

STATEMENT OF WITNESS

(Criminal Justice Act 1967, ss 2,9/M.C. Rules, 1968, r.58)

Statement of : Nicolas Hager

Age of witness

(if over 18 enter 'over 18') : Over 18

Occupation of witness : Investigative journalist / author

Address : Known to Birnberg Peirce

This statement, consisting of 13 pages signed by me, is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

Dated the 18 July **2020**

Signed N. Hager

Signature witnessed by MIRIAM PRICKEIT

Introduction

1. My full name is Nicolas Alfred Hager. I live in Wellington, New Zealand. Since the early 1990s I have worked as an investigative journalist and author. I have written seven books and various investigative feature articles in New Zealand and overseas newspapers. I have specialised in investigating complex and/or actively hidden subjects that typically take months or years of research. The

Signed N. Hager

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subjects have included intelligence agencies, military, police and unethical parts of politics. There are common themes in this work relating to democracy, integrity in government, transparency, freedom of information and respect for human rights. I have lectured on investigative techniques in journalism in several countries and been a keynote speaker at several global investigative journalism conferences.

2. I have been asked to provide such information as I am able in respect of the publication in 2010 and 2011 by WikiLeaks of material relating to the Guantanamo files, the "collateral murder" video, the US diplomatic cables and the Afghan and Iraq war logs. I have been asked to comment upon my own background and experience of relevance in assessing issues related to those publications.
3. I am setting out my evidence under the following headings:
 - My work relevant to this affidavit
 - The necessity of using classified information in my work
 - The Wikileaks Afghanistan and Iraq "War Diary" releases
 - The Wikileaks US embassy cables release
 - The importance of the war log and embassy cable information
 - Some comments on Julian Assange
 - The misuse of espionage charges

My work relevant to this affidavit

4. My first book was called *Secret Power, New Zealand's role in the international intelligence network*, published in 1996. The book was the product of several years of research into the previously little-known Government Communications Security Bureau (GCSB). The GCSB is a New Zealand foreign intelligence agency. The book described the agency's history, internal structures, operations, training and facilities.

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- The book described long-term GCSB operations against most South Pacific nations, Japan, Russia and many other countries. Its most important finding concerned GCSB participation in a US-UK-Canada-Australia-New Zealand global surveillance system called Echelon, the antecedent of the mass surveillance systems revealed in recent years by the US whistleblower Edward Snowden, who has also been a focus of Julian Assange's work. This was the first detailed description of the Echelon system to be published.
 - In 2000-01 there was a year-long special inquiry into Echelon by the European Parliament, the Temporary Committee on the Echelon Interception System (final report 11 July 2001, adopted by European parliament 5 September 2011). I was invited to present to the committee in 2001 and advised on its recommendations. Secret Power has been translated into various other languages.
 - Former New Zealand Prime Minister David Lange wrote a foreword to the book in which he said that "an astonishing number of people have told him things that I, as Prime Minister in charge of the intelligence services, was never told." He wrote "it is an outrage that I and other ministers were told so little, and this raises the question of to whom those concerned saw themselves ultimately responsible." My research into the GCSB and the international systems was based primarily on information provided by confidential sources. Various of the sources had security clearances above top secret. It would have been impossible to gather the information without those sources.
5. My fifth book was published in 2011. It was called *Other People's Wars, New Zealand in Afghanistan, Iraq and the war on terror*. This book had taken several years of work, gradually piecing together the history of ten years of New Zealand military and intelligence involvement in Afghanistan and Iraq.

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- My motive for writing the book was that this was New Zealand's longest overseas war, but it seemed to me that most of this history had remained hidden from the public. The book showed admirable parts of New Zealand's roles and also ones that the authorities were embarrassed about and kept secret. There were also various clear examples of the military failing to follow the government's instructions, raising issues of civilian control of the military.
- I write my books with extensive endnotes so that readers and other researchers can know the basis for each piece of information. Other People's Wars has about 1400 individual endnotes, each referencing one or more documents, articles and other sources.
- Most information in the book had never been published before because the events had been actively kept secret. The book was only possible because I interviewed a wide range of past and current military and intelligence staff about their experiences, and used a very wide range of internal documents. These included tens of thousands of New Zealand military and intelligence reports. Some of these reports were obtained using freedom of information laws but most by far came from confidential sources. As I describe below, I also extensively used US military and State Department documents published by Wikileaks, which greatly increased my understanding of the conduct of the war. It would have been impossible to write the book without these confidential and leaked sources.
- Once I had gathered the interviews and internal documents, it took me a full year to read, check, analyse and cross reference the information. Also, for each detail, incident or issue, I searched for open source information to check and supplement what the leaks and confidential sources had given me. It is through this process of checking and cross

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referencing that I was able to minimise errors in a long and complex book.

