



Ministerial Policy Statement

Conducting activities in accordance with an exemption from the Land Transport (Road User) Rule 2004 that is conferred by section 231 of the Intelligence and Security Act 2017

Summary

The Intelligence and Security Act 2017 provides the New Zealand Security Intelligence Service (NZSIS) with an exemption from the Land Transport (Road User) Rule 2004 in certain circumstances. This ministerial policy statement (MPS) is intended to guide the conduct of activity to which this exemption applies. In making decisions related to the use of the exemption from the Rule, NZSIS must have regard to the requirements of section 231 of the Act and the following principles: necessity, proportionality, minimising risk, legality 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.

The Rule means the [Land Transport \(Road User\) Rule 2004](#).

NZSIS means the New Zealand Security Intelligence Service.

Vehicle has the same meaning as in section 2(1) of the Land Transport Act 1998.

Visual surveillance means activity that involves the use of NZSIS employees to collect intelligence, 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.

Purpose

1. This MPS is issued by the Minister in Charge of the NZSIS pursuant to section 206(j) of the Act.
2. The purpose of this MPS is to provide guidance in relation to the conduct of visual surveillance conducted by NZSIS from a vehicle on a public road in reliance on the exemption conferred by section 231 of the Act. The MPS comprises the Minister's expectations for how NZSIS should properly use this exemption and establishes a framework for good decision-making and best practice conduct.
3. MPSs are also relevant to oversight of NZSIS by the Inspector-General of Intelligence and Security in the exercise of her 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 decisions or taking any action related to visual surveillance from a vehicle on a public road in reliance on the exemption from the Rule 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 Director-General is responsible for ensuring the MPS is reflected in NZSIS'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 relates only to visual surveillance from a vehicle on a public road conducted lawfully by NZSIS in reliance on the exemption conferred by section 231 (the exemption). Section 231 creates exemptions for NZSIS employees from the following parts of the Rule:
 - Part 3 (which sets out requirements for traffic signs and signals);
 - Part 5 (which relates to speed limits); and
 - Part 6 (which refers to stopping and parking).
6. The exemption only applies if:
 - a) the employee is carrying out lawful visual surveillance from a vehicle on a public road; and
 - b) the employee who takes the action that would otherwise constitute an offence considers that taking the action is reasonably necessary in order to continue the visual surveillance; and
 - c) the employee takes all reasonable steps to ensure that his or her actions do not cause injury or damage, or interfere with any other person.
7. Only qualified NZSIS employees (including seconded staff) carrying out the role of a surveillance officer will meet the criteria for these exemptions. NZSIS is subject to all other parts of the Rule and the Land Transport Act 1998.
8. The MPS addresses the responsibilities of NZSIS in relation to the conduct of visual surveillance on a public road, which include such matters as ensuring appropriate and up to date training for all staff involved in such activity, and that health and safety requirements are factored into the planning and conduct of all such activity. It also details the

responsibilities of individual NZSIS employees who may carry out an activity in reliance on the section 231 exemption. Those employees remain legally responsible at an individual level, even when conducting activities in an official capacity.

9. This MPS must be read in conjunction with the MPS on *Surveillance in a public place*.

Context

10. NZSIS's objectives are set out in the Act. NZSIS contributes 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.
11. NZSIS does this through the performance of its statutory functions, which include:
 - a) Intelligence collection and analysis; and
 - b) The provision of protective security services, advice and assistance.
12. MPSs are an important component of the measures put in place by the Act to ensure the functions of NZSIS are performed with propriety and in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.
13. To perform any of its statutory functions it is necessary for NZSIS to use a range of methods to collect information, including surveillance. Surveillance may need to be carried out using covert methods in order to obtain information that could not be obtained if the subject of the surveillance was aware it was occurring, or to avoid alerting persons to other covert activities of NZSIS. Such surveillance methods are a legitimate tactic in the toolkits of many New Zealand government agencies with an intelligence collection or law enforcement function.
14. The exemption is intended to allow for effective visual surveillance by NZSIS employees from a vehicle on a public road. The nature of this surveillance activity will in itself mean that an NZSIS employee cannot drive in a manner that would reveal the visual surveillance activity to the subject(s) of the visual surveillance. This differs from how the New Zealand Police use a similar exemption from the Rule, which requires their use of warning devices such as sirens and lights.
15. The Rule states that "[t]raffic law promotes the safe and efficient operation of roads by providing a legal framework to support consistent and predictable responses by road users." The exemption in section 231 does not provide blanket protection for NZSIS employees carrying out visual surveillance from a vehicle. It is relatively narrow in scope, covering only three Parts of the Rule. For example, it does allow for stopping or parking in a bus lane but does not provide an exemption for driving in a bus lane.
16. The exemption does not detract in any way from the importance of ensuring public safety, and does not provide license for NZSIS employees to engage in careless or reckless driving or shield them from other serious offences involving a vehicle. A duty of care exists in all situations, and NZSIS employees involved in visual surveillance from a vehicle may be charged with traffic offences or be liable to civil proceedings if driving is not reasonable and necessary, or if proper care is not taken in using the section 231 exemption.
17. The exemption does not apply to NZSIS employees driving surveillance vehicles for other purposes or travelling while not on an active surveillance operation.

Principles

18. The following principles constitute a framework for good decision-making and must be taken into account by NZSIS when planning and conducting visual surveillance from a vehicle.

