



Ministerial Policy Statement

Legal entities

Summary

It is lawful for GCSB and NZSIS to create and maintain a legal entity. This MPS provides guidance on the conduct of this activity. In making decisions related to creating and maintaining a legal entity, GCSB and NZSIS must have regard to the following principles: legal obligations, necessity, proportionality, appropriateness, good faith, and oversight. The MPS also specifies certain matters to be included in internal policies and procedures.

Any agency that receives a request for assistance to create or maintain a legal entity also must have regard to this MPS in considering that request, to the extent this MPS is known to that agency.

Definitions

The Act means the Intelligence and Security Act 2017.

Agency means the chief executive of a department, a department, a Registrar or Deputy Registrar appointed under, or in accordance with, any enactment, a Board established under section 8 of the Charities Act 2005 or a regulatory authority.

Entity means an unincorporated body, a body corporate, a corporation sole, or a trust.

GCSB means the Government Communications Security Bureau.

NZSIS means the New Zealand Security Intelligence Service.

Context

1. To effectively perform their statutory functions, GCSB and NZSIS often need to carry out their activities in secret. One method of avoiding activities being attributed to GCSB or NZSIS is to establish a legal entity through which GCSB or NZSIS conduct transactions. For example, an incorporated company may be created with directors who are unconnected with GCSB or NZSIS or a place of business not associated with GCSB or NZSIS. This company could then be used to conduct transactions that appear to be unconnected to GCSB or NZSIS, or to help an assumed identity look convincing and withstand scrutiny.
2. Section 33 of the Act sets out the purpose for which a legal entity may be created and maintained, namely to facilitate the ability of an intelligence and security agency to carry out its activities while maintaining the secrecy of those activities.

3. Legal entities created for these purposes may need to be detailed, supported by convincing evidence, and have an established history in order to ensure any links between the entity and GCSB or NZSIS are effectively hidden. For example, an entity may need strong evidence of an established trading history to prevent an adversary foreign intelligence agency from knowing the entity is conducting transactions on behalf of GCSB or NZSIS.

Creating a legal entity

4. Section 35 of the Act allows GCSB or NZSIS to request assistance from another agency in order to help establish convincing legal entities. Requests for assistance may involve the alteration of a public register or other publicly available record and could include:
 - incorporating a company or a charitable trust board and issuing a certificate of incorporation.
 - registering an entity as a charitable entity or a financial service provider.
 - allocating an entity a New Zealand Business Number or goods and services tax registration number and recording that number in the relevant register.
5. As specified in section 35(2) of the Act, a request must provide details of:
 - the entity or proposed entity that is the subject of the request, necessary to enable the agency to take the requested action; and
 - the action the agency is being requested to take in respect of the entity or proposed entity.
6. A request from GCSB or NZSIS must also confirm that the request is being made for the purpose of enabling GCSB or NZSIS to create and maintain a legal entity through which it may conduct transactions for the purposes of facilitating the ability of GCSB or NZSIS to carry out their activities while maintaining the secrecy of those activities.
7. An agency that receives a request for assistance from GCSB or NZSIS can choose to either grant the request or to decline it. The agency can decline the request if it is not satisfied that GCSB or NZSIS will appropriately use the legal identity, status, or capacity to be conferred, or unique identifier to be allocated to the entity or proposed entity, or if the agency thinks it otherwise appropriate to decline the request (section 36(2)). This is important as agencies who may be asked to assist have statutory responsibilities with respect to the integrity of the schemes they administer. If considering whether to decline a request, the agency must have regard to the matters set out in section 36(3) of the Act including the purpose and protections that are or will be in place for the purpose of ensuring that GCSB or NZSIS will use the legal entity appropriately. An agency can make further inquiries of GCSB or NZSIS if they wish, which GCSB or NZSIS must respond to (as far as possible).

Maintaining a legal entity

8. Once a legal entity has been created, maintaining that entity may be required. This may include changes to the legal identity, status or capacity of the entity or changes to a public register or publicly available record related to that entity.
9. GCSB or NZSIS may request assistance from another agency to maintain the entity (section 37). An assisting agency can choose to grant or decline the request if it is not satisfied it is appropriate to provide the assistance to maintain the entity. Assisting agencies must have regard to any impact on member of the public of such changes.

Protecting and cancelling a legal entity

10. GCSB or NZSIS may also need to protect the fact a legal entity was used by them, even when that entity is no longer in use. To protect such information, GCSB or NZSIS may direct any agency to cancel evidence of the legal entity (section 38), subject to specific legislation requiring the retention of certain information, such as records under tax legislation and the Public Records Act 2005. The cancellation must be undertaken in the manner set out by the relevant Director-General (section 38(2)). Assisting agencies also have obligations to restrict access to information they hold about the assistance they have provided (section 41).