- The book is now used as a reference book by students in universities and military studies courses. Leading US reporter Seymour Hersh read *Other People's Wars*, as part of research he was doing for a book of his own, and commented "Nicky Hager has more knowledge and understanding of the American intelligence world in Afghanistan – both its good and its very bad points – than any reporter I know." A chapter of *Other People's Wars* was included in the Penguin Book of New Zealand War Writing.
 - I was aware, as I wrote this book, that my motivation was partly personal. Like many people, I am affected by my own family's terrible experiences in war. I have come to realise that many of my investigative journalism colleagues, through the generations, have had similar motivations. They see our work as trying to uphold the importance of human rights and to save succeeding generations from what the preamble of the United Nations charter calls the "scourge of war". I believe this is an essential and proper part of the work of journalists.
6. My seventh book, published in 2017, was called *Hit & Run, The New Zealand SAS in Afghanistan and the meaning of honour*. My involvement in this book project began in 2014 when I was approached by a man who asked if he could speak to me about a subject that had been weighing on his conscience. He described being involved in a New Zealand Special Air Service (SAS) raid on two Afghan villages. He said the raid was commanded by the New Zealanders and called Operation Burnham. He named the main insurgents who were being sought in the raid but explained that they and the rest of their insurgent group had not been in the villages at the time of the raid. He said that instead six civilians had been killed and many others injured. He gave the date of the raid as 22 August 2010. As I discuss below, it was an operation I had already written

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about briefly in *Other People's Wars*, but at that stage with only scraps of information.

- The book described events that had been hidden and denied for years afterwards. It was only possible to write the book because of confidential sources and the contextual material that I could draw from open sources, most importantly the Wikileaks materials.
7. Besides writing books, I have written many investigative articles for a variety of publications including in New Zealand the *Sunday Star Times*, *Otago Daily Times*, *Press*, *New Zealand Herald*, *Television New Zealand* and *Radio New Zealand*. I have written for international publications including *Le Monde Diplomatique* in France, the *Guardian* in the United Kingdom, *Suddeutsche Zeitung* in Germany, *Ta Nea* in Greece and *l'Espresso* in Italy. I reported on the Snowden documents and Panama Papers in New Zealand.

The necessity of using classified information in my work

8. Some of the most important and interesting information in the world is not secret, although it may be scattered, unnoticed or difficult to gather. However there are some areas where classified information is indispensable. The most important such area is war.
9. War is perhaps the ultimate failure of human societies, unleashing terrible harm and wrongs. If wars can be authorised, launched and conducted in secret, the public and politicians have little influence. Wars, and especially recent wars, are extremely secret. Operational security rules combine with tight control of military information for "public affairs" objectives. It is in general impossible to research and write about war to a useful standard without access to sources that the authorities concerned regard as sensitive and out of bounds – and all the more so with the subject of war crimes.

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10. In the case of war, information which is classified is essential to allow journalism to perform its roles of informing the public, enabling democratic decision making and deterring wrongdoing. Confidential sources and unauthorised leaks of information fall squarely within this and it is a widespread practice for investigative journalists to ask their sources for information. There is simply no realistic and effective alternative.
11. I have learned that often when previously classified or hidden information reaches the public, there are initial claims that the publication will do great harm. Invariably, in my experience, the information quite quickly becomes an accepted and uncontroversial part of the great sum of public knowledge in democratic societies. The claims of harm are shown to have been wildly exaggerated: no serious harm results. Years afterwards, as I have heard on various occasions, the secret agencies are using my books and articles as usefully unclassified references for training their staff.

The Wikileaks Afghanistan and Iraq "War Diary" releases

12. I was not involved in the Afghanistan and Iraq War Diary/war log releases. However, as mentioned already, I have used them extensively since they were released. They are intelligence reports describing immediate events experienced by US military units on the ground in Afghanistan and Iraq. While individually these reports are no more than very small footnotes to the wars, rendered almost unreadable by the density of acronyms, analysed as a whole they give the public an insight into the terrible everyday realities of these types of wars.
13. The Afghan war logs were publicly released on 25 July 2010 and the Iraq war logs later that year on 22 October 2010. This was while I was researching and beginning to write *Other People's Wars*. I spent a large amount of time analysing these materials to study different aspects of the wars: aid and provincial reconstruction teams; psychological operations; tactical intelligence operations;

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special forces operations; CIA paid local forces; and so on. These source materials allowed me to give, chapter by chapter, a multi-layered explanation of the Afghanistan war.


14. As I stated above, it is in general impossible to research and write about war to a useful standard without access to sources that the authorities concerned regard as sensitive and out of bounds. Consequently, information marked as classified is essential to allow journalism to perform its roles of informing the public about war, enabling democratic decision making and deterring wrongdoing. The war logs are an outstanding example of information that serves this public interest.


The Wikileaks US embassy cables release

15. I travelled to the United Kingdom in November 2010⁴ to report on the launch of the US embassy cables. Wikileaks offered me advance access to the cables relating to my region of the world so that I could prepare news stories. I wrote several stories for the New Zealand-based *Sunday Star-Times*, and also a piece about the experience of visiting Julian Assange and Wikileaks at that time.

16. I noted in the article about visiting Julian Assange and Wikileaks that they had decided to allow a set of "media partners", including the New York Times, the Guardian and Le Monde, to make the initial decisions on which documents to publicise and which parts of them to redact. While I was there, Wikileaks asked the same of me: to read the cables from New Zealand and Australia, and to identify any that should not be released for reasons such as personal safety of named people. I found the Wikileaks staff to be engaged in a careful and responsible process.

