



Ministerial Policy Statement

Conducting surveillance in a public place

Summary

It is lawful for GCSB and NZSIS to conduct surveillance in a public place without a warrant in certain circumstances and subject to some limits. This ministerial policy statement (MPS) provides guidance on the proper conduct of this activity. In making decisions related to the conduct of surveillance in a public place, GCSB and NZSIS must have regard to the following principles: legality, respect for freedom of expression, respect for privacy, necessity, proportionality, less intrusive means to be considered, minimisation of impact on third parties and oversight. This MPS also specifies certain matters to be included in internal policy and procedures.

Definitions

The Act means the *Intelligence and Security Act 2017*.

GCSB means the *Government Communications Security Bureau*.

NZSIS means the *New Zealand Security Intelligence Service*.

Public place means a physical place that is routinely open to the public or is used by the public, whether for free or on payment of a charge, and includes any form of public transport. For the avoidance of doubt, it also includes places that the owner or occupier is lawfully entitled to exclude or eject any person from.

Surveillance in a public place means activity that involves the use of NZSIS or GCSB employees collecting intelligence in a public place, primarily through monitoring, observing or listening to persons, their movements, conversations or other activities. This primarily occurs through observation and opportunistic or temporary deployments of technologies, and may involve recording.

Context

1. To perform any of their statutory functions, GCSB and NZSIS need to use a range of methods to collect information, including surveillance. Surveillance is generally carried out covertly in order to get information that could not be obtained if the subject was aware of the surveillance, or to avoid alerting persons to other covert activities of GCSB and NZSIS. Surveillance may be carried out in-person and/or remotely using technical capabilities. This may include access to closed circuit (CCTV) systems operated by third parties in public places (including privately owned premises which are accessible to the public). Such surveillance methods are a legitimate practice of many New Zealand government agencies with an intelligence collection or law enforcement function. NZSIS carries out surveillance more routinely than GCSB.
2. If covert surveillance activities are compromised there are risks to the particular operation, the individual employee and can create controversy for the agencies which can be difficult to explain or counter.

Examples of when NZSIS might conduct surveillance in a public place

3. As an example, NZSIS might conduct surveillance in relation to a person who is the subject of a counter-espionage investigation in order to identify people they are in contact with, their movements, and their whereabouts on any given day. The information gathered from such surveillance can be useful in ascertaining the individual's intentions, identifying other persons of concern, and eliminating individuals from the scope of investigations.
4. NZSIS might also conduct surveillance in a public place to further preliminary inquiries into a person of interest. The surveillance may be in order to determine whether there are sufficient grounds to obtain a warrant or to establish that there is no further investigation required.

Concerns about public surveillance

5. Surveillance in a public place may lead to concerns about individual privacy, with those concerns likely to vary depending on where the individual is and what they are doing. For example, people have higher expectations that their activity is private in certain locations (such as a funeral service or medical centre) than others (such as a park or supermarket).
6. There are also reasonable expectations of privacy associated with a private conversation in a public place, depending on the circumstances¹. People generally expect that their private conversations are not listened to and will have reasonable expectations of privacy in certain situations, depending on where a conversation takes place and whether the individuals would expect to be overheard. For example, an individual might have higher expectations

¹ For this reason, the *Intelligence and Security Act 2017* defines private communication as:

- [...] a communication (whether in oral or written form, or in the form of a telecommunication, or otherwise) made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but
- does not include a communication of that kind occurring in circumstances in which any party to the communication ought reasonably to expect that the communication may be intercepted by some other person without having the express or implied consent of any party to do so.

of privacy when talking to a pharmacist in a deliberately quiet voice about a health issue than they would talking to a supermarket checkout operator.

7. The New Zealand public reasonably expect that activities conducted in public places are not generally subject to surveillance by the state and that agencies with surveillance powers and capabilities will use them with restraint. Privacy concerns might arise from those who are the subject of surveillance (should the surveillance become known to them), and others who interact with, or come into close proximity with, people while they are subject to surveillance. Whether there is a reasonable expectation of privacy will depend on the nature of the place and other circumstances and will need to be assessed on a case-by-case basis. A more detailed discussion of the factors the agencies need to consider in relation to privacy is included within the 'Respect for Privacy' principle below.

