



Ministerial Policy Statement

Making false or misleading representations under section 228 of the Intelligence and Security Act 2017 about being employed with an intelligence and security agency

Summary

It is lawful for employees of the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS) to make false and misleading representations about their employment, for the purpose of maintaining personal cover. This ministerial policy statement (MPS) provides guidance for employees on such activity. In making decisions related to making false or misleading representations about being employed with an intelligence and security agency, employees must have regard to the following principles: necessity, appropriateness, good faith, legality, consistency, 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.

Department means a department specified in Schedule 1 of the State Sector Act 1988 and departmental agencies as defined in section 27A of the State Sector Act 1988. It also includes the Non-Public Service Departments included in the Public Finance Act 1989.

Employee, in relation to an intelligence and security agency, means a person employed in any capacity in that agency.

GCSB means the Government Communications Security Bureau.

Intelligence and security agencies are GCSB and NZSIS.

NZSIS means the New Zealand Security Intelligence Service.

Personal cover means the measures by which employees disguise their employment with an intelligence and security agency from the point they first engage with the agency through to after they have left. This includes what employees tell people and organisations outside the intelligence and security agencies about their job in social and official contexts, what they communicate online and if / how they engage with other agency personnel outside work.

Purpose

1. This MPS is issued by the Minister Responsible for the GCSB and the NZSIS pursuant to section 206(i) of the Act.
2. The purpose of the MPS is to provide guidance to GCSB and NZSIS on the use of personal cover by making false or misleading representations about being employed with an intelligence and security agency, under section 228 of the Act. The MPS comprises the Minister's expectations for how GCSB and NZSIS should properly perform their functions and establishes a framework for good decision-making and best practice conduct.
3. MPSs are also relevant to oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of their propriety jurisdiction (the Act requires the Inspector-General of Intelligence and Security to take account of any relevant MPS and the extent to which an agency has had regard to it when conducting any inquiry or review).
4. Every employee making a false or misleading representation about being employed with an intelligence and security agency must have regard to this MPS. Employees should be able to explain how they had regard to the MPS. This might amount to an explanation of their consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General are responsible for ensuring the MPS is reflected in their agency's internal policies and procedures. If any action or decision is taken that is inconsistent with the MPS, employees must be able to explain why the action was taken and how they had regard to the MPS.

Scope

5. This MPS applies to lawful false and misleading representations made by an employee of an intelligence and security agency about their employment, under section 228 of the Act, for the purpose of maintaining personal cover. These representations are made using the employee's real identity.
6. This MPS does not apply to false or misleading representations made using an assumed identity under Part 3 of the Act, which are covered by a separate MPS (see MPS on *Acquiring, using and maintaining assumed identity under subpart 1 of Part 3 of the Act*) and which require specific approvals and training.

Context

7. GCSB's and NZSIS's objectives are set out in the Act. Both agencies contribute to:
 - a) The protection of New Zealand's national security;
 - b) The international relations and well-being of New Zealand; and
 - c) The economic well-being of New Zealand.
8. GCSB and NZSIS do this through the performance of their statutory functions, which include:
 - a) Intelligence collection and analysis; and
 - b) The provision of protective security services, advice and assistance.
9. MPSs are an important component of the measures put in place by the Act to ensure the functions of GCSB and NZSIS are performed with propriety and in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.
10. In order to effectively perform their statutory functions GCSB and NZSIS often need to carry out their activities in secret. Secrecy is often necessary to:

- avoid parties stopping or interfering with sources of information or other methods of collection used by GCSB and NZSIS;
 - protect the identity of employees, or those who support them, to minimise the danger to the life and safety of persons carrying out activities on behalf of the agencies; and
 - minimise the risks to the reputation of GCSB, NZSIS, and the New Zealand Government associated with those activities.
11. To preserve the ability of GCSB and NZSIS to carry out their activities, now and in the future, without revealing that they are doing so, all employees of GCSB and NZSIS require some identity protection. Specifically, an employee may need to limit the persons who know of their place of employment. In addition to protecting the ability to conduct covert activities, this protection is in place to ensure the safety, security and privacy of employees and their families, and sources and their families, as well as to protect the classified information employees have access to and to avoid the risk of an employee being identified by their association with another employee or because of the indiscretion of others.
 12. The measures used by an employee under their real identity for the general protection of information about their place of employment, whether during official activities or in private circumstances, are referred to as using “personal cover”. Personal cover is not used directly for the collection of intelligence or information assurance and cybersecurity activities, employees are better able to conduct overt or covert activities that support the performance of the agencies’ statutory functions by limiting the number of people who know they work for intelligence and security agencies.
 13. So that employees can use personal cover, section 228 of the Act allows employees to make some false or misleading representations about employment for the purpose of keeping secret the fact that he or she is an employee of GCSB or NZSIS. For example, an employee may state that they work for a different organisation, in a different area of work, or omit information about their employer. This clause is restricted to employees hiding their employment only.
 14. Although all employees require the ability to make a false or misleading representation about their employment, doing so will not be necessary at all times. The requirement for using personal cover could arise during official business and activities and/or in an employee’s personal life.
 15. In most circumstances GCSB and NZSIS employees would not need to make a false or misleading representation about their employment while conducting official business with officials from other New Zealand government agencies or departments.

Example One: Official circumstances

Employees may choose to make a false or misleading representation about their employment when attending conferences where the composition of the audience cannot be known in advance, or at meetings with officials from other New Zealand departments when foreign attendees are also present.

The purpose for concealing the fact of their employment in these circumstances would be because they do not know the nature or intent of the other individuals at the conference or meeting.

Example Two: Private circumstances

An NZSIS employee who needs to use an assumed identity as part of their work and purport to be someone else to gain a person's trust in order to collect intelligence, will be unable to do so should there be widespread community knowledge of their true name and employment.

They must therefore limit the knowledge of their employment by making false and misleading representations in their personal life to protect their current or future ability to fulfill their official role, or to move across roles within the agency in the future.

Example Three: Private circumstances

Many GCSB and NZSIS employees have vast knowledge of operational matters and have access to classified information, which could cause them, or those closely associated with them, to become a target of hostile foreign intelligence agencies.

In order to protect the safety, security and privacy of themselves and their families, an employee may use personal cover with those in their social circle in order to limit knowledge of their employer becoming widely known.

16. Section 229 gives employees immunity from civil and criminal liability for acts or omissions made regarding any aspect of his or her employment, provided they were done or omitted in good faith and with reasonable care. This provision is necessary to ensure that employees do not face prosecution as a result of keeping their involvement with GCSB or NZSIS a secret. For example, making false or misleading statements or omissions may amount to a criminal offence under the Immigration Act 2009 when done so in the course of completing border documentation. False or misleading representations made in contract documents could result in civil liability. It is not feasible to expect employees to be open to these kinds of offences or liabilities when taking steps to protect their safety and the safety of the agencies' classified information and operational methods.
17. These representations must only be made in accordance with any requirements of the Director-General of the relevant agency, and may not be made to certain parties listed in section 228 (3) of the Act. These parties mostly relate to ensuring there is sufficient transparency during legal and Parliamentary proceedings, or when dealing with statutory oversight mechanisms. For

example, employees are not permitted to hide their employer from the Inspector-General of Intelligence and Security.

18. Corresponding with this ability, section 227 of the Act makes it a criminal offence to publish or broadcast the fact that any person (other than the Directors-General) is an employee of GCSB and NZSIS or connected in any way with an employee of GCSB and NZSIS (subject to consent from the Minister).

Principles

19. The following principles constitute a framework for good decision-making and must be taken into account by GCSB and NZSIS when developing Directors-General's requirements and policies and procedures for employees making false or misleading representations about their employment. Those policies and procedures should be subject to periodic review as to whether the practice of making false and misleading representations about employment continues to be consistent with these principles, as well as all of the other requirements set out in this MPS.