17. In an article I wrote in December 2010 about my experience collaborating with WikiLeaks (Exhibit 1), I described how WikiLeaks had responded to criticism of past releases and decided on a slower, more controlled process of release

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gradually country by country with a range of media partners from around the world.

18. Subsequently I studied the Afghanistan and Iraq material, and embassy cables, for many months. The archives taken as a whole were of enormous value to the historical record.

The importance of the war log and embassy cable information

19. I frequently receive leaked materials in my work and I am accustomed to making judgements about whether the public interest justifies using the materials. In the case of the embassy cables and the war logs, it was exactly the sort of information that citizens need and news organisations willingly publish to inform citizens about what their governments are doing. These archives are of the highest public interest; some of the most important material I have ever used.

20. The war diary and embassy cables gave an extraordinary insight into the conduct of modern war, showing things that are usually never seen. For me, this information would probably lead on to further research and corroboration.

21. The issues that emerged most strongly from the Afghan and Iraq war logs were: a previously unknown US programme of kill-capture operations using drones, bombs and night-time raids, targeting individuals on a secret kill-capture list (the "JPEL" lists); and reports showing large numbers of civilian deaths and injuries that had never been officially revealed.

22. The single most influential revelation about civilian deaths and injuries was a piece of US Apache helicopter video released by Wikileaks on 5 April 2010, understood together with supporting documentation (the Iraq Rules of Engagement. The pilots asked for and received "permission to engage" from their superiors. Whether permission was granted or not to attack and use lethal force is defined by the rules of engagement). The video showed two Apaches

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firing on a group of men in Baghdad, including a Reuters photographer and driver. Many people were killed and two children seriously injured. The cockpit talk between the pilot and gunner records one of them saying "Look at those dead bastards," and the other replying "Nice".

23. The publication of this "Collateral Murder" video was the equivalent of the death of George Floyd and his words "I can't breathe" for world opinion about the misuse of state power. It would be hard to overstate how important it was for public awareness of the problem of civilian casualties. Until that time, repeated civilian casualty incidents in Afghanistan and Iraq had been distressing families and severely undermining efforts to achieve peace, but they had been largely invisible to the rest of the world. The publications demonstrated that the actions were unlawful both under international law and the US military's own Rules of Engagement. The video put the issue of civilian death and injuries at the forefront of discussion about those wars. It undoubtedly contributed to the changes made shortly after to the rules of engagement in Afghanistan and Iraq.

24. I would like to give a personal example of how important this information was for New Zealand. As already mentioned, I used this material extensively for researching a history of the Afghanistan and Iraq wars called *Other People's Wars*. Sensitised by the Wikileaks releases to the issues of kill-capture missions and civilian casualties, I included a short section in the book about a New Zealand special forces raid that targeted two low-level Taliban leaders but resulted in accusations of 21 dead and injured civilians. In response (and for years after) the New Zealand military denied anything had gone wrong and six years later I was able to publish a book on the subject.

25. The opening chapter of the book *Hit & Run* described the state of the Afghanistan war in August 2010 when the raid was launched. The chapter quoted reports of a growing threat from insurgents against New Zealand troops, based on information in the war logs. It then drew on the Wikileaks revelations as "a checklist of everything that went wrong." First, was the Collateral Murder

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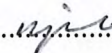
helicopter video release, involving the same Apache helicopters that carelessly killed and injured innocent villagers on the New Zealand raid. Then the chapter gave examples of other accidental civilian deaths caused by German and Polish soldiers — again sourced from war log revelations. Next, the war log revelations about the kill-capture list — setting the scene for the story of New Zealand special forces troops launching a kill-capture operation.

26. The point of this story is that this book resulted in a 27 month official New Zealand inquiry (Inquiry into Operation Burnham and Related Matters). It is the first time in the country's history there has been an independent inquiry into the actions of New Zealand forces overseas. At the time of writing this submission the final report on the Inquiry is still several weeks away. But it is already clear that the Inquiry will uphold at least some of the key allegations about the raid and will recommend an overhaul of military processes to try to stop a repeat of the 2010 events. It is very probable that it will find that laws of war have been breached. This is a reminder of the vital importance generally of confidential sources of information in a democratic society. Without them, the raid would still be a secret and its secrecy would make similar acts more likely.

27. The Inquiry was the end point of a chain of events. My main source for that book had, I know, been influenced by the events leading up to the August 2010 NZSAS raid. The Wikileaks Collateral Murder video had come out just four months earlier. The Afghan war logs had come out only three months earlier. Any informed person involved in Afghanistan was sensitised to issues of night-time raids and civilian casualties. Without the Wikileaks publications, my source might never have found the courage to approach me. Without him, I could not have done the book.

28. I too was influenced by what I read in the materials released by Wikileaks. This prompted me to focus on one disputed operation in Afghanistan and eventually write a whole book about it. That might have been the end of it, but a government decided to have an inquiry. The Inquiry promises to have a major

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effect on the New Zealand Defence Force. One thing leads to another. Revelations about the hidden nature of the Afghanistan war may lead to significant reforms.

