

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM
AND RELATED MATTERS**

**Outline of submissions for the New Zealand Defence Force for the hearing on Inquiry
Minutes 3 and 4**

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Solicitor acting:

JENNY CATRAN

Crown Law

PO Box 2858

Wellington 6140

Tel: 04 472 1719

jenny.catran@crownlaw.govt.nz

Counsel acting:

PAUL RADICH QC

Clifton Chambers

PO Box 10731

Wellington 6140

Tel: 04 974 5951

paul.radich@cliftonchambers.co.nz

1. The procedural scheme prescribed by the Inquiries Act 2013 contains a comprehensive package of principles that focus both on open justice and efficiency. It provides mechanisms that are quite different from those that must apply in conventional litigation to deliver fairness.
2. NZDF sees the procedure contemplated by the Inquiry in Minutes 3 and 4 as being well in line with the type of procedure the Act enables for an inquiry of this type, which features national security, international confidence and vulnerable witness considerations.
3. NZDF sees the procedures contemplated by the Inquiry as meeting the natural justice rights and interests of those involved while enabling the inquiry to progress efficiently. It adds the following points, designed to address the scheme comprehensively, to those in the Crown's submissions.

The statutory scheme and related considerations

4. The scheme of the Inquiries Act, as it relates to matters of procedure, involves the interplay of a range of competing considerations, many of which do not and cannot feature in proceedings in the courts. The scheme – considered in terms of a procedural sequence – may be summarised in this way:

(a) ***Section 14 – A broad discretion***

An inquiry is to conduct its inquiry as it considers appropriate but it must, both, comply with the principles of natural justice and have regard to the need to avoid unnecessary delay or cost.

Natural justice is expressed on the basis that, if an inquiry proposes to make a finding that is adverse to any person, the inquiry must be satisfied that the person is aware of the matters on which the proposed finding is based and has an opportunity to respond.

Beyond that, there is no restriction on an inquiry deciding whether, for example, to call witnesses, hold hearings, receive submissions or allow cross examination.

(b) **Section 20 – Production of documents and information to the inquiry**

An inquiry may require the production of documents and information. In doing so it may examine any document for which privilege or confidentiality is claimed or refer the document to an independent person to consider whether the claim for privilege or confidentiality is justifiable or whether the document should be disclosed.

(c) **Section 22 – Disclosure of evidence to other participants in an inquiry**

An inquiry may order a person to disclose a document or information to another person participating in an inquiry on appropriate terms and conditions.

(d) **Section 15 – Restrictions on publication and private hearings**

An inquiry may forbid the publication of relevant material, restrict public access to any part of an inquiry and hold the inquiry or any part of it in private. Before doing so, it is to take into account a range of criteria including “the benefits of” observing the principle of open justice, risks to public confidence, the need to ascertain facts properly, prejudice to security, defence or economic interests of New Zealand, privacy and the administration of justice.

(e) **Section 27 – immunities and privileges**

A party may invoke the immunities or privileges they would have in civil proceedings through relevant Evidence Act provisions; including s 70 of the Evidence Act which enables a direction that information relating to matters of state is not to be disclosed if the public interest in disclosure is outweighed by the public interest in withholding the information.

However, in deciding whether to order disclosure of documents received by the Inquiry to other participants under s 22 and/or to restrict public access to information under s 15, the broader considerations in ss 14 and 15 will apply.

5. With the subject matter and features of this Inquiry in mind, the Inquiry’s Terms of Reference emphasise the ability of the Inquiry to hold the Inquiry, or any part of it, in private or to restrict access to inquiry information in order – amongst other considerations and for any other reason the Inquiry considers appropriate

– to protect security and defence interests and international relations, to protect information provided on the basis of confidence by another country, to protect the identity of witnesses, to ensure that individuals fair trial rights are protected.

