

PRESS RELEASE: 25 AUGUST 2017

**HIGH COURT GIVES JUDGMENT AGAINST
GOVERNMENT COMMUNICATIONS SECURITY BUREAU
FOR UNLAWFUL SPYING**

GCSB CLAIMS DETAILS ARE “TOP SECRET”

In a decision dated December last year, but only made publicly available for the first time this week, the High Court has entered two judgments against the GCSB for unlawful spying on Mathias Ortmann and Bram van der Kolk who are defendants in the extradition proceedings that also involve Kim Dotcom and Finn Batato. The judgments both include a detailed declaratory statement of the circumstances in which the unlawful spying took place. Copies of the two judgments, each including the declaratory statement, are attached.

As can be seen from the last two paragraphs of the declaratory statement, the GCSB has now admitted that its illegal conduct went far further than was previously revealed. The GCSB has officially accepted that it cannot refute allegations that it acted unlawfully when it intercepted communications of Mr Ortmann and Mr Batato, neither of whom is a New Zealand citizen or permanent resident.

The judgment reveals that the GCSB has admitted allegations contained in a High Court statement of claim. Those admissions in turn mean that the whole of the GCSB surveillance operation involving the extradition defendants was unlawful, not just because it involved permanent residents (as previously stated by government) but, more fundamentally, because the whole surveillance operation fell outside the authorisation of the GCSB legislation as it was at the relevant time.

At the end of the declaratory statement, the GCSB is recorded as saying:

The circumstances of the interceptions of Messrs Ortmann and Batato's communications (and the technical details regarding the other plaintiffs' interceptions) are Top Secret, and it has not proved possible to plead to the allegations the plaintiffs have made without revealing information which would jeopardise the national security of New Zealand.

The High Court judgment states that the GCSB acted unlawfully both because it failed to comply with its own legislation and also because its conduct amounted to an unreasonable search in breach of the New Zealand Bill of Rights Act 1990. The GCSB legislation has since been amended to broaden the powers of the GCSB to spy on New Zealanders. Was Parliament aware of the extent of the unlawful behaviour of the GCSB?

Please refer any inquiries to:

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DUPLICATE

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV- 2013-404-2168

IN THE MATTER of the New Zealand Bill of Rights Act 1990 and the
Government Communications Security Bureau Act 2003

BETWEEN **KIM DOTCOM** of Auckland, Businessman
First Plaintiff

AND **MONA DOTCOM** of Auckland, Married Woman
Second Plaintiff

AND **BRAM VAN DER KOLK** of Auckland, Businessman
Third Plaintiff

AND **JUNELYN VAN DER KOLK** of Auckland, Married
Woman
Fourth Plaintiff

CONT.

JUDGMENT OF THE COURT

Dated 7th August 2017

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SOLICITORS: P J K Spring / A K Hyde

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A N D **MATHIAS ORTMANN** of Auckland, Businessman
Fifth Plaintiff

A N D **FINN BATATO** of Auckland, Businessman
Sixth Plaintiff

A N D **VESTOR LIMITED** a Hong Kong registered company
which carried on business interalia as a tenant
Seventh Plaintiff

A N D **ATTORNEY-GENERAL** in respect of the New Zealand
Police
First Defendant

A N D **ATTORNEY-GENERAL** in respect of the Government
Communications Security Bureau
Second Defendant



Before the Honourable Justice Gilbert on 16 December 2016.

After reading the joint memorandum of counsel for the fifth plaintiff and the second defendant dated 12 May 2017 and the memorandum of counsel for the second defendant dated 14 December 2016 in which the second defendant admitted liability in respect of each cause of action made by the fifth plaintiff against the second defendant in the second amended statement of claim dated 29 June 2016, by consent this court hereby gives judgment as to liability in respect of the said causes of action and grants consequential declaratory relief as follows:

1. A declaration that:

- (a) The interception, collection, storage, and disclosure of and enabling of access to the fifth plaintiff's communications and information, whether in its original form or in some derivative form, were unlawful and contrary to the Government Communications Security Bureau Act 2003;
- (b) The interception, collection, storage, and disclosure of and enabling of access to the fifth plaintiff's communications and information, whether in its original form or in some derivative form, amounted to an unreasonable search in contravention of s 21 of the New Zealand Bill of Rights Act 1990.

