

Lying in unison (A)

In mid-2003 James Buwalda, the new Secretary of the New Zealand Department of Labour, walked into a big political firestorm. Within a week of arriving in the job he had launched an investigation into the conduct of his new team over accusations that they had misled the public and the Ombudsman in a very sensitive case involving the arrival of an Algerian refugee. For the previous eight months the New Zealand Immigration Service (NZIS - part of his new department) had been wracked with controversy. The Minister of Immigration, Lianne Dalziel, had come under a lot of pressure in Parliament from Murray McCully, the main opposition spokesperson, and Winston Peters, the leader of a critical swing party. The media had also had been criticising members of his staff. Buwalda knew he needed to find out what had gone wrong, explain it, and fix it. As a first step he had commissioned an inquiry.

His investigation had revealed a number of errors. These were caused by poor internal communications, undue haste, and procedural errors in handling official information (i.e. freedom of information) requests. Though some were made at relatively low levels he had also identified errors at the top; including actions of the NZIS communication manager, Ian Smith, and even the new head of the Immigration Service, Andrew Lockhart (one of Buwalda's deputies). Going beyond specific errors, Buwalda also identified systemic failure within NZIS, relating to its responsibilities under the Official Information Act (OIA) and the Ombudsman.

This case was written by Meg Prebble, for Adjunct Professor Mark Prebble (School of Government, Victoria University of Wellington) as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation.

This case study draws heavily on Buwalda, J, *Report on an investigation into the Department of Labour's management of information in relation to Ahmed Zaoui*. Department of Labour: Wellington, 2003, (DoL Report). The assistance of James Buwalda is appreciated, but responsibility for the final content rests with the author.

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His report was likely to fuel the flames already roasting his department. The matter was of great media and political interest. The *New Zealand Herald* had earlier that month, reported comments such as “heads will roll”¹ and “It was Lianne Dalziel’s credibility at stake as Mr Peters and Mr McCully zeroed in on [a] memo written by her Immigration Service spokesperson Ian Smith.”²

At the end of August 2003, Buwalda had to decide whether his report was ready for release; did it set clear standards while being fair to the staff of his new department?

The security threat

On 4 December 2002 Algerian Ahmed Zaoui arrived in New Zealand.³ He had destroyed some of his documents on the plane, and immediately applied for refugee status while at Auckland International Airport. The Immigration Act allows detention for up to 28 days without a warrant. Accordingly, like many refugee applicants, he was detained while his refugee claim was considered. Unlike others he was held in a maximum security prison, because during processing and in interactions with the New Zealand Security Intelligence Service he was identified as a potential security threat. No announcement was made of his arrival: as with all refugee claimants. NZIS was required by the Immigration Act to keep all details of his refugee claim confidential, including his identity and presence.

Despite the requirement for confidentiality, by 12 December New Zealand newspapers were aware that someone was being detained as a security threat and began asking NZIS about Zaoui’s presence. Ian Smith, the media adviser at NZIS, was responsible for answering their enquiries. He knew nothing of Zaoui and denied that anything unusual was going on: he was quoted by the *Herald* as saying: “Normally if there was anything untoward they would have let me know and I haven’t heard anything”.⁴

Actually, Smith suspected that something must be happening but he assumed there must be a reason for confidentiality so he persisted in his denials.⁵ In fact, the reason why Ian Smith knew nothing was that he did not have the necessary security clearance, so he had not been informed. Smith had been in the job for some years and was supposed to have a security clearance. However, despite requests that he undergo vetting he had not got around to starting the process.

Detention of immigrants because they pose a security risk is very unusual in New Zealand, and the media did not give up questioning Ian Smith. Within a day, on 13 December, the *Herald* published news of Zaoui’s arrival and confirmation from Immigration Minister Lianne Dalziel that a refugee applicant was being held. Smith, however, still knew nothing and continued to refuse to confirm Zaoui’s presence.