29. When the Operation Burnham Inquiry began, the lawyer for the Defence Force said that virtually all of the relevant military documents would have to remain secret and could not be released to the public or core participants such as me. The Inquiry hired two specialists to review the security classifications on the military documents. Since then a large number of key documents have been released and placed on the Inquiry website. They include intelligence reports, operation plans, battle damage assessments, emails between special forces officers, Cabinet documents and much more. These can be seen here: <https://operationburnham.inquiry.govt.nz/information/declassified-documents/documents-relating-to-operation-burnham/>. This is a reminder that claims about the sensitivity of documents and the harm they would cause if released are frequently exaggerated and incorrect.

30. I continue to use the war logs and embassy cables as a source for my work. The most recent instance of this was in June 2020 when I found valuable information about money launderers I was investigating in an African country. I assume I will continue to use those 2010-11 resources for the rest of my working life. To a serious researcher, they will continue to provide a most accurate and useful understanding of the true cost of war and its geopolitical underpinnings.

Some comments on Julian Assange

31. During my time with the Wikileaks team studying and writing about the embassy cables, I spent quite a lot of time with Julian Assange. The person I got to know was very different from the image portrayed in the US media. I found him thoughtful, humorous and energetic; not the difficult, awful person he is often portrayed as through the media. I see him as a principled person who has

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devoted himself to trying to make the world a better place in an era when there is declining freedom of information in most of the world.

32. In the years after the September 11 attacks the United States and its allies had rapidly closed down access to information, especially in foreign policy and military areas. I think Mr Assange's vision was that the digital age might allow a new kind of whistle blower and leaking of information that could redress some of the growing imbalance between citizens and governments. At the same time the post-September 11 world had its very dark side: war crimes, torture and secret prisons. The war logs and embassy cables, much like the Pentagon Papers 40 years earlier, provided exactly the type of leaked information to the public that the era required.

The misuse of espionage charges

33. There is a possibly relevant postscript to these experiences. I learned last year that the New Zealand Defence Force asked the New Zealand Security Intelligence Service to try to find out confidential sources I had used for my book *Other People's Wars*.

34. I discovered evidence of the NZSIS's actions and complained to the New Zealand Inspector General of Intelligence and Security, who found that the NZSIS had illegally accessed my phone data. The reason the NZSIS gave to the Inspector General as justification for the operation was that they were investigating the leaks in the book as potential acts of espionage — the same charges Julian Assange faces for publishing very similar material. The Inspector-General wrote a carefully reasoned report that found the NZSIS was wrong and acting unlawfully when it tried to equate publishing leaked materials with espionage. The NZSIS director made a public apology to me about this in October 2019 (Exhibit 2).

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WikiLeaks cloak and dagger

 stuff.co.nz/sunday-star-times/features/4471086/WikiLeaks-cloak-and-dagger

NICKY HAGER

18 December 2010



Photo: Reuters

WikiLeaks' supporters in southern Spain protest over the arrest of founder Julian Assange following the release of the embassy files.

Cloak and dagger doesn't come close to describing how Nicky Hager came to secure the New Zealand WikiLeaks cables. He reveals the spy-novel subterfuge the group demanded, what it was like in their office the day the cables were released to the world, and offers a peek inside the mind of founder Julian Assange.

I HAVE had many careful meetings with sources during the last 20 years, but never anything as cautious and mysterious as this. I was heading overseas to meet the WikiLeaks team in the midst of heavy threats from the United States government and more imminent threats of police action. They were staying at a hidden location, getting ready to make the largest unofficial release of official documents in history – 251,000 leaked United States embassy cables – and I was very conscious of not wanting accidentally to lead the authorities to them.

I was keen to find out what the cables revealed about New Zealand and NZ-US relations. I left home with only the following instructions. Fly to Britain, take the Heathrow Express to a station in central London and, once there, buy a new mobile phone to call a number I had been given by secure means before leaving home.

Julian Assange

This could sound a bit like playing spies. But imagine being a small freedom-of-information group that finds itself with internationally important information in its hands and also an angry US government's intelligence and security agencies directed against it. Who knows if the massive intelligence resources of the US-British alliance had managed to track it down anyway? But it seemed entirely reasonable to be taking precautions to avoid interference until the document release was safely under way.

I had had occasional contact with Julian Assange and WikiLeaks across the internet since the organisation was launched in 2006. WikiLeaks was the perfect and natural product of that year. After six years of the Bush administration, many people around the world were feeling disillusioned by the accumulated lies, secrecy and media manipulation, particularly over the Afghanistan and Iraq wars.

At the same time, the internet had developed to a point that made previously unimaginable things possible. The result was the idea that became WikiLeaks: that the internet could allow whistleblowers anonymously to leak information of public importance, and that this information could be posted on the internet as a freedom of information resource.

MY DIRECTIONS from the London station took me through the Underground and then on a long train journey into the English countryside, winter's snow blanketing the fields. It is dark by 4.30pm. I was met at a station, where the parked cars were thick with snow, and then driven a long way in the dark to where the group was temporarily staying.