2. A declaration that the foregoing conduct was carried out in the context of the facts and matters set out in the attached statement of facts.

Date:

16th December 2016

Signature:



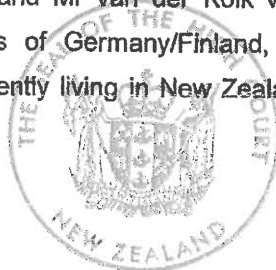
STATEMENT OF FACTS

Background

1. Operation Debut was commenced by Police in response to extradition and mutual assistance requests from the United States to the New Zealand Government. The requests concerned the Federal Bureau of Investigation's investigation into Kim Dotcom, Bram van der Kolk, Mathias Ortmann, Finn Batato and others associated with the Megaupload business.
2. On 14 December 2011 representatives from Police, Crown Law, the Ministry of Justice and the GCSB attended an Operation Debut briefing at Police National Headquarters. The attendees included Detective Inspector Grant Wormald and Detective Sergeant Nigel McMorran from Police. The representatives from the GCSB were a unit manager (G1) and a team supervisor (G2) (who arrived late).
3. During the briefing Detective Sergeant McMorran outlined the FBI's investigation into Megaupload. The FBI alleged Megaupload was involved in criminal breach of copyright on a very large scale. He referred to a list of suspects, which included Kim Dotcom and Bram van der Kolk, both of whom were living in New Zealand.
4. Messrs Dotcom and van der Kolk held residence class visas, however, as will appear, there was confusion on the part of the GCSB regarding their status until 7 September 2012. Under s 14 of the GCSB Act, the GCSB was (and is) not permitted to intercept the communications of New Zealand citizens or permanent residents. Permanent residents are defined in the GCSB Act as holders of residence class visas. A residence class visa under the Immigration Act 2009 includes both permanent resident visas and resident visas.
5. Police were planning to terminate Operation Debut in late January 2012 with the execution of search warrants and the arrest of the suspects. Police understood there was likely to be a party to celebrate Mr Dotcom's birthday, which many of the suspects would be attending.



6. At the end of the briefing Detective Inspector Wormald and G1 and G2 stayed behind to discuss the assistance Police were seeking from the GCSB. Detective Sergeant McMorran was also present for some of that meeting. In preparation for termination Police wished to obtain information regarding the travel plans of the persons of interest and whether there was anything to indicate risk to the Police in executing the arrest warrants. (On 17 January 2012 OFCANZ added a request for information about "atmospherics" of the group, specifically any awareness on the part of suspects of the imminent arrest operations).
7. Detective Inspector Wormald advised G1 and G2 that Police did not have a warrant to intercept any of the targets' communications, and asked if the GCSB could assist.
8. There are no notes recording the conversation between Detective Inspector Wormald and G1 and G2 regarding the residency status of the Operation Debut suspects. While some suspects were foreign, some were New Zealand residents.
9. Detective Inspector Wormald initially advised G1 and G2 he did not think it would be possible for the GCSB to intercept communications from Messrs Dotcom or van der Kolk because they were living in New Zealand. He told G1 and G2 that Mr Dotcom and Mr van der Kolk were not citizens but that Police could not advise with any certainty what type of "residency" they held, though he noted they were able to come and go. He offered to be a go-between for the GCSB for enquiries with New Zealand Immigration for the purpose of clarifying this point if required.
10. After the 14 December 2011 meeting Police forwarded the draft application for the search warrant and briefing documents to the GCSB. The documents included email addresses, telephone numbers and other contact details of the suspects and a description of the alleged offending. Mr and Mrs Dotcom and Mr van der Kolk were described respectively as being citizens of Germany/Finland, the Philippines and the Netherlands, but currently living in New Zealand. The draft search warrant stated at [143]:



Dotcom has applied for New Zealand residency under the investor category, for himself, his wife and three children. Dotcom was not eligible for residency due to his criminal convictions however he has applied for a "special direction" which has been granted. Dotcom is required to send his passport to Immigration New Zealand so they can add the appropriate documentation to his passport.

