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Scott

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Tēnā koe Scott

Official Information Act request

Thank you for your Official Information Act 1982 (OIA) request of 22 March 2024 to the Government Communications Security Bureau (GCSB) regarding the Inspector-General of Intelligence and Security (IGIS)'s report *Inquiry into GCSB's hosting of a foreign capability*. Your request contained twelve questions relating to this report, stated in my response below. I note you expressed a preference to receive copies of the documents requested, rather than excerpts or summaries. This was considered during the assessment of the material in scope of your request.

I further note that the timeframe for responding to your request was extended by a maximum of 15 working days, as the consultations necessary to complete making a decision on your request were such that a proper response could not reasonably be made within the original time limit. Following this, I am now in a position to respond.

I would begin by noting that the GCSB supported the IGIS to release as much information as possible in the public IGIS report. I am confident that the public IGIS report balances accountability with the need to protect New Zealand's national security interests. To continue to protect these interests, I have assessed the information you requested under the following sections of the OIA:

- Section 6(a), as the making available of the information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; and
- Section 6(b)(i), as the making available of the information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government.

In addition, I have also considered the following sections of the OIA regarding some information in scope of your request, as appropriate:

- Section 9(2)(a), as the withholding of the information is necessary to protect the privacy of natural persons, including that of deceased natural persons, and
- Section 9(2)(h), to maintain legal professional privilege.

Where section 9 grounds have been applied in this response I do not consider that the need to withhold this information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

Please find responses to each of your questions as follows.

ONE: I would like to request copies of all communications, dated since 2020, between GCSB and the former GCSB Directors-General Bruce Ferguson, Simon Murdoch and Ian Fletcher relating to the matters covered in this IGIS report.

I will start by noting that the IGIS produced both a classified report, and an unclassified report, the latter being the one which was made public. The GCSB communicated with the listed former Directors-General by email regarding these draft IGIS reports. An initial email was sent to each former Director-General on 1 February 2024 by the GCSB Chief Legal Advisor. Each Director-General subsequently came in to view the draft reports in person, liaising with the GCSB Chief Legal Advisor during their visit.

As the former Directors-General do not have current security clearances, each was asked in-person to sign a non-disclosure agreement prior to viewing the draft classified version of the IGIS report. The former Directors-General also reviewed the draft unclassified version of the report during this time. Comments of the former Directors-General were provided by email to the Inspector-General, and are noted in the public report at paragraphs 36, 44 and 126.

Please find the emails between each former Director-General and our Chief Legal Advisor enclosed. A small amount of information has been withheld in these as marked under sections 6(a) and 9(2)(a) of the OIA.

TWO: Former Director-General Ferguson told media that GCSB have recently been in contact with him regarding a "non-disclosure order:" "He... said the GCSB asked him two weeks ago to sign a non-disclosure order, saying he wouldn't talk about the report. He says he refused to sign."... I would like to request copies of the records of all communications with Bruce Ferguson relating to this.

As noted in my response to question one, each former Director-General that was invited to view the draft classified report by the IGIS was asked in-person to sign a non-disclosure agreement in order to enable them to view this classified material. This request was made by our Chief Legal Advisor at the start of each meeting with each former Director-General.

Sir Bruce advised he did not wish to sign the non-disclosure agreement, and was therefore invited to view the draft unclassified version of the report. I would like to be clear that there was no restriction sought by the GCSB on Sir Bruce being able to comment publicly about the published unclassified report. Besides the emails noted in response to question one, the GCSB holds no further written communication with Sir Bruce regarding this.

THREE: In paragraph 16 of the IGIS report it is stated: "In late 2020, the Bureau alerted me to the existence of the capability and highlighted potential concerns about whether it had been operating unauthorised." I would like to request a copy of the message sent to IGIS by GCSB alerting him to this capability's existence.

