

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 13 July 2020 [reissued 17 July 2020]

MINUTE No 23 OF INQUIRY

Conclusion of Inquiry

[1] The Government Inquiry into Operation Burnham and related matters (the Inquiry) will present its final report to the Attorney-General, Hon David Parker, on 17 July 2020.

[2] The Inquiry acknowledges that this has been a demanding and time-consuming process for core participants, Crown Agencies and others involved. The Inquiry thanks all those who have contributed to its work.

[3] The Inquiry has no authority to release its report to anyone other than the Attorney-General. In that sense, the Inquiry's report is confidential, and will remain so until released by the Attorney-General.

[4] The Inquiry members will not be making any public comment about the report, in accordance with long-established custom.

[5] The Inquiry itself will cease once it has provided its report to the Attorney-General on 17 July 2020.

[6] The Inquiry Secretariat will continue to operate until 19 August 2020 to deal with final administrative matters. After that date, any further queries should be directed to the Department of Internal Affairs.

Status of information relating to the Inquiry

[7] A number of interim and final orders have been made under s 15 of the Inquiries Act 2013 (the Act) during the course of the Inquiry. Those orders that are not already spent continue in effect, except to the extent modified or overtaken by the orders that follow.

[8] After the Inquiry has reported, all information held by the Inquiry becomes official information for the purposes of the Official Information Act 1982 (the OIA), with two exceptions:¹

- (a) any matters over which the Inquiry has made an order under s 15(1)(a) of the Act; and
- (b) any information relating to internal deliberations of the Inquiry.²

[9] Section 15(1)(a) of the Act enables the Inquiry to make orders to forbid publication of:

- (a) all or part of any evidence or submissions presented to the Inquiry;
- (b) any report or account of the evidence or submissions;
- (c) names or other particulars likely to lead to the identification of witnesses or other participants in the Inquiry; and
- (d) any rulings of the Inquiry.

[10] Under s 15(1)(b) and (c) an inquiry may restrict public access to any part of it and hold any part of it in private.

[11] The Inquiry has carefully considered the matters set out in s 15(2) of the Act, as well as the provisions of the OIA that will govern later decisions to release

¹ Inquiries Act 2013, s 32.

² The internal deliberations of the Inquiry are automatically protected by s 32(2)(b) of the Act.

or protect the information it holds. It has concluded that some of the information it holds requires continuing protection from public release or publication.

[12] In particular, it is necessary to protect information in the evidence and submissions provided to the Inquiry that:

- (a) contains personal or private information (including personal information which, if released, might place people at risk or prejudice New Zealand's security interests);
- (b) was provided in confidence;³ or
- (c) reflects draft or preliminary findings reached prior to the finalisation of the Inquiry's report, which were made available to core participants and affected parties in discharge of the Inquiry's natural justice and other obligations to them.

[13] The protection of this information is necessary:

- (a) To allow the Inquiry to honour its advice to witnesses about the basis on which their evidence was taken, specifically, that it would be taken in confidence.
- (b) To protect privacy and personal safety interests, and New Zealand's security interests.
- (c) To safeguard the ability of future inquiries to ascertain facts properly and promptly. It would be unfair to witnesses and participants in the Inquiry if their involvement and the information that they have provided under conditions of confidentiality was now subject to potential disclosure under the OIA. In our view, such potential disclosure would reduce the likelihood of future inquiries receiving the necessary level of cooperation.

³ Classified information held by the Inquiry that has not been publicly released continues to be covered by the Government's Protective Security Requirements: see [33]–[37] below.

- (d) In relation to the draft report or excerpts of it provided to core participants or affected parties for comment, to be fair to those given the opportunity to comment, and to protect the integrity of the Inquiry's processes.