11. Following the 14 December 2011 meeting and receipt of the briefing documents, G1 and G2 were confident Kim Dotcom and Bram van der Kolk were targetable as "foreign persons", in that they were neither New Zealand citizens nor permanent residents. Despite Detective Inspector Wormald's initially-expressed reservations, the GCSB personnel understood Mr Dotcom and Mr van der Kolk were targetable as they were not permanent residents.
12. This belief illustrates a serious misunderstanding within the GCSB of the meaning of "permanent resident" under the GCSB Act, which is discussed further below. When Police accurately described Mr Dotcom as not being a permanent resident, the GCSB personnel understood (incorrectly) this meant he was targetable for the purposes of the GCSB Act.
13. On 15 December 2011 G1 briefed his team at the GCSB on the proposed assistance to be provided to Police, using the briefing information sent through by Police.
14. Around that time G1 and G2 sought legal advice from Hugh Wolfensohn on one aspect of the operation, but this did not concern the targets' immigration status. G1 described the targets of the operation as foreign and therefore targetable. He noted they were neither permanent residents nor citizens.
15. On 16 December 2011 G2 prepared a draft Request for Information (RFI) for review by Detective Sergeant McMorran. The RFI was signed by Detective Sergeant McMorran that day. The RFI formally requested the GCSB's assistance in gathering intelligence on Mega Media Group's executives' intentions to travel to New Zealand in mid to late January 2012. The executive officers of the Group were named as particular targets: Kim Schmitz (also known as Kim Dotcom and Kim



Tim Jim Vestor), Finn Batato, Julius Bencko, Sven Echternach, Mathias Ortmann, Andrus Nomm and Bram van der Kolk.

16. Also on 16 December 2011 the GCSB staff began preliminary work in preparation for intercepting the targets' communications. They began identifying "selectors" (or contact details) that could be "tasked" (submitted to the system in order to intercept communications). Staff compiled a spreadsheet setting out who could or could not be tasked. Foreigners were highlighted in green, indicating they could be tasked. Those who might be New Zealanders (and other protected persons) were highlighted in red, indicating they should not be tasked. Tasking commenced that day.
17. On 19 December 2012 Police sent through further target details to the GCSB and tasking of selectors continued. The first report was ready for release to Police the next day.
18. In all, nine GCSB reports including details about the suspects' movements were prepared and released to Police as follows:
 - (a) 20 December 2011;
 - (b) 5 January 2012;
 - (c) 12 January 2012;
 - (d) 16 January 2012;
 - (e) 16 January 2012;
 - (f) 18 January 2012;
 - (g) 18 January 2012;
 - (h) 19 January 2012;
 - (i) 20 January 2012.
19. The request from Police to the GCSB related to information about travel, risk and (later) atmospherics. The reports were all confined to the requested topics.



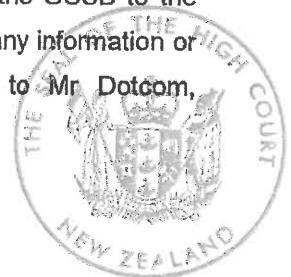
20. Operation Debut terminated on 20 January 2012 with the execution of search warrants and the arrest of Messrs Dotcom, van der Kolk, Ortmann and Batato.
21. The GCSB and Police made arrangements for a joint debrief at the GCSB on 16 February 2012. During the debrief the agencies gave presentations on the background to the operation, the processes undertaken and the keys to a successful operation.
22. At the end of the debrief G1 and G3 (who had been involved from 16 December and had formally taken over G2's role from 9 January 2012) raised concerns with Detective Inspector Wormald about reports in the media, which had circulated since the arrests, that Mr Dotcom and Mr van der Kolk were New Zealand residents. Following that conversation, G1 spoke to Mr Wolfensohn and advised there might be a problem with the interception of the communications of Mr and Mrs Dotcom and Mr van der Kolk. Mr Wolfensohn asked G1 to prepare him a report.
23. On 20 February 2012 G1 asked G3 to contact Police and obtain details about the exact residency status of Mr and Mrs Dotcom and Mr van der Kolk so the GCSB could check to see if they had made a mistake in targeting them. G1 also began preparing a report for Mr Wolfensohn on what he had begun to view as the erroneous targeting of protected persons. The report went through several revisions.
24. On 22 and 23 February 2012 G1 received confirmation via Police from Immigration New Zealand that Mr and Mrs Dotcom had been granted residence class visas on 18 November 2010, and Mr van der Kolk had been granted a residence class visa on 2 December 2011. G1 noted Mr and Mrs Dotcom and Mr van der Kolk were residents, but not permanent residents, and accordingly reaffirmed his original (2011) view they were eligible to be targeted. G1's finalised report, dated 24 February 2012, noted that none of the Dotcom or van der Kolk family members had been granted permanent resident visas, and that from the GCSB's perspective the formal RFI for Operation Debut had been closed, meaning no ongoing work was required, and that no ongoing issues remained.



