

UNDER

THE INQUIRIES ACT 2003

IN THE MATTER

**A GOVERNMENT INQUIRY INTO**

**OPERATION BURNHAM AND RELATED MATTERS**

**Date of Hearing:** 16 September 2019

**Inquiry Members:**

Sir Terence Arnold QC - Chair

Sir Geoffrey Palmer QC

**Counsel Appearing:**

Ms K McDonald QC and Mr Andru Isac QC, Counsel Assisting  
the Inquiry

Mr D Salmon and Mr S Humphrey appear for Jon Stephenson

Mr I Auld appears for Crown Agencies/Crown Law

Mr P Radich QC, Ms L van Dam and Ms L Richardson appear  
for NZDF

Mr F Geiringer appears for Mr N Hager

**Venue:**

The Thorndon Hotel

24 Hawkestone Street

Thorndon

Wellington

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**TRANSCRIPT OF PROCEEDINGS**

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### OPENING COMMENTS FROM SIR TERENCE

SIR TERENCE: Before we begin this week's hearing, I'd like first of all to welcome you all here and to re-state the purpose of the hearing.

As we explained in Minute No 19, the Inquiry's Terms of Reference require us to inquire into and report on the extent of the New Zealand Defence Force's knowledge of civilian casualties during and after Operation Burnham; the content of the written briefings to Ministers about civilian casualties after the operation; publishing statements prepared or made by NZDF about civilian casualties, and steps taken by NZDF to review the conduct of the operation.

Now, these various elements of the Terms of Reference reflect the fact that allegations of a cover up by NZDF have been made.

As we noted in Minute 19, the Inquiry has been able to address some aspects of this relatively easily, for example, we know what public statements NZDF made; we should also have all the written briefings that were provided to Ministers; so those aspects are straightforward.

We do know from what we've seen that some of the briefings and public statements appear to be inconsistent with what contemporaneous investigations had indicated.

Against this background, the Inquiry considered the questions of what NZDF personnel knew; what they reported and what was said publicly should be explored in a public forum, hence this hearing.

In the Minute we identified a number of specific matters that we expected NZDF's evidence to cover. I won't repeat that detail here, but it can be found in Minute No 19 at paragraphs 15 to 17.

The format for the hearing will be as follows:

Counsel for NZDF will make a brief opening statement. He will then call the first NZDF witness. Each witness has prepared a Brief of Evidence. The witness will read his brief

on oath or affirmation, and that will be the evidence-in-chief.

One of the Counsel Assisting the Inquiry will then cross-examine the witness.

Following that, one counsel for the non-Crown core participants will have no more than 30 minutes to undertake any supplementary cross-examination.

Counsel for NZDF will then have the opportunity to re-examine.

If Sir Geoffrey and I have any questions after that, we will ask them then.

The evidence will be recorded and transcribed. We hope that the full transcript will be available by the end of next week. It's possible that we may be able to issue parts of the transcript on a progressive or bit-by-bit basis as it becomes available.

In preparation for the hearing, a good deal of previously classified material has been reviewed and made available for disclosure to the public.

Counsel and the media have copies of that material in the folder before them. Members of the public will be able to access it on the Inquiry's website in due course.

Reviewing and making this material available has been a challenging task for all concerned. And I want to acknowledge and thank all of those who have worked so hard to make it possible to disclose as much material as is being disclosed. It is unprecedented. Sir Geoffrey and I are very appreciative of the effort that has gone into this.

Minute No 19 allowed for the possibility of closing submissions. Given the number of witnesses to be heard, we think it unlikely that there will be time for closing submissions to be delivered orally at the conclusion of the evidence.

However, the Inquiry's normal processes will apply, that is parties will have a period following the conclusion of the

hearing to submit any written submissions. Normally that period is two weeks, but to ensure that people have time to consider the transcript fully, we will extend that time to three weeks.

And finally, could I just emphasise the points that our manager, Ms Wilson-Farrell will have made to you before we came in, and recorded on the flyers on your seats; we do ask for your cooperation in adhering to those requirements.

Before we get underway, I'd like to ask counsel just to formally introduce themselves so that everybody understands who is who and I'll start with Counsel Assisting.

MS McDONALD: Thank you Sir Terence, so Kristy McDonald; I appear with Mr Andru Isac and we're assisted behind us with me, Ms Valente.

SIR TERENCE: Thank you very much Ms McDonald.

Counsel for the New Zealand Defence Force?

MR RADICH: Tēnā kōrua, Sir Terence, Paul Radich here with Ms Lucila van Dam and Ms Lucy Richardson for the New Zealand Defence Force.

SIR TERENCE: Thank you Mr Radich.

Counsel for Mr Stephenson?

MR SALMON: Sir, Davey Salmon and Sam Humphrey, with Mr Stephenson behind us.

SIR TERENCE: Thank you very much.

And finally Mr Hager, yes

MR HAGER: Thank you sir, (inaudible).

SIR TERENCE: Thank you.

And that's everybody I think, oh sorry, Mr Auld, you're here.

MR AULD: Yes, thank you sir, for the Crown agency, except for NZDF, but also the other Crown agencies (inaudible).

SIR TERENCE: Thank you very much.

MS McDONALD: Sir, I should have mentioned this to you earlier, but just before -- I know Mr Radich is going to do an opening

statement, but before we embark upon the witnesses, can I suggest that there's an order excluding witnesses?

SIR TERENCE: Yes, is there any issue about that?

MR RADICH: No sir, that was something I meant to raise with my learned friend, so if that's acceptable to you, and if you would prefer that, then that's fine.

SIR TERENCE: All right, we'll make an order excluding witnesses thank you.

(Order excluding witnesses to apply after the  
NZDF Opening Submission)

MR RADICH: That might exclude the opening submissions though Sir Terence, would that be right?

SIR TERENCE: Yes, I hadn't, sorry intended it --

MR RADICH: Oh sorry no, I didn't look behind me when I said that.

SIR TERENCE: Yes, sorry about that.

MR RADICH: But yes, if that's possible, thank you.

SIR TERENCE: Right, Mr Radich?

#### **NZDF OPENING SUBMISSION**

MR RADICH: (Opens in Māori) I greet you both Sir Terence, Sir Geoffrey, this house, the people here in the room, the people of the land, and I wish us well.

There's an opening submission in writing, I'm not sure if you have it in front of you at the moment? You do, thank you. There are single sided copies if that's any use to you, would you prefer something that was single sided or?

SIR TERENCE: No this is fine.

MR RADICH: All right, thank you very much.

Let me, if I may, summarise the position for NZDF over the first few paragraphs, and it's this:

That NZDF personnel did nothing other than to faithfully report what they understood about the allegations of civilian casualties arising out of Operation Burnham.

Let me explain that: For several years after the Operation they had a genuine, reasonably-held belief that, following the joint ISAF/Afghan investigation, which we'll hear a bit about, into the prospect of civilian casualties, the investigators had concluded that there were in fact none.

Once they had read the report prepared by the ISAF Incident Assessment Team, known as the IAT report and once they'd then realised their understanding of the IAT report's conclusions was not right, that it was an error, their reporting was corrected; with one exception in 2017, which we'll explain, which was due to a momentary oversight, and which is certainly regretted.

There was no cover-up. There was never an intention to mislead. It's not to say that there were not missteps along the way; looking back with the benefit of hindsight, there were certainly things that might have been done differently, lessons to be learned. But those missteps do not, in my submission, relate to the actions of New Zealand troops on the ground, who were held in extremely high regard, they do not comprise a cover-up. Nothing could be further from the truth.

The evidence you'll hear over the next few days will explain the events which enable me to make those comments. And just by way of further expansion at this stage, they're these:

The day after Operation Burnham was conducted, reports began to emerge of casualties and of significant damage to property. Fictitious, exaggerated claims of civilian casualties following ISAF operations were not uncommon. Spreading mis-information about casualties caused by Coalition troops was a well-known effective insurgent strategy. Nevertheless, the allegations were taken very seriously indeed.

The prospect of civilian casualties was deeply concerning to everyone involved. The principle of distinction, which we've heard about in this hearing, in previous hearings for

the Inquiry, is fundamental to international humanitarian law. In going to Afghanistan, this ethos of the NZSAS was to protect civilians; to win the hearts and minds of the Afghan people was their mantra, and to act with integrity and with honour. And they achieved this through countless missions in Afghanistan, this was, of course, just one of countless missions with which they were involved, many of which were nothing short of heroic.

So as soon as the allegations of civilian casualties came to light, an ISAF/Afghan Incident Assessment Team which I've mentioned, headed by Brigadier General Zadalis was established and conducted a thorough investigation into the allegations. The NZDF participated fully being part of ISAF, of course it was an investigation that was part of the way in which NZDF operated, it was subject to the requirement that there be an investigation of this sort. It provided information, it answered questions, and it reviewed footage from Coalition aircraft.

Now while reviewing the footage, it then became apparent to the Incident Assessment Team and to the NZDF that there was a gun sight malfunction on one of the AH 64s, one of the helicopters, not operated by New Zealand troops, who were on the ground, which caused several rounds to fall short, inadvertently striking two buildings. Until that moment, that is to say until that footage was seen, the NZSAS troops who were on the ground had no knowledge (and no way of knowing) of that malfunction or of the rounds impacting a building.

The NZDF was aware of ISAF's press release on 29 August 2010, and we'll hear a bit about that over the next few days, in which these mechanical issues and the possibility of civilian casualties was acknowledged. The NZDF's internal communications and briefings to the Minister, at that time were consistent with that press release.

NZDF was very keen at this time to have a copy of ISAF's classified IAT report, but the requests were declined. And that report remains classified.

At last, on 7 September 2010, the NZDF received what it understood to be a direct account of the findings that were made in the IAT report, of the outcomes. The NZDF's Senior National Officer then in Afghanistan, though not permitted to read the report, as it had not been cleared for release to New Zealand, was able to see one paragraph in the report, just one paragraph, described to him as being the key finding.

The paragraph he was permitted to see conveyed a conclusion that there had been no civilian casualties. And through its use of acronyms, and that paragraph, the SNO, the Senior National Officer, understood, as any reasonable reader would have, that the paragraph applied both to air forces and to the ground forces. In fact, it applied only to the latter. But there was no way of knowing that from the paragraphs that he was able to see alone.

Had he been able to see the entire IAT report, he would have appreciated its actual conclusion. Now, as I said, the report does remain classified, however its conclusions have been reported elsewhere, and the conclusions therefore that I refer to here are these:

That all the engagements appeared to be in accordance with the Rules of Engagement and the Tactical Directive;

But that civilian casualties were possible as a result of the errant rounds from one of the AH 64 helicopters.

So here was New Zealand's SNO reaching what I say to you is an entirely reasonable understanding in the circumstances, that the IAT investigation had concluded that there was no way that civilian casualties could have occurred from the paragraph he was able to see. He drafted an email to the Director of Special Operations of NZDF relaying what he had read.

Now up until that point, NZDF had been taking steps to get to the bottom of allegations, it had talked to people, received intelligence reports, analysed them, reviewed footage. This email from the SNO conveying the conclusions, as he saw them, of the investigation was, to those concerned, the conclusive outcome on this issue. It superseded media reporting. It superseded intelligence reports. It superseded earlier email chains. It superseded the ISAF press release. It superseded all previous information, and from their perspective at that point in time, the matter was closed.

That became NZDF's genuine understanding of the bottom line; the most definitive and recent word. It formed the basis of briefings to the CDF, the Commander of the Defence Force, Chief of the Defence Force, the Minister of Defence, and to the Prime Minister. This was what NZDF understood the position to be, so this is what it told the press following a One News item on operation Burnham in April 2011.

Similarly, in 2014 when the issue arose again in the context of Jon Stephenson's *Native Affairs* report which aired on Māori Television, the NZDF stood by its statement of 2011. At that point in time, it had no reason and no basis to do otherwise.

Had NZDF known that, in fact, the IAT report had gone on to say that there may have been civilian casualties as a result of the misaligned sight on the helicopter gun, then it would have said that instead.

And this is an important point, if I may, as I say in paragraph 20, it certainly was not in New Zealand's interests not to tell it as it was. The possibility of civilian casualties as a result of the errant rounds was not within New Zealand's control or its responsibility. There was no advantage to NZDF in concealing that possibility. There was nothing to be gained. There was no cover up. There was no wordsmithing. No side stepping. There was only a genuine endeavour to tell it as it was understood to be.

It was on 30 June 2014, the night that the *Native Affairs* programme of Jon Stephenson aired that NZDF became aware of the actual conclusion in the IAT report.

On the day of that programme, the Minister of Defence's military secretary, an NZDF personnel member, took a bundle of documents from an NZDF safe to the Minister's office to brief him on Operation Burnham, in case of some media attention following the programme. Unbeknownst to all those who had been involved with the issue within NZDF, the final document in this bundle was the IAT report itself. It was read within the Minister's office, brought to the attention of NZDF after the *Native Affairs* programme had gone to air.

The following morning, after a meeting with the Vice Chief of Defence Force and the Chief of Staff, the Minister explained to the media that while no civilians were killed by New Zealand soldiers, you couldn't, as he said at the time, rule out the possibility of civilian casualties as a result of a gun sight malfunction on Coalition aircraft. He set the record straight.

In light of these events in 2014, it is regrettable that when the subject of Operation Burnham came up again in 2017, following the release of the *Hit & Run* book, the New Zealand Defence Force's initial response was incorrect.

*Hit & Run* launched just after 5 pm on the 21st of March. The NZDF had not been approached for comment during the drafting of the book. The Chief of Defence Force, the Minister of Defence, were in Iraq at that time. That night, the Vice Chief of Defence Force and a team absorbed the book as quickly as they could. They were in no position to prepare a substantive response. But they needed to do something to say something quickly. The pressure was on them to make a statement within an hour of the book being released. So those in the office still that night, searched the catalogue of prior media statements. The IAT report itself wasn't seen at that time. No-one on deck at the time brought it to mind.

No-one immediately drew the connection between the story in the book and the *Native Affairs* report from some years prior.

By the following morning though, after substantive efforts had been made to gather all relevant information, it was understood that the operation described in *Hit & Run*, although described in materially different terms, must in fact have been the operation addressed in that IAT report. Once that connection was made, and the IAT report brought back to mind, NZDF openly acknowledged the possibility of civilian casualties arising out of Operation Burnham.

Now these facts will be recounted in detail over several days by 12 witnesses. A high-level summary follows now, which I'll just mention briefly. Now the summary I'm about to give is chronological. The witnesses will be called in a slightly different order as you know Sir Terence, Sir Geoffrey, as a result of practical considerations.

But chronologically, Colonel Rian McKinstry, and I use the relevant titles for them here, Rian was the Senior National Officer in Afghanistan when Operation Burnham took place. And he'll give evidence about the understanding gained following the operation of the prospect of civilian casualties. He was very keen to obtain clarity. He participated openly and fully in the IAT inquiry. He learned that, if there had been civilian casualties, it was due to an accident beyond the control of the NZDF forces.

Brigadier Christopher Parsons: Chris Parsons took over from Rian McKinstry as Senior National Officer on 7 September 2010. On a visit to the ISAF Joint Command Headquarters that day, the day he started, he was able to see, briefly, that paragraph of the report which said that no civilian casualties could have occurred. Understanding this to relate to the operation as a whole, he relayed the point to the NZDF through its Director of Special Operations, its DSO. Having only recently been able to see the whole IAT report, in preparation for this hearing, he now knows that his understanding of the

report's outcome at the time, which he relayed to NZDF at the time, to be incorrect. But he reported faithfully what he had understood.

Major General Peter Kelly will give evidence. He was the Director of the Special Operations during Operation Burnham. He briefed the CDF based on communications he received and assisted in drafting the CDF's notes to the Minister in 2010, based on the communication he'd received from both Rian McKinstry and Chris Parsons and from which he understood the bottom line to be that no civilian casualties had occurred.

Lieutenant General the Rt Hon Sir Jeremiah Mateparae was the CDF at the time of Operation Burnham. He viewed the operation from Camp Warehouse in Kabul, as it was taking place. He will speak about his briefings to the Minister in August 2010 and in December 2010, based on information he'd received from Peter Kelly who I'll come to mention in a moment. He'll explain the NZDF's approach to civilian casualty investigations in the context of partnered operations.

Next Colonel Karl Cummins: At the time of Operation Burnham, Karl Cummins was the Deputy Director of Special Operations. He was privy to the email communications from the Senior National Officer following the operation. After a 20 April 2011 story on the operation, that I mentioned on One News, he was involved in drafting a press release, which amongst other things, and based on the 2010 communications on the point, referred to allegations of civilian casualties as being unfounded. The use of this word "unfounded" was not a case of wordsmithing. It was thought by all concerned at the time, within NZDF, to be accurate based upon their understanding of the IAT outcome.

Rear Admiral Jack Steer: At the time of the One News story Jack Steer was the Vice Chief of the Defence Force and was Acting Chief of Defence because the then CDF, Lieutenant Rhys Jones, was out of the country. Having liaised with Karl

Cummins, he approved the press release, believing at that time that it was factually correct and being resolute in his endeavour to be accurate.

Colonel Mike Thompson is the next witness, and on 7 September 2011, Mike Thompson, then the Deputy Chief of Staff in the Office of the Chief of Defence Force, received and placed into his safe, the safe by his desk, a copy of the IAT report. At this distance it is just not known how the report, in hard copy, came to New Zealand or who gave it to him to place in the safe. He'll explain that.

The next piece of evidence will come from Lieutenant General Rhys Jones. Rhys Jones, as the CDF at the time, was in Gallipoli when the One News story aired and the press release in response was prepared. He had no involvement with it, or related events. There is little that he can add to assist, I believe, but he'll be here to answer questions and to assist in any way that he can.

