

Office of the  *Ombudsmen*
Nga Kaitiaki Mana Tangata

**REPORT OF
THE OMBUDSMAN, MEL SMITH**

**UPON THE ACTIONS OF
THE DEPARTMENT OF LABOUR**

**IN REGARD TO
AN OFFICIAL INFORMATION ACT COMPLAINT BY SARAH BOYLE,
OF THE OFFICE OF THE LEADER OF THE OPPOSITION**

CONTENTS

	Page
SUMMARY OF BACKGROUND	
Introduction.....	1
Background.....	1
Manner of Present Investigation.....	5
REQUEST FOR OFFICIAL INFORMATION	
Handling of Request.....	6
Assessment of Handling of Request.....	9
OFFICIAL INFORMATION ACT INVESTIGATION OF OMBUDSMAN	
Course of Events.....	10
Events Subsequent to Official Information Act Investigation.....	14
Investigation.....	15
Oral Evidence.....	16
Ian Smith.....	16
<i>CD</i>	29
Andrew Lockhart.....	38
CONCLUSIONS.....	43
RECOMMENDATIONS.....	47
Annexure 1 – Department of Labour Report 28 August 2003	
Annexure 2 – Attachment to email of 16 May 2003	
Annexure 3 – Email of 13 May 2003	
Annexure 4 – Unedited copies of media logs	

SUMMARY OF BACKGROUND

Introduction

It is appropriate that I commence my Report on this investigation with brief general comment on the Official Information Act 1982, its history and its relevance to the democratic process in New Zealand.

The Official Information Act 1982 is a statute of constitutional importance. As was said by Cooke P in *Commissioner of Police v Ombudsman* 1 NZLR [1988] 385 at page 391, "*the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure*". This is illustrated by the purposes of the Act as set out in section 4(a). This reads:

"4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

(a) *To increase progressively the availability of official information to the people of New Zealand in order—*

(i) *To enable their more effective participation in the making and administration of laws and policies; and*

(ii) *To promote the accountability of Ministers of the Crown and officials,—*

and thereby to enhance respect for the law and to promote the good government of New Zealand:"

The Act in its operation is of particular significance in contributing to transparency and accountability in the public sector. It provides a process that contributes to public accountability by government organisations and public officials.

It is also appropriate that I note at the outset that this investigation by me has absolutely nothing to do with issues surrounding the detention of Mr Ahmed Zaoui.

Background

Under my reference W49819, in the period 10 March 2003 to 27 June 2003 I undertook an investigation and review under the Official Information Act 1982 into a complaint by Sarah Boyle, Political Adviser in the Office of the Leader of the Opposition.

On 23 December 2002, Ms Boyle addressed a request to Andrew Lockhart, General Manager of the New Zealand Immigration Service (NZIS) expressed in terms:

"I request under section 12 of the Official Information Act, a copy of all communications relating to the detention of Ahmed Zaoui in December 2002. Please note that I am also interested in all information received by the Immigration Service from any other party prior to Mr Zaoui's detention.

I note that Immigration Service spokesperson Ian Smith is quoted in the media as stating that he had no knowledge of Mr Zaoui's presence in New Zealand.

He is reported as saying: 'Normally if there was anything untoward they would let me know and I haven't heard anything.'

I would like copies of all letters, memoranda, emails and other communications, including internal communications, between Immigration officials and any other person in relation to this case."

The request was refused by letter dated 22 January 2003, signed by Mr Lockhart.

NZIS is part of the Department of Labour.

By letter dated 5 March 2003, Ms Boyle by complaint under the Official Information Act asked my former colleague, Sir Brian Elwood, then Chief Ombudsman, to review the decision not to release the requested information. As the Ombudsman with usual responsibility for investigating complaints against NZIS, the complaint was passed to me to consider.

I advised John Chetwin, then Chief Executive of the Department of Labour, of Ms Boyle's complaint by letter dated 10 March 2003. I summarised the request in terms:

"On 23 December 2002, Ms Boyle wrote to Andrew Lockhart, General Manager of the New Zealand Immigration Service, requesting a copy of all communications relating to the detention of Ahmed Zaoui in December 2002".

I asked for a copy of the information at issue, and stated that my request was made pursuant to my statutory powers under section 19(1) of the Ombudsmen Act, and was subject to the time limit set out in section 29A of the Official Information Act. My letter also stated that Andrew McCaw was the investigating officer assisting me in the matter.

Mr Lockhart responded on behalf of the Department of Labour by letter dated 10 April 2003, being marginally outside the maximum time limit permitted by section 29A of the Official Information Act. He stated:

"As requested, enclosed is a copy of the information at issue and papers relevant to the NZIS's consideration of the request".

Mr Lockhart nominated CD of NZIS as the Department of Labour's contact officer for the purpose of dealing with the matter.

Subsequently, Mr McCaw on my behalf spoke to Ms Boyle to clarify her particular interest in order that my investigation could be focused accordingly. It had appeared that the information supplied included much material in which (from past experience) Ms Boyle might not be especially interested. Ms Boyle responded by email dated 8 May 2003, and the same day this was forwarded to CD. Ms Boyle said in her email:

"... I can advise you [Mr McCaw] that the information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case".

On 12 May 2003, by telephone Mr McCaw further clarified that Ms Boyle was only concerned with the period of December 2002 and again advised CD.

I have been informed that media logs are principally summaries of articles appearing in the media. At the relevant time they were composed by Mr Ian Smith, Communications Adviser, NZIS. Aside from the summaries of the articles, Mr Smith had a practice at that time of including comment upon the content. It appears that it had been a long-standing custom

within NZIS to circulate media logs, and in the course of my investigation I was informed that as at December 2002 approximately 300 persons within NZIS and the Public Service in New Zealand and overseas were on the circulation list. The list included Mr Lockhart and CD. I note also that the Chief Executive of the Department of Labour and other senior staff were included.

The bundle of information supplied to me under Mr Lockhart's covering letter of 10 April 2003 had not included the media logs subsequently to be discovered to be of interest to Ms Boyle. It appeared that until Ms Boyle's email of 8 May 2003 no particular thought had been given to the fact that media logs could or should be regarded as being within the scope of the request. This was surprising and I discuss later in this Report the fact that as recently as 1997 it was made very clear that media logs were official information and therefore subject to the Act. Nevertheless, following Ms Boyle's statement of her interest, by email dated 16 May 2003, CD forwarded what appeared to be media logs dated 13 December 2002, 16 December 2002, 17 December 2002, 18 December 2002 and 19 December 2002.

The media logs for December 2002 that were forwarded under the covering email of 16 May 2003 constituted a summary of various media articles, and for 13 December 2002 included a section noting continued inquiries by certain media organisations under the heading "*Media Issues and Inquiries*".

A further exchange of emails took place on 23 May 2003 between Mr McCaw and CD. In the course of this, Mr McCaw forwarded to CD another email of that same day from Ms Boyle designed to refine and focus her request. Ms Boyle had stated:

"I would like [the Ombudsmen's] office to review all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs".

What happened subsequently was central to the investigation under the Ombudsmen Act 1975 that I have now undertaken, and which is explained below. Suffice it to say, however, that despite further inquiries both by Mr McCaw of CD and myself of Mr Lockhart, no further information was forwarded to my Office by the Department of Labour disclosing the type of comment in which Ms Boyle had declared an interest.

Eventually, in reliance upon the inquiries that had been undertaken up to that point, on 27 June 2003 I wrote to Ms Boyle (copied to the Department under covering letter of the same date). The substance of my letter read:

"During the course of my investigation, you have narrowed the scope of the information you wish me to review to include only, for the month of December 2002:

'...all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs'.

No such information was among the material I had obtained from the New Zealand Immigration Service ("NZIS") for the purposes of my investigation. Accordingly, Mr McCaw specifically asked the NZIS whether it held any such information.

I subsequently received advice from Mr Ian Smith of the NZIS that he has no record of any such information, nor is he able to recall any information of this nature.

I understand that Mr McCaw has relayed this advice to you, and that you do not wish me to take any further action.

I have discontinued my investigation accordingly."

My covering letter to the Department formally confirmed the discontinuance of my investigation.

As appears below, my comment that "*I subsequently received advice from Mr Ian Smith*" was not strictly correct in that the relevant communications from Mr Smith, although his, were provided through CD. Furthermore, in the course of my investigation, a question arose as to whether CD accurately conveyed all that Mr Smith imparted.

It subsequently came to my attention that some comment was in fact recorded within certain of the relevant media logs, which was not included in the versions received by me. In part I became aware of this through media reports, and in part through specific communications from the Hon Murray McCully MP. In particular, I was referred to a media log for 17 December 2002 which included a summary of an article in The New Zealand Herald that criticised the handling of media inquiries by Mr Smith. Appended to that summary and following on from it was a comment by Mr Smith which read:

"I was let down badly ... Everyone had agreed to lie in unison, but all the others caved in and I was the only one left singing the original song."

The foregoing comment reached the public domain, and achieved some public notoriety in July 2003.

Where a request is made for official information and that request is refused, the requester is entitled to seek an investigation and review of that refusal by an Ombudsman. Following acceptance of such a complaint for investigation, it has been the practice of successive Ombudsmen since the commencement of the Act on 1 July 1983 to seek a copy of all of the information at issue from the holder, together with a report setting out any reasons in terms of the Act for refusing the request.

We have been, and indeed are, fortunate in New Zealand in having a Public Service which is characterised by officials of honesty and integrity. The Ombudsmen have traditionally been able to rely on the integrity of Government Departments and their officials in terms of supplying full and complete responses to the Ombudsmen. The present case is a matter of considerable concern in that questions have been raised as to whether officials engaged in a "*conspiracy to deceive*" so as to defeat the Official Information Act and/or to deprive me of information that I specifically sought under statutory powers for the purpose of an investigation under the Act.

After I became aware that relevant information had apparently not been supplied to me, I decided to undertake an investigation into the circumstances of my own motion pursuant to section 13(3) of the Ombudsmen Act. The failure to provide me with all relevant information had affected adversely my investigation under the Official Information Act, and correspondingly personally affected Ms Boyle.

The matter in my judgment involved issues of considerable public importance. If an Ombudsman cannot rely upon a full and complete response from a holder of official

information, the purposes of the Official Information Act are liable to be frustrated. This will occur by defeating Parliament's intent that requesters shall have an effective right of review of any refusal of a request by recourse to an Ombudsman. The issue of release or withholding is irrelevant in this context. I noted at the beginning of this Report the constitutional significance of the Official Information Act, and that it provides a process that contributes to public accountability by government organisations and public officials. The public interest in this matter therefore needs to be considered from two perspectives. The first is the entitlement of the Ombudsman to obtain information pursuant to his statutory powers; and the second is the integrity of the Official Information Act in terms of its operation and management in organisations subject to it.

I advised the Department of Labour of my investigation by letter dated 5 August 2003. I set out the framework for my investigation by saying:

"My investigation will include, but not necessarily be limited to considering:

- a) whether the Department of Labour (and NZIS in particular) has adequate procedures in place for responding to an Ombudsman on receipt of a request for information made pursuant to section 19(1) of the Ombudsmen Act;*
- b) whether and how those procedures were implemented in the case of the complaint by Ms Boyle;*
- c) actions or conduct of departmental officials that may have caused or contributed to the apparent omission [to provide information] recorded above."*

It should be noted that the reasons why Mr Smith chose to make the comment *"I was let down badly ... [etc]"*, and the background to it was not the subject-matter of my investigation.

I requested a report from the Department of Labour into the circumstances. In due course I received a copy of a Report dated 28 August 2003 under the name of the current Chief Executive, Dr James Buwalda, entitled *"Report of an Investigation into the Department of Labour's Management of Information in relation to Mr Ahmed Zaoui"*. A copy of this Report was subsequently released publicly by the Department of Labour and made available on its web site, albeit in a version which did not disclose the names of certain officials. I attach a copy of this (minus annexes) at **Annexure 1**.

I observe that Dr Buwalda took up his present position on 25 July 2003, after the events to which his Report related, and subsequent to the issues I decided to investigate.

Manner of Present Investigation

For the purposes of my present investigation, I was given access to various background papers in accordance with requests that I made to the Department of Labour pursuant to my statutory powers in section 19(1) of the Ombudsmen Act.

Additionally, again under the authority of section 19(1), several officials were examined under oath in my presence, namely *AB* (Operations Adviser, NZIS), *CD* (Adviser, NZIS), Ian Smith (Communications Adviser, NZIS) and Andrew Lockhart (General Manger, NZIS). The examinations were searching and, given the nature of my investigation which took account of the suggestions of conspiracy canvassed in the Department of Labour's Report of 28 August 2003, may fairly be described as rigorous. The evidence was tape recorded, and transcribed.

In the course of this Report I reproduce various sections of the transcripts of the evidence given before me. In those transcripts, most of the questions are marked as having been asked by "QF": This is Quentin Ford, Deputy Assistant Ombudsman, who (wholly in my presence) primarily conducted the examinations of all witnesses.

REQUEST FOR OFFICIAL INFORMATION

Handling of Request

Following receipt, Ms Boyle's original request of 23 December 2002 was passed to AB, Operations Adviser, NZIS, for processing.

AB explained during his oral examination before me that he was inexperienced in the handling of Official Information Act requests. While he had received training in the Act in the past, he said that he had not been on any training courses "in recent years". It appears that there was no particular reason for the request to be allocated to him, although the allocation was likely influenced by the fact that it was a holiday period and an unusually high proportion of NZIS employees would have been on leave.

AB said that although he might himself deal with a simple request for a discrete piece of information, he would expect larger requests to be handled and assessed by others. He explained his understanding of the process in terms:

"The process would be to look at what the request is, collect information or find out who is holding the information and seek advice on the issues if there is anything to withhold or, and then release whatever is needed to be released and withhold whatever is needed to be withheld with the reasons to be given."