25. Mr Wolfensohn thanked G1 on 27 February 2012 for the comprehensive report "and for the confirmation that we do not in fact have an issue." He noted no follow up action was required. G1 advised Police the same day there had been no inadvertent targeting of protected persons:

Thought you'd like to know that the paper that I submitted to our Lawyers re Debut met their need. They agreed that as the families only had Residence, there was no inadvertent targeting of NZSID7 protected persons - who are only protected when they have Permanent Residency. So all done and dusted. Thanks for your help in pulling the facts together. Bring on the next case!

26. The GCSB's involvement in the Dotcom case was mentioned briefly during the Prime Minister's visit to the GCSB on 29 February 2012.
27. The next event of significance was on 9 August 2012 when the involvement of an unnamed Government organisation in the Dotcom operation emerged. The involvement of this group was revealed by Detective Inspector Wormald in evidence in the High Court, although he declined to identify the group "because of the nature of the organisation." The next day the Crown made an application for a direction that this information should not be disclosed.
28. Mr Wolfensohn emailed G1 on 10 August 2012 in response to a media article, asking if the organisation referred to by Detective Inspector Wormald was the GCSB, and if so, who attended and who authorised their involvement. G1 replied outlining the background to the GCSB's involvement in Operation Debut. On 15 August 2012, following discussions with Crown Law, Mr Wolfensohn emailed G1 to say the next step was to wait to see if a requirement for a Ministerial Certificate developed.
29. On 15 August 2012 Mr Davison QC wrote to Crown Law requesting "...disclosure of all information (if any) provided by the GCSB to the New Zealand Police (including OFCANZ) relating to any information or data intercepted or obtained by GCSB relating to Mr Dotcom, Megaupload and any associated parties."



30. Also on 15 August 2012 Simpson Grierson made an Official Information Request to the GCSB for "all or any personal information relating to Mr Dotcom, Mr van der Kolk, Mr Ortmann, Mr Batato or either of them held by GCSB." Ian Fletcher, by now the Director of the GCSB, responded on 16 August 2012 declining to provide any of the information requested on the grounds disclosure would be likely to prejudice:
- (a) The security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (b) 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; or
 - (c) The maintenance of the law, including the prevention, investigation, and detection of offences.
31. By way of a letter dated 16 August 2012 the GCSB requested a Ministerial Certificate from the Honourable Bill English, as Acting Prime Minister. The Certificate was signed by the Acting Prime Minister on 17 August (though it was dated 16 August in error). The Certificate is addressed to Detective Inspector Wormald and the Commissioner of Police. It refers to the 15 August 2012 letter from Mr Davison to Crown Law and directs that neither Detective Inspector Wormald nor any other person shall disclose any information requested in the letter, unless ordered otherwise by a Court.
32. On 7 September 2012 Mr Davison QC filed a memorandum and affidavit of Mr Dotcom setting out Mr Dotcom's status as the holder of a residence class visa. The affidavit observes that pursuant to s 14 of the GCSB Act the interception of the communications of permanent residents is prohibited. It points out that "permanent resident" is defined as a person who is or is deemed to be the holder of a residence class visa under the Immigration Act 2009. As a result, the interception of Mr Dotcom's communications, if it occurred, was illegal.