Next Commodore Ross Smith: Ross Smith was the Chief of Staff in the Office of the CDF when the Māori Television "*Collateral damage*" item, presented by Jon Stephenson, went to air in 2014. He'll explain the exchanges with Mr Stephenson in the days before the item went to air; the reason that NZDF responded that it stood by its April 2011 press release. He approved the statement because the then CDF, Tim Keating, was overseas at that time. It, and like communications leading up to it, was based on former CDF Sir Jerry Mateparae's briefing to the Minister in December 2010 which, in turn, was based on communications from the SNO at the time. It was regarded as the most accurate source.

The IAT report was unearthed on the day of the "*Collateral Damage*" report, as a result of which NZDF's position was corrected publicly the following day.

Unfortunately, as Ross will explain, the corrected position was lost sight of, but only temporarily, three years later

when *Hit & Run* was published; a stance that was in no way deliberate.

Captain Christopher Hoey: It was Chris Hoey who in 2014 found the IAT report in the safe, which he had inherited from Mike Thompson, that is to say he had inherited the desk of Mike Thompson, the safe was under it, in the course of the search for material for the Minister on the day of the *Native Affairs* programme. Now Chris' evidence has been given by affidavit and we're obliged to the Members of the Inquiry for that.

Air Marshall Kevin Short: Kevin Short was the VCDF, that's to say the Vice Chief of Defence Force when the *Native Affairs* programme aired. In the absence of Lieutenant General Tim Keating, he briefed the then Minister of Defence, at that time, the Honourable Dr Jonathan Coleman, the following morning, following which the Minister addressed the media and was able to portray the IAT outcome accurately.

He was in the same situation, that is to say Air Marshal Kevin Short, in 2017 when *Hit & Run* was published. CDF Keating was in Iraq at that time and with the then Minister of Defence, the Honourable Gerry Brownlee. He'll describe the pressured environment in which, that night, they needed to read the book and make an initial statement. They found the April 2011 press release. They assumed it to be correct, not appreciating at the time that the allegations in *Hit & Run* arose out of the same operation as had been the subject of the *Native Affairs* story, three years earlier, and so did not immediately bring that IAT report to mind.

As a result, the initial response was, truly regretfully, at odds with the report's conclusions, but he was able to provide clarity the next day when briefing the Prime Minister.

The last witness in this chronological list is Lieutenant General Tim Keating: Tim Keating, who was in Australia when the *Native Affairs* programme went to air in 2014 and when the initial press release was issued, liaised with the Minister

over the programme while he was away, and in person, when he got back.

Tim Keating was in Iraq when *Hit & Run* was released in 2017. From there, he did not pick up on the inaccuracy in the initial NZDF response. While he was in Iraq, and in the days and weeks and months following his return from Iraq, he embarked on a comprehensive information-gathering process. He was extremely keen to get to the heart of the facts.

Tim Keating will explain the public statements he made on his return; his ongoing briefings to the Minister of Defence and to the Prime Minister.

He will tell you about his absolute motivation to gather as much information as possible to understand and to be able to explain publicly exactly what had occurred.

The notion of NZDF being involved in some form of cover up, and of its CDF at the time being at the helm of that, simply could not be further from the truth. The opportunity to address the sequence of events is very much appreciated and welcomed by the people that you will hear from, so they can explain the position.

They're my opening remarks.

Just one housekeeping matter if I may Sir Terence, Sir Geoffrey? There are two versions of the NZDF briefs, there were some slight adjustments that we've made, would you rather they dealt with the original version and then made their amendments orally as they go, or would you rather they read off the adjusted versions, and I explain the changes?

SIR TERENCE: All right, well perhaps just read the original and just note the changes as we're going through, because we had prepared on the basis of those. But the changes as you say, are relatively minor anyway.

MR RADICH: Thank you for that accommodation. It's much appreciated.

All right, well with those comments in mind I would now, unless the Inquiry members have questions of me, would call Sir Jerry Mateparae.

**SIR JEREMIAH MATEPARAE (Sworn)**  
EVIDENCE-IN-CHIEF BY MR RADICH

A. Morena tā Terence and tā Geoffrey, ngā mihi mahana ki a koutou. Ki a kōrua.

I am Lieutenant General (Retired) Sir Jeremiah Mateparae. I am the High Commissioner of New Zealand to the United Kingdom.

I enlisted in the New Zealand Army in 1972. I served in the Royal New Zealand Infantry Regiment and then in the New Zealand Special Air Service. I have had two operational postings to peace support missions in Southern Lebanon and Bougainville. I was the Joint Commander for the New Zealand forces attached to the United Nations Transitional Administration in East Timor. In 2002 I became Chief of Army, and between 2006 and January 2011, I was Chief of the Defence Force (CDF).

I served as the Director of the Government Communications Security Bureau from February to July 2011, and served as Governor-General of New Zealand from August 2011 to August 2016. I was appointed as New Zealand's High Commissioner to the United Kingdom in December 2016.

Q. And Sir Jerry, if I could stop you there for a moment, I think you wish to adjust the date of your appointment from December 2016 to March 2017, is that correct?

A. That's correct.

Q. Thank you.

A. I am a graduate of the British Army Staff College in 1989, the Australian Joint Services Staff College in 1995, and the Royal College of Defence Studies, 1999. I have a Master of Arts with First Class Honours from the University of Waikato and an Honorary doctorate from Massey University.

In 2011, I was made an Additional Knight Grand Companion of the New Zealand Order of Merit and an Additional Companion of the Queen's Service Order.

In terms of briefings to the Minister of Defence:

On the night of 21/22 August 2010, I was at Camp Warehouse, the New Zealand Special Air Service headquarters in Kabul, Afghanistan.

Q. Just pause for a moment will you please, because you're reading from the original version and I think you wish to adjust the next sentence. Would you just please explain to the Inquiry what you were deleting and why you do that?

A. I believed that the Minister of Defence, the then Minister, the Honourable Dr Wayne Mapp was in the briefing the whole time and in fact, it could be that he wasn't at the briefing the whole time. And so he would not necessarily have viewed the real time footage from the intelligence surveillance and reconnaissance aerial vehicle.

Q. Thank you.

A. So, I was able to view in real time the footage from the ISR unmanned aerial vehicle that was positioned over the area of operations, in what has since become known as Operation Burnham (the Operation).

As I recall, there were a number of people in the room, including the then Lieutenant Colonel Rian McKinstry, the Senior National Officer, the SNO, in Afghanistan at the time, an Operations Officer, a Signals Officer, and a Joint Tactical Air Controller.

There is nothing I observed from the footage at the time that led me to consider that any issue of civilian casualties of any kind had arisen in the course of the Operation.

My visit to Afghanistan with the Minister concluded the following day.

Once I was back in New Zealand, I depended upon then Colonel Peter Kelly, the then Director of Special Operations,

the DSO, to keep me informed on the outcome of the Operation, and all other NZSAS matters.

In that regard, each week I received a briefing --

Q. Just pause there if you can, I'm sorry to interrupt mid-sentence, but I think you're looking to change the words "in my office" to "in a secure room", is that correct?

A. That's correct. All of the operational briefings were conducted in a secure room.

Q. Thank you.

A. And those briefings were from various New Zealand Defence Force personnel.

At the end of the weekly briefing, the room would be cleared of people who were not sufficiently cleared, and Peter Kelly would conduct a strategic briefing. Usually the strategic briefings were verbal, but sometimes the presentation would be supported by written material.

I understand that Peter Kelly will, in his Brief of Evidence, speak about those briefings and about the factual matters upon which those briefings were based.

The content of these strategic briefings formed the basis of my advice to the Minister. I met with the Minister every week to provide updates about NZDF business. He was very direct and inquisitive at those meetings. On occasion he would ask for a briefing to be recorded in writing, by way of a Note to the Minister. I provided three Notes to the Minister on the subject of Operation Burnham.

The first Note to the Minister following the operation was on 25 August 2010. And I refer to the bundle at page 23.

Q. Now at your left hand, just closer to you than the ring binder, is a spiral bound bundle, and hopefully that will say on the front Sir Jerry, "Bundle of documents accompanying NZDF witness briefs", is that the one you have?

A. Correct.

Q. Thank you, would you go now please to page 23, the number's at the bottom, and is that the document that you're referring to in paragraph 14 of your brief?

A. It is.

Q. And just so we can identify the document as a whole, if you turn over the page in the bundle please you'll see page 25, is this a continuation of that document?

A. It is.

Q. Thank you. Would you go back now to your brief, paragraph 14, the third sentence?

A. So the main purpose of the Note was to advise the Minister that the NZDF had become aware of allegations that civilians were killed during the Operation and that the International Security Assistance Force, ISAF, had initiated an investigation. The Note went on to say, at paragraph 3 and 5 the following:

"HQ ISAF has a policy of investigating all alleged civilian casualties as a result of operations conducted by Coalition forces. A Brigadier has been tasked to lead the investigation into the allegations and he has spoken to the Senior National Officer and Officer Commanding [redacted] on Tuesday evening. He then reviewed the 'gun tapes' from the Apache helicopters and [redacted] that were involved in the operation to determine if they had adhered to Coalition Rules of Engagement. Over the next two days he plans to travel to Baghlan and to speak...the Governor of Baghlan province...and if security permits he will travel to the TALA WA BARFAK region to meet with the local Sub Governor of the district.

...

I will keep you apprised of any developments and outcomes and would recommend that you discuss this with the Minister of Foreign Affairs and Prime Minister."

I am now aware that the ISAF Joint Command issued a media release on 29 August 2010, which referred to rounds from Coalition helicopters having fallen short, and that that may

have resulted in civilian casualties. I refer to the bundle at page 39 --

Q. Just pause if you would Sir Jerry, and if you wouldn't mind doing that, at page 39, is this the press release that you are referring to?

A. It is.

It is likely that I saw the media release at the time, but I have no specific memory of it.

My next Note to the Minister was provided on 10 December 2010. And I refer to the bundle at page 163.

Q. If you'd just pause and do that please? And if you look at that page, is this the 10 December note that you've referred to?

A. Yes it is.

Q. And just if you wouldn't mind turning over so we identify the whole document, does it continue through to page 166?

A. Yes it does.

Q. Thank you.

A. Although the Note is signed by my then Chief of Staff on account of me being "AOD" - absent on duty, I will have seen --

Q. And just to pause there, I think you were looking to make a change at that point Sir Jerry, if you'd explain that please?

A. Correct. I wouldn't have seen the document before it went, but I would have been aware of it and approved it before it went to the Minister.

Q. Yes, thank you.

A. The 10 December 2010 Note described the context and execution of the Operation and of the related operation of the 3rd of October 2010. Additionally, at paragraph 7 the Note provided an update on the ISAF investigation into the allegations of civilian casualties. Which says:

"Following the operation Afghan citizens from the Tala wa Barfak district alleged that up to twenty (20) civilians had been killed by aerial bombardment and twenty (20) houses

destroyed by fire. Based on these allegations and reported in the New York Times, a joint assessment team composed of representatives from the Afghan Ministries of the Interior and Defence and ISAF officials conduct a full assessment of the operation. The assessment team visited the provincial and district capitals, the hospital where the alleged casualties were receiving treatment, viewed the gun tapes from the Coalition air assets and spoke to the NZSAS personnel. As a result of their investigation, the joint assessment team concluded that the allegations were baseless and categorically cleared the actions of the RTF and Coalition air of all allegations. The assessment concluded that 'having reviewed the evidence there is no way that civilian casualties could have occurred'. The joint assessment team's report has not been released beyond Headquarters ISAF and our knowledge of the findings are based on the comments provided by the New Zealand Special Air Service Task Force commander, who was permitted to read the report."

I never saw the conclusions reached by the ISAF assessment team and never had, prior to the preparation for this hearing. As is indicated in the Note to the Minister, my understanding of ISAF's findings, following its investigation, was based on an email from the then SNO in Afghanistan, then Lieutenant Colonel Chris Parsons. I understand that Chris Parsons will be giving evidence about the content of that email and the context in which the email was written. I now appreciate that this Note inadvertently mischaracterises the conclusion reached by the IAT report. However, this was not our understanding of the position at that time.

- Q. Just to pause there, can I just ask you, because I think there was an errant word "not" in that sentence, would you mind if I ask you just to look at that last sentence of 18 again?
- A. Okay, so I should say, I now appreciate that this Note inadvertently mischaracterises the conclusions reached by the

IAT report. However, this was our understanding of the position at that time.

Q. Thank you very much.

A. At the time, I believed that the extract in quotation marks was taken directly from the IAT report. I now understand that this may not be the case. I am not in a position to give direct evidence on this point but I do understand that this will be covered in Peter Kelly's evidence.

As I said in my paragraph 13, I briefed the Minister -

Q. Just to pause there, I think we just made a slight amendment to the brief the Inquiry Members will be looking at, I think we're changing 12 to 13 there Sir Jerry, is that the case?

A. Correct.

Q. Thank you.

A. I briefed the Minister on a weekly basis so that this was not the first time that he was made aware of the New Zealand Defence Force's understanding as to the outcome of the ISAF investigation, and of the New Zealand Special Air Service's return operation to Tirgiran. I imagine that the reason the Minister asked for these matters to be recorded in a Note was so that he would have surety once I had left my role as the CDF the following month.

Three days later, on the 13th of December 2010, I provided another Note to the Minister. And I refer to the bundle at page 167.

Q. And if we could just do that please Sir Jerry, is that the note that you're referring to there?

A. It is.

Q. And does it continue over pages 168 and 169?

A. It does.

Q. Thank you.

A. "The purpose of this note is to provide releasable information to the Prime Minister of the operations conducted by the Crisis Response Unit and the New Zealand Special Air Service

Task Force in Baghlan Province, Afghanistan on 22 August and 3 October 2010."

In short, this Note was an unclassified version of the 10 December 2010 note, which could be released publicly.

This Note includes, at paragraph 4, a slightly abridged version of paragraph 7 of my 10 December 2010 Note, set out in my paragraph 17 above. So the points I have made in paragraphs 18 and 19 above equally apply here.

I understand that the NZDF has been described as being secretive about the conduct of the Operations, and of the NZSAS operations more broadly. It is true that the NZDF is conscious not to compromise the security of its troops on any basis, including through the release of information which describes their operations. However, as the 13 December Note demonstrates, we were wanting to release publicly a synopsis of the New Zealand Special Air Service's activities in Tirgiran.

Ultimately, as the handwritten note on the cover sheet indicates, it was decided not to release the information to the media at the time.

Q. Just so we're clear on that point, if you look at page 167 please, is that the handwritten note you see just to the right of your signature?

A. It is.

Q. Thank you.

A. In terms of policies to investigate allegations of civilian deaths:

In August 2010, the New Zealand Defence Force did not have a specific Defence Force Order prescribing a process for the investigation of allegations of civilian deaths in the course of operations in which NZDF personnel were involved.

However, as is recorded in the 25 August 2010 Note to the Minister, ISAF had a policy of investigating all alleged civilian casualties as a result of operations conducted by

Coalition forces. As a contributing member of ISAF, that policy applied to New Zealand.

I was satisfied with ISAF's investigation. If ISAF hadn't investigated, or if its investigation had shown or suggested that NZDF personnel had been involved in the deaths of civilians, I would have ordered the SNO to conduct our own investigation.

Q. And just to pause there, I think you were looking to add some additional words there?

A. I was.

Q. Do you have them in front of you?

A. It would have been, I would have sent support from New Zealand to help them conduct that, legal support.

Q. Legal support, thank you.

A. Despite not having a specific policy in the form of a standalone Defence Order in place, we did take steps to evaluate reports of civilian casualties. I understand that Rian McKinstry will, in his Brief of Evidence, address the steps taken after Operation Burnham, including the intelligence that was gathered, speaking to Coalition partners and reviewing footage.

That is my evidence.

#### CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Good morning Sir Jerry. I wonder if we could start please with -- if I could get you to help me with a couple of contextual matters, general questions, and please correct me if I'm wrong, because I may well be, but am I correct that New Zealand have rarely, perhaps if ever, but certainly rarely, ever publicly been associated with allegations of civilian casualties before the issues surrounding Operation Burnham?

A. As far as I know, yes. They have.

Q. Thank you. And isn't it the case that, at least since Vietnam, the New Zealand military activity had largely focused on peacekeeping operations? Is that a fair comment?

A. Yes, it is.

Q. And does it also follow that any suggestion of the possibility of civilian casualties arising from an operation in which New Zealand was connected or associated would have been, and would be, certainly in your time as CDF, of considerable significance to the country, and particularly to Ministers and the Government?

A. Yes, and to the Defence Force.

Q. Of course. Thank you.

Now, you've told us in your evidence that you were the Chief of Defence at the time of Operation Burnham in August 2010, and just to be absolutely clear, the period -- you finished in early January 2011?

A. Correct.

Q. All right. So you were responsible to the Minister up until the time that you left in January 2011 for the reporting on activities in Afghanistan and Operation Burnham in particular?

A. I was.

Q. And as Chief of Defence you received weekly briefings from your senior officers, including the Director of Special Operations, the DSO, and that's Peter Kelly, as we've heard?

A. I did.

Q. And you had a Chief of Staff, I assume?

A. I did.

Q. Who was that in your time?

A. I think it was Tim Keating.

Q. All right, and what was the role of the Chief of Staff and Tim Keating's role to you, at that stage? What did he do?

A. So a Chief of Staff is -- the case in most circumstances, provides the staff support for the principal. So he makes sure -- he made sure that all of the work that needed to be completed through my office was completed through the office,

and ensured that if I was away, that he liaised with the Vice Chief of the Defence Force to ensure that the smooth running of the office and to an extent, the Defence Force, was continued.

