

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS

STATUTORY DECLARATION OF GABRIELLE ANNE RUSH
CONCERNING PROVISION OF MFAT MATERIAL

21 December 2018

CROWN LAW

TE TARI TURE O TE KARAUNA

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I, Gabrielle Anne Rush, of Wellington, Legal Adviser, solemnly and sincerely declare:

1. I am the Manager of the General International Law Unit in the Legal Division of the Ministry of Foreign Affairs and Trade (MFAT). I lead MFAT's core team responsible for the Ministry's engagement in the Government Inquiry.
2. I therefore arranged for inquiries to be undertaken within MFAT to identify and collate all information that is relevant to the Inquiry's Terms of Reference.
3. Based on the information provided by those inquiries, I attach at Confidential Annex A, a description of the process MFAT undertook to identify, review and provide all relevant information to the Inquiry and I attach at Confidential Annex B, a list of documents that MFAT is providing to the Inquiry.
4. To the best of my knowledge and belief, this declaration is correct in all respects and carries out my obligations under the disclosure order.
5. And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

Declared)
 at Wellington this 21st day of December)
 2018)
 before me:)




 A Solicitor of the High Court of New Zealand

Kasia Ginders
 Solicitor
 Wellington

Annex A: Outline of process followed by MFAT to provide all relevant material to the Inquiry

1. This annex describes the steps taken by MFAT to obtain all potentially relevant documents within MFAT's possession and control for which MFAT does not need the express consent of overseas partners to provide these documents to the Inquiry. MFAT notes that a significant number of the documents being provided do, nonetheless, contain information which was provided by partners to MFAT in confidence and engage partner equities.

Preliminary comments

2. First we wish to make a number of comments about the types of documents held by MFAT that are relevant to the Inquiry's Terms of Reference, the nature of MFAT's document storage systems, and the process that MFAT has followed to identify relevant documents.
3. In his letter of 1 November 2018 to MFAT, Sir Terence Arnold noted that in addition to facilitating the Inquiry's access to relevant information under the control of overseas parties, he assumed that the Ministry held general background material (such as country reports about conditions in Afghanistan when the decision to deploy the NZSAS to Afghanistan was made in 2009 and during the period of the deployment) and material that is more directly relevant to the issues in the Inquiry (such as any relevant agreements or understandings between the Governments of New Zealand and Afghanistan concerning matters such as the conduct of deployment, the treatment of detainees and the rules of engagement).
4. As noted in MFAT's reply letter to Sir Terence Arnold of 16 November 2018, MFAT has not identified any records relating directly to Operations Burnham, Nova, or Yamaha, and no documents have been found including the name Qari Miraj.
5. In terms of relevance, MFAT has identified documents centred on two main subject areas; firstly, the background context in Afghanistan during the relevant period in which Operations Burnham, Nova, and Yamaha took place, and



secondly material relevant to New Zealand's policies and practice on the management of detainees that applied at that time.

5.1 MFAT has searched for relevant documents in these broad subject areas focused on the period identified by the Inquiry, i.e. mid-2009 to mid-2012.

5.2 MFAT has also searched earlier material for documents that might be useful to the Inquiry and have included a selection of earlier material, mainly related to New Zealand's approaches in relation to the treatment of detainees.

MFAT record management system

6. During the period of relevance to the Inquiry, MFAT was in the process of moving from a paper file system to an electronic system. The process of migration to electronic document management involved two steps, first the implementation of an Interim Document Management (IDM) system, and secondly introduction of the present Global Document Management (GDM) system. Significant documents stored in IDM were transferred to GDM, but it is possible to search both electronic depositories using key terms and authors.
7. All MFAT personnel (wherever based) have access to, and used, GDM and IDM. All key documents or emails were expected to be saved to this system, which is organised by libraries and folders relating to relevant division within MFAT but because it was a period of transition, during the relevant period the paper files remained the main depository.

Resources dedicated to disclosure

8. In order to comply with the disclosure obligations, in addition to utilising research advisers and staff from our policy, information management and Executive Service teams, MFAT has employed a retired senior MFAT staff member with the necessary clearances and experience as a dedicated resource to search over IDM/GDM and hard copy records for relevant documents, or types of documents. These efforts are detailed further below.