I feel uncomfortable revealing some details of my visit; I went there on the basis of confidentiality. However, a journalist from another country visited them there and has already written about the house. This is how he described it: "The setting was utterly incongruous. The home was a marvellous example of Georgian elegance, a relic of the pre-industrial age... on the walls of the drawing room, in effect WikiLeaks' operations room, paintings of long-dead defenders of the empire, most in the scarlet uniforms, looked down on a tangle of laptops, printers, wires, power cables and other equipment."

The atmosphere in that room was far removed from the portrayals of WikiLeaks coming from its critics. Remarkably, given the circumstances, it was relaxed and friendly. Much of the time it was completely silent, apart from typing, as they focused on formatting materials and liaising with media organisations in preparation for the release.

You might imagine a room full of hackers and other shadowy types. But the small inner core of WikiLeaks' workers was mainly journalists and computer specialists: competent, strikingly free of egotism and personal conflict, and very focused on the work that needed to be done.

One of the main criticisms of WikiLeaks after earlier releases was that it endangered the lives of people named in documents. There is no evidence that this happened and the US government would surely have publicised it if it had. But, anyway, WikiLeaks had decided on a very controlled release this time. The embassy cables were offered to a set of "media partners", including the New York Times, Guardian and Le Monde, which are making all the initial decisions on which documents to publicise and which parts of them to redact.

Several journalists were visiting from different corners of the world. We sat in the tangle of computer cables and equipment, reading through the hundreds, or thousands, of embassy cables about our home regions. As I read, it dawned on me how remarkable these documents are.

WikiLeaks's previous two large releases of leaked US government documents consisted of thousands of detailed military reports from the Afghanistan and Iraq wars. A mass of acronyms and jargon, they were hard to understand, and it took a lot of analysis to extract the important stories they told.

But the latest release is quite different. It consists of years of cables to and from US diplomats in nearly every country on Earth: articulate diplomats giving blow-by-blow accounts of United States' foreign policy. Some is routine and unexceptional, but much is the unseen detail, country by country, of secret collaborations, pressures and agendas. Much is US diplomats revealing things about other countries that the citizens of those countries should, but did not, know.

Some of the early news coverage of the cables made them sound mainly like titillating and embarrassing diplomatic gossip. But it is a treasure trove of information about superpower politics and the inner workings of governments around the world. Journalists, researchers, film-makers, academics, students and many others will be using this information source for years to come.

I WAS LUCKY enough to be present when the embassy cable release was launched. Months of work was ready. The first bundle of documents went live at 6pm British time and immediately there was a massive denial of service attack. Unknown people somewhere in the world were bombarding the WikiLeaks' websites, trying to close them down.

Everything was focused on a computer specialist who had arrived at the house to donate his time to overseeing the launch. He was obviously at the top of his profession. Everyone seemed in awe of his skills. He had prepared for the launch, typing computer code faster than most journalists can write words, apparently working straight through the night. Now he was engrossed in fending off the cyber attack: monitoring the waves of incoming traffic and identifying and blocking the attackers. The mood was tense until, after a long 30 minutes, he looked up with a little smile and said the attack seemed to be over.

I had a feeling of being present as history was being made.

The day before I left, I went for a long walk across the wide, snowy landscape with Julian Assange, the Australian who first had the idea of WikiLeaks. I had wondered what he would be like in person. I had gratefully used his and WikiLeaks' work from a distance, but what about the man?

The first thing that usually happens when someone challenges powerful interests is that they get attacked personally, their character and motives smeared. It is most often unfair, but still seems inevitable. Assange has helped challenge very powerful interests. He is being called reckless and dangerous by the White House, a criminal and even a terrorist by the US right, and also dictatorial and an egomaniac by disaffected ex-colleagues. And then there are the Swedish sex charges.

I can tell you only what I saw. Working in that crowded room, he was very focused, but also good humoured and thoughtful of others. For someone at the centre of international news attention, and an international man-hunt, he seemed calm and considered, and not to be taking himself too seriously. He is clearly the central force in the organisation, but there were gutsy people working around him as well. Sometimes they sought his decisions on things and other times they bossed him around.

He is a likeable person who, in my opinion, is simply using his considerable skills and strengths, and the opportunity provided by WikiLeaks' successes, to try to do some good in the world. Whatever went on in Sweden – a confused controversy with elements reminiscent of the Swedish Millennium trilogy – my instincts told me that he is, fundamentally, a good person.

Fortunately, he is also self-contained. While we were walking along the frozen farm tracks, our conversation was about things like longer-term academic uses for the embassy cables. The subject of Swedish and US legal threats did not come up. A few days later he was in Wandsworth Prison, with the threat of many more troubles to come. But, whatever happens along the way, Assange is going to be all right. So too WikiLeaks. At a time when western governments are less open and democratic, history has thrown up new ways of providing openness. This is the era of the geeks. History is on their side.

Sunday Star Times



Office of the Inspector-General of Intelligence and Security

Report into a complaint by Nicky Hager against the NZSIS

Madeleine Laracy
Acting Inspector-General of Intelligence and Security
18 September 2019

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Note: The inquiry into this complaint was substantially completed during the tenure of Cheryl Gwyn as Inspector-General of Intelligence and Security.