[14] The need for continuing protection of information must be balanced against the benefits of observing the principle of open justice and the need for transparency to ensure public confidence in the procedures of the Inquiry. The public interest in disclosure of information has been (or will be) met by:

- (a) the detailed discussion of the facts, the findings and the recommendations in the Inquiry's final report, which the Attorney-General may release publicly in due course;
- (b) the publication of most submissions received from participants and others and the substantial disclosure of documents (including previously classified documents) on the Inquiry's website; and
- (c) the public hearings the Inquiry held on 21–22 November 2018 and 4 April, 22–23 May, 29–30 July, 16–19 September, and 15, 16 and 18 October 2019, transcripts from which have been made publicly available.

[15] The following identifies categories of information held by the Inquiry and records the orders made by the Inquiry in respect of that information under s 15 of the Act under the following headings:

- (a) Information relating to the Inquiry's draft report.
- (b) Information relating to the Inquiry's interviewees and witnesses.
- (c) Correspondence and working papers relating to the Inquiry's internal deliberations.
- (d) Afghan villagers.

- (e) Classified and confidential material.
- (f) Information held by public sector agencies.

Information relating to the Inquiry's draft report

[16] The Inquiry engaged in a consultation process with core participants and affected parties (including certain witnesses) in relation to its draft report. As part of that process, the Inquiry:

- (a) made excerpts of its draft report available on a confidential basis to affected parties to enable those who might be subject to adverse comment to respond, and to enable the Inquiry to meet its natural justice obligations to those parties; and
- (b) made its full draft report available on a confidential basis to core participants for review, to enable them to respond to the Inquiry on any aspect of the draft report both generally, and in discharge of the Inquiry's natural justice obligations to core participants.

[17] The Inquiry received submissions and responses on provisional findings in its draft report from affected parties and core participants. Those submissions and responses were considered by the Inquiry in the preparation of its final report and in some instances resulted in material changes to the draft report.

[18] Because the Inquiry's draft report was produced before the Inquiry had addressed all its natural justice obligations to affected parties and core participants, it does not reflect the findings made in the final report in all respects. For this reason, when the Inquiry made the draft report (or excerpts from it) available for comment, it ordered that both the draft report (or excerpts) and the submissions or responses received from affected parties and core participants be kept confidential. The Inquiry considers that both the draft report (and excerpts from it) and the submissions and responses received require continuing protection from public release or publication, except to the extent referred to in the report. The Inquiry

considers that continuing protection is necessary to avoid prejudice to affected parties, to ensure privacy interests are protected and to avoid any risk of prejudice to public confidence in the proceedings of the Inquiry that might result from the release of draft findings.

[19] The Inquiry orders under s 15(1)(a) of the Act that no person may publish or disclose to any other person the following information (whether held in the records of the Inquiry or otherwise) relating to the Inquiry's draft report:

- (a) the draft report of the Inquiry or any excerpt from it;
- (b) any submissions or responses to the Inquiry in relation to any part of the draft report;
- (c) any correspondence with the Inquiry about the substance of the draft report or any excerpt from it; and
- (d) any document produced in relation to the drafts of the Inquiry's report or any part of it, including emails, memoranda, notes, comments, advice or records of discussions.

Information relating to Inquiry interviewees and witnesses

[20] In Ruling No 1 of the Inquiry dated 21 December 2018 the Inquiry determined that all witnesses would be witnesses of the Inquiry and that, in general, interviews and evidence-gathering would be conducted in private, subject to the possibility that some evidence might be able to be heard in a public setting. Accordingly, witnesses were interviewed and gave evidence in private during the Inquiry, with the exception of those who gave evidence at the Inquiry's public hearings. Interim confidentiality orders are in effect in respect of all witnesses who gave evidence in private.

[21] The Inquiry has considered the factors in s 15(2) of the Act and has determined that a permanent confidentiality order should be made in relation to

witnesses who gave evidence in confidence to the Inquiry to protect their identities and evidence. The order is necessary to:

- (a) honour the Inquiry's advice to witnesses that their identities would be protected and their evidence treated as confidential, which facilitated the Inquiry's ability to ascertain the facts accurately;
- (b) protect the privacy interests of those involved; and
- (c) in relation to past and present members of New Zealand Defence Force and the intelligence and security agencies, to protect New Zealand's security interests.

