



## *Ministerial Policy Statement*

# Requesting information from agencies under section 121 of the Intelligence and Security Act 2017

### **Summary**

The Intelligence and Security Act 2017 expressly recognises the existing ability of the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS) to request information from an agency under section 121. This ministerial policy statement (MPS) provides guidance about making those requests. In making these requests GCSB and NZSIS must have regard to the following principles: legality, necessity, proportionality, respect for privacy, less intrusive means to be considered, use of most appropriate statutory mechanism, 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

**Agency** means any person, whether in the public sector or the private sector, and includes a department

**GCSB** means the Government Communications and Security Bureau

**NZSIS** means the New Zealand Security Intelligence Service

## Purpose

1. This MPS is issued by the Minister Responsible for the GCSB and the Minister in Charge of the NZSIS pursuant to section 206(g) of the Act.
2. The purpose of this MPS is to provide guidance to GCSB and NZSIS about making requests for information under section 121 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 her propriety jurisdiction (the Act requires the Inspector-General 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 request for information under section 121 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 formal requests under section 121 of the Act for information from other agencies that is necessary for the performance of GCSB's and NZSIS's functions. Corresponding disclosures by other organisations are made under section 122.
6. This MPS does not apply to information obtained under any of the other mechanisms available under the Act (discussed in more detail below), or pursuant to an intelligence warrant. Any requirements associated with obtaining information under such mechanisms or pursuant to intelligence warrants will be specifically stated in those mechanisms/intelligence warrants. Nor does it apply to informal requests for information that GCSB or NZSIS employees may make in the course of interactions with agencies (for example, requests arising in the context of a conversation or at a conference).
7. Because section 121 requires a statement from the relevant Director-General that the requested information is necessary to enable the performance of one or more of GCSB's/NZSIS's functions (see below), section 121 only applies to overt or declared requests. The agencies cannot use section 121 to make covert or undeclared requests; depending on the circumstances, such requests may constitute lawful human intelligence activities (see MPS on *Collecting information lawfully from persons without an intelligence warrant or authorisation given under section 78*).
8. New Zealand obtains a significant amount of information (including intelligence) from overseas public authorities. Cooperation and sharing of intelligence with overseas public authorities is addressed by a separate MPS (see MPS on *Cooperation with overseas public authorities*); requests for such information are not covered by this MPS.

## Context

9. GCSB's and NZSIS's objectives are set out in the Act. GCSB and NZSIS 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.
10. 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.
11. 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.
12. To perform any of their statutory functions, it is necessary for GCSB and NZSIS to use a range of methods to collect information, including requests for information to a range of agencies. Information (such as someone's address, information about their family and friend groups, or travel movements) may help GCSB and NZSIS to investigate the activities of that person. It may also help to verify information obtained from other sources to assess the quality of those other sources, or identify links between persons of intelligence interest. GCSB and NZSIS may request technical information (such as information about the configuration of computer networks) to provide advice and assistance to support the protection of those networks from malicious cyber activity.
13. The Act contains a range of mechanisms that, depending on the circumstances, can be used by GCSB or NZSIS to obtain information needed to perform their statutory functions:
  - Subpart 2 of Part 5 provides for direct access to certain government databases (subject to a direct access agreement between Ministers). Those databases contain, for example, information about citizenship, residency and travel movements, and financial intelligence.
  - Subpart 3 of Part 5 provides for case-by-case disclosure of certain restricted information (ie, information that cannot currently be disclosed due to a statutory prohibition or restriction). That information includes, for example, adoption information, tax information, and driver licence photographs.
  - Subpart 4 of Part 5 establishes a scheme for the compulsory disclosure of certain business records held by telecommunications companies and financial service providers.
14. GCSB and NZSIS can also obtain information through otherwise unlawful means (for example, by intercepting private communications) pursuant to an intelligence warrant. Those means are not covered by this MPS.

### *Legislative basis of requests for information*

15. Section 121 of the Act recognises the existing ability of GCSB and NZSIS to request information held by other agencies (both public and private). Section 122 recognises the existing ability of an agency to disclose information it holds to the GCSB and NZSIS (see sections 121 and 122).

