



GOVERNMENT
COMMUNICATIONS
SECURITY BUREAU
TE TIRA TIAKI

Policy Statement: **PS - 216**

Incidental Intelligence Policy

1. Purpose

1. The GCSB Act 2003 requires GCSB to destroy irrelevant records obtained by interception as soon as practicable after interception (section 23). However, the Act also recognises that sometimes these irrelevant records will contain information that is so critically important that it must be shared (section 25).
2. The purpose of this policy is to set out how GCSB will identify, retain and communicate such material, described in the Act as “incidental intelligence”.¹

2. Policy

Relevant provisions and principles

Generally, GCSB must destroy “irrelevant records” obtained by interception

3. Section 23 of the GCSB Act requires GCSB to destroy irrelevant records “as soon as practicable” after interception. Irrelevant records are communications which have been intercepted under a valid GCSB authorisation,² but which do not relate directly or indirectly either to one of GCSB’s objectives, or to its information assurance and cybersecurity function or to its foreign intelligence function.
4. In other words an “irrelevant record” is a legitimately intercepted communication which does not relate to any of the following:
 - a. The protection or advancement of New Zealand’s national security; international relations and well-being; or economic well-being (section 7)

¹ For clarification: the word ‘intelligence’ as used in this policy refers to information derived from intercepted communications and not derived from any other source.

² An interception warrant, an access authorisation or a section 16 authorisation.

- b. The protection, security and integrity of communications or information infrastructures (section 8A)
- c. The capabilities, intentions and activities of foreign persons and foreign organisations (section 8B).

Section 25 “saves” certain information from destruction

- 5. Despite the general requirement to destroy irrelevant records, GCSB may retain and share incidentally obtained intelligence (“incidental intelligence”), in certain circumstances. These are set out in section 25 of the Act. The rationale for this is that, despite the need for restraint on the exercise of GCSB’s powers, sometimes GCSB will inadvertently come across intelligence that is not related to its role but is nonetheless so critical to New Zealand or partner interests that it should be shared. Section 25 relates to activities conducted under section 8B of the Act (foreign intelligence).

What is incidental intelligence?

- 6. The Act defines incidental intelligence as intelligence obtained under section 8B in the course of gathering what is generally described as foreign intelligence – that is, intelligence about the capabilities, intentions or activities of foreign organisations or foreign persons – but which is not itself actually foreign intelligence.
- 7. Generally, one would expect that the communications of a foreign entity would contain some information about that entity’s capabilities, intentions or activities.
- 8. But in considering whether or not a communication (including any associated copy or record) is incidental intelligence, there are more aspects than simply the nationality of the communicants that are relevant. The subject matter of the communication may be relevant to determining whether it is foreign intelligence, as may information revealed by the metadata.
- 9. Hypothetical examples of incidental intelligence could be:
 - a. *In collecting against a foreign target, inadvertent collection of the communications of a New Zealand national suggests that the person’s life is in danger.*
 - b. *In collecting against a foreign narcotics target, a person identifies the location in New Zealand of a large quantity of drugs.*
- 10. In each case the question that must be asked is: “Does this communication provide intelligence about the capabilities, intentions or activities of a foreign person or organisation?”
- 11. If the answer is yes, *and* if the intelligence is required by the New Zealand Government, then the communication falls within the ambit of GCSB’s foreign intelligence function as outlined in section 8B of the Act. It is not incidental intelligence, and may be handled in the usual way.

12. If the answer is no, the information may only be shared if it meets the incidental intelligence test.
13. It will be rare that GCSB would ever obtain intelligence that:
 - a. is so critical that it must be shared; but
 - b. is foreign intelligence (so it cannot be classed as “incidental intelligence”); and yet
 - c. does not meet a New Zealand Government requirement (so section 8B does not apply).
14. If this ever happens, the manager(s) responsible for managing the information must seek advice from the Chief Legal Adviser before any decision is taken relating to retention, sharing or destruction of the material.