33. It was not until this point that the GCSB realised the illegality of the Operation Debut interceptions to the extent they targeted Mr and Mrs Dotcom and Mr van der Kolk.
34. The GCSB briefed the Prime Minister's Office orally regarding the illegality on 13 September 2012. On 17 September the Prime Minister asked the Honourable Paul Neazor QC, Inspector-General of Intelligence and Security, to undertake an inquiry into the facts of the case, including any errors by the GCSB.
35. Mr Wolfensohn also wrote to the Inspector-General on 17 September 2012 and met with him, reporting that the GCSB had "inadvertently failed to comply with the requirements of s 14 of the GCSB Act in relation to the interception of communications of New Zealand persons". Mr Wolfensohn emphasised that the GCSB staff involved in the operation were acting in good faith in the belief the targeted individuals did not hold permanent resident status. He accepted responsibility for the failure to recognise, on receipt of Mr and Mrs Dotcom and Mr van der Kolk's residency details in February 2012, that they were protected persons.
36. No later than 12 September 2012, the Crown advised the Court it proposed to prepare an affidavit disclosing what material was gathered by GCSB, together with how, when and why. On 17 September 2012, the Crown indicated it wished to rely on the Ministerial Certificate in support of an application under s 70 of the Evidence Act 2006 to resist wider discovery. On 24 September, the Crown formally advised the Court and the plaintiffs that it discontinued its reliance on the Certificate as it related to the identity of the entity referred to in Detective Inspector Wormald's evidence, and as to the summary of the GCSB's involvement set out in that memorandum, but wished to rely on the Certificate to resist the provision of further information as to the GCSB's operational activities.
37. On 11 October 2012, Mr Grieve QC was appointed to scrutinise the merits of the GCSB's s 70 application. Mr Grieve's appointment met the GCSB's principal concern regarding security of its classified material while discovery issues were determined. The Ministerial

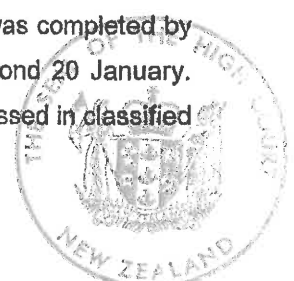


Certificate has played no role since Mr Grieve's appointment, and the GCSB has not relied on it for any purpose.

38. On 24 September 2012 the Prime Minister issued a media statement acknowledging the illegality of the GCSB's actions.
39. On 26 September 2012 the Director of the GCSB suspended almost all of the GCSB's action on assistance requests from New Zealand agencies.
40. On 27 September 2012 the Inspector-General's report was released, confirming the interception of Mr Dotcom's communications had been illegal.
41. On 1 October 2012 DPMC and the GCSB issued a joint media statement announcing the secondment of Rebecca Kitteridge, the Secretary of the Cabinet, to the GCSB in the new role of Associate Director. Over the next six months Ms Kitteridge carried out a review of compliance at the GCSB. The objective of the review was to provide the Director of the GCSB with assurance that the Bureau's activities were undertaken within its powers, and that adequate assurance and safeguards were in place. Ms Kitteridge's report was finalised in March 2013 and included a range of recommendations.

Summary of intercepts

42. Five reports were affected by the error as to Messrs Dotcom and van der Kolk's residency status.
43. There was intrusion into the privacy of Mr and Mrs Dotcom. There was also intrusion into the privacy of Messrs Ortmann and Batato, albeit to a lesser degree than in the case of Mr and Mrs Dotcom.
44. The intrusion into Mr van der Kolk's privacy was minimal.
45. There were no intercepts of any kind involving Mrs van der Kolk.
46. De-tasking commenced from 20 January 2012, and was completed by 30 January. Some automated activity continued beyond 20 January. The reason for this is technical in nature, and is discussed in classified



affidavits dated 26 March 2013, 31 March 2014 and 9 December 2016. The final dates on which communications were intercepted were:

- (a) Mr Dotcom: 16 February 2012;
- (b) Mrs Dotcom: 19 December 2011;
- (c) Mr van der Kolk: 27 January 2012;
- (d) Mr Ortmann: 22 March 2012;
- (e) Mr Batato: 30 January 2012.