That seems to me to reflect a reasonable appreciation on his part of the appropriate process for dealing with a request under the Official Information Act.

By email dated 6 January 2003, AB advised a number of persons within NZIS of the request. They included Mr Lockhart, and Brendan Quirk (acting General Manager, NZIS). It is noted that Mr Lockhart was on sick leave from 13 December 2002 until 13 January 2003. Mr Quirk was acting General Manager from 13-20 December 2002 and from 6-13 January 2003.

Additionally, persons within the Border and Investigations section of NZIS (B&I), the Refugee Status Branch (RSB), Legal Services of the Department of Labour, and Mr Smith were advised of the matter. AB's own manager who had allocated the matter to him was also upon the list.

Finally, I note that AB's email was copied to CD.

AB told me that he identified the persons to be notified of the request from his own institutional knowledge. It has appeared from my inquiries that the list he compiled was appropriate and complete.

AB set out the request and its background in the following terms:

"Subject: URGENT : OIA request - Ahmed Zaoui

Re above named - see article below from today's media log.

The General Manager has received an OIA request from the Office of the Leader of the Opposition for copies of all communications relating to the detention of Ahmed Zaoui in December 2002, including information received by NZIS from any other party.

The request is for all copies of letters, memoranda, emails, etc including internal communications between NZIS officials and any other person in relation to the case.

Action Required:

- (a) Please advise urgently what information if any you have and
- (b) forward copies to me by 15 Jan

Many Thanks.

The Press (4/1/03) 'High security at Zaoui hearing 'Algerian Ahmed Zaoui, who has been held at Paremoremo Prison since arriving in New Zealand a month ago, could wait another six weeks for a decision on alleged terrorist links. Zaoui appeared briefly in the Manukau District Court for an extension of the 28 day warrant under which he is being held. Two guards searched bags and swept detection devices over anybody entering the main courtroom. Zaoui arrived at Auckland Airport from Malaysia on December 4 with false South African documents, some destroyed on the flight.' (Good to see the Immigration Daily starting the year with some more fine writing: a person arriving with documents he destroyed on the flight.)"

The section headed "The Press" was an extract from a media log dated 6 January 2003. The following remark in parentheses was a comment by Mr Smith.

On 7 January 2003, AB (correctly) clarified his earlier advice so as to state that the request was for "information received by NZIS from any other party **prior** to Mr Zaoui's detention".

It appears that some doubt arose thereafter with regard to the exact scope of the request, and AB told me that he spoke with Ms Boyle personally. On 13 January 2003 AB circulated another email to relevant officials stating:

"... it seems that the request is for **all information held by NZIS including memoranda, e-mails and other communications relating to the above named.** Not necessarily just relating to his detention.

I have checked with the requestor and she has confirmed that they want all information."

I observe that by this date certain additional officials were named on the circulation list, apparently as a result of relevant managers directing AB's initial emails to them.

AB told me that when speaking with Ms Boyle, media logs were not specifically mentioned as being of interest. He said in his evidence to me that when dealing with the request:

"...at that time I never thought that the media logs would form part of the information held on Zaoui. ...the thought would not have occurred to me to go around looking for media logs. The media log is not personal information it's just a summary of something that's reported in the media. Now I know that

there's also personal annotations recorded in there, so that might not be in the public arena and therefore forms part of the official information."

At this time, the history of emails shows that an effort was made to identify all relevant information. In particular, *EF* of the Refugee Status Branch (RSB), NZIS, by email dated 13 January 2003 indicated in brief terms that he held a large number of relevant documents. He circulated his email to the full list of officials who at that time were being advised of the matter.

On 14 January 2003 *EF* sent a more significant email to Legal Services of the Department of Labour. Noting that *"RSB does not hold anyone versed in the OIA"*, *EF* set out the information he had identified in a series of categories. He went on to request urgent advice from Legal Services as to whether or not any of the information could be released. *EF* copied his email to both *AB* and *CD*.

Later the same day, an official of Legal Services, Department of Labour, responded providing general advice. In broad terms he expressed the view that the official information identified by *EF* could be withheld in terms of the Official Information Act. It is important to note however that the official qualified his advice. He commenced with the remark, *"I should say at the outset that it is difficult to be entirely certain about this without actually viewing the documents in question"*. At a later point in relation to one particular category of information, he stated, *"Again, without seeing the documentation I do not know whether that is case"*. Having said that, I reiterate that the overall impression of the advice was that the official information at issue could be withheld.

That was not quite the end of the matter, as *GH*, a senior official of Legal Services, Department of Labour, seems later to have reviewed the case. In further emails dated 15 January 2003, *GH* directed the attention of *AB*, *EF*, and other colleagues within Legal Services to a further likely reason for withholding. To *AB*, he said that *AB "should run what you propose to release past legal before you do so"*. In a further email sent to a number of officials he commented, *"I tend to be of the view that OIA, Privacy Act and s129T of the Immigration Act will prevent any of the requested material being released, except that which is within the public domain already"*. He repeated his advice that any material to be released should be referred to Legal Services before any release. He stated that if advice was required on what the addressees *"may decline to release"*, contact should be made with a specified person within Legal Services.

In the event, however, it appears no further action was taken with regard to gathering and assessing the actual information at issue. Nevertheless, on 16 January 2003 Legal Services provided to *AB* a draft form of wording for a letter of refusal, which by email the following day *AB* circulated to various colleagues for comment. It would seem that no objection was raised to the content.

Mr Smith did not respond in any way to the notifications of the request from *AB*. When examined, he commented:

"I didn't believe that was required. The original memo, the original e-mail had gone to Andrew Lockhart and Brendan Quirk – Andrew Lockhart is the General Manager, is also my manager, I report directly to him. Brendan – I work just one office away from him – and all the people that original email went to were at senior management level, which I am not. The request was for copies of all communications relating to the detention of Ahmed Zaoui. I had already been at pains to explain to the media that I had no information relating to the detention of Ahmed Zaoui. The people on that distribution list would have already been aware of that, so I really didn't feel there was any

need for me to reply, and had anyone amongst those, particularly Andrew, felt that I did have, I'm sure he would have come to me and asked for it."

AB himself said that he was not surprised to have received no response from Mr Smith. He said that he had advised Mr Smith because Mr Smith was "our media person and this thing was in the media at that time".

In due course, AB finalised a draft letter to Ms Boyle refusing the request (using the wording provided by Legal Services), and submitted it to Mr Lockhart for signature. AB states that he attached copies of relevant emails so as to provide an explanation of the background to Mr Lockhart. Mr Lockhart then signed the letter as drafted.

In summary, as far as I was able to ascertain, nobody within NZIS gave any specific thought to media logs when dealing with the request. This was unfortunate in that such information was clearly within the scope of the request. If this had been realised, the subsequent chain of events leading to the failure to supply me with complete copies might have been avoided. For this reason, my Report deals below with the manner in which the request was handled.

The omission to identify media logs as within the scope of the request was disappointing on two fronts.

First, because a signpost to media logs was provided by AB's initial notification to his colleagues of the request, which for their information and assistance included a media log on the subject of Mr Zaoui.

Second, because similar media logs had constituted information at issue in a complaint under the Official Information Act against NZIS and the Department of Labour that the Ombudsmen had considered in 1997. This made it clear that media logs were within the definition of "official information". I comment further on the 1997 matter later in this Report.

Assessment of Handling of Request

It is, and has been, the view of successive Ombudsmen that it is fundamental to the operation of the Official Information Act that decisions to withhold particular official information requested under the Act should not be made without assessment of the actual information at issue. As appears in the Departmental Report ([Annexure 1](#)), the Department of Labour accepts this, and I have been told that the Chief Executive of the Department is currently undertaking a review into the processes with regard to responding to requests made pursuant to the Act. I commend this initiative.

There is also the issue that no thought was given to the media logs as falling within the original request dated 23 December 2002. I am of the opinion that was an oversight by the Department, apparently arising from a lack of adequate process in the organisation, coupled with lack of training of officials. I refer to "the Department" as it appears to me that the process (or lack of process) was such that no individual official was seized of the clear responsibility to take charge of the matter. This aspect will no doubt be included in the Department of Labour's review.

In the circumstances, pending the outcome of the Department of Labour's review, I regard it as unnecessary for me to offer comment on how the process as a whole could have been managed better. Nevertheless, it is appropriate that I should express some particular views.

It seems to me that the background emails provided to Mr Lockhart by AB in conjunction with the draft letter of refusal, might well have alerted Mr Lockhart to the fact that the information

at issue had never been directly perused by any individual possessing the requisite knowledge and skill for the purpose of making a decision on releasing/withholding.

Mr Lockhart told me that as at the time of his evidence to me he had no specific recollection of the particular circumstances of his signing the letter of refusal. I accept this. However, the question was put to Mr Lockhart whether he would have thought it proper for an information request to be refused on the basis of a category type analysis. Mr Lockhart stated:

“At that time and in relation to this, I mean just thinking back, I probably would have felt that it was OK to in fact decline it on the basis of the category...”

I was surprised to find that a person of Mr Lockhart's seniority at the time considered it unnecessary for information at issue to be perused; and that he regarded it as satisfactory to accept advice that had been given by reference to categories of information. This, however, seems to have reflected the general approach of officials in NZIS dealing with the matter, and in general indicates a lack of attention to what the Official Information Act in practice requires at an organisational level.

Mr Lockhart was further asked whether it was fair to say that *AB* acted properly according to his knowledge at the time from a departmental point of view. Mr Lockhart agreed this was the case.

I am satisfied that *AB* handled this matter to the best of his ability in the light of the knowledge that he possessed, and his limited experience of Official Information Act matters. I am satisfied that he identified correctly the appropriate colleagues to whom it was relevant to refer the request at the outset. It was proper and sensible for him to speak personally with Ms Boyle to seek clarification of the scope of the request. Given the nature of the legal advice provided, and the fact that Legal Services supported that advice with a draft letter of refusal, I do not find it surprising that he utilised that draft for placing a letter of refusal before Mr Lockhart. In particular, I am satisfied that *AB* gave truthful evidence to me, and did his utmost to assist my inquiries.

OFFICIAL INFORMATION ACT INVESTIGATION OF OMBUDSMAN

Course of Events

By letter dated 4 March 2003, Ms Boyle complained under the Official Information Act about the refusal of her request to Sir Brian Elwood, then Chief Ombudsman. The matter was referred to me, and I decided to undertake a formal investigation under the Act. By letters dated 10 March 2003 I advised Ms Boyle and the then Chief Executive of the Department of Labour accordingly. I drew attention to the original letter of request dated 23 December 2002, which at that time represented my sole knowledge of what was being sought by Ms Boyle. I requested a copy of the information at issue and a report setting out any concerns with release of the information.

Mr Lockhart, on behalf of the Department of Labour, responded by letter dated 10 April 2003 (signed by another official *“per pro”*). He said, *“As requested, enclosed is a copy of the information at issue and papers relevant to the NZIS's consideration of the request”*. He nominated *CD* as the contact officer with whom this Office should liaise.

On perusal of the information, the investigating officer assisting me, Mr McCaw, considered that it was appropriate to consult Ms Boyle as to whether she wished to focus her complaint on any particular category of information. Experience suggested to Mr McCaw that this might well be the case, and his intuition turned out to be well founded.

There followed a series of emails commencing 8 May 2003, during which Ms Boyle reduced the scope of her complaint so as to seek a small amount of quite particular information.

The course of the emails between Ms Boyle, Mr McCaw and NZIS is fundamental to my consideration of the matter as a whole, and whether any official alone or in conjunction with any colleague:

- a) deceived, or by omission permitted any deception, of myself; or
- b) failed to draw attention to relevant information that he or she knew or believed might be held by the Department of Labour and which he or she knew or believed was not being provided to me.

Throughout the following stages of the matter, CD acted as the representative of the Department of Labour for the purpose of the discussions conducted on my behalf by Mr McCaw.

By email dated 8 May 2003, Ms Boyle told Mr McCaw:

"I can advise you that the information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case".

The same day CD was advised of this, and Mr McCaw asked her if she would *"check whether the NZIS holds such information and get back to me"*.

On 8 May 2003, CD sent an email to Mr Smith advising him of the above. She included copies of earlier emails from AB that had been sent to Mr Smith in January 2003 so as to remind him of the initial terms, and went on to say:

"Remember this request? It was refused. The requester has now further clarified the request (via the Ombudsmen's Office which is investigating the OIA complaint and has a copy of the NZIS file for Mr Zaoui) to:

'The information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case.'

lan – do you have copies of the daily media logs that mention Zaoui, and copies of any associated commentary/remarks from employees regarding the Ahmed Zaoui case."

Mr Smith made no immediate reply, save that by email of 9 May 2003 he asked what I consider in the context of my investigation to be an interesting and surprising question:

"Who is the requester, and what's this all about, [CD]?"

If Mr Smith had read and understood the full series of emails forwarded to him at that time by CD, the identity of the requester and subject of the request would have been plain. The point is worthy of note as one question in my mind was whether Mr Smith was deliberately avoiding what he knew or believed to be the real object of Ms Boyle's redefined request. It also needs to be noted that Mr Smith was one of the recipients of the 6 January 2003 email from AB.

On 12 May 2003, Ms Boyle informed Mr McCaw by telephone that she would be satisfied with the media logs for December 2002 alone. Mr McCaw in turn advised CD by telephone the same day.

On 16 May 2003, Mr McCaw received an email from CD. It read:

"Andrew - attached is the e-mail containing extracts relating to Mr Zaoui, from the media logs for December 2002."

As an attachment to this email was an apparent email dated 13 May 2003 from Mr Smith to CD. It carried the usual form of heading of an email, and to all appearances was an exact copy of an email sent by Mr Smith to CD. The text of the attachment commenced:

"Nothing before the 13th, [CD].

