

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: Thursday 29 November 2018

MINUTE No. 6 OF INQUIRY

Introduction

[1] On 21 and 22 November 2018, we held a hearing on two issues addressed in Minute No 4, namely the procedure for the conduct of the Inquiry and the process for the review of classified information. We indicated at the conclusion of the hearing that we hoped to be able to issue a ruling on these issues either by Christmas or by early in the New Year (this will be Ruling No 1).

[2] In light of the Inquiry's progress to date and of what emerged at the hearing, and to assist us in reaching our final view on some of the matters to be determined in Ruling No 1, we consider it necessary to make a range of orders, as set out below.¹

[3] Our initial approach to the Inquiry was to ask various parties for information and material rather than requiring it to be produced by way of formal order. We adopted this low-key approach for several reasons, including that we considered it would be the most effective way to obtain the consent of overseas parties to the release of relevant information to the Inquiry; that it reflected the reality that the Inquiry was still in the process of settling its processes and procedures, as were some of the parties holding relevant information and material; and that the Inquiry

¹ Some core participants sought orders other than those dealt with in this Minute. We will address those in Ruling No 1.

members wished to undertake their own preliminary background research on various topics, such as conditions in Afghanistan and the relevant legal settings.

[4] As a result of this informal approach, we have obtained some relevant material and information, principally from the New Zealand Defence Force (NZDF) and from the Ministry of Foreign Affairs and Trade (MFAT), and have been able to analyse it and get the review process for classified material underway.

[5] As well, the Inquiry, through Counsel Assisting, has had preliminary discussions with several potential witnesses who wish to provide information on a basis of confidence.

[6] All these factors mean that we have reached the stage where we need to make a variety of formal orders to ensure that the Inquiry has the material and information that it now needs.

NZDF

[7] In relation to the production to the Inquiry of relevant material, Mr Radich QC advised at the hearing that NZDF had identified some 17,400 items of potential relevance, sourced both from NZDF itself and from other parties, including overseas partners. Because approximately 3,100 of these items are owned or authored by parties other than NZDF, NZDF considers it will need their consent before the items can be provided to the Inquiry. We have been advised that United States has given consent for its material to be released to the Inquiry. As yet, the North Atlantic Treaty Organisation (NATO) has not notified any decision in relation to NATO/ISAF-controlled material.²

[8] Thus far, 1,639 of the 17,400 items have been reviewed by NZDF for relevance. Of that number, 1,127 are documents generated by NZDF. 324 of these have been provided to the Inquiry to date. Mr Radich undertook on behalf of NZDF that the process of providing documents to the Inquiry would be completed by the end of February 2019.

²

It is not clear to us whether any other overseas parties are involved. This is a matter on which we seek further advice from NZDF.

[9] We had understood from advice given earlier by NZDF that the total number of classified documents involved was something over 2000³ and had arranged our facilities and processes on that basis. Accordingly, we were surprised at the advice given at the hearing.

[10] Against this background, we think it necessary to make the following orders under s 20 of the Inquiries Act 2013:

- (a) NZDF is to produce to the Inquiry all documents or things that are relevant to the matters identified in paragraph [7] of the Terms of Reference and are in its possession and control. The material is to be provided in tranches, so that all relevant material is provided by, at the latest, 5 pm on Thursday 28 February 2019.
- (b) The material is to be provided in accordance with the requirements set out in the Appendix to this Minute.
- (c) NZDF is to discuss the staging of the production of material with the Inquiry's Manager Secretariat, Anna Wilson-Farrell, with a view to identifying a timetable for the production of tranches of material.
- (d) In relation to items in respect of which the consent of overseas partners is required, NZDF is to provide the relevant material as soon as reasonably possible after consent is received.
- (e) NZDF must file memoranda with the Inquiry on Friday 14 December 2018, Friday 18 January 2019 and Friday 18 February 2019 advising progress in relation to the production of material, including material requiring the consent of overseas parties.
- (f) When the final tranche of material is produced, NZDF is to verify by statutory declaration that all relevant material has been provided to the Inquiry.

³ NZDF Memorandum of 18 July 2018, para [12].

[11] Given the increased volume of material that will now have to be assessed as part of the review process for classified material, we consider that the Inquiry will need additional resources to ensure that the process, which is complex and time-consuming, is completed in a timely fashion. The need for timeliness is particularly important as the process will determine how much material might be released to other core participants and to the public. Accordingly, the Inquiry has retained the services of Mr David Johnstone of Meredith Connell to work with Mr Ben Keith in undertaking the review process.