The message sent to the IGIS contains information that needs to be withheld under sections 6(a) and 6(b)(i) of the OIA. However, I can provide you with a summary of this message, as allowed under section 16(1)(e) of the OIA. A copy of the Memorandum of Understanding between ourselves and the foreign partner relating to the hosting was attached to the email; I note this Memorandum was addressed in my response to a separate OIA request made by yourself. Please find the summary of the requested message below.

The GCSB advised the IGIS of the capability and potential concerns through a short email sent from our Chief Legal Advisor on 5 October 2020. Two individuals working at the Office of the IGIS were copied in, as well as a Senior Legal Advisor from the GCSB Legal team.

The message began by advising the IGIS that this "is an early heads up on an evolving issue that we're currently working on". It went on to advise the IGIS that our Legal team had recently received confirmation that the system was "not operating, and it will remain in that state until we have resolved our questions around authorisation". The email concluded by encouraging the IGIS to contact our Chief Legal Advisor by phone or email if there were any initial questions about our approach. The Chief Legal Advisor's signature block ended the email.

FOUR: In paragraph 29 of the IGIS report it is stated: "A Powerpoint presentation prepared for the meeting detailed what the GCSB understood about the capability at the time, including its potential military applications. The presentation raised questions for the meeting about the legal and moral issues that might arise from hosting the system. It identified a need for a procedure for the GCSB to vet the tasking of the capability." I would like to request a copy of this presentation.

This PowerPoint was prepared internally by a GCSB staff member for sharing with GCSB staff. The only information that can be released from this document is already available in the public IGIS report. I am withholding the rest of the PowerPoint presentation under sections 6(a) and 6(b)(i) of the OIA.

FIVE: In paragraph 31 of the IGIS report it is stated: "In late 2010 a senior GCSB officer signed an agreement in principle to host the capability. The letter noted the purposes of the capability, which included the potential use for military action. It recognised the value of the GCSB being involved. It highlighted that some operational scenarios would need careful handling to ensure compliance with New Zealand law, but the issues were not unmanageable." I would like to request a copy of this "agreement in principle."

Similar to the above, the only information that can be released from the agreement in principle is already available in the public IGIS report. I am withholding the rest of the agreement in principle under sections 6(a) and 6(b)(i) of the OIA.

SIX: In paragraph 33 of the IGIS report it is stated: "Late in 2011, the then Director-General, Simon Murdoch, noted in an email that GCSB legal would need to be closely involved in the matter and that it would potentially require the awareness or consent of the Minister, as well as consultation with the IGIS." I would like to request a copy of this email.

A copy of this email from the then Director-General is enclosed. The email was sent internally to a small group of GCSB staff. I have withheld a small amount of information under section 6(a) of the OIA.

SEVEN: In paragraph 78 of the IGIS report it is stated: "The Bureau reported internally in February 2020 that the capability had been "rarely tasked - eight times in the past two years". I would like to request a copy of this internal report.

This was noted in a GCSB briefing paper to the then-Director General of the GCSB, Andrew Hampton, from the GCSB Chief Legal Advisor, and the same GCSB Senior Legal Advisor

referred to in response to question 3. Two other GCSB staff members were copied. The briefing paper states it is for the Director-General's "information and decision", and is dated 23 February 2021. However, the only additional information that can be released from this briefing is already available in the public IGIS report, referred to at paragraphs 78, 122, 139 and 142 of the report. I am therefore withholding this briefing paper under sections 6(a), 6(b)(i) and 9(2)(h) of the OIA.

EIGHT: In paragraph 88 of the IGIS report it is stated: "When asked about this in the course of the Inquiry, the GCSB noted: "GCSB is usually aware that [an overseas partner] is using data shared with it by way of [requests for changes to the capability's settings]. In the unlikely but possible situation no [...] change was required, GCSB would only be aware that the data could be used by [an overseas partner], not that it had been." I would like to request a copy of the message from GCSB to the IGIS containing this statement.

