



## **Office of the Inspector-General of Intelligence and Security**

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### **Report into Government Communications Security Bureau's process for determining its foreign intelligence activity**

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Public report

Cheryl Gwyn  
**Inspector-General of Intelligence and Security**

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## INTRODUCTION

1. This inquiry concerns allegations that the Government Communications Security Bureau (GCSB or Bureau) acted unlawfully or improperly in providing assistance to the New Zealand government's campaign to advance the Hon Tim Groser as a candidate for Director-General of the World Trade Organisation (WTO) in late 2012 to early 2013.
2. I have found that the GCSB did not act unlawfully or improperly in providing assistance to the New Zealand government campaign. I have reached that finding for two reasons:
  - 2.1. The New Zealand government had determined that the campaign pursued New Zealand's national interest in the effective functioning of the WTO, an international, multilateral organisation, which has a significant impact on New Zealand's economic well-being.
  - 2.2. Under the Government Communications Security Bureau Act 2003, which applied at the time, the GCSB had a statutory responsibility to provide foreign intelligence assistance in support of New Zealand's foreign policy objectives. In line with the government's decision and the foreign policy basis for that decision, the GCSB acted lawfully and appropriately in providing its assistance to the campaign.
3. I am required to report publicly on every inquiry that I undertake.<sup>1</sup> This is an important aspect of effective oversight and public accountability. I have made this report as full and transparent as possible: I have provided a detailed account of the actions and decisions of the GCSB, the legal standards that govern those actions and decisions, and my conclusions. I have also set out recommendations for changes in GCSB procedures.
4. I may not disclose in my reports information that would be likely to prejudice New Zealand's national security, international relations or information-sharing; the functioning of the intelligence and security agencies; or the identity of agency personnel other than the Directors.<sup>2</sup> As required, I have consulted the Director of the GCSB<sup>3</sup> and have also sought the views of the Department of the Prime Minister and Cabinet and the Ministry of Foreign Affairs and Trade. I am satisfied that some of the material I have reviewed in this inquiry falls within the national security restriction.
5. As a result, and to the extent strictly necessary to avoid that likelihood of prejudice, I have omitted that detail from this published copy of the report.<sup>4</sup> However, no matters material to this inquiry are omitted. The report includes all my findings and recommendations. It is consistent with the full, classified report which has been provided to the Minister responsible for the GCSB, the Prime Minister and the Director of the GCSB.
6. For the avoidance of doubt, I emphasise that this report does not confirm or deny any allegation concerning matters of operational detail, or address any other particular foreign intelligence activity undertaken by the GCSB.

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<sup>1</sup> Inspector-General of Intelligence and Security Act 1996 (IGIS Act), s 25(1).

<sup>2</sup> IGIS Act, s 25A(2).

<sup>3</sup> IGIS Act, s 25(8).

<sup>4</sup> A copy of this report is available on the Inspector-General's website: [www.igis.govt.nz](http://www.igis.govt.nz).

7. I have not sought in this inquiry to confirm or disprove the authenticity of any allegedly leaked documents on this subject matter. It was not necessary for me to do so: my inquiry has proceeded on its terms, to consider the substantive questions of what the GCSB did and whether it was lawful and proper. In doing so I undertook the detailed investigation set out in Appendix B, paras 3-14.

**PART 1: GCSB'S DECISION TO PROVIDE FOREIGN INTELLIGENCE RELEVANT TO NEW ZEALAND'S WTO CAMPAIGN AND THE ISSUES RAISED**

8. This section summarises my findings on the GCSB's decision to provide foreign intelligence relevant to the New Zealand government's campaign to have Mr Groser appointed as Director-General of the WTO (WTO D-G) and the issues raised. I have been able to establish all critical events but incomplete records and the limited recollections<sup>5</sup> of those involved mean that the account of the provision of foreign intelligence relevant to Mr Groser's bid to be WTO D-G (New Zealand's WTO campaign) is not complete in every detail.
9. During the key period (late 2012 – April 2013) Mr Groser was Minister of Trade, Minister for Climate Change Issues and Associate Minister of Foreign Affairs. The Minister Responsible for the GCSB was the Prime Minister, Rt Hon John Key. Ian Fletcher was the Director of the GCSB.

**The facts**

Early 2012                    Ministers and officials considered a possible campaign to appoint Mr Groser as the next WTO D-G, for which the selection process was to run from January-April 2013.

During this time, the GCSB provided regular foreign intelligence reporting to Mr Groser and the Ministry of Foreign Affairs and Trade (MFAT).

November 2012                Mr Fletcher, who was aware of the possible campaign, considered whether to offer fuller foreign intelligence relevant to New Zealand's WTO campaign. After a discussion with a GCSB operational manager, he sought a meeting with Mr Groser and his staff to gauge Mr Groser's interest in his offer.

The Director and a GCSB operational manager met Mr Groser on 28 November. The Director explained the offer and Mr Groser expressed his acceptance.

December 2012                Mr Groser's staff met with GCSB staff on 5 December to advise about matters of interest relevant to New Zealand's WTO campaign.

On 10 December, Cabinet agreed to nominate Mr Groser for the position of WTO D-G. The Prime Minister announced the Government's nomination of Mr Groser on 21 December.

January 2013                 The GCSB provided foreign intelligence relevant to New Zealand's WTO campaign.

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<sup>5</sup> Given the time elapsed and pressures of work, it is understandable that recollections may not be complete and the inquiry is not critical of this.

From February to April 2013 This situation continued until it became known on Friday 26 April 2013 that Mr Groser had not been selected for the third round of the WTO D-G appointment process.

10. Between early February 2013 and 26 April 2013, the GCSB provided foreign intelligence relevant to New Zealand's WTO campaign to MFAT officials and Mr Groser. Some of this intelligence formed part of weekly intelligence summaries compiled by the National Assessments Bureau which were distributed to relevant Ministers and senior officials including the Chief Executive of the Department of the Prime Minister and Cabinet and the Secretary of MFAT. These weekly summaries also contributed to briefings for the Prime Minister.

#### **The issues**

11. In this inquiry, I investigated whether the GCSB provided foreign intelligence assistance to the New Zealand government campaign to appoint Mr Groser as the next WTO D-G and, if so:

##### **Was that foreign intelligence-provision lawful and proper?**<sup>6</sup>

Did it fall within the GCSB's statutory powers, objectives and functions?

Was it authorised by government?

Did the GCSB maintain political neutrality, given that Mr Groser was a senior government politician at the time who stood to benefit personally if selected as WTO D-G?

##### **Was the GCSB's process for determining its foreign intelligence activity adequate and was it followed?**

Did the GCSB procedure ensure that decisions to provide foreign intelligence were lawful and consistent with government policy?

Was that procedure followed in this case and, if not, did that have any adverse effect?

Were the risks and benefits of particular decisions to provide foreign intelligence adequately assessed?

##### **Is the current GCSB process for determining its foreign intelligence activity adequate?**

What if any changes have been made to the Bureau's processes for making decisions to provide foreign intelligence since 2012-13?

Have any shortcomings in the earlier process been addressed?

What if any issues remain?

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<sup>6</sup> My inquiry has considered legality and propriety and proper process but not the question of whether, as a matter of policy, "economic well-being" should be a statutory objective.

12. These are the questions I seek to address in this report. The report proceeds as follows:

12.1. Parts 2-4 set out my investigation of the following issues:

Part 2: The legitimacy of the GCSB's provision of foreign intelligence relevant to New Zealand's WTO campaign.

Part 3: GCSB's process, at the time of the WTO activity, for making decisions to provide foreign intelligence.

Part 4: Current GCSB processes for making decisions to provide foreign intelligence.

12.2. Appendix B summarises the process I followed in my inquiry.

**PART 2: THE LEGITIMACY OF THE GCSB'S DECISION TO PROVIDE FOREIGN INTELLIGENCE RELEVANT TO NEW ZEALAND'S WTO CAMPAIGN**

13. The question of whether the provision of foreign intelligence relevant to New Zealand's WTO campaign was lawful and consistent with propriety turns on:
- Whether it was within the Bureau's lawful objective, as then set out in s 7 of the Government Communications Security Bureau Act 2003 (GCSB Act);
  - Whether it fell within the government's foreign intelligence requirements as necessary under s 8(1)(a) of the GCSB Act; and
  - Whether the Bureau met its obligation of political neutrality, as it then arose under the State Sector Act 1988.

**Consistency with the statutory objective of the Bureau**

14. The statutory objective of the Bureau, at the time of the WTO campaign, was defined by s 7 of the GCSB Act:

**"7 Objective of Bureau**

- (1) The objective of the Bureau is to contribute to the national security of New Zealand by providing—
  - (a) foreign intelligence that the Government of New Zealand requires to protect and advance—
    - (i) the security or defence of New Zealand; or
    - (ii) the international relations of the Government of New Zealand; or
    - (iii) New Zealand's international well-being or economic well-being: ..."<sup>7</sup>

15. The provision of foreign intelligence relevant to New Zealand's WTO campaign fell principally under s 7(1)(a)(iii). The lawfulness of the WTO campaign activity therefore depended upon whether it contributed to national security by providing foreign intelligence required by the government to protect and advance New Zealand's international economic well-being, as permitted by s 7(1)(a)(iii). It is important to note that s 7 does not justify foreign intelligence provision that simply protects and advances New Zealand's economic well-being, to any degree. Relevant intelligence will be that which protects and advances New Zealand's economic well-being to an extent or in a way that contributes to national security.

16. The term "national security" is not defined in the GCSB Act. The lack of a statutory definition gives scope for the government to determine as a matter of policy what its approach to national security will be. In 2011, Cabinet approved the New Zealand National

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<sup>7</sup> This was the wording of s 7 until its amendment in September 2013 by the Government Communications Security Bureau Amendment Act 2013.