Necessity

19. The Rule should only be breached in accordance with the exemption in section 231. In taking any action that relies on the exemption (i.e. would otherwise constitute an offence) an NZSIS employee must consider that the action is reasonably necessary to continue the visual surveillance. What is necessary will depend on the context. Given the need to keep visual surveillance activity covert, the exemption may need to be used several times in the course of a single surveillance operation.

Proportionality

20. In each case, the degree to which the Rule needs to be breached during a surveillance operation should be balanced against the degree to which the operation enables NZSIS to carry out one of its statutory functions, and is proportionate to the risks to public safety involved. The extent to which the Rule is breached must be proportionate to the purpose for which an action is carried out, contravene the Rule to the least possible extent, and extend for the shortest possible duration.
21. For instance, driving over the speed limit should be done at the lowest speed necessary in order to continue the visual surveillance, and taking due care to avoid a collision. Sustained driving above the speed limit is likely to be noticed and poses a risk to safety and would therefore not be deemed proportionate in relation to either, the outcomes of the surveillance operation, or the risks to public safety.
22. When driving through an intersection against the instructions of a traffic sign or signal, surveillance officers should reduce speed so as to not exceed 20 km per hour and must take due care to avoid collisions with pedestrians and other traffic.
23. Driving actions undertaken in reliance of the exemption from the Rule that meet the threshold for more punitive enforcement actions under the provisions of the Land Transport Act 1998 – such as exceeding 40km/h over the speed limit, which introduces mandatory vehicle impoundment and licence suspension – pose an inherent risk to public safety and that of the surveillance officer and should rarely be seen as a proportionate or appropriate use of the exemption.

Minimising risk

24. At no time are the public or NZSIS employees to be placed at unjustified risk when carrying out visual surveillance from a vehicle. Visual surveillance activities from a vehicle should be conducted at a speed and in a manner appropriate to the circumstances. Surveillance officers must make use of risk-based assessment when carrying out visual surveillance from a vehicle and determining to take an action that relies on the exemption from the Rule.
25. A surveillance officer carrying out visual surveillance from a vehicle must take all reasonable steps to ensure that any actions they take when carrying out the surveillance do not cause injury or damage, or interfere with any other person. Any actions taken in reliance on the exemption from the Rule must be done in the safest possible manner – i.e., in a fashion that minimises the risk to the surveillance officer, the target and third parties.

26. Some actions taken in reliance on the exemption from the Rule will not pose a risk, or will pose a lesser risk, to public safety, for example parking in a loading zone. Others inherently pose a risk to public safety, for example driving through a stop sign or exceeding the speed limit. The circumstances of the action must be considered in risk assessments.
27. If at any time a risk assessment identifies unjustified risk to the public or NZSIS employees, the particular action being taken in reliance on the exemption from the Rule must be discontinued immediately.

Legality

28. NZSIS must ensure that visual surveillance from a vehicle on a public road is carried out in accordance with the law. Any NZSIS employee who breaches the Rule outside the exemption in section 231 may be charged with traffic offences or be liable to criminal proceedings.

Oversight

29. NZSIS must carry out all activities in a manner that facilitates effective oversight, including through keeping appropriate records about activities undertaken in the course of a surveillance operation. NZSIS must keep records of when the New Zealand Police have given a warning or issued an infringement notice to a surveillance officer, including the circumstances in which these were issued.

Matters to be reflected in internal policies and procedures

30. 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. Those policies and procedures must also address the following matters:

Compliance with State Services Code of Conduct

The Director-General of NZSIS must issue policies and procedures that reflect NZSIS's obligations under the State Sector Act 1988.

Engagement with New Zealand Police and New Zealand Transport Agency

NZSIS must agree procedures with New Zealand Police and New Zealand Transport Agency to govern the exercise of the exemption.

Health and safety

Visual surveillance from a vehicle must be undertaken consistently with NZSIS's obligations under the Health and Safety at Work Act 2015. The health and safety of all NZSIS employees and all other persons who might be affected by surveillance should be a key consideration in the planning and undertaking of such activities.

Training requirements

Only NZSIS surveillance officers may undertake operational driving activities. In order to do so, those surveillance officers must have qualified on a surveillance officer training course recognised by NZSIS. Surveillance officers must also be trained in their obligations under the Health and Safety at Work Act 2015, the general requirements of traffic law, and all relevant internal policies and standard operating procedures. This training will ensure that NZSIS employees operate as safely as possible when conducting activities in accordance with the exemption from the rule (for instance when running a red light). Training should also be

refreshed on a regular basis. In developing training policies and practices, NZSIS must consult with the New Zealand Police and the New Zealand Transport Agency.

Authorisation procedures

31. Visual surveillance activities from a vehicle should be authorised at a level of seniority within NZSIS that is commensurate with the level of operational, reputational 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. The identification and management of operational, reputational, legal and health and safety risks should be carried out in accordance with a risk management policy.
32. Authority for individual employees to rely on the exemption in the course of surveillance activities will depend on those employees having fulfilled all relevant training requirements.

Duration of ministerial policy statement

33. This MPS will take effect from 28 September 2017 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 Christopher Finlayson

Minister responsible for the Government Communications Security Service

Minister in charge of the New Zealand Security Intelligence Service

September 2017