COMPLAINT

1. Nicky Hager, an investigative journalist, complains that the New Zealand Security Intelligence Service (NZSIS) unlawfully assisted the New Zealand Defence Force (NZDF) in efforts to identify his journalistic sources for his book *Other People's Wars*.¹ Specifically Mr Hager complains that any such assistance provided by NZSIS was unlawful given the definition of "security" under the NZSIS Act 1969, which obtained at the relevant time and was instrumental in defining the lawful scope of NZSIS activity.

FACTS

2. *Other People's Wars* was published in September 2011. It concerns New Zealand's involvement in the 'war on terror' after 11 September 2001, including New Zealand military and intelligence activity. Much information in the book is attributed to confidential sources.
3. NZDF determined that *Other People's Wars* contained Defence information, some of which might have been disclosed without authorisation by a Defence Force officer. It came to suspect a particular officer, but its inquiries were inconclusive. It sought assistance from NZSIS to take the investigation further.
4. NZDF agreed to provide NZSIS with a summary of the grounds for investigation, on which the Service would seek internal legal advice. Neither I nor NZSIS have been able to find any record of any such document, or any NZSIS legal advice on the matter.
5. NZSIS conducted a 'preliminary investigation' for NZDF. It analysed *Other People's Wars*, without any conclusive result. It acquired three months of telephone call metadata for the NZDF officer's home and mobile numbers and two months of call metadata on Mr Hager's home telephone line. Analysis of this data did not establish any connection between them.
6. NZSIS advised NZDF that its inquiries were inconclusive as to any connection between Mr Hager and the NZDF officer. NZDF decided against any further investigation.

LEGALITY OF NZSIS ASSISTANCE TO NZDF

Statutory context: "security" and "espionage"

7. Under the NZSIS Act 1969, as in force at the time of NZSIS' assistance to NZDF, the Service's relevant functions under s 4(1) included:
 - (a) to obtain, correlate and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security;
 - ...
 - (ba) to advise any of the following persons on protective measures that are directly or indirectly relevant to security:
 - (i) Ministers of the Crown or government departments:

¹ Nicky Hager *Other People's Wars: New Zealand in Afghanistan, Iraq and the war on terror* (Craig Potton Publishing, Nelson, 2011).

- (ii) public authorities
- (iii) any person who, in the opinion of the director, should receive the advice:

...

- (b) to co-operate 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:

8. The immediately obvious provision under which NZSIS might lawfully have been able to assist NZDF in the manner requested (ie by investigating a suspected security risk) is s 4(1)(a). Whether a matter was “relevant to security” depended however on the definition of “security”, which under s 2 was:

- (a) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether 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 of facilitating of any terrorist act.

9. NZSIS has advised me that it considered its assistance to NZDF fell within paragraph (a) and related in particular to identifying whether espionage was occurring.

10. Under s 2 espionage was defined by reference to s 78 of the Crimes Act 1961, which at the relevant time read as follows:

78 Espionage

Every one is liable to imprisonment for a term not exceeding 14 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand,—

- (a) with intent to prejudice the security or defence of New Zealand, communicates information or delivers any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation; or
- (b) with intent to prejudice the security or defence of New Zealand and with the intention of communicating information or delivering any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation,—
 - (i) collects or records any information; or
 - (ii) copies any document; or
 - (iii) obtains any object; or
 - (iv) makes any sketch, plan, model, or note; or
 - (v) takes any photograph; or
 - (vi) records any sound or image; or
 - (vii) delivers any object to any person,—

if the communication or delivery or intended communication or intended delivery under paragraph (a) or paragraph (b) is likely to prejudice the security or defence of New Zealand.

11. Mr Hager's complaint, in essence, is that the definition of security did not enable NZSIS to investigate the identity of his journalistic sources for *Other People's Wars* because there was no basis for suspecting that any disclosure to him of NZDF information, including any classified information, could have amounted to espionage.
12. As noted, NZSIS has no record of any consideration given to this question at the time of the decision to assist NZDF, or any conclusions that might have been reached. It has noted however that its "preliminary investigations" were undertaken without any indication of concern that they were unauthorised. It has also proposed some reasoning that might have applied.

A reasonable suspicion of espionage?

13. First, the Service proposes that it was not obliged to establish that the offence of espionage was *prima facie* established and/or completed before it could lawfully begin to investigate it as a possibility.
14. That is correct, and goes without saying. The relevant consideration, however, is whether the Service was obliged to have, at least, grounds for reasonable suspicion that such activity might have occurred (or be occurring). In my view, deployment of the NZSIS' intrusive investigatory powers and capabilities on the basis of anything less than a reasonable suspicion of a relevant

mischief would scarcely have been consistent with its obligation to contribute to “keeping New Zealand society secure, independent, and free and democratic”.²

15. To give grounds for a reasonable suspicion of espionage, the circumstances presented to the Service had to support a reasonable suspicion that the key elements of the offence of espionage under s 78 might be present.
16. The first element is not at issue: the NZDF officer was a person who owed allegiance to the Queen. The key questions as to whether any possible transmission by the officer to Mr Hager of sensitive NZDF information might have constituted espionage arise from the other requirements under s 78 for:
 - 16.1. “intent to prejudice the security or defence of New Zealand”; and
 - 16.2. communication of information “to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation”; and
 - 16.3. communication “likely to prejudice the security of New Zealand”.