Necessity

20. It may be necessary for all employees of GCSB and NZSIS to make some false or misleading representations about their employment in order to fulfill, or preserve their ability to fulfill in the future, the functions of the agencies under the Act, or to protect the safety of themselves and their families, or their sources and their families. As such, the use of personal cover is considered to be an appropriate "business as usual" activity for employees.
21. However, those representations should only be made when it is necessary to keep the fact of employment from the person in the circumstances at the time, or where there is not a good reason to provide that information to the person. For example, information should be disclosed to serve an intelligence warrant on a person (whether or not this is done under an employee's real identity or under an assumed identity), or as part of working directly with other government agencies.
22. Necessity in this instance is generally judged against the need to protect the secrecy and safety of GCSB's and NZSIS's employees, capabilities and lawful activities.

Appropriateness

23. An employee of GCSB or NZSIS may only make a false or misleading representation about their employment for the purpose of keeping secret the fact that they are employed by an intelligence and security agency, and in accordance with any requirements of the Director-General of the agency. In setting those requirements, the Directors-General should at all times consider whether those requirements are appropriate within the context of the agency's functions and other obligations, such as the public service minimum standards of integrity and conduct. False or misleading representations must not deliberately be used for personal gain, for example to obtain discounts or other concessions that might be available to employees of "cover" departments or agencies.

Good faith

24. Section 229 of the Act protects employees from civil and criminal liability for any act the employee does, or omits to do, in good faith and with reasonable care in the course of making a false or misleading representation about their employment.

25. False or misleading representations about their employment will generally be considered in good faith and with reasonable care if they are consistent with the following, as applicable:
- Acting in accordance with statutory obligations;
 - Acting in accordance with authorisations;
 - Acting in accordance with this MPS and any internal policies, guidelines and procedures which reflect this MPS;
 - Acting consistently with managerial expectations;
 - Acting as part of a legitimate function of the role the employee is undertaking or the agency they are employed by;
 - Demonstrating sound professional judgements and responsible behavior in making the false or misleading representation; and
 - Acting in accordance with any agreement in place with a “cover” department or agency related to the use of that department or agency for personal cover.

Legality

26. GCSB and NZSIS must ensure that employees making a false or misleading representation about their employment do so in accordance with the law and the restrictions contained within the Act. Where appropriate, legal advice should be sought.

Consistency

27. GCSB and NZSIS should ensure there are common practices for employees making a false and misleading representation about their employment. This requires consistent policies and guidelines, and that all employees are advised when recommended practices change. To the extent that it is possible, guidelines, policies and procedures should be consistent between GCSB and NZSIS. This does not preclude employees from having the ability to tailor their use of representations about their employment for their own circumstances, in order to maintain protections for all employees.

Oversight

28. GCSB and NZSIS must carry out all activities in a manner that facilitates effective oversight, including through the keeping of appropriate records about the ability of employees to make false or misleading statements about their employment. This includes maintaining up-to-date policies and procedures about, and providing training on, the use of personal cover. As it would not be feasible to require all instances of false and misleading representations about employment to be recorded, it is particularly important in this context that employees are aware of their obligation to be able to explain how they had regard to this MPS when making false or misleading statements.

Matters to be reflected in internal policies and procedures

29. GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles above, and must have systems to place to support and monitor compliance. Those policies and procedures must also address the following additional matters:

Representations in particular circumstances

GCSB and NZSIS must issue clear guidelines to assist staff to determine whether to make a false or misleading representation of employment including, but not limited to, the following types of circumstances:

- During official circumstances (such as meetings with officials from other departments or uncleared foreign nationals in New Zealand Government premises, or completing visa applications and passport applications for official travel overseas) where there are specific operational reasons for concealing one's identity;
- On official forms and documents in the employee's personal capacity (such as census forms, IRD forms and bank documents); and
- In personal circumstances (such as telling close relatives, flatmates, friends and acquaintances in social settings, and private overseas travel).

