

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND  
RELATED MATTERS

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MEMORANDUM OF COUNSEL FOR THE CROWN

26 April 2019

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**CROWN LAW**

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**MAY IT PLEASE THE INQUIRY:**

1. In its order for disclosure of information, dated 3 April 2019 (**Order**), the Inquiry ordered a number of the Crown Agencies to provide a list containing the names and other information concerning all employees and associated personnel who participated in, provided advice on, contributed to or otherwise had involvement in the specific operations to which the Inquiry relates. The Inquiry ordered that the lists be provided by 26 April 2019, and that they be verified by way of statutory declarations on behalf of each agency.
2. Filed along with this memorandum are statutory declarations on behalf of the following agencies:
  - 2.1 New Zealand Security Intelligence Service (**NZSIS**).
  - 2.2 Government Communications Security Bureau (**GCSB**).
  - 2.3 Ministry of Foreign Affairs and Trade (**MFAT**).
  - 2.4 Department of the Prime Minister and Cabinet (**DPMC**).
  - 2.5 Ministry of Defence (**MOD**).
3. The lists of personnel for the NZSIS and GCSB will be provided separately to comply with Protective Security Requirements.

**Scope of the order and lists**

4. The Crown Agencies have interpreted the Order as requiring provision of the details of personnel with some involvement with the listed operations. Accordingly, the agencies have not sought to identify every official who may have had involvement with the New Zealand Government's policy in respect of the Afghanistan conflict, or diplomatic relations with Afghanistan, over the relevant period.
5. DPMC and MOD have identified only the key officials who had responsibility for matters of national security and advice on foreign relations during the relevant period, who may have had some knowledge of the operations in question, or matters relating to them. Similarly, MFAT has only identified one

person who was briefed on the circumstances of the named operation in paragraph 3(e) of the Order.

6. The Crown Agencies have not identified every official who may have had involvement in providing advice relating to the Afghanistan conflict at the relevant times, or who may have been generally aware of some or all of the operations. Similarly, the Crown Agencies have not provided the information relating to individuals with purely administrative roles, who may have been privy to some information relating to the operations, but who did not themselves participate in, provide advice on, contribute to or otherwise have involvement in the operations.
7. Where an individual was seconded between agencies at the relevant time, they have been included within the list of the host agency (i.e. the agency for which they were working at the relevant time).
8. The Crown Agencies have provided only a high level description of the individuals' roles and the nature of their possible involvement in the operations. This is because the individuals may become witnesses of the Inquiry, and the specific information concerning their involvement in the operations will be a matter of evidence. Accordingly, the Crown Agencies have avoided discussing the specifics of each individual's particular involvement with the people concerned.
9. The Crown Agencies trust that the approach outlined above is in line with the Inquiry's expectations. Should the Inquiry identify any further individuals or classes of people who the Inquiry considers may be able to assist the Inquiry, the Crown Agencies would be happy to provide further information.

#### **Application for restriction orders – NZSIS and GCSB**

10. The Inquiry has made interim orders under s 15(1) of the Inquiries Act prohibiting publication of the names and other particulars of the personnel identified on the Crown Agencies' lists that is likely to lead to their identification. The Inquiry has invited the Crown Agencies to make applications seeking permanent orders, where appropriate.

11. The names and identifying particulars of employees of the NZSIS and GCSB and the fact that they are or have been employed by the NZSIS or GCSB, is classified. Accordingly, this information is covered by the order under s 15(1) currently in place over all classified material provided to the Inquiry. For the avoidance of doubt, however, the NZSIS and GCSB seek a permanent order under s 15(1) prohibiting publication of the names or other particulars of the personnel identified on the list that is likely to lead to their identification. The grounds for the application are as follows:
  - 11.1 Under s 227 of the Intelligence and Security Act 2017, it is an offence to publish, without the consent of the relevant Minister, the fact that any person is an employee of the NZSIS or GCSB (other than the Directors-General of the agencies).
  - 11.2 The policy rationale for this provision is that publication of this information is likely to lead to risks to the safety and wellbeing of the employee concerned, and to a prejudice to New Zealand's national security. The same policy considerations apply to publication of the names and identifying particulars of former employees of the agencies.
  - 11.3 Employees of the NZSIS and GCSB often need to act covertly to fulfil their functions under the Intelligence and Security Act 2017. Disclosure of their names or other identifying particulars would prejudice their ability to do this, which would in turn prejudice the effectiveness of the agencies to fulfil their functions and risk disclosure of previous covert activities. Degrading the effectiveness of the agencies would ultimately prejudice New Zealand's national security.
  - 11.4 If the identity of employees or former employees of the NZSIS or GCSB are published, they could become targets for intelligence or counter-intelligence operations of New Zealand's adversaries. This would both lead to a risk to their personal safety and welfare, and prejudice New Zealand's national security.



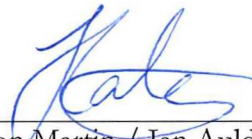
- 11.5 Furthermore, if the principle of protection for the identities of employees or former employees of the agencies is weakened, given the risks to personal safety and welfare that disclosure can produce, it may result in a negative impact on morale within the two agencies and reduce the willingness of employees to expose themselves to those risks. This could, in turn, lead to a prejudice to New Zealand's national security.
- 11.6 There is also a potential risk to international relations if the general policy of protection of the identities of intelligence personnel is weakened. This is because foreign governments share intelligence information with New Zealand on the basis that it will be protected. One important method of protecting the information is by protecting the identities of those people who have access to that information to prevent them becoming the target of intelligence activities of adversaries, as discussed above. If this protection is compromised, other nations may be less willing to share sensitive information with New Zealand, which would have implications for both national security and international relations.
12. There may also be security risks relating to the method by which the Inquiry contacts any current or former employees of the NZSIS or GCSB. The NZSIS and GCSB will provide a separate letter explaining some of these issues, and invite the Inquiry to consult the agencies, as appropriate, to mitigate them.

#### **Restriction orders – other Crown Agencies**

13. The other Crown Agencies do not seek permanent orders under s 15(1) in respect of the names or identifying particulars of the people on their lists. The agencies trust that the Inquiry will consider the individuals' privacy interests, and balance this against the principles of natural justice and open justice, when considering whether to publish this information or order disclosure under s 22 of the Inquiries Act. The Crown Agencies submit that these principles will not necessarily weigh in favour of disclosure of the names or identities. This is a matter of judgment for the Inquiry.

14. The agencies do, however, seek an order under s 15(1) in respect of the contact details and dates of birth (where relevant) of the individuals listed, in order to protect their privacy interests. The Crown submits that there is no public interest in this information, nor any requirement to provide this information to non-Crown core participants in the interests of natural justice.

26 April 2019



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