*Cheers
Ian"*

There followed what appeared to be five media logs for 13, 16, 17, 18 and 19 December 2002, all of which contained references to Mr Zaoui. I attach this as **Annexure 2**.

The media log for 13 December 2002 (as represented by the attachment) had a section entitled "*Media Issues, and Inquiries*". This recited the fact that inquiries about "*an Algerian terrorist*" had been made by a number of news agencies.

None of the logs (again as represented by the attachment) included any comment by Mr Smith save for that dated 16 December 2002, where midway through one summary of an article was the comment "*(and now to the last paragraph of the story...)*".

Of significance is the fact that the foregoing apparent copy of the email received by CD from Mr Smith had been edited before supply to this Office. I attach a copy of the original email of 13 May 2003 as sent by Mr Smith to CD as **Annexure 3**.

For the purpose of sending Mr Smith's communication to Mr McCaw, CD had added the section "*Media Issues, and Inquiries*" to the media log of 13 December 2002, and had further added the media log for 17 December 2002.

Furthermore, CD had deleted a remark by Mr Smith that had appeared following the media log for 16 December 2002. Mr Smith's remark read:

"I can't find one for the 17th, [CD]. I have a feeling I never did one for that day, but for the life of me I can't recall why."

There was nothing on the face of the attachment to indicate that it was anything other than a complete and exact copy of the email of 13 May 2003 sent by Mr Smith to CD. Neither was the fact of editing called to the attention of Mr McCaw or this Office at any time prior to the close of my Official Information Act investigation.

I attach as **Annexure 4**, full and unedited copies of the relevant media logs for December 2002, namely those dated 13, 16, 17, 18 and 19 December 2002.

The series of emails did not end there.

Given the absence of commentary in the material that he had been sent, Mr McCaw again queried Ms Boyle's interest with her. On 23 May 2003, Ms Boyle restated the scope of her concern to Mr McCaw in terms:

"I would like your office to review all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs."

Mr McCaw forwarded this to CD with the comment:

"...clearly Sarah Boyle believes there may be some relevant info held by the NZIS that has not yet been provided to us. To this end, she has sent me further clarification. Could you please further check whether there is any info of the type indicated below (covering the month of December 2002 only)."

CD responded:

"Do you want me to email the approx 600 staff in NZIS to see if any of them have this information?"

Mr McCaw replied:

"No - I think it would be sufficient at this stage simply to ask Ian Smith if he is aware of the existence of any such info, or whether he has a record of any communications of this nature (given that it is fairly specific)."

By email 23 May 2003, CD forwarded the query to Mr Smith, saying:

"Ian - the complainant (Sarah Boyle) has come back to the Ombudsmen's Office. She still thinks that there are emails or other correspondence or memoranda that were circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs --- this is in December 2002 only.

The Ombudsmen's Office has asked me to ask you if you are aware of the existence of any such info, or whether you have a record of any communications of this nature (given that it is fairly specific)."

The same date, Mr Smith responded, saying:

"I would have deleted any responses to the Media Logs that far back. For security reasons I wasn't included in most of the email traffic on this, and people referring to the newspaper articles I put in the Logs may not have emailed me in response; it may have prompted them to email someone else about it."

This reference to "responses" was repeated in a further email from CD to Mr Smith dated 27 May 2003, where she said:

"Ian - you were going to check whether you had received any responses to the media logs in December 2002 regarding Mr Zaoui. Grateful if you could get back to me on this asap so I can advise the Ombudsmen's Office."

By email dated 28 May 2003 Mr Smith replied, saying:

"I've looked through the clippings folder I have, and, if the media reports did trigger any responses, I never kept them.

I can't actually recall any feedback on this issue."

On 28 May 2003 CD forwarded the foregoing series of exchanges between herself and Mr Smith (commencing with the email of 23 May 2003) to Mr McCaw by way of an attachment to an email which read:

"Andrew - here's the reply from Ian Smith - hope this helps."

The position was thus reached that NZIS was saying through its officials that there seemed to be no commentary held by NZIS of the nature evidently being sought by Ms Boyle.

In due course, I reviewed the full file. The apparent absence of relevant information as requested by Ms Boyle concerned me. It seemed to me that Ms Boyle would likely have had a reason for being so specific and persistent. In the circumstances, on 24 June 2003 I took the somewhat unusual step of telephoning Mr Lockhart, and sought his confirmation that no information as requested by Ms Boyle was held by NZIS. I sought an early response from him.

As of 27 June 2003 I had not received any reply from Mr Lockhart, and decided to assume he had not returned to me because no further information was held. Accordingly I discontinued my investigation by formal letters dated 27 June 2003 to Ms Boyle and the Department of Labour.

Events Subsequent to Official Information Act Investigation

As set out in the opening part of this Report, I became aware through media reports and communications from the Hon Murray McCully MP that relevant information had been held by NZIS which had not been supplied to me. Particular reference was made to the media log for 17 December 2002, and the comment by Mr Smith appended to his summary of an article in the New Zealand Herald of that day. Mr Smith's comment read:

"I was let down badly ... Everyone had agreed to lie in unison, but all the others caved in and I was the only one left singing the original song."

However, there was also comment included in the media log for 13 December 2002. Following the *"Media Issues, and Inquiries"* section, which referred to inquiries being made by various media organisations into the Zaoui case, there was a comment by Mr Smith that read:

"...(and all handing out liberal doses of abuse when no information was forthcoming. One of the many fringe benefits that go with his job is that it allows you to learn all about your pedigree without actually having to undertake your own family history research.)"

The significance of requested information to a requester or to the public is not something that is of concern to an Ombudsman in terms of the Official Information Act, unless it impacts on any withholding grounds. For present purposes, therefore, there is no distinction to be drawn between the failure to provide me with the comment incorporated in the media log for 13 December 2002 quoted in the previous paragraph, and the failure to provide me with the comment incorporated in the log of 17 December 2002.

I had no doubt that the wording of Sarah Boyle's refined complaint seeking media logs, as set out in the chain of emails in the previous part of this Report, plainly embraced the comments of Mr Smith. I regarded his comments as clearly within Ms Boyle's email of 8 May 2003 seeking *"the daily media logs and associated commentary or remarks from employees"*; and also within her email of 23 May 2003 seeking *"all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs"*.

I find it difficult to see how better Ms Boyle could have defined the information sought by her. In evidence to me, Mr Lockhart put the matter in this way:

"... the daily media logs are what the daily media logs are. They are a complete record of everything that was in those media logs, so I have no question about that. That would include any commentary made by Ian in those media logs so the media logs themselves would form that."

I agree with Mr Lockhart. I am in no doubt that Mr Smith's comment was itself part of the media logs, and that a direct request for *"associated commentary or remarks"* was strictly not necessary to capture any comment by him.

For the sake of completeness, I further observe that there can be no doubt that the commentary included by Mr Smith in his media logs is as much *"official information"* as the summaries of media articles contained therein.

In the circumstances, I commenced my present investigation pursuant to section 13(3) of the Ombudsmen Act.

Investigation

Having set out this history of the omission to provide me with full and unedited copies of the media logs (that is with the comments by Mr Smith included), I turn to the reasons why this occurred.

As appears below, in expressing my views it has been necessary for me to reach opinions on the credibility of certain officials who gave evidence on oath before me. An Ombudsman does not have the same functions of a court of law in making findings of fact, but it is nevertheless part of an Ombudsman's functions to reach opinions and report those opinions in appropriate cases.

The original bundle of information supplied to me for the purpose of my Official Information Act investigation did not include the media logs.

As I have already indicated, there is no doubt that the complete media logs held by the Department of Labour (through its officials) constituted *"official information"* as defined under the Official Information Act. The failure to identify them as such was a regrettable and serious omission. This is the more so because in 1997 the then Ombudsmen had occasion to discuss media logs specifically with the Department of Labour (and NZIS in particular). In an Official Information Act complaint investigated at that time, media logs held by NZIS were the subject of a specific request.

In part, the concern of the Ombudsmen in that earlier matter was that the summaries of published articles contained in the media logs had been initially withheld, when quite clearly they should have been released. In respect of this aspect, the Ombudsmen were told by the then Secretary of Labour in a letter dated 12 September 1997 that *"The NZIS is currently*

reviewing its training needs following recent staff changes. It is also tidying up its records relating to media logs.”

However, there was a further issue acknowledged by the Department of Labour (in the same letter of 12 September 1997) that “*the NZIS did not have a readily accessible record of all media logs*”. In an earlier letter dated 17 July 1997, the investigating Ombudsman had been told by NZIS that the compiler of the media logs:

“...advises that she does not hold any media logs for 1996 on the system and does not keep them on a paper file. Officers usually delete the media logs from their e-mail when they have no further use for them, but two officers did have some media logs on their computers from 2 September 1996. However, we are therefore unable to provide media logs prior to that date...”

For present purposes, it is also appropriate to record the eventual outcome of that investigation. Although the summaries of published media articles as they appeared in the media logs were disclosed, the Ombudsman formed the opinion that certain associated comment in the logs had been properly withheld by the Department of Labour in reliance upon section 9(2)(g)(i) of the Official Information Act. It may thus be said that the status of media logs together with comments incorporated therein had been well-canvassed in 1997 with NZIS.

Mr Smith was not the compiler of the relevant media logs in 1996 and early 1997, having commenced his present employment on 25 August 1997. However, it does appear that CD had been NZIS’s contact officer for liaison with the Office of the Ombudsmen in the matter.

I have already noted that in this case it seems no thought initially was given to the media logs as falling within the original request dated 23 December 2002, and that I accept this was an oversight albeit a serious one by the Department of Labour.

Of much greater concern to me is the suggestion that officials deliberately failed to supply such information to me for the purposes of my Official Information Act investigation, following quite specific requests on my behalf in May 2003.

The Report by the Department of Labour ([Annexure 1](#)) canvassed the existence of a “*conspiracy to deceive*” in this respect. However, aside from any “*conspiracy*”, I have also considered in my present investigation whether any individual official culpably erred by action or omission.

Oral Evidence

Four witnesses were examined on oath before me, namely AB, CD, Mr Smith and Mr Lockhart.

AB was only concerned with the handling of the initial request for official information, and did not play any part with regard to the subsequent provision of information to me for the purposes my Official Information Act investigation. It is unnecessary for me to add to what I have already said in respect of his role.

I will consider the remaining witnesses in turn.

Ian Smith

Mr Smith said that he was employed as Communications Adviser (Media) for NZIS. As at December 2002, he had held that post for approximately 5.5 years. He had further

experience as a communications officer in the Public Service before that, and had approximately 10 years in that type of position in the Public Service.

It was part of his functions to deal with inquiries to NZIS, and in particular it was part of his job to produce media logs. He stated that production of these logs *"was a daily event"*.

Mr Smith told me that he could not recall responding to AB following AB's notification of the request in January 2003. This was consistent with the information I had received from other sources. Mr Smith said that he felt it was unnecessary for him to respond, in that he did not believe that he held relevant information.

It may be said that Mr Smith should have responded to the notification, but I am prepared to accept that he did not realise it was necessary notwithstanding the relatively recent 1997 case relating to media logs. Mr Smith was not alone in failing to identify the relevance of the media logs as forming part of Ms Boyle's request.

The question of whether Mr Smith should have directed attention to his media logs (including his comments incorporated therein) following the Official Information Act complaint to me, requires more detailed consideration.

By way of approach, I was of the view that the wording of Ms Boyle's refined complaint seeking media logs, as set out in the chain of emails in the previous part of this Report, plainly embraced the comments of Mr Smith. Not only did Ms Boyle specifically seek such comment, but the nature of the media logs were such that the comment was part of the media logs themselves. As I have said, I find it difficult to see how better Ms Boyle could have defined the information sought by her. I also note the management views as expressed to me by Mr Lockhart with regard to what constituted a media log, and recorded below.

Mr Smith consistently stated that at no stage did he realise that what was being sought was his media logs, complete with his comments. With similar consistency, he sought to impress upon me that it was his understanding that what was required was any commentary on his media logs sent in response by other employees to the media logs. As support for his claimed understanding, he drew particular attention to the remark included by CD in her email of 8 May 2003, where she said:

"Ian – do you have copies of the daily media logs that mention Zaoui, and copies of any associated commentary/remarks from employees regarding the Ahmed Zaoui case?"

Mr Smith also explained that his understanding that what was required related back to the original request, where Ms Boyle was seeking information that related to the detention of Mr Zaoui. He stated:

"...my impression of it went right back to that original e-mail, very non-specific where Ms Boyle was looking for information relating to the detention of Mr Zaoui. I didn't have any of that information. I'd been telling the media I didn't have any information. I thought this was an extension of that request. I still didn't have any other information."

I have reviewed above the full series of relevant emails. However, it is appropriate to bring the salient items together for the purpose of providing my opinion on Mr Smith's evidence.

On 8 May 2003, CD sent an email to Mr Smith that included copies of earlier emails from AB which had been sent to Mr Smith, and went on to say:

"Remember this request? It was refused. The requester has now further clarified the request (via the Ombudsmen's Office which is investigating the OIA complaint and has a copy of the NZIS file for Mr Zaoui) to:

'The information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case.'

lan – do you have copies of the daily media logs that mention Zaoui, and copies of any associated commentary/remarks from employees regarding the Ahmed Zaoui case."

Mr Smith made no immediate reply, save that by email of 9 May 2003 he asked:

"Who is the requester, and what's this all about, [CD]?"

The email of CD had in fact provided details of the requester and the subject matter. I note also that Mr Smith had been one of the recipients of the emails sent by AB on 6, 7 and 13 January 2003.

By email 23 May 2003, CD forwarded to Mr Smith the most recent definition by Ms Boyle of what she sought from my investigation.

"I would like your [the Ombudsman's] office to review all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs."