Guidance for GCSB and NZSIS

Scope of this MPS

8. This MPS only applies to lawful surveillance activity that is conducted in a public place. Surveillance can be carried out without GCSB and NZSIS employees needing to obtain a warrant or other form of authorisation issued under the Act. Unlawful acts that would require the agencies to obtain a warrant would include trespass or offences in relation to private property, or that involve the use of particular technology or interception of private communications.
9. Surveillance activity that involves otherwise unlawful acts may only be carried out in accordance with an authorisation issued under Part 4 of the Act, including any restrictions or conditions set out in the authorisation. They must, like all activities of GCSB and NZSIS, be conducted with propriety. This MPS does not address activities carried out under an authorisation.
10. This MPS should also be read in conjunction with the *Road user rule exemption MPS*.

Principles

11. The following principles constitute a framework for good decision making and must be taken into account by GCSB and NZSIS when planning and conducting surveillance in a public place. All surveillance in a public place should be subject to ongoing review to ensure it remains consistent with these principles. This is particularly important given that, in most cases, it is not possible to predict the person's movements and therefore know in advance where the surveillance will take place. The need for ongoing review is important if the surveillance is prolonged.

Legal obligations

12. GCSB and NZSIS must ensure surveillance in a public place is lawful. Section 21 of the New Zealand Bill of Rights Act 1990 (freedom from unreasonable search and seizure) is not limited to searches for law enforcement purposes,² and therefore applies to activities undertaken by the intelligence and security agencies. When conducting public surveillance, it must be carried out reasonably to avoid breaching section 21. In addition, surveillance

² See, for example, *Hamed v R* [2011] NZSC 101 at [225] per Tipping J

may impact on the enjoyment of the rights to freedom of expression, association and movement (affirmed by sections 14, 17 and 18 of the New Zealand Bill of Rights Act 1990).

13. Some forms of surveillance in a public place are clearly lawful, for instance where the surveillance does no more than a private citizen could do lawfully. For example:
 - The passive observation of a person in the street.
 - The use of video surveillance in a public place (see the caveats below) because there is no common law prohibition of such activity and it would not be unlawful for a citizen to do the same thing.³
14. However, the legality of other forms of surveillance is less clear-cut. The question of lawfulness needs to be determined on a case by case basis. There are a number of factors that are relevant to determining legality. These factors are discussed below.
15. GCSB and NZSIS should consider these factors carefully. If there is any doubt as to legality in any situation, GCSB and NZSIS should apply for a warrant before proceeding.

Use of technology

16. Whether surveillance in a public place is lawful also depends on the nature and features of the visual technology used. GCSB and NZSIS may use visual technology only to the extent that it enhances images that exist within public view or can be seen by the naked eye. If the technology enables the capturing of imagery that would otherwise only be visible from within the private premises, or not able to be seen by the naked eye, it may constitute an unreasonable search under the New Zealand Bill of Rights Act 1990.
17. A warrant will be required to record any private conversations where there is a reasonable expectation of privacy.

The location of surveillance

18. What surveillance is lawful without a warrant also depends on the location of the surveillance. What is a 'public' place is not always clear-cut. Some places are clearly public in nature (such as the street). Others are clearly private (such as inside a private residence or inside a hotel room). However, some locations might be somewhere in between depending on the circumstances.
19. Whether the subject of surveillance is within public view is also relevant. For example, observing someone in their front yard or driveway from the street does not raise concerns about lawfulness. However, if a fence needs to be climbed in order to undertake the surveillance that action is likely to constitute a search and therefore require an assessment of reasonableness from a Bill of Rights Act perspective.
20. If the GCSB and NZSIS go beyond the scope of the implied licence⁴ of a private property, it might make the activity unlawful.

³ See, for example, *Lorigan vs R [2012] NZCA 264 (2012)*

⁴ An implied licence exists where the law assumes implicit permission is given for an activity to occur. For example, entering a person's property entrance to knock on their front door.

Duration

21. The duration of surveillance should be considered when assessing legality. As an example, there is a provision in the Search and Surveillance Act 2012⁵ that allows law enforcement officers to observe private activity, but requires them to obtain a warrant if the observation exceeds a certain duration. Although this example applies to surveillance by enforcement officers (such as Police, Customs Officers and Fisheries Officers), it demonstrates that while surveillance of a limited duration is considered reasonable by Parliament, a more prolonged period of surveillance by an enforcement officer requires a warrant.

Respect for freedom of expression, including the right to advocate, protest, or dissent

22. Section 19 of the Act provides that the exercise by any person or any class of persons of their right to freedom of expression under the law (including the right to advocate, protest, or dissent) does not of itself justify an intelligence and security agency taking any action in respect of that person or class of persons. This important protection should be a key factor in planning and undertaking surveillance activities.
23. GCSB and NZSIS must ensure that the conduct of surveillance in a public place does not infringe upon that right. In addition, the agencies must be alive to sensitivities around surveillance of protest activity and public gatherings or meetings. Where surveillance at events where the right to freedom of expression is being lawfully exercised, the agencies should ensure the act of advocacy, protest or dissent is not, of itself, the justification for the surveillance. As with any surveillance undertaken in a public place, GCSB and NZSIS must ensure such surveillance is undertaken only where necessary to enable the agency to carry out one of its statutory functions.