Non-resident plaintiffs

- 47. The GCSB intercepted communications of Messrs Ortmann and Batato as well as communications of the three resident plaintiffs. These interceptions were not affected by the error about the other three plaintiffs' residency status.
- 48. The circumstances of the interceptions of Messrs Ortmann and Batato's communications (and the technical details regarding the other plaintiffs' interceptions) are Top Secret, and it has not proved possible to plead to the allegations the plaintiffs have made without revealing information which would jeopardise the national security of New Zealand. As a result, the GCSB is deemed to have admitted the allegations in the statement of claim which relate to the manner in which the interceptions were effected; these deemed admissions are sufficient to establish the GCSB's liability to Messrs Ortmann and Batato.



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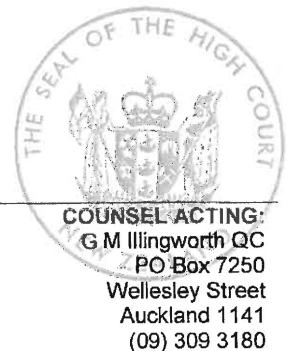
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Dated 7th August 2017

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SOLICITORS: P J K Spring / A K Hyde

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1. A declaration that:
 - (a) The interception, collection, storage, and disclosure of and enabling of access to the third plaintiff's communications and information, whether in its original form or in some derivative form, were unlawful and contrary to the Government Communications Security Bureau Act 2003;
 - (b) The interception, collection, storage, and disclosure of and enabling of access to the third plaintiff's communications and information, whether in its original form or in some derivative form, amounted to an unreasonable search in contravention of s 21 of the New Zealand Bill of Rights Act 1990.
2. A declaration that the foregoing conduct was carried out in the context of the facts and matters set out in the attached statement of facts.

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Signature:



STATEMENT OF FACTS

Background

1. Operation Debut was commenced by Police in response to extradition and mutual assistance requests from the United States to the New Zealand Government. The requests concerned the Federal Bureau of Investigation's investigation into Kim Dotcom, Bram van der Kolk, Mathias Ortmann, Finn Batato and others associated with the Megaupload business.
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3. During the briefing Detective Sergeant McMorran outlined the FBI's investigation into Megaupload. The FBI alleged Megaupload was involved in criminal breach of copyright on a very large scale. He referred to a list of suspects, which included Kim Dotcom and Bram van der Kolk, both of whom were living in New Zealand.
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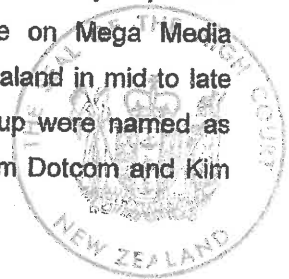


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 - (i) 20 January 2012.
19. The request from Police to the GCSB related to information about travel, risk and (later) atmospherics. The reports were all confined to the requested topics.



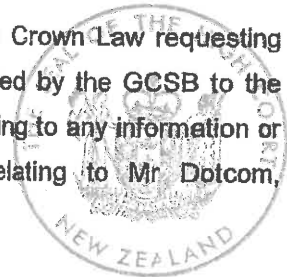
20. Operation Debut terminated on 20 January 2012 with the execution of search warrants and the arrest of Messrs Dotcom, van der Kolk, Ortmann and Batato.
21. The GCSB and Police made arrangements for a joint debrief at the GCSB on 16 February 2012. During the debrief the agencies gave presentations on the background to the operation, the processes undertaken and the keys to a successful operation.
22. At the end of the debrief G1 and G3 (who had been involved from 16 December and had formally taken over G2's role from 9 January 2012) raised concerns with Detective Inspector Wormald about reports in the media, which had circulated since the arrests, that Mr Dotcom and Mr van der Kolk were New Zealand residents. Following that conversation, G1 spoke to Mr Wolfensohn and advised there might be a problem with the interception of the communications of Mr and Mrs Dotcom and Mr van der Kolk. Mr Wolfensohn asked G1 to prepare him a report.
23. On 20 February 2012 G1 asked G3 to contact Police and obtain details about the exact residency status of Mr and Mrs Dotcom and Mr van der Kolk so the GCSB could check to see if they had made a mistake in targeting them. G1 also began preparing a report for Mr Wolfensohn on what he had begun to view as the erroneous targeting of protected persons. The report went through several revisions.
24. On 22 and 23 February 2012 G1 received confirmation via Police from Immigration New Zealand that Mr and Mrs Dotcom had been granted residence class visas on 18 November 2010, and Mr van der Kolk had been granted a residence class visa on 2 December 2011. G1 noted Mr and Mrs Dotcom and Mr van der Kolk were residents, but not permanent residents, and accordingly reaffirmed his original (2011) view they were eligible to be targeted. G1's finalised report, dated 24 February 2012, noted that none of the Dotcom or van der Kolk family members had been granted permanent resident visas, and that from the GCSB perspective the formal RFI for Operation Debut had been closed, meaning no ongoing work was required, and that no ongoing issues remained.