CD went on to say:

"lan - the complainant (Sarah Boyle) has come back to the Ombudsmen's Office. She still thinks that there are emails or other correspondence or memoranda that were circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs --- this is in December 2002 only.

The Ombudsmen's Office has asked me to ask you if you are aware of the existence of any such info, or whether you have a record of any communications of this nature (given that it is fairly specific)."

The same date, Mr Smith responded, saying:

"I would have deleted any responses to the Media Logs that far back. For security reasons I wasn't included in most of the email traffic on this, and people referring to the newspaper articles I put in the Logs may not have emailed me in response; it may have prompted them to email someone else about it."

In relation to the above, Mr Smith confirmed in his evidence that at the time he did not hold a relevant security clearance. He stated that it was *"something that's always intended to be done and never, I've just never got round to it that was all"*.

Mr Smith's security status was something that concerned me, and inquiries were also made of Mr Lockhart during his evidence. I comment below in detail on Mr Smith's security clearance when considering Mr Lockhart's evidence.

I have noted previously that at this time, Mr Smith referred to "responses to the Media Logs". In fact, the query (which reflected the earlier definitions of the complaint by Ms Boyle) did not seek "responses" to media logs, but any comments circulated within NZIS "including comments from NZIS staff on information contained within media logs". In other words, there had been a subtle but significant rephrasing of what was being required, which departed from the actual request of Ms Boyle. "Responses to the Media Logs" would tend to exclude Mr Smith's own comments incorporated within the logs.

CD sent a reminder to Mr Smith by email dated 27 May 2003, which picked up on the use of the word "responses". It said:

"Ian – you were going to check whether you had received any responses to the media logs in December 2002 regarding Mr Zaoui. Grateful if you could get back to me on this asap so I can advise the Ombudsmen's office."

By email dated 28 May 2003 Mr Smith replied, saying:

"I've looked through the clippings folder I have, and, if the media reports did trigger any responses, I never kept them."

I can't actually recall any feedback on this issue."

This reply reflected a further refinement of what was being requested in that it referred to a "clippings folder", and did not make any reference to email or computerised records.

By email dated 13 May 2003, Mr Smith did supply to CD some information as to his media logs. He said:

"Nothing before the 13th, [CD]."

*Cheers
Ian"*

There followed what appeared to be four media logs for 13, 16, 18 and 19 December 2002 (**Annexure 3**). However, the "Media Issues, and Inquiries" section for 13 December 2002 (including Mr Smith's comment on that section) was not included. Further there was no media log for 17 December 2002, in respect of which Mr Smith said:

"I can't find one for the 17th, [CD]. I have a feeling I never did one for that day, but for the life of me I can't recall why."

It was the 17 December 2002 media log that included the comment,

"I was let down badly ... Everyone had agreed to lie in unison, but all the others caved in and I was the only one left singing the original song."

Following specific inquiries by the Department of Labour following public revelation of the above comment, full copies of the media logs were subsequently discovered on computers of certain officials.

In particular, inquiries showed that unedited copies were retained in the "Sent" folder of Mr Smith's Outlook email system. Mr Smith accepted this in evidence.

In other words, at any time Mr Smith could have accessed unedited versions of all relevant media logs at any time. Mr Smith was asked for his comment on this. Mr Smith was also asked about his handwritten diary records which appeared to confirm that he had compiled a media log for 17 December 2002, and which might have been expected to remind him of the fact.

The relevant section of the transcript of Mr Smith's evidence reads:

QF	Now, subsequently I believe it was discovered that you had full copies of all your media logs and annotations in your Outlook sent folder. When did that come to your notice? When did you realise that was the position?
IS	It was probably early in the morning following the <i>Herald's</i> telephone call about the story on whatever night it was, I'm not sure of the date, but it was the following morning I think.
QF	What time are we talking about here? In what month, for example?
IS	Oh, July.
QF	And how long have you been using e-mail? (IS, well since I have been with the Immigration Service.) And Outlook has been standard? (IS, yes.) As communications adviser have you have never had occasion to check past e-mail correspondence by reference to deleted items?
IS	Well, probably, but the instances, this instance, in this instance, [CD] had told me that she had the log for the 17 th which I'd told her that I didn't. So I didn't have to, I felt I didn't have to worry about that because [CD] had it.
QF	When was that conversation with [CD]? (IS, 13 th .) The same day that you sent this e-mail? (IS, yes.) Before or after you sent the e-mail?
IS	It would have been before. I kept a, I wrote down on a piece of pad paper, I put a series of dates for December down the left hand side, I went through the, the logs that I could find to find out which of them contained references to Mr Zaoui, ticked them off, I couldn't find the one for the 17 th , it was nothing untoward as far as I was concerned, because I was sure we would be able to find one, and in fact when I rang [CD] to say these are the ones I've found that have got references to Mr Zaoui in them, I haven't got one for the 17 th , she said, "It's OK I think I've got that one".
QF	And you, yourself, didn't think of looking in your sent box?
IS	No, I didn't, I had no need to because [CD] said she had it. And I have to say at this point that I didn't know at that stage that [CD] was taking the comments out of them. So as far as I was concerned I had the full media logs, although I was unaware that that was what was being asked for, and [CD] had the one that I couldn't find. And I would also make the point that at the stage that Sarah Boyle approached the Ombudsman's office for an investigation, she again had the opportunity to say exactly what it was that she wanted, but she never did that. Had she done so that media log would have been found.
QF	Can you explain why you were able to find the media log for, say, the 13 th , the 16 th , the 18 th and 19 th , but the 17 th was missing?

IS	They were probably ... yes ...when I, well I can offer up a logical explanation I hope. When I send them out, often if people are not receiving them, or out of the office, or for some reason or other I get bounce back messages to say that, they are not, the message isn't going through, I delete those in bulk. It could have simply been a case that, that media log was deleted along with all the bounce-back messages I got for that day. I know that's happened often enough. But there was nothing, nothing unusual, it was, dare I say it, Murphy's law that that one disappeared, but I mean I hadn't thought to go to my sent box. I had no reason to because in discussing it with [CD] she said she had that one, so the gap had been filled in my mind.
QF	You said, <i>"I can't find one for the 17th. I have a feeling I never did one for that day."</i> Where did that feeling come from?
IS	Well, I just couldn't work out, you know, I can't find one for the 17 th . Normally there would be one kicking around. It had been, it was getting near Christmas. I had been out of the office late, and media logs were something I always did as an end-of-the-day task and I did that to leave as much time as I could to record any inquiries that I've had from journalists late in the afternoon. But I just, I had a feeling that perhaps I hadn't done that because I may have been late, or not gone to the office. This is now May and we are looking back to December. I mean, that was, but I was still, I was still confident that, you know, there would be one there and that's what happened. [CD] said, <i>"It's OK, I've got one"</i> .
QF	If [CD] had already told you that she had a copy why did you bother to mention at all, <i>"I have a feeling I never did one for that day"</i> because you knew it was going to be inserted later.
IS	Well, I probably compiled the e-mail before I sent it off, or before I made the 'phone call to [CD]. I have no idea. I just ... all I was doing was trying to tell [CD] that I don't have one for the 17 th .
QF	So, as I understand you, you seem to have racked your brains and came up blank for the 17 th ? (IS, for the 17 th I did.)
QF	You didn't think of looking in your Sent folder? (IS, no I didn't.) Did your clippings folder contain clippings from which you could have expected to make a media log?
IS	No, no I don't usually, I don't usually print, well, I wouldn't have printed it off for any reason.
QF	But if you had clippings you might have expected a media log to go with those clippings?
IS	Well, not really, because as I say they are just issued on a daily basis for the information of other NZIS staff.
QF	Were there any other records available for you to consult as to whether or not you'd done a media log?
IS	Well, no, other than asking someone else if they had a copy of it which is what I did.
QF	That was [CD]? (IS, yes.) I have here a copy of your personal diary for December. Is that a copy of your diary

	<p>for December? (IS, yes.) The first page is dated the 11th of December (IS, right) on the top left (IS, yes). We see file media log and media log. (IS, yes.) Turn over the page, Tuesday 12th of December - file media log/media log. (IS, Yes.) The 13th – file media log/media log. (IS, Yes.) The 16th - file media log/media log (IS, yes). The 17th, the same again - file media log/media log. (IS, yes.) The same for the 18th (IS, yep), and so it goes on. (IS, yes.)</p> <p>Your diary recorded your work, I presume?</p>
IS	Well, it did, but when it came to filing the media log, that was an intermittent function that I never really adhered to.
QF	So why did you write it in your diary?
IS	Well, I would go in there and sit at my desk and it was always something to think, well what am I going to do today? I'll file the media log, I'll write the media log, and from then on I will just, it was just, it was like an exercise to start the day.
QF	And according to your diary you started the day on the 17 th with filing the media log? (IS, yes.) And yet you were telling [CD] that you didn't think you'd ever done one. (IS, correct.) So what changed your mind from what you recorded in your diary?
IS	Only, that ... well I think the e-mail that I sent to [CD] kind of expresses it. I mean "I can't find one for the 17 th . I have a feeling I never did one for that day but for the life of me I can't recall why." But I mean this is again May, this is again in May, we're dealing with May here, and I have asked [CD], I've told [CD] the ones that I can find, and [CD] has said, "It's OK, I've got the missing one". I mean I didn't think about going back to my diary to see whether I had done it because I didn't need to. [CD] had already said that she had the one covered for the 17 th .
QF	But something caused you to say, "I don't think I had one for the 17 th ". What was that something?
IS	Well, it was just a feeling. It was the week leading up to Christmas.

Mr Smith was also referred to the fact that he had apparently removed his comments from the media log of 13 December 2002. The transcript reads:

QF	Did you tell [CD] that you were only sending part of the information that you once held?
IS	I can't recall what I told [CD] but I know that I telephoned [CD] when she'd asked me to go through the media logs to tell her which ones I'd been able to find, and that I would, I presume I told her that I would send her the references to Mr Zaoui that were contained in those logs.
QF	I mean with regard to the 13 th of December I still don't quite understand why you could only find half of it.
IS	It wasn't that I could only find half of it, it's just that I'd picked out the reference to Zaoui to send in response to the OIA. The reporters' inquiry I felt had no bearing on what Sarah Boyle would be looking for because the reporters were probably trying to find the same information and I had none to give them.

QF	So you made a conscious decision not to send [CD] the media issues and your annotation, is that what it comes down to?
IS	Put that way, yes. But not for any sinister purpose, just because I felt that it had nothing to add.

A later section of the transcript reads:

QF	At any time have you had a conversation with [CD] about the annotations that you made to your media logs?
IS	Only on the night that the story broke. When the <i>Herald</i> reporter telephoned and asked me about it, I said, and I think my words were, <i>"It sounds as if that's something that I would have said or written"</i> . I asked her what it was contained in. The reporter really prevaricated. I think, well she said, <i>"You're just trying to find out where I got the document from, and I'm not going to tell you that"</i> or words to that effect. And I said, <i>"Well I'll have to go into work to check that whatever it was, was correct"</i> . So I went into work. I didn't have the media log for that day. [CD] was still at work. I telephoned her and asked her if I could come over and get the log for that day and it was only then when I saw it there that I realised there was no comment. And I asked [CD] was there a comment in this? And [CD] said something along the lines of, <i>"I take all that stuff out. It's no use to me"</i> . So, I have to say my concern then was that we would be looking bad because we seemed to have been deliberately, someone, [CD] taking out the comments, when in actual fact that was just her practice and I was totally dumbfounded by it.
QF	You, yourself, had removed comments, though, from the 13 th of December, hadn't you?
IS	No, I hadn't removed them. I'd just not sent the section of the media log because I didn't think that it warranted inclusion.
QF	Well, why were you astonished that [CD] had done the same?
IS	No, no, she hadn't. What she'd done was she'd taken out the line at the end of the article that I'd put in. I took out, well not took out, I just didn't bother to send the media inquiries which had the comment attached to it because I didn't think that reporters' questions about the incident were going to help what Sarah Boyle was after.

Mr Smith was asked if he had any personal policy on the retention of media logs. He said that he had no *"set policy"*, and did not maintain any file of hard copies. With regard to the media clippings, he said:

"Once at the end of every week, although ...this wasn't consistent, what I would do is I would take the clippings and put them into folders relating to whatever topic they related to. So, really the logs themselves became superfluous in a sense."

In all the circumstances of the matter, I turned my consideration to whether there was any particular reason why the media logs at issue might be expected to have been in Mr Smith's mind when they were sought in May 2003.

Mr Smith had been subject to some media criticism in December 2002. In part, this appears from his comment in the media log for 13 December 2002, where he commented that persons from the media making inquiries had been *"handing out liberal doses of abuse when no information was forthcoming"*.

He had been subject to more direct criticism as appears from the media log of 17 December 2002, due to his failure to provide information to the media. In particular (as appears from the media log of that date) a New Zealand Herald article had remarked *"the difference between saying nothing and telling untruths is clearly an elusive concept for some"*. The original article also said, *"...Immigration officials should have recognised there was no point in pursuing ham-fisted denials"*.

In evidence, Mr Smith said that he *"thought it was fairly unusual"* for a spokesman to be criticised in such a fashion, and nothing like that had happened before to him.

In my opinion, the manner in which Mr Smith was treated by the media was likely to have remained in his mind.

Mr Smith was also asked about his comment for 17 December 2002 which read:

"I was let down badly ... Everyone had agreed to lie in unison, but all the others caved in and I was the only one left singing the original song."

Whether this comment represented the literal truth was not something which has concerned my investigation. However, I note that Mr Smith stated that he made the remark by way of *"trying to point out that it was quite preposterous that they should think that I was trying to hide information from them"*. He expressed the belief that all recipients of the media log would understand his intent and meaning. He said:

"People, my readership knew me, they understood me, they knew that this wouldn't be serious. They would also know that if there was a genuine conspiracy I would hardly be likely to communicate it to 300 people."