[22] The Inquiry considers that such orders do not undermine the observance of open justice or risk prejudicing public confidence in the Inquiry. Where the Inquiry has found it necessary to refer in its report to specific evidence given in confidence by a particular individual, the Inquiry has obtained the consent of the relevant person.

[23] In addition, the Inquiry interviewed some people in private under conditions of confidentiality. The Inquiry considers that a permanent confidentiality order should be made in respect of those interviewed on this basis as well.

[24] The Inquiry orders under s 15(1)(a) of the Act that there must be no publication of the following information held in the records of the Inquiry:

- (a) the name or any identifying particular likely to lead to the identification of any witness of the Inquiry who did not give evidence at a public hearing of the Inquiry or of any person interviewed by the Inquiry in private;
- (b) any material provided to the Inquiry by witnesses or interviewees under conditions of confidence (including by Mr Hager and Mr Stephenson); and

- (c) any audio recordings, transcripts of evidence, “will say” or similar statements or notes resulting from, or prepared in relation to, any meetings or interviews with witnesses of, or persons interviewed by, the Inquiry (including those interviewed by Counsel Assisting) other than during a public hearing. This applies to evidence given in private by Mr Hager and Mr Stephenson.

[25] The orders in paragraph [24]:

- (a) do not apply to the Inquiry’s final report;
- (b) do not prevent Mr Hager or Mr Stephenson from using publicly any information they provided to the Inquiry (except to the extent that the order at [19] above applies).

[26] In addition, the Inquiry makes an order under s 15(1)(a)(iii) prohibiting the publication of the names or other identifying particulars held in its records of personnel currently or previously employed by the Government Communications Security Bureau or the New Zealand Security Intelligence Service. Disclosure of these details may prejudice New Zealand’s security interests, as well as the privacy interests of the people involved.⁴

Correspondence and working papers relating to the Inquiry’s internal deliberations

[27] Section 32(2)(b) of the Act provides that any information relating to the internal deliberations of an inquiry and either created by a member of the inquiry during the inquiry or provided to the inquiry by an officer of the inquiry does not become official information after the Inquiry has reported.

⁴ The Inquiry made an interim confidentiality order in Minute No 6 dated 29 November 2018 at [13] in relation to members of the NZSAS referred to in [12] of that Minute. That interim order was made permanent in Ruling No 1 dated 21 December 2018 at [49]. That order remains in effect to the extent necessary to protect anyone not otherwise covered by the orders in this Minute.

[28] To avoid doubt, the Inquiry considers that the information held in the records of the Inquiry that falls within s 32(2)(b) includes, but is not limited to:

- (a) any internal documents (including memoranda, file notes, analysis or working papers) and any drafts of such documents prepared by Members of the Inquiry, Counsel Assisting, the Inquiry secretariat team, experts engaged by the Inquiry or any other person working for the Inquiry in relation to the matters before it;
- (b) any correspondence, drafts of correspondence or records of correspondence between Members of the Inquiry, Counsel Assisting, the Inquiry secretariat team, experts engaged by the Inquiry or any other person working for the Inquiry in relation to the matters before it; and
- (c) any records of meetings or discussions between Members of the Inquiry, Counsel Assisting, the Inquiry secretariat team, experts engaged by the Inquiry or any other person working for the Inquiry in relation to matters before it.

[29] For the avoidance of doubt, in respect of any material referred to in paragraph [28](a)–(c) above that does not fall within s 32(2)(b), the Inquiry orders under s 15(1)(a)(ii) and (b) that it be kept confidential and not be disclosed. This order is made to protect the privacy interests of the people involved, the integrity of the Inquiry's processes and public confidence in the Inquiry's proceedings.

Afghan villagers

[30] The Inquiry has made confidentiality orders in relation to the Afghan villagers in Minute No 2 dated 19 July 2018, Minute No 6 dated 29 November 2018 at [26] (confirming an oral order made on 21 November 2018), Ruling No 1 dated 21 December 2018 at [98](c) and Minute No 10 dated 20 March 2019 at [25]. These orders were made to protect the Afghan villagers who were clients of McLeod & Associates against retaliation by the Taliban for participating in the

Inquiry. These orders are rescinded and replaced with the order set out at [32] below.

