EXECUTIVE SUMMARY

GREEN PARTY COMPLAINT THAT THE GOVERNMENT COMMUNICATION SECURITY BUREAU (GCSB) ILLEGALLY INTERCEPTED PRIVATE COMMUNICATIONS; KIM DOTCOM AND BRAM VAN DER KOLK: CRIMES ACT 1961, SECTION 216B

INTRODUCTION

1. Following evidence at a judicial review hearing in 2012 it was revealed that the Government Communications Security Bureau (GCSB) was involved in the surveillance of Kim Dotcom and Bram van der Kolk. The Inspector General Intelligence and Security (IGIS) was asked by the Prime Minister to report on the matter.

2. In his letter to the Prime Minister dated 27 September 2012, Hon Paul Neazor, the IGIS, determined that the GCSB had intercepted communications of Dotcom, believing he was a foreign person for the purposes of their Act. He subsequently concluded that the actions of GCSB were not lawful.

3. Russel Norman MP made a complaint to the Police Commissioner in respect of the "illegal actions" suggesting they were a breach of section 216B of the Crimes Act 1961. The Police Commissioner directed that this investigation was to be undertaken to determine if any person could be found to be criminally liable.

THE LAW

Section 216B(1) of the Crimes Act 1961 sets out the following offence:

Subject to subsections (2) to (5), every one is liable to imprisonment for a term not exceeding 2 years who intentionally intercepts any private communication by means of an interception device.

4. Subsection 2(b)(iii) of section 216B of the Crimes Act provides an exception to any breach of subsection (1) if the interception is carried out in accordance with the GCSB Act 2003.
(2) Subsection (1) does not apply where the person intercepting the private communication—

(a) is a party to that private communication; or

(b) does so pursuant to, and in accordance with the terms of, any authority conferred on him or her by or under—

(i) the Search and Surveillance Act 2012; or

(iii) the New Zealand Security Intelligence Service Act 1969; or

(iiiia) the Government Communications Security Bureau Act 2003; or


5. For the purposes of this investigation it has been accepted that the interception against Dotcom and van der Kolk were interceptions against New Zealand residents. Accordingly, the interception did not fall within the provisions of section 216B 2(b)(iiiia) and therefore does not apply.

6. The relevant definitions of intercept, interception device and private communication as defined by the Crimes Act 1961 have been considered.

7. I have also considered section 216C of the Crimes Act. This section prohibits disclosure of unlawfully intercepted communications. No disclosures of intercepted communications in breach of section 216C were established.

8. Section 107 of the Crimes Act was also considered. This provision is a general offence creating provision which applies when no other penalty is provided. No penalty is provided for a breach of section 14 of the GCSB Act. There is a requirement that the act is intentional. The offence reads;

   Everyone is liable to imprisonment for a term not exceeding one year who, without lawful excuse, contravenes any enactment by wilfully doing any act which it forbids, or by wilfully omitting to do any act which it requires to be done.

9. The investigation identified that intent applies to all of the elements of an offence against section 216B of the Crimes Act 1961. Any employee who acts in good faith and without culpable ignorance or negligence is protected from criminal prosecution. A person who honestly but mistakenly believes that the interception was done pursuant to, and in accordance with the terms of, the relevant statutory authority will not be criminally liable.

10. Parties and attempts as they related to section 216B were also considered.
THE INVESTIGATION

11. This investigation was undertaken without the use of production orders or search warrants. The cooperation of the individuals and organisations in reviewing documents was sought and received.

12. A Police group, the Organised and Financial Crime Agency of New Zealand (OFCANZ) was delegated the function of responding to a request for assistance from the Federal Bureau of Investigation (FBI), to extradite Dotcom and others to the United States of America to face charges in respect of criminal breaches of copyright. This operation was named Task Force Debut (TF Debut).

13. OFCANZ hosted a meeting on the 14th of December 2011 at Police National Headquarters (PNHQ) to brief other government agencies about the OFCANZ operation to arrest Dotcom and others on extradition warrants. All of the OFCANZ staff members who either attended the meeting or had any dealings with GCSB staff in relation to TF Debut were interviewed. Staff from other government agencies that attended the meeting were also interviewed.

14. Immigration New Zealand staff were interviewed and confirmed that no inquiry was made with them by GCSB in respect of the immigration status of Dotcom or van der Kolk.