And again:

"People that read the media logs would have realised my frustration and realised that I had a smile on my, on the corner of my lips when I came out with that line".

I express no opinion on Mr Smith's reasoning behind his comment. However, it seems to me that the comment was patently unwise or inappropriate in that, if it reached the public domain, it was liable to result in the type of difficulty for the Department of Labour and Mr Smith as in fact has resulted. For this reason, it was in my view reasonable to expect Mr Smith to have remembered it in the context of the persistent inquiries by Ms Boyle in May 2003.

One further aspect concerned me. There was a media report that was drawn to my attention dated 30 July 2003 which stated:

"Ms Dalziel [Minister of Immigration] said yesterday that Mr Lockhart had put a stop to Mr Smith's habit of adding commentary to media logs in January after he became general manager".

If Mr Smith had received a direct instruction as the quote appeared to suggest, it seemed to me that Mr Smith might well have had his media log comments for December 2002 in his

mind when questions were raised in May 2003. However, I had been told by AB and CD that they had personally perceived no fundamental change in the practice of Mr Smith.

Accordingly, the matter was put to Mr Smith, and he denied receiving any such instruction. Indeed, he said. “... *to the contrary I have had encouragement to continue with the media logs with the comments in them*”; and stated that Mr Lockhart’s predecessor had specifically remarked on the inclusion of humour. I have checked Mr Smith’s employment records, and they are consistent with what Mr Smith told me. In October 2002 he was praised by the then General Manager for “*[adding] value to the process [of media logs] with some humour*”. At an earlier time, however, his employment records include the comment, “*As discussed, please continue being mindful of possible public perception if [the media logs are] made public*”.

The matter was later in turn put to Mr Lockhart during his examination. The relevant parts of the transcript read:

QF	A published report in the New Zealand Press Association, dated 30 July stated that the Minister for Immigration, and I’ll quote the report, “ <i>said yesterday that Mr Lockhart had put a stop to Mr Smith’s habit of adding commentary to media logs in January after he became General Manager</i> ”.
AL	I had that conversation with him, yes.
QF	Can you identify that occasion by time or place, or the circumstance?
AL	I can’t give you a date or a time for it, but it was a general, it was a discussion that I had and I had a discussion with a number of staff when I got appointed when I came back after Christmas, just around my own sort of expectations and some of the, I suppose my own way of operating and it was that, and what that actual discussion covered was our relationship with the media itself and the content around the “ <i>Sweeping the Pool</i> ” which is an internal magazine and the media logs and just setting out that we needed to manage those risks well and it was at that point, you know, in time that I made my expectation about the media logs clear but also Ian confirmed to me at that time that he had, I think his words were “ <i>toned down</i> ” the comments in the media logs.
QF	Was this a conversation in your office, or his office or a group meeting?
AL	My office.
QF	And the report says January, is that date correct? (AL, yes.) Did you make a note of the conversation?
AL	I’ve looked back but I don’t think I did, I mean because I had a general conversation with quite a lot of people at that time as I took the role up.
QF	Would persons other than Mr Smith have known of this discussion or instruction or guidance?
AL	I don’t know. I mean it was only Ian and myself that were there. I mean I don’t think there is any dispute between myself and Ian that the conversation took place and what the subject of the conversation was.
QF	What triggered the instruction?

AL	I'd point out it wasn't an instruction, it was a discussion around the thing and it was more around my expectations. What triggered it? I think it was that as I took up the role there were a number of discussions around what I saw as the risks, perhaps I'll give it in a context, because another conversation I had with, around policy development and legislation, was the fact that we needed to make sure I was aware of the risks around the fact that some of the decisions we were making in terms of policy, operational policy changes, were being linked to legislation that may not have been specifically designed for that purpose, and just keeping in mind at that time the High Court and the Court of Appeal decision around the detention cases and around the Court case we'd had in November around the policy changes in November and feeling that going forward we needed to make sure that our operational policy lined up with specific enabling legislation. And then that is part of what drove changes on 1 July, so that rather than linking it to something that was perhaps already in the legislation is getting enabling legislation to do that so it was, that's just another example of some of the things that I saw when I first came into the job around the risks that were there. So I don't know that there's anything in particular that triggered it, it was just me, I suppose I had a conversation with a fair number of my direct reports and others around the new role that they had taken on and what sort of my expectations around that might be.
QF	Can you give an example that you would have preferred to see toned down?
AL	No because my reliance on those, my conversation around that was more based on, I don't want to say gossip, but what people had kind of commented about the media logs over a period. Because for myself I don't read the media logs and so therefore it was more based on that sort of contextual information rather than anything specific.

Further questioning resulted in the following exchange.

QF	You see the report says " <i>Mr Lockhart had put a stop to Mr Smith's habit of adding commentary</i> ". That seems to be a far more definite statement than merely casually asking him to tone down what he was saying.
AL	He'd said he'd tone them down, I said that I was, what my expectations were is that it was around the risk and the fact that we don't, I didn't want undue comment in those media logs. So his was a " <i>I've toned them down</i> " thing, because there are some comments in there that are quite OK. There are some questions that, because I've looked at them subsequent to January, where he goes out and asks people for further information so it wasn't actually, my expectation wasn't that all comment came out but that comment was appropriate, not inappropriate.
QF	So, just to clarify what you're saying, in January when you spoke to Mr Smith, are you saying that it was Mr Smith's introduction into the conversation that he had toned down his annotations or commentary?
AL	Sorry?
QF	Are you saying it was Mr Smith who introduced to the conversation the fact that he had toned down his commentary?

AL	No, his, that response was actually, sorry, that statement was a response to my concerns and my expectations, so that was a two-part conversation. Yes he confirmed to me that he'd toned them down but that was around me raising the fact that I wasn't happy with the level of comment and that we needed to manage those risks.
QF	You see, we return again to the fact you were not happy about the level of commentary. Can you give any example of something with which you were not happy?
AL	No I can't because as I said to you, I don't read the media logs themselves, but I had heard from people that there were inappropriate comments in there and I just wanted to make sure that with me becoming General Manager that my expectations were clear around it, because I don't think that previously that had necessarily been the case. I think there had been an acceptance of it.
QF	Had you been given any examples of inappropriateness?
AL	No I hadn't no. But I had been given examples where people had, had raised it with the previous General Manager.
QF	If you were doing any sort of performance appraisal on a staff member, is it not fundamental management practice to put to that staff member individual occasions when you are perhaps not happy with what they have done. One doesn't make general statements, one puts specific examples to them.
AL	But it wasn't a performance appraisal. I wasn't undertaking a performance appraisal, it just was a general discussion about my expectations going forward as General Manager. It was not a performance appraisal.
QF	You see, one impression from your evidence is that you were relying on little more than gossip that Mr Smith had been putting inappropriate comments in.
AL	I was relying on other information I'd heard, that's correct. But that wasn't, that wasn't a performance appraisal, that was a discussion around my expectations coming in as General Manager.
QF	Either before or after speaking to Mr Smith, did you see fit to check the media logs in your own possession to see whether there was anything inappropriate there?
AL	No, I didn't.

Having heard the relevant evidence, I was not satisfied that Mr Smith had been "*instructed*" to alter his practice of including comment in the media logs, or otherwise discussed that practice with Mr Lockhart, in terms that would have resulted in the media log comments being in Mr Smith's mind in May 2003.

I asked Mr Smith if he had been aware of the Ombudsmen's 1997 investigation when dealing with the matter. He said that he was not. I have previously noted that he was not the compiler of the media logs in 1996 or early 1997, and I accept, although I find it surprising, Mr Smith's evidence that he did not know of the 1997 matter. I pause to comment that I find it particularly unfortunate that the Department of Labour's processes and training had not

rendered an official holding Mr Smith's position fully conversant with that case, and the Official Information Act requirements as a consequence. The Department's letter of 12 September 1997, which was soon after Mr Smith took up his appointment, made particular reference to reviewing its training needs "*following recent staff changes*".

It was confirmed with Mr Smith that he realised that if he deliberately withheld information, knowing that it was required by the Ombudsman, he would have been obstructing the Ombudsman's investigation. Mr Smith similarly agreed that the same consequence would have flowed, if he had failed to draw attention to information that he knew his colleagues were seeking for the purpose of the Ombudsman's investigation.

In the circumstances, the credibility of Mr Smith's evidence is crucial to this investigation.

If I were to accept Mr Smith's evidence that he failed to appreciate exactly what was being required in terms of information to be provided to me, issues of competence might arise; but such issues would be very different from the "*conspiracy to deceive*" that was canvassed at the outset.

In considering the matter I have had regard to the incontrovertible chain of events as evidenced by the documentary trail. I have formed the opinion that the nature of the information sought by Ms Boyle and explained to Mr Smith by emails was abundantly clear. Those handling the matter were public officials dealing with official information.

I have adverted above to Mr Smith's reference in an email dated 23 May 2003 to "*Responses to the Media Logs*", and that this represented a subtle but significant rephrasing by Mr Smith of what was being required. I have further adverted to the fact that in an email dated 28 May 2003, Mr Smith's response referring to his "*clippings folder*", failed to make any reference to email or computerised records. Having very carefully considered all of the factors and the evidence, I have formed an opinion that it is consistent with a deliberate attempt to avoid reference to the real information being sought, which was unedited versions of the media logs for the relevant days.

I found unconvincing Mr Smith's explanation that his approach in whole or part arose from his interpretation of CD's email of 8 May 2003 where she said:

"Ian – do you have copies of the daily media logs that mention Zaoui, and copies of any associated commentary/remarks from employees regarding the Ahmed Zaoui case".

Again having given careful consideration to all of the factors and the evidence, I found Mr Smith's claim in his email of 13 May 2003 to CD that he was unable to find the comment for 17 December 2002, and, indeed, that he had "*a feeling [he] never did one for that day*" difficult to accept. A copy of the email was in the "*sent*" folder on his email system, and the fact of the compilation of a media log for that day was recorded in his handwritten diary. At some stage, he expressed his understanding that CD had a copy of the relevant media log but to my mind that does not explain his statement in the email. Again, this aspect is one which is consistent to my mind with an attempt to deflect attention from the media log of 17 December 2002.

I considered that the comment for 17 December 2002 was one which taken at face value was an extraordinary comment for an official to write, and one which was liable to have difficult consequences for the author and the Department of Labour if it reached the public domain; and indeed could be a cause of embarrassment to relevant Ministers. It is couched in language that cannot be described as importless or insignificant. Accordingly, in my opinion Mr Smith should reasonably have been expected to have recalled it.

Finally, I turn specifically to the quality of Mr Smith's evidence. A person conducting an investigation such as this, in order to reach appropriate conclusions and to express an opinion, has to form a view on the credibility of testimony. Having considered all of the evidence given to me and all the relevant information before me, I did not accept Mr Smith's evidence on certain fundamental issues.

Taking all matters into account, I have formed the opinion that during May 2003 Mr Smith knew or believed that unedited versions of his media logs were sought by the Ombudsman for the purposes of an investigation, and deliberately dissembled. His actions thus contributed to the fact that the relevant information was not supplied to me by the Department of Labour. Insofar as his oral testimony claimed otherwise, taking into account the other material before me (which is fully described in this Report), I did not accept it.

Having been made aware of my proposed opinion adverse to him in the previous two paragraphs, Mr Smith strenuously submitted that it was not merited. Suffice it to say, I do not agree.

CD

CD told me that she occupied the position of Adviser in NZIS. She said she had held her present post with similar duties since 1989. She had been employed almost continuously by the Department since 1965.

She stated that her principal duty with regard to Official Information Act requests was to deal with complaints, although she did handle some of the more difficult or complex requests received by National Office, NZIS. She regarded herself as experienced both with regard to answering requests and dealing with complaints under the Official Information Act made to the Ombudsmen.

I was further aware from my own knowledge that CD also had considerable experience with dealing with complaints made to this Office under the Ombudsmen Act in respect of issues involving NZIS.

With regard to the original request as circulated by AB, it appeared that CD had little personal involvement. Although she gave her approval to the draft wording for the letter of refusal, it seems that her approval was not necessary and the referral to her was little more than a courtesy. In the circumstances, it is unnecessary for me to consider further the involvement of CD in the handling of the original request.

CD, however, had been named as the contact officer of the Department of Labour in Mr Lockhart's response of 10 April 2003 to my notification of the complaint under the Official Information Act. Indeed, she had in fact signed Mr Lockhart's letter to me on his behalf "per pro".

In evidence, CD stated that she had been responsible for compiling the bundle of information at issue which accompanied that letter of 10 April 2003. She said:

"... I called for the files, I looked on our database, our AMS database and saw that files were in various places and I sent an e-mail to the people that I thought may hold information and asked them to send the files to me and ... photocopied the information. I may have had some assistance in photocopying some of the files..."

She went on to say that what was forwarded to me represented the information at issue as she understood it.

CD was asked whether there was any process for tracing emails that might have been deleted (entirely properly) from individual officials' records. She stated that she would have expected hard copies of any emails to have been printed and placed on the relevant file. As regards her own practice, she said:

“I save the media logs for my own information. I delete information that I don’t think I will need in the future, which includes annotations and other items like good news stories or items about, I only retain items that I think are going to impact on my work in the future, possibly if there’s, if it’s a high profile case, like Mr Zaoui. I keep that information so that I can be aware of when it, the particular case hit the media. Sort of a trigger if there’s an Official Information Act request or an Ombudsman complaint or a Privacy Act request, because if there’s an Official Information Act request then it could have an effect on, depending on what information is out in the public domain would have an effect on what information we would, the department would release of its hold, or how we would view such a request for information. I go through them regularly and just delete them, just delete the actual, I go through them about every 3 months and if the case has been settled, then I just delete the whole e-mail. It’s just sort of a reference for my own use, own personal use, and also because I’ve got them to, my it’s to save space, that’s another reason I delete information, extraneous information that I don’t need for my own personal, my own use in relation to my work, to save space on my computer.”

