

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 20 March 2019

MINUTE No 10 OF INQUIRY

Introduction

[1] In Minute No 6,¹ the Inquiry noted that Mr Hager had advised the Inquiry that one of his sources was not prepared to give evidence to the Inquiry and that another would do so only if satisfactory protective measures were in place. It also noted that Mr Stephenson had indicated that some of his sources would not require confidentiality. The Inquiry went on to order that Mr Hager and Mr Stephenson provide, on a confidential basis, the names and contact details of their sources by 14 December 2018 (later extended to 21 December 2018).

[2] The Inquiry also made orders prohibiting the publication of the names or any particulars likely to lead to the identification of the sources² and directed Counsel Assisting to give Mr Hager and Mr Stephenson (as appropriate) 24 hours' notice before attempting to contact any of their sources.³ These orders were "intended to protect the names and any identifying particulars of the authors' sources who seek confidentiality, so that they can have preliminary discussions with Counsel Assisting about their concerns and the protections that the Inquiry is able to provide ..."⁴

¹ Minute No 6 dated 29 November 2018, at para [21](b) and (c).

² At para [24](b).

³ At para [25](a).

⁴ At para [22].

[3] In an Afterword to Ruling No 1,⁵ the Inquiry noted that it had just received responses from the non-Crown core participants to its orders in Minute No 6. The Inquiry said:

[98] Since we completed the above, we have received responses from the authors and from the Afghan villagers to the orders in Minute No 6 for the provision of certain information to the Inquiry.

- (a) Mr Hager has declined to provide details about his source or sources and seeks an indefinite extension to the time for complying with the Inquiry's order. The Inquiry considers that it is untenable to extend time indefinitely and declines to do so. It will accordingly treat Mr Hager as having invoked the confidentiality accorded to journalists in respect of their sources by s 68 of the Evidence Act 2006.
- (b) Mr Stephenson has said he will provide the details of three of his sources through Counsel Assisting but has claimed confidentiality under s 68 in relation to the remainder, pending further discussions with those sources and with the Inquiry about the protections it can offer.
- (c) Ms Manning has provided the names and other details of her Afghan villager clients and has sought certain orders as to confidentiality. We will address these in a separate minute in the New Year but in the meantime, we make an interim order prohibiting the publication of the names or any identifying particulars of Ms Manning's Afghan clients.

[99] Obviously, the stance adopted by the journalists creates some difficulty for the Inquiry. We will issue a further minute early in the New Year to address the position.

[4] We now address these matters. We also comment on a further issue held over from an earlier Minute,⁶ namely the issue of taking evidence from Afghanistan residents.

Mr Stephenson's sources

[5] Counsel Assisting have had a number of discussions with Mr Stephenson and his legal advisers about the provision of information to the Inquiry. Mr Stephenson emphasised his willingness to assist the Inquiry to the extent that he can and agreed to give evidence. He is having discussions with his sources and has

⁵ Ruling No 1 dated 21 December 2018, at para [98].

⁶ Minute No 4 dated 14 September 2018, Appendix 1 at para [24].

provided further information. We will await the outcome of his further discussions with his remaining sources and are hopeful that we will be able to have access to them.

Mr Hager's sources

[6] On 20 December 2018, Mr Hager sought an indefinite extension for complying with the Inquiry's order. We declined to grant an extension, and treated Mr Hager as having invoked the journalists' privilege in s 68 of the Evidence Act 2006.

[7] On 11 March 2019, Mr Hager wrote to the Inquiry making a number of complaints about its processes. We will not address his complaints here, save in one respect. Mr Hager made the following comments in relation to his sources:

At the same time, the Inquiry has acted in [a] heavy-handed way that discouraged my main sources from being willing to participate, seriously damaging the possibility of a process that hears all sides. I was shocked by the careless actions that caused these very vulnerable sources to lose confidence in the Inquiry.

[8] It is difficult to understand on what rational basis these comments were made.