6. Although the Inquiry must carry out its functions “effectively, efficiently, and fairly”,¹ and must comply with the principles of natural justice,² the courts have emphasised that inquiries are not courts of law; “they do not have the power of determination, and their recommendations and findings bind no one. *The corollary is that inquiries do not come with all the protections of a court hearing.*”³
7. Often, a government inquiry is necessary precisely because the issues cannot be determined within a conventional judicial framework:⁴

For my part I have reached the reluctant conclusion that, by their very nature, claims of the sort advanced here, targeted as they are principally against the Intelligence Services, are quite simply untriable by any remotely conventional open court process...

[C]ases of this kind, necessarily involving highly sensitive security issues should go for determination by some body ... which does not pretend to be deciding such claims on a remotely conventional basis...

Obviously, I need hardly add, claims of the sort made here – of the complicity of the Intelligence Services in torture – ought not simply to be swept under the carpet. That, of course, explains why, these particular claims ... are to be the subject of an inquiry.

8. Similarly, although the Inquiry is, at times,⁵ required to take into account the principle of open justice:⁶

The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others.

9. In the NZDF’s view, the Inquiry has accommodated appropriately the principles of natural justice and open justice:

¹ Inquiries Act 2013, s 3(1)(c).

² Inquiries Act 2013, s 14(2).

³ Law Commission “The Role of Public Inquiries – Issues Paper 1” (Wellington, 2007) at [103] (emphasis added).

⁴ *Al Rawi v The Security Service* [2011] UKSC 34 (UKSC) at [86] and [87].

⁵ Inquiries Act 2013, s 15(2)(a).

⁶ *Kennedy v The Charity Commission* [2014] UKSC 20 (UKSC) at [125].

- (a) although there is no right for core participants to receive information produced to the Inquiry,⁷ the Inquiry's draft protocol enables non-Crown core participants to receive certain information upon completion of the review procedure;
- (b) some of the evidence will be given in public session;⁸
- (c) although there is no right to cross-examination,⁹ the Inquiry has indicated that there may be circumstances in which cross-examination by core participants' counsel would be helpful,¹⁰ and, in all other cases, has made provision for core participants to "suggest topics to be pursued in questioning and suggest particular questions or sequences of questions to be put to particular witnesses";¹¹
- (d) where material, adverse to the interests of a person or of an organisation emerges in the course of gathering evidence, the person/organisation will be given a summary of the relevant material and an opportunity to respond;¹²
- (e) where natural justice concerns do not specifically arise, participation will nevertheless be facilitated by the Inquiry by making available:
 - (i) some transcripts of evidence;¹³
 - (ii) some summaries of evidence;¹⁴
- (f) public hearings on discrete issues may be held.¹⁵

⁷ Inquiries Act 2013, s 22(1).

⁸ Inquiry Minute No 4 at [90].

⁹ Inquiries Act 2013, s 14(4)(f).

¹⁰ Inquiry Minute No 4 at [76].

¹¹ Inquiry Minute No 4 at [77].

¹² Inquiry Minute No 4 at [90].

¹³ Inquiry Minute No 4 at [90].

¹⁴ Inquiry Minute No 4 at [76].

¹⁵ Inquiry Minute No 4 at [81].

Particular points that arise for NZDF

The draft protocol for the review of classified information

10. The NZDF reiterates concerns raised in the Crown submissions about the Inquiry's draft protocol.¹⁶ It adds the following points.
11. Core participants have no right to receive information produced to the Inquiry; rather, the Inquiry may, in its discretion, order a participant to disclose information to another participant.¹⁷ There is no express guidance in the Inquiries Act 2013 as to how that discretion ought to be exercised.
12. The NZDF's view is that, as with all decisions relating to procedure, the starting point is that the Inquiry must comply with the principles of natural justice *and* the need to avoid unnecessary delay or cost.¹⁸ Additionally, in exercising its discretion to disclose information to other participants, the Inquiry may find the factors enumerated in s 15(2) to be useful.
13. The NZDF accepts that the Inquiry may have regard to the criteria in s 70 of the Evidence Act 2006.¹⁹ However, with respect, the NZDF is concerned with the Inquiry's description that it has "the *power* under s 27 of Inquiries Act 2013 and s 70 of the Evidence Act 2006 to assess claims to withhold particular information from public and other disclosure."²⁰
14. In the NZDF's view, s 27 of the Inquiries Act empowers a *participant* to invoke the s 70 immunity; a different power to the Inquiry's power in s 22 to require disclosure to other participants on appropriate terms and conditions.²¹
15. The NZDF has not yet invoked the public interest immunity; it is committed to providing relevant information *to the Inquiry*. However, it asks the Inquiry to

¹⁶ Summary of Crown submissions of 15 November 2018 at [55] to [58].