[12] NZDF has provided the Inquiry with the names and other details of NZSAS members involved in the Objective Burnham operation on 21-22 August 2010 by way of a classified list, although we are unsure whether that is a complete list. To ensure that we have full information, we make the following orders under s 20:

- (a) NZDF is to provide the names, dates of birth, current Defence Force status,⁴ contact details (if known) and current clearance status (if known) of all NZSAS members and associated personnel who participated in the following:
 - (i) The operation in relation to Objective Burnham on 21-22 August 2010;
 - (ii) The operation in relation to Objective Nova on 2-3 October 2010;
 - (iii) The operation leading to the capture of Qari Miraj and his transfer to the NDS facility on 16 January 2011;
 - (iv) The operations in relation to Alawuddin and Qari Musa on 20 and 23 May 2011 respectively;
 - (v) The operation in relation to Abdullah Kalta on 21 November 2012.

⁴ That is, whether retired, a member of the Reserves or still serving as a permanent member of NZDF.

- (b) The list in relation to Objective Burnham is to be provided by 5 pm on Friday 7 December 2018, and the remaining lists are to be provided by 5 pm on Friday 18 January 2019.
- (c) The lists are to be accompanied by a statutory declaration on behalf of NZDF verifying the information provided.

[13] At the hearing, Mr Radich sought an order under s 15(1)(a)(iii) protecting the identities and other details of members of the NZSAS and associated personnel supplied to the Inquiry. We will address this in Ruling No 1. In the meantime, we make an interim order forbidding publication of the name or any other particulars of the NZSAS members or associated personnel involved in any of the matters referred to in paragraph [12](a) above that is likely to lead to their identification.

Ministry of Defence (MOD)

[14] As we understand it, MOD is likely to hold some relevant material in relation to the matters referred to in paragraph [7] of the Terms of Reference. In this context, we note that the Secretary of Defence is the principal civilian adviser to the Minister of Defence and other Ministers.⁵ Presumably, advice that is relevant to the Inquiry was given in that capacity. In addition, there may be other relevant material.

[15] Accordingly, we make the following orders under s 20:

- (a) MOD is to provide all relevant material to the Inquiry by Friday 18 January 2019;
- (b) The material is to be provided in accordance with the requirements set out in the Appendix.

⁵ Defence Act 1990, s 24.

- (c) MOD is to verify by way of statutory declaration that all relevant material which is in its possession or control has been provided to the Inquiry.

MFAT

[16] MFAT has produced some documents to the Inquiry and has facilitated obtaining consent from overseas partners for the provision of material they control to the Inquiry. The Inquiry is grateful for MFAT's assistance in this respect.

[17] In relation to relevant material in MFAT's possession or control and for which MFAT does not need the consent of an overseas partner, we make the following orders under s 20:

- (a) MFAT is to provide all relevant material to the Inquiry by 5 pm on Friday 14 December 2018;
- (b) The material is to be provided in accordance with the requirements set out in the Appendix.
- (c) MFAT is to verify by way of statutory declaration that all relevant material has been provided to the Inquiry.

[18] In relation to relevant material which is in MFAT's possession but for which the consent of an overseas partner is required, we make the following orders under s 20:

- (a) MFAT is to provide all relevant material to the Inquiry as soon as reasonably possible after consent is obtained.
- (b) MFAT is to verify by way of statutory declaration that all relevant material has been provided to the Inquiry.

Department of Prime Minister and Cabinet (DPMC), Government Communications Security Bureau (GCSB) and New Zealand Security and Intelligence Service (NZSIS)

[19] DPMC, GCSB and NZSIS have not provided any information to the Inquiry as yet. As with the other Crown parties, some of the relevant material they hold may require the consent of overseas partners for release to the Inquiry.

[20] Against this background, we make the following orders under s 20 in relation to each of the three agencies:

- (a) Each agency is to produce to the Inquiry any relevant material which either:
 - (i) does not require the consent of an overseas partner to release to the Inquiry; or
 - (ii) in respect of which consent has been given.
- (b) The material is to be provided in accordance with the requirements set out in the Appendix.
- (c) Each agency is to discuss the timetable for the production of relevant material with the Manager Secretariat, Anna Wilson-Farrell. These discussions must be undertaken no later than 5 working days after the date of this Minute.
- (d) Each agency is to verify by way of statutory declaration that all relevant material which is in its possession and control has been provided to the Inquiry.
- (e) In relation to any material which requires the consent of overseas partners for release, a confidential memorandum is to be filed by, or on behalf of, each agency describing what steps they have taken to obtain consent and, if consent has not already been obtained, when it

is likely to be obtained. This is to be done by, at the latest, 5 pm on Friday 14 December 2018.

- (f) Once the consent of overseas partners has been obtained, the relevant material must be provided to the Inquiry as soon as reasonably practical and must be verified by way of a statutory declaration.