CD said that she was aware of Mr Smith’s practice of including comments in his media logs. She was referred to Mr McCaw’s email of 8 May 2003, which contained Ms Boyle’s statement:

“... the information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case”.

The transcript of her following evidence reads:

QF	Sarah Boyle’s request or complaint as forwarded to you by Andrew McCaw on 8 th May and in turn passed to Ian Smith by yourself was in terms that the <i>“information I am specifically seeking are the daily media logs and associated commentary or remarks from employees regarding the Ahmed Zaoui case”</i> . Did not this plainly embrace annotations by Ian Smith on the logs?
CD	Yes.
QF	Did you recognise that at the time?
CD	Yes I did. Yes.
QF	But those annotations weren’t eventually passed to the Ombudsman.

CD	I wasn't aw... I didn't remember whether there were any annotations on the logs that I had seen, on the media logs when they had been sent out, so I couldn't recall whether the media logs that I had received from Ian Smith when I asked him for them for his in response to Andrew McCaw's request. I wasn't aware that there were, had been annotations on those specific items.
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Subsequently, CD was referred to Mr McCaw's email of 23 May 2003, where Mr McCaw forwarded the restated request of Ms Boyle in terms:

"I would like your office to review all emails or other correspondence or memoranda circulated within NZIS which comments on the Zaoui case, including comments from NZIS staff on information contained within media logs".

CD then offered to email the approximate 600 staff of NZIS to make the foregoing query. The transcript reads:

CD	... I couldn't see any other way that we would know whether there were any comments except by possibly knowing who had made the comments and I wasn't aware that anyone had made comments.
QF	Mr Smith's annotations or practice of annotation didn't figure in your calculations then?
CD	Not specifically, no, because I mean it could have been comments by any, because it says comments from NZIS staff on information contained within the, so it could have been comments from any NZIS officer.

CD was also referred to the subsequent series of emails between herself and Mr Smith between 23 May 2003 and 28 May 2003. The fact that Mr Smith had referred to "responses" to media logs was noted. The transcript reads:

QF	But responses to the media logs wasn't actually the request of Sarah Boyle, is it fair to say that?
CD	Well, the first request from Andrew McCaw, sorry the first e-mail from Andrew McCaw said "enclosed an e-mail from Sarah Boyle specifically seeking daily media logs and associated commentaries". And the second, the second one was slightly different, asking "to review all e-mails and other correspondence or memoranda circulated within NZIS which comment on the Zaoui case including comments from NZIS staff on information contained within media logs". Because in the, because as far as I was concerned, I had received, I had received from Ian Smith the copies of the information about Mr Zaoui that were in the media logs except for one which was the 17 th of December and I assumed that he had provided me with all of the extracts from those media logs in relation to Zaoui including any comments that he had included when he had sent them out. When I forwarded the extracts to Andrew McCaw on 16 May I included the extract that I had retained from my, from my records for the media logs for the 17 th of December.
QF	Perhaps I can put the question again. The refined request or complaint for Sarah Boyle included comments from NZIS staff on information contained within the media log and there was the previous refinement of Sarah Boyle before that. You've already indicated that on the face of it that would seem to include annotations by

	Ian Smith if they existed. However, in this e-mail, instead of looking for all comment which would include Mr Smith’s comment, we have it subtly changed to responses to the media logs if you like from other members of the Immigration Service. So responses to the media logs is subtly changing what Sarah Boyle is actually wanting, is it not? Do you understand the point that I’m putting to you?
CD	Yes, yes. But I don’t see it that way because as far as I was aware, Ian Smith had provided me with all the information including any comments he may have, including his commentary and I wasn’t aware of anyone else who may have retained the media logs so that I could check it with anyone else.

CD was asked about her practice with regard to the retention of media logs. She stated that the receipt of media logs was usually a daily event. She said that she moved the parts of the media logs that she felt might be of subsequent interest to a folder, and appended a suitable key word.

It became apparent from CD’s evidence that she used to strike out the comments of Mr Smith. One part of the transcript reads:

QF	When you were editing what you wanted and what you did not want, you struck out the annotations of Mr Smith if they were no obvious use to you, you say ([CD], yes). Did you read annotations that you considered inappropriate from time to time?
CD	I didn’t think they were very professional, it wasn’t a professional thing to do to annotate media logs that go out to a wide audience.

At a later point, her evidence was that she “*routinely*” deleted Mr Smith’s comments without necessarily reading them.

I have referred above to the fact that under covering email dated 16 May 2003, CD forwarded an apparent copy of an email she had received from Mr Smith dated 13 May 2003. As previously set out, the attachment was significantly amended from that which CD had initially received but CD failed to indicate this to Mr McCaw or my Office. If CD had explained the situation together with her practice of deleting comments, I can say with confidence that I or my staff would have made further inquiries.

On the face of the papers before me, I regarded CD’s attachment to her email of 16 May 2003 to be misleading (**Annexure 2**). Accordingly, CD was asked about the circumstances of its compilation and its forwarding to my Office. This issue is important to the issue of my analysis of the evidence, and I set out at length the relevant section of transcript:

QF	In due course, by email dated 16 May you forwarded to Mr McCaw the copies of the media logs that you had identified.
CD	Yes.
QF	I’ll show that to you... We see that it includes 5 media logs of the attachment, the attachment being dated 13 May. ([CD], yes.) Your covering email of 16 May says or commences, “ <i>Andrew, attached is the email containing extracts related to Mr Zaoui for the media logs for December 2002</i> ”.
CD	Mm.

QF	And the attachment dated 13 May is apparently such an email?
CD	Yes.
QF	Would you agree that the attachment dated 13 May looks as if it is an original email from Mr Smith?
CD	Yes, it does look as though it's an original email from Mr Smith.
QF	As it is described in the departmental report in fact Mr Smith had not forwarded you emails for all 5 days but only 4 days, in particular the email you originally received from Ian Smith did not include that for the 17 th December. Is that correct?
CD	Yes, that's correct. I think there are 6 days on this
QF	6 days are there? I only have 5.
CD	13 th to the 19 th .
QF	13, 16...
CD	13, 16 (QF, 17), oh sorry I was counting, I was looking at the wrong date I was looking at the press 14/12, sorry
QF	So there are 5 media logs.
CD	There are 5 media logs, yes.
QF	And the entry for the 13 th of December again wasn't as received by you from Ian Smith. I'll hand you a copy of what I understand to be the original email, and if you look at the ([CD], yes that's right) 13 th of December when you forwarded the email or the attachment to be accurate to Mr McCaw, you had added the " <i>Media Issues and Enquiries</i> " section, is that correct? 13 th of December.
CD	Yes, I see what you mean. I didn't recall that, but it looks like I did.
QF	So you had added the " <i>Media Issues and Enquiries</i> " section for the 13 th December?
CD	Yes, I must have if it's not in the one I got from Ian Smith. Yes.
QF	The addendum which you made, " <i>Media Issues and Enquiries</i> ", of course doesn't include Mr Smith's annotation, does it?
CD	No. I mean I don't know, oh it doesn't include, I don't know.
QF	You have a copy of the media log there ([CD], yes) it's in the bundle. It is the annotation of " <i>and all handing out liberal doses of abuse</i> ".
CD	All right. No it doesn't include it.
QF	You have a copy of the email as forwarded to this office, you also have a copy before you of what I understand was the original email from Ian Smith to you. ([CD], yes.) Why did you reformat Mr Smith's email in the way you did before dispatch to this office?

CD	Because it was to make sure that all the information that we held from the media logs relating to Zaoui was included, all the information I was aware of that we, that the Department held about Mr Zaoui in those media logs was included in the information.
QF	Why did you not tell Mr McCaw that Mr Smith, who he'd asked to be consulted, was merely sending 3½ logs and you were sending 1½ from your own records?
CD	It never occurred to me to tell him.
QF	Would you agree that your, or would you say that your email was misleading as received by Mr McCaw in the sense that the attachment apparently was an original email from Mr Smith when it wasn't?
CD	It could be regarded as being misleading, yes. It wasn't meant to be misleading. I could have pasted them on to a separate document, pasted the media logs that I'd received from Ian Smith and mine, the media logs I had retained, on to a separate document and sent them.
QF	If you look at the covering email to the attachment, it commences " <i>Andrew, attached is the email</i> ", what was attached was not the email, was it? Is that a correct statement?
CD	Yes.
QF	You did not tell Mr McCaw at any stage that you edited your own logs. Is that correct?
CD	I don't think I ever discussed it with him, no.
QF	If you had discussed the question of logs being edited, would you agree that it might have alerted Mr McCaw that additional information might exist?
CD	Yes.
QF	When you were dealing with Mr McCaw at this time, his annotation about relating to the 13 th of December, " <i>all handing out liberal doses of abuse</i> " was that something that lingered in your mind?
CD	No, no.
QF	When you inserted the media log for the 17 th of December, did it linger in your mind that there was an annotation about " <i>lying in unison</i> "?
CD	No.
QF	But you must have read both of those, or seen both annotations before cutting out from your own records. Are you sure that neither of them registered with you?
CD	No, no. I don't recall all the annotations and I don't recall the annotations at all because I just skim them, the media logs. Is " <i>that likely to be of use to me in the future, I'll keep it, if not I'll delete it</i> ".

QF	If we could return to the original email that you received from Ian Smith, this one, towards the bottom there is a comment by Mr Smith “I <i>can’t find one for the 17th [CD], I have a feeling I never did one for that day but for the life of me I can’t recall why</i> ”.
CD	Mm.
QF	That was cut out of the document that you forwarded to this office. Is that correct?
CD	Yes.
QF	Would it not have been relevant to inform this office of the state of Mr Smith’s recollection?
CD	It never occurred to me.
QF	Why did you cut it out?
CD	Because it wasn’t part of the media logs, I know it was related to the media logs, but it wasn’t part of the media logs, I mean it was a comment to me.
QF	Mr McCaw had asked for Mr Smith to be consulted specifically so wasn’t it relevant to that consultation?
CD	No because my understanding, the way I was thinking was that we were to, Immigration was being asked to provide the media logs, the actual information from the media logs and consulting Ian Smith was just asking him for the information, because he didn’t have it and I had it, or an edited version of it I just included that in what I provided to Andrew McCaw. But I didn’t think that was relevant that Ian couldn’t find his of the 17 th .
QF	Now you were interviewed by the Auditor for the purposes of the departmental report. ([CD], yes.) I don’t know whether you know, but I can tell you that Mr Smith was also interviewed. In the course of his interview the Ombudsman has been told that Mr Smith told the Auditor in interview that he “ <i>discussed the media logs with [CD]</i> ” and between you identified all the media logs. Now first of all, is that statement correct? Did you and Mr Smith discuss the matter and between you identify all the media logs? If your recollection is different to that of Mr Smith, please say so
CD	Yes, yes. After I’d received this email from Ian dated 13 May, I did talk to him and say that I had the media log for the 17 th of May and that I would include it in the information, I would include it in the information going back to Andrew, sending it back to Andrew.
QF	So that conversation was after you’d received this email?
CD	Yes.

I pause to note that the reference to “17th May” in the penultimate answer of CD appears to have been a slip of the tongue for 17 December [2002].

I also regarded it as important to establish whether any contact between CD and Mr Smith gave rise to believe that Mr Smith's media log comments were in the mind of either at the time of my inquiries. Again, I refer to the relevant part of the transcript:

QF	After the close of the Ombudsman's official information investigation at the end of June, did you or have you discussed the matter with Ian Smith, personally?
CD	No, I sent him an email advising what the Ombudsman's decision, I mean what the Ombudsman's findings had been on the complaint, the original complaint, and that was all.
QF	You haven't discussed with him the circumstances of why you're here today.
CD	No I haven't. I haven't talked to anyone about it, except my support people.
QF	When he was interviewed by the Auditor, Mr Smith stated that you, [CD], had a practice of deleting his annotations from the emails. Is it correct that - let me put it in a different way, did you discuss with Mr Smith your practice of deleting of his annotations at any time?
CD	I could possibly have mentioned it when I mentioned that I had the 17 th of December media log. I possibly mentioned it then, that I didn't have any annotations, any of his annotations.
QF	So it appears that annotations were discussed between you?
CD	No. It's possible that I said that I have the media log of 17 December but it's only my version of it, it's not the complete one.
QF	So the deletion of annotations did figure in the conversation. Is that what it comes down to?
CD	Possibly. I don't recall. I mean I was quite open about deleting annotations and deleting items that were of no use to me.
QF	What I'm trying to get at is how did Mr Smith come to know that you had a practice of deleting his annotations unless you discussed it?
CD	I must have mentioned it to him.
QF	So at that time...
CD	No I don't recall when I mentioned it to him.
QF	So at that time annotations must have been both in your mind and his?
CD	It might have occurred after, I may have mentioned it after this, the issue, this whole issue hit the media, before the, before the internal investigation, the Department of Labour investigation. I may have just mentioned it, I don't recall when I mentioned it to Ian.
QF	Well I'd like to be quite clear. As I understood your evidence a moment ago you said that you hadn't discussed the case with Mr Smith since the close of the Ombudsman's investigation, now you seem to be saying that perhaps you did. I

	wish to be quite clear. I'm not suggesting anything one way or the other, perhaps you can just tell us.
<i>CD</i>	I seem to recall that, yes I do recall that Ian distributes an internal, I can't even remember the name of it, comings and goings, that kind of thing and he normally comes around and hands them out to all the staff members. I think it's produced once a month or once every 2 months, I can't recall, and I seem to recall that as he was passing we sort of mentioned the issue about lying to the Ombudsman and that I normally delete the annotations and other items I don't want. I possibly said then, I don't know whether it was, whether it was when he sent me the information on the 13 th of May or whether it was after the closure of the Ombudsman's investigation.
<i>QF</i>	In turn did Mr Smith discuss with you his practice of deletion that he may have had?
<i>CD</i>	He mentioned some, he mentioned at some stage, I can't recall when that, or it might have been in these email exchanges that I had with him, that he doesn't keep all of the media logs.