[9] The Inquiry wants to obtain all relevant information. It would like to speak to Mr Hager's source(s) on a confidential basis and can offer comprehensive protection to ensure confidentiality, as it has to other vulnerable witnesses. Through Counsel Assisting, the Inquiry has made this plain to Mr Hager. Counsel Assisting first raised the issue of access to sources with Mr Hager in a meeting on 10 July 2018. At that meeting, Mr Hager advised that he might not be able to provide any sources to the Inquiry but would continue to think about it. At a meeting on 2 August 2018 with Counsel Assisting, Mr Hager indicated that his main source might be prepared to meet the Inquiry if sufficient protection by way of anonymity and confidentiality was guaranteed and said that he would be advising the source on whether it was "safe" to engage with the Inquiry. Counsel Assisting offered to meet the source on a confidential basis to discuss his/her needs and concerns, as that might assist the Inquiry to determine the process by which it could

meet with him/her and take evidence. Ms McDonald QC followed up by speaking to Mr Hager by telephone on 6 August 2018, reiterating that Counsel Assisting could meet his source in circumstances of confidentiality. Mr Hager indicated that he would be in touch later in the month. In the event, no meeting eventuated.

[10] The Inquiry annexed a proposed witness protocol to its Minute No 4, dated 14 September 2018, in which it set out its preliminary views about its procedures. That protocol set out the process that the Inquiry proposed to follow with witnesses, both those requiring confidentiality and those who did not.⁷ The Inquiry invited comment on its preliminary views concerning process.

[11] At a meeting on 7 November 2018 with Counsel Assisting, Mr Hager provided a written set of conditions on the basis of which he said his source(s) would give evidence. We addressed Mr Hager's conditions in Minute No 7.⁸ Most were consistent with what is set out in the Inquiry's Witness Protocol and were acceptable to the Inquiry.

[12] One was particularly problematic, however. Mr Hager said his source(s) required to be provided with the evidence from all New Zealand Defence Force (NZDF) witnesses and to have access to all NZDF documentation so as to be able to respond to them. Plainly, this condition was not directed at the protection of the source's identity and personal details or otherwise at preserving confidentiality. Moreover, as Minute No 7 explained,⁹ such a requirement misunderstands the role of a witness in the Inquiry. The Minute noted that if there were issues relevant to the evidence of a witness arising from documents or other witnesses, the Inquiry would consider whether they needed to be raised with the witness and, if they thought it necessary, would raise them.

[13] In the result, the Inquiry does not accept that it has acted in a heavy-handed way that has discouraged Mr Hager's source(s) from speaking to the Inquiry. Rather, it has attempted, albeit unsuccessfully, to encourage Mr Hager to

⁷ Minute No 4 dated 14 September 2018, Appendix 1.

⁸ Minute No 7 dated 10 December 2018, at paras [4]–[16].

⁹ At [16].

facilitate their contact with the Inquiry on a confidential basis so as to identify their concerns and ensure their ongoing confidentiality.

[14] If Mr Hager's source(s) continues to refuse to talk to the Inquiry on a confidential basis, that will be most disappointing. Obviously the source's stance does not assist the Inquiry's work. Nevertheless, we are confident that we will still be able to hear all sides of the story. Most of the sources who contributed to *Hit & Run* are Mr Stephenson's, not Mr Hager's. Indeed, as we understand it, independently of Mr Stephenson, Mr Hager had only one or two sources. Because Mr Stephenson is assisting the Inquiry by providing information and evidence, and because the Inquiry will be able to take evidence from the NZDF and other New Zealand personnel involved in the various operations at issue, the Inquiry should be able to fully explore the competing versions of events.

[15] Furthermore, what Mr Hager has learned from his source is no doubt reflected not only in *Hit & Run*, but also in at least some of the substantive submissions and letters he has provided to the Inquiry. As we said in Minute No 9, Mr Hager will be giving evidence to the Inquiry. In the course of that, he will presumably draw on what he was told by his source. To that extent, the Inquiry will have an awareness of the source's information and will be able to take it into account.