Security System (NSS) framework,<sup>8</sup> which links the term “national security” in the GCSB Act to the government’s overarching security objectives. One of those objectives was “sustaining economic prosperity.”<sup>9</sup>

17. The relevant information, as provided from the documentary record and in evidence by a number of witnesses to the inquiry, was that:

17.1. The New Zealand Government’s WTO campaign was ultimately authorised by Cabinet Minute on 10 December 2012. The proposed decision was sought by way of an oral Cabinet item and so there was no underlying Cabinet paper. However, in agreeing to nominate Mr Groser for the position, the Cabinet Minute noted the value to New Zealand of a New Zealander being appointed WTO D-G and the qualifications of the Minister of Trade, Mr Groser, for the position.<sup>10</sup>

17.2. MFAT’s assessment was that the WTO was an:

“... institution of fundamental importance to the economic prosperity of New Zealand and the wider international community.”<sup>11</sup>

MFAT officials explained that there was an urgent need for the WTO to have capable leadership, as the Doha Round negotiations had broken down in 2008 and a moribund WTO created trade and economic risks for New Zealand.

- 17.3. Mr Ian Fletcher, the Bureau’s Director at the time, (Director) also indicated in evidence that if the campaign was successful, this would be a significant foreign policy gain for New Zealand.<sup>12</sup>

#### *Comment*

18. The question of whether the GCSB’s provision of foreign intelligence work contributed to national security in terms of s 7(1)(a)(iii) involves a determination of New Zealand’s national interest. That determination can, properly, involve a substantial policy judgement.<sup>13</sup> The question for this inquiry is not whether I agree with any assessment of the national interest, but rather whether there was an objective basis for that determination. I consider that:

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<sup>8</sup> It sets out a comprehensive description of New Zealand’s national security interests and how government agencies are to work together to manage and respond to national security interests. Further information can be found in [Appendix C](#) including the list of seven objectives that underpin the concept of national security.

<sup>9</sup> DPMC, “*New Zealand’s National Security System*” (May 2011).

<sup>10</sup> CAB MIN (12) 44/30.

<sup>11</sup> MFAT Formal Message from Trade Negotiations Division to All posts (19 December 2012).

<sup>12</sup> The Director expressed his views in the following statements and interviews: the Director’s first statement to the Inquiry (17 March 2016); IGIS first interview with the Director (18 March 2016); the Director’s second statement to Inquiry (19 May 2016); and IGIS second interview with the Director (20 May 2016).

<sup>13</sup> See, for example, *R (Lord Carlile of Berriew) v Home Secretary* [2015] AC 945 (UKSC), [26].

- 18.1. Cabinet had made a foreign policy decision that Mr Groser's nomination was of benefit to New Zealand and that must be given significant weight in assessing a national interest objective of this kind;
- 18.2. There was an underlying evidential basis on which to find that Mr Groser's selection would, if successful, serve New Zealand's economic well-being by supporting and enhancing the operation of the WTO. That reflected both Mr Groser's own potential contribution and New Zealand's interests in the functioning of the WTO; and
- 18.3. While it is the case that the WTO D-G does not serve as a national advocate for his or her country, this factor did not detract from the general economic benefits for New Zealand of a successful campaign.

#### **Government foreign intelligence requirement**

19. The further question under both s 7(1)(a)(iii) and under the Bureau's statutory functions then set out in s 8 was whether the Bureau's intelligence-gathering met a government intelligence requirement.
20. Official sources of government foreign intelligence requirements included Cabinet-endorsed Foreign Intelligence Requirements (FIRs) and New Zealand Intelligence Priorities (NZIPs). The Government could, however, identify foreign intelligence requirements additional to those stated in the FIRs and NZIPs.

#### *Foreign Intelligence Requirements*

21. The foreign intelligence requirements of the Government were, at the time of the campaign, most clearly expressed in the FIRs. The Bureau routinely used the FIRs as a means of identifying Government foreign intelligence requirements.
22. The FIRs are a product of the Domestic and External Security Coordination (DESC) system<sup>14</sup> which provides a structure for dealing with national security issues requiring ministerial direction and a whole-of-government approach.<sup>15</sup> The FIRs were endorsed by the Cabinet Committee on Domestic and External Security Coordination, now called the National Security Committee. Sitting under the National Security Committee, various committees of officials provide oversight and coordination of the New Zealand Intelligence Community (NZIC).<sup>16</sup> At the time of New Zealand's WTO campaign, the Intelligence Coordination Group within the Department of the Prime Minister and Cabinet (DPMC) had oversight, management and governance functions in relation to the NZIC.

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<sup>14</sup> See [Appendix C](#) of this report which provides a summary of the DESC system.

<sup>15</sup> DPMC, *New Zealand's National Security*, (May 2011), p 7.

<sup>16</sup> The core NZIC is made up of GCSB, New Zealand Security Intelligence Service (NZSIS) and the National Assessments Bureau. The wider NZIC includes the Directorate of Defence Intelligence and Security, New Zealand Police, New Zealand Customs, Immigration, the Ministry of Primary Industries and MFAT.

- 23. The FIRs “set out high level subject areas in which the government has an intelligence interest, as well as relative priorities between the identified subject areas.”<sup>17</sup> While the actual details of what is covered by the FIRs are classified, the FIRs provided guidance to the intelligence and security agencies about national security issues including areas of international relations and economic activity which Ministers regard as important to New Zealand. The FIRs identified and prioritised the subject areas in respect of which foreign intelligence information could make a useful contribution. Accordingly, they were not regarded as a mechanism for authorising particular foreign intelligence activity.
- 24. The GCSB stated that in determining the priority given to a request for foreign intelligence its “starting point is (and must be) the Foreign Intelligence Requirements (FIRs) approved by government.”<sup>18</sup> GCSB policy procedures explained that the FIRs are used as a mechanism to “direct prioritisation, resource allocation and collection across the Intelligence directorate.”<sup>19</sup>
- 25. While the FIRs, the Intelligence Coordination Group and cross-government committees within the DESC system provided guidance to GCSB about what topics were of interest to relevant government agencies, DPMC accepted that, the GCSB had to “prioritise ruthlessly”<sup>20</sup> which often meant that it declined to carry out work requested by customers.

*New Zealand Intelligence Priorities*

- 26. Alongside the FIR framework, the first New Zealand Intelligence Priorities (NZIPs) were approved by the Cabinet Committee on Domestic and External Security Coordination on 18 July 2012. These provided a basis for what was described by DPMC as a prioritised intelligence reporting programme. This programme was intended to provide “ministers and senior officials with intelligence assessment contributed by all relevant parts of the NZIC”.<sup>21</sup> DPMC considered that most of the high level FIR themes translated into the 2012 priorities.
- 27. In 2012, the relationship between the FIRs and NZIPs was not very clear for the purposes of operational decision-making at the GCSB. However, interviews with Bureau management confirmed the NZIPs did have a place in setting operational priorities.

*Government requirements supplemental to the FIRs*

- 28. While the FIRs are broadly expressed, there have been occasional instances of intelligence requests that have not fallen within a FIR but, nonetheless, have been determined to be legitimate government intelligence requirements.

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<sup>17</sup> GCSB letter of 2 July 2015 in response to IGIS enquiries, para 15.

<sup>18</sup> GCSB letter of 2 July 2015, para 14.

<sup>19</sup> GCSB Policy Procedure (PP)-2012, para 4.

<sup>20</sup> Interviews with the Director of Intelligence Coordination (at time of WTO campaign) and the current Deputy Chief Executive, Security and Intelligence, DPMC.

<sup>21</sup> DPMC, *Annual Report for year ending 2012*.

29. I found two instances where this issue arose in the 2011-2013 period. While the approach taken in each was different, in both cases cross-government consideration was given to the issue and documented.
30. In one example, the GCSB ensured there was a documented record of the request, submitted it to senior GCSB management and sought guidance from DPMC. These steps ensured that the broader NZIC agreed with the GCSB's assessment that the request was a matter of national importance and priority.
31. In the second example, there was also evidence of broader intelligence community engagement in the decision and a written record of the foreign intelligence requirement from the "customer" Minister which was endorsed by the Prime Minister, who was the Minister responsible for the GCSB at the time.
32. These examples provided a traceable link between GCSB foreign intelligence activity and a government foreign intelligence requirement.

*Other guidance on intelligence requirements*

33. Once a government requirement was established and foreign intelligence collected, further activity by the GCSB was guided by feedback from its customers – including Ministers – about the usefulness of the information provided. In addition, feedback was received from the National Assessments Committee. This was chaired by the Director of the National Assessments Bureau within DPMC and included representatives from across the NZIC. The National Assessments Committee met regularly, often weekly, to provide oversight of weekly intelligence summaries written for Ministers and senior officials. These summaries drew on all sources within the NZIC and contributed to weekly intelligence briefings to the Prime Minister provided by DPMC.

**What consideration did GCSB give to the FIRs?**

34. At the time, the Director considered that the provision of foreign intelligence relevant to New Zealand's WTO campaign came within the FIRs. While the Director did not keep a record of his consideration of these matters, he recalls that he turned his mind to the relevant FIRs.
35. He said that he discussed the provision of foreign intelligence relevant to New Zealand's WTO campaign with his senior management team and no one from the team questioned whether the GCSB should be providing this intelligence, although GCSB staff I interviewed could not recollect any discussion with the Director about the applicability of the FIRs.
36. The process followed for the provision of foreign intelligence relevant to New Zealand's WTO campaign differed from the GCSB's usual practice in 2012/13<sup>22</sup> in that the task was conveyed by the Director direct to GCSB staff responsible for organising the Bureau's contribution to New Zealand's WTO campaign. The question of the applicability of the

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<sup>22</sup> This practice is summarised in Part 3 of this report.

FIRs did not arise for discussion among more senior managers as it might in the normal course of events, when an intelligence request from a minister would be relayed to the Bureau by one of its customer relations officers.<sup>23</sup>

**Did the FIRs cover the Bureau’s provision of foreign intelligence to New Zealand’s WTO campaign?**

37. My inquiry found various explanations within GCSB about how its activity fitted within the FIRs. The Director provided a full explanation, in written statements and at interviews, of how he understood the FIRs to be relevant. Bureau staff we interviewed were not aware of the reasons why the Director considered the FIRs to be applicable, and provided their own explanations for their applicability.
38. The FIRs do not on a literal reading extend to the campaign. I do not doubt the sincerity of the Bureau, the Director and Bureau staff that they regarded the campaign as falling within the FIRs. But in my view the application of the FIRs to the circumstances was not as clear cut as others have suggested.
39. It is not, however, necessary for me to reach a concluded view because:
  - the FIRs were not comprehensive: there was scope for the government to supplement the FIRs; and
  - key decision-makers were aware of the Bureau’s actions and there was a proper basis for those actions to proceed, which I explain below.