Q. So he's sort of your right-hand man, in a way?

A. Right and a half, yes.

Q. Right and a half, okay.

And, broadly, he'd be over everything of significance that was happening in the office? Helping you with briefings? That sort of thing?

A. I would expect him to be, yes.

Q. And just coming then to your briefings and you've touched on this in your Brief of Evidence, when you got your briefings from Peter Kelly, you would have a -- just help me here a little bit. So you'd have a briefing that involved a number of people and then you'd decamp, if you like, into a secure room to have a more closed briefing, is that right?

A. The briefing was done in the one and the same room. So the -- it was in a secure room, and so we would have a briefing which was a general briefing about the operations of the Defence Force, and during my period, the Defence Force was quite heavily engaged in operations, peace support, and also in Afghanistan, and once that general briefing was finished, then we'd clear the room and then there'd be a more classified briefing.

Q. And that would involve what, you and Peter Kelly?

A. Peter Kelly would usually provide the briefing. It sometimes involved the Secretary of Defence. So those who had an appropriate security clearance, yes.

Q. And your Chief of Staff would remain for those briefings?

A. He would.

Q. And that, I take it from what you've said, and obviously enough, reflects the sensitive and secret nature of what you're talking about?

A. Correct.

Q. And you've said too that those strategic briefings that you got would sometimes be supported by written material? We don't have any documents from NZDF of material of that type for this operation. Are you aware of any yourself that was committed -- anything that was committed to writing?

A. I am aware that there were PowerPoint presentations that were provided to us.

Q. Right?

A. So the briefings would be by PowerPoint and we would get a written -- well, yeah, PowerPoint in paper.

Q. You'd get a hard copy PowerPoint?

A. Yeah, hard copy.

Q. And so you'd expect that those would still be retained?

A. I would.

Q. All right. Well, we'll follow that up if we need to.

And you'd use that briefing and those briefing materials, presumably, for the purposes of then your briefing to the Ministers. Is that right?

A. Correct.

Q. All right. And at that time that was Dr Wayne Mapp, I think?

A. It was.

Q. Where I'm getting to with this is that you're fairly heavily reliant, aren't you, on what your staff are telling you and giving you? So Peter Kelly, you're very reliant on the information that's coming from him and presumably others?

A. Yes.

Q. Now, just moving to a slightly different point, as the CDF at the time, I understand that you had to approve Operation Burnham, because it actually fell outside the standard remit of operations, because it was outside Kabul and the immediate surrounding districts. Am I right about that?

A. You are right.

Q. And I think also you had to approve the -- what's called the ConOps, the Concept of Operations?

A. I did.

Q. And I'm not sure whether we have that in the bundle or not, but I don't think we need to go to it in any event.

So ultimately, through that process, you held the responsibility for the decision to undertake the operation?

A. I did.

Q. Just one matter I want to come back to, just before we go on there. In your time as CDF, the office of CDF, the OCDF, that's all on the same floor, in your time? That was one office, one suite if you like?

A. Yes.

Q. And we've heard, and you will have heard from Mr Radich's opening, about a safe that was in that OCDF. Do you know where that safe was?

A. No, but I know where Mike Thomson had his office. So it was on the same floor.

Q. It was on the same floor?

A. Yeah.

Q. And can you tell us was that a big safe or a small safe?

A. I don't know.

Q. Did you ever put things in that safe?

A. No.

Q. What sort of things were held in the safe?

A. I have no idea. I never had cause to check what was going into the safe. That was a staff responsibility.

Q. A staff responsibility? And was that the only safe on the floor?

A. Probably not.

Q. So you didn't use another safe, for example? If there was something that needed to be put in a safe in the Office of the Chief of Defence, it would go into that safe? Is that -

A. There probably was another safe in and around my office for my passport, those sorts of things.

Q. Right, but the Chief of Staff, who operated -- who had access to the safe, you would expect that safe would be where important documents would be put?

A. Ah yes, and there probably was a second safe in the operations area.

Q. Right, and the significance of that second safe? Would that -- what sort of material would go in there?

A. Again, operational material.

Q. And we certainly know from the documents that have been provided last week that the material that was going into the safe that Mr Thomson is going to talk about, was material that was at the -- at a high level of classification, TS and S. That would be consistent with your understanding?

A. It would be.

Q. Coming back then to the briefings for a moment, who drafted the Ministerial briefings about Operation Burnham?

A. My understanding is that Peter Kelly did.

Q. And the handwriting that Mr Radich just took you to on the 25 August briefing, I can go to it if you need to, but you may not need to, where it said that this -- ultimately the decision was made not to release it, whose handwriting is that? Do you --

A. I don't know.

Q. Don't know, okay.

Actually, while we are looking at handwriting, I just want to take you to one document. The big black folder that's in front of you, which we're calling, just as we move through the week, that's the Inquiry bundle of documents. The small bound one is the Defence bundle of documents. At the very back of that, I understand there's a divider and there's a supplementary section?

A. There is.

Q. Okay. If you go to page 60 of that, you'll see there that this is a copy of your 13 December 2010 briefing to the Minister. Have you got the right page?

A. I have.

Q. Yes? And we're going to talk about this a little more with other witnesses, but while we have you here, you'll see some handwriting on that document?

A. I do.

Q. Can you just tell me is that your handwriting by any chance?

A. No, it's not.

Q. It's not? All right. And just to be absolutely clear then, turn over, if you wouldn't mind, to page 57, and this, I think, is the 25 August briefing, a draft briefing, and again, some handwriting on that document on that page and on page 5. Again, could you confirm is that also not your handwriting?

A. It's not my handwriting.

Q. Thank you.

Now, so come then to the first part of that black bundle, page 164, and I'm sorry, I'm going to refer to the documents as they appear in the Inquiry bundle, because I'm more familiar with that version and I've marked them up. So, there's a bit of repetition, but we'll just have to make do. So, paragraph 164 is a copy of the 10 December 2010 briefing, isn't it?

A. It is.

Q. And based on what you've just told me, is it your evidence that Peter Kelly drafted that?

A. That's my understanding, yes.

Q. Would you normally check it?

A. I would normally read it, yes.

Q. All right, but you wouldn't normally do a content check? You would -- in your position, you have to rely on what Peter Kelly's put in there, and you would accept that?

A. No, if I saw something that I was not happy with, I would make sure that the edit was done.

Q. All right, but beyond something that jumped out at you as being something you weren't happy with or wrong, you wouldn't do a content check beyond that?

A. I'm not sure what you mean by "a content check"?

- Q. Well, you would accept what's being drafted for you by your staff?
- A. Yes, I would.
- Q. I'm not being critical; I mean, that would be natural?
- A. Yeah. Yeah, no, I would. Of course I would.
- Q. Now, as I understand it from looking at the documents, and to help you, if you turn to 178 of the bundle, you'll see there some emails and one at the bottom of the page is from TVNZ. I'll put my proposition to you and take the time you need to read those emails, but what I was going to suggest to you is that it seems that that 10 December briefing to the Minister looks to have been triggered, perhaps, by the TVNZ official information request on the 8th of December 2010?
- A. It may well have been.
- Q. And if you go back to page 164, the briefing in itself confirms, doesn't it, that -- in the purpose section, that the purpose of the note was to inform the Prime Minister of Operations Burnham and Nova?
- A. Yes.
- Q. And just for those who aren't as familiar as others with the documents, Operation Nova was the return operation to the valley, wasn't it?
- A. Yeah.
- Q. Couple of months later.
- And we know that this note got referred to both the Minister of Defence and to the Prime Minister. Do you accept that?
- A. I assume so, yes.
- Q. If you have a look at page 167.E under recommendations. And Minister of Foreign Affairs as well?
- A. Yes.
- Q. Now page 166, paragraph 7, I just want to go through that with you. In fact -- well, just working our way through it. So paragraph 7 says that:

"Following the operation Afghan citizens from the Talah wa Barfak District alleged that there were civilian casualties."

And then coming down to the -- two-thirds of the way down that paragraph, starting with the sentence, "as a result of their investigation", and we're talking here about the assessment team's investigation and visit to the provincial and district capitals:

"As a result of their investigation the joint assessment team concluded that the allegations were baseless and categorically cleared the actions of the RTF."

And that's the Response Task Force. Is that right?

A. Yes.

Q. "...and Coalition air of all allegations. The assessment concluded that:

'Having reviewed the evidence, there is no way that civilian casualties could have occurred.'"

A. That's right.

Q. "The Joint Assessment Team's report has not been released beyond headquarters ISAF and our knowledge of the findings are based on the comments provided by the NZSAS Task Force Commander who was permitted to read the report."

A. Correct.

Q. Now, just to be clear, the NZSAS Task Force Commander referred to there is Mr Chris Parsons --

A. It is.

Q. -- that you mentioned in your brief?

A. Yes.

Q. Okay. And you'd accept, and I think you may have actually, in your brief, in any event, that those quotation marks give the impression that the information has come directly from the investigation report itself, the IAT report, don't they?

A. That's Chris' -- yeah, Chris' comment. So, "having reviewed the evidence, there is no way that civilian..." Yes, to your answer, yes.

- Q. Well, you'd accept though, wouldn't you, Sir Jerry, that putting something like that in quotation marks to give it to the Minister, the expectation would be that the Minister would think that was a direct quote from the report?
- A. That's a reasonable assumption, yes.
- Q. If we come then to the 13 December briefing, which is on page 168. So that's three days later, and you provide another briefing, and this one was for the purpose of providing releasable information to the Prime Minister about the operations, and as you've said, ultimately it didn't get released, but the purpose of it was to provide releasable information. Correct?
- A. Correct.
- Q. Now the content, I suggest to you, and correct me if you think I'm wrong, but is largely identical, in terms of particularly paragraph 4, which is essentially the same as paragraph 7 of the earlier briefing, but it leaves out, doesn't it, the caveat from the 10 December briefing that the IAT report had not been released to NZDF, and that NZDF's knowledge was based on comments from the Task Force Commander? So if you look at it, you'll see that those two facts were omitted from the 13 December briefing?
- A. Yes.
- Q. Correct?
- A. Yes.
- Q. Why were those matters left out, do you know Sir Jerry?
- A. No, I don't.
- Q. Okay, and just while I -- can you also help us just actually -- as this was for a public release, did NZDF obtain partner consent for the release of this information, to your knowledge?
- A. I can't recall. I assume we would, because that's the --
- Q. So why would you not tell the Minister that you didn't have the IAT report in that briefing three days later?
- A. I do not know.

Q. Was there some thought at the time that NZDF might have had it at that time?

A. I doubt it.

Q. And why would you not say that the information was based on information from Mr Parsons?

A. I have no idea, when I now look back at what was provided. I mean, part of it would be to not disclose who was giving the information in what was an unclassified document. So the classified document, the Minister had. The unclassified document, the Minister would get and would also be able to use fully, and it would be releasable.

Q. I understand that could be -- it could be a reason, but could you also accept though that that second briefing reads as if it's a quote directly from the IAT report, and it may leave the impression that New Zealand has the IAT report?

A. Though the second briefing is for the Minister and the Prime Minister to release in its entirety. They know the full context of the briefing that this was placed -- taken from.

Q. Do you see, though, what I'm suggesting to you, and I know you haven't got any sort of specific memory back after so many years, but it's a -- it looks -- or at least it's possible, isn't it, that the second briefing, which tells us:

"As a result of the IAT's investigation the assessment team concluded that:

'Having reviewed the evidence, there is no way that civilian casualties could have occurred...'"

And I suggest to you that that could be read as a direct quote from the IAT report, a direct finding, "...and the actions of the ground force and the Coalition air were cleared of all accusations."

What it doesn't go on and say, publicly, is NZDF don't actually have the IAT report, and that this is based on the comments of somebody in Theatre?

Now, the first report made -- gave the caveat that NZDF don't have the report. The second one didn't. Do you understand my point?

A. I understand your point. I hear what you're saying, yes.

Q. Now, can I turn then, now, to page 72 of that same bundle -- no, 71 and 70? I want to take you now to the ISAF press release at the time?

A. So which page, sorry?

Q. Start with page 70 of the big bundle. Now, we know that there was an earlier press release?

A. Can I just --

Q. Sorry.

A. I'm scrambling to find page 70.

Q. Page 70, don't feel any pressure.

A. Okay, I've got it. No pressure, yes.

Q. Now we know that there was an earlier press release than these two, dated, I think, the 22nd, which announced the investigation?

A. Yep.

Q. But I really want to concentrate on these two. Now, the press release that's on page 71, and they both, I think, came out fairly quickly, one after the other, but that's the press release which refers to Air Force, Brigadier General Zadalis, and the -- so that's the second ISAF press release, and the one on the other page, on page 70, is the third press release.

So, we know that NZDF had the press release on page 71 prior to your briefings to the Minister. I can take you to the documents that show that if you wish me to --

A. No, it's okay.

Q. -- but it's not in issue.

So the headline for that press release is:

"Joint assessment team confirms possibility of civilian casualties in Baghlan."

Doesn't it?

A. It does.

Q. And I also need to get it out so I can read it, but if you can just have a look at it, paragraph 2:

"The team determined that several rounds from Coalition helicopters fell short missing the intended target and instead striking two buildings which may have resulted in civilian casualties. Insurgents were using the buildings as a base for operations. However, it was not the intended target. The team discovered the accidental short rounds during an examination of the Air Weapons Team video. The assessment determined a gun sight malfunction was the cause of the errant rounds."

Then it goes on to quote:

"We regret any possible civilian loss of life or injury. Our first objective is to protect the people of Afghanistan...during their assessment the team received operational briefings...initial reports from the ground operation indicated 13 insurgents were killed with no civilian casualties. However, close examination of the weapons system video showed the errant round striking the unintended buildings. This is exactly why we send assessment teams to look into civilian casualty allegations, said Zadalis, we want to be sure we understand exactly what happened, review all information available and set the record straight."

Now, we know that that press release came to the attention of NZDF and indeed MFAT on the 30th of August. Were you aware of it?

A. I can't recall. I probably would have been.

Q. And if you have a look, for example, at page -- just turn over the page, the series of emails at pages 72 and 73 which are, I find incomprehensibly difficult to fathom because of all of the deletions of the names, but I can tell you that the one on page 73, and you'll see the reference to MFAT there, that's -- that shows us that -- and we do know the names of the people -- that that was in the hands of MFAT, and that attaches that email -- that press release.

And then if you look on page 72, you've got Mike Thompson, Colonel Mike Thompson, he was -- was he working out of your office at the time?

A. Well, in essence, yes.

Q. All right.

A. Yeah.

Q. And he's sending an email to various people including Peter Kelly and Kevin Short. The Minister's office are asking, "do we have any idea when the assessment is likely to be completed?". "I have reminded them that this is an ISAF process which we have little or no sway over."

So -- and then if you turn over to page 77, you'll see an email from Peter Kelly to Edward Poot, who was a comms advisor in NZDF?

A. Um no, he was --

Q. Minister's comms advisor?

A. He was -- is in the Minister's office. He was the Military Secretary to the Minister.

Q. All right, and Mike Thompson again is seen there?

A. Mmhmm.

Q. And that says:

"At this point in time CDF spoke to Minister last night, reference this, and we are now awaiting the office HQ ISAF assessment report from Theatre..."

So you must have had a conversation with the Minister about it?

A. I had many conversations with the Honourable Dr Wayne Mapp over this issue.

Q. But particularly about that press release at this point, by the look of it?

A. Oh absolutely. Absolutely. In fact, you know, the Minister was -- I would say seized of the impact of civilian casualties on the reputation of the Defence Force and New Zealand.

Q. And New Zealand. It was a New Zealand Inc issue too, wasn't it?

A. It was.

Q. And, you know, we don't need to get into it here, but ISAF were very concerned as part of the COIN strategy to address the issue of civilian casualties and investigate those and acknowledge anything that had gone amiss, weren't they? That was part of the thinking?

A. It was. General David Petraeus, who was the Commander of ISAF, part of his becoming the commander of ISAF was to change the dynamic in the theatre, so that it was a hearts and minds operation, rather than what they called a kinetic operation.

Q. Yes. So, as at the 29th of August, this press release is dated, we have ISAF openly, and I would suggest to you, responsibly acknowledging that the IAT, the Initial Assessment Team investigation, had confirmed that errant rounds from the US Coalition helicopters had missed their target and struck two houses, which may have resulted in civilian casualties. Do you accept that?

A. I accept that, yes.

Q. And that NZDF knew that that was ISAF's publicly stated position from 30 August 2010?

A. And we knew, yes.

Q. Now the second, if you go back to that page 70, the press release on page 70, so earlier in the document than the other one, is the -- what is actually called the third press release. It's the second on that day or at that period. So we have, soon after that one that I went through with you a moment ago, ISAF announced a formal investigation into the civilian casualty issue, didn't they? So, we had the Initial Assessment Team, Zadalis investigation, with the findings that we've just talked about, and then the announcement of a more formal investigation. You were aware of that at that time?

A. Yes.

Q. And it confirms, if you look at that press release second paragraph:

"The investigation was ordered based on information contained in the joint Initial Assessment Team's report of the operation."

Restates the finding, and says:

"'We are here to protect the people of Afghanistan. Civilian casualties reduce the confidence of the Afghan people and erodes trust placed in us,' said U.S. Army Lt. Gen. David M. Rodriguez, ISAF Joint Command commander. 'This is a serious issue and that's why I ordered this investigation. We will find out what happened during this operation.' Results of the investigation will be provided upon completion."