[16] We should emphasise that, to the extent that Mr Hager can provide us with additional relevant information, we wish to receive it, and will, of course, take it into account in forming our views. And, for the avoidance of doubt, we reiterate that we would like to take evidence from Mr Hager's source(s) directly, under conditions of confidentiality. From the Inquiry's perspective, talking directly to sources is preferable as it enables the Inquiry to assess the witness and the weight to be given to what they have to say. We ask again that Mr Hager do what he can to facilitate that.

Afghan villagers

[17] In Minute No 1, the Inquiry designated as core participants three Afghan nationals (the plaintiffs in judicial review proceedings filed in the Wellington Registry under CIV-2017-485-000675).¹⁰ On their application we made confidentiality orders as to their identity.¹¹ They are accordingly referred to as AV1, AV2 and AV3. The Inquiry indicated that further designations might be made as the Inquiry proceeds but to date, none have been made.

[18] In their memorandum of 19 November 2018, counsel for the Afghan villagers said they were instructed that 21 persons were killed or wounded as a result of Operation Burnham, 19 at the village of Khak Khuday Dad and two at Naik.¹² Counsel identified the victims by name; indicated what had happened to them; which village they were in; and, in some instances, gave their relationships to others. The list provided comprised substantially the same names as on the list in *Hit & Run*.¹³ The Inquiry then sought precise details. In Minute No 6, the Inquiry ordered counsel's instructing solicitor, Mr McLeod, to provide "the names, gender, Afghan identification numbers, direct contact details and connection to the events at issue of the Afghan nationals represented by his firm".¹⁴

[19] In his response of 20 December 2018, Mr McLeod provided a list of 22 names and other associated information. Mr McLeod did not, however, provide contact details in relation to his clients, a matter to which we return below. The 20 December list includes relatives of those listed in *Hit & Run* as having been killed in Operation Burnham. The Inquiry has several queries about the 20 December list, on which it seeks clarification.¹⁵

¹⁰ Minute No 1 dated 10 July 2018 at para [5](d).

¹¹ Minute No 2 dated 19 July 2018.

¹² Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik Requesting Orders as to Procedural Matters (19 November 2018), at para 23.

¹³ At p 126.

¹⁴ Minute No 6 dated 29 November 2018 at para [27](a).

¹⁵ In the first instance, we suggest that Counsel Assisting confer with counsel for the Afghan villagers about these details.

[20] First, although the 20 December list includes the persons identified as AV1 and AV3, it does not appear to include the person identified as AV2, nor does that person appear in the list of 21 people in *Hit & Run*. We ask what the position is in relation to AV2.

[21] Second, the 20 December list contains three people with the name *[withheld]*, each having a different Afghan identification number. On the basis of the list in *Hit & Run* and the list in 19 November submission, the Inquiry is aware of *[withheld]* with that name. Are there in fact three different people with the same name? If so, it would be helpful if the connection of each to those on the list in *Hit & Run* could be clarified.

[22] The same analysis applies to the multiple persons with the name *[withheld]*; it is unclear which person(s) with this name is/are the client(s) of the counsel for the villagers (the Inquiry has made several attempts to reconcile the various submissions through family-tree mapping and through the analysis of the various identity numbers provided). In addition, a person with this name appears in the *[withheld]*, and the Inquiry asks whether this is the same person.

[23] Next, in the 20 December list, *[withheld]* is identified as the daughter of *[withheld]*. *[Withheld]*'s Afghan identification number is cited as *[withheld]*, but according to the 20 December list that is also the identification number of *[withheld]* (identified as the father of *[withheld]*). *[Withheld]* is referred to in *Hit & Run* as the father of *[withheld]*, and his wife is referred to as *[withheld]*¹⁶ or *[withheld]*.¹⁷ We enquire whether *[withheld]* is the woman referred to as *[withheld]* and the wife of *[withheld]*.