**Did the GCSB’s provision of foreign intelligence relevant to New Zealand’s WTO campaign meet a government intelligence requirement supplemental to the FIRs?**

40. Because of the uncertainty as to whether the provision of intelligence relevant to New Zealand’s WTO campaign fell within the FIRs, it is necessary to consider whether it would nonetheless have amounted to a government intelligence requirement in terms of s 8(1) of the GCSB Act.
41. Requests for foreign intelligence from Ministers and other GCSB customers will, very often, fall within the FIRs. Where they do not, the FIR system is not expressed to be exhaustive but also (and unlike precursor systems) does not specify any particular process by which the GCSB may be given additional government requirements.
42. What is necessary, however, is that the government’s intelligence requirements are set by government, that is:
  - By decisions of Cabinet or its delegate, in practice mostly likely the Cabinet National Security Committee;
  - By the responsible Minister within the scope of his or her discretion; or

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<sup>23</sup> GCSB’s customers comprise New Zealand government agencies, Ministers of the Crown and foreign intelligence partner agencies. They include NAB, MFAT, New Zealand Police, New Zealand’s Security Intelligence Service (NZSIS), DPMC, and New Zealand Defence Force.

- If and to the extent they may have necessary delegated authority, by the Officials Committee for Domestic and External Coordination (ODESC) or other officials.
43. There are several reasons for that necessity:
- Sections 8(1) of the then GCSB Act (and now sections 8 and 8B of the current GCSB Act) differentiate between the Government, which sets requirements, and individual Ministers and others, who receive intelligence as a result.
  - That distinction is consistent with the structure of responsible government, whereby Cabinet determines government policy collectively and is collectively responsible to Parliament for the overall conduct of government and Ministers are individually responsible to Parliament for the conduct of their departments. A corollary of individual Ministerial responsibility is that Ministers who wish to obtain information from, or the assistance of, a department other than the one for which they are responsible should do so through the relevant portfolio Minister.<sup>24</sup>
  - The overall direction of government policy has, over some period, emphasised whole-of-government determination of intelligence requirements and their relative priority.<sup>25</sup> Although, as above, the resulting standing requirements are not exhaustive, it follows that any decision to supplement those requirements is similarly to be made on a whole-of-government basis.
44. There are also good practical reasons for such decision-making:
- Ministerial involvement ensures compliance with the GCSB Act, under which the Minister is to authorise provision of GCSB reports to any recipient;
  - Decisions to undertake any new activity are likely to involve some reprioritisation of standing FIR work; and
  - Such decisions may introduce risks or sensitivities that require Cabinet or, at least, ministerial consideration.

*Whether a government requirement existed here*

45. The question is therefore whether the provision of foreign intelligence relevant to New Zealand's WTO campaign was, if not within the FIRs, nonetheless the subject of such a government decision.
46. I acknowledge that the Director was firm in his view that the Bureau's support for the campaign came squarely within the FIRs. He was also of the view that the support provided was clearly in response to a government requirement, even if it did not fit

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<sup>24</sup> Cabinet Manual, 2.21, 3.21 & 3.18.

<sup>25</sup> See the Murdoch and Wintringham reviews, both in 2009 note 66 below, proposing greater coordination and the discussion of cross-government determination foreign intelligence requirements in Controller and Auditor-General *Managing Threats to Domestic Security* (2003) p 55, paras 4.21-4.22

within the FIRs. He referred to the Cabinet Minute recording the decision to nominate Mr Groser and agreeing to government assistance being provided. In addition, the Director pointed out that Mr Groser's acceptance of the offer itself had been made by an "appropriately nominated member of the executive"<sup>26</sup> and the Bureau had kept a record of the meeting where this offer was made. In his view,<sup>27</sup> the decisions made with regard to supporting the campaign were legitimate, sensible, proportionate, lawful and consistent not only with government policy but with what a reasonable insider observer with access to all the material would regard as reasonable.

- 47. I accept that the Director considered he had sound reasons to consider the GCSB's provision of foreign intelligence relevant to New Zealand's WTO campaign as meeting a government intelligence requirement.
- 48. Separately from the Director's consideration, various GCSB staff involved in the provision of this foreign intelligence also considered the issue of whether the GCSB was responding to a government requirement and concluded it was. They knew from their contact with senior officials in the intelligence community that there was a high level of cross-government support for the WTO campaign.
- 49. I concluded that in the circumstances of this case, the assistance provided to New Zealand's WTO campaign met a government foreign intelligence requirement. The Cabinet Minute, the acceptance by MFAT of the high priority that should be given to this campaign, the cross-government concern about the effectiveness of the WTO especially as it impacted on New Zealand's economic well-being, and the acceptance by the wider NZIC of the provision of relevant intelligence by the GCSB on this matter, are factors that indicate the presence of a government requirement.

## **Findings**

- 50. The statutory objectives of the Bureau were sufficiently broad to cover the provision of foreign intelligence to support a New Zealand government minister's bid for leadership of an international, multi-lateral organisation, such as the WTO, which is significant for New Zealand's international well-being or economic well-being. The GCSB had reasonable grounds for accepting that the relevant foreign intelligence it provided contributed to "New Zealand's international well-being or economic well-being".<sup>28</sup> There was a Cabinet Minute agreeing to nominate Mr Groser for the position of WTO D-G and permitting the provision of government assistance to the campaign.
- 51. Provision of intelligence by the Bureau for such a purpose could have come within the New Zealand government's foreign intelligence requirements, whether by fitting within the formal FIRs or otherwise.<sup>29</sup> The GCSB's provision of foreign intelligence relevant to

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<sup>26</sup> The Director's second interview.

<sup>27</sup> The Director's second interview.

<sup>28</sup> GCSB Act, s 7(1)(a)(iii), prior to the amendments of 2013.

<sup>29</sup> GCSB Act, s 8, prior to the amendments of 2013.

New Zealand's WTO campaign related to the FIRs or another identified government requirement.

### **Recommendations**

52. At the time of the campaign there was no general policy or procedure for dealing with foreign intelligence requests that did not fit within the FIRs or NZIPs frameworks. I recommend for the future that there should be. That policy and procedure can encompass the range of decision-making processes that have been used, as in the examples given, or other new practices for the GCSB, DPMC and others to determine. The critical point is that there is a documented assessment that a request falls outside the frameworks and that there is a recorded government decision to accept that request as a government requirement, upon which the GCSB can then act. At a practical level, that is likely to require:
- An assessment, either by the GCSB alone or, in marginal or uncertain cases, by the GCSB in consultation with DPMC that a request falls outside the current NZIP framework which has superseded the FIR framework;
  - Where a request does fall outside the framework, referral of the request to the responsible Minister and/or ODESC, who may decide that the request can be accepted as a requirement or, alternatively, may consider it necessary to refer to Cabinet or to delegated ministers for decision; but
  - If an issue is already being addressed by a cross-government body – for example, where Cabinet or delegated ministers and/or officials are already dealing with a particular issue or incident – it may well be possible that the decision can be made by that body either specifically or as part an overall direction to government agencies.

### **Consideration of political neutrality and personal benefit**

#### *Political neutrality*

53. In 2012-2013, the GCSB was, as a government department, subject to the state sector *Standards of Integrity and Conduct* and to the underlying obligations of political neutrality applicable to the state sector.<sup>30</sup> As stated in the *Cabinet Manual*:

“Officials must perform their job professionally, without bias towards one political party or another. Employees in the state sector are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is a key element of impartial conduct.”

54. At the relevant time, the GCSB Act had not been amended to include additional duties imposed on the Director and Minister to ensure that the GCSB was not used for political

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<sup>30</sup> See *Standards of Integrity and Conduct* (2007); Cabinet Manual (2008) paras 3.50-3.51.

- purposes.<sup>31</sup> Nonetheless, the GCSB submitted in a letter to me that there were several ways in which the duty of political neutrality was reinforced.
55. One was the GCSB Code of Conduct, effective from May 2012, which forms part of the terms of employment for all GCSB staff. It stipulates that staff are required to “observe political neutrality in the performance of their duties.” This duty was reinforced by other provisions in the Code of Conduct and by the Code of Conduct for the State Services.
56. The GCSB Act also contributed indirectly to maintaining political neutrality, through provisions including:
- the prohibition in s 14 against intercepting the private communications of New Zealand citizens or permanent residents;
  - the alignment of the functions of the Bureau (s 8) with government requirements rather than the interests of political parties;
  - the authorisation process for ministerial warrants and authorisations which imposed checks and balances, including consultation with the Minister of Foreign Affairs; and
  - the provision for oversight which could discover political influence as a result of investigation by an oversight body.
57. As I detailed in a previous report,<sup>32</sup> the essence of the obligation of political neutrality is that an intelligence and security agency should not promote or damage the interests of particular political groups, use its intrusive powers to target lawful political activity, or act in a politically partisan way.
58. The Director did not see political neutrality as an issue to be concerned about in this case. He was aware that such nominations “enjoyed broad bipartisan support” and referred to the National Government’s support of the Rt Hon Mike Moore to the same position as an example of this.<sup>33</sup> Also both major political parties were supportive of the effective functioning of the WTO rules-based multilateral trade system<sup>34</sup> and would accept the value to New Zealand in having the WTO D-G position held by a New Zealander.

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<sup>31</sup> Section 8D was inserted by s 7 of the Government Communications Security Bureau Amendment Act 2013 (2013 No 57) on 26 September 2013. It imposed additional duties on the Director to ensure that GCSB is not used for political purposes.

<sup>32</sup> IGIS, *Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011* (25 November 2014).

<sup>33</sup> The Director’s first statement, para 9.

<sup>34</sup> The Director’s first statement, paras 6-9.