16. Section 121 sets out the ability to request information from another agency where the Director-General of GCSB or NZSIS believes on reasonable grounds that the information is necessary to enable his or her agency to perform any of its functions. Such a request must provide details of the information requested and confirm the information is necessary to enable GCSB or NZSIS to perform any of its functions. That is, the intention is that section 121 deals with overt and declared requests for information.
17. Disclosing agencies retain the discretion to decide whether to disclose information to the agencies upon receiving such a request from GCSB or NZSIS. Section 122 of the Act states organisations may disclose information if they have reasonable grounds to believe disclosure is necessary to enable the intelligence and security agency to perform any of its functions. Disclosures of information under section 122 may not be made if there are other Acts that prohibit or restrict the disclosure of information to GCSB and NZSIS. If another statutory provision regulates the way in which the information may be obtained or made available to GCSB and NZSIS, then the terms of that provision will prevail. Disclosures of information also remain subject to any other obligations of confidence, or contracts, agreements or other documents relating to the disclosure of the specific information.
18. The disclosure of personal information is also subject to the Privacy Act 1993. [Information privacy principles](#) 1, 4(a), and 5 to 12 apply to GCSB and NZSIS. Information privacy principle 11 provides that an agency may disclose information if that disclosure is one of the purposes in connection with which the information was obtained or is directly related to those purposes. An exception to information privacy principle 11 permits disclosure where it is necessary to enable an intelligence and security agency to perform any of its functions (see information privacy principle 11(fa)). Depending on the information in question, it may be that industry or sector-specific privacy codes also apply (the Health Information Privacy Code 1994, for example). Even when a disclosure is consistent with information privacy principle 11, the requirements of section 122 must also be met, that is, including that the disclosing organisation must believe on reasonable grounds the disclosure is necessary to enable either GCSB or NZSIS to perform any of its functions.
19. In situations where an organisation considering disclosing information does not have reasonable grounds for believing disclosure is necessary for the performance of a function of GCSB or NZSIS, the relevant Director-General may certify that disclosure of the information is necessary to enable the agency to perform its functions (section 122(3)). Certificates will always be provided in written form.

## **Principles**

20. The following principles constitute a framework for good decision-making and must be taken into account by GCSB and NZSIS when making requests for information under section 121 of the Act. All requests for information (to the extent they are ongoing or repeated) should be subject to ongoing review as to whether they continue to be consistent with these principles.

## *Legality*

21. GCSB and NZSIS must ensure all requests made under section 121 are made in accordance with the law. Requests must be identifiable as a non-enforceable request, rather than a demand with which the recipient is legally required to comply. Where appropriate, legal advice should be sought before requests are made.

### *Necessity*

22. Requests should only be made when the information sought is necessary to enable GCSB or NZSIS to perform one or more of its functions. This reflects the law in relation to personal information – [information privacy principle 1](#) of the Privacy Act 1993 provides that personal information should not be collected unless the information is being collected for a lawful purpose connected with a function or activity of the agency and the collection of the information is necessary for that purpose.
23. Requests must be formulated so that they target the information that is necessary and do not seek to capture irrelevant information. Consideration of necessity will also require consideration of whether there is another way to obtain the information (for example, by directly accessing it where it falls within the direct access scheme in the Act and where a direct access agreement is in place in respect of that category of information).

### *Proportionality*

24. The nature and amount of information requested should be proportionate to the purpose for which the information is sought. For example, a request for a larger amount of information, relating to a larger number of people, or relating to sensitive personal (for example, health information) or commercial matters, should only be made where the purpose for obtaining that information is proportionately important – such as if it will support the production of higher-priority intelligence, or is part of addressing an immediate threat. Similarly, a proportionality assessment should be made in relation to any ongoing or repeated requests for information made in reliance on section 121.

### *Respect for privacy*

25. GCSB and NZSIS are subject to the Privacy Act 1993 and [information privacy principles](#) 1, 4(a), and 5 to 12 will apply where they have access to personal information. GCSB and NZSIS should take special care in relation to any personal information that the person who is the subject of the request has a reasonable expectation of privacy in relation to. Whether a reasonable expectation of privacy exists requires consideration of all of the circumstances, including such factors as the nature of the information, the nature of the relationship between the agency to which the request is directed and the person who is the subject of the information, where the information was obtained, and the manner in which the information was obtained. Reasonable expectations of privacy exist to protect information that would tend to reveal intimate details of the lifestyle and personal choices of the individual concerned.
26. GCSB and NZSIS must take reasonable steps to mitigate the impact on the privacy of the person who is the subject of the request. Such steps may include defining the scope of requests for personal information to ensure no more than is necessary is sought, retaining as little personal information as possible when it is supplied, restricting the number of people who may access that information, establishing processes to ensure that information is only accessed for a function of the agencies, and only disclosing that information where there is a legitimate need.
27. Where a reasonable expectation of privacy arises, section 21 of the New Zealand Bill of Rights Act 1990 will apply and it will be necessary to consider the reasonableness of the proposed request. Legal advice should be sought in such cases.

### *Less intrusive means to be considered*

28. GCSB and NZSIS should seek to obtain any information by the least intrusive means reasonably available. This means GCSB and NZSIS should only make a request for information where a less intrusive means of obtaining the information is not reasonably available. A request for information is a reasonably available means of obtaining information and is preferable to more intrusive means of obtaining the information.
29. The intrusiveness of requests for information vary according to the particular information requested. While requests for information from other agencies are often less intrusive than other methods of collection (for example, warranted methods) for the agency receiving the request, such a request may be more intrusive from the perspective of the person who is the subject of the request due to the lesser procedural protections that are in place.
30. Generally, GCSB and NZSIS may need to obtain information from multiple sources, using a range of means in order to assess the accuracy of information, or the reliability of sources. For example, in order to reliably assess the state of a person's finances (and the honesty of that person) as part of vetting them for a security clearance, it may be necessary to request information from the person themselves, other persons who are aware of their financial situation, and their bank.