15. Two GCSB staff members attended the 14 December meeting at PNHQ.

16. Following the meeting the two GCSB staff members who attended, briefed their GCSB managers and sought legal advice.

17. The investigation established that the Request for Information (RFI) was prepared by one of the GCSB staff members who attended the meeting. This was signed by Detective Sergeant McMorran on behalf of Detective Inspector Wormald at about 6pm on Friday the 16th of December 2011 at the GCSB building.

18. Normally the RFI is processed by a designated individual at GCSB, but on this occasion this did not happen. The person the RFI was addressed to did not see or authorise it before the GCSB began working on the named targets. The person who processed the RFI was one of the GCSB staff members who attended the 14 December briefing. The person declined to be interviewed.

19. Ten current or past GCSB staff were interviewed during the investigation. Three current GCSB staff declined to be interviewed. One GCSB staff member who had left the country prior to the commencement of the investigation was not contacted or asked for an interview. All of the interviews conducted were done in a classified environment and format.

20. Classified GCSB documents were viewed and analysed as part of the investigation. All relevant documents were exhibited and are held in a secure area at GCSB.

21. The investigation could find no evidence that any employee of GCSB made or caused to be made any inquiry about the targets’ immigration status. Neither was the immigration status of any of the targets raised with GCSB in house legal advisor until after the search warrants had been executed.
23. Because of the origin of the data supplied to GCSB it could not be established to an evidential standard whether the data was gathered at rest or in transit. The collection of data in transit is needed to satisfy the Crimes Act legal definition of intercept. R v Cox.

24. All of the GCSB staff interviewed expressed the firm belief that they were acting in accordance with their legislation. They believed they were legally entitled to target Dotcom and van der Kolk by virtue of their immigration status.

25. GCSB staff were mistaken in their understanding of the Immigration Act 2009 and how it related to the GCSB Act. They believed that Dotcom and van der Kolk had not fully completed all of the requirements necessary to become permanent residents and that they were therefore entitled to intercept their communications and that their actions were authorised under the GCSB legislation.

26. This belief came about because the GCSB legal advisor was not conversant with the changes in the Immigration Act 2009 that came into force in November 2010 or how the changes affected the GCSB's capability to intercept persons who hold resident's visas pursuant to their own enactment.

THE FACTS

27. Immediately following the December 14 meeting, Wormald met with two GCSB staff members and discussed what assistance GCSB could provide.

28. The information provided to GCSB immediately following the meeting contained a number of references to the residential status of Dotcom and van der Kolk. OFCANZ also possessed a subject profile of Dotcom which correctly identified him as about to become the holder of a New Zealand resident's visa. This profile was prepared in November 2010 a year before the 14 December PNHQ meeting. This profile was not provided to GCSB.

29. Initially there was conflict between Wormald and GCSB about the discussion Wormald had with GCSB staff on the 14th of December 2011. However three court documents filed on behalf of GCSB, each successive document softening their position, and an interview with one of the GCSB staff members present confirmed that he did not fully read the OFCANZ documents provided and that GCSB had a mistaken belief of the Immigration Act and how it related to the GCSB Act. This shift in position subsequently led to the acknowledgment that Wormald's account of the discussion "may well be right." Given that, in the absence of anything to the contrary from the other GCSB member who was present at this meeting the account provided by Wormald is accepted.

30. There are two inferences that can be taken from this shift in position. The first is that the GCSB member has not told the truth in order to protect his position and professional reputation in respect of his involvement with TF Debut. The second is that as he has become aware of systemic and institutional GCSB failings he has changed his position. His documented accounts then reflected this. The investigation accepts the position that he has changed his account to reflect the new information he was becoming aware of.

31. It was the view of the investigation that OFCANZ should have provided more detailed information to GCSB following the first meeting, in particular the subject profile. It is important to note however that the understanding that GCSB had of the Immigration Act as it related to the GCSB Act was fundamentally flawed. Even if this profile had been provided GCSB are likely to have made the same mistaken assessment based
on their then misunderstanding of the relevant legislative provisions. This is supported by the review of the legality of the GCSB targeting following receipt of the Immigration file of Dotcom and van der Kolk from OFCANZ after the February 2012 debrief. Even at that time GCSB still mistakenly determined they were entitled to assist OFCANZ in the manner that they had.

32. No interception warrant had been sought by OFCANZ, as there was no evidential foundation to legally obtain a warrant.