[31] *Hit & Run* names the villagers alleged to have been killed and injured in Operation Burnham. In addition, some villagers, including the parents of Fatima, have participated in television programmes and/or been interviewed by print media about the operation. That information is in the public domain. The Inquiry's report refers by name to those alleged in the book to have been killed and to some of those alleged to have been injured. In addition, it refers to interviews with the parents and brother of Fatima and the father and brother of Islamuddin. They were among the villagers interviewed by lawyers in Afghanistan on the Inquiry's behalf. All the villagers involved chose to participate in the interviews, including Fatima's parents and brother and Islamuddin's father and brother. Those interviews are referred to in the report, although the other villagers interviewed are not named and no identifying particulars are given. Given that the interviews were carried out in private, they are subject to the order made at [24] above.

[32] Against that background, the Inquiry orders that no Afghan villager may be identified as a client of McLeod & Associates or as having been represented in the Inquiry by McLeod & Associates. This order is made to protect their privacy interests and personal safety.

Classified and confidential material

[33] The Inquiry has received and considered a substantial amount of information that is subject to the Government's Protective Security Requirements. In addition, it has received:

- (a) information in confidence from a number of people, including in relation to confidential sources; and
- (b) confidential submissions and correspondence.

[34] To the extent possible, the Inquiry has sought to make relevant classified information available to the public through a process involving two independent counsel who were engaged to review classified material and test the relevant public sector organisation's claims to classification. Through this process, a significant amount of previously classified information has been disclosed publicly, both in public hearings and on the Inquiry's website.

[35] However, many documents held in the Inquiry's records did not go through the Inquiry's classification review process and so remain subject to the Protective Security Requirements. They have not been disclosed beyond the Inquiry. At the request of the Crown, the Inquiry made a permanent non-publication order under s 15(1) in Ruling No 1 dated 21 December 2018 at [90] in respect of all classified information provided to the Inquiry (subject to the outcome of the classification review process). The Inquiry considers that the order should expire as from 17 July 2020, when it will present its report to the Attorney-General. From that time, the classified material will be held in accordance with the Protective Security Requirements, but will be subject to normal OIA procedures for its continued protection or release in the same way as other classified information. The Inquiry orders accordingly.

[36] In relation to material that is not classified but was provided to the Inquiry in confidence, we order under s 15(1)(a)(i) and (ii) and s 15(1)(b) of the Act that it is to be kept confidential in the Inquiry's records. This is necessary to:

- (a) honour the terms on which particular information was obtained or the basis on which particular correspondence or submissions were received; and
- (b) to protect the integrity of the Inquiry's processes and to maintain confidence in future inquiries.

[37] For the avoidance of doubt, this order does not prevent Mr Hager or Mr Stephenson from making available to others (including the public) any

information from their sources or researches that they provided to the Inquiry in confidence (except to the extent that the order at [19] above applies).

Information held by public sector organisations

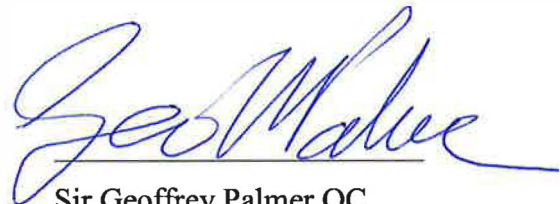
[38] Requests for access to any information related to the Inquiry that is held by a public sector organisation subject to the OIA and which is not covered by these orders will be subject to normal OIA processes. This information should be assessed for protection or release under the OIA in the normal way.

Leave reserved

[39] We reserve leave for any recipient of this Minute to raise any issues about the orders made, or the need for further orders. Submissions must be filed in writing by 4 pm on Wednesday 15 July 2020.



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Core Participants:

Mr Radich QC for New Zealand Defence Force

Mr Nilsson for Mr Stephenson

Mr Hager

Also:

Messrs Martin and Auld for Crown Agencies

Mr McLeod for the Afghan villagers