*Personal benefit to Mr Groser*

- 59. Mr Groser stood to benefit personally if selected as WTO D-G. The consensus view across all the GCSB, MFAT<sup>35</sup> and DPMC officials I interviewed, however, was that the personal professional benefit to Minister Groser if successful in his bid was irrelevant as it was clearly in New Zealand's interest to have a New Zealander of Mr Groser's experience and stature as WTO D-G and the GCSB's contribution to New Zealand's WTO campaign raised no issues of impropriety.
- 60. For the same reasons that he did not see political neutrality as an issue, the Director strongly refuted any suggestion that the element of personal professional benefit to Minister Groser was a relevant consideration in this case.

*Comment*

- 61. I could not find any partisan political purpose, or intention to promote the interests of a particular political group, on the part of the Director or the GCSB in providing foreign intelligence relevant to New Zealand's WTO campaign. The Director and senior government officials outside of the GCSB were persuaded that if the campaign was successful there would be significant benefit to New Zealand.
- 62. An element of personal professional benefit to a requester is not necessarily a basis for concluding the request is improper. In this case, there were reasons for the belief that there would be wider benefits for New Zealand if Mr Groser was successful.
- 63. Nevertheless, where GCSB activities may give rise to an element of personal benefit, I think the GCSB should document the consideration given to this aspect of a request. This is particularly important if the Bureau's activity does not require formal ministerial approval of a warrant or access authorisation, with the associated documentation of justifications and accountabilities.

**Finding**

- 64. There was no breach of political neutrality by the Bureau. Senior MFAT and DPMC officials assessed the bid for Mr Groser to become WTO D-G as being important and the economic benefit to New Zealand significant, if the campaign were successful, and the campaign had Cabinet support. The Bureau's offer of assistance was not a breach of political neutrality. While there may have been an element of personal professional benefit to Mr Groser, the GCSB was entitled to rely on the Government's endorsement of Mr Groser's candidature and did not act with politically partisan purpose or intent.

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<sup>35</sup> The Secretary of Foreign Affairs and Trade provided written assurance of MFAT's full cooperation with my inquiry. Accordingly, MFAT staff understood the need for full cooperation and candor in their interactions with the inquiry.

**Recommendation**

65. Where a customer's request for provision of foreign intelligence collection could be seen to or does raise any novel issue of legality or other significant sensitivity or concern, the Bureau should ensure that a record is made of how that issue has been addressed, for example by deciding to accept or not to accept the request or, in the case of issues arising in the course of any activity, to discontinue or modify that activity. To take two examples from the current inquiry, such occasions include circumstances where the requester could receive an element of personal professional benefit from GCSB activity or factors bearing on the GCSB's duty to maintain political neutrality.

**PART 3: GCSB PRACTICE IN 2012/2013 FOR THE RECEIPT AND CONSIDERATION OF FOREIGN INTELLIGENCE REQUESTS**

66. The next question is whether, as at late 2012/early 2013, the GCSB had decision-making procedures in place adequate to ensure that its foreign intelligence activity was lawful and consistent with policy and, further, whether the process followed in this instance was adequate. That required:
- 66.1. investigation of how the GCSB received and assessed requests for foreign intelligence; and
  - 66.2. investigation of how the GCSB came to undertake its focussed foreign intelligence gathering for New Zealand's WTO campaign.

**Receipt of foreign intelligence requests**

67. The GCSB received requests for the provision of foreign intelligence from a range of New Zealand government agencies, Ministers, and government agencies in partner countries. Ministerial requests were accorded high priority. The Minister responsible for the GCSB had the authority<sup>36</sup> to approve the sharing of foreign intelligence information with customers.
68. The GCSB had several policies to guide the collection, processing, retention, and dissemination of intelligence information. They were intended to ensure that the GCSB complied with the law, did not compromise the legitimate privacy interests of New Zealanders and followed the rules of partners in relation to the privacy of their citizens and permanent residents.
69. Most new foreign intelligence requests in 2012-2013 came from customers to the Outreach Unit (Outreach) through a customer relations officer or by letter.<sup>37</sup> Outreach had direct and frequent interactions with customers to gauge whether their requirements for information had changed and to assist in refining their foreign intelligence requests.

**Initial assessments**

70. Upon receipt of a request for foreign intelligence, the Outreach Manager was responsible for determining whether the request was valid. This included considering whether the requested information related to the GCSB's statutory function of gathering foreign intelligence; whether the customer had a legal mandate to request the information; whether it related to a FIR and if there was any risk of inadvertently collecting a New Zealander's private communications. The Outreach Manager would seek legal advice as

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<sup>36</sup> GCSB Act, s 8(1)(d).

<sup>37</sup> Kitteridge, *Review of Compliance at the Government Communications Security Bureau* (March 2013) (Kitteridge Report) noted (at para 57) the lack, at the time, of a uniform process by which domestic customers made requests for information and requests for assistance. The report explained that requests could arrive in a range of ways and there was no consistent procedure that applied to them although, at that time, Outreach had begun the process of trialing a template request form.

- needed. Outreach was also responsible for the nationality checks required in respect of GCSB work.
71. Once the relevant FIR was identified, the customer request would be considered against the associated FIR guidance about priority. The FIR guidance was not determinative: a customer's argument for increasing the level of priority might be accepted.
  72. Policy governing foreign intelligence collection did not require a record of which FIR(s) supported a decision to begin collection. There was however a policy that required any foreign intelligence report to refer to a relevant FIR and its associated priority. This was intended to enable GCSB employees to connect the output with the Bureau's overarching requirements, as decided by the intelligence community, customers and the Intelligence Co-ordination Group within DPMC.<sup>38</sup>
  73. Once Outreach had determined that the request was valid, it would be passed to an operational manager for further assessment. Where a request related to work already underway, the Outreach Manager and the relevant operational manager could refocus the work to meet the customer requirement.
  74. New requests would typically be discussed with senior managers, considering what resources would be required, what capabilities were available, the impact on current business, the need for authorisations, the extent to which the request met a FIR, the priority accorded to the FIR and any particular case made by the customer for priority. The GCSB also referred to an internal table of priorities informed by the FIRs and NZIPs, engagement with customers and the National Assessments Committee.<sup>39</sup> National Assessments Committee meetings provided one way for the GCSB to check that its work priorities were in line with what Ministers and Government agencies required.

### **Risk assessments**

75. Risk assessment covered relationship risks (which could arise with Five Eyes partners or New Zealand customers, including Ministers) business risks, operational risks, legal risks and risks of disclosure. These also involved ensuring that nationality restrictions applying to the private communications of New Zealand citizens and permanent residents and similar Five Eyes and other restrictions were met. Risk/benefit assessments were considered at an operational level or escalated to senior management for consideration if necessary.<sup>40</sup>

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<sup>38</sup> PP-2012, para 5.

<sup>39</sup> It stated that: "This table of priorities reflects the effort and resources applied to work against these targets across the SIGINT Directorate. This list will be reviewed monthly or in response to a significant change in requirements."

<sup>40</sup> The description of risk assessment given here is a summary of information gathered from interviews.

### **Comment**

76. There was not, at the time of the WTO campaign, a standardised practice that captured the manner in which customer requests for foreign intelligence were managed within the Bureau and the decisions made. Some of these shortcomings were referred to in the Kitteridge Report and were subsequently addressed by the GCSB.
77. However, and while there was no standardised practice, there was a considered process (although it was not particularly well defined or adequately documented) for managing the Bureau's foreign intelligence activity at the operational level. It was highly dependent on the professional competence and collegial, rather than formal, working relationships between managers at the operational level in the GCSB. The Bureau depended on the collective experience of its managers to deal with difficult questions arising from customer requests. The managers also had regular discussions about prioritisation as there was an on going need to consider what resources could be allocated to non-routine work.
78. I am satisfied that when customer requests for foreign intelligence information were assessed by GCSB managers, including senior managers where necessary, a series of checks and balances applied as significant corporate experience was brought into play. Managers maintained and used their links with National Assessments Committee and DPMC when external validation of a customer request as a government requirement was required. Managers took seriously the role of the FIRs in guiding priorities, resource allocation and decisions about Bureau foreign intelligence activity.
79. While there was no clear centralised record of customer requests, there was evidence of record keeping at the operational level. Unfortunately, records kept by different parts of the Bureau were not linked to provide an easily accessible and coherent record of the consideration given to particular decisions.

### **Decision process for provision of foreign intelligence relevant to New Zealand's WTO campaign**

80. The processing of the foreign intelligence requirement for intelligence relevant to New Zealand's WTO campaign was unusual, in that the Director directly offered assistance and passed the resulting request to an operational manager without it being discussed first with Outreach staff or senior managers. It was rare (although not unprecedented) for the Director to meet the Prime Minister or other Ministers and officials to discuss their foreign intelligence information requirements and relay that back to the Bureau for action.
81. The Director was mindful of the importance of being useful and relevant to customer agencies. He saw his approach to the Minister as relationship management.<sup>41</sup>

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<sup>41</sup> The Director's first interview.

*Internal planning*

- 82. While no record was made of the internal management process carried out by GCSB staff, I am satisfied on the basis of the evidence provided in interviews that there was an adequately managed process in this instance.
- 83. I am satisfied that provision of foreign intelligence relevant to New Zealand's WTO campaign was properly authorised in terms of the GCSB Act.

*Risk assessment*

- 84. I am satisfied that the GCSB carried out an assessment of the risks and benefits of providing foreign intelligence relevant to New Zealand's WTO campaign. The Director explained at interview the factors he took into account in his risk assessment.<sup>42</sup>
- 85. GCSB staff also managed risk in accordance with standard procedures at the time. Compliance issues were managed by analysts and their managers. The records kept at the time demonstrate that attention was paid to relevant New Zealand rules.

*Provision of foreign intelligence*

- 86. The GCSB provided foreign intelligence relevant to New Zealand's WTO campaign in the later part of January 2013 until Friday 26 April 2013, when it became known that Mr Groser had not been selected for the third round of the WTO D-G appointment process.

*Internal oversight*

- 87. The Director stated that his personal involvement in this matter ceased after the 28 November 2012 meeting with Mr Groser. He recalled no further formal discussions with Mr Groser about it. He was aware that the GCSB was providing the Minister's office with relevant material. He thought that progress on the campaign might have been reported at his morning meetings with the senior management team. No records were kept of these and other senior management meetings so it is not possible to evaluate what, if any, reporting up occurred. Relevant managers were aware that the GCSB was providing foreign intelligence relevant to New Zealand's WTO campaign, accepted that the activity came within the FIRs, and saw nothing unusual about it.