Intent to prejudice the security or defence of New Zealand?

17. NZIS notes, first, that the intentions of the officer (if the officer had in fact made any unauthorised disclosure) and/or Mr Hager were not clear. It suggests that at an early stage of investigation, with limited information, it might have been considered too risky for NZSIS to dismiss the possibility of espionage solely on the basis that the criminal offence in s 78 of the Crimes Act could not be immediately established.
18. Again, however, the question is not whether the intentions of the officer and Mr Hager were unclear, or whether any intention to prejudice the security or defence of New Zealand could be immediately established to some level of “proof”, but whether there was any basis for a reasonable suspicion of such an intention on the part of either of them.
19. An intention to prejudice the security or defence of New Zealand is no small matter: it would be a profoundly grievous intention to attribute to any New Zealander and particularly to a member of the Defence Force. It requires *some* foundation. I do not see any reasonable basis in *Other People’s Wars* or the related information reviewed for this inquiry for suspecting that either the officer or Mr Hager might have had any such intention.
20. I would accept that NZDF’s inquiries were capable of supporting a reasonable suspicion that the officer had unwittingly supplied Mr Hager with information. Without reason to suspect any deliberate disclosure to Mr Hager, however, there was no reason to ascribe any malicious intention to the officer’s actions, let alone an intention to prejudice national security or defence.
21. A record of a meeting involving NZDF and NZSIS notes an agreement between them that any investigation of whether the officer was a source for Mr Hager should be “a security

² New Zealand Security Intelligence Service Act 1969, s 4AAA(1)(a).

investigation, not a criminal investigation". The reason for this choice is not recorded. It does not however suggest a suspicion that the crime of espionage might have been committed.

22. Other records do not indicate any perception within either NZDF or NZSIS that NZDF had been subjected to anything other than sceptical investigative journalism.
23. Mr Hager has never made any secret of his intentions. In *Other People's Wars* he writes of his intention to raise questions about the extent to which the military is properly under civilian control; to inform people about the conduct of modern warfare; and "simply to give an account of New Zealand's part in 10 years of war."³ Nobody is obliged to accept Mr Hager's statement of his express intent, but it is a factor that must be considered before an alternative, and negative, inference is drawn. Some might see Mr Hager as a threat to the security of classified and other sensitive government information, given his longstanding pursuit of it as an investigative journalist. But ascribing to him a possible intention to "prejudice the security or defence of New Zealand" by his actions is an altogether different judgement. I do not see any reasonable basis for it.

Communication of information to a country or organisation outside New Zealand?

24. NZSIS has advised me that it was considered arguable, within NZSIS, that a person could commit espionage if, having the intent to prejudice the security or defence of New Zealand, they communicated classified information to a journalist for the purpose of dissemination into a public forum. Such publication, it is suggested, could constitute communication to a country or organisation outside New Zealand, as hostile foreign intelligence services operating within and outside New Zealand are likely to collect that information for intelligence purposes.
25. I have already said that I do not think there was a basis for a reasonable suspicion that the NZDF officer or Mr Hager had the relevant intention. That effectively obviates the need to ask whether any communication of information by the officer to Mr Hager might possibly have amounted to a communication of that information to a country or organisation outside New Zealand. Even if that was possible, without any reasonable suspicion of the relevant intent the point is moot.
26. On the strict construction ordinarily given to criminal offence provisions, however, I am not sure the interpretation suggested by the Service was available. Section 78 contrasts two potentially culpable means of communication: to a country or organisation outside New Zealand, or to a person acting on behalf of any such country or organisation. Those I think can reasonably be understood as *direct* communication to a foreign country, on the one hand, and communication to an agent of a foreign country on the other. If "communication to a country or organisation outside New Zealand" had been intended to encompass *indirect* means of communication, such as through an agent, the specification of the latter possibility would have been unnecessary. Given that communication of information to a New Zealand journalist for publication in New Zealand would be an even more indirect means of communicating to another country than communication to an agent of that country, I do not think it would have amounted to "communication to a country or organisation outside New Zealand" under s 78. In the present case there was no reasonable possibility that Mr Hager might have been an agent of a foreign

³ At 10-11.

country. I question, therefore, whether (intention aside) there was any basis for a reasonable suspicion that the NZDF officer might have communicated information to a country or organisation outside New Zealand, or to a person acting on behalf of any such country or organisation, in the sense relevant to s 78.

Communication likely to prejudice the security of New Zealand?

