right, and the agency can withhold personal information if it has a proper basis to do so, by relying on one of the grounds set out in section 27-29 of the Act. Here, the Service withheld information from you under sections 32 and 27(1)(a). My investigation reviewed this information and this letter sets out my conclusion as to whether or not the Service is entitled to withhold this information from you under the Act. I don't propose to examine the withholding of information under section 32 as circumstances as they arose overtook that ground and a further ground is now relied upon.

The main provision relied upon is contained in section 27(1)(a), which mandates the withholding of information if disclosure of the information would be likely to:

- (a) prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand;

Review of the information withheld

Having reviewed the information and the Service's decision, I am satisfied that if it were released it would be likely to prejudice the interests described in section 27(1)(a). It is difficult to discuss the reasoning behind the Service's use of section 27(1)(a) as to do so would be likely to prejudice the interests sought to be protected. I have tried to elude in a very general way in earlier correspondence. Suffice to say that the Service engages, among other pursuits, in the collection of intelligence to further its functions. As an intelligence gathering agency it employs a number of strategies to collect information, aimed at acquiring information on individuals and/or groups of interest. None of these comments are particularly sensitive but the various sources of information might be confidential or sensitive for a number of reasons. In addition, the methods used to collect information might also be sensitive and require protection. Further, the interest that the agency has in an individual or group will vary over time and context.

While I make these comments as a way of understanding the Services functions, I do not intend to identify any one or more of them as being relevant in your circumstances. What I do say is that having looked at the information, its context and other factors I am satisfied that if it were released it "would be likely" to prejudice the security of New Zealand. That term is taken from the Court of Appeal in *Commissioner of Police* [1988] 1 NZLR 385. In that case Cooke P. left no doubt that "to require a threat to be established as more than likely to eventuate than not would be unreal. It must be enough if there is a serious or real or substantial risk to a protected interest, a risk that might well eventuate." I am satisfied that if the further information were to be released to you that a prejudice to security might well eventuate.

The Service relies on section 27(1)(a) alone. In my view, that is sufficient to adequately deal with the access request. However, I am also of the view that the Service could also rely on section 27(1)(c), that is, that if the information was released to you it would be likely that there would be a prejudice to the maintenance of the law, in this case the Services ability to ensure the security of New Zealand was not compromised or breached.

Section 27(1)(c) provides a proper withholding ground if the disclosure would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial. The word *including* indicates that the phrase *to prejudice the maintenance of the law* is not merely limited to prevention, investigation and detection of offences. This Office has routinely interpreted *the prejudice to the maintenance of the law* phrase as being capable of being used by a wide range of agencies whose responsibility is to maintain the law in some form or another. Agencies, for example, the Official Assignee and labour inspectors have functions under the law which do not necessarily involve the prevention, investigation and detection of offences. However, they do have a responsibility to maintain the law, and it is not unforeseeable that in certain circumstances, if information were to be released, some prejudice would result in their ability to maintain the law. That is the circumstance in this case and I am of the view that release of any further information to you would be likely to prejudice the maintenance of the law.

Conclusion

As a consequence of my review, some information has been released to you. However, the remainder is subject to appropriate withholding grounds, and in the circumstances, I support the Service's decision to withhold information from you. The information is subject to section 27(1)(a) and the Service has neither breached the Act nor interfered with your privacy. As I have indicated, I believe that the Service could also rely on section 27(1)(c), although the Service has not done so.

Unlike most access complaints, complaints about the Service are not subject to scrutiny by the Human Rights Review Tribunal. I refer to section 81(6) of the Act. In other circumstances you would be able to file plaintiff proceedings in the Tribunal and challenge the Services decision. The earlier subsections of section 81 refer to the potential action that this Office may take if a review indicates an interference with privacy. Because I do not believe there has been an interference with your privacy, I am not able to take this matter further. The complaint process is finished and our complaint file will be closed.

Thank you for bringing this matter to our attention.

Yours sincerely



Mike Flahive

Assistant Commissioner (Investigations)