So, when did you think you -- do you know when you became aware of that second press release?

A. Oh, I can't --

Q. It's a big ask this long after the event, I know. You don't know?

A. But -- no, I don't, but I mean, they would have been rolling through.

Q. If have a look at --

SIR TERENCE: Can I just clarify that? I think you said second press release, but meant the third?

Q. Oh third, sorry. Second on that day or within that period of time, but the third press release, thank you, Sir.

If you have a look at page 168 -- I may just be putting you wrong there, sorry. And --

A. So that's the same one as you've shown me -- asked me to look at before?

Q. Yes, I know, and then if we go through a few pages to 173, you'll see here -- not those same press releases in the same format -- but you'll see on page 173, for examples, a reproduction, which essentially contains the same information, and these documents, if you have a look at the hole punch that you can see in the top left-hand side, I suggest to you that these papers have all been associated with the Ministerial briefing that starts probably at page 164 -- sorry, 168, 169.

And, they appear to be part of that briefing pack. Do you accept that? That's our understanding of how the documents have been provided. If you don't know, that's fine. Can you see the hole at the top of the page, the little photocopied dot on the left-hand side at the top of each page?

A. Yes, I can.

Q. I think they line up as apparently as having been part of one document. You may not be able to confirm that.

A. It looks like they are, yes.

Q. They look like they are.

You see the briefing note doesn't draw attention to them, and I wondered if you might be able to help us with why it would be that the briefing to the Minister doesn't draw any attention at all to the press releases?

A. I don't necessarily agree that those documents are --

Q. Part of it?

A. -- part of it, because the security classification on pages 169 and 170 are unclassified, and on the 171, it is restricted.

Q. All right. Well, that may be correct, and we can do some more digging and ask some other witnesses about that if necessary, but putting that to one side, there's no doubt you knew about the press releases at the time.

A. Oh yeah, absolutely.

Q. -- that the Minister was briefed?

A. And I said that before. We knew there were press releases.

Q. So put my theory to one side, that they were associated with it. The point is still why wasn't the Minister -- why weren't press releases drawn to the attention of the Minister?

A. Well, the Minister would -- the Minister did know about them?

Q. Why weren't they referred to in the briefing?

A. I don't know.

Q. Because wouldn't it be -- because they're inconsistent with the briefing, aren't they?

- A. See, I don't think so. I mean, I think that, in relation to the wording, you know, it says "possibility of civilian casualties". So, you know, there's no categoric "there are civilian casualties".
- Q. But Sir Jerry, to be fair, if you have a look at the briefing on page 169, the briefing is categorical?
- A. The briefing is what can be -- what we agreed would be useful for a Minister to disclose.
- Q. The briefing, with respect --
- A. And all of the other things are in the public domain.
- Q. But Sir Jerry, paragraph 4 says, in inverted commas, i.e. a quote:
- "Having reviewed the evidence, there is no way that civilian casualties could have occurred."
- That's not what the press release says.
- A. The possibility, and may, and -- so in the context of the information that's coming back, there's the press releases, which suggest that there may have been casualties. There's the investigation that goes out to look for 20 people who were injured, including two women who were supposedly in the hospital, and they were found to be military aged males. So in the context of that, you know, the setting is Minister has seen these press releases, and it's a matter of how do we add to the conversation, rather than how do we supplement.
- Q. But wouldn't the more accurate thing to have said in the ministerial briefing, would be to refer to the press releases or the information coming out of Afghanistan, which has suggested there may be civilian casualties?
- A. In hindsight, yes.
- Q. Mmm?
- A. In hindsight, it could have been, yes.
- Q. And I know you didn't draft these, and you're reliant on your staff. I completely acknowledge that, but you'd have to accept, wouldn't you, that there is a stark inconsistency between the wording of the briefing and the press release?

A. Oh, I mean, I hear what you're saying, but again, I don't necessarily subscribe to what the conclusion is.

Q. I don't want to labour the point --

A. Yes.

Q. -- but really, saying that "there is no way that civilian casualties could have occurred" and ISAF finding or the Initial Assessment Team finding that "civilian casualties were a possibility" --

A. Yes.

Q. -- do strike me as inconsistent. Is that not fair?

A. That's a fair assessment, yes.

Q. And you'd -- you can also confirm, I'm sure, for us that NZDF wasn't only reliant, and I think you've alluded to this a minute ago, wasn't only reliant on ISAF to tell it whether there might have been civilian casualties?

A. Correct, and in fact, I think that the first notion we had of it was from the media.

Q. And just going on with what I was going to put to you, is that you had access to Battle Damage Assessments, called BDAs?

A. Possibly, I mean --

Q. I'm going to take you to some of these documents.

A. Yeah, sure.

Q. It's a general question.

A. Yes.

Q. You would accept that --

A. I did.

Q. -- NZDF --

A. Of course.

Q. -- would have access to BDAs?

A. We certainly had access to the -- well, we -- we had viewed the tapes from the operation, yes.

Q. You had intelligence reporting after the operation?

A. Yes.

Q. And those -- and I'm going to come to some documents in a moment, but I'll ask you the broad question first because you

might be able to answer it for me anyway, I suggest to you that those documents all confirmed the public reports that were coming out at the time of the possibility, and I'm not putting it higher than that, of the possibility of civilian casualties. Is that fair?

A. Yeah, that's fair.

Q. And you knew, didn't you, that the SNO, Rian McKinstry, had seen the gun tapes that had shown the rounds striking buildings? This is after the operation?

A. Yes.

Q. Well, given that, I suggest again to you that those ministerial briefings, about what the IAT report had found, are wrong and inconsistent with the other information?

A. Clearly they are wrong, and clearly they are inconsistent. Now, with hindsight, yes.

Q. And, I think other witnesses are going to be taken to these -- some of these post-operation documents in more detail -- in a detailed way, so I'm not going to spend too long with them, but if you have a look, and we talked a minute ago about the intelligence reporting that was coming out of the operation -- after the operation, sorry -- but have a look, for example, at page 13. That's the 23rd of August 2010, first update, intelligence reporting document. Would you have seen these sort of documents at the time?

A. No.

Q. You would expect that Mr Kelly would have?

A. I would assume so, yes.

Q. Yes. And can you just help us there with some definitions and translations. "NFI" means "no further information", correct?

A. Correct.

Q. And INS means insurgent, correct?

A. Correct.

Q. And am I right that what happens -- and what has happened here and what you would expect is that the intelligence reporting comes through every day or so after an operation, and the

picture often changes depending on the information that's coming to light?

A. It does.

Q. And here in this one, dated, as I say, the 23rd of August we've got two people possibly killed, no further information. Someone likely killed, who's said to be a sister. A number of insurgents, likely injured daughter, of an unknown female. And if you go through to page 23, this is another update, 25th of August, couple of days later. Bit more information, but we're still seeing two no further information references, possibly a daughter still there. Unknown female. Again, it's changing slightly. Come through to page 33, I can take you -- we can go through these in more detail if you'd like to, but other witnesses with deal with them, Sir Jerry, so you may not need to -- and again, page 33, 26th day after, references to insurgents. Another NFI -- moved over to the two NFIs, still there but moved over into the likely killed column. Reference to unknown female, unknown daughter, and then, if you look at page 36 and just help us, and perhaps confirm, this is a document that's a BDA, Battle Damage Assessment, from the PRT analysis. So that's a different -- coming through a different source. It's a different process, isn't it?

A. Yes.

Q. But it's still a battle damage -- part of the Battle Damage Assessment process.

And then if you go to page 63, this is an intelligence summary report, dated 26th August, and the operation, we know, is on the 22nd of August, correct?

A. Correct.

Q. And this has still got two NFIs in the probably killed category in the column on page 64, possibly killed sister of, unknown female over in the injured column.

So, certainly movement and change, but each and every one of those reports indicates, doesn't it, the possibility of civilian casualties?

A. Yes.

Q. And you were aware that ISAF had decided, and this is the Rodriguez third press release I'm referring back to now, that there would be this more thorough, more fulsome inquiry following?

A. Yes.

Q. Did anyone in your office read those press releases, to your knowledge, Sir Jerry?

A. Which press releases?

Q. The two press releases that we talked about earlier and perhaps also this BDA reporting? That would be what you would expect?

A. I would assume, yes.

Q. And that would be Peter Kelly and would it also be the Chief of Staff, Tim Keating?

A. And also the ACDS guy at the time.

Q. The who guy, sorry?

A. The ACDS guy, so the Assistant Chief of Defence Strategic Intelligence.

Q. Who held that role?

A. I think -- I'm not sure, but I think it was Kevin Short.

Q. All right. I do need to suggest to you, given what we've been looking at, that there was a -- what I suggest to you, a surprising lack of questioning, or a lack of curiosity, by senior people at NZDF about the possibility of civilian casualties at this time?

A. There was acknowledgment that there was a possibility of casualties, yes.

Q. Not in the -- I'll just stop you there, I don't mean to interrupt -- but just not in the ministerial briefings?

A. I thought in the ministerial briefings that there were comment that there were allegations of civilian casualties?

- Q. Yes, but that last briefing that we went to said, didn't it, that --
- A. Well, it didn't go on to -- we didn't give a fuller version of it, yes.
- Q. Now, the IAT report, we know that the -- both briefings that we've been looking at were materially and inaccurately -- misstated the conclusions of the IAT report, don't we?
- A. Yes. We know that with hindsight, yes.
- Q. All right. And we know, from what you've said, that Chris Parsons' email appears to have formed the basis for that?
- A. Yes.
- Q. Do you not think, looking back on it now with the benefit of hindsight, given that that email was so much at odds with ISAF's public statements about their own investigation, and arguably -- well, not arguably, but it was also inconsistent with what your own intelligence reporting and BDAs were showing -- can you help me with why that email was so unquestionably accepted as the final word on it?
- A. I guess, just in terms of the information coming into the headquarters, so you're characterising it as though that information went to only one place, that is into the special operations centre. It didn't. So, intelligence operations -- or intelligence reports and summaries would have gone into Kevin Short's area. So -- and in that area, there was a dedicated intelligence section. So there were -- there were multiple eyes on the topic, and so, whilst I can agree with you that it's an anomaly that with a whole group of eyes looking at the information, that this didn't filter through, I guess, you know, sometimes -- and as has been acknowledged, there have been missteps in this, and there are obviously processes and procedures that would have -- could have, improved the passage of information from the Defence Force to the Minister. Absolutely.

- Q. I understand that, but really what you're saying is that a whole lot of very senior people are looking at the stuff, and notwithstanding that, remarkably, nobody is picking up on the fact that ISAF's own public statements about its investigations are not lining up with what you're telling the Minister?
- A. What is lining up is the fact that there are allegations of casualties. Some of those allegations are proved to be wrong. Outrageously wrong. And then some of those, you know, are questionable. If you add to the context of a counterinsurgency operation, which was the tenor of the ISAF method then, and making sure that you engage with the civilian population on the one hand, and also, the fact that there was, you know, the investigation initially by ISAF, which we participated in, and then secondly, to reinforce that, by Rodriguez, who is outside of the theatre, I think, and the inclusion of both the Ministry of the Interior and the Ministry of Defence from Afghanistan, together with the Coalition force, you know, there is -- you know, some predicament that we are in, in terms of what is -- you know, what is being reported. I acknowledge that. I acknowledge also that in terms of what we -- what I put to the Minister, was the best information that I had.
- Q. It certainly wasn't the best information that your staff could have --
- A. That I had.
- Q. -- given you though, was it?
- A. That's --
- Q. That's a fair comment?
- A. That's a fair comment, absolutely.
- Q. And I mean, you can, you know, again, looking back now, you can accept, can't you, why people looking back at this might see it as -- on one view of it, NZDF doggedly refusing to accept, even as a possibility, civilian casualties from this operation.

A. Yeah, I can. Yes.

Q. Sir Jerry, would you accept that with the secrecy that goes with Special Forces Operations, of necessity, comes a heightened duty of candour and absolute accuracy when reporting facts about these things to Ministers?

A. Uncategorically, yes.

Q. Thank you. And do you accept that NZDF, not you personally, seriously failed the Minister in that regard, in relation to this matter?

A. In that regard, we did not provide all of the information to the Minister and the Prime Minister, from what I now see.

Q. And just finally, and I preface what I'm about to say by acknowledging this is nothing to do with you -- you're no longer --

A. But it is.

Q. -- there, but we now know, as of only one week ago, that that IAT report was in fact in NZDF's hands, held in a safe, in the Office of the Chief of Defence, by at the latest, 1 September 2011. You'd left by then, hadn't you?

A. I most certainly had.

Q. It -- and take it from me, we're going to talk about this with other witnesses -- but it shows on its face that it had been marked up, clearly read by somebody, and was attached to a set of papers, a pack, that was attached to your briefing papers or draft briefing papers to the Minister from 2010.

Would you accept, and I'm asking for your opinion on this, that had you been in the Chair, if you like, in 2011 in September, when that IAT report had come to light, you would have gone straight to the Prime Minister and the Minister and made it known to them, and said, look, we put you wrong about the IAT. We actually have it now and this is what it says. Is that a reasonable thing for a Chief of Defence to have done at that time, when it came to light?

A. Yes.

Q. Because that would be entirely consistent, wouldn't it, with the no surprises policy --

A. Correct.

Q. -- that the Chief of Defence is obliged to follow?

A. Absolutely.

Q. Thank you very much, Sir Jerry. I have nothing further.

CROSS-EXAMINATION BY MR SALMON

MR SALMON: Good morning. I take it from what we've heard that you accept now, and did accept then, that civilians may have been killed in Operation Burnham?

A. There was a possibility of civilian casualties, yes.

Q. Was, and is?

A. Was, and is.

Q. You'd put it slightly higher than possibility now, wouldn't you?

A. Possibly. I mean, the context of -- you know, it's interesting that the people who were affected are not here, and the nature of the people in the Tala wa Barfak area -- we'd had quite a bit of interaction with them over time and from what I'd been told, they were not always reliable, and it would have been good to see them face-to-face and just to talk, but obviously that's not the ---

Q. Well let's talk about that briefly. The principal investigation into the possibility of civilian casualties, was that undertaken by ISAF, correct?

A. It was.

Q. And the NZDF did not undertake its own on the ground investigation. Correct?

A. Correct.

Q. And that means the NZDF did not go and interview individuals itself, go and talk to potential casualties or injured persons itself?

A. Correct. And again, the context -- I mean, you can't just walk into a village like the villages that were around Tala wa

Barfak, in terms of military from the New Zealand Defence Force, and equally, that village happened to be outside of the area of operations for our Provincial Reconstruction Team.

Q. So you could go in on an armed and aggressive basis, but you couldn't go and talk. Is that your evidence?

A. The evidence is that the -- the operation that was conducted on the 22nd was one that was sanctioned by ISAF and approved by me.

Q. But is that your evidence, that it wasn't something you'd reasonably expect the New Zealand Defence Force to do, to go and investigate itself?

A. The point is that you couldn't go in. They couldn't have gone in.

Q. Right?

A. And in fact I'd stopped a previous attempt to go in.

Q. So you've made no attempts or directed that no attempt has been made to talk to the villagers. That follows naturally from that, doesn't it?

A. No, it doesn't, necessarily follow.

Q. Oh, you have made attempts?

A. It doesn't follow that you can go into a village, in an operational area.

Q. If you listen to my questions carefully, we'll get through this in the 30 minutes that I need to keep to --

A. Yes, absolutely.

Q. -- can we do that?

You have made no attempts and directed that no attempts be made to speak directly to the villagers to investigate this?

A. I have -- I have -- I was in no position to make that --

Q. All right.

A. -- that decision.

Q. So separately, when we might hear a suggestion that NZDF has been "trying to get to the bottom of this", really what that means is it was allowing the ISAF investigatory team to get to the bottom of this?

A. Correct.

Q. Okay. So, it's not really correct what was said by the counsel this morning for the NZDF, that that's been a major focus of NZDF, is it, trying to get to the bottom of this? It's been passive?

A. Well, it's not entirely passive, because it is encouraging, in terms of the participation in the inquiry that ISAF did.

Q. Okay. So what it's done is be interviewed by ISAF when ISAF wished to interview relevant personnel?

A. ISAF conducted the operation. ISAF conducted the investigation.

Q. But NZDF, other than by participating in ISAF, was not trying to get to the bottom of this, was it?

A. We didn't have the capacity to do that.

Q. Okay. Now you've agreed, I think, that this was a serious operation and a serious type of fall-out. You agree with that?

A. Serious type of?

Q. Fall-out from the operation? The allegations of civilian deaths?

A. Oh absolutely, yeah.

Q. And you know, don't you, and you knew at the time, that there was worry internally by Colonel McKinstry, and from his emails, by others, of the possibility of civilian casualties?

A. I see that, yes.

Q. But you knew that at that time?

A. In terms of after the operation or --

Q. After the operation and before the statements you made to the Minister?

A. There was certainly a suggestion that the possibility of casualties, civilian casualties, was likely.

Q. And you can remember that?

A. Yes.

Q. But your memory of all events isn't too crisp, is it, given that you've changed your account of whether Dr Mapp, the then

Minister of Defence, was present in the operations room. Your first brief said that he was, and now you say maybe he wasn't?

A. Well, there are two parts of it. The first part was when I briefed the Prime Minister, and definitely Dr Mapp would have been there, and so he would have been in the operations room, and then, subsequently, and I'm not sure when that happened, I do know that he left, because he would not have stayed for the entire operation. So that's the clarification.

Q. And I'm just asking what you can remember, you can remember him leaving, or are you inferring that he left from hearing that he might have left from others?