25. Mr Wolfensohn thanked G1 on 27 February 2012 for the comprehensive report "and for the confirmation that we do not in fact have an issue." He noted no follow up action was required. G1 advised Police the same day there had been no inadvertent targeting of protected persons:

Thought you'd like to know that the paper that I submitted to our Lawyers re Debut met their need. They agreed that as the families only had Residence, there was no inadvertent targeting of NZSID7 protected persons - who are only protected when they have Permanent Residency. So all done and dusted. Thanks for your help in pulling the facts together. Bring on the next case!

26. The GCSB's involvement in the Dotcom case was mentioned briefly during the Prime Minister's visit to the GCSB on 29 February 2012.
27. The next event of significance was on 9 August 2012 when the involvement of an unnamed Government organisation in the Dotcom operation emerged. The involvement of this group was revealed by Detective Inspector Wormald in evidence in the High Court, although he declined to identify the group "because of the nature of the organisation." The next day the Crown made an application for a direction that this information should not be disclosed.
28. Mr Wolfensohn emailed G1 on 10 August 2012 in response to a media article, asking if the organisation referred to by Detective Inspector Wormald was the GCSB, and if so, who attended and who authorised their involvement. G1 replied outlining the background to the GCSB's involvement in Operation Debut. On 15 August 2012, following discussions with Crown Law, Mr Wolfensohn emailed G1 to say the next step was to wait to see if a requirement for a Ministerial Certificate developed.
29. On 15 August 2012 Mr Davison QC wrote to Crown Law requesting "...disclosure of all information (if any) provided by the GCSB to the New Zealand Police (including OFCANZ) relating to any information or data intercepted or obtained by GCSB relating to Mr Dotcom, Megaupload and any associated parties."



30. Also on 15 August 2012 Simpson Grierson made an Official Information Request to the GCSB for "all or any personal information relating to Mr Dotcom, Mr van der Kolk, Mr Ortmann, Mr Batato or either of them held by GCSB." Ian Fletcher, by now the Director of the GCSB, responded on 16 August 2012 declining to provide any of the information requested on the grounds disclosure would be likely to prejudice:
- (a) The security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (b) 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; or
 - (c) The maintenance of the law, including the prevention, investigation, and detection of offences.
31. By way of a letter dated 16 August 2012 the GCSB requested a Ministerial Certificate from the Honourable Bill English, as Acting Prime Minister. The Certificate was signed by the Acting Prime Minister on 17 August (though it was dated 16 August in error). The Certificate is addressed to Detective Inspector Wormald and the Commissioner of Police. It refers to the 15 August 2012 letter from Mr Davison to Crown Law and directs that neither Detective Inspector Wormald nor any other person shall disclose any information requested in the letter, unless ordered otherwise by a Court.
32. On 7 September 2012 Mr Davison QC filed a memorandum and affidavit of Mr Dotcom setting out Mr Dotcom's status as the holder of a residence class visa. The affidavit observes that pursuant to s 14 of the GCSB Act the interception of the communications of permanent residents is prohibited. It points out that "permanent resident" is defined as a person who is or is deemed to be the holder of a residence class visa under the Immigration Act 2009. As a result, the interception of Mr Dotcom's communications, if it occurred, was illegal.



