



# GOVERNMENT COMMUNICATIONS SECURITY BUREAU

TE TIRA TIAKI

## Nationality Policy

### Purpose

- 1 (U) This policy statement outlines the way in which GCSB will ensure compliance with its obligations under sections 14 and 16(1A)(b) of the GCSB Act 2003, which regulate GCSB's activities with respect to the interception of the private communications of New Zealanders when conducting its Foreign Intelligence function.

### Policy

#### General Principles

2. (U) GCSB complies with New Zealand law, and with its high standards of respect for human rights. The GCSB Act requires GCSB to act independently, impartially and with integrity and professionalism, and in a manner that facilitates effective democratic oversight.
3. (U) One of GCSB's three functions is to gather intelligence about the capabilities, intentions and activities of foreign persons and foreign organisations, and about information infrastructures (section 8B of the GCSB Act). When exercising this function, GCSB must not do anything for the purpose of intercepting the private communications of New Zealanders (section 14). GCSB must also take all practicable steps that are reasonable in the circumstances to minimise the likelihood of intercepting the communications of third parties (section 24).
4. (U) Legitimately obtained foreign intelligence material will sometimes include information about New Zealanders. As well as establishing a defensible foreign intelligence purpose prior to beginning interception activities, GCSB will take reasonable steps to guard against inadvertent interception of New Zealanders' communications.

5. (U) Everyone involved with the interception of foreign intelligence must generate and maintain reliable documentation, to ensure that decisions and the reasoning behind them can be easily understood later.

### **New Zealand Persons**

6. (U) Section 14 of the GCSB Act extends protections to the private communications of a New Zealand citizen or permanent resident.<sup>1</sup> The following information about citizenship has been taken from the public website of the New Zealand Department of Internal Affairs, and may be used as general guidance. The Chief Legal Adviser should be consulted for definitive advice on individual cases, particularly where citizenship rights may be unclear.
7. (U) A person may be a New Zealand citizen if he or she was:
  - born in New Zealand, the Cook Islands, Niue, Tokelau or the Ross Dependency (Antarctica) on or prior to 1 Jan 2006
  - born in one of those places after 1 Jan 2006, and at the time of the birth one or both of the parents was a New Zealand citizen or entitled to be in New Zealand indefinitely
  - born overseas to a parent who is/was a New Zealand citizen
  - granted New Zealand citizenship
  - legally adopted by a parent who is/was a New Zealand citizen (if adopted from overseas, further checks will be needed)
  - a British subject who was resident in New Zealand during all of 1948.
8. (U) A person is a permanent resident of New Zealand if he or she holds a residence class visa under the Immigration Act 2009.

### **Australians in New Zealand**

9. (U) An Australian citizen or permanent resident who comes to New Zealand is usually automatically granted a residence visa on entering the country. Australian citizens in New Zealand therefore meet the test set out in section 14, and must be treated as New Zealand persons. If the Australian person subsequently leaves New Zealand to reside elsewhere, he or she stops being a permanent resident at that time (unless, of course, meeting one of the other tests for New Zealand person set out above).

### **Dual Nationals**

10. (U) GCSB's legal obligations to New Zealand persons endure, regardless of whether they are also citizens or residents of another country.

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<sup>1</sup> Unless, and to the extent that, he or she is acting as an agent of a foreign power. This is discussed below.

11. (U) GCSB will never assist a 5-Eyes partner by doing something on the partner's behalf which would be illegal for the partner to do for itself, and will never ask a 5-Eyes partner to do something on its behalf that it would be illegal for GCSB to do for itself.

#### ***Agent of a Foreign Power (AoFP)***

12. (U) The GCSB Act permits GCSB to intercept the communications of a New Zealand person, if, and to the extent that, he or she comes within the definition of a foreign person or foreign organisation – where the Commissioner of Security Warrants jointly issues the relevant warrant or authorisation with the responsible Minister. The New Zealand person must be demonstrably acting in his or her capacity as an agent or a representative either of a foreign person, ie someone who is not a New Zealand citizen or permanent resident, or of a foreign Government, body or organisation. GCSB uses the term “Agent of a Foreign Power” (AoFP) to describe a New Zealander who falls within this definition.
13. (U) Although the GCSB Act does not explicitly require this, it is a longstanding GCSB policy to require a formal AoFP authorisation, signed by the Director GCSB, before treating a New Zealand person as an AoFP.