A. No, I'm recounting what I assess would have been his likely actions.

Q. Which means you don't remember?

A. I don't remember in detail.

Q. Okay. So if there's a simple quick answer like that, given my time limit, you can just give that to me, and we can move forward --

A. We could do that, yes.

Q. -- going forward. Great. Thank you.

It was also serious, both the mission and the potential fall out, because this was an NZDF-led, or SAS-led mission, wasn't it?

A. It was a mission that was led by the Afghan unit that we were with.

Q. Well, that's what you endeavoured to say to the Minister, and say to the public, but in fact, it was not the Afghan initiative was it? It was a New Zealand initiative?

A. It was an ISAF initiative, yes.

Q. Run by NZDF, on NZDF volition, and with NZDF coordinating it, correct?

A. With the Afghan national support for it, yes.

Q. Yeah, some of them came along, correct?

A. They were there, yeah.

Q. All right, but you're not running the spin today, on oath, are you, that this was somehow CRU-led? This was a New Zealand Defence Force-led mission, wasn't it?

A. It was an ISAF-led mission, yes.

Q. And within ISAF, led by the NZDF?

A. I guess.

Q. Well, you're guessing? You were the Chief of Defence Force?

A. Well, now then, the operation was approved by me. So yes.

Q. All right.

A. Yes.

Q. It was approved by you and approved by the Minister of Defence, correct?

A. Ah, no, the Minister did not approve it.

Q. I thought you said --

A. The Minister had no -- no approval. He -- I briefed the Minister, and I briefed the Prime Minister. I was categorical that the decision to conduct the operation was mine, and I also went through the caveats that they would have been concerned about.

Q. I thought you said earlier today that you sought approval from the Minister --

A. No, I did not.

Q. -- and from the Prime Minister?

A. No, I did not.

Q. You did not?

A. I did not say.

Q. Okay, I might have misunderstood, but we have a transcript.

In any event, the involvement of the Minister, both in location and on the issue, elevated the seriousness of the event, didn't it, in the sense that any fallout had a degree of political risk, rather than just operational profile risk for you?

A. Yes.

Q. And the fallout itself was particularly serious because the prospect of civilian casualties, as you've confirmed to my

learned friend, was a very unusual one for New Zealand Defence Force to face, correct?

A. Yes.

Q. And you had none other than General Petraeus stating in the ISAF press release you've already been to that it was a "serious issue"?

A. Yes.

Q. And so, really this was about as serious as an issue can get for the NZDF in recent times. Agree?

A. Correct.

Q. And one, therefore, that required great care both in terms of investigation, accuracy, and statements made to the Minister and Prime Minister, correct?

A. Correct.

Q. And that meant, given the allegations involved possibly troops going awry, not simply taking the word of one troop, or one army personnel person, but a proper investigation, agreed?

A. And a proper investigation was conducted, yes.

Q. But you wouldn't take the word of one person as to what had happened in theatre, or what was happening on the ground in Afghanistan, without a proper investigation?

A. Well, the investigation was done by ISAF and also by Rodriguez, who was outside of the environment, and the point that you're making, is that the report that Chris Parsons was able to view is the one piece that he was able to relay, because that's what he was --

Q. But the point is that you elected to seize upon a second-hand relaying of a passage seen over someone's shoulder, by Chris Parsons on his what -- second day in Afghanistan, over all other material that we now know you have, correct?

A. The report, the IAT report, is the authoritative report.

Q. Right, and would you agree --

A. And anything else -- anything else is corollary to that.

Q. Right. Would you agree that if the IAT is the primary source, the next best thing is what ISAF says in its public statements that the report says?

A. I don't believe that it says that the IAT says that there were casualties. What I believe --

Q. You're not answering my question General Mateparae --

A. What I believe it said is that there is a possibility, and that there may have been casualties.

Q. You're not answering my question. My question is --

A. Well, I think I am.

Q. -- do you agree --

A. No, I don't agree with what you said --

Q. So what are you not agreeing with?

A. -- because I've just explained --

Q. What are you not agreeing with? What question?

A. I'm agreeing with the question that you asked.

Q. Which was what?

A. Well, put your question, and then I'll answer it again.

Q. Are you disagreeing with a question even though you can't remember what it was?

I'll put it again, the next best source, if you don't have the ISAF report, as to what is in the report, and what the investigation concluded, is what is in ISAF's publicly released statements about what's in the report. Do you agree or not?

A. And, as I said, the publicly released statements say that there was a possibility of, and there may have been. It doesn't say categorically that there were, and I am waiting --

Q. Do you agree that --

A. I am waiting --

Q. -- they're the best source?

A. The best source is the source that comes from the theatre.

Q. All right sir, that's half past, if that's convenient? I think that's 15 minutes in.

(Morning adjournment)

MR SALMON: General Mateparae, I'll try to work through the rest without having to go to documents, except where we need to.

You looked at two releases from ISAF in particular with my learned friend; one of which noted that there was a further investigation ongoing following the first ISAF report, correct?

A. Correct.

Q. And so, having seen these you would have known that not only was there a possibility, but there was a further investigation underway?

A. Sorry just to clarify, so that's the IAT is the first one, and then the second with that General Rodriguez had initiated, is that --

Q. Yes.

A. So, yes.

Q. And so, at the time you were briefing the Minister you would have known that at some point a further report might be released?

A. I assumed so, yes.

Q. And that meant you were dealing with some degree of information deficit still, there might be further material that would come out beyond what was publicly available from ISAF?

A. Yes.

Q. And that might include, for example, worrying findings, or it might be a reduction of concern about civilian casualties, but you didn't know?

A. I didn't know.

Q. So at the time having seen that there was one ISAF report, I put it to you that the natural thing for you to do as Chief of the Defence Force on such a serious issue would have been to contact ISAF and ask for more information yourself, did you do that?

A. I don't recall doing that, no.

Q. Did you write to ISAF and ask?

A. I don't recall writing to ISAF, no.

Q. Did you ask anyone to?

A. I don't recall, no.

Q. Have you checked, or do you know if NZDF has checked and provided to this Inquiry any such attempts to contact ISAF for any documents recording --

A. No I'm not aware of anything of that sort.

Q. Do I take it then that to the best of your knowledge nobody bothered contacting ISAF directly from New Zealand and asking for a copy of the ISAF report?

A. Of the second report did you say?

Q. Of the first report?

A. Well, we had asked for the IAT, yes.

Q. Who had asked?

A. We'd asked through Chris Parsons.

Q. Right, who was in his second day on the job.

A. By the time that you're talking about, it's a little bit longer than two days. So his --

Q. Three, was it three?

A. -- deployment was for six months.

Q. I'm asking though about whether anyone of a more senior level contacted ISAF and asked --

A. Well, he was the most senior -- he was the most senior officer in ISAF --

Q. He was a Lieutenant Colonel at the time --

A. -- from New Zealand.

Q. -- is that right?

A. Yes.

Q. But you were the Chief of the Defence Force?

A. Correct.

Q. Did you ask?

A. I asked through Peter Kelly to Chris Parsons.

Q. Right, and he was told no. You would be aware of the value of rank though, you made no attempts to find it yourself, did you?

A. I made an attempt through Chris Parsons, who was the Senior National Officer, and has the direct call and link in to General Petraeus.

Q. But you have status as the Chief of Defence Force to make contact with General Petraeus on such a significant issue that he's made a press statement himself about it?

A. Yes I did, yeah.

Q. You could have done that, couldn't you?

A. I could have, yes.

Q. And had you wanted to see what was in the ISAF report in detail before telling the Minister your account of events that's what you would have done, isn't it?

A. The fact of the matter is that we were told that ISAF would not release it. So I accepted what I was informed. And that's what happens when you are a part of a multi-national operation --

Q. Well, that's just not --

A. -- you have no --

Q. -- realistic, is it General Mateparae?

A. I'm not General Mateparae.

Q. My apologies, how should I address you?

A. Well, Jerry is my name.

Q. I think the Inquiry won't like that. Sir Jerry?

A. I'm quite happy with that.

Q. Okay I'll go with that. I'm one of the people who's not a sir, so I forget, my apologies.

Sir Jerry, it's just obvious, isn't it, that if people on the ground at the levels they liaise aren't getting success, sometimes contact further up the ranks or even by MFAT will politically work?

A. That's a fair assumption, yes.

- Q. Okay. And so that would've been the natural thing to do had you really wanted to see it?
- A. Having been told that it wasn't releasable I didn't -- I did not go back and ask. I could have, yes.
- Q. Okay, and I just need to put to you, the reason for that is you didn't really actually want to see the detail of the report, did you?
- A. That's not -- no that's not true. I mean, if the report had of come back I would have made sure I saw it.
- Q. If it had come back, but you didn't ask, so you can't have been that keen to see it, that's all I'm putting to you?
- A. I was keen to see the report. But I was told that it wasn't available. And that's the nature of military operations in the military operational setting. There are times when reports that are produced that are cognisant of other nations which are not divulged. So I could well have gone, but I didn't.
- Q. So your approach to military intel would be have someone of a mid-level officer rank ask once, nicely, and if declined New Zealand takes no for an answer?
- A. Well you'd have to ask how nicely Colonel Parsons requested. But request is the request.
- Q. Well, it's you I'm interested in Sir Jerry, you wanted to see it, but appear to have done nothing to try to get it?
- A. No, I don't -- I don't agree your assertion, because I asked through the officers that were in the theatre at the time.
- Q. So your evidence is yes, you did want to see it, because you regarded it as an important document?
- A. When it was finished, yes.
- Q. Okay, and that would mean, wouldn't it, that if anyone did manage to get their hands on it within your inner circle of command, they would know they were on to something important that they should tell you about, correct?
- A. I would assume so, yes.

Q. And that makes it just very unlikely, doesn't it, that any person in your office would have received a copy of this important report and forgotten about it?

A. I would assume so, yes.

Q. Indeed, the reality must have been that when the ISAF report did reach your office it ultimately ended up in a safe, it was something that your office knew about?

A. My office? So I assume that when the report was delivered and I'm not sure how it was delivered, and when it was delivered, that someone would have read it, yes.

Q. Right. And what I'm putting to you --

A. And someone should have understood the context of the report.

Q. Right, and what I'm putting to you is that someone would have --

A. Oh yes, should have, not would have, should have.

Q. Well, the final point I'll just put to you is that someone did, and in fact there was an awareness within NZDF of the existence of that report and what it said?

A. I'm -- I don't know that.

Q. You just don't know?

A. I don't know that, no.

Q. It would be a profound failure of the mechanisms within your wider office for something so important to be misunderstood or thrown in a safe with no-one told?

A. So are you characterising it as my office or the -- generally in the office of --

Q. The office under your command?

A. The office of the Chief of Defence Force?

Q. Yes.

A. One would assume that a document of that import would be made known, yes.

Q. Okay. The briefing that you provided on 10 December which we -- I don't think we'll need to go to, but it's at 164, that used the word "baseless" in the covering page, didn't it, about the allegations of civilian casualties?

A. It did, yes.

Q. Did you approve the use of that word?

A. I don't know whether I used -- whether I gave it direct approval. Having said though, that, you know, I would have seen it, and I would have been, you know, comfortable with its release to the Minister.

Q. Even Chris Parsons' short email didn't suggest that the allegations had ever been baseless, did it?

A. I don't remember.

Q. You don't remember what Chris Parsons' email said?

A. Well, no -- well, I -- I mean, you're not letting me --

Q. Well you can if you like?

A. Okay.

Q. Do you want to -- given time, do you want to take it from me it doesn't have the word baseless?

A. Okay, yeah I'll take it --

Q. And you remember the general gist?

A. Yeah, the general gist, yes.

Q. Which is that he had now seen a report that hitherto had been in the context of there being a possibility of civilian casualties, but now there was apparently a conclusion that there weren't any?

A. That there was no civilian casualties attributable to the force, yes.

Q. Right. Which does not mean that any allegations were baseless, or ever were baseless, does it? It means that someone, if his email was right, had found out that they turned out not to be accurate?

A. You're right, yes.

Q. So the use of the word "baseless" was inappropriate with hindsight?

A. With hindsight, yes.

Q. And you've already talked to my learned friend about the 13 December briefing and the use of the words "no way". You made some references when talking to her about persons in a

hospital being males, not females, and males of a "military" age, do you recall saying that?

A. Yes.

Q. Is your operating assumption when advising the Minister that such persons couldn't be civilian casualties, that if a casualty is male --

A. No, not at all.

Q. What do you mean by that?

A. No, so the assertion -- well the inference was that the accuracy of the information is more about that, that having said that there were women, they in fact turned out to be male, so that's the only --

Q. Well you said "males of a military age"?

A. Yes.

Q. So presumably you're implying they might have been insurgents?

A. They were males of a military age, yes.

Q. Right. But that doesn't mean you know that they're not civilians --

A. Absolutely.

Q. -- does it?

A. Yeah.

Q. So at that time, even when you knew about these males, they may have been civilian casualties in your mind?

A. Ah they could have been, yes.

Q. You certainly weren't judging them as being insurgents, were you?

A. I was not judging them as being insurgents.

Q. So given that your mind was open to them being civilians, how could you possibly tell the Minister and the Prime Minister that there was "no way that any of them were civilians" that was just inaccurate, wasn't it?

A. In hindsight, it was inaccurate, yes.

Q. Well, even at the time it was inaccurate --

A. Yes.

Q. -- wasn't it, Sir Jerry?

A. Yes.

Q. Now, you used these words and I tried to write them down as you said them, the transcript will tell if I got any minor words wrong, but I think I got it right, you said this about the 13 December briefing:

"The briefing is what we thought it would be useful for the Minister to disclose."

A. Yes.

Q. And that's what it was, wasn't it, although not ultimately published, it was a statement designed to be sent to the nation by the Prime Minister of what would be useful?

A. An unfortunate term, yes, but you're right, that's what I said, yes.

Q. And that's what you meant too, isn't it?

A. No it's not.

Q. Well, you've agreed it wasn't even at the time accurate, and that in your mind there was the possibility of civilian casualties?

A. So at the time it was my best assessment of the circumstances surrounding the operation and the information that was releasable, yes.

Q. Well, you've agreed that it wasn't accurate at the time?

A. I'm agreeing that, with hindsight, the words I could have used, during the questioning, could have been better put, yes.

Q. You could also have said there's a further investigation ongoing that may reveal damaging material?

A. I could have said that, yes.

Q. But you chose not to?

A. I chose not to.

Q. Now, just finally, and I've only got a few minutes left so I'll try to be brief, one of the submissions made by my learned friend in the opening for the Defence Force was that there was nothing to be gained by denying that there were potential civilian casualties, this was in paragraph 20 of the written submissions I'm sure you've read them. That's not

really right is it? And let me put this to you, you would have understood that New Zealand's Defence Force, the SAS, potentially being viewed as in command of the operation would have suffered potential legal or representational blow-back from civilian casualties, whether they had directly caused them or they were caused by other countries' personnel, you would have understood that at the time, wouldn't you?

A. Ah no, not necessarily, no.

Q. You wouldn't understand --

A. No, I mean, there's a direct relationship between our soldiers and what they can do and how they conduct themselves and the way that others peripherally conduct themselves.

Q. But you would have understood that if your soldiers are calling in air strikes, and the air strikes cause civilian casualties there will be at least reputational and probably legal consequences from that?

A. Oh absolutely and that's why, you know, the information was passed to the Minister, yes.

Q. But that's why also there was something to be gained in downplaying civilian casualties, because there was potential immediate blow-back to the NZDF from civilian casualties on its operation, correct?

A. There would have been, yes.

Q. Right. And that potential blow-back was exacerbated by the involvement in situ of yourself and the presence in Afghanistan at the time of the then Minister of Defence, correct?

A. That could well have been the case, yes.

Q. And that was a major motivating factor behind the way in which the NZDF hurried to leap upon Chris Parsons' short email over any official ISAF material and claimed that there were no basis at all for civilian death allegations, correct?

A. I'm not sure that that's exactly the supposition that you could put, but I mean, I can see where -- I can understand and acknowledge what you're saying, yes.

Q. And I guess if I can put that more gently, with the benefit of hindsight, we can see that there would have been, and was, a desire within NZDF to tell a story in which there were no civilian casualties without being distracted by the detail that said there might have been?

A. No, I don't -- I don't agree with that assertion. I mean, I think the intent would be to provide as accurate information as we could to the Minister.

MR SALMON: Sir, my client tells me I was 11 minutes in the first half, so that brings me to 28, I think.

SIR TERENCE: No you've got five minutes.

MR SALMON: I've got five. I must have a military clock.

But in saying that then, Sir Jerry, you're not for a moment suggesting that what was said was accurate, are you?

A. With hindsight, you are right, yes.

Q. And that hindsight is not something that you've only been able to reach now, it's a degree of clarity that was available quite early on after these events? In other words, you could have been correcting the impressions given to the Minister or the Prime Minister quite swiftly, had you not left the office, is that fair to say?

A. I mean supposition, but I think that I would have been prepared to give more information as that information came to the Minister, yes.

Q. And had you remained in office you would have also followed up with ISAF and obtained its full report if you possibly could, and in particular, followed up the subsequent report that was being undertaken, had you stayed in office?

A. I assume so, yes.

Q. And that's what you'd expect your successor to have done?

A. I don't know the context of my successor's, you know, work programme. I mean, I know mine, and I know what I was doing during the period of the investigations and as information was coming back.

Q. Just finally, given this is your chance to say it, given my client's presence and his experience on these issues, do you now accept that civilians probably did die in this operation, albeit not from shots fired by NZDF?