Respect for privacy

24. The right to privacy is a human right, protected under the United Nations Declaration of Human Rights and under article 17 of the International Covenant on Civil and Political Rights (the ICCPR). Article 17 of the ICCPR applies to surveillance and interception, which must be authorised by relevant legislation. The right to privacy (in the form of freedom from unreasonable search and seizure) is protected by section 21 of the New Zealand Bill of Rights Act 1990. In addition, both GCSB and NZSIS are subject to relevant [privacy principles](#) under the Privacy Act 2020, including principle 1 (purpose of collection) and principle 4(a) (lawful manner of collection).
25. Expectations of privacy in a public place differ according to the place and the activity being observed. The agencies should try to minimise any intrusion into privacy as much as possible. There are a number of factors the agencies need to consider when assessing privacy intrusions. These factors need to be considered separately, as well as how they collectively contribute to a context that may give rise to greater expectations of privacy. These factors include:
 - The sensitivity or personal nature of activities being observed. For example a person's expectations of privacy are higher when discussing a sensitive health matter with a pharmacist or other health professional.

⁵ See Section 46.

- The subject's own reasonable expectations of privacy. For example, if a subject has exerted effort to be private (such as sitting in a restaurant in a corner away from other diners).
- The location of the surveillance. For example, if someone is in a sensitive area such as a medical centre, Marae, school or place of worship their expectations of privacy are higher than if they are in a supermarket or walking along the street.
- The duration of the surveillance. A prolonged period of surveillance is more intrusive and will give rise to greater expectations of privacy in certain circumstances.
- The privacy of third parties who are not the subject of the surveillance. The intrusiveness on third parties should be considered as part of the privacy assessment (this is discussed in more detail below)

Necessity

26. Surveillance in a public place should be undertaken only where necessary to enable the agencies to carry out their statutory functions. This may include surveillance for operational security purposes and training in surveillance techniques. When carrying out training activity GCSB and NZSIS should only use willing participants who are aware of the nature of the activities of which they are the target.

Proportionality

27. The intrusiveness of any surveillance in a public place should be proportionate to the purpose for which it is carried out. In each case, the scope of the proposed surveillance and level of intrusiveness should be balanced against the degree to which it will meet a defined intelligence need. Relevant factors in assessing proportionality may include the duration of the surveillance, the number of people impacted by it (including those who are not the target of the surveillance), and the nature and sensitivity of the activities under observation (as discussed above).

Less intrusive means to be considered

28. As it is a lawful activity and takes place in a public place, surveillance involves a lower level of intrusiveness than some other methods of intelligence collection. However, GCSB and NZSIS should always consider whether the intelligence need can be met by a less intrusive means of collection.
29. The location in which surveillance will be undertaken is a relevant factor in considering the degree of intrusiveness. The nature of a public place or the activities that take place there may give rise to particular sensitivities (as discussed in paragraph 18). GCSB and NZSIS should have regard to these sensitivities when considering the intrusiveness of surveillance.
30. The extent to which technology will be involved is also relevant. It may enhance GCSB's and NZSIS's ability to collect intelligence from surveillance in a public place and ensure that intelligence is reliable, and potentially limit intrusiveness on third parties through more targeted surveillance, but it may also significantly increase the intrusiveness of the surveillance. For instance, use of a high-powered lens on an area may increase the intrusiveness of the surveillance on the person of interest while restricting intrusion on surrounding third parties observation (while if that area was otherwise only visible from within private premises, this might constitute an unlawful search).

Minimisation of impact on third parties

31. A key objective of surveillance in a public place is often to obtain an understanding of the people with whom a person of security concern has contact, or the people associated with a place of security concern. Surveillance activity must always be related to a particular person or place with relevance to the agencies' statutory functions. The agencies should consider the possible impact of surveillance activity on persons who are not relevant, and in particular, the risk of collecting information about such persons. The impact on third parties should be considered as part of the principle of proportionality and the assessment into the least intrusive means.
32. Where practicable, measures should be taken to avoid or minimise surveillance activity carried out in a public place that may affect people who are not relevant to the purpose of the surveillance. This might include persons who have only incidental contact with the subject of the surveillance or persons regarded as sensitive persons because of their age, occupation, or other vulnerabilities. However, in many cases, the question of who the subject is meeting or interacting with will actually be the purpose of the surveillance.