#### **Private Communications**

14. (U) Section 14 of the GCSB Act prohibits GCSB from doing anything for the purpose of intercepting the private communications of a New Zealand citizen or permanent resident.
15. (U) Private communications are defined in the Act as being made in circumstances that can reasonably be taken to indicate that any of the parties to the communication desires it to remain confined only to those parties.
16. (U) A communication is *not* private if it is made in circumstances in which any person should reasonably expect that the communication might be intercepted by a third party who doesn't have consent to do so.

#### **Information about New Zealanders**

##### ***Privileged communications***

17. (U) The GCSB Act prohibits GCSB from exercising any of its powers under an interception warrant or access authorisation for the purpose of intercepting the privileged communications of New Zealand citizens or permanent residents (section 15C). Privileged communications are communications with a person's religious, legal or medical adviser. Communications defined as privileged under the GCSB Act are set out in sections 54, 56, 58 and 59 of the Evidence Act 2006. If the privileged communications of a New Zealander are intercepted, they are to be treated as irrelevant and destroyed as soon as practicable as required by section 23 of the Act.

18. (U) In practice, intelligence analysts may find it difficult to determine whether or not a communication with a religious, legal or medical adviser falls under the definition of 'privileged' or not. In any case of hesitation or doubt, the Chief Legal Adviser is to be consulted.

### ***Incidental Intelligence***

19. (U) Incidental intelligence is intelligence obtained as part of a foreign intelligence activity, that isn't itself foreign intelligence (ie it is information about or relating to a New Zealand person). Ordinarily, GCSB should destroy such material as soon as practicable after it has been intercepted. The exception is if the intelligence relates to:
  - preventing or detecting serious crime, in New Zealand or any other country
  - preventing or avoiding the loss of human life on the high seas
  - preventing or responding to threats to human life, in New Zealand or any other country
  - identifying, preventing or responding to threats or potential threats to the security or defence of New Zealand or any other country.
20. (U) In this case, GCSB may (if authorised by the Director GCSB) communicate the intelligence to the New Zealand Police; New Zealand Defence Force; Director of Security; or any other public authority (either in New Zealand or overseas).
21. (U) Detailed guidance about incidental intelligence is provided in a separate Policy Statement.

### ***Irrelevant Records***

22. (U) The GCSB Act requires GCSB to destroy irrelevant material with no foreign intelligence value as soon as practicable.

### **Decision-making**

23. (U) GCSB's actions in pursuing its foreign intelligence function are regulated by section 14 of the GCSB Act, which dictates that GCSB must not authorise or do anything for the purpose of intercepting the private communications of a New Zealand citizen or permanent resident. Section 21 of the Act provides explicit immunities from legal liability for GCSB staff involved in foreign intelligence interception, provided that their actions were taken in good faith and were reasonable. Only good contemporaneous records will allow staff to reliably invoke these immunities.
24. (U) All decisions taken in pursuit of GCSB's foreign intelligence function which pertain to questions of nationality are to be recorded and stored in an appropriate repository so that they can be easily read and understood later, even by someone who has little or no current operational knowledge. Decision-makers should record the following:

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- what was decided
  - the basis for the decision-maker's belief that the decision was lawful and proper
  - all relevant facts, including explicit identification of any issues which, if they arose, would require the decision to be revisited.
25. (U) Sometimes it will be as important to record the fact that a decision was *not* taken (and the basis for that) as it would be to record that one *was*.

***Advice, Training and Internal Audit***

26. (U) As set out in Policy Statement *Legal and Policy Compliance*, the Manager Compliance and Policy is responsible for ensuring that an ongoing programme of education and training is in place, so that GCSB staff are aware of their responsibilities under this policy.