*External oversight*

- 88. The Directors of the GCSB and the NZSIS and the Directors of the Intelligence Coordination Group and the National Assessments Bureau met on a weekly basis to discuss any current technical, operational or policy issues or new priority issues of note. The Director received regular briefings about the provision of intelligence related to New Zealand's WTO campaign. He was sure that he would have informed the Director of the Intelligence Coordination Group and the Secretary of Foreign Affairs of progress. They also received the weekly intelligence summaries written for Ministers and senior officials.

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<sup>42</sup> The Director's first statement, para 29 and the Director's first interview.

He thought he had, at least once, discussed it with the Prime Minister (then the Minister responsible for the Bureau).<sup>43</sup> In any event, the Prime Minister received weekly intelligence briefings from DPMC which included reference to the foreign intelligence provided by the GCSB relevant to New Zealand's WTO campaign.

#### **Comment**

89. The weakness in the GCSB process for considering foreign intelligence decisions at the time of the WTO campaign was that there was no set documented practice for assessing new requests. The usual practice relied heavily on working relationships between senior managers and managers. The process in this case was unusual in that the Director directly offered assistance and passed the resulting request to an operational manager without it being discussed first with Outreach staff or senior managers.
90. However, managers who were responsible for providing the relevant foreign intelligence did follow the established but undocumented procedure of submitting the proposal to a series of assessment questions.
91. Nonetheless a written record of the assessments carried out would have provided a better basis for a review of the decision-making at the time.

#### **Finding**

92. In 2012-2013, there were informal but robust practices for the managing and evaluation of new requests from customers for foreign intelligence information. GCSB had in place practices and process to identify whether requests for foreign intelligence were within its statutory objectives and functions and were government foreign intelligence requirements. The GCSB also had in place practices and process which provided for the assessment of the benefits and risks of foreign intelligence activity including risk to the GCSB's political neutrality. The particular circumstances of this case meant that those practices/process were not rigorously followed, but that did not ultimately mean the activity was unlawful or outside government requirements.

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<sup>43</sup> The Director's first statement, para 15.

**PART 4: CURRENT GCSB PROCESSES FOR RECEIVING, ANALYSING AND EXECUTING REQUESTS FOR FOREIGN INTELLIGENCE**

93. The last question for this inquiry concerns the adequacy of current GCSB procedure for intelligence decision-making, compared to 2012/2013.

**Legislative and policy framework**

94. Amendments to the GCSB Act 2003 in 2013:
- 94.1. simplified the statement of the Bureau's objective in s 7;
  - 94.2. replaced the statement of the Bureau's functions in s 8 with specific sections (ss 8A, 8B and 8C) on the core functions of the Bureau (information assurance and cybersecurity, intelligence gathering and analysis, and cooperation with other entities); and
  - 94.3. introduced a new section (s 8D) setting out principles underpinning performance of Bureau's functions, including requirements of independence, impartiality, integrity, professionalism and political neutrality.
95. In terms of statutory authorisations, the 2013 Act retained interception warrants and s 16 authorisations<sup>44</sup> but replaced the category for computer access authorisations with access authorisations to information infrastructures. In the case of interception warrants and access authorisations, the GCSB Act (as amended) prescribes a process for the Minister and, in certain cases, the Commissioner of Security Warrants, to follow which involves evaluating the necessity and the risks and benefits of issuing a requested warrant or access authorisation.
96. The prohibition against targeting New Zealanders' private communications in s 14 of the GCSB Act was amended to clarify that this prohibition applied to activities under the GCSB's section 8B functions (ie its foreign intelligence collection). This applies to activities conducted under a warrant or access authorisation and also those not requiring a formal authorisation.
97. Since 2013, there have been changes to the DESC system. It was restructured in order to better manage national security issues and emergencies. Three new governance boards are now collectively responsible for performance across the national security and resilience<sup>45</sup> sector. The ODESC Security and Intelligence Board is the chief executive forum which provides advice to the Cabinet National Security Committee about the

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<sup>44</sup> These are known as Director's authorisations.

<sup>45</sup> "Resilience" is the ability of a system to respond and recover from an event (whether potential or actual). See DPMC, *National Security System Handbook*, (August 2016).

- security and intelligence sector and is responsible for the implementation of Cabinet decisions.<sup>46</sup>
98. DPMC implemented further organisational change to enhance its leadership and coordination roles within the NZIC. In January 2014, it established a new Security and Intelligence Group (S & I) and discontinued the Intelligence Coordination Group and the Security and Risk Group within DPMC.
  99. Building on previous work,<sup>47</sup> DPMC identified the security priorities that are most important for the Government of New Zealand. The NZIPs were refreshed in 2015 and endorsed by the National Security Committee in September 2015. These were developed within the context of an extensive consultation process, a new framework providing criteria for identifying intelligence priorities and Ministerial direction about their expectations for delivery within the intelligence sector.
  100. The NZIPs have now superseded the FIRs as guidance for the NZIC.
  101. Alongside the creation of the 2015 NZIPs, a comprehensive framework (Intelligence Prioritisation Framework) for setting and renewing the NZIPs annually was developed. This was implemented during 2016. The framework is structured to enable Ministers to have regular input to the review of intelligence priorities. As a result, the NZIPs were further reviewed and adjusted by Cabinet in August 2016. This process has the effect of ensuring that decisions about national intelligence priorities are made at the appropriate level.
  102. The framework is also intended to ensure that there is careful management of the link between foreign intelligence collection requirements and priorities. A sub-committee of the ODESC Security and Intelligence Board, the National Intelligence Coordination Committee (NICC), has replaced the National Assessments Committee and will coordinate the development of assessments and collection requirements and it will report on delivery as against the NZIPs. The intention is that DPMC will lead NICC agencies, on an annual basis, to review the NZIPs and make submissions accordingly to ODESC Security and Intelligence Board. If approved, the proposed priorities will be put to the Cabinet ministers of the National Security Committee for their decision.
  103. A performance framework is being developed for each of the priorities.
  104. The NZIPs are intended to be sufficiently general (similar to the FIR themes) to be enduring but provide meaningful guidance. Intelligence priorities are categorised as high, medium or low. Key questions are being developed for each priority area to provide guidance for operational decisions on intelligence activity. It is clear from interviews

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<sup>46</sup> Membership of the Security and Intelligence Board comprises: the Chief Executives of DPMC, GCSB, MFAT, Ministry of Defence, New Zealand Customs, New Zealand Defence Force, New Zealand Police and NZSIS. The Board is chaired by the Deputy Chief Executive Security and Intelligence, DPMC.

<sup>47</sup> DPMC *National Security System* (2011), *Draft National Security & Resilience Plan* (2013).

conducted with GCSB staff that their work is being organised by managers to align with these priorities.

#### **Current GCSB practice in determining foreign intelligence requests**

105. The GCSB did substantial work, following the Kitteridge Report and the 2013 amendments to the GCSB Act, to develop a robust compliance framework. This is supported by a range of new operational policies which are more demanding in terms of record keeping. Target and research plans<sup>48</sup> are used to ensure that the Bureau meets its statutory obligations when carrying out its foreign intelligence functions. A target plan will govern GCSB's generation of foreign intelligence in relation to a specific foreign intelligence project or subject area. If the purpose of a target plan is to gather foreign intelligence about the capabilities, intentions and activities of a foreign person or organisation,<sup>49</sup> it must make an explicit link with relevant New Zealand Government requirements for intelligence. This is now done by reference to the NZIPs.
106. A target plan sets out reasons for intended foreign intelligence activities, links them to a foreign intelligence purpose; assesses the risk that private New Zealand communications might be encountered during the course of those activities and outlines strategies to manage and respond to the risk.
107. While the responsibility for the target plan rests with the manager of the relevant operational team, the Compliance Manager is the approval authority for the intelligence purpose which directs the activities outlined in the plan. This provides an additional check that the activity proposed relates to a government foreign intelligence requirement.
108. There now must be a written record of customer requests for foreign intelligence information. Most requests for foreign intelligence information fall under existing target plans and go direct to the operational manager responsible for the relevant target plan. The Outreach Manager deals with new customer requests.
109. The key policy procedures governing requests for foreign intelligence information require that no customer request is actioned without prior risk assessment; effort is not duplicated through unnecessarily re-assessing risk; and all requests are appropriately authorised prior to taking action.

#### **Requests that align with target plans**

110. A customer request for foreign intelligence which corresponds directly to current operational activity and is within the parameters of an existing target plan will be considered against the priorities set out in the NZIPs. If it does not fit within one of the high priority groups, it is unlikely to be progressed without additional direct guidance

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<sup>48</sup> Target Plans relate to activity carried out under s 8B(1)(a) of the GCSB Act and Research Plans relate to activity carried out under s 8B(1)(b) of the GCSB Act.

<sup>49</sup> GCSB Act, s 8B(a).

from the customer. A request may be declined on the grounds of insufficient resourcing, capability or priority. Whether approved or declined a record is kept and the customer informed.

111. As previously discussed, government foreign intelligence requirements are not confined solely to those previously expressed in FIRs or now the NZIPs. There is clearly a “layered” approach to articulating government foreign intelligence requirements, ranging from very broad high level to particular questions as set out in subordinate documents. Usually specific customer requests from government agencies and Ministers amount to refinements of the high level requirements. If the request does not align with an existing target plan or it is novel (in that it does not fall within a NZIP) it will be assessed as a new request and processed through the Outreach.