Oversight

33. GCSB and NZSIS must carry out all activities in a manner that facilitates effective oversight, including through the keeping of appropriate records about the planning, approval, conduct and reporting of surveillance activities carried out in a public place.

Matters to be reflected in internal policies and procedures

34. As public service agencies, GCSB and NZSIS must comply with policies and procedures common to all public service agencies.⁶
35. In addition, GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the principles above, and have systems in place to support and monitor compliance. Those policies and procedures must also address the following matters:

Training

36. GCSB and NZSIS employees may only participate in surveillance in a public place if they have been appropriately trained for the role they are expected to play, and on the relevant law, policies and procedures.

Cooperation with and assistance from other agencies

37. Where surveillance in a public place is carried out with assistance from other agencies, GCSB and NZSIS remain responsible for the conduct of these activities and the actions of employees of other agencies. All such activities will be open to inquiry by the Inspector-General of Intelligence and Security. Any employees of other agencies who assist GCSB and NZSIS in the conduct of surveillance activities should be appropriately trained for the role they are expected to play.

⁶ This includes the Public Service Act 2020 and the Health and Safety at Work Act 2015.

38. Where surveillance in a public place is carried out alongside or in cooperation with an operation led by another agency (for example, NZSIS and the Police each carrying out surveillance relevant to counter-terrorism), each agency shall remain subject to their own internal controls and subject to their usual oversight mechanisms.

Compliance with information privacy principles

39. GCSB and NZSIS are subject to information privacy principles 1, 4(a), and 5 to 12 of the [Privacy Act 2020](#). All policies relating to surveillance in a public place and the handling of any information collected through such activity must incorporate guidance about compliance with the information privacy principles. The GCSB and NZSIS should, where relevant and appropriate, look to incorporate guidelines from Te Kawa Mataaho Public Service Commission and Office of the Privacy Commissioner.

Information management

40. Information collected as a result of surveillance in a public place may be among some of the more sensitive information held by GCSB and NZSIS, given it may include sensitive information about identifiable individuals. This information must be handled and stored in accordance with clear access controls that correspond to the sensitivity of the information. The MPS on *Information management* applies in relation to management of this information.
41. Incidentally obtained information about third parties not relevant to the subject of surveillance may only be retained for the purposes of disclosing that information to other public authorities in order to assist them to perform their own statutory functions as provided for in section 104 of the Act. If there is no reason to disclose that information to another public authority, the information must be disposed of in accordance with the requirements detailed in the MPS on *Information Management*.

Sensitive category individuals

42. GCSB and NZSIS must have a policy setting out the restrictions and protections necessary in the conduct of activities in respect of sensitive categories of individuals (for example, children and young people aged under 18 years of age, and people vulnerable by reason of illness or other incapacity). Authorisation at a high level within the relevant agency is required for activities conducted in respect of these individuals. This will provide reassurance that appropriate measures are in place in the event public surveillance activities need to be carried out in respect of sensitive category individuals.

Communications protected by privilege

43. GCSB and NZSIS must have a policy setting out the restrictions and protections necessary in the conduct of activities that may involve communications by individuals that may be protected by privilege (for example, Members of Parliament, members of the judiciary, journalists, lawyers, and registered medical practitioners or other providers of health services attracting medical privilege). It is expected that the policy sets out the types of privilege that may apply to communications, reassurance that appropriate measures are in place, and that authorisation at a high level within the relevant agency is required to conduct public surveillance activities that may observe these communications.

Authorisation procedures

44. Surveillance activities should be authorised at a level of seniority within the agencies that is commensurate with the level of operational, reputational, health and safety and legal risk involved. The level of authorisation required should be dictated by the tactics to be deployed during the surveillance operation and the assessed overall residual risk exposure. For instance, the use of technology that may increase the level of intrusiveness of the surveillance should form part of any consideration of authorisation levels. The identification and management of operational, reputational, legal, and health and safety risks should be carried out in accordance with a risk management policy.
45. The Director-General of each agency should have delegations in place for such authorisations.

Duration of ministerial policy statement

46. This MPS will take effect from 01 March 2022 for a period of three years. The Minister who issued an MPS may, at any time, amend, revoke or replace the MPS.

Ministerial Policy Statement issued by:

A handwritten signature in blue ink that reads "Andrew Little". The signature is written in a cursive, flowing style.

Hon Andrew Little

Minister Responsible for the Government Communications Security Bureau

Minister Responsible for the New Zealand Security Intelligence Service

01 March 2022