¹⁷ Inquiries Act 2013, s 22(1).

¹⁸ Inquiries Act 2013, s 14(2).

¹⁹ Draft Protocol at [12].

²⁰ Draft Protocol at [2] (emphasis added); expressed also in Minute No 4 at [5](b); [21](b); and [25].

²¹ The exercise of the s 22 power would then be guided by the factors identified in ss 14 and 15 and in s 70 of the Evidence Act.

exercise its powers under ss 15 and 22 in relation to material that should not, having regard to the s 15 criteria, be disclosed to other core participants.

16. In accordance with the Crown submissions, the NZDF's position is that Mr Keith's review should be confined to material which, on its face, ought to be disclosed to specific individuals in the interests of natural justice.²²
17. When reviewing that subset of material, Mr Keith would consider whether the Crown has a justifiable reason for claiming confidentiality.²³ Provided that the Crown's need to withhold information from other core participants is expressed with due particularity,²⁴ and its claim is made on a "cogent and specific factual basis",²⁵ the NZDF's position is that there is a "particularly strong"²⁶ argument for deference.
18. If Mr Keith considers that the Crown has a justified reason for claiming confidentiality, he will evaluate whether the public interest in disclosure outweighs the interest in maintaining the confidentiality,²⁷ bearing in mind the Court of Appeal's view that "the public interest in national security *will seldom yield* to the public interest in the administration of civil justice".²⁸
19. The draft protocol envisages a document-by-document review. Once the Inquiry, with Mr Keith's assistance, has made a determination as to which documents (in whole, following redactions or by way of a summary) ought to be disclosed to core participants, the NZDF asks for an opportunity to evaluate and advise whether, viewed cumulatively, there is a risk arising out of the disclosure of the *bundle* of material.

²² Summary of Crown submissions of 15 November 2018 at [59].

²³ Summary of Crown submissions of 15 November 2018 at [61.1].

²⁴ *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 596.

²⁵ Draft Protocol at [7].

²⁶ *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 593.

²⁷ Summary of Crown submissions of 15 November 2018 at [61.2].

²⁸ *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [19]; applied in *Dotcom v Attorney-General* [2017] NZHC 1621 at [41].

20. The “jigsaw” or “mosaic” principle, upon which the NZDF relies, provides that seemingly benign pieces of information, when fitted together, may permit a comprehensive understanding of the information being protected.²⁹
21. The Full Court of the Federal Court of Australia affirmed this principle as a basis for refusing to disclose information; the court explained that the reference to “mosaic” “is simply a description of the ordinary process by which inferences might be drawn from multiple sources of information”.³⁰
22. The “jigsaw effect” was acknowledged by the Court of Appeal in *Choudry*:³¹
- The Courts have recognised that an item of information, which by itself might appear to be innocuous, may, when considered with other information, prove damaging to national security interests.
23. The NZDF accepts that a mere assertion of the mosaic effect is not sufficient to prevent the disclosure of information that seems innocuous. Rather, that there would have to be an evidential basis for the claim.³²

Protection of the identities of members of the NZSAS

24. An important restriction on access that is sought by NZDF in this inquiry is the protection of the identities of members of the NZSAS. As explained in its memorandum to the Inquiry of 29 October 2018, the NZDF follows, for important reasons, a practice of protecting the identities and roles of individual members of the NZSAS and associated personnel, both past and present.
25. The practice is in line with that of international military special forces and has been adopted by the NZDF over the last, approximately, 30 years. Protection is provided on the basis that serving NZSAS members are not identified to external audiences by name, photograph, rank, service, occupation or trade.
26. The reason for the practice relates to the nature of duties undertaken by members of the NZSAS. It is a highly specialised capability which the New Zealand

²⁹ *Attorney General of Canada v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* [2008] 3 FCR 248 (Federal Court) at [82].