Sensitive witnesses

[21] Some of those who are able to provide the Inquiry with relevant information seek to have their identities and identifying details protected, for legitimate reasons. In particular:

- (a) Counsel Assisting have had preliminary discussions with three persons who have relevant information to offer and who seek anonymity, and are about to have discussions with a fourth person. To preserve their anonymity, these potential witnesses have been given the cyphers P 49, P 50, P 51 and P 52.
- (b) Mr Hager has advised that one of his sources does not wish to speak to the Inquiry and another will only do so if satisfactory protections are in place. Mr Hager has provided us with a set of conditions.⁶ We will not address these proposed conditions here, but will do so in Ruling No 1.
- (c) While Mr Stephenson has advised that some of his sources do not require confidentiality, we assume that some will.

[22] It will assist us in reaching our final view as to process to have a clearer sense of how many people there are in this category and the precise nature of their concerns. Accordingly, we think it necessary that we make the further orders set out below. These orders are intended to protect the names and any identifying particulars of both Mr Hager's and Mr Stephenson's sources who seek

⁶ <https://www.operationburnham.inquiry.govt.nz/information/submissions-to-the-inquiry/>

confidentiality, so that they can have preliminary discussions with Counsel Assisting about their concerns and the protections that the Inquiry is able to provide, as has already occurred with P 49, P 50 and P 51. They can do so with the assurance that protections will be in place to ensure that their involvement with the Inquiry will not become known more widely than (a) the Inquirers and (b) Counsel Assisting and that nothing they say can be used against them subsequently.

[23] Against this background, we make the following orders under s 20:

- (a) Mr Hager is to provide to the Inquiry, on a confidential basis, the names and contact details of his sources by Friday 14 December 2018.
- (b) Mr Stephenson is to provide to the Inquiry, on a confidential basis, the names and contact details of his sources by Friday 14 December 2018.

[24] We make the following orders under s 15:

- (a) Publication of the names and any particulars likely to lead to the identification of the persons bearing the cyphers P 49, P 50, P 51 and P 52 is prohibited.
- (b) Publication of the names and any particulars likely to lead to the identification of the sources whose names and other details are provided to the Inquiry by Mr Hager and by Mr Stephenson is prohibited.

[25] Finally, we make the following direction:

- (a) Before making initial contact with any source whose name and other details are provided by Mr Hager or by Mr Stephenson, Counsel Assisting will give Mr Hager or Mr Stephenson, as appropriate, 24 hours' notice of their intention to do so.

Afghan Nationals

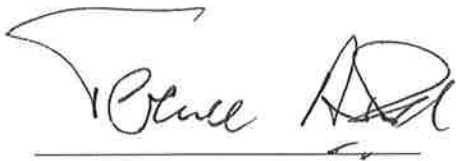
[26] In her submissions to the Inquiry, Ms Manning said that her instructions were that six Afghan nationals were killed as a result of the Objective Burnham operation and 15 were injured (the victims). Their names and other details are listed at paragraph 23 of her submissions dated 19 November 2018. On her application, the Inquiry made a non-publication order in relation to the names of the victims at the hearing. We now formally record that the publication of the names and any particulars likely to lead to the identification of the victims is prohibited.

[27] We assume that McLeod & Associates' clients are those alleged to have been wounded and the next of kin of those alleged to have been killed. However, to ensure that we are clear about who are McLeod & Associate's clients, and to enable us to make contact with them, the Inquiry makes the following order under s 20:

- (a) Mr McLeod of McLeod & Associates is to provide, by Friday 21 December 2018, the names, gender, Afghan identification numbers, direct contact details and connection to the events at issue of the Afghan nationals represented by his firm.

Conclusion

[28] The Inquiry will make additional orders for the production of material and the provision of information in due course. The matters covered in this Minute are of the most immediate concern.



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Parties:
Richard McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Force
Mr Hager
Mr Salmon for Mr Stephenson

Appendix: Requirements for all information supplied to the Inquiry

[1] Each collection of documents must be clearly labelled with the source agency, the collection number (for example: Agency name, Book 1), the pages numbered or documents separated by numbered tabs, and the classification of each document and of the collection (based on the highest classification of the documents included).

[2] An index should indicate the page or tab number of each document, the date of a document's origin, the security classification of each document, and which documents contain redactions. Any redactions must be clearly marked on the page as withheld.

[3] All documents are required in electronic format. Hard copies are also required unless otherwise agreed with the Secretariat team.

[4] Where possible, material classified Confidential or Secret will be kept separate from material marked Restricted or below. Material classified Top Secret must be provided separately as different arrangements apply.

Information marked Restricted or below including unclassified information

[5] Documents can be provided via email to the Manager Secretariat (or provided on disc or USB) and provided in hard copy unless otherwise agreed.

Information marked Confidential and Secret

[6] Documents must be provided on disc and in hard copy unless otherwise agreed. Both can be delivered to the Secretariat Team at the DIA National Office.

Information marked Top Secret

[7] Documents must be provided in both hard copy and as electronic files. Hard copies are to be delivered to the Secretariat Team with sufficient advance notice to enable the appropriate arrangements for receipt. Electronic files are to be provided by secure email. The Secretariat will provide secure email details as required.