Those guidelines should describe the circumstances in which it is appropriate for an employee to reveal their employer, and how to do so in a way that manages the risk of the employee's place of employment becoming more widely known.

In addition, GCSB and NZSIS must have procedures in place for communicating to the Commissioner of Police, any circumstances in which it was necessary for an employee to make a false or misleading representation about their employment to a police officer.

Representations by prospective and former employees

There may be circumstances outside employment by an intelligence and security agency where it is appropriate to make a false or misleading representation about a person's involvement with an agency. GCSB and NZSIS should provide guidance to prospective and former employees on the representations they may have to make or have made about their possible or former employment with GCSB and NZSIS.

While non-employees do not enjoy the legal protections offered under section 229 of the Act, there may still be risks to covert activities by not ensuring guidelines are in place in these circumstances. For example, a prospective employee (ie, a candidate in an employment selection process) may have told friends and family that they have had an interview to work at one of the intelligence and security agencies. This immediately compromises the individual's ability to later conceal their employer if required. Alternatively, a former employee revealing they used to work at an intelligence and security agency may inadvertently reveal that same information about other former colleagues, if their associations are known by others.

Consent from "cover" departments and agencies

Employees may use other government departments or Crown agencies as cover when keeping the fact of their employment secret. When employees are advised as a matter of course to use a particular department or agency as personal cover, especially on official personal documents or in official circumstances, an agreement to do so must be in place between the Director-General of the intelligence and security agency and the chief executive of the "cover" department or agency.

This agreement must include the circumstances under which the cover arrangement may be used, and under which true employees of the "cover" department or agency will be made aware that the agreement exists, and the training to be provided to allow those employees to manage situations where they may come across a person they know not to be employed by their department or agency. These considerations will assist in avoiding inadvertent disclosure of an

employee's true employer. The agreement should also consider how the parties will collectively respond to a significant break of cover or other detrimental situation.

Employees of an intelligence and security agency should not be directed to routinely or regularly use another department or agency as part of their personal cover unless such an agreement is in place. This is not intended to preclude those unexpected social situations when an employee may need to use a department or agency for personal cover purposes where an agreement is not in place and time does not allow for permission to be sought (for example, when an employee from an agreed cover department or agency they do not know is present, and they would like to avoid questioning about their employment).

On choosing such "cover" departments, GCSB and NZSIS must consider whether the totality of employees using that department or agency for personal cover could have undue consequences for true employees of cover departments or agencies. For example, if all employees of GCSB and/or NZSIS were instructed to use the cover of a relatively small department or agency, then the employees of that department or agency would be outnumbered by cover employees, which could cause significant difficulties for their employees.

Employees using another department or agency as part of personal cover must not act in any way which would damage the reputation of that department or agency.

Compliance with public service minimum standards of integrity and conduct

The Directors-General of GCSB and NZSIS must issue policies and procedures that reflect their agencies' obligations under the Public Service Act 2020.

Consultation with the Publics Service Commission

GCSB and NZSIS must consult with the Public Service Commission when developing internal policies and procedures that guide the use of personal cover and making false or misleading representations about employment with GCSB and NZSIS.

Health and safety

All employees must act consistently with GCSB's and NZSIS's obligations under the Health and Safety at Work Act 2015 when making false or misleading representations about employment.

Training

All employees of an intelligence and security agency must be provided training on all relevant law, policies and procedures in relation to making false or misleading representations about their employment. This training should be provided to all existing employees and to new employees at induction, and whenever there are changes or updates to the policies and procedures, to ensure that at all times employees are aware of current practices.

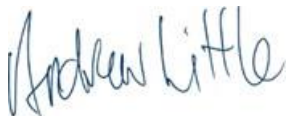
Authorisation procedures

30. The Directors-General of GCSB and NZSIS must issue policies and procedures to guide employees' use of false and misleading representations about their employment. No further authorisation is required before employees make such representations (provided all training has been completed).

Duration of ministerial policy statement

31. This MPS will take effect from 28 September 2020 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, slightly slanted style.

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

September 2020