In the following days relations soured between Smith and reporters. Newspapers were loud in their condemnation of NZIS, accusing it of cover-up. Smith made no public response, but he did respond internally. One of Ian Smith’s jobs was keeping media logs; these were distributed to 300 readers in NZIS plus others in the Department of Labour and beyond. He regularly annotated these media logs for the amusement of his readers. For example, on 13

¹ Armstrong, J, ‘Fortress Dalziel shaken by shots over lie claim’, *New Zealand Herald* 30-7-2003, A3,

² Ibid.

³ A timeline of events is attached as *Appendix 1*.

⁴ *New Zealand Herald*, ‘Terrorist alert as traveller detained,’ 13-13-2002, A1

⁵ Buwalda, J, *Report on an investigation into the Department of Labour’s management of information in relation to Ahmed Zaoui*. Department of Labour: Wellington, 2003, (DoL Report) , p9.

December, alongside an account of the number of enquiries he had received about Zaoui he added:

“...and all handing out liberal doses of abuse when no information was forthcoming. One of the many fringe benefits that go with this job is that it allows you to learn all about your pedigree without actually having to undertake your own family history research.”⁶

The media attacks culminated on 17 December in an editorial in the *Herald* focused on the Department’s handling of the matter. It included the comment that “the difference between saying nothing and telling untruths is clearly an elusive concept for some.”⁷ Smith annotated the editorial in his usual facetious style and circulated it as part of his daily media log.

Official Information Act request

On 23 December 2003 Sarah Boyle, political adviser to the Leader of the Opposition, requested copies of:

“All communications relating to Mr Zaoui’s detention in December 2002; information about Mr Zaoui received by NZIS from any other party prior to Mr Zaoui’s detention; and copies of all letters, memoranda, emails and other communications, including internal communications between Immigration officials and any other person in relation to this case.”⁸

This request fell to Andrew Lockhart. Lockhart was the new General Manager of Immigration. He had been aware of Zaoui’s arrival, because he had been briefly involved in early December when he was Chief Operations Officer for NZIS. However, on 9 December, the same day that he formally assumed the role of head of the Immigration Service, he went on a month’s sick leave. He had not been following events. During his absence an adviser had collated the material that appeared to be captured by the request (though nobody thought to include media logs) and sought advice on whether the material should be withheld. Senior NZIS staff suggested that the Immigration Act gave good grounds to refuse the release. A departmental lawyer advised that there might be grounds to withhold, but that it was difficult to be entirely certain without viewing the documents.⁹

On 22 January 2003, little over a week after he returned from sick leave, Lockhart declined to release any information, stating that despite the existence of Mr Zaoui’s claim being public knowledge, NZIS could not release further information due to the requirements of confidentiality which surround refugee claims.

Ombudsman’s review

In early March Sarah Boyle asked the Ombudsman¹⁰ to investigate this refusal to release the information relating to Zaoui, who remained in custody.

The Ombudsman, Mel Smith, followed the normal process in such cases, and requested that NZIS send him all relevant documents. It was “CD’s”¹¹ job to gather and supply this information to the Ombudsman. In that role she had a number of exchanges with the Ombudsmen’s Office regarding the precise documents wanted. The Ombudsmen’s Office

⁶ DoL Report p10.

⁷ *New Zealand Herald*, ‘Serious Lapse at Border’, 17-12-2002 .

⁸ DoL Report p12.

⁹ *Ibid*, p14.

¹⁰ Under s28 of the Official Information Act 1982 it is the function of the Ombudsman to review any decision to withhold official information.

¹¹ CD has not been named in any of the reports into this series of events.

acted as a go-between, and in early May passed on a clarification from Boyle seeking “daily media logs and associated commentary or remarks from employees.”¹²

This was the first reference to media logs and it changed the focus of the NZIS response. “CD” and Ian Smith worked together to assemble copies of all the media logs that referred to the detention of Zaoui. This was not simple as neither of them held a complete record. As it happened, Smith had deleted his copy of the media logs for 13 and 17 December, but “CD” had a copy. However, “CD” habitually deleted Ian Smith’s annotations before filing her copies, so the logs provided to the Ombudsman did not include Ian Smith’s facetious comments for those days.