I have mentioned previously that *CD* appeared to have been NZIS's contact officer at the time of the Ombudsmen's investigation in 1997. I asked her about this.

<i>MS</i>	I've just got a couple of questions perhaps. Are you aware of the 1997 issue that there was in relation to media logs between, involving the Official Information Act?
<i>CD</i>	Yes. Yes that, I was asked by the Auditor whether there had been anything, any investigation, someone investigated in the past and I just, media logs sort of just triggered in my mind and I located some papers relating to the previous investigation relating to media logs.
<i>MS</i>	Do I assume then that investigation did not occur to you during the current issue or request?
<i>CD</i>	No, no it didn't.

The fact that I had to consider whether *CD* knew or believed relevant information was held or might be held within the Department of Labour which was not being supplied to me, was made clear to *CD*. The transcript reads:

<i>QF</i>	In your dealings with this office, for the purpose of the Official Information Act investigation, at any time did you come to know or believe that relevant information was held or might be held within the Department of Labour which was not being supplied to the Ombudsman? In other words, did you know or believe the Ombudsman wanted information and that it was not being supplied?
<i>CD</i>	Not during the course of the investigations.
<i>QF</i>	That's all I'm asking. At any time in colloquial terms did you turn a blind eye to that possibility?
<i>CD</i>	No.

QF	Now in considering the matter the Ombudsman may ask himself whether he accepts the truth of those previous 2 answers. Beyond that which you've already said, is there anything further you would like to say to the Ombudsman on that issue?
CD	Only that I've always been open and honest with the Ombudsmen's office in dealing with any complaint whether it's official information or Ombudsmen Act complaint, I provide all the information that I am aware of that exists in relation to the investigation.

The fundamental issue that arises for my consideration for *CD* is similar to that for Mr Smith, namely whether *CD* knew or believed relevant information was or might be held by the Department of Labour, and failed to draw that to attention.

Again, I have taken as my starting point my opinion that the nature of the information sought by Ms Boyle and explained to *CD* was clear.

CD stated that she was aware of Mr Smith's practice of comment and as a matter of routine deleted such comment from the versions of those media logs that she chose to save. Whether in May 2003 she recalled the precise content of the December 2002 media logs subject of Ms Boyle's interest, is something upon which it is not necessary for me to express an opinion. What is significant in my view was that *CD* knew that Mr Smith included comments in media logs, and regularly deleted them from her own records.

I have said above that on the face of the papers before me I regarded *CD*'s attachment to her email of 16 May 2003 to be misleading. At the conclusion of *CD*'s testimony, I remained of that opinion.

Taking all matters into account, including her substantial experience, I formed the opinion that during May 2003 *CD* knew or believed that unedited versions of Mr Smith's media logs were sought by me as Ombudsman for the purposes of an investigation, and consciously failed to draw attention to them. In so far as her oral testimony claimed otherwise, taking into account the other material before me (which is fully described in this Report), I did not accept it.

Having been made aware of my proposed opinion adverse to her in the previous paragraph, *CD* strenuously submitted that it was not merited. As in the case of Mr Smith, I do not agree.

Andrew Lockhart

Mr Lockhart told me that he became General Manager of NZIS in early December 2002. However, he was on sick leave from 13 December of that year until 10 January 2003. He said that he had been with the Department of Labour in various capacities since 1984, but principally with NZIS. From March 2001 until his appointment as General Manager he had been Chief Operating Officer of NZIS.

It appeared that Mr Lockhart's first personal dealing with this matter came when he was presented with the proposed letter refusing Ms Boyle's request. I have already discussed this under the heading "*Request for Official Information*", sub-heading "*Handling of Request*", and it is unnecessary for me to comment further on this aspect.

With regard to my investigation under the Official Information Act, on 24 June 2003 I telephoned Mr Lockhart and requested that he confirm to me that the information requested

by Ms Boyle was not held by NZIS. What was in my mind was the desire of Ms Boyle to obtain the relevant media logs for December 2002 and associated commentary, as set out above in email records. However, in evidence Mr Lockhart said that he understood the matter differently. In the following excerpt of the transcript *GH* and *IJ* are mentioned. *GH* is a senior official of Legal Services, Department of Labour, and *IJ* is an Intelligence Officer, NZIS.

<p>QF</p>	<p>Subsequently on the 24th of June you had a personal discussion with the Ombudsman about the request as it affected the complaint before him. That is correct? (AL, yes.) At any time prior to that conversation did you personally become aware that the initial scope of the request, which was quite broad, had been narrowed so as to focus on media logs? (AL, no I didn't.)</p> <p>Were you surprised to get a personal call from the Ombudsman? (AL, I was surprised, yeah, but yeah I suppose I was surprised.) And it was clear that the Ombudsman was querying the completeness of the information supplied? (AL, Yes he was asking whether all the information had been provided).</p> <p>You were spoken to by the, or interviewed by the Internal Auditor for the purposes of the departmental report (AL, yes) and the notes of interview which have been presented to the Ombudsman indicate that following your conversation with the Ombudsman you consulted [<i>GH</i>] and [<i>IJ</i>] with regard to the completeness of the information. (AL, I had conversations, yes.) Perhaps you can briefly outline the effect of your conversation with each, perhaps starting with [<i>GH</i>].</p>
<p>AL</p>	<p>Perhaps I can just go back just in the context because I think I came away, well I know I came away from the conversation with the Ombudsman with the impression that this, I mean the context in which I had it was the letter of the 10th of April which I had sent across, which was around the information, and my context around that was that this related to security rather than to the media logs because I hadn't known that the information had been narrowed, so my concern at that point in time was that we hadn't supplied the information to the Ombudsman, or perhaps that there was information relating to the detention and the place in which Mr Zaoui had been detained because he had been moved to Paremoro, rather than around the media logs, and so that I went and talked, I think it was, I think I talked to [<i>IJ</i>] first, because I just wanted to confirm with either of them that there wasn't any information that we had provided to the Corrections or Police or SIS that might have resulted in him being in that secure, you know being transferred to Paremoro. So that was the context in which I had had both of those conversations. I more clearly recall the conversation with [<i>IJ</i>] because she was the one who provided any correspondence and I suppose it was the bit about the prior to his detention that kind of drew me to that rather than anything else.</p>
<p>QF</p>	<p>You've referred to the letter of the 10th of April – that was the letter which responded to the Ombudsman's notification of the fact a complaint had been made?</p>
<p>AL</p>	<p>Yes. Well, I only do that for contextual purposes and because that's the context I had in my mind around the request itself. I didn't, I wasn't aware that the request had been narrowed.</p>
<p>QF</p>	<p>In terms of supplying the information to the Ombudsman, that was via [<i>CD</i>]? Is that correct?</p>

AL	The letter of the 10 th of April?
QF	The bundle of information which was... (AL, yes, it was collated by [CD]) [CD]? (AL, yes.) And [CD] was the Departmental contact officer? (AL, that's right). For our purposes (AL, yes, yes). You had indeed in the 10 th of April letter you had nominated her as the contact person. If anybody knew what the problem was with information it would be [CD], would it not?
AL	To be honest I never thought about that. I thought that what she had done is she collated all the information that she had and given it to the Ombudsman. What concerned me in the discussion, in the quick conversation I had with the Ombudsman, is that there was some other information that we hadn't provided. That's essentially what was in my mind, and that from my perspective was around the detention of Zaoui and my understanding where that information might lie was with [IJ] primarily and in any sort of subsequent court proceedings around [GH] himself.
QF	In your experience is it fairly rare for the completeness of information to be queried?
AL	Well, I'd only taken up that role so I don't know what conversations the Ombudsman may have had with my predecessor, but that was the first conversation I definitely had, yes.
QF	You knew the requester was Sarah Boyle of the Office of the Leader of the Opposition? (AL, I did, yes.) If somebody was querying the completeness of the information did that send up any warning flags?
AL	I was concerned that there was some information around his detention that we may have been withholding or, have, sorry have provided that might have led to his detention. I mean the other context around this was that there was a lot of enquiries across, well there were some enquiries across government departments or some queries about how Mr Zaoui ended up in Paremoro Prison. And so that was the context in which I went off to seek that information. I was trying to assure myself that we hadn't first of all provided any information to other agencies or correspondents around his detention in Paremoro and that if we had, that we hadn't withheld that from the Ombudsman. I had no qualms that that would not be released, but that was the context in which I made those enquiries.
QF	If anybody knew of any problems with regard to the completeness of information it would be the person who regularly spoke to this office, namely [CD], wouldn't it?
AL	Well the other thing I didn't know, which is again in context, is that I didn't know that there'd continued to be informal correspondence across, between [CD] and the Ombudsman's office. And I mean, for the purposes of getting information I can quite see how that works, but I didn't know about that at that time. I had thought that we provided the information and what the Ombudsman was seeking from me was there wasn't anything that we had withheld, so I went to [IJ] to...around the detention of Zaoui and I went to [IJ] to ensure that. That's the context in which this happened.
QF	Wasn't it incumbent upon you to check what correspondence there had been between this office and [CD]?

AL	Well, it never even occurred to me that there was correspondence. I mean, my understanding around Ombudsmen's ones, I mean this is the learning that I've had from this is that we formally moved the information that you formally requested from us, the information that we withheld and the reasons for the withhold, that we then sent all of that information across to you and that you made an assessment of it. I didn't have any knowledge that an information request could be narrowed in that way until all of this actually came to light after the newspaper article.
QF	So you had no idea it was possible to narrow the scope of a complaint, is that what you're saying?
AL	Well not in the way in which it occurred. I'm not saying I didn't know you could further narrow but I thought, I mean in my own mind I thought that that would occur in a more formal basis, but I mean I accepted that it was a proper procedure, I just didn't know about it and at the end of the day the issue for me was that there was no connect and I accept the responsibility for that in part. There was no connect between myself and [CD] about the request.
QF	You had responded to the Ombudsman by letter dated 10 April. You were talking to the Ombudsman about the completeness of the information on 24 June, which is more than 2 months. Didn't it occur to you that some things might have been going on during that 2 months which [CD] would know about? (AL, no I didn't.) You say you feel in part responsible, are you not fully responsible?
AL	I am responsible for not making sure that those connections were actually there. I mean that is a systems breakdown, that's around making, knowing...sorry, having systems in place that actually ensure that that information is, that ongoing dialogue is happening inside the Immigration Service. Certainly not saying that that was a wrong procedure that was followed between the Ombudsmen's office and ours. It was just that the disconnect was actually within our own organisation.
QF	Do you consider you were personally at fault?
AL	No, I think the system failed in that regard, I didn't understand that that system existed and there was no formal way of actually making sure that I got advised about where the request got narrowed down. I mean I'm certainly now well aware of it and certainly it's been a sort of strong lesson.
MS	Can I assume then from what you say that [CD], when she had the discussion with Andrew McCaw of this office did not come to you. (AL, no.) Thank you
QF	During the entire course of this matter, did you have any conversations with [CD]?
AL	No, not that I'm aware of, no....

I accept Mr Lockhart's account of what was in his mind as a result of our conversation. Nevertheless, the Department of Labour had nominated CD as the particular contact person for liaison between the Department and my Office. Consequently, in my opinion Mr Lockhart should have made inquiries of CD. I consider his omission to do so was unfortunate, and indicates a failure to treat my personal inquiry with the importance that it merited. An Ombudsman does not usually or lightly seek a personal confirmation of a Department's position.

I considered whether there was any reason for Mr Lockhart to have specifically considered the media logs aside from our conversation, but concluded that there was not. As appears in the context of my consideration of Mr Smith's evidence, Mr Lockhart did not read the media logs. Furthermore, his conversation in January 2003 with Mr Smith as provided to me in evidence about Mr Smith amending his practice as to comment in the media logs was to me uncertain and imprecise.

It appeared that in December 2002, Mr Smith had not held a security clearance that would have given him access to all (or significant) information related to the detention of Ahmed Zaoui. If he had held such clearance and had been in possession of reasonably complete information about Mr Zaoui, Mr Smith might have handled media inquiries differently. The outcome might have been that media criticism would not have occurred, and the need for my present investigation might well not have arisen. I thus asked Mr Lockhart about Mr Smith's security clearance. Mr Lockhart said:

MS	I've just got a few questions Mr Lockhart. Can we go back to the issue of Ian Smith and his security clearance. (AL, yes.) What would be the standard practice within the organisation for the obtaining of a security clearance? You said as I understand it that it was really left to Smith's own initiative.
AL	He's got to complete - yes, it was. I mean the first part is he's got to complete the forms and nominate the referees and then within our Human Resources area we have a person who then sends that across to the SIS.
MS	Was the fact that he did not have such a clearance an issue for you and are you aware whether it might have been an issue for people like [GH] and [IJ] as to what information would be passed to him from within the organisation about Zaoui?
AL	I mean that was the issue around whatever day it was, 6 th of December I think, that he didn't have a....I mean it was a concern to me and I raised at the half-year performance management review with him and asked him to initiate getting a security clearance, so it was definitely a concern to me but it had actually become an issue at that period of time when Zaoui was taken into custody because it was a security - I mean apart from the fact that he was taken into custody because he was refused entry, the fact that he was a security risk meant that some of the information relating to him could only be shared with those who had the appropriate clearance level and so that became an issue at that time.

In my opinion, it was unfortunate, bearing in mind Mr Smith's position in the organisation and the functions attaching to that position, that the question of Mr Smith's security clearance had not earlier been regarded as a matter of greater importance by the Department of Labour. As Mr Smith said, he had "*just never got round to it*", and it appears that over a period of time the Department had never seen fit to pursue the matter. As of December 2002, Mr Smith had been in post for a number of years, and I consider that Mr Lockhart was correct to be concerned about the position.