The information quoted above is contained in a letter from the GCSB to the IGIS dated 28 September 2021, in response to ten questions from the IGIS. However, the only additional information that can be released from this briefing is already available in the public IGIS report. I am withholding this letter under sections 6(a) and 6(b)(i) of the OIA.

NINE: In paragraph 95 of the IGIS report it is stated: "Comments in emails suggest GCSB staff were under the impression they were meant to comply with requests from the overseas partner and not ask any questions. For example: "[...] we have no input whatsoever into the process as its all controlled from [overseas] [...] [A staff member] has set up a separate data flow for the capability traffic so the process should be totally invisible to us." I would like to request a copy of the email containing this comment.

Please find a copy of this email enclosed. It was sent internally to a small group of GCSB staff. I have withheld a small amount of information under section 6(a) of the OIA.

TEN: In paragraph 122 of the IGIS report it is stated: "This inquiry found no record of any consideration, before or during the GCSB's hosting of the capability, of how the supply of GCSB data to the system would relate to subsequent GCSB authorisations for relevant signals collection. The first substantive consideration of this was the GCSB's Chief Legal Adviser's briefing to the Director-General about the capability on 23 February 2021, after the system had ceased operating." I would like to request a copy of this briefing to the Director-General.

This briefing is the same document quoted in question 7. As per my response to question 7, I am withholding this briefing paper under sections 6(a), 6(b)(i) and 9(2)(h) of the OIA, as noted above.

ELEVEN: I would like to request a copy of the first briefing to the responsible minister since the capability was "rediscovered" in 2020, that alerts the minister to this and advises the minister of the steps GCSB would be taking.

Our records indicate that the first written briefing on this topic to the then-Minister Responsible for the GCSB, Hon Andrew Little, was a section included in a paper dated 1 December 2020 for the Minister's information, which primarily covered a separate matter. I am withholding this briefing paper under sections 6(a), 6(b)(i) and 9(2)(h) of the OIA.

TWELVE: I would like to request copies of all talking points prepared for GCSB staff for dealing with inquiries related to this matter.

Talking points about the IGIS's Report were prepared to support my appearance at the Intelligence and Security Committee for the annual review of the GCSB on 26 March 2024. Please find these enclosed at Annex A. If you are not already aware, you may be interested to know that a recording of both my address to the Intelligence and Security Committee, and that given by the Director-General of the NZSIS, can be found online at:

<https://www.parliament.nz/en/pb/sc/scl/intelligence-and-security-committee/news-archive/watch-public-meetings-of-the-intelligence-and-security-committee/>.

Review

If you would like to discuss this response with us, please feel free to contact information@gcsb.govt.nz. You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please note that the GCSB proactively publishes OIA responses in accordance with the expectations of Te Kawa Mataaho/the Public Service Commission. We intend to publish this response (with your personal information removed) on the GCSB website. Publication of such responses is done on a quarterly basis.

Ngā mihi



Andrew Clark

Te Tumu Whakarae mō Te Tira Tiaki
Director-General, GCSB

Annex A: Talking Points

(U) The agency you see today is not the one reflected in the Inspector-General's report.

(U) While the report covers events from more than a decade ago, it highlights what were unsatisfactory operational processes of that time, albeit in line with the policies and legislation of the day.

(U) I'm satisfied there has been significant change in the GCSB since then, as well as new legislation and a strengthened Office of the Inspector-General.

(U) The Inspector-General provides valuable robust and critical oversight of our agencies. We welcome the inquiry report.

If asked about working with international partners

(U) New Zealand's relationships with international partners is vitally important in helping the Bureau deliver the best security and intelligence outcomes for New Zealand and New Zealanders.

(U) Any intelligence sharing with overseas partners needs to be in accordance with our own intelligence and security priorities, laws and human rights obligations.

Regarding the capability or partner country

(U) This is something I won't be discussing.

If asked for further detail by the ISC

(U) The IGIS's classified report will be available to the committee. This report goes into further detail about the IGIS's investigation.