### *Use of most appropriate statutory mechanism*

31. Generally, the Act is designed to operate as a toolkit from which the agencies may utilise any appropriate mechanism for obtaining information. For example, section 155 makes clear that nothing in the business records authorisation regime in the Act precludes the disclosure of business records to GCSB and NZSIS where disclosure is required, authorised or permitted by or under another provision of the Act or any other statute.
32. Where the Act or another enactment provides a specific mechanism (other than an authorisation under Part 4 of the Act) for access by GCSB/NZSIS to certain information, there is a general expectation that those mechanisms be used unless there is good reason to make a request under section 121. This is because the procedural safeguards applying to other statutory mechanisms will generally provide greater protection for individual privacy interests than case by case requests. For example, if a direct access agreement between NZSIS and/or GCSB and another public sector agency is in place for information about travel movements, the agencies should use that mechanism instead of making ad-hoc requests under section 121. It is important to note, however, that the existence of a specific scheme does not preclude GCSB and NZSIS from making ad-hoc requests under section 121 if there are operational reasons to do so (such as urgent requests).

### *Oversight*

33. GCSB and NZSIS must carry out all activities in a manner that facilitates effective oversight, including through the keeping of records about requests for information. These records should include enough information to allow a person reviewing a request to identify the purpose for making that request.
34. Section 123 of the Act requires the Directors-General to keep a register of all certificates issued under section 122(3). It also specifies the information that must be recorded in the register of certificates. The register plays an important role in supporting GCSB, NZSIS, the

Inspector-General of Intelligence and Security, and the responsible Minister to monitor and review use of certificates under section 123.

35. GCSB and NZSIS should record the response to each request (ie, request fulfilled entirely, request fulfilled partially, or request denied) to allow for transparency reporting about the number of requests for information under section 121.

## **Matters to be reflected in internal policies and procedures**

36. 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 in place to support and monitor compliance. The policies and procedures of GCSB and NZSIS must also address the following specific matters.

### **Compliance with the State Services Code of Conduct**

The Directors-General of GCSB and NZSIS must issue policies and procedures that reflect their agencies' obligations under the State Sector Act 1988.

Consistent with the State Services [Standards of Integrity and Conduct](#), the agencies will not permit individual employees to request information about any person or matter that they have a personal interest in or relationship (for example, a family member or friend, or where the employee has a personal financial interest in a matter), except when:

- a) there is a specific reason why it is necessary for that particular employee to request the information for the performance of a statutory function; or
- b) there are no other persons reasonably available to make the request.

### **Training**

GCSB and NZSIS employees may only make requests for information if they are appropriately trained on relevant policies and procedures. Those employees must receive ongoing training to ensure they have up-to-date knowledge of those policies and procedures.

### **Information management**

Information received as the result of a request from agencies under 121 may be among some of the more sensitive information held by GCSB and NZSIS, given the personal nature of that information. This information must be handled and stored in accordance with clear access controls that correspond to the sensitivity of the information. The MPS [link management of information] also applies in relation to management of this information.

### **Compliance with information privacy principles**

GCSB and NZSIS are subject to [information privacy principles](#) 1, 4(a), and 5 to 12 of the information privacy principles in the Privacy Act 1993. All policies relating to requests made under section 121 of the Act and the handling of any information collected and held as a result of such requests must incorporate guidance about compliance with the relevant information privacy principles.

### **Sensitive category individuals**

GCSB and NZSIS must have a policy setting out how 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, Members of New Zealand's Parliament, members of the New Zealand judiciary, journalists, lawyers, registered medical

practitioners or other providers of health services attracting medical privilege, 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 that requests for information need to be made to or in relation to sensitive category individuals.

### **Authorisation procedures**

37. The Directors-General of GCSB and NZSIS may delegate their ability to make requests for information consistently with the State Sector Act 1988.
38. All requests for information must be authorised by an appropriately senior employee of the agencies, having regard to the nature of the information requested and the agency it is requested from (such as sensitive categories of individuals), and any risks associated with making the request.

### **Duration of ministerial policy statement**

39. This MPS will take effect from 28 September 2017 for a period of three years. The Minister who issued a MPS may, at any time, amend, revoke or replace the MPS.

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Ministerial Policy Statement issued by:



Hon Christopher Finlayson  
Minister responsible for the Government Communications Security Service  
Minister in charge of the New Zealand Security Intelligence Service

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