A. I don't know. I genuinely do not know.

Q. But your view on that has moved a long way from --

A. It has --

Q. -- the one you expressed back then?

A. -- yes, absolutely.

Q. And the materials that you've looked at to form that view are really the materials that were available to you way back then, correct?

A. Not available to me, but available to the Defence Force, yes.

Q. And what were those materials?

A. So, firstly was the IAT report. I mean that's the categorical piece of evidence that has swayed my view. And I've only seen that --

Q. And when did you see that?

A. I've only seen that in the recent past leading into this Inquiry.

Q. And is that in the course of being briefed?

A. Yes.

SIR TERENCE: Mr Radich?

MS McDONALD: Sir, I wonder if before Mr Radich gets to his feet, I just wanted to clarify one matter. Early on in my questions with Sir Jerry we were talking about the CDF briefings and I indicated that the Inquiry hadn't been provided with, I thought I said all of those briefings, and I may have not been as precise as I might -- should have been, we have got three of those briefings, we've got the 31st of August, the 7th of September, and the 14th of September. And you will recall Sir Jerry talked about weekly briefings. I just want to be clear I'm not suggesting that we didn't get those three.

SIR TERENCE: Alright. Mr Radich?

RE-EXAMINATION BY MR RADICH

MR RADICH: Sir Jerry, thank you very much for your evidence so far. I wanted to pick up on the point my learned friend Ms McDonald has just made, and would you have a look at the bundle for the NZDF, it's the spiral bound one. I just want to identify those documents for you, would you please go to page 43 -- sorry, page 45? Is that a briefing of the type that was being discussed?

A. Yes.

Q. And secondly --

A. Probably, I'm -- yeah.

Q. All right. Could I ask you --

A. It looks familiar.

Q. It looks familiar.

Could I ask you please to now go to page 61 and just flick over the pages that follow that? Is that another one of them?

A. Yeah, probably.

Q. And also on page 83, is that one also? I was looking at 83, but I'm being directed helpfully to page 75?

A. 75 is.

Q. 75 I think might have been the end of the previous one. Page 65?

A. It's the same one.

Q. The same one.

Just having a look at the index you'll have a look there on -- if you go back, the index in that bundle, sorry to knock you around, but in the index, if you look at item number 16, on the left-hand side, and you'll see "brief to CDF" and then you'll see over the right-hand side pages 61 to 75?

A. Yes.

Q. So does that help?

So just if you wouldn't mind, just so we can be, sure have a quick look please Sir Jerry at pages 61 through to 75. Is that one of the briefings?

A. It could well be, yeah.

Q. Okay. And the third one that I was looking at is on page 83?

A. Yeah.

Q. Which is just I think -- and it goes to page 85 in this bundle, is that also a briefing?

A. Yes, it is.

Q. Thank you.

Just a few things to cover, you were asked some questions by my learned friend Ms McDonald about the safe that Mike Thompson had, and the possibility of other safes, did you have -- or please would you explain whether you had any involvement with safes in the office of CDF or what was in them?

A. I did not, no.

Q. All right, thank you.

I want to come to the press releases with you, if I can, and if we could do this by looking at the Inquiry's bundle, that's the ring binder. I'm sorry we're moving between the two bundles, it's just that the exigencies of time meant that we had to prepare separate ones, so there is some duplication. So if you have a look please in the bundle first of all at page 71 and page 70. Now these are the two press releases you've been taken to. Can I ask you to keep your finger on that page and now dial back please to page 10?

So do you see the press release that's on page 10 that's dated 23 August 2010?

A. Yes.

Q. Just have a -- take your time if you would to have a look at it.

Do you have at this distance any recollection of having seen that press release?

A. To be honest, I -- yeah, I could have seen it, I probably would have seen it because it would have been put to me.

Q. Okay. Do you recall how much press releases you saw at the time, there is this one, and then you go back to pages 70 and

71, did you see all three, or might you have seen less than all three?

A. I assume my staff would have shown me all of them, because in the context of understanding what was coming out of the theatre in relation to those, you know, the fatalities and those injured, that would have been part and parcel of it.

Q. The press release on page 70 refers to in the second line the commander of ISAF ordering an investigation, and on the next paragraph talks about investigation ordered based upon the IAT's decision. Is that something that you were aware of at the time, or please explain to the Inquiry what your knowledge was to the extent that you can recall, about that point?

A. Even -- I mean, up until very recently I thought there was one report, that was the IAT report. That's the only report that I was aware of. I wasn't aware -- and I thought that the IAT report and the other with the Ministry of Interior and the Ministry of Defence and ISAF was one and the same.

Q. I see. Just before I lose the point, we talk about IAT and there have been some references to it in questions to Incident Assessment Team and some to Initial Assessment Team, do you know which is correct?

A. No.

Q. No, all right, we'll deal with that through other means.

I just want to look at some timings with you if I may? So first of all, and I'm going to give you our bundle reference for this, on page 25 -- in fact if we start at 23 please Sir Jerry, do you recall that we looked at this, but just to refamiliarise yourself with it, if you look please at page 25, is there reference on there, and if so, would you mind just pointing to it, to the notion of civilian casualties?

A. Yes, in paragraph 2 there's -- it says:

"During the operation a number of armed insurgents were engaged by the ground and air forces and killed. Afghan citizens within the Talah wa Barfak region have alleged that innocent civilians were killed during the operation, and

headquarters ISAF has commenced an investigation into the allegations."

Q. Thank you. Do you recall seeing the email from Chris Parsons that we've been talking about on which your subsequent reporting was based?

A. No, I don't.

Q. Did you see it at the time?

A. No.

Q. Could I ask you please to have a look at the same bundle, the NZDF bundle at page 77? Do you see there in the centre of the page there's an email from WATEA SNO dated 8 September?

A. Yes.

Q. Have you seen that email previously?

A. I don't recall, no.

Q. If you have a look please at the first paragraph of it, the sentence beginning "however", and based upon the comments from my learned friend Mr Salmon when he took you to the word used "baseless", do you have any comment to make if you line the word "baseless" up with the point that's made in that paragraph?

A. I mean I can't -- yes, you can see that it -- you know, where he says "categorically clears", that has got -- you know, that could well be -- you know, you could follow from that "baseless", based not on fact.

Q. And next could I take you please to page -- and I'm going to move bundles with you now if you don't mind, to the Inquiry bundle, at page 164, this is, just to reorientate you, is your briefing to the Minister of 10 December 2010, was that before or after the email you've just looked at?

A. Well, it would be after.

Q. Yes. And again, I know you've looked at it several times, but paragraph 7 of that document where you say about two-thirds of the way down:

"The assessment concluded that having reviewed..."?

A. Yes.

Q. Do you understand the basis for that now different conclusion?

A. I can, yes.

Q. And would you mind just explaining that a little?

A. Well, I guess as we have just progressed, in terms of the press releases and including, you know, the first press release, and then the -- you know, the email from Chris Parsons as it seems, to then producing the information that I would then provide to Dr Mapp, there is a line of logic, well it seems to me.

Q. And can you explain this note, having been drafted for you, the way in which you assessed the position in light of the press coverage from an earlier time?

A. So as I've mentioned to others, it's an accumulation of information as it's come through. And I guess one of the things that is in this, the continuity, really, is with a very few group -- small group of people. And so, you know, you, on the one hand watching an operation unfold and seeing the activities as they do unfold, and then seeing allegations and the allegations being disproved; then a report saying I've seen the IAT which categorically dispels any sense that our troops or the air force involved created those casualties; I mean, for me there is a logic. But I can well understand why people might not see that.

Q. My learned friend Mr Salmon put some questions to you about accepting the account that you received from Chris Parsons. In terms of the way in which you operated as CDF in command structure generally, can you explain a little bit further about the way you would assess the information you received from Chris Parsons?

A. For a start, you know, there's the element of trust. I knew Chris, I knew his character, and I knew the values by which he would operate. I knew that he was, you know, an officer of high repute in the Defence Force. I also knew that he was being selected because he had the confidence of those who worked with him and around him. So, you know, for me, a lot

of what was put before me, whilst I would read it, and whilst I would have my view, I would take the advice that people I trusted, to be accurate.

Q. Had the information you received from Chris or people in his position referred to civilian casualties being likely, what would you have then done about it in terms of briefings to the Minister or otherwise?

A. I would have informed the Minister that the allegations had some veracity to them.

Q. My learned friend Ms McDonald asked you to have a look at the -- in fact, it's the document we've just looked at, the December briefing, which is again it's on page 164 of the large bundle, and asked you to acknowledge that the purpose of it was to inform the Minister about Operation Burnham. Had the Minister been informed previously?

A. Yes, and indeed, both in written form, but also in oral briefings to the Minister. Please don't ask me to recount the oral briefings.

Q. No.

A. But let me say that Dr Mapp was very very keen to be kept appraised of what had happened.

Q. Yes. You were asked by my learned friend, Ms McDonald, about whether you had let the Minister down, and you referred to an acknowledgment of the fact that not everything had been provided with the benefit of hindsight. I just want to be clear about that in terms of the sequence we've just been through together. What were you telling the Minister and what did you believe the position was in terms of the conclusiveness of the information you were telling the Minister?

A. Okay, both in terms of the written submissions and also the oral briefings, I told the Minister all that I knew. And it certainly was something that we both had a conversation about, but he was also very inquisitorial about.

Q. And you were asked by my learned friend, Ms McDonald, about had you been in the chair, as it were, at the time that the IAT report was released, some questions were asked about that. Did you have in your time any information at all about likely receipt, possible receipt of the IAT report?

A. No.

Q. My learned friend, Mr Salmon, asked you some questions about the report was an ISAF report not an NZDF, and was putting it to you that NZDF was being passive in its approach. Can you have a look please just back at your Brief of Evidence at paragraphs 26 to 28 and can you please describe to the Inquiry having regard to the ISAF SOPs how ISAF investigations are relevant to New Zealand?

A. I don't have it here.

Q. My apologies.

A. No, I left it in my bag.

But one of the -- I mean one of the concerns -- one of the concerns that we did have was -- and this wasn't only for the SAS operations and deployments, I think -- and I think for subsequent deployments, is to make sure that our operations are conducted within a legal framework. And so, we were the very first Special Forces operation to deploy lawyers with our force. And that was to ensure that the operations were conducted legally. And that the Senior National Officer and also the Task Force Commander could refer to both the deployment document and also their legal advisor, and then relate that to what ISAF was doing. And in that regard, as we were looking through the deployment, one of the things that we were looking at is what do we do in the event that we need a -- to do a, you know, a proper investigation inquiry? And we were sort of assured by the fact that ISAF as part of its operating procedures would do that. Again, as part of the deployment, we would have sent a group across just to check on what those would have been. And that group would probably

have included a lawyer, if not, indeed the NZDF's Chief Legal Advisor.

And then, on that basis, when we found out that, you know, any instance of alleged civilian casualties as the result of operations by the Coalition would be investigated, it seemed to me that that was a reasonable way of accepting that in the event of these things. Having said that, if -- you know, so that was the first cut.

The second cut was because we were concerned, there was every intention, and there had been some work been done by the legal staff to draft a Defence Force order, but for all sorts of reasons, including that the person who was doing it went off to Harvard, I think, you know that went into abeyance. But the inclination was that if there was a serious and genuinely, you know, categorical accusation, allegation of NZDF involvement in committing a crime, then we would have sent an investigation team from New Zealand.

- Q. And at what point in the sequence that we're talking about, allegations, IAT report, would you have taken that step?
- A. Probably after the -- we'd seen the IAT report. Because up until that point they were, in my mind, allegations. And that would also have been the advice given to me, I guess.
- Q. My learned friend, Mr Salmon, was talking to you about the components of the force that conducted Operation Burnham. Could I just ask you to explain the components please between the Afghanistan components, the New Zealand components, and the Coalition asset components, if I can put it that way to you?
- A. So, if I start with the Coalition assets, they would have been under tactical control, probably, in which case, you know they're there for support, but they determine what they're going to do in relation to the mission, the mission set and their assessment of what's going on. That's why, you know, within the group there's the tactical air controller. So that

provides the -- that was the direct link into the support assets.

But in terms of, you know, their conduct, that's -- that is separate to, but supporting the operation to make sure that, you know, there's the safety of the force. And I think Mr Salmon's point in relation to the CRU and our SAS, the requirement was that the SAS would be in support of the CRU. And that was my requirement of the deployment. And that whilst numbers might be, you know, heavily in favour of the SAS, and because of the capabilities, because they were a mentoring force as well for the Afghan National Force. So numbers didn't -- numbers count, you know? But the essence of the operation would be a supporting one as I mentioned, it was an ISAF operation, so ISAF needed to approve it, first off. When ISAF had approved it, then I would give the final national approval to conduct the operation.

The national approval would be, was it within the terms of the Rules of Engagement? And was the force in support of an Afghan National Command? So that, you know, the relationship really was between the Afghan National Force and our force. And we don't have -- I mean, you can't command each other. You can -- you're in support of them.

Q. Okay, thank you.

Just two more points. My learned friend, Mr Salmon, was asking you about whether or not people asked for a copy of the IAT report. And you were talking about Chris Parsons' role in that, can you just remind us who Chris Parsons' predecessor was in that SNO role?

A. Rian McKinstry. And Rian had been involved in the initial part of the setting up.

Q. Do you know whether or not he asked for a copy of the IAT report also?

A. I'm not sure when the IAT report was completed, so in terms of that, but yes, I mean again, it's, you know, you assume that -- I assume that he would have.

Q. Yes. Finally, just to be clear, you were asked some questions by my learned friend, Mr Salmon, about a report coming into an office and CDF being made aware of that, just to be clear, had you left office or were you still in office at that time?

A. Well, it seems I was well gone.

#### QUESTIONS FROM INQUIRY MEMBERS

SIR GEOFFREY: Sir Jerry, could I just ask you this, the nature of this operation, it was a JTAC who would call in the fires, and the JTAC was of course a New Zealand SAS officer, is that right?

A. Yes.

SIR GEOFFREY: And so the question of where those fires went, there was some New Zealand responsibility in that regard, was there not?

A. Yes.

SIR GEOFFREY: And it is true, is it not, as you've just said, that New Zealand takes seriously its legal responsibilities under international law?

A. Yes.

SIR GEOFFREY: And wouldn't it not be wise, therefore in the circumstances, whenever there are allegations of civilian casualties in an operation in which New Zealand has been involved, that New Zealand prepare its own report to satisfy itself that it has met its international rule obligations?

A. Yes.

SIR GEOFFREY: Well, don't you think that might be a good idea to take into the future so that is done and we don't have to spend years unravelling what happened?

A. Sir Geoffrey, yes.

SIR TERENCE: I don't have any additional questions thank you Sir Jerry. We are conscious that you travelled from the United Kingdom to attend this hearing, and give evidence, and we're very appreciative of the fact that you've come, thank you.

(Witness excused)

**COMMODORE (RETIRED) GORDON ROSS SMITH (Sworn)**

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Now, you are retired Commodore Gordon Ross Smith?

A. That's correct.

Q. You have a Brief of Evidence in front of you. This is the Sir Terence - Sir Geoffrey, again the original version that was filed, and you have a signed copy that we will make available to the Inquiry. Could I ask you please now to just start reading your brief for the Inquiry Members and those assembled at paragraph 2?

A. I joined the Royal New Zealand Navy in 1981 as a Sub Lieutenant in the Seaman/Executive Branch specialisation. The early part of my career followed the general path of a Seaman Officer serving at sea for many years with breaks ashore to conduct professional and developmental courses. Ship appointments included: Bridge Watchkeeper or Officer of the Watch (1982-83); Navigating Officer (1984-1987); Principal Warfare Officer (1988-91); Operations Officer (1991-1993); Executive Officer (1993); and Commanding Officer (1998-2001).

During the period of my service, total service in the NZDF, operational deployments or missions included the Indian Ocean, Bougainville, East Timor, the Arabian Gulf, the Solomon Islands, and Afghanistan.

Between 1998 and September 2018, I held a number of diverse appointments within the New Zealand Defence Force, including Commanding Officer of HMNZS Te Kaha (1998-2001), Director of Naval Warfare (2001-2002), Operational Requirements Manager for Project Protector - a multi-ship acquisition project (2002-2004), Chief of Staff (Operations) and Chief of Staff (Plans) of the Headquarters Joint Forces (2004-2006), Commander of the New Zealand Provincial Reconstruction Team and Senior National Officer in Afghanistan (2006), Assistant Chief of Navy (Personnel) (2006-2009), Maritime Component Commander (2009-2011).

Q. Pause there if you would, and I think there was an addition that you needed to make to cover 2011 to 2014, if I'm correct?

A. Indeed. During that period I was the Defence Advisor in Canberra.

Q. Thank you and then carrying on from that semi-colon, or perhaps comma, at the second to last line?

A. And Chief of Staff, the Office -- in the Office of the Chief of Defence Force (2014-2018).

I have a Bachelor of Science from the University of Otago (1980) and a Masters in Strategic Studies from Victoria University of Wellington (2009).

In 1998 I was made a member of the New Zealand Order of Merit.

In relation to the 30 June 2014 press release:

Shortly after 4pm on Friday, 27 June 2014, the senior media advisor at Headquarters NZDF, Geoff Davies, received a call from Jon Stephenson seeking comment on an NZDF operation in Afghanistan. The tenor of Mr Stephenson's call is summarised in the Senior Media Advisor's email of 5.33pm, which is in the bundle at page 203.

Q. Just pause there and we'll just identify that please. If you could have a look at -- now you've got this bundle here, which is the spiral bound one. That's the one that we'll be using when we look at your evidence. So if you could please have a look at that one, at page 203? Is that the email in question?