33. It was not until this point that the GCSB realised the illegality of the Operation Debut interceptions to the extent they targeted Mr and Mrs Dotcom and Mr van der Kolk.
34. The GCSB briefed the Prime Minister's Office orally regarding the illegality on 13 September 2012. On 17 September the Prime Minister asked the Honourable Paul Neazor QC, Inspector-General of Intelligence and Security, to undertake an inquiry into the facts of the case, including any errors by the GCSB.
35. Mr Wolfensohn also wrote to the Inspector-General on 17 September 2012 and met with him, reporting that the GCSB had "inadvertently failed to comply with the requirements of s 14 of the GCSB Act in relation to the interception of communications of New Zealand persons". Mr Wolfensohn emphasised that the GCSB staff involved in the operation were acting in good faith in the belief the targeted individuals did not hold permanent resident status. He accepted responsibility for the failure to recognise, on receipt of Mr and Mrs Dotcom and Mr van der Koik's residency details in February 2012, that they were protected persons.
36. No later than 12 September 2012, the Crown advised the Court it proposed to prepare an affidavit disclosing what material was gathered by GCSB, together with how, when and why. On 17 September 2012, the Crown indicated it wished to rely on the Ministerial Certificate in support of an application under s 70 of the Evidence Act 2006 to resist wider discovery. On 24 September, the Crown formally advised the Court and the plaintiffs that it discontinued its reliance on the Certificate as it related to the identity of the entity referred to in Detective Inspector Wormald's evidence, and as to the summary of the GCSB's involvement set out in that memorandum, but wished to rely on the Certificate to resist the provision of further information as to the GCSB's operational activities.
37. On 11 October 2012, Mr Grieve QC was appointed to scrutinise the merits of the GCSB's s 70 application. Mr Grieve's appointment met the GCSB's principal concern regarding security of its classified material while discovery issues were determined. The Ministerial



Certificate has played no role since Mr Grieve's appointment, and the GCSB has not relied on it for any purpose.

38. On 24 September 2012 the Prime Minister issued a media statement acknowledging the illegality of the GCSB's actions.
39. On 26 September 2012 the Director of the GCSB suspended almost all of the GCSB's action on assistance requests from New Zealand agencies.
40. On 27 September 2012 the Inspector-General's report was released, confirming the interception of Mr Dotcom's communications had been illegal.
41. On 1 October 2012 DPMC and the GCSB issued a joint media statement announcing the secondment of Rebecca Kitteridge, the Secretary of the Cabinet, to the GCSB in the new role of Associate Director. Over the next six months Ms Kitteridge carried out a review of compliance at the GCSB. The objective of the review was to provide the Director of the GCSB with assurance that the Bureau's activities were undertaken within its powers, and that adequate assurance and safeguards were in place. Ms Kitteridge's report was finalised in March 2013 and included a range of recommendations.

Summary of intercepts

42. Five reports were affected by the error as to Messrs Dotcom and van der Kolk's residency status.
43. There was intrusion into the privacy of Mr and Mrs Dotcom. There was also intrusion into the privacy of Messrs Ortmann and Batato, albeit to a lesser degree than in the case of Mr and Mrs Dotcom.
44. The intrusion into Mr van der Kolk's privacy was minimal.
45. There were no intercepts of any kind involving Mrs van der Kolk.
46. De-tasking commenced from 20 January 2012, and was completed by 30 January. Some automated activity continued beyond 20 January. The reason for this is technical in nature, and is discussed in classified



affidavits dated 26 March 2013, 31 March 2014 and 9 December 2016. The final dates on which communications were intercepted were:

- (a) Mr Dotcom: 16 February 2012;
- (b) Mrs Dotcom: 19 December 2011;
- (c) Mr van der Kolk: 27 January 2012;
- (d) Mr Ortmann: 22 March 2012;
- (e) Mr Batato: 30 January 2012.

Non-resident plaintiffs

47. The GCSB intercepted communications of Messrs Ortmann and Batato as well as communications of the three resident plaintiffs. These interceptions were not affected by the error about the other three plaintiffs' residency status.
48. The circumstances of the interceptions of Messrs Ortmann and Batato's communications (and the technical details regarding the other plaintiffs' interceptions) are Top Secret, and it has not proved possible to plead to the allegations the plaintiffs have made without revealing information which would jeopardise the national security of New Zealand. As a result, the GCSB is deemed to have admitted the allegations in the statement of claim which relate to the manner in which the interceptions were effected; these deemed admissions are sufficient to establish the GCSB's liability to Messrs Ortmann and Batato.