#### *Risk assessment and management*

112. A target plan includes an analysis of the likelihood and possible impact of inadvertent interception of the communications of a New Zealand person.<sup>50</sup> Factors considered in assessing possible impact include whether inadvertent interception could be seen as reasonably preventable; the scale, duration, and level of intrusiveness; and the nature of any subsequent intelligence production and dissemination.<sup>51</sup> This assessment of likelihood and impact informs a risk reduction strategy with ‘red flag’ indicators for analysts and directions on what to do when one is encountered.
113. Information from nationality checks, carried out by Outreach, is recorded separately. The record sets out the initial basis for believing a target is not a New Zealand person. Any subsequent issues are also recorded. Analysts and their supervisors are required to check nationality before commencing work. If it is discovered that a target is a New Zealand person, targeting stops, the date it ceases is recorded<sup>52</sup> and the matter is reported to the GCSB compliance team and, if necessary, remedial steps are taken.
114. In March 2013, the Kitteridge review of GCSB compliance recommended that there should be documented consideration of the foreign intelligence requirements whenever intelligence was gathered:<sup>53</sup>

“For example, by law foreign intelligence must be gathered in accordance with the foreign intelligence requirements. Those requirements should be properly considered and documented either electronically or on paper. It is not sufficient to copy the text of foreign intelligence requirement justifications. The system should require analysts to address their minds to this point in free text.”

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<sup>50</sup> A New Zealand citizen or permanent resident.

<sup>51</sup> The meaning of these risk descriptors are taken from Target Plans provided by GCSB.

<sup>52</sup> The date targeting ceases is based on a best guess as it is very difficult to ascertain the date with certainty.

<sup>53</sup> The Kitteridge report at para 57.c.

*New activities*

- 115. If a customer request for foreign intelligence is not within the parameters of an existing target plan, or has been accepted under a plan but then identified as higher risk than originally thought, it is assessed as a new activity. This can also apply to an urgent request or one in an area for which a target plan is under development.
- 116. Outreach requires the customer to provide any information known on an individual target's nationality and location, any known selectors,<sup>54</sup> the type of information sought, and a justification (in free text) that includes the purpose, reasons and the legal basis for the request. The customer must answer whether the information sought is obtainable by any other means and specify a level of priority for the request and a justification for this. The details of the request are recorded.
- 117. The request will be allocated a serial number and this will be notified to the customer. The request and its number are entered into the customer register which records each request, its date, number, the type of information sought, the requestor, the request's status, whether the request is approved or not and brief identifying details about the content of the request.
- 118. Outreach assesses the validity of the request in light of the Bureau's statutory objectives and functions; whether the requester has a legal mandate for requesting the particular information; whether the private communications of any New Zealand person will be intercepted; and whether the request corresponds to a NZIP.
- 119. As part of the approval process, Outreach will carry out a nationality check to ensure compliance with s 14 of the GCSB Act. The customer request form will be annotated with the outcome of the check. When necessary, the Outreach will consult with the Bureau's lawyers or compliance staff. Where this occurs or particular issues or risks have been identified, approval for the activity must be obtained from the Assistant Director and sometimes the Deputy Director of Intelligence.
- 120. A written record is kept of the assessment of a request. Although the approval confirms that the request meets legal and policy requirements for foreign intelligence, the procedure does not require a record of which NZIP is identified as supporting an approved request.

*Operational assessment*

- 121. An approved request is referred within the GCSB for operational assessment to determine whether there are sufficient resources and capabilities to carry it out. This results in an operational plan setting out the parameters of the work.

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A selector is an identifier such as a telephone number that can be targeted for interception.

### **Political neutrality**

122. In a letter to me, the GCSB suggested the risk to political neutrality might arise in two principal areas: improper external influence for party political purposes and unprofessional conduct on the part of GCSB senior management or staff in pursuit of political interests. It suggested the safeguards against this include the requirements of the State Sector Act 1988, the duty on the Director under the GCSB Act to ensure that the Bureau is not used for political purposes,<sup>55</sup> the Bureau's Code of Conduct, its adherence to its statutory functions, its internal policy on nationality, the discipline of target and research plans, and ministerial and political oversight. The GCSB also expressed the expectation that if any staff member became concerned about political influence, that person would voice those concerns either through the management chain or directly to the Inspector-General of Intelligence and Security through a protected disclosure.<sup>56</sup> Staff could also raise an issue of political neutrality through a Bureau process for checking the sensitivity of particular reporting.

### **Comment in relation to current practices for the receipt of a foreign intelligence request**

123. In my view, in addition to the process of formal ministerial authorisations, the risk to neutrality is most effectively mitigated by ensuring that there is adequate assessment and recording of the link between GCSB activity and a government intelligence requirement. I think there could be a better record kept, for new activities, so that the choice of a NZIP is more firmly entrenched as part of the standard process of assessing such requests. The Bureau should record the appropriate NZIP together with a record of any decision taken in situations where there has been consultation about the link between a request and a government intelligence requirement. If there is any uncertainty, there should be a record of who was consulted about the matter and the steps taken to resolve that uncertainty.
124. Since 2013, the current wider NZIC framework within which the GCSB operates and the associated accountabilities of that framework, the material improvements in processing and documenting foreign intelligence requests and the monitoring of compliance standards, have contributed to a more robust system of checks and balances for the use of the GCSB's intrusive capabilities in a manner which is consistent with its legal obligations and the need for it to act with propriety.

### **Finding**

125. There is now in place a standardised process for receiving and assessing new requests from the GCSB's customers which provides greater transparency of the decision-making processes.

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<sup>55</sup> GCSB Act, s 8D.

<sup>56</sup> GCSB has been reviewing its policy on protected disclosures and is developing a revised policy for the Intelligence community as a whole.

**Recommendation**

126. In regard to the GCSB's current practice, I recommend one further modification:

126.1. Where a customer makes a new request for the provision of foreign intelligence, the proposed government intelligence requirement is recorded on the customer request form along with reasons for the identification of that requirement.

## PART 5: FINDINGS AND RECOMMENDATIONS OF THIS REPORT

### Findings

127. My findings can be summarised as follows:

- 127.1. The statutory objectives of the Bureau (then and now) are sufficiently broad to cover the collection of foreign intelligence to support a New Zealand government minister's bid for leadership of an international, multi-lateral organisation, such as the WTO, which is significant for New Zealand's international well-being or economic well-being. The GCSB had reasonable grounds for accepting that the relevant foreign intelligence it provided contributed to "New Zealand's international well-being or economic well-being.<sup>57</sup> There was a Cabinet Minute agreeing to nominate Mr Groser for the position of WTO D-G and permitting the provision of government assistance to the campaign.
- 127.2. Provision of intelligence by the Bureau for such a purpose came within the New Zealand government's foreign intelligence requirements, whether by fitting within the formal FIRs or otherwise.<sup>58</sup> The GCSB's provision of foreign intelligence relevant to New Zealand's WTO campaign related to the FIRs or another identified government requirement.
- 127.3. There was no breach of political neutrality by the Bureau. Senior MFAT and DPMC officials assessed the bid for Mr Groser to become WTO D-G as being important and the economic benefit to New Zealand significant, if the campaign were successful. The Bureau's offer of assistance was not a breach of political neutrality. The campaign was also endorsed by Cabinet. While there may have been an element of personal professional benefit to Mr Groser, the GCSB was entitled to rely on the government's endorsement of Mr Groser's candidature and did not act with politically partisan purpose or intent.
- 127.4. In 2012-2013, there were informal but robust practices for the managing and evaluation of new requests from customers for foreign intelligence information. The GCSB had in place practices and process to identify whether requests for foreign intelligence were within its statutory objectives and functions and were government foreign intelligence requirements. The GCSB also had in place practices and process which provided for the assessment of the benefits and risks of foreign intelligence activity including risk to the GCSB's political neutrality. The particular circumstances of this case meant that those practices/process were not rigorously followed, but that did not ultimately mean the activity was unlawful or outside government requirements.

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<sup>57</sup> GCSB Act, s 7(1)(a)(iii), prior to the amendments of 2013.

<sup>58</sup> GCSB Act, s 8, prior to the amendments of 2013.

127.5. There is now in place a standardised process for receiving and assessing new requests from the GCSB's customers which provides greater transparency of the decision-making processes.

### **Recommendations**

128. In regard to the GCSB's current practice, I recommend three modifications:

128.1. In respect of a new customer request to the GCSB for foreign intelligence assistance, the proposed government intelligence requirement is recorded on the customer request form along with reasons for the identification of that requirement.

128.2. Where a customer's request for the provision of foreign intelligence could be seen to or does raise any novel issue of legality or other significant sensitivity or concern, the Bureau should ensure that a record is made of how that issue has been addressed, for example by deciding to accept or not to accept the request or, in the case of issues arising in the course of collection, to discontinue or modify that collection. Such occasions include circumstances where the requester could receive an element of personal professional benefit from Bureau activity or factors bearing on the GCSB's duty to maintain political neutrality.

128.3. Policy and procedure is developed for dealing with foreign intelligence requests that do not fit within the NZIP framework. The new policy and procedure can encompass the range of decision-making processes that have been used, as in the examples given, or other new practices for the GCSB, DPMC and others to determine. The critical point is that there is a documented assessment that a request falls outside the frameworks and that there is a recorded government decision to accept that request as a government requirement, upon which the GCSB can then act. At a practical level, that is likely to require:

- an assessment, either by the GCSB alone or, in marginal or uncertain cases, by the GCSB in consultation with DPMC that a request falls outside the NZIP framework;
- where a request does fall outside the framework, referral of the request to the responsible Minister and/or ODESC, who may decide that the request can be accepted as a requirement or, alternatively, may consider it necessary to refer to Cabinet or to delegated ministers for decision; but
- if an issue is already being addressed by a cross-government body – for example, where Cabinet or delegated ministers and/or officials are already dealing with a particular issue or incident – it may well be possible that the decision can be made by that body either specifically or as part an overall direction to government agencies.

**APPENDIX A****Andrew Little's complaint letter**

24 March 2015

Cheryl Gwyn  
 Inspector-General of Intelligence and Security  
 PO Box 5609  
 Wellington 6145

Email: [Cheryl.gwyn@iis.govt.nz](mailto:Cheryl.gwyn@iis.govt.nz)

Dear Ms Gwyn,

I am writing to ask you to investigate recent revelations that the Government Communications Security Bureau used its intelligence tools to intercept data from foreign government officials in an attempt to assist Minister Tim Groser in his bid to become Director-General of the World Trade Organisation.

The document released by the New Zealand Herald appears that show that the GCSB used the XKeyscore system to search for communications relating to Mr Groser and other applicants in their bids for the Director-Generalship.

Mr Groser was, and remains, a government minister when this activity took place but the role he was bidding for would not have been as a representative of the New Zealand Government. The Director-General of the WTO is expected to be strictly neutral between state parties.