A. Yes.

Q. Thank you, and perhaps if you go back to your evidence where you are citing from it, in paragraph 7?

A. And this is quoting from that email:

"He alleges the raid in question was a reprisal raid for the death of Lieutenant Tim O'Donnell earlier in the month.

He also told me that he has solid information that six civilians, including a three-year-old girl, were killed in the raid, and 15 wounded. (He cites his sources as including a district governor, a provincial governor, a former member or

members of the NZSAS, a former NZDF officer who was in the PRT at the time, a doctor who treated the wounded, and an international NGO who interviewed victims.)

He was at pains to emphasise that there were no suggestion that New Zealanders were responsible for any harm to civilians - that occurred because of the helo gunsight malfunction - but that SAS soldiers blew up an arms cache and two houses during the raid.

On the phone he gave me a deadline of Monday for a response but I note that isn't restated here.

Mr Stephenson sent an email to Geoff Davies at 4.35 pm, which is in the bundle at page 193.

Q. And if you'd just have a look at that, please? Do you see the email there, of 27 June 2014?

A. Yes.

Q. And is that the email that you are referring to?

A. Yes.

Q. Thank you.

And then just carrying on with your evidence, paragraph 8, second sentence.

A. I understand that the email contained three attachments: An International Security Assistance Force press release of 29 August 2010, which is in the bundle at page 195; the NZDF press release of 20 April 2011, which is in the bundle at page 197; and the United Nations Assistance Mission in Afghanistan Annual Report of 2010, the relevant extract of which is in the bundle at 199.

The 20 April 2011 NZDF press release, which is in the bundle at page 197 --

Q. Just pause, we might just have a look at that one, which I know you've mentioned already, but if you just please turn to page 197, and is that the press release that you are referring to?

A. Yes.

Q. Thank you.

Just carrying on with para 9.

A. Stated that:

- the NZSAS, together with Afghan National Security Forces and other Coalition elements, conducted an operation against an insurgent group;
- the operation was conducted as part of the wider ISAF mission to improve the security of the Afghan people and to protect the New Zealand Provincial Reconstruction Team in Bamyán province;
- the operation was approved by both the Afghan Government and ISAF;
- nine insurgents were killed;
- allegations of civilian casualties were investigated by an ISAF joint assessment team; and
- the investigation concluded that the allegations of civilian casualties were unfounded.

Mr Stephenson's 4.35pm email posed the following questions:

(1) Does the Defence Force stand by its attached statement?

(2) Specifically, does it stand by the statement that nine insurgents were killed?

(3) If so, can it confirm that the SAS was responsible for those nine deaths, or can it rule out being involved directly in the nine alleged deaths?

(4) Can the Defence Force comment on the ISAF media release that refers to the possibility that, due to a gun sight malfunction of US helicopters, cannon rounds fell short and hit two houses that were not a target, but where civilians may have been hiding?

(5) Given its involvement in this raid, what steps has the Defence Force taken to ensure that the allegations of civilian casualties have been carefully checked?

(6) Is it correct that Prime Minister John Key personally approved New Zealand's involvement in the raid on Tirgiran?

Mr Stephenson sent a further email to Geoff Davies at 11.33 pm, which is in the bundle at page 205.

Q. I'll just ask you to turn to that page please, to identify it for us. Is that the email that you refer to?

A. Yes.

Q. Thank you.

A. Providing further information, and a quote:

"You will see that, in the questions I sent earlier, I have referred to the name of the village that was raided as 'Tirgiran', and I'll spell it, T-I-R-G-I-R-A-N. There are alternative spellings, including 'Tergeran', and I'll spell T-E-R-G-E-R-A-N.

"Multiple sources and documents make it clear to me that the raid which the NZDF referred to as occurring in the Tala wa Barfak district of Baghlan is in fact referring to the village of Tirgiran (which is in the Tala wa Barfak district). However, it would be helpful if the NZDF could confirm that this is the village referred to in its press release.

"Also, please note that it would be helpful to have your response by late Sunday. That is, two full days from the time I sent my questions. I am very keen to give the NZDF perspective on this issue. The sooner I get your response, the more time I have to do that."

I received this email exchange from a Major on Saturday, 28 June 2014, at 10.46am, see the bundle at page 210.

Q. Just have a look, please, at page 210?

A. Yes.

Q. And is that, if you look at the emails on that page, the lower of the two, is that you, to whom the email is being sent?

A. Yes.

Q. And is that the email in question?

A. Yes.

Q. Thank you, please just carry on with 12, para 12?

A. See the bundle at page 210 with the following remarks:

You will note that this is a complex, historical and potentially classified matter. As such we recommend that this matter is referred for OIA processing.

It is requested that you approve this course of action and advise if you require me to forward this information to the Press Secretary at the Minister's office immediately given the subject matter and the reference to the Prime Minister. Or, if you are comfortable with us contacting her first thing on Monday.

Q. Just pause again. OIA, the acronym, can you explain that for those who may not be familiar with it?

A. The Official Information Act.

Q. Thank you. At paragraph 13?

A. I responded by email, on Saturday, at 11.33am, and again, see the bundle at page 210. My response:

"Agree nature of the questions are complex and that an OIA response is best course of action.

"Let the Press Secretary know we have a series of questions from Stephenson and that we will process them as an OIA. You can pass the questions, for info, to the Press Secretary on Monday."

I understand that, later that day, the Office of the Minister of Defence was advised about Jon Stephenson's questions and that the Minister of Defence received a briefing from someone at the NZDF. I did not participate in that briefing and I have no knowledge as to who was there or what was said.

Although our view on the Saturday had been to respond to Mr Stephenson under the Official Information Act 1982, in order to give us time to ascertain the facts, it seems that we decided to meet his original timeframe of Monday, 30 June 2014. I cannot recall the reason for this change in approach.

As you can see in the email of 30 June 2014, at 12.46pm, in the bundle at page 213 --

Q. Just pause again for a moment, despite the fact it's mid-sentence, and have a look please at 213. Is that the email?

A. Yes.

- Q. Thank you very much. Back to 16.
- A. As you can see in the email to the Minister's Office, I approved the following statement:
- "The NZDF stands by its statement made on 20 April 2011 and will not be making further comment."
- I believe I was asked to approve the draft statement because the then CDF, Tim Keating, was in Australia for the change of command ceremony.
- The reason I approved the statement, affirming our press release of 20 April 2011, is because the 20 April 2011 press release was consistent with CDF Sir Jerry Mateparae's Note to the Minister of 10 December 2010, which is in the bundle at page 163.
- Q. Just have a quick look please at 163, and please, when you get there, go over and have a look at the pages between that and 166, and can you confirm that is the document?
- A. Yes, that is the document.
- Q. Thank you.
- A. In my mind, despite the ISAF press release which reported that there may have been civilian casualties, the subsequent Note to the Minister carried greater weight. It was drafted in consultation with people who were close (in time and geographically) to the events in question; its contents would have been fact-checked; and it was signed off by the Chief of Staff on behalf of the CDF (who, incidentally, CDF had been in Afghanistan during the operation).
- Q. So just pause there, and Sir Terence, Sir Geoffrey, that's an amendment I believe to the very end of paragraph 19. So you've just added that it was signed in the CDF's absence by his Chief of Staff. Is that correct?
- A. That's correct, yes, and that AOD nomenclature there means "absent on duty".
- Q. Thank you very much. Paragraph 20.
- A. I had no reason to question the veracity of the Note to the Minister; it amounted to contemporaneous, formal reporting,

and I had not been presented with any evidence to the contrary.

I don't have any record of the statement being provided to Jon Stephenson but understand it to have been issued in the afternoon of 30 June 2014.

In relation to the *Native Affairs* programme:

At 8.35pm on Monday the 30th of June 2014 I watched Jon Stephenson's report "*Collateral Damage*", on *Native Affairs*. A copy of the transcript of the programme is in the bundle at page 215.

Q. Let's just identify them please, page 215, and would you just look at that page and the pages that follow through to 227? Is that the transcript that you refer to?

A. Yes.

Q. Thank you.

A. I took notes at the time, see the bundle at page 235.

Q. And if we can go there, please, 235? And, if you'd have a look just so we can identify it now, over the subsequent pages also, 236, and 237, they are your notes?

A. Yes.

Q. In fact, they go all the way to page 240. Can you confirm that to be the case?

A. Yes, those are a copy of my notes.

Q. Yes, thank you. Back to 23 please.

A. At some point after the programme had finished, I received a call from CDF Tim Keating, who was in Australia at the time. The CDF told me that he had just received a call from the then Minister of Defence, The Hon Dr Jonathan Coleman.

The CDF relayed to me that the Minister was frustrated. He told the CDF that his Military Secretary had brought over a bundle of documents from NZDF, one of which was the ISAF Incident Assessment Team's report of 26 August 2010. This is a point that Chris Hoey addresses in his affidavit.

From my notes of my call with the CDF, which are in the bundle at page 237, I can see that the Minister relayed to the

CDF that, although the IAT report totally cleared the ground forces, that is the NZSAS contingent, the Minister said it had concluded that there was a likelihood of civilian casualties. This was at odds with the statement in our 20 April 2011 press release that the ISAF investigation "concluded that the allegations of civilian casualties were unfounded".

My stomach sank; I was thinking "how did I not know we had this report?"

The Minister asked for a briefing the following morning.

I saw the IAT report for the first time on the 1st of July 2014, ahead of the briefing with Minister Coleman at 8.30am.

I recall attending the briefing with the Vice Chief of Defence Force, Kevin Short. We would have explained to Minister Coleman that we had never seen the IAT report before and that we didn't even know NZDF had a copy of it.

The notes that I took during that meeting, at page 239 of the Bundle, record, among other things, that the Minister:

a. Asked us to contact Rian McKinstry, who was the Senior National Officer in Afghanistan when Operation Burnham was conducted, to ask him what he knew about the IAT report and how he had interpreted it;

b. Raised the issue of SAS accountability; and

c. Requested more formal briefings in these types of matters in the future.

I can see from the New Zealand Herald story of 1 July 2014, at page 243 of the bundle, that after the briefing, the Minister set the record straight.

Q. Just pause there and if we can go there, please. It's not a terribly clear copy, but is that on page 243 to 245, the report that you refer to?

A. That's correct.

Q. And if you'd have a look, please, at page 244; do you see, about six paragraphs down, it begins "Mr Coleman said: You probably can't rule that out". Is that the -- are they the extracts that you're referring to?

A. Yes.

Q. Thank you. So then if you could read again --

A. Para 31?

Q. 31, second sentence?

A. That after the briefing, the Minister set the record straight. He accepted that, although New Zealand soldiers were not implicated, "you probably can't rule out" civilian casualties as a result of a malfunctioning gun sight on a Coalition helicopter.

After the meeting -- after meeting with the Minister, I contacted Peter Kelly, who was the Director of Special Operations when Operation Burnham was conducted, and Rian McKinstry, to ask them to meet with me the following day.

I can see from my notes, in the bundle at page 240, that I collated some material for the CDF to peruse upon his return to New Zealand, including the IAT report and the three Notes to the Minister from August and December 2010. The CDF would have asked me to do this.

My notes indicate that the CDF arrived back in New Zealand in time to attend a private briefing with Minister Coleman and the Secretary of Defence, ahead of the scheduled Defence Weekly Meeting at 4pm, on 1 July 2014.

On 2 July 2014, at 9am, I met with Peter Kelly. My notes from that meeting, which are in the bundle at page 253, record that Peter Kelly:

a. Categorically stated that he had not seen the IAT report;

b. Was aware that the SNO had been verbally briefed at the time that ground force activities were conducted in accordance with the Rules of Engagement and the Operation Plan; and

c. Wondered whether the IAT report may have come in to NZDF headquarters via another channel, for example, through the legal team.

I can see from my notes, which are in the bundle at page 255, that I contacted Defence Legal Services at 10.27am to request that they search for the IAT report.

At 9.35am, on 2 July 2014, I met with Rian McKinstry, who had flown down from Auckland for the purposes of this meeting. My notes, at page 254 of the bundle, record that Rian McKinstry:

a. Had not seen the IAT report until the DSO sent it to him on 1 July 2014;

b. Had never seen a copy of the IAT report in theatre;

c. Had received a verbal briefing that the ground forces (including the SAS) were not responsible for any civilian casualties;

d. Had asked New Zealand staff, when he departed theatre, to keep a look out for the IAT report;

e. Had searched for, but was unable to find the IAT report; and,

f. Had no idea how the IAT report got into the safe of Chris Hoey, the Director of Coordination.

I have no further notes from this period of time. I would have reported these matters back to CDF to be relayed to the Minister. I then had no further involvement.

Now moving forward to 2017, *Hit & Run*:

The book *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour*, co-authored by Nicky Hager and Jon Stephenson, was launched at 5.15pm on 21 March 2017. Neither Mr Hager nor Mr Stephenson gave us any advance notice of the launch.

I remember that evening was hectic. By the time we had picked up some copies of the book, and realised that the book contained a number of very serious allegations directed at the NZDF, there were not many people left in the office.

I took some notes on the night of 21 March 2017, which are in the bundle at page 258:

- untrue, nothing new, authors were challenging the integrity of NZDF;
- we must hold ourselves up because our integrity and professionalism in war is exemplary and second to none in this space; and
- the allegation that we are war criminals is unpatriotic.

Q. Just to pause there, do you have any recall as to whether these are your thoughts or whether you're recording the thoughts of someone else?

A. On reading these for the first time a number of weeks ago, they -- to me, are not the sort of words that I'd write down. I believe I was scribbling some notes down perhaps from the end of a phone call, is my understanding.

Q. Thank you.

To 42, please?

A. I imagine I was making a note of a phone call I received. It could have been from CDF, who was in Iraq with the Minister of Defence, but I simply don't recall, and my notes don't provide any clarity on the issue.

We were scrambling to read the book so as to understand exactly what was being alleged. We were really not in a position to respond in a considered manner at that point in time. I would have expected the authors to have afforded us the opportunity to reflect on, and respond to, the allegations.

There was considerable pressure to make a statement that night. As I recall, we thought the most prudent way to proceed, in circumstances where we didn't have all the information in front of us, was to take a position that was consistent with what we had said in the past.

I have made a note in my diary, which is in the bundle at page 259, to check all previous press releases. My recollection is that someone did do that; the search of the online database of press releases pulled up the 20 April 2011

statement. That statement then formed the basis of our initial response to *Hit & Run*, which is in the bundle at page 267.

Q. Just have a look at that page, please. Is that the statement that you refer to?

A. Yes.

Q. Thank you.

A. Unfortunately, the search of the online database did not show NZDF's response to Jon Stephenson of 30 June 2014, or the related media coverage at the time, because they were not technically press releases. Unfortunately, our minds were not cast back to the *Native Affairs* report and the subsequent discovery of the IAT report.

If we had had the *Native Affairs* programme, and the IAT report in mind, we certainly would not have repeated the statement that the ISAF investigation "concluded that the allegations of civilian casualties were unfounded". While it was correct for the NZDF response to say that New Zealand personnel conducted themselves in accordance with the applicable Rules of Engagement, it was incorrect to reassert that the ISAF investigation "concluded that the allegations of civilian casualties were unfounded".

What I can say without hesitation is that, although our statement was incorrect, it was not deliberate. We ought to have remembered the *Native Affairs* programme and the IAT report, but we didn't. So many things happen in the Office of the CDF in the course of each and every day; that does not excuse our oversight but it does go some way towards explaining it.

I understand that Air Marshal Kevin Short, who was VCDF at the time, will give evidence about NZDF's response in the days following the launch of *Hit & Run*, including his briefing to the Prime Minister on 22 March 2017; and that Lieutenant General Tim Keating, who was then CDF, will give evidence about the steps he took upon return to New Zealand on 25 March 2017.

Q. Thank you very much.

Sir Terence, I see, incredibly, that takes us to exactly 1 pm. Would you like to take the break?

SIR TERENCE: Yes. Thank you we'll break for lunch for an hour, resuming at 2 o'clock.

(The luncheon adjournment)

CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Mr Smith, you've told us that you were the Chief of Staff to Lieutenant Colonel Keating between 2014 and 2018. That's correct?

A. General Keating.

Q. Lieutenant General Keating, sorry, but otherwise I'm correct?

A. Yes.

Q. All right. And who did you take over that role from? Who was Chief of Staff to the CDF prior to your taking up that position?

A. Commodore Wayne Burrows.

Q. All right. And who followed on from you; do you know?

A. Yeah, Commodore Andrew Woods.

Q. Right, okay. So, can you tell us something about the role of Chief of Staff to a CDF? We've heard a little bit about it from Sir Jerry Mateparae this morning, but presumably you were the CDF's right-hand man, helped with briefings, worked closely with the CDF?

A. Yeah, I think it's one of those roles that has evolved over time. My predecessor was more focused on corporate documentation, strategic view, strategic intents, strategic plans, and strategy. Whereas, when I first came into the job, it was for a four week period while Commodore Wayne Burrows was overseas on leave. I had just returned from Canberra and was asked if perhaps I'd like to fill in that role as I -- at that stage, was on a sort of a six month road to retirement, and I agreed, and so my focus then, knowing that in the first

couple of weeks of the job I was there for only four weeks, I focused very much on day-to-day activities, as you've mentioned, briefings of the day, what was happening overnight, both overseas and here in New Zealand. The CDF at the time, General Keating obviously liked that approach, and I was asked to stay on.

Q. It's a pretty key pivotal role for a Chief Executive or, in this case, a Chief of Defence, isn't it, the Chief of Staff?