[24] Finally, *[withheld]* is cited as being from Khak Khuday Dad in both *Hit & Run* and the 19 November submission. However in the 20 December submission, *[withheld]* is listed as being from "Nayak" (presumably "Naik" as per

¹⁶ *[Withheld]*.

¹⁷ *[Withheld]*.

the book). It would be helpful if this discrepancy could be clarified. Additionally, the Inquiry seeks clarification that *[withheld]* is the *[withheld]* of AV3, because the name of AV3 (*[withheld]*) and the person listed on the 20 December list (*[withheld]*) are similar, although not identical.

[25] We made an interim confidentiality order under s 15(1)(a)(iii) of the Inquiries Act 2013 in relation to the names on the client list in Ruling No 1. Having considered the factors identified in s 15(2) of the Act, in particular the privacy interests of the Afghan villagers and the risks to them and their families in Afghanistan, we continue that interim order.

Protocol for taking evidence from Afghan witnesses

[26] When the Inquiry finalised its Witness Protocol, it expressly reserved the position in relation to the Afghan villagers and said that it wished to consider further how evidence should be taken from them. We now update the position.

[27] As noted, the Inquiry's order required the provision of direct contact details for the Afghan clients of McLeod & Associates but those details were not provided. Counsel's covering memorandum explained the position as follows:¹⁸

The Inquiry has also requested direct contact details for these individuals. Such contact is difficult, however, owing to the circumstances of our clients in Afghanistan. Many do not have any direct means of contact at all. Those individuals who do have phones change phone numbers frequently, and are often out of contact for prolonged periods for various reasons. For this reason, counsel have relied upon intermediaries to facilitate direct contact with the clients.

Counsel then explained that that they had used a New Zealand-based interpreter to contact either a client directly or, if that was not possible, an intermediary, who would then contact the relevant client. Counsel said that it was either impossible or impracticable to provide contact details for their clients because such details "may become quickly outdated and will be frequently unreliable".¹⁹ Accordingly, they

¹⁸ Memorandum of Counsel in Reply for Former Residents of Khak Khuday Dad and Naik (20 December 2018) at para 2.

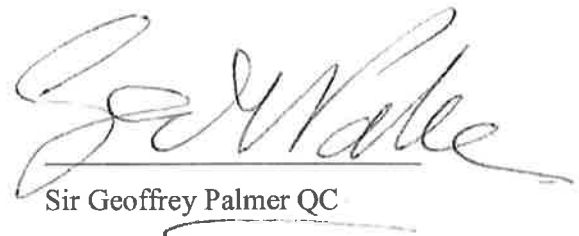
¹⁹ At para 6.

suggested that the Inquiry contact the Afghan villagers through the New Zealand-based interpreter they had retained.

[28] The Inquiry has significant reservations about this suggestion. As the Inquiry has already explained, all witnesses will be the Inquiry's witnesses. It wishes to deal with them directly. At this stage, the Inquiry is unsure as to how many of the Afghan villagers (besides the three persons designated as core participants)²⁰ it will need to hear evidence from. That will become clearer as the Inquiry acquires more information and is able to identify more precisely the specific areas of material factual dispute. Accordingly, the Inquiry wishes to reserve its position for the moment. However, as foreshadowed in Minute 4, the Inquiry intends to prepare a draft evidence-taking protocol in relation to witnesses resident in Afghanistan and will make that available to core participants for comment. The protocol will need to reflect the particular challenges of taking evidence from persons resident in Afghanistan and the need to accommodate the ethical principles set out in Minute 6, particularly the principles of "do no harm" and "fully informed consent".²¹



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Parties:

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

²⁰ This is subject to clarification of the position of AV2.

²¹ Minute No 4 dated 14 September 2018, at paras [75] and [85]–[86].