³⁰ *Spencer v Commonwealth of Australia* [2012] FCAFC 169 (FCA) at [49].

³¹ *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [23].

³² *Attorney General of Canada v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* [2008] 3 FCR 248 (Federal Court) at [84].

government may use in relation to a broad range of domestic and offshore security issues. Its capabilities and operations, including its tactics, techniques and procedures, differ significantly from those of conventional forces. Its members often need to operate in an inconspicuous manner, including in advance parties and through covert and clandestine operations, which might be compromised if personnel are identifiable.

27. Members of the SAS understand, and expect, that their identities will be accorded the greatest degree of protection possible by the New Zealand Government and they are, themselves, expected to minimise any risk of disclosure of their own identities and their involvement with special forces.
28. The protection afforded derives from the same principles that underlie the New Zealand Government's Protective Security Requirements given the adverse effects that disclosure might have on New Zealand's national interests. Different justifications for protection attract different classifications. For example, endangering the safety of a person is regarded as 'sensitive', while serious damage to operational effectiveness, security, or relations with friendly governments – for example, through revealing a covert or clandestine operation – is regarded as 'secret'.
29. New Zealand's national interests are engaged because disclosure of the identities of NZSAS members have the ability to damage – potentially seriously – the operational effectiveness and safety of New Zealand forces, valuable security and intelligence operations and relations with partner governments.
30. Further, the safety of the individuals and their families is of the utmost concern to the NZDF in the context of this Inquiry. The NZSAS and associated personnel have, or have had, responsibilities relating to counterterrorism and the combating of extremism and so the personnel and their families, if their identities are known, are regarded as being likely targets for exploitation. Furthermore, revelation of their identity has the potential to cause threats to their personal safety and wellness, including through harassment, targeting, discrimination and bullying which can take place in social, educational and other contexts.

31. NZDF says that the s 15 considerations are able to be applied to enable the identities of members of NZSAS and associated personnel to be protected.

Provision of information to the Inquiry

32. The NZDF has been providing items of material (a term which includes documents, images, maps and videos) to the Inquiry that falls within the scope of the Inquiry's Terms of Reference on an ongoing basis. It is committed to providing all of the relevant material that holds to the Inquiry.
33. In identifying and providing material to the Inquiry, the NZDF is not endeavouring to filter the information in any way. Its approach is simply to identify material that falls within the terms of the Inquiry's Terms of Reference and to deliver it to the Inquiry as promptly as it can.³³
34. The NZDF is using specialist researchers within its Special Inquiry Office to research, identify and collate material for the Inquiry. Their work has required them to review multiple filing and record systems used by personnel in different international locations who have been involved with potentially relevant events at strategic, tactical and operational levels from 2009 to the present day. The process that has been used can be described more fully in the following way:
- (a) In order to maintain consistency and integrity in the handling of data and information, a framework has been developed within the Special Inquiry Office to describe the way in which material is to be explored, discovered, considered and catalogued.
 - (b) The framework has been supplemented with a brief for research team staff (both permanent or temporary) to enable them to understand what is required from the researchers, how the daily work is to be undertaken and the research standards that are expected in order to maintain consistency and integrity.
 - (c) Following an initial exploration of potential material across databases by individuals within the Special Inquiry Office, it was realised that

³³ The November 2016 earthquake and the subsequent demolition of NZDF's headquarters building in Wellington has had an adverse impact on the pace at which NZDF has been able to identify and retrieve some of the documents.

potentially available data could not properly be identified and retrieved in this way and that information retrieval software would be needed. Once the software was chosen and installed, all material was scanned in a digital format so that clusters of keywords could be applied to determine whether the material had the potential to fall within the scope of the Inquiry's Terms of Reference.