There were continuing email exchanges between “CD” and the Ombudsmen’s Office; it seemed that Boyle thought there might be further material which the department was failing to provide to the Ombudsman. In late May an email from Boyle said:

“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.”¹³

As the media logs were Ian Smith’s responsibility, the Ombudsman told “CD” “... ask Ian Smith if he is aware of the existence of any such info[rmation], or whether he has a record of any communications of this nature (given that it is fairly specific)”.¹⁴ Ian Smith responded that he had looked through his records and could not find (or recall) any responses to the media reports; this was passed on to the Ombudsman by “CD”.

Before wrapping up his review the Ombudsman, Mel Smith, looked through the material that had been provided; he was puzzled by the continuing pressure from Sarah Boyle, as the documents from the Immigration Service seemed innocuous. He wondered if something was missing, so he took the extra precaution of ringing Andrew Lockhart on 24 June to confirm that all relevant material had been provided by the department. Lockhart undertook to get back to the Ombudsman if there was anything else; in the event he advised the Ombudsman on 30 June that he believed the department had no further relevant material.¹⁵

His response was already too late. On 27 June the Ombudsman had written to Sarah Boyle saying “Mr Ian Smith of the NZIS... has no record of any such information, nor is he able to recall any information of this nature.”¹⁶ Accordingly, the Ombudsman discontinued his investigation.

Explosive disclosures

The exchanges between Boyle, the Ombudsman and the department had all occurred out of the limelight, but the Zaoui story had been an ongoing media sensation in the seven months since his arrival. Each time he returned to court to have his detention continued there was another media flurry. The government would not reveal the basis for its concerns about Zaoui, citing security issues. Many people with a concern about civil liberties wondered if an injustice was happening. And it seemed that Zaoui would never get his day in open court. Instead a little-known office-holder, the Inspector-General of Intelligence and Security, was

¹² Ibid, p16 .

¹³ DoL Report, p16.

¹⁴ Ibid, p16.

¹⁵ Ibid, p17.

¹⁶ Ibid, p17.

charged with hearing secret evidence in closed session. In effect the security apparatus of New Zealand was asking the public to trust a mysterious process. In that context the following media disclosures were explosive.

James Buwalda arrived to take up the role of Chief Executive and Secretary of Labour on Friday 25 July 2003. He was an experienced official, who had previously served as Chief Executive of the smaller and policy-focussed Ministry of Research, Science and Technology. Labour was a much larger department with a number of mainly operational business units, one of which was the Immigration Service.

On Tuesday 29 July 2003, four days after James Buwalda arrived, the *New Zealand Herald's* lead story, covering most of the front page, carried the headline "Everyone to 'Lie in Unison'". It stated this was from "an internal Immigration Service document" which "suggests there may have been a conspiracy to lie about the detention of a suspected Algerian terrorist in Auckland last year."¹⁷ The full text of what was described as an "internal memo" was also published:

*"I was let down badly, everyone agreed to lie in unison, but all the others caved in and I was the only one left singing the original song."*¹⁸

This was the annotation that Ian Smith had attached to the media log on 17 December 2002; it was the material that he and "CD" had failed to find for the Ombudsman.

Political pressure on Lianne Dalziel was high. On the same day as the *Herald* published its disclosures she faced intense questioning in parliament from Winston Peters and Murray McCully. She defended her officials. By the time the day was over she had assured the House no fewer than ten times that "there was no 'agreement to lie' to the media about Ahmed Zaoui's detention".¹⁹

Pressure was also increasing for NZIS, with McCully quoted as finding there was an "inescapable conclusion that there was a planned and concerted effort to deceive the media and Ombudsman".²⁰ The following day the *Herald* further revealed that "...officials may have lied to an investigating Ombudsman about the existence of the explosive memo."²¹ The paper also carried the news that the Ombudsman would be looking into the matter.

James Buwalda moved fast. He announced, late on 29 July, that he was starting an investigation into the matter of 'lying in unison' and the handling of the Official Information Act requests including the interactions with the Ombudsman.