33. Analysis of the data provided to the investigation established that only one communication relating to Dotcom had been intercepted in breach of the provisions of section 216B of the Crimes Act 1961.

34. GCSB gave an assurance and it was confirmed by the investigation that this communication contained no content.

35. It was also established that other communications were obtained that were considered to have been intercepted by GCSB’s New Zealand based resources. These communications were lawfully intercepted in accordance with the GCSB Act. Following a system audit GCSB gave assurances that none of these communications were reviewed or analysed by GCSB staff as part of TF Debut.

36. None of the content of the New Zealand intercepted communication formed part of the nine information reports that was passed to OFCANZ.

37. For the remainder of the data collected by GCSB the investigation could not establish whether it was gathered at rest or in transit when it was acquired. GCSB could not provide the investigation with this information as they did not have it.

ANALYSIS

38. It was established that the GCSB in conducting the intercept operation breached Section 216B in that they intercepted the private communication of a New Zealand resident visa holder. This is in reference to the one communication of Dotcom obtained in contravention to section 216B of the Crimes Act.

39. All other data acquired by GCSB in support of the RFI from OFCANZ, did not reach the evidential standard necessary to establish that it was intercepted as defined by the Crimes Act or it was obtained lawfully.

40. It is necessary that a criminal intent be established for each element of section 216B before any liability could be found. It was apparent at interview that all of the GCSB staff believed that their actions in intercepting the communications were justified and lawful.

41. In the view of the investigation no GCSB staff could be reasonably held liable in respect of section 216B because of their genuinely held but mistaken belief that they were legally entitled to undertake the actions they did. Accordingly, it could not be established that they had the necessary criminal intent.

42. Section 107 of the Crimes Act 1961 was considered. This offence provides a penalty for any offence that does not carry a penalty. Section 14 of the GCSB Act does not carry any penalty. Again, this provision requires that a criminal intent would need to be established. For the same reasons as set out above, it was concluded that no GCSB staff could be held liable for a prosecution under this provision as no criminal intent could be established.
43. The investigation could find no evidence that prior to the February 2012 debrief, any employee of GCSB made or caused to be made any inquiry about the immigration status of Dotcom or van der Kolk, despite Wormald expressing concerns about whether GCSB could target Dotcom and van der Kolk.

CONCLUSION

44. OFCANZ staff cannot be considered as being culpable for any criminal offending.

45. In good faith they provided GCSB with information and verbal advice in respect of the TF Debut targets. There was sufficient detail in the information they provided to warrant GCSB to inquire further. However GCSB’s flawed interpretation of the Immigration Act persuaded them not to pursue this line of inquiry.

46. OFCANZ however had more accurate and detailed information that they should have provided GCSB, but they didn’t.

47. GCSB had an incorrect understanding of the Immigration Act 2009 and how it related to the GCSB Act. That mistaken understanding caused them not to question the true immigration status of Dotcom and van der Kolk.

48. GCSB did not follow their own internal processes in actioning the request for information from OFCANZ.

49. GCSB staff did commit the act prohibited by section 216B of the Crimes Act 1961 but did not have the necessary intent to satisfy the elements of the offence and be considered criminally liable.

50. The GCSB did intercept a communication of Dotcom, a permanent resident of New Zealand. Systemic and institutional issues existed within GCSB that allowed the targeting of Dotcom and van der Kolk to progress to the point it did. While the actions of some of the employees of GCSB may be considered to be incompetent or negligent they could not be considered criminally liable.

51. The interception that breached section 216B did not form part of the information reports provided to OFCANZ and there was no consequential breach of section 216C of the Crimes Act by passing illegally intercepted information to another party.

52. No GCSB staff should be prosecuted in respect of Section 107 of the Crimes Act as it could not be established that they had the necessary intent.

53. This investigation could find no criminal culpability on the part of any GCSB employee.

54. It is the understanding of the investigation that GCSB have reviewed their policy, practice and procedures in relation to requests for information or assistance.

RECOMMENDATIONS

55. That no criminal charges be commenced against any person in respect of the alleged breach of Sections 216B, 216C and 107 of the Crimes Act 1961.

56. That Police operations requiring GCSB assistance, should request that assistance through a designated Liaison Officer based at PNHQ.
57. That Police develop a template in conjunction with GCSB, for requests for assistance.

58. That Police groups likely to request GCSB assistance or services receive training from GCSB about the process for requesting that assistance and information as well as the security requirements.

Peter Read
Detective Superintendent: Southern