- (d) The approach to keyword searching has been designed to reduce the inclusion of unnecessary documents but without giving rise to a risk of under-disclosure.
 - (e) Material identified by the software is then reviewed by the researchers for completeness, duplication and potential relevance.
 - (f) Documents identified as being potentially relevant are then reviewed for authorship – as the NZDF is providing documents authored by its members or for which it is responsible on the understanding that other Crown agencies will provide documents authorised by their personnel.
 - (g) Material identified as being potentially relevant is reviewed, also, to determine whether or not it contains information provided in confidence by one of New Zealand's international partners. This is an important consideration for the NZDF, which relies on the provision to it of a significant quantity of operational and military-related information from its international partners on the basis of an understanding with those partners that the information will be treated with the utmost confidence. The importance of the relationship between the NZDF and New Zealand's international partners is such that consents from those partners are obtained by NZDF in order for material of this sort to be provided to the Inquiry.
 - (h) Material is then indexed and catalogued and provided to the Inquiry. NZDF has been undertaking this work on a continuing basis and information is being provided to the Inquiry as it becomes available.
35. This process has been applied by the NZDF Special Inquiry Office researchers and other personnel in relation to over 80,000 items of material on the following basis:

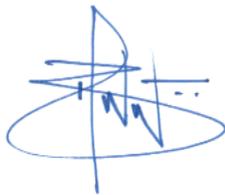
- (a) In the first place, a total of approximately 1,000 paper documents were examined (archived paper documents owned by NZDF or owned by another New Zealand agency) of which 248 were considered to be potentially relevant and were scanned electronically.
- (b) The scanned documents were added to other electronic files obtained by the Special Inquiry Office - for a range of records and from a range of locations - to create a data source of 80,565 items of material (from NZDF sources, New Zealand and international agencies and other nations) that had the potential to be relevant to the Terms of Reference.
- (c) This figure was reduced by 63,100 items of material which were considered to be irrelevant to the Inquiry; primarily digital map sheets and other GIS data documents which formed part of the material contained in a hard drive received from Headquarters Joint Forces NZ.
- (d) This leaves a balance of approximately 17,400 items³⁴ from a range of sources including NZDF, New Zealand agencies and international partners and organisations including NATO, ISAF and the US.
- (e) Of this figure, to date, 1,639 items have been examined for potential relevance under the Terms of Reference and have been catalogued. Of those 1,639 items, 1,127 are authored by NZDF. Of those 1,127 documents, the Inquiry has, to date, received 324 documents, on a digital CD and in hard copy.
- (f) An electronic assessment of the data pool of 17,400 items indicates that approximately 3,100 items are likely to be owned or authored by parties other than the NZDF. Those items are awaiting approval for disclosure to the Inquiry by their owners. To date, 512 items of the 3,100 items have been examined and catalogued by NZDF.
- (g) This leaves approximately 13,700 items of material that have yet to be examined by NZDF.³⁵

³⁴ These items include multiple drafts, copies or substantially similar items or incomplete items such that the items to be provided to the Inquiry will be materially less than that.

³⁵ The 13,700 figure has been determined by subtracting the NZDF authored and catalogued figure (1127) and the unexamined portion of the non-NZDF authored objects (2588) from the balance of 17,400 documents.

The narrative account of events

36. The NZDF has worked collaboratively with other agencies, including Crown Law, Ministry of Foreign Affairs and Trade, the Government Communications Security Bureau, the New Zealand Security and Intelligence Service and the Department of the Prime Minister and Cabinet, to ensure that the narrative account sought by the Inquiry is accurate and appropriate for public disclosure. Much of the information that has informed the unclassified account is based on classified documents or other sources that have been withheld from public disclosure – subject to the Inquiry’s own review – as a result of considerations relating to national security and international relations. It is hoped that the information – involving a level of disclosure that is unprecedented for NZDF – will assist the Inquiry, core participants and the broader public in understanding the context in which the operations in issue were conducted and the nature of the operations themselves, and that it will assist an understanding of why it is that much of the information that informs the narrative is subject to security classifications.



Paul Radich QC
Counsel for New Zealand Defence Force
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