Department of Labour review

Buwalda took control of the investigation; as Secretary of Labour it was his responsibility to find the truth, but as an employer it was also his responsibility to give his staff a fair hearing. On 30 July he started to inquire into several questions (the terms of reference are attached as *Appendix 2*). The first question went straight to the most serious concern: "Was there a conspiracy to deceive amongst officials in relation to the Zaoui case?"

¹⁷ Young, A, 'Everyone to "lie in unison"' *New Zealand Herald*, 29-07-2003, A1

¹⁸ Ibid.

¹⁹ Armstrong, J, 'Fortress Dalziel shaken by shots over lie claim', *New Zealand Herald*, 30-7-2003, A3.

²⁰ Young, A, 'Two probes start into 'lie in unison'', *New Zealand Herald*, 30-7-2003, A3.

²¹ Young, A, 'Inquiry misled over "lie in unison" memo', *New Zealand Herald*, 30-7-2003, A1.

Buwalda appointed the Departmental Auditor, an official in his office reporting directly to him as the Secretary of Labour, to look into what had happened. The Auditor was authorised to interview relevant departmental staff and to access departmental documents to find the facts of the matter. Though he was busy moving into his new job, Buwalda took a hands-on role in the inquiry. The Auditor collected evidence, and Buwalda spent his weekends and evenings reviewing the findings to see if they seemed supportable and reasonable; he then wrote his conclusions about possible breaches of official information law or the public service code of conduct.²²

By late August the investigation was nearing completion. James Buwalda had draft answers to all of his questions. The most serious conclusions related to conspiracy.

“Lying in unison”

The first matter Buwalda’s report considered was whether there was in fact a “conspiracy to deceive” the media in regard to Zaoui’s detention. Buwalda found there was not, saying:

“Taken at face value, Ian Smith’s annotation in the media log for 17 December 2002 suggests a conspiracy to deceive. The facts of the matter however point strongly to the absence of any such conspiracy. I formed this conclusion following an examination (by my Auditor) of information relating to Mr Zaoui between his arrival in New Zealand (on 4 December 2002) and the receipt of the official information request from the Office of the Leader of the Opposition (on 24 December 2002).”²³

Supporting his findings was Smith’s lack of knowledge about Zaoui’s detention at the time, due to Smith not having an appropriate security clearance.

“When interviewed during the current investigation, the manager [Border & Investigations], Mr Lockhart and [another adviser] all recall giving consideration to security implications associated with the detention and processing of Mr Zaoui, and (independently) deciding not to advise Ian Smith. They did not confer on this. The rationale for their (independent) decisions on this matter was an awareness of the security implications and their knowledge that Mr Smith does not have a sufficiently high security clearance for dealing with matters involving confidential information.”²⁴

Since Smith did not know about Zaoui’s arrival it was hard to see how he could have been part of an organised deception, but Buwalda still considered his annotation be unwise.

“On the face of it, the annotation made by Mr Smith seems to display poor judgement, a lack of professionalism, and a lack of respect for the media. Mr Smith himself acknowledges the annotation was inappropriate.”²⁵

Handling of the initial request for information

The second area James Buwalda considered was the initial handling of Sarah Boyle’s Official Information Act request.

His Auditor investigated the process NZIS went through to answer the request. Buwalda found that the request was handled by a staff member of NZIS, identified only as “AB”²⁶.

²² Interview with James Buwalda, 8 May, 2012.

²³ DoL Report, p8.

²⁴ Ibid, p9.

²⁵ Ibid, p12.

²⁶ Like CD, AB was only ever identified by initials.

“AB” circulated Boyle’s request by email to the correct staff members, asking that they identify and collect the information requested.

“Subsequent email communication between various NZIS officials (on 13 January 2003) reveals a discussion about whether or not it was appropriate to release various types of information, referring to possible restrictions under the Immigration Act and the Privacy Act. It appears that at no time was all the relevant material actually scrutinised by Departmental solicitors.”²⁷

“Formal scrutiny of the requested material, prior to making the decision to decline release, was inadequate. Rather, judgements made about the appropriateness of releasing were based on general advice from Departmental solicitors about types of information. Furthermore, there was no thorough follow-through with all those officials contacted initially. Rather, the general advice was accepted as a basis for a general decision to decline.