I do not see how Mr Groser's bid for a new job can fall within the GCSB's three objectives:

- a) the national security of New Zealand; and
- (b) the international relations and well-being of New Zealand; and
- (c) the economic well-being of New Zealand.

The GCSB has an important role to play in protecting and enhancing New Zealand's security, well-being, and economic interests. New Zealanders and our international partners must have confidence that it is fulfilling that role and not stepping beyond it. It is not appropriate for its resources to be diverted to assisting the private interests of a Minister of the Crown.

.../2

2.

I believe this is an issue of sufficient importance to warrant an investigation by you to reassure New Zealanders and our international partners that the GCSB is acting within the law and within the scope of its intended role, and to recommend steps to prevent future inappropriate actions.

I would appreciate the opportunity to discuss this issue further with you.

Yours sincerely,

  
 Andrew Little, MP  
 Leader of the Opposition

## APPENDIX B – INQUIRY PROCESS

### Public concern

1. When this issue first arose publicly in March 2015, there was considerable public comment and speculation, including:
  - Whether any assistance provided by GCSB to the government campaign was within GCSB's objectives<sup>59</sup> and therefore lawful;
  - Whether, even if lawful, such assistance was a proper use of GCSB's resources;
  - The importance to New Zealand's economic well-being of having an effectively functioning WTO and the significance of the identity of the Director-General in realising the ideals of the WTO and the establishment of a free and fair global trading environment;
  - Recognition of Mr Groser's expertise and experience in international trade negotiations and his suitability for the role of Director-General; and
  - Conversely, whether the nomination of Mr Groser and GCSB assistance to the New Zealand Government's campaign, could be justified given that the Director-General acts in the interests of all WTO members, rather than in the interests of his or her home country alone.

### Terms of reference and jurisdiction

2. On 24 March 2015, I received a complaint<sup>60</sup> from Andrew Little MP, Leader of the Opposition.<sup>60</sup> Under s 11(1)(b)(i) of the IGIS Act, I have jurisdiction to inquire into a complaint by a New Zealand person who has or may have been adversely affected by an act, omission, practice, policy, or procedure of an intelligence and security agency. I concluded that Mr Little's complaint did not demonstrate adverse effect. However, I was satisfied that there was a sufficient public interest justifying the commencement of an own-motion inquiry into the legality and propriety of the actions raised.
3. On 22 April 2015, as required by s 19(1)(a) of the Inspector-General of Intelligence and Security Act 1996 (IGIS Act), I advised the Director of the GCSB that I had initiated an inquiry under s 11(1)(a) and (ca) of the Act and that the inquiry would consider the following questions:
  - how GCSB determines whether proposed foreign intelligence activity falls within its statutory functions and within New Zealand's particular intelligence requirements;
  - whether and how GCSB assesses the benefits and risks of the proposed activity;
  - where there may be any issue of potential or perceived political advantage, how GCSB identifies and manages any issue that may arise from its duty of political neutrality; and
  - how GCSB keeps the responsible Minister(s) and the Commissioner of Security Warrants informed, and ensures ministerial oversight, particularly where the proposed activity

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<sup>59</sup> New Zealand's national security, its international relations and well-being, and its economic well-being.

<sup>60</sup> See Appendix A.

involves a potentially contested assessment of the international relations and well-being and/or the economic well-being of New Zealand.

4. On 22 April 2015, I also advised the Minister Responsible for the Bureau, Hon Christopher Finlayson QC, that I had commenced the inquiry. Following initial consultations I announced the inquiry publicly on 14 May 2015.
5. Jurisdiction for the inquiry is contained in s 11 of the IGIS Act. Under s 11(1)(a) I may, of my own motion, inquire into “any matter that relates to the compliance by an intelligence and security agency with the law of New Zealand”. Under s 11(1)(ca) I may, of my own motion, inquire into “the propriety of particular activities of an intelligence and security agency”. The jurisdiction in respect of propriety is qualified by s 11(3), which states that “it shall not be a function of the Inspector-General to inquire into [the propriety of] any action taken by the Minister [Responsible for the GCSB]”.
6. I have established a non-exhaustive list of criteria for deciding whether to commence an own motion inquiry. The factors I consider include:
  - Does the matter relate to a systemic issue?
  - Are a large number of people affected by the issue?
  - Does it raise a matter of significant public interest?
  - Would the issue benefit from the use of formal interviews and other powers that are available in the context of an inquiry?
  - Are recommendations required to improve agency processes?
  - Is it the best use of my office’s resources?
7. I have had the full cooperation in carrying out the inquiry of the Hon Tim Groser, former GCSB Director, Mr Ian Fletcher, acting Directors, Ms Una Jagose and Ms Lisa Fong, the current Director, Mr Andrew Hampton, and current and former GCSB, MFAT and DPMC staff. Under the IGIS Act, I have powers to access all relevant records held by the GCSB and I have used those powers in this inquiry.

### **Procedure**

8. On 22 April 2015, I wrote to the then GCSB Director, Una Jagose, requiring her to provide the following information:
  - an explanation of how the Government provides requests for intelligence to the Bureau and copies of any relevant policies and procedures;
  - an explanation of how the Bureau determines that a requested activity is related to the discharge of its function(s) and copies of any relevant policies and procedures;
  - an explanation of how the Bureau determines what priority to give to a request for intelligence and copies of any relevant policies and procedures;

- an evaluation of the risks to the Bureau's duty of political neutrality and an explanation of the steps taken by the Bureau to limit and mitigate those risks;
  - an explanation of how any decision to provide foreign intelligence relevant to New Zealand's WTO campaign complied with the Bureau's policies and processes as described in the foregoing explanations requested; and
  - all hardcopy and electronic information and files relating to the provision of foreign intelligence relevant to New Zealand's WTO campaign.
9. GCSB responded with a series of detailed reports and documentation dated 3 June, 2 July and 3 July 2015. It also provided further contextual information as required. In addition, my inquiry team had access to GCSB's electronic repositories of information and was able to conduct its own searches for relevant information. I obtained documents from MFAT and some witnesses also produced documentation at or after their interviews.
10. I interviewed 15 people, including Mr Groser, Mr Fletcher and both past and current staff from GCSB, MFAT and DPMC. The interviews were conducted by me, the Deputy Inspector-General Ben Keith and a Senior Investigating Officer in my office. The interviews were necessary as there was little documentation available to help explain, in general terms, how GCSB determined its foreign intelligence activity at the time of New Zealand's WTO campaign and how, specifically, GCSB came to provide foreign intelligence relevant to the New Zealand campaign.
11. I wrote to each interviewee asking them to attend an interview and I enclosed an information sheet, setting out the purpose and scope of the GCSB staff interviews, outlining the protections for those giving evidence and explaining the right to obtain legal advice or representation at any point during the interview process. I was also available to meet with GCSB staff before the interviews to discuss the process questions. I therefore met with some staff, initially identified for interview, to explain the inquiry's process and to answer questions.
12. As some interviewees did not have a current security clearance and it was necessary to discuss classified material with them, I required them to sign a Deed for Special Access to Protectively Marked Material.
13. I provided the current Director with a draft report and offered him the opportunity to make submissions to me about matters of which I was likely to be expressly or impliedly critical and to comment on my draft report and recommendations, in accordance with s 19(7) of the IGIS Act.
14. I have also provided witnesses, whether or not they might be adversely affected by the report, with relevant parts of the draft report and offered each of them the opportunity to correct matters of fact and make any comment, in accordance with s19(7) of the IGIS Act.
15. I had regard to comments provided by those witnesses in finalising this report.

## APPENDIX C

### Domestic and External Security Coordination (DESC) system up to 2014<sup>61</sup>

1. Both the previous and current Foreign Intelligence Requirements (FIRs) were developed within what was known as the Domestic and External Security Coordination (DESC) system that, since 1987, has provided a structure for dealing with national security issues requiring ministerial direction and a whole-of-government approach.<sup>62</sup> This structure has been subject to iterative development over the decades. Within this system, various committees of officials and government ministers provided oversight and coordination of the New Zealand Intelligence Community (NZIC).<sup>63</sup>
2. At the highest strategic and political level, the FIRs were endorsed by the Cabinet Committee on Domestic and External Security Co-ordination (DES), now called the National Security Cabinet Committee (NSC).<sup>64</sup> DES, which was chaired by the Prime Minister, was “the key decision-making body of executive government in respect of all issues involving security, intelligence and crisis management.”<sup>65</sup>
3. Sitting under DES was the Officials Committee for Domestic and External Security Coordination (ODESC) which directed the development of the FIRs in place at the time of New Zealand’s WTO campaign. This is a high level committee which, in 2010, functioned as an inter-agency forum of central government chief executives to ensure “... that Ministers and the DES receive coordinated advice from senior officials on security issues.”<sup>66</sup> It was administered and chaired by DPMC.
4. This framework was substantially revised in the years following the implementation of the current FIRs in 2010. As these changes were relevant at the time of New Zealand’s WTO campaign and have impacted on subsequent developments, a brief outline of the changes is provided below. The changes to the DESC system were instigated by reviews<sup>67</sup> of the intelligence and security agencies in 2009. These resulted in Cabinet approving changes to ODESC’s membership, structure and functions in order to achieve, among other things,

<sup>61</sup> Since 2014, further significant development has occurred in the governance and management of the National Security System. The new structures are described in DPMC’s *National Security System Handbook*, (August 2016) and some of the developments as they relate to the intelligence and security agencies are referred to in the body of this report.

<sup>62</sup> DPMC, *New Zealand’s National Security System* (May 2011) p 7.

<sup>63</sup> The core NZIC is made up of GCSB, NZSIS and the National Assessments Bureau (NAB). NAB is part of DPMC’s Intelligence & Assessment directorate. The wider NZIC includes the Directorate of Defence Intelligence and Security (DDIS), Police, Customs, Immigration, the Ministry of Primary Industries and the MFAT.

<sup>64</sup> NSC is chaired by the Prime Minister who is the Minister of National Security and Intelligence. It includes the Ministers of Finance, Defence, Economic Development, Communications, Attorney-General/the intelligence and security agencies, Foreign Affairs, Police and Immigration.