Exemptions from compliance with requirements

11. Section 42 of the Act provides that an entity, or officer of that entity, that has been conferred with any legal identity, status or capacity under section 36 of the Act (ie created via assistance), may be exempted from any requirements or duties that relate to that particular legal identity, status or capacity. For example, if GCSB or NZSIS has sought assistance to create an incorporated company, the Director-General of GCSB or NZSIS may also request that the company be exempt from complying with a director's obligations and reporting obligations under the Companies Act 1993.
12. Such an exemption may only be granted by the agency with regulatory responsibility for that requirement or duty. The regulatory agency making the decision must be satisfied that granting the exemption will not have a significant negative impact on members of the public and is otherwise appropriate. In reaching this view the agency must have regard to the purposes of the legislation under which the requirement or duty is made. An agency may decline the request.

Immunities

13. The Act provides protection from criminal and civil liability for both the entity that has been conferred with any legal identity, status or capacity under section 36 (ie, via assistance) and persons who provide assistance in relation to a request associated with the entity (sections 43 and 44). Entities created without the assistance provided for in subpart 2 of Part 3 do not enjoy immunities that may be conferred through such assistance.
14. Immunities only apply to acts and omissions which have been done in good faith and with reasonable care. They do not extend to anything in breach of a contractual arrangement (unless a breach is a necessary consequence of creating or maintaining the entity) or any acts that require the holding of a qualification when the entity does not hold that qualification. For example, an entity that is not qualified to provide a financial service is not authorised to do so even though it has acquired such a licence under subpart 2 of Part 3 of the Act.

Guidance for GCSB and NZSIS

Scope

15. This MPS applies to creating, maintaining and using a legal entity under subpart 2 of Part 3 of the Act, and any request for assistance in relation to a legal entity (collectively, 'actions in relation to a legal entity').

16. GCSB and NZSIS have different needs for legal entities but both agencies are governed by this MPS. Internal policies and procedures may be shared, where possible.
17. This MPS does not apply to legal entities created, maintained or operated under an assumed identity, or under an employee's real identity, without using the provisions of subpart 2 of Part 3 of the Act. The use of an assumed identity, including in relation to the creation of a legal entity, is addressed in the *Assumed Identities MPS*.
18. Any agency considering a request for assistance in relation to a legal entity must have regard to this MPS to the extent it is known to that agency (section 36(3)(b)). Assisting agencies may decline the request in accordance with subsections 36(2) and (3). They do not need to make their own assessments, however, about whether a request meets the principles below. This MPS contains relevant information for agencies that receive requests for assistance but is not intended to provide specific guidance to assisting agencies to support their decision making.

Principles

19. The following principles constitute a framework for good decision making and best practice. They must be taken into account by GCSB and NZSIS when taking actions in relation to a legal entity. Maintaining a legal entity, and any transactions conducted through the legal entity, should be subject to ongoing review as to whether the use and maintenance remains consistent with these principles.

Legal obligations

20. GCSB and NZSIS must ensure the creation and maintenance of legal entities is carried out in accordance with the law. Where appropriate, legal advice should be sought. Outside the terms of the immunity in section 44 of the Act, legal entities created or maintained remain subject to New Zealand law, including the law of contract and criminal law.
21. For the reporting purposes of the Public Finance Act 1989, any legal entities created under subpart 2 of Part 3 should be considered to be part of GCSB or NZSIS. Any expenses and capital expenditure incurred by a legal entity will be covered by GCSB's or NZSIS's single-line appropriation, therefore, the basic principles for public spending (transparency, fairness, legality, accountability and value for money) apply. Any procurement activities conducted through a legal entity should follow the spirit of the Government Rules of Sourcing and Principles of Government Procurement except where doing so interferes with GCSB and NZSIS's functions and objectives.
22. In requesting assistance from other government agencies in creating and maintaining legal entities, GCSB or NZSIS should engage fully with assisting agencies in order to understand the legal and regulatory consequences of that entity being created or maintained.

Necessity

23. There must be a clear purpose for the legal entity to facilitate the ability of the GCSB or NZSIS to carry out its activities while maintaining the secrecy of those activities (in accordance with section 33 of the Act).
24. A legal entity may be created in advance of an activity, or maintained and used after the activity for which it was originally created ceases, as long as there is a clear purpose. For example, a legal entity may be created for future use to build convincing cover; or may

continue to be maintained in order to establish a history. In circumstances where a legal entity is being maintained, periodic review should be undertaken by GCSB or NZSIS to ensure the entity is still required.

Proportionality

25. The use of a legal entity and the risks related to any particular activity should be proportionate to the outcome sought to be achieved. When assessing proportionality GCSB and NZSIS should, at a minimum, consider the scope of the proposed use of the legal entity, any intrusive impact on the public, the risk the activity poses to employees acting through or associated with the legal entity, the risk to any agency that provided assistance in support of that entity, and the reputational risk to GCSB, NZSIS or the New Zealand Government if the use of the legal entity is compromised in some way.