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General search process

9. We outline below the general process MFAT used to identify and provide all relevant material to the Inquiry.
10. Firstly, initial scoping work was carried out to identify potential sources of information:
 - 10.1 Former and current MFAT staff with relevant institutional knowledge during the relevant period, including:
 - 10.1.1 initial NZDF deployment into Afghanistan (as it relates to Rules of Engagement);
 - 10.1.2 Operations Burnham and Nova in August and October 2010, including any Ministerial authorisations;
 - 10.1.3 Transfer of Qari Miraj to the Afghan National Directorate of Security in January 2011; and
 - 10.1.4 any subsequent briefings provided to relevant senior officials and Ministers on the outcome of Operation Burnham, Operation Nova and/or transfer of Qari Miraj.
 - 10.2 Preliminary enquiries transpired that MFAT staff did not have direct knowledge of the operations and transfer of Qari Miraj.
 - 10.3 Secondly, identification and searches of relevant electronic databases and records, including GDM/IDM took place.
 - 10.4 Thirdly, identification and searches of relevant paper files held at MFAT or offsite record facilities took place.
11. Information Management Division (IMD) searched electronic databases and records using certain key words (the most relevant were, Afghanistan deployment, Afghanistan ISAF, Burnham, Nova, Qari Miraj, detainee transfer, NDS Kabul, Tirgiran Village, Khak Khuday Dad Village, Naik Village, ISAF Report, NZSAS/SAS, Rules of Engagement and key MFAT officials).



12. IMD located and searched relevant paper files for the relevant period 2009-2012.
13. A review of identified and located material which may fall within scope of the Inquiry's Terms of Reference, including originator of information was carried out.
14. Relevant material was collated into unclassified and classified categories.
15. Collated material was packaged in a manner and form requested by the Inquiry Secretariat.
16. We note that paragraph 12(iv) and (v) of Inquiry Minute No.6 requires NZDF to provide the details of personnel who participated in the operations in relation to Alawuddin, Qari Musa, and Abdullah Kalta. For clarity, we confirm that MFAT has not searched for material relating to those operations and would need to carry out further searches should the Inquiry wish MFAT to do so.

Electronic searches of MFAT databases

Global Document Management (IDM/GDM)

17. The search capability on IDM/GDM is relatively poor. Searches, even when quite specific such as "Afghanistan operation" tend to return very large numbers of documents many if not most of little relevance to the topic sought. In the instance above 7500 results were returned. Investigation of the 7,500 results identified that even many of the possibly relevant documents were undated, not sourced or drafts for which the final version had not been placed on the system.
18. For the reasons above, the number of relevant documents identified in digital form is very small and the paper files have been the main source of relevant documents.

Hard copy documents

19. Research advisers in IMD reviewed all file titles relating to Afghanistan, NATO and ISAF and identified a large pool of file parts that could contain relevant information for the period 2009-2012.

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- 19.1 For example, potentially relevant file parts were located in Security Policy Division files relating to ISAF, bilateral security relations, New Zealand defence and security policy on Afghanistan, Afghanistan/NZ Bilateral relations, files from the post in Kabul, Riyadh and other regional Embassies and High Commissions, Afghanistan/NATO, and Legal Division files on collective peacekeeping and security in Afghanistan, Rules and Conduct of War including detainees.
 - 19.2 IMD staff then reviewed file parts during the relevant period to narrow down and identify the file parts that would contain the most relevant information.
 - 19.3 After identifying the most relevant file parts, policy and legal staff reviewed the files to identify documents that may fall within scope of the Inquiry's Terms of Reference.
 - 19.4 Legal advisers then reviewed the material for all relevant documents, focused on the categories of 'detainees' and 'background' as above.
 - 19.5 As documents were generated from different parts of the Ministry, relevant policy divisions were consulted.
20. All possible relevant documents have been photocopied and scheduled in an Excel spreadsheet. The hard copies of these documents have been organised in folders as directed by the Inquiry in the Appendix 'Requirements for all material supplied to the Inquiry' to Minute No.6 of Thursday 29 November 2018.
21. A number of documents found to be relevant were copies held on MFAT files of documents prepared by other Crown agencies. Those copies are not included but steps have been taken to ensure that the original documents have been or will be provided to the Inquiry by the originating agency. Similarly, relevant documents found on MFAT files containing legal advice have been listed but will be provided by the Crown Law Office.