“NZIS officials involved in responding to this request for official information shared a common view about the importance of confidentiality regarding all information about individuals seeking refugee status. There is no evidence however, that these individuals colluded to prevent release of information in this particular case.”²⁸

Buwalda found that the letter to Sarah Boyle that Andrew Lockhart signed declining to release the information drew on the staff consensus and general advice from the departmental solicitors regarding release of types of information, not the specific documents relating to Mr Zaoui. As such Buwalda found that:

“My investigation suggests that the manner in which Department of Labour officials addressed the initial request for official information regarding Mr Zaoui may not have been consistent with Departmental policies and guidelines in relation to the Official Information Act, but I found no evidence of a conspiracy amongst officials to deceive.”²⁹

The response to the Ombudsman

Potentially the most sensitive question was whether there had been a deliberate cover-up when departmental officials dealt with the Ombudsmen’s Office. The main players in this process were “CD”, Ian Smith and (because of his conversation with the Ombudsman) Andrew Lockhart.

“When interviewed during this investigation, [CD] and Mr Smith independently state that, when requests from the Ombudsmen's Office specifically sought ‘*comments from NZIS staff on information contained within media logs*’, they independently concluded that they regarded that this related to responses made by other staff to the media logs, rather than the media logs themselves. [CD] and Mr Smith deny colluding to delete potentially embarrassing information. Mr Smith states that he was unaware until late July 2003, when the issue under investigation first appeared in the media, that [CD’s] personal collection of media logs was incomplete.”³⁰

Ian Smith’s response to the first request which specifically mentioned the December 2002 media logs, which was made on 8 May 2003, was to locate the media logs he had available and forward these to “CD”.

²⁷ DoL Report, pp14-15.

²⁸ Ibid., p15.

²⁹ Ibid, pp15-16.

³⁰ Ibid. p17.

“Neither [CD] nor Mr Smith held a full set of media logs as distributed by Mr Smith most working days. [CD] routinely deleted the personal annotations of Mr Smith as soon as she received the (daily) media log, before saving a copy for her records. Mr Smith does not formally save a copy of every media log he distributes. Mr Smith forwarded to [CD] the media logs for 16, 18 and 19 December 2002. She added her edited media logs (i.e. with the personal annotations from Mr Smith deleted) for 13 and 17 December 2002. This set of information was forwarded to the Ombudsmen’s Office on 16 May 2003.”³¹

It was in a further exchange that Ms Boyle asked for more information, including information around the media logs.

“On 28 May 2003, Ian Smith advised [CD] (by email) that he had ‘*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.*’ [CD] immediately forwarded this response to the Ombudsmen’s Office.”³²

James Buwalda’s draft report took two pages to describe the interactions between the Ombudsman’s Office, “CD” and Ian Smith. The report concluded: “I did not find evidence”³³ of deliberate deception.

Then there was the issue of Andrew Lockhart’s involvement.

“On 24 June 2003, the Ombudsman spoke directly with Mr Lockhart, seeking his confirmation that relevant information as requested by Ms Boyle was not held by the NZIS. The Ombudsman has since advised me that, in the absence of any response from Mr Lockhart to the effect that such information had been identified, he assumed that none was held. Mr Lockhart subsequently advised the Ombudsman, on 30 June 2003, that he believed there was no more relevant information held.”³⁴

The report later explained this error:

“The telephone conversation between Mr Lockhart and the Ombudsman (on 24 June 2003) appears to have resulted in them talking at cross purposes. Mr Lockhart presumed the Ombudsman was enquiring about issues around Mr Zaoui’s detention and processing... he was not aware at the time that media logs had become an issue, because it appears neither the [CD] nor Mr Smith had informed him about correspondence with the Ombudsmen’s Office.”³⁵

Buwalda’s decision

Overall the draft report made sober reading. It was reassuring that the main findings did not substantiate allegations of conspiracy; and the report elsewhere concluded that relevant departmental guidelines were comprehensive and detailed. However, the draft also showed there had been repeated failures to meet appropriate standards for handling official information, and that guidelines should be clarified about seeking legal advice and in dealing with the ombudsmen’s office.