<sup>65</sup> DPMC, *“New Zealand’s National Security System”* (May 2011), p 7.

<sup>66</sup> DPMC, *“New Zealand’s National Security System”* (May 2011), p 11.

<sup>67</sup> Report by Michael Wintringham and Jane Jones, *“A National Security & Intelligence Framework for New Zealand”* (September 2009); Report by Simon Murdoch, *“Report to the State Services Commissioner: Intelligence Agencies Review”* (12 October 2009).

improved efficiency and effectiveness in the way the intelligence and security sector operated. Accordingly, ODESC's role was expanded to encompass governance responsibilities for the national security and intelligence sector so it could lead improvements for cross-agency coordination and the identification of national security priorities.

5. The reviews also resulted, in March 2010, in Cabinet direction to DPMC to strengthen its oversight, management and governance arrangements for the NZIC. In 2010, DPMC established an Intelligence Coordination Group (from 13 September 2010) and appointed Mr Roy Ferguson as Director of Intelligence Coordination. This group provided support to ODESC in its intelligence coordination and governance roles in relation to the NZIC, led collaboration within the NZIC, offered a strategic view across the NZIC and assisted in the setting of its priorities. These changes occurred later in the year the FIRs were approved.
6. Changes were also made to the National Assessments Bureau (NAB) which sits within DPMC. The changes included broadening its mandate for coordination of assessments by drawing on the resources of all of the NZIC.<sup>68</sup> In line with this, NAB was tasked with developing, from 2010 onwards, a national assessments programme which was related to national security interests and priorities.<sup>69</sup> A further change associated with the intelligence agencies reviews, was the development of a New Zealand National Security System (NSS) framework which was approved by Cabinet in 2011. The NSS sought to improve the alignment of security and intelligence arrangements. It provided a framework to guide future work across government agencies, including work carried out by NZIC, to facilitate the implementation of the overarching security objectives set by Cabinet.<sup>70</sup> Crucially, there was a broadening of the concept of national security for New Zealand to include not only traditional national security risks but also civil contingencies and societal risks. This framework incorporated a system for the regular review and setting of national intelligence priorities (NZIPs) and requirements.
7. The DPMC paper,<sup>71</sup> which described this approach, set out seven key objectives that underpin a comprehensive concept of national security:
  - "Preserving sovereignty and territorial integrity"
  - Protecting lines of communication
  - Strengthening international order to promote security
  - Sustaining economic prosperity
  - Maintaining democratic institutions and national values
  - Ensuring public safety

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<sup>68</sup> DPMC, *Annual Report for year ending 2013*.

<sup>69</sup> DPMC, *Statement of Intent 2010*.

<sup>70</sup> DPMC, *Annual Report for year ending 2012*, Section: *Output Class 3 Service Performance: Security and Risk group*.

<sup>71</sup> DPMC, "New Zealand's National Security System" (May 2011).

➤ “Protecting the natural environment”

8. Implementation of these changes led DPMC to conclude in its 2012 annual report, that:

“ODESC is now overseeing a wider range of issues and providing better alignment of security and intelligence arrangements with the objectives, principles, framework and processes set out in the National Security System.”<sup>72</sup>

#### **Foreign Intelligence Requirements (FIRs) in place from 2010 - 2016**

9. The FIRs in place at the time of New Zealand’s WTO campaign were approved by ODESC on 11 February 2010 and were endorsed by DES. They came about as a result of direction from ODESC to review the FIR system from first principles. The previous FIRs comprised a detailed list of about 187 prioritised FIRs which had been developed by the then Foreign Intelligence Requirements Committee (FIRC)<sup>73</sup> under the direction of ODESC and endorsed by DES.
10. DPMC’s Intelligence Coordinator<sup>74</sup> led the development of the 2010 FIRs. He coordinated input from representatives across eighteen government agencies, including the intelligence agencies, to ensure that the needs of NZIC customers guided the decisions about key issues and priorities. Working groups comprising representatives from these government agencies and chaired by the Intelligence Coordinator were formed around five broad themes. Each group identified national security issues of importance to New Zealand relating to the theme and in respect of which foreign intelligence information could make a useful contribution. The working groups then worked through a process which resulted in each issue or category having an agreed priority rating for intelligence collection purposes.
11. Each issue receives two ratings. One rating relates to the relative importance for New Zealand’s interests of each issue within the context of a particular theme. This scale goes from “critical” interest (rating 1) to “low” interest (rating 4). The second rating scale relates to the contribution that intelligence may be expected to make in providing information on the issue. This scale goes from “crucial” contribution (rating 1) to “minor” contribution (rating 4). Then the issues are prioritised on a scale of A to D, with A being the highest, according to the combination of the two rating scales
12. GCSB explained<sup>75</sup> that the FIRs “set out high level subject areas in which the government has an intelligence interest, as well as relative priorities between the identified subject areas.” They provided guidance on the themes, issues and questions concerning national security, international relations and economic activity in which Ministers are most interested.

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<sup>72</sup> DPMC, *Annual Report for year ending 2012*.

<sup>73</sup> The FIRC was responsible to ODESC and included senior representatives from DPMC, the intelligence agencies and customers of the intelligence community. It was tasked with the setting of New Zealand’s requirements for foreign intelligence.

<sup>74</sup> The Intelligence Coordinator reported through the Chief Executive of DPMC to ODESC. This was a position that existed before the establishment of the Intelligence Coordination Group.

<sup>75</sup> GCSB letter of 2 July 2015, para 15.

13. Each theme was “amplified into a requirements paper describing the associated issues and corresponding priorities.”<sup>76</sup> The requirements paper for each theme was developed by the relevant cross-agency working group (chaired by the Intelligence Coordinator).
14. In an Annex to each requirements paper, these issues were each described in a set of “context statements”, usually in two parts. The first part described briefly the aspects of the issue that were of importance to the New Zealand government. The second part then summarised the types of information relating to the issue that was expected to be provided by foreign intelligence collection. The wording gave an indication of how significant that contribution was expected to be. These context statements, derived as they were from the main part of the FIR, provided a level of intermediate detail from which further detailed questions could be developed.<sup>77</sup>
15. The requirements papers were submitted to FIRC and approved by ODESC in whole. The themes were endorsed by DES which also noted the issues listed under each theme.
16. Paragraph 9 of each requirements paper provided that the themes and issues can be supplemented by intelligence questions which would be known as National Intelligence Priorities (NIP) papers.
17. By late 2012, the further level of detailed envisioned in the requirements papers was provided in five particular areas. The NIPs for a specific subject area carried the same priority allocated in the FIRs requirements papers for that general issue. As the FIRC had been disestablished by 2012, the completed NIPs were signed off by the National Assessments Committee (NAC), a sub-committee of ODESC.
18. Until late 2016, the FIRs of 2010 continued to be used routinely as a means of identifying Government intelligence requirements. The prominence given to the FIRs is apparent in GCSB’s policies regarding foreign intelligence collection and reporting. In its letter of 2 July 2015, responding to questions posed by this inquiry, GCSB stated that in determining the priority given to a request for intelligence its “starting point is (and must be) the Foreign Intelligence Requirements (FIRs) approved by government.”<sup>78</sup> GCSB policy procedures explain that the FIRs are used as a mechanism to “direct prioritisation, resource allocation and collection across the Intelligence directorate.”<sup>79</sup>

#### **Prioritised reporting programme - NZIPs**

19. Alongside the FIR framework, the first list of intelligence collection and assessment priorities was approved by DES for the NZIC on 18 July 2012. These are the New Zealand Intelligence Priorities (NZIPs) and they provided a basis for what was described as a “prioritised reporting programme”. This was intended to provide “ministers and

<sup>76</sup> GCSB Policy Procedure 2012 (PP-2012), *Foreign Intelligence Requirements*, effective from 14 December 2011, para 2.

<sup>77</sup> The explanation in this paragraph was provided by the Principal Adviser, National Security Policy Directorate, Security and Intelligence Group, DPMC.

<sup>78</sup> GCSB letter of 2 July 2015, para 14.

<sup>79</sup> GCSB PP-2012, para 4.

senior officials with intelligence assessment contributed by all relevant parts of the NZIC".<sup>80</sup> It was considered that most of the high level FIR themes translated into the 2012 priorities.<sup>81</sup>

- 20. The development of the NZIPs built on the work that had established the NSS. The National Assessments Committee (NAC),<sup>82</sup> on the direction of ODESC, commissioned and authorised ten national assessments which addressed the major security risks to New Zealand.<sup>83</sup> The NZIPs were drawn from these assessments and were presented in a Cabinet paper, dated 16 July 2012, from ODESC to DES.
  - 21. The priorities identified were to be supplemented by more specific papers called National Intelligence Priorities (NIP) papers. These would be approved at officials' level and were intended to provide more detail on "key questions of interest to New Zealand decision-makers." ODESC linked the NIPs with the FIR framework by explaining that NIPs were designed to sit under the high-level Intelligence Requirements papers of the FIRs and "provide more direction for intelligence collectors by identifying key questions for which we are seeking answers."
  - 22. DPMC's annual report for the year ending 2013 stated that:
- "The prioritised reporting programme agreed by the **National Assessments Committee** (NAC) identified the reporting requirements of the Prime Minister, senior ministers and other key stakeholders and was strongly linked to New Zealand's national security interests in relation to anticipated international events and developments."
- 23. Since 2013 there have been further changes to the ODESC system which are described in Part 4 of my report and include the replacement of the FIRs with the NZIPs.<sup>84</sup>

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<sup>80</sup> DPMC, *Annual Report for year ending 2012*.

<sup>81</sup> Interview with DPMC official.

<sup>82</sup> NAC was an inter-agency committee and sub-committee of ODESC. It was responsible for coordinating the overall effort of Government agencies in meeting the NZIPs and ensuring assessment requirements are met. In 2011 it was chaired by the Director of NAB.

<sup>83</sup> These were largely based on the "vectors of harm" identified in Michael Wintringham and Jane Jones, above note 66.

<sup>84</sup> The NZIPs are now commonly referred to as the "National Intelligence Priorities (NIPs)" but they are not the same as the NIPs or National Intelligence Priority papers described in the FIR system.