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Annex B: Index of documents from the Ministry of Foreign Affairs and Trade

Ministry of Foreign Affairs and Trade: Tranche 2 Documents

Background: Unclassified/Restricted

Index

| No | Title | Date | Classification |
|----|--|------------|----------------|
| 1 | Afghanistan: Update on New Zealand's Integrated Engagement | 3/02/2009 | Res |
| 2 | Minister of Foreign Affairs' Visit to Afghanistan 24-26 April- Issues for Input to NZ Afghanistan Review | 7/05/2009 | Res |
| 3 | Afghanistan: Notification of Deployment to UNSG | 12/08/2009 | Unclass |
| 4 | Afghanistan: MFA on Morning Report: Talking Points | 18/08/2009 | Res |
| 5 | Afghanistan: Discussion with State | 4/09/2009 | Res |
| 6 | Afghanistan | 21/09/2009 | Res |
| 7 | UN Security Council: Afghanistan | 30/09/2009 | Res |
| 8 | Afghanistan: Accreditation Visit | 1/04/2010 | Res |
| 9 | NATO: Afghanistan: Payments for Civilian Casualties - Non Binding Guidelines | 20/05/2010 | Sensitive |
| 10 | New Zealand's Afghanistan Policy | 23/07/2010 | Unclass |
| 11 | Afghanistan Country Paper | 1/07/2010 | Unclass |
| 12 | Conclusions from the Minister of Foreign Affairs Visit to Afghanistan and Attendance at the Kabul International Conference | 26/07/2010 | Res |
| 13 | Minutes of Afghanistan Reference Group Meeting 29 July 2010 | 29/07/2010 | Res |
| 14 | Improvised Explosive Device (IED) Attack against a patrol from the Bamyán PRT | 4/08/2010 | Unclass |
| 15 | Afghanistan: Parliamentary Elections | 21/09/2010 | Res |
| 16 | Afghanistan: Lobbying for Transition: Amended timeframe | 24/09/2010 | Res |
| 17 | Meeting with General Petraeus | 10/11/2010 | Res |
| 18 | Visit of CEO DPMC to Washington: Discussions on Afghanistan | 9/02/2011 | Res |
| 19 | Security Council on Afghanistan: UNAMA Mandate Renewed and Revised | 24/03/2011 | Sensitive |

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Ministry of Foreign Affairs and Trade: Tranche 2 Documents

Background: Confidential/Secret

Index

| No | Title | Date | Classification |
|----|--|------------|----------------|
| A | Minister of Foreign Affairs Visit to Afghanistan - meetings with President Karzai and Ministers of Foreign Affairs and Defence Part 2 of 3 | 7/05/2009 | Conf |
| B | Afghanistan: Views of German Special Envoy | 5/08/2009 | Conf |
| C | Afghanistan: New Zealand Engagement: Cross Accreditation Visit | 3/09/2009 | Conf |
| D | Re C100001377-WLN NATO Afghanistan: Updated CSPMP: Transition and Civilian Casualties | 26/03/2010 | Conf |
| E | NATO Afghanistan: Updated CSPMPO and Civilian Casualties Papers: NZ Comments | 29/03/2010 | Conf |
| F | NATO Afghanistan: Call on Supreme Allied Commander Europe | 7/04/2010 | Conf |
| G | Re C10000074 BRU: Re C10001573 WLN: NATO Afghanistan: CSPMP, Transition and Civilian Casualties | 8/04/2010 | Conf |
| HI | Visit by Minister of Foreign Affairs to United Arab Emirates and Afghanistan 17-20 July 2010 | 17/07/2010 | Conf |
| JK | NATO: Afghanistan: Mission Update: Elections and Force Generation | 2/09/2010 | Conf |
| L | Visit of Minister of Defence and CDF to Afghanistan 18-22 August: Part II: Discussions in Kabul | 3/09/2010 | Conf |
| M | Bamyan PRT Report | 23/12/2010 | Conf |
| N | Extension of the Deployment of the SAS to Afghanistan | 31/01/2011 | Sec |
| O | Extension of the deployment of the NZSAS to Afghanistan | 1/02/2011 | Sec |
| PQ | Re (CH 11000028-WLN) Extension of the Deployment of the NZSAS to Afghanistan | 2/02/2011 | Sec |
| R | Re (CH 11000028-WLN) Extension of the Deployment of the NZSAS to Afghanistan | 2/02/2011 | Sec |
| S | NATO: Afghanistan: North Atlantic Council Meeting 4 February | 4/02/2011 | Conf |
| T | Afghanistan: Briefing by Commander ISAF and NATO Senior Civilian Representative | 20/02/2011 | Conf |
| UV | Meeting of Special Representatives for Afghanistan and Pakistan, Jeddah Saudi Arabia, 3 March 2011 | 15/03/2011 | Conf |

