

INTERNATIONAL CONFERENCE OF INFORMATION COMMISSIONERS
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**TALKING TO GOVERNMENT ABOUT SENSITIVE ISSUES: HOW FAR CAN
“BEHIND THE SCENES” CONVERSATIONS RESOLVE PROBLEMS?**

- For two reasons I feel honoured to have been invited to talk to this gathering.
- First, it is always an honour to address distinguished people and you must all be distinguished because otherwise you would not have been appointed to the demanding positions you hold.
- Second, John Belgrave would presumably not have invited me to speak if he did not respect my views and I regard that respect as an honour. It is also important for substantive reasons which will become clear as I attempt to answer the question he has posed as the topic for this talk.

- Let me repeat the topic
- My answer is, “Such conversations can and do resolve problems if two conditions are satisfied”.
- Let me give a bit of background about the New Zealand situation and then explain why that is my answer.

- In New Zealand, as you know, the relevant legislation is the Official Information Act 1982, the OIA.
- My main experience in dealing with this Act was during the seven years I was Director of Security, the head of the New Zealand Security Intelligence Service, the SIS.
- Like the Ombudsmen, the Director of Security is a statutory officer. The Director’s responsibilities are set out in some detail in the NZSIS Act 1969 as amended several times. Chief among them of course is protection of security.
- In New Zealand, unlike in some other countries, the intelligence agencies are not exempt from the OIA or its equivalent. The SIS is therefore subject to scrutiny by the Ombudsmen in respect of that Act.
- And the SIS is not exempt from all parts of the Privacy Act, so it is subject to scrutiny by the Privacy Commissioner as well – and I much look forward to hearing what Marie Shroff has to say.
- There is also the Inspector-General of Intelligence and Security, another statutory officer, who has the responsibility to examine complaints from people who believe they may have been adversely affected by any act, omission, practice, policy or procedure of the SIS.
- So, as a statutory officer myself, my decisions were potentially subject to scrutiny by three other statutory offices. The same case can be subject to investigation by all three.
- On the political side the Director of Security is responsible to the Minister in Charge of the Service (who in New Zealand is always the Prime Minister) for the

proper and efficient working of the Service and is required by law to consult the Leader of the Opposition from time to time.

- The Director also reports to the Parliamentary Intelligence and Security Committee, chaired by the Prime Minister and including the Leader of the Opposition and three other Members of Parliament, currently the leaders of two other political parties and the Deputy Prime Minister.
- So there is a lot of statutory and political oversight of the SIS.
- I believe that oversight is important.
- New Zealand is a free, open and democratic society, founded on the rule of law and respect for individual liberty and human rights. It is the security of that society that the SIS seeks to protect.
- But in order to carry out its role effectively, the SIS necessarily operates on a basis of confidentiality and often in secret. There is inevitably a tension between confidentiality and secrecy on one hand and on the other the openness which the Official Information Act promotes.
- Incidentally, the SIS has become more open in recent years. For instance, since 2000 edited versions of its Annual Reports have been presented to Parliament and are publicly available. For several years it has had its own website which now includes some statements and speeches by the Director. The Director talks to groups like Rotary about the Service's work.
- And recently the current Director gave a press conference to issue a detailed statement of his reasons for deciding why a certain individual no longer constituted a threat to security. This was unprecedented.
- But this greater openness does not remove the need for oversight.
- Complying with the requirements of this oversight was at times very time-consuming, involving me and other SIS staff in long hours of preparation and meetings with the various statutory officers and their staff. But I never found it inappropriate or irritating, even when we had to discuss the same case, often the same documents, with all three statutory offices.
- Proper oversight is necessary in order to manage the tension between openness and secrecy, to strike the right balance, when protecting the security of our society.
- Let me now turn specifically to the operation of the OIA as far as the SIS is concerned. I cannot speak about the experience of any other organisations.
- As I said earlier, in my view "behind the scenes" conversations can and do resolve problems if two conditions are satisfied.
- Those conditions are:
 - First, that the wording of the relevant legislation (in New Zealand, the OIA) is clear and appropriate;
 - Second, that there is complete mutual trust between the people concerned, in this context the Ombudsmen and the Director of Security and their respective staffs who deal with the issues that arise.
- Fortunately in my experience both these conditions are met in New Zealand.