27. The final element of the offence of espionage under s 78 was that the relevant communication (to another country or its agent) had to be “likely to prejudice the security or defence of New Zealand”. Section 78C of the Crimes Act provided that this was a question of law.
28. I accept that NZDF and NZSIS were concerned that the NZDF officer, given their position in the Defence Force, was in possession of information that, if disclosed to a foreign power, could have prejudiced the security or defence of New Zealand. Had there been any grounds for a reasonable suspicion of unauthorised communication with the requisite intent, that understanding of the officer’s knowledge and access to sensitive information would have been sufficient, in my view, to support a reasonable suspicion that prejudice to the security of defence of New Zealand was possible. As already explained, however, I do not think those preceding requirements were met.

Espionage v. Wrongful communication of official information

29. Alongside the offence of espionage the Crimes Act specified, at the relevant time, an offence of knowing or reckless unauthorised disclosure of sensitive official information to any person (s 78A(1)(a)):

78A Wrongful communication, retention, or copying of official information

- (1) Every one is liable to imprisonment for a term not exceeding 3 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand,—
- (a) knowingly or recklessly, and with knowledge that he is acting without proper authority, communicates any official information or delivers any object to any other person knowing that such communication or delivery is likely to prejudice the security or defence of New Zealand; ...

30. In my view this offence corresponds more closely to the nature and gravity of the activity suspected by NZDF than does the offence of espionage under s 78.
31. Wrongful communication of official information under s 78A(1)(a) was not however a matter of “security” as defined in the NZSIS Act 1969. If there were grounds for reasonable suspicion that the NZDF officer had acted in breach of s 78A(1)(a) (and I express no view on that), NZDF would have been justified in seeking to investigate the matter further, for example with the assistance of the Police. But a potential breach of s 78A(1)(a) was not sufficient cause for NZSIS to become involved in any investigation.
32. The existence of the “wrongful communication” offence at the relevant time, with its greater relevance to the kind of wrongdoing suspected by NZDF, reinforces my view that there was no

sound basis for suspecting espionage and therefore no matter of “security” for NZSIS to investigate.

Journalistic privilege

33. Given Mr Hager’s occupation it is relevant to consider what regard NZSIS was obliged to have for journalistic privilege when deciding whether to provide the assistance sought by NZDF.
34. At the relevant time, s 4A of the NZSIS Act required that to issue an intelligence warrant, the Minister had to be satisfied that (among other things):
 - (3)
 - ...
 - (d) any communication sought to be intercepted or seized under the proposed warrant is not privileged in proceedings in a court of law under –
 - (i) section 58 or 59 of the Evidence Act 2006; or
 - (ii) any rule of law that confers privilege on communications of a professional nature between a lawyer and his or her client.
35. Sections 58 and 59 of the Evidence Act covered religious and medical privilege. The NZSIS Act did not refer to s 68, which provided a limited protection for journalists’ confidential sources in criminal and civil proceedings.
36. The effect of section 68 was that a journalist could not be compelled (with certain exceptions) to disclose confidential sources in court. It protected the ability of a journalist to give and maintain an undertaking of confidence to a source, in the interests of protecting the benefits to freedom of expression associated with a free press.
37. Although NZSIS was not expressly prohibited in the NZSIS Act 1969 from targeting (under warrant) information subject to journalistic privilege, in my view its obligations to contribute to keeping New Zealand “free and democratic” and to respect protected rights, including freedom of expression, argued for a cautious approach to any inquiry – whether subject to warrant or not – into a journalist’s confidential sources. This would require care to ensure that any such inquiry had a genuine, important national security purpose and that it was pursued with appropriate restraint, using the least intrusive means available.
38. In this case NZSIS initially showed reasonable caution. Its records show a clear recognition that any investigation into Mr Hager’s possible sources, particularly if focused on Mr Hager himself, would be a sensitive matter requiring legal advice and probably ministerial support. The Service sought from NZDF a statement of the grounds for NZSIS assistance, on which NZSIS would take legal advice (paragraph 4 above).
39. The NZDF request for NZSIS assistance did not however address the legal basis for it and NZSIS has no record of any internal legal advice. As a result it is not possible to know whether, if at all, NZSIS assessed the questions that arise on the facts of this case of “intent” and “communication to a foreign country”. There is no basis now to resolve that uncertainty in favour of NZSIS. The

Service nonetheless went forward with its inquiries. I am unable to find, therefore, that it proceeded with the kind of caution that would have been proper in the circumstances.

CONCLUSION AND RECOMMENDATION

40. For the reasons given I have found that NZSIS unlawfully provided investigative assistance to NZDF in efforts to determine whether a specific NZDF officer had been a source for information published in Mr Hager's book *Other People's Wars*. Specifically, NZSIS provided that assistance despite a lack of grounds for reasonable suspicion that any activity had occurred that was a matter of national "security" as that was defined in the governing legislation of NZSIS at the time. I have been unable to find that the Service showed the kind of caution I consider proper, for an intelligence agency in a free and democratic society, about launching any investigation into a journalist's sources.
41. Mr Hager's complaint against NZSIS is therefore upheld.
42. To the extent that Mr Hager was the subject of NZSIS inquiries that I have found were not within the lawful scope of NZSIS activity at the relevant time, I consider he was adversely affected by the agency's activities. The Service acquired two months of call metadata for Mr Hager's home telephone line. In the circumstances I think an apology from NZSIS to Mr Hager is an appropriate remedy. I recommend accordingly.