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Ministry of Foreign Affairs and Trade: Tranche 2 Documents

Detainees: Unclassified/Restricted

Index

| No | Title | Date | Classification |
|----|--|------------|----------------|
| 1 | London Conference: Afghanistan Bilateral | 20/02/2006 | Res |
| 2 | Afghanistan: SAS and detainees: possible media/parliamentary questions | 3/08/2009 | Unclass |
| 3 | US Questions on Detainee Monitoring in Afghanistan New Zealand Approach | 3/06/2010 | Res |
| 4 | Sunday Star Times: SAS prisoners being delivered to brutal Afghan secret police DDIS Brief | 15/08/2010 | Res |
| 5 | Transcript: RNZ Morning Report 16 August 2010 Wayne Mapp | 16/08/2010 | Unclass |
| 6 | Your C10-4214: Detainees | 18/08/2010 | Res |
| 7 | Note | 3/05/2011 | Res |
| 8 | New Zealand Monitoring Taliban commanders welfare | 4/05/2011 | Unclass |
| 9 | UNAMA Report on Detainees | 11/10/2011 | Unclass |

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Ministry of Foreign Affairs and Trade: Tranche 2 Documents

Detainees: Confidential

Index

| No | Title | Date | Classification |
|--------|--|------------|----------------|
| A | Afghanistan: Detainee Conference in London | 2/10/2009 | Conf |
| B | Canada: Detainee Handling | 28/10/2009 | Conf |
| C | Afghanistan/Detainees: UK High Court Ruling and Implications for New Zealand | 17/08/2010 | Conf |
| D | Re (C10004214-WLN): Afghanistan/Detainees: UK High Court Ruling and Implications for New Zealand | 17/08/2010 | Conf |
| E * | Afghanistan/Detainees: UK High Court Judgement and Possible Implications for New Zealand | 18/08/2010 | Conf |
| F * | Afghanistan/Detainees: UK High Court Judgement and Possible Implications for New Zealand | 18/08/2010 | Conf |
| G | Visit of Minister of Defence and CDF to Afghanistan 18-22 August: Detainees | 2/09/2010 | Conf |
| HI | Detainee Arrangements - Afghanistan | 15/09/2010 | Conf |
| JK | ISAF Conference on Afghanistan Detainees: Meeting Report | 9/10/2010 | Conf |
| L * | Afghan Detainees: NZDF and Crown Law opinions | 23/12/2010 | Conf |
| M | Detainee | 2/02/2011 | Conf |
| N * | Afghanistan-New Zealand Monitoring of Detainee | 15/02/2011 | Conf |
| O | Detainee | 18/02/2011 | Conf |
| PQ | Afghanistan Detainee Transfer Conditions: meeting with NZDF | 28/02/2011 | Conf |
| R | Detainee | 2/05/2011 | Conf |

Note: Documents listed above with an asterisk (*) contain legal advice. Therefore, Crown Law will be providing these documents to the Inquiry in due course, as they have with all other legal advice.

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