- Let us look first at the OIA. I will do so only briefly, because there is a thorough analysis of this point in the address John Belgrave gave to your Conference in Manchester last year, which is well worth reading again if you do not recall it.
- The first two purposes of the OIA are, in summary, “to increase the availability of official information to the people of New Zealand” and “to provide for proper access by each person to official information relating to that person”.
- But the third purpose is “to protect official information to the extent consistent with the public interest and the preservation of personal privacy”.
- Thus the purposes themselves are carefully balanced.
- As I mentioned earlier, in New Zealand intelligence agencies are not exempt from the Act.
- Therefore the elaboration of the third purpose – to protect official information where appropriate – is of great importance.
- Several grounds for withholding information are set out in the Act. The ones which are most relevant in this context are in Section 6:

“Good reason for withholding official information exists ... if the making available of that information would be likely-

- (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by-
 - (i) The government of any other country or any agency of such a government; or
 - (ii) Any international organisation;”
- Importantly, these grounds are conclusive. If it is established on those grounds that good reason exists for withholding information, that is sufficient in itself and the restriction cannot be overridden by other aspects of the wider public interest.
 - As John Belgrave said in his talk to you last year, this provision shows “a realisation on the part of the legislators that the maintenance of national security for example is of particular importance”.
 - The clarity of this provision, and the fact that both the Ombudsmen and the SIS regard it as fair and sensible, satisfy the first of the two conditions I mentioned – that the wording of the relevant legislation is clear and appropriate.
 - It may be worth adding, however, that the second point – about the entrusting of information to New Zealand by the agency of another government – is particularly significant for us.
 - This point was mentioned by John in his talk to you last year. As a small country New Zealand is undoubtedly the net beneficiary of the international exchange of security information.
 - Our ability to respect other countries’ restrictions on the use of such information is therefore vital to us. We make our own assessment of the value of individual pieces of information before deciding whether or not to rely on it. But failure to

- respect other countries' restrictions on the use of their information would cause the flow of information to dry up, to the detriment of New Zealand's security.
- There has been an increase in the flow of such information between countries as intelligence and security agencies strive to protect their own and each others' countries from the increased threat of international terrorism.
 - But I am not aware of any increase in the practice of "originator control" or other restrictions on the use of such information. That is longstanding practice which has not changed; it is simply being applied to a greater flow of information.
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- The second condition is that there is complete mutual trust between the people concerned, in this case the Ombudsmen and the Director of Security and the staff from the two offices who deal with the issues. How is this to be achieved?
 - To start with, the people appointed to these statutory positions must obviously be of complete integrity. Then the Ombudsmen and the Director of Security have to establish mutual confidence in each other while respecting their different viewpoints and responsibilities.
 - That mutual confidence and respect must include appreciation of each others' statutory independence. The Director of Security has to appreciate how important it is that the public, Parliament and OIA requesters, retain trust in the independence of the Ombudsmen when they are investigating matters relating to the SIS.
 - Equally the Ombudsmen have to appreciate the importance of the Director's responsibility to protect New Zealand's security as defined in the SIS Act, including where appropriate the protection of information.
 - As it happens, John Belgrave and I have known each other for over forty years, having both started off in the 1960s as officers of the (now-defunct) Department of Industries and Commerce. Back then it certainly did not occur to me, or probably to John either, that we might one day deal with each other as Chief Ombudsman and Director of Security! However that long acquaintance did help to establish mutual confidence in these new capacities.
 - But before John's appointment I dealt with his predecessor, Sir Brian Elwood, and another Ombudsman, Judge Anand Satyanand, now our Governor-General, neither of whom I knew before. Establishing a relationship of mutual confidence from scratch depended on both parties being willing to spend time together, face to face, looking each other in the eye, listening carefully and being willing to understand each others' points of view.
 - Having thus established mutual confidence, we had to ensure that that confidence, and thus a willingness to be completely open, was shared by the staff from the two offices who worked on the issues. The staff concerned are all of the highest calibre. They share their chiefs' understanding of the OIA and their determination to work together to achieve its purposes.
 - It almost goes without saying, but it's essential that all those involved be New Zealand citizens and that the Ombudsmen and their staff involved in dealing with these issues go through the same rigorous security clearance process as the SIS staff.