Can intelligence acquired exclusively through information assurance activity be incidental intelligence?

15. The definition of incidental intelligence in the GCSB Act concerns only material obtained in the course of gathering foreign intelligence.
16. It may be that intelligence gathered under both sections 8A and 8B functions results in incidental intelligence which is available for sharing under section 25. If a manager identifies material which potentially qualifies as incidental intelligence, he or she is to consult the Chief Legal Adviser before making any decisions about retention or sharing of the material.

When may incidental intelligence be shared?

17. Incidental intelligence may only be shared for the following (limited) purposes:
 - a. Preventing or detecting serious crime in New Zealand or any other country. A serious crime is one which, if committed in New Zealand, is punishable by two or more years in prison.
 - b. Preventing or avoiding the loss of human life on the high seas.
 - c. Preventing or responding to threats to human life in New Zealand or any other country.
 - d. Identifying, preventing or responding to threats or potential threats to the security or defence of New Zealand or any other country.

Who may receive incidental intelligence?

18. Where one or more of the relevant purposes are engaged, incidental intelligence may be reported to:
 - a. Any employee of the New Zealand Police
 - b. Any member of the New Zealand Defence Force
 - c. The Director of Security
 - d. Any other public authority that the Director thinks fit. This includes a public authority overseas – such as a 5-Eyes counterpart agency.

Process for analysing, reporting and disseminating incidentally obtained intelligence

19. Analysts must immediately alert their manager to communications or records of communications that may meet the criteria of incidentally obtained intelligence, and need to be reported to an appropriate authority for one of the purposes permitted under section 25.
20. The manager is then responsible for identifying the most appropriate person to carry out the necessary analysis and/or reporting.
21. It is important to remember that incidental intelligence is different from foreign intelligence. Incidental intelligence is material which GCSB should ordinarily destroy, but which it is permitted to keep and share with a limited range of recipients, for a limited range of very significant purposes.
22. Additionally, because incidental intelligence might well relate to New Zealand entities, it requires particular care and sensitivity in handling.
23. The same general processes for the analysis, reporting and dissemination of foreign intelligence apply to incidental intelligence. Reporting must, however, make clearly apparent that the material is incidental intelligence and not foreign intelligence. The authorisation process to disseminate the material should be clearly recorded, and must identify the relevant section 25 purposes on which the dissemination relies. A separate sequence of serial numbers from those used for cybersecurity or foreign intelligence reporting is to be used, for ease of later auditing.
24. A formal serialised GCSB intelligence report must always be issued when incidental intelligence is shared. The Chief Legal Adviser and relevant manager must always be consulted in the preparation of an Incidental Intelligence report. External agencies should be consulted when relevant, for example if the issue might impact on a military or police operation, or on New Zealand's foreign relationships.
25. The Director is the release authority for an Incidental Intelligence Report. The Director is also responsible for authorising the release of the information to any public authority beyond the New Zealand Police, New Zealand Defence Force or Director of Security.
26. Any intercepted communications used for an Incidental Intelligence Report, together with all associated records, are to be retained by GCSB in accordance with the same policies governing foreign intelligence material.

What to do in extremely urgent situations

27. Given the critical situations to which incidental intelligence is intended to respond, there may be occasions when the information must be communicated immediately and cannot wait for the usual reporting release processes – for example, where information about an imminent threat to life has to be communicated immediately if it is to be of any use. If this is the case, it may be communicated in whatever

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medium is most appropriate, with the verbal approval of the Director. If the Director is not available or cannot be reached in the timeframe necessary, any officer of Tier 3 or above may verbally approve the release.

28. This must be followed up in slower time with a formal report issued according to standard criteria, and with documentation which records the rationale for the decision to circumvent usual procedure.
29. In approving this policy statement, the Director has signified his approval in advance for Tier 3 or Tier 2 officers to approve an emergency release of incidental intelligence if the circumstances so demand.