The report concluded that James Buwalda would be following-up the apparent failures “through appropriate disciplinary processes.”³⁶ He laid down a marker to his direct reports:

³¹ Ibid., p16

³² DoL Report, p17

³³ Ibid

³⁴ Ibid

³⁵ Ibid, p18

³⁶ Ibid. p21

“I have made my expectations of senior management (the “Management Board”) clear with regard to their accountability for ensuring staff throughout the department comply.”³⁷

In particular he firmly reiterated his commitment to high standards of behaviour in his department:

“I will not tolerate unprofessional behaviour and standards that risk the extent to which the department deserves and holds the respect of citizens.”³⁸

Whatever the political and media commentary might say this was his responsibility as Secretary of Labour. It was his job to set and enforce the standards in the department. But it was equally his role to protect his staff from unjustified criticism. Buwalda knew that there would be attacks on his findings. The question was whether his report was ready for release; had he done enough to settle the turmoil?

³⁷ Ibid., p3

³⁸ Ibid., p4

Appendix 1: Timeline

Date	Event
4 Dec 2002	Ahmed Zaoui entered New Zealand
9 Dec 2002	Andrew Lockhart became General Manager of New Zealand Immigration Service (NZIS) and immediately took a month's sick leave
12 Dec 2002	<i>New Zealand Herald</i> heard of the arrival and detention of Zaoui; the paper approached Ian Smith who denied knowledge. Later that day it had confirmation from Lianne Dalziel that someone was being held because of security concerns.
13 Dec 2002	<i>Herald</i> reports Zaoui's presence in New Zealand; various media approached Ian Smith for confirmation; he continued to deny knowledge
17 Dec 2002	<i>Herald</i> editorial criticised the Department of Labour. Ian Smith annotated the NZIS media log with "lie in unison" comment.
23 Dec 2002	Sarah Boyle placed an official information act (OIA) request on behalf of the Parliamentary Opposition to NZIS General Manager Andrew Lockhart.
13 Jan 2003	Lockhart returned from sick leave.
22 Jan 2003	Lockhart refused the information request.
5 Mar 2003	Boyle laid a complaint to the Ombudsman under the OIA, asking that he review the Lockhart's decision not to release the information
10 Apr 2003	Some information was supplied to the Ombudsman, and passed on to Boyle, but the media logs were not included.
8 May 2003	Boyle clarified it was the media logs she was specifically interested in.
23 May 2003	Boyle further clarified that she wanted media logs including comments from NZIS staff.
28 May 2003	Ian Smith told "CD" by email that he did not have any record of the media reports having triggered any responses.
24 Jun 2003	The Ombudsman called Andrew Lockhart to confirm he received all relevant information.
27 Jun 2003	The Ombudsman informed Sarah Boyle that Ian Smith "has no record of any such information, nor he is he able to recall any information of this nature."
30 Jun 2003	Andrew Lockhart responded to the Ombudsman, confirming he believed the department had no further relevant material.
25 Jul 2003	James Buwalda started as Secretary of Labour
29 Jul 2003	Headlines in the <i>Herald</i> , including the "lying in unison" excerpt from the media logs.

Appendix 2: Questions addressed in James Buwalda's report

(i) Was there a conspiracy to deceive amongst officials in relation to the Zaoui case?

(ii) Was information managed by the Department in relation to the Zaoui case in accordance with the Official Information Act? If not, why not?

(iii) In the Zaoui case, were the Department's policies and systems for managing official information appropriate and effectively applied?

(iv) In relation to the Zaoui case, were the Department's expectations of appropriate public service conduct and behaviour clear and upheld?

(v) Are there implications from this situation for the Department's practices and policies relating to standards and behaviours expected of public servants?