- With these factors in place, I'm glad to say that the second condition – complete mutual trust among those involved – is also satisfied.
- With those two conditions satisfied, it is possible for what John has called “behind the scenes” conversations to take place to resolve any problems that may arise.
- And let's not pretend that there are no problems. The inevitable tension I mentioned earlier makes problems inevitable.
- For instance, it is not always immediately apparent to the Ombudsmen why release of particular information would in fact prejudice security.
- Equally, it is not always apparent to the SIS that, even if actual documents or files cannot be released, it may sometimes be possible to make a short statement which reflects the gist of the documents in question.
- Thus, although (given common interpretation of the OIA's provisions) agreement is often reached quite easily, there are times when problems arise which can only be resolved by detailed discussions between staff from both sides and sometimes between the Ombudsman concerned and the Director of Security.
- These discussions are “behind the scenes” in the sense that they are by mutual agreement confidential. They have to be kept confidential if they are to achieve their aim, which in terms of the OIA includes the avoidance of prejudice to the security of New Zealand or to the entrusting of information to the SIS by agencies of other countries.
- In my experience, when problems have arisen, “behind the scenes” conversations - initiated by either party - have always produced a conclusion which satisfies both the Ombudsmen and the Director of Security in the exercise of their respective statutory functions.
- Let me give a couple of examples.
- On one occasion an enquirer sought information not only about a specific operation but also about the Service's operating procedures and practices. With my concurrence in the particular circumstances of the case, but without prejudice to the necessary normal practice of neither confirm nor deny, the Chief Ombudsman informed the enquirer that the operation did not relate to a named individual.
- The Chief Ombudsman then turned his attention to the second part of the request. There was exhaustive discussion between respective staff members, followed by written exchanges initiated by the Ombudsmen's office to confirm in confidence what had been said. Then there were face to face discussions between the Chief Ombudsman and me.
- The Chief Ombudsman, after thorough consideration, reached his own decision that release of this information would undermine the Service's ability to obtain intelligence relevant to security and would thus prejudice the security of New Zealand. He informed the enquirer of his decision and gave as detailed a description of his reasons as he could without prejudicing security.
- On another occasion there was a request, by no means the first, for historical information about an individual whose name had for some time been in the public domain in a security context.

- After detailed exchanges between staff members, the Chief Ombudsman and me, it was agreed that some of the actual documents could not be released, but the Chief Ombudsman asked the Service to prepare a statement to ensure that what was released would not give a misleading impression of overall SIS holdings on the individual. I agreed.
 - A draft statement was prepared and discussed with the Ombudsmen's staff to ensure its accuracy and conformity with security and privacy requirements. The statement was then released to the person making the enquiry and to other people who had also enquired about the same individual.
 - In both cases the Ombudsmen and their staff demonstrated the complete independence of their role and subjected the Service to rigorous examination. Quite right! At the same time they demonstrated the necessary understanding of security considerations.
 - "Behind the scenes" exchanges produced the appropriate outcome in both cases.
 - That was possible because both the conditions I have talked about are currently met in New Zealand.
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- If one of those two conditions were not met, I doubt that "behind the scenes" conversations would usually be able to resolve problems.
 - If the wording of the relevant legislation did not provide clear and appropriate guidance, interpreted in the same way and seen as fair and sensible by both parties, any number of "behind the scenes" conversations would be unlikely to produce agreement.
 - And "behind the scenes" conversations could not be full or meaningful if the two parties did not have absolute trust in each other. The information commissioners must be satisfied that the security people are being fully open with them. And the security people can be fully open with the information commissioners only if they are satisfied that the information which it is their duty to protect will indeed be properly protected.
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- I have no knowledge of the situation in other countries.
 - But if those two conditions are met, I would commend "behind the scenes" conversations as a means of resolving problems.
 - If one or both of those conditions is not satisfied, I would recommend trying to remedy the situation.
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- I repeat that it is an honour to speak to you. I will be happy to try to answer any questions, although as I always said to New Zealand audiences, despite greater openness there may be some questions which I will choose not to answer!