It seems that the issue of a security clearance had been raised formally some time before. Subsequent to Mr Lockhart's examination, I ascertained from Mr Smith's employment records that the then General Manager of NZIS wrote to Mr Smith by letter dated 23 March 1999 in terms:

"I understand that you have been requested to complete your Security Clearance and you have not done it.

I appreciate people are busy but that does not mean you can ignore this requirement.

You are required to be security cleared in order for you to do your job. Would you complete the requirements immediately."

For the sake of completeness, I also note the same employment records show that by letter dated 9 June 2003, Mr Lockhart advised Mr Smith of the matters that Mr Lockhart saw as priorities. These included *"Obtaining a security clearance for the work in communications"*.

Although it appeared that Mr Lockhart had not been advised in May 2003 that Ms Boyle had limited her interest to media logs, I was interested to know how he would have interpreted Ms Boyle's requests if he had been advised of them. As recited previously, in answer to my questioning Mr Lockhart said:

"... the daily media logs are what the daily media logs are. They are a complete record of everything that was in those media logs, so I have no question of that. That would include any commentary made by Ian in those media logs so the media logs themselves would form that."

I agreed with the foregoing interpretation of Mr Lockhart that any commentary by Mr Smith was itself part of each *"media log"*.

CONCLUSIONS

In my opinion, as disclosed by the facts and the evidence given to me, there was an omission by the Department of Labour to provide me with information required by me for the purpose of my Official Information Act into the complaint under that Act by Sarah Boyle as outlined earlier in this Report. Given that my request for the information was made pursuant to my statutory powers under section 19(1) of the Ombudsmen Act and section 29A of the Official Information Act, I consider that such omission *"appears to have been contrary to law"* and *"was wrong"* within the meaning of section 22(1) of the Ombudsmen Act.

In the light of that opinion, it is appropriate for me to set out my views in greater detail.

With regard to the manner in which Ms Boyle's initial request for information was handled, the Department of Labour erred in that no individual official gathered together and assessed the information at issue for the purpose of determining whether it should be released or withheld. This error was compounded by the fact that lessons available to be learned from the 1997 investigation were not taken on board and actioned by the Department, and the clear message that media logs constitute *"official information"* was not communicated in an on-going fashion to staff.

The mishandling of the initial request appears to have been a problem of process and system failure. The Department of Labour as a result of its own investigation has determined that this was case. The Chief Executive of the Department is currently undertaking a review of the matter to see how its processes may be amended to protect against any similar future systemic error. I am content at this stage that he should do this, and it is unnecessary for me at this time to comment further. However, I have asked the Chief Executive to keep me informed as to its progress, and I anticipate that I will have the opportunity to comment to the

Department as its deliberations advance. The Ombudsmen will provide advice as may be appropriate.

Having said that, the need to review information at issue with particularity is but one aspect of the practical workings of the Official Information Act. An omission in this respect may be symptomatic of a lack of knowledge in other areas. In the circumstances, I consider it would be useful to repeat remarks by the former Chief Ombudsman, Sir Brian Elwood, in his Report on Leaving Office to the House of Representatives dated 30 June 2003.

“8.6 ...the decade of the 1990s has seen rapid growth in the number of requests for access to official information and release of information. Yet the Ombudsmen have been required to report to Parliament on several occasions that the purposes of and obligations imposed upon the sector and Ministers, by the OIA [Official Information Act], have not been adequately understood, leading to frustrations with the Act evidenced by both the requesters and holders of the information. The Act is not the problem. Understanding and applying its provisions is. There is an absolutely fundamental need to improve knowledge about the workings of the official information legislation. The requirement is training and more training. Some organisation within the public sector, such as the State Services Commission, should take responsibility for this. The Commission as the organisation with the widest overview of the sector and a focus on performance outcomes appears the obvious choice. The Ombudsmen have done what they can to assist the staff in Ministers offices and in the agencies of government to understand what is required by the Act. But the Ombudsmen as independent reviewers of complaints made pursuant to the Act cannot also be the ‘educators’ in its application.”

With regard to the failure of the Department of Labour to provide me with all information that I required for purposes of my Official Information Act investigation, it is necessary that I comment in more detail.

Any Department or organisation subject to the Official Information Act inevitably acts through its officials and employees. A degree of responsibility and autonomy will necessarily reside with the person who is allocated or delegated the duty of dealing with a complaint to an Ombudsman. The Department or organisation must ensure that the relevant person has adequate training, and is of sufficient seniority reasonably to take that responsibility. The present case suggests that it may be appropriate for the work of that person to be subject to further oversight at a more senior level of management.

In this particular matter, *CD* was extremely experienced both with regard to the Official Information Act and dealing with my Office. Mr Smith, as Communications Adviser and a person who would deal with media inquiries, was an employee granted significant responsibilities in the performance of his duties. I consider that the Department of Labour reasonably entrusted the routine administration of the Official Information Act complaint to *CD*. Similarly, I perceive no reason why the Department in terms of management discretion should not have permitted Mr Smith the responsibility of responding to *CD*. To this extent, I do not find ground to criticise the Department's procedure with regard to the handling of the Official Information Act complaint insofar as such handling required informal contact between relevant officials and with my Office.

Nevertheless, any Department or organisation is at risk if employees or officials fail to perform their duties professionally and with sufficient thoroughness. In my opinion both Mr Smith and *CD* failed in different ways to display the professionalism and diligence required of public servants. It is these failures, which I have set out above in assessing the evidence of Mr Smith and *CD*, that in my opinion resulted in the omission to supply me with

required information. In my opinion, if either Mr Smith or CD had fulfilled their duties as I consider they should have been fulfilled, the omission would not have occurred.

I have referred to "either" Mr Smith or CD in the previous paragraph. It has been suggested that there may have been a "conspiracy to deceive" the Ombudsman. I have considered the facts and evidence carefully. However, I have not identified sufficient reliable evidence to enable me to express an opinion as to whether there was any "conspiracy" in terms of an overt agreement between Mr Smith and CD (or any other person) to deceive me by failing to disclose all information, and in particular information containing the comment of Mr Smith.

If CD had been the subject of appropriate managerial supervision, Ms Boyle's persistence might well have given rise to the sort of inquiry that would have identified the information that Ms Boyle was evidently seeking. In the circumstances, it is my opinion that the Department of Labour should consider whether in the future some specific degree of supervision should always be exercised over persons holding her position.

This aspect is of particular importance given the statutory provisions relating to Ombudsmen's investigations, and the usual practice of the Ombudsmen when dealing with complaints. Section 18(1) of the Ombudsmen Act provides that the Chief Executive of the Department affected (or the principal administrative officer of an organisation) shall be notified of an Ombudsman's intention to make an investigation. Thereafter, formal correspondence from the Ombudsman is normally directed to the Chief Executive, and for the most part responses are received under the Chief Executive's signature. With regard to NZIS, because it is a distinct section of the Department of Labour, it has been customary for responses to be received under the signature of the General Manager of NZIS.

I would view it as unreasonable to expect every minor inquiry arising during the course of an investigation to be considered personally at Chief Executive or General Manager level, which is why the Ombudsmen utilise their investigating staff to liaise informally with nominated contact officers in Departments and organisations. However, I regard it as incumbent upon Chief Executives to ensure that whatever is said in the names of their Departments or organisations is approved, if not by themselves, by senior persons who will carry meaningful responsibility for the content.

With the benefit of hindsight, it may be said that there were certain opportunities throughout the history of the request and complaint to me which, if taken, might have avoided the unhappy situation that eventually came to pass.

- a) If Mr Smith had possessed the appropriate security clearance, he might not have been subjected to media criticism and the media log of 17 December 2002 (with comment) would not have been written. I have commented on the failure of both Mr Smith and the Department of Labour to take the necessary action to obtain the required security clearance.
- b) If Mr Smith had been required to keep a hard copy of his media logs or if there had been a central computerised record of his media logs, the information of prime interest would have been that much more difficult to ignore. Whilst that is a good practice process issue, it does not detract from the fact that the information in question was available for production.
- c) If any person in management had been allocated responsibility for checking the content and quality of media logs, any comments might well have been stopped before Mr Smith's practice developed to the point where he felt free to compose the comment of 17 December 2002.

- d) If Mr Lockhart had paid greater attention to media logs and had inquired more deeply when he states Mr Smith's comments arose in conversation during January 2003, perhaps the media log of 17 December 2002 would have been identified as a source of potential problem and would have figured specifically in NZIS considerations in May 2003.
- e) If Mr Lockhart had consulted the Department of Labour's own contact officer, *CD*, following his conversation with me on 24 June 2003, Mr Lockhart might have found himself with cause to investigate in greater depth the completeness of information provided to me.

With regard to (a), I consider that the Department of Labour should have actively pursued the need for Mr Smith to have appropriate security clearance when it was first identified. Accordingly, in my opinion the Department should review its processes in this regard for its employees.

With regard to (b) and (c), in my opinion the Department of Labour should have ensured that a full record was kept (at least for a specified period of time) of media logs, and that their composition was appropriately supervised or checked. This was material that was circulated extremely widely both in New Zealand and overseas (including persons outside NZIS). By the reason of the breadth of circulation alone, it would appear that they merited greater importance than they seem to have been afforded.

With regard to (d) and (e), I can best adopt Mr Lockhart's own words to me, where he commented in one context "*...certainly it's been a sort of strong lesson*". I was left in no doubt by the end of Mr Lockhart's testimony that the present chain of events is one that he would not wish to see repeated, and I consider that no further comment by me is required.

It has been necessary for me to express adverse opinions with regard to the credibility of Mr Smith and *CD*, and to express an adverse opinion as to the manner in which they fulfilled their departmental responsibilities. It has grieved me to do so, and I would hope that it will never again become necessary for me to express any similar opinions in the course of any future investigation which may fall to me. I consider the circumstances of this investigation provide a salutary warning to all persons who may be subject to requirements by an Ombudsman that their functions should be undertaken with the greatest of care, and that the Ombudsmen will not treat lightly any dereliction of duty. In this respect, I refer back to my comments in introducing this Report about the significance of the Official Information Act and its purpose as part of the accountability process.

For the purpose of an investigation, under section 19 of the Ombudsmen Act, the Ombudsmen have statutory powers to require the production of relevant information and to summon and examine persons on oath. Section 27 of the Act gives the Ombudsmen power to enter the premises of Departments and organisations specified in the Act for the purpose of carrying out an investigation. These are significant powers, and historically there has been little use of them. In this case, of course, I did find it appropriate to examine certain persons on oath and consider that to have been a proper and necessary action. I would regard it as highly unfortunate if the climate of compliance with the Official Information Act deteriorated to the point that it became a normal practice for the full powers of the Ombudsmen under the Ombudsmen Act to be exercised.

Noting the comments of Sir Brian Elwood on leaving Office, pursuant to my power to issue reports in the public interest under the Ombudsmen Rules 1989, I have forwarded a copy of this Report to the State Services Commissioner for his consideration.

I have considered whether I should make any specific recommendations with regard to any of the individual officials mentioned in this Report, but have decided not to do so. Insofar as the Department of Labour may consider that employment issues arise that merit attention, I consider it should be for the Chief Executive of the Department to address them in accordance with Departmental procedures.

Having said that, I feel obliged to comment on the experience of this office in respect of prior dealings with Mr Lockhart and CD. I reiterate that any employment issues that might arise from this matter are entirely for the Chief Executive of the Department of Labour. However, both of these officials, in submissions to me, have noted for my attention their previous relationships with this office and the circumstances existing at the time of the events leading up to my investigation.

Referring to Mr Lockhart, I acknowledge his substantial experience and his commitment to the work of NZIS. I have also noted in my Report his illness at a critical time.

I have noted in this Report the management failings that contributed to the situation and expressed an opinion that more rigorous and proactive management may well have avoided the various actions by individuals at lower levels in the organisation. I am, however, aware and appreciate the complex and difficult management role in a large and dynamic operational organisation such as NZIS, and the daily pressure that is created on senior managers in such an environment.

In respect of CD, I have expressed an opinion based on the facts and evidence before me. I do, however, record that this office has had, and continues to have substantial contact with her relating, in the main, to Ombudsmen Act investigations involving NZIS. Current circumstances aside, the Ombudsmen and the staff of my Office have always regarded CD as being unfailingly courteous and helpful.

It is appropriate that I refer in this Report to the comments now publicly described as the "*lie in unison*" comment.

My investigation was not directed to any actions or behaviours that preceded and gave rise to these particular words being recorded in the media log compiled by Mr Smith for 17 December 2002. I merely record that I have not seen or heard any evidence that suggests or indicates that any person or persons, as officials in NZIS, was involved in any agreement to "*lie in unison*".

RECOMMENDATIONS

I recommend that the Department of Labour:

- (i) proceed with and conclude its review into its processes for handling requests for official information under the Official Information Act in the light of my comments above;
- (ii) include in the foregoing review, consideration of appropriate on-going training for relevant officials;
- (iii) with respect to investigations notified by the Ombudsmen, implement management controls so as to ensure that there is effective senior oversight over actions taken by officials in dealing with the Office of the Ombudsmen, including communications undertaken by those officials;

- (iv) note the failure to pursue the question of Mr Smith's security clearance, with a view to ensuring that no similar omission occurs in the future;
- (v) note that Mr Smith's media logs had the potential to affect seriously the Department of Labour if only by reason of their breadth of circulation, and ensure that any similar activity is effectively monitored by a responsible manager.

A handwritten signature in black ink, appearing to read 'Mel Smith', with a stylized flourish at the end.

Signed:

Mel Smith, Ombudsman

Date:

24 February 2004