Appropriateness

26. A Director-General of GCSB or NZSIS may only request an agency create or maintain a legal entity for the specific purpose set out in section 33 of the Act (maintaining the secrecy of the activities of the GCSB and NZSIS). A legal entity must not be used for personal purposes, including personal gain. GCSB and NZSIS must have suitable protections in place, including ongoing monitoring and training, to ensure a legal entity is used appropriately.
27. An agency that receives a request for assistance to create or maintain a legal entity may decline a request if it is not satisfied the legal entity will be used appropriately or it otherwise considers that it is appropriate to decline the request.
28. GCSB and NZSIS must make all reasonable endeavours to establish and maintain good relationships with agencies they request assistance from and, where necessary, make arrangements for employees in assisting agencies to receive the relevant national security clearance to enable them to receive classified information.

Good faith

29. GCSB and NZSIS employees must act in good faith and with reasonable care at all times when taking actions in relation to a legal entity. This includes providing, subject to security requirements, sufficient information for an agency to decide whether to grant the request, and confirmation that the legal entity to be created or maintained meets the specified statutory purpose.
30. Actions in relation to legal entities will generally be considered to have been made in good faith and with reasonable care if they are (as applicable):
 - in accordance with statutory obligations, authorisations, and any agreement in place with another agency regarding assistance related to assumed identities;
 - in accordance with this MPS and associated internal policies, guidelines and procedures;
 - consistent with managerial expectations; and
 - a legitimate function of the employee's role (or the role of GCSB or NZSIS).

Oversight

31. GCSB and NZSIS must carry out all activities in a manner that facilitates effective oversight, including through keeping appropriate records about the creation and maintenance of legal entities.
32. Section 45 of the Act requires GCSB and NZSIS to maintain a detailed register of the legal entities created and maintained and specifies the information to be recorded. All of the information in this register may be accessed at any time by the responsible Minister and the Inspector-General of Intelligence and Security. This requirement is in addition to general record-keeping requirements otherwise applying to GCSB and NZSIS.

Matters to be reflected in internal policies and procedures

33. As public service agencies, GCSB and NZSIS must comply with policies and procedures common to all public service agencies.¹
34. 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:

Agreements with assisting agencies

35. Where GCSB and NZSIS are likely to regularly request assistance from a specific agency to assist with actions in relation to a legal entity, an agreement should be in place between the relevant Director-General and the chief executive of the assisting agency. This agreement should include provisions for how requests will be made, processes for providing the relevant assurances to the assisting agency to allow them to consider the request, and processes for managing any dispute that may arise if a request is declined. Such agreements should be made available to the Inspector-General of Intelligence and Security on request.

Periods of review

36. GCSB and NZSIS must have in place periods of review in relation to assessments of the ongoing necessity of maintaining each legal entity (to ensure there continues to be a clear purpose and need for the legal entity).

Information management

37. Information related to legal entities will be among some of the more sensitive information held by GCSB and NZSIS, given their purpose in protecting the secrecy of their activities. This information, including the register of legal entities, must be handled and stored at an appropriate level of classification with clear access controls that correspond to the sensitivity of the information. The *Information Management MPS* will also apply in relation to this information.

¹ This includes the *Public Service Act 2020* and the *Health and Safety at Work Act 2015*.

Training

38. All employees involved in creating, using and maintaining a legal entity created under subpart 2 of Part 3 of the Act must be appropriately trained for the role they are expected to undertake, and be aware of all relevant laws, policies and procedures. Training should be provided before employees carry out work involving legal entities, and whenever there are changes or updates to the policies and procedures, to ensure that at all times employees are aware of current practices.

Authorisation procedures

39. Approval to create and maintain a legal entity should be authorised at a level of seniority within GCSB or NZSIS that is commensurate with the level of operational, reputational, legal and health and safety risks involved. Authorisation procedures should include consideration of the risk to assisting agencies and possible impacts on the integrity of statutory and regulatory schemes under which the assistance is being provided. The Directors-General of GCSB and NZSIS should have delegations in place for such authorisations.
40. The Directors-General must establish processes for approving the creation and maintenance of legal entities. These processes should require applications for legal entities to identify the purpose for which they are required.
41. GCSB and NZSIS must have a dedicated team (either individually or shared between the agencies) that is responsible for all processes associated with creating and maintaining legal entities (this may be the same team that is responsible for assumed identities). Legal entities should not be created by anyone that is outside this team(s) unless authorised to do so. The dedicated team(s) should be responsible for maintaining relationships with assisting agencies involved in conferring legal identity, status or capacity on an entity. Before being approved, the team(s) should consider any risk that a proposed entity poses to the security of any other legal entities or assumed identities used by authorised persons of either agency.

Duration of ministerial policy statement

42. 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:



Hon Andrew Little

Minister Responsible for the Government Communications Security Bureau
Minister Responsible for the New Zealand Security Intelligence Service

01 March 2022