A. Yes.

Q. Now, we've heard and -- about the safe that was held in the office of the Chief of Defence. That was held somewhere near you, was it?

A. You're talking about Chris Hoey's safe?

Q. The safe, yes.

A. The Director of Coordination's safe?

Q. Yes.

A. Yes.

Q. Right. And it was, though, in the office of the Chief of Defence Force, though, wasn't it?

A. Yes, that's correct.

Q. It was in the same floor, same suite of offices?

A. From memory, yes.

Q. Yes, right.

A. I didn't have access to that safe.

Q. You didn't have access to it?

A. No.

Q. That would suggest that there's a limited number of people that did have access to it?

A. That's correct.

Q. Who did have access to it? Can you tell us?

A. Chris Hoey, and you'd have to ask him who else had access.

Q. Well, he's not appearing this week. So, we -- if you could just help us with the sorts of people that would have access to that safe, that would be great?

A. Well, Chris Hoey.

Q. Yep, anybody else?

A. Ah, I'd only be speculating.

Q. Right. And presumably it's a safe that's got a combination?

A. Correct.

Q. And are you suggesting that only Chris Hoey or someone holding that position that Chris Hoey held would have access to that combination? Do you know?

A. That's correct. There's normally an alternative custodian, but they wouldn't necessarily have access on a day-to-day basis.

Q. All right. So what I'm getting at, Mr Smith, is it's not the sort of situation where a lot of people in the office of the Chief of Defence can access that safe and therefore put material in and out of it. Is that correct?

A. No, it was just one of a number of safes, and that safe was controlled by the Director of Coordination.

Q. All right, and that reflects, I assume, the significance of the material that would generally be held in that safe, secret or top-secret material of sufficient significance to be held in the Office of the Chief of Defence Force?

A. That was one of the safes in the Office of the Chief of Defence Force, not the only safe.

Q. That's -- I understand that.

A. Yeah.

Q. But my question more is, does the fact that one person in that office have the combination and has the ability to access that safe reflect the significance of the material that's intended to be held in that safe?

A. It signifies the classification of the material in the safe.

Q. All right, but there are many people who operate and work in the Office of the Chief of Defence Force who have the right classification level to be able to access secret and top-secret material?

A. Correct.

- Q. They don't all, as I understand what you're telling me, have access to the safe?
- A. Correct.
- Q. Right, and is it correct then that important material is held in the safe? That's really what I'm trying to get to?
- A. Well, important classified material that was germane to Chris Hoey's role as the Director of Coordination.
- Q. All right.
- A. Other material, which may have been outside his immediate, I guess, sphere of interest on a day-to-day basis would be held in other safes.
- Q. All right. Well, we're not talking though about other safes?
- A. No.
- Q. Anyway, can we come to the -- well, I may not need to take you to this document now, depending on whether you need me to, we'll come to the -- it a little bit later anyway, but what I want to suggest to you, and you can tell me whether you know or not, that safe has a register that's associated with it?
- A. That's correct.
- Q. All right, and just broadly, that register deals with the classification criteria for the material that's being put in the safe, its date of origin, what the document broadly is described as, where it came from, things of that type?
- A. Yes.
- Q. All right. We'll talk about this in a little bit more detail later.
- So, I want to come now to June 2014 and you've covered, to some extent, these matters in your Brief of Evidence, but I want to go through them in a little bit more detail. So, we know, don't we, that Jon Stephenson was -- began e-mailing NZDF communications people from about the 27th of June 2014 about the programme to be broadcast, correct?
- A. Yes.
- Q. All right, and the email that's at -- you've referred to this, but if you look at the Inquiry bundle, the black one in front

of you, page 214, 215, that shows Mr Stephenson's email -- sorry, you've got the -- yes, the black one. I know you referred to the bundle, Defence bundle earlier, but I'm taking you to the Inquiry bundle. Have you got that?

A. Yes.

Q. And Geoff Davies was the senior media advisor? Is that right?

A. One of them, yes.

Q. Okay. And Mr Stephenson attached, didn't he, the New Zealand Defence Force press release from the 20th of April 2011 with his email?

A. Yes.

Q. And I think you've said in his brief he also provided a copy of the ISAF press release for the 29th of August 2010?

A. Yes.

Q. And we know, don't we, that that NZDF April 2011 press release stated that the IAT investigation concluded the allegations of civilian casualties was unfounded, correct?

A. Yes.

Q. And Mr Stephenson has asked in that email for NZDF to confirm whether or not it stands, or to advise whether or not it stands by that April 2011 press release, given what ISAF had said in its press release?

A. Yes.

Q. And he also, as you've indicated in your brief, I think, asked for confirmation that the operation, Operation Burnham, occurred in the Tirgiran Valley?

A. Yes.

Q. Now on the 28th of June, it's a Saturday; it seems Minister Coleman was briefed and you refer to that at paragraph 14 of your Brief of Evidence. So this is the next day?

A. Yep.

Q. And do you know where the documents are for that briefing?

A. If there were any documents, I don't know where they are.

Q. Right, we haven't got those documents. Do you know whether there were any documents?

- A. I certainly didn't see any documents. There may not have been any documents. Many of the briefings we do to Ministers is verbal.
- Q. And would there nonetheless be material prepared for those who are conducting the briefing, notes and the like? Would that be normal?
- A. If I was conducting a briefing, I would write my own notes to make sure I at least covered the material that was supposed to be covered. I don't know who conducted that briefing on that day; I don't know whether there were notes.
- Q. So there's absolutely no record of who conducted that briefing and whether there were notes?
- A. Not to my knowledge.
- Q. Does that strike you as unusual, that we don't know who conducted a ministerial briefing, and whether there were any notes for it? I don't know, is it?
- A. Ministers get briefed often, formally, informally, telephone calls and face-to-face. There are not necessarily records every time a Minister is briefed.
- Q. Not even records of who conducted the briefing?
- A. On that occasion, no.
- Q. All right. If you had conducted that briefing, and I think a minute ago you may have almost answered this question, but if you'd been conducting that briefing would you have kept a record, diary, or somewhere that you were doing that briefing or had done that briefing and what was covered in it?
- A. Yes, because I keep notes; I've got many many notebooks through my time as Chief of Staff.
- Q. Now, I appreciate what you've said that you didn't do the briefing, but would you accept from me that it's logical that that briefing would have confirmed, in all likelihood, that there were no civilian casualties?
- A. I don't know.

- Q. Because that would be consistent, wouldn't it, with the Minister of Defence -- with what the information was, the Defence press release of April 2011?
- A. That briefing that we're referring to on that Saturday, I don't know who did that briefing, and I'm not sure what material was covered.
- Q. No, but do you understand what I'm suggesting to you? It would seem consistent, wouldn't it, because the -- because the Defence are confirming their April 2011 position? There's nothing to suggest -- I'll put it another way -- there's nothing to suggest that the Minister, in that briefing, was told anything other than that the position regarding civilian casualties or the suggestion regarding civilian casualties was unfounded?
- A. You can make that assumption.
- Q. We know that on the 30th of June the programme *Collateral Damage* went to air and that was a Monday, correct?
- A. Correct.
- Q. And that same day, the 30th of June, you approve the NZDF statement, which reiterated the misleading 20 April 2011 press release, which denied the possibility of civilian casualties, correct?
- A. Correct.
- Q. So at this time point, Mr Stephenson has pointed out that the ISAF press release and its -- he's pointed out that the ISAF press release is inconsistent with New Zealand Defence Force April 2011 press release, and you know that?
- A. Could you repeat that question?
- Q. Well, you had the inconsistency, didn't you? You had the April 2011 press release?
- A. Yeah.
- Q. And you had the ISAF press release, and there was an inconsistency, between those two press releases?
- A. Yes, and I think I used as my foundation document, my source document for the press release being the Note to the Minister,

which in my view, at that time, was probably the most accurate we had for the reasons I briefed this morning.

Q. Right. I understand that Mr Smith, but what I suggest to you is -- well, what I want to ask you is what investigation did you do to check the position? Or did you just out of hand reject the ISAF press release as being wrong? That's what I'm struggling to follow?

A. I'm recalling that the ISAF report did not conclude that there had been civilian casualties.

Q. It said that there may have been?

A. May have been, yes. So, I took the definitive document, which was the Note to the Minister that I referred to this morning, as the source document I had. There was no evidence in my mind that shifted the position away from that Note to the Minister from which that 2011 press statement was derived.

Q. All right. So, you never questioned it, really, is that what you're saying? You never questioned the -- you never sort of questioned the New Zealand Defence Force position in that sense? You thought well, the ISAF press release must just be wrong. Is that what you're saying?

A. No, it wasn't as definitive as the Note to the Minister.

Q. All right.

A. And in the timeframe that we had to gather information and provide a response to Mr Stephenson -- did not allow a full, I guess, reassessment of the situation on that night.

Q. Did it not strike you as odd that ISAF would be so wrong about its own investigation?

A. I'm not suggesting they were wrong; it's just that they were not definitive with regard to the question of civilian casualties.

Q. Well, let's have a look at that press release. Have a look at page 71 of the black bundle. Did you read this at the time?

A. I'm sure it was brought to my attention. I cannot remember reading it at the time, but I'm sure it would have been brought to my attention.

- Q. So can you point to me where you say they're not being -- what are you relying on as them not being definitive?
- A. I guess some words jump out, "possibility", "may have resulted".
- Q. But they are saying, aren't they, that they've conducted an investigation, they've determined that several rounds from Coalition helicopters fell short, missing the intended target and then striking two buildings, which may have resulted in civilian casualties. So they've done an investigation. They've found that something went wrong, and that there may be civilian casualties?
- A. I'm happy with inclusion that there was a malfunction in the gun sight on one of their helicopters, that rounds fell short, but I'm not convinced that there were civilian casualties.
- Q. There were civilian casualties? Right. And on what basis did you reach the view that you weren't convinced there were civilian casualties?
- A. From the Note to the Minister some years before, which as I mentioned in my brief this morning, that would have been drafted or investigated, drafted and put to the senior leaders, at the time, by people who were there, close to the events of that night.
- Q. Well, I suggest to you, Mr Smith, that you discounted the possibility that NZDF could have made a mistake about that. Is that correct?
- A. A mistake about --
- Q. About the position stated in the Minister's briefing? You didn't question that?
- A. No. No, and in my interpretation of the word "unfounded" is that, in my view it was unproven, not well-founded.
- Q. Okay. Not well-founded. So, do you think -- are you suggesting that "not well-founded" means the same thing as "unfounded"?
- A. Not proven.

- Q. So, I'll take you to page 212. Mmm, it's gone awry here. We'll just use my colleague's one because it's marked up. If you have a look at the email, this is an email from Geoff Davies dated 30 June 2014, so we're at the same time period, and you'll see that he's e-mailing people. We don't know who he's e-mailing because those names have been removed from the email. And let's just read out what he says. He's talking about the media question regarding the Baghlan raid in Afghanistan in 2010. You see that under the heading?
- A. Yes.
- Q. Under the subject matter heading?
- A. Yes.
- Q. Right. "I still think this is not as smart as it could be", and bear in mind he's being asked about the media response, isn't he? Is that what he's looking at --
- A. Looking down --
- Q. Response to be cleared to go to Mr Stephenson, see email below?
- A. Yes.
- Q. "Our PR of 20 April 2011 contradicts the ISAF PR of 29 August 2010 headed 'Joint assessment team confirms possibility of civilian casualties in Baghlan' in that we say allegations of civilian casualties are unfounded and ISAF says there could have been and Stephenson plans to present evidence that there was, as per his Friday email".
- So I'll just stop there. So this is Mr Davies pointing out the same inconsistency that I just took you through, correct?
- A. Yes. Yeah.
- Q. "I believe we could cover ourselves better and look more sensible to the public by saying if it is accurate..." and then there's the bit below in quotes, which I take to have been what he was suggesting is said, "as no new evidence has been presented to NZDF we stand by the statement made on the 20th of April and will not be making further comment." And then he says, "I realise we're saying no further comment, but

this way an out to any question about why we don't believe ISAF."

So here we have Mr Davies identifying the obvious inconsistency, and questioning the wisdom of just the bland repeat of the 20 April 2011 press release, and at least suggesting that you might want to qualify that, or it might need to be qualified in some way. Were you aware of his views at the time?

A. I was not party to that email.

Q. I don't know because those names have been removed by NZDF. So I don't know whether you were or not?

A. No, I was not -- yeah, but -- my name would have been there had I been on that email. I did not see that email.

Q. All right.

And looking at that now, do you think that might have been a sensible course to have adopted?

A. Looking at it now, yes.

Q. Who is, and I don't know, I'm sorry, whether this is a Mr or Mrs, but Coromandel, the name Coromandel? Do you know who I'm talking about?

A. Yes.

Q. Who is that person?

A. At the time, I believe he was the squadron leader, Lyn Coromandel, and I believe at the time, from recollection, he would have been the Acting Director of the Defence communications crew.

Q. And where did he operate out of?

A. Out of Defence House.

Q. The same building you worked in?

A. The same building I worked in.

Q. Same floor?

A. No.

Q. Somebody called Tawhiao, T-A-W-H-I-A-O?

A. I think it's the same person, isn't it?

Q. Oh, is that his first name is it?

A. Yeah.

Q. Okay, right. Tracey Tibbs?

A. Yes.

Q. Where does she work, or did she work?

A. From recollection, she was the senior media advisor for Army.

Q. And where -- which building did she work out of?

A. She worked in the same building as I did.

Q. All right. And Major Hayman, Bridget Hayman?

A. Don't recollect.

Q. Now, these names, Sir Geoffrey and Sir Terence, have been removed from the email by Defence. This raises the issue that we've raised previously. There may be some reason why my friend needs to apply for a confidentiality order over them, but I thought it was important to be clear about who the email chain went to.

SIR TERENCE: Thank you. Is there an issue there?

MR RADICH: Bear with me a moment, if you wouldn't mind just -- yeah, not with the first two, Sir Terence, but with the third name, it's not something we're familiar with, and if you wouldn't mind giving us the chance to check it, that would be most appreciated.

SIR TERENCE: All right, so just for the moment, we'll make a confidentiality order in relation to the third name until you can check it.<sup>1</sup>

MR RADICH: Thank you very much, Sir Terence. We'll check it as soon as we can.

SIR TERENCE: All right.

CROSS-EXAMINATION CONTINUED BY MS McDONALD

MS McDONALD: Without wanting to labour the point, Mr Smith, I do need to put this to you, that it does -- and I'd ask for your comment on it, strike me as odd that someone who holds the position of Chief of Staff to the CDF would not check the obvious -- check the position further, given the obvious

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<sup>1</sup> The confidentiality order was not made permanent after NZDF checked the name.

inconsistency and the importance of issuing a press release at that time. Do you want to make any further comment to that, other than what you've already said?

A. No. No, but can I also say, now that I've seen this email, and right at the back -- right at the top there, Geoff Davies has said, "just back from Comm J's brief", that would indicate to me that Geoff, at that stage was based out at Trentham. So he was not in the same building as me, if we're getting down to who was located where.

Q. But nonetheless, the people that he was sending the email to were?

A. Yes.

Q. So, we know that the Prime Minister made a public statement on the 1st of July, which is the following day, so if we go to 224?

A. I think you might be wanting to refer to the Minister of Defence, not the Prime Minister?

Q. Well, if we go -- can you turn up page 224 for me, please, and if you have a look at the date of that document, which is a transcript from first line "Prime Minister John Key interview transcript", Firstline Newshub?

A. Oh, okay.

Q. And it's dated the 1st of July 2014, isn't it?

A. Okay, I was referring to that other Herald paper, I think, yep.

Q. So, am I correct that the Prime Minister made some public statements in an interview on Newshub on the 1st of July?

A. It appears that from the paper that I'm looking at now, yes.

Q. Okay, and if you come down to the bottom of page 224, you'll see there, the Prime Minister saying, in relation to the programme:

"I haven't seen the programme but obviously we were alerted to it over the weekend, and so my understanding is the CDF, Chief of Defence Force, came in over the weekend. There was a thorough review of the particular mission that the SAS had

gone on, and my understanding is that they refute the claims; that they say that there were insurgents that were killed, but that was it."

And then, come over to page 225, to the entry about halfway down the page, with John Key, last sentence of that entry it says:

"But my understanding is that after a thorough review by CDF in the weekend, he is very confident that the New Zealand Defence version of events is correct, and Mr Stephenson once again is wrong."

So, did you assist the CDF in the briefings that led to the Prime Minister being briefed over the weekend?

A. No.

Q. Did you know about it?

A. No.

Q. All right. Do you know why the Prime Minister was referring to "Mr Stephenson being wrong once again"? Do you know what that's a reference to?

A. No.

Q. And do you know what the thorough review consisted of that is said to have been undertaken by the CDF?

A. That would be a review of Notes to the Minister, close to the time of the event.

Q. Was it no more, Mr Smith, than looking at the erroneous briefings from 2010?

A. I don't know.

Q. Because it rather suggests, doesn't it, that there was a thorough review, and a thorough review surely would have entailed some consideration of whether the ISAF press release might be correct, and New Zealand Defence Force position might be wrong?

A. Going back to my earlier statement, it was me that signed off on the response to Mr Stephenson, that certainly the review or the papers or the briefings that I had received, that there

was no evidence to suggest our statement from 2011 should be changed.

Q. All right. What we do know though, Mr Smith, don't we, is that the day before the Prime Minister had made that public statement, so on the 30th of June 2014, Mr Coleman's military advisor had discovered the IAT, the assessment team report, in a bundle of papers in the safe. He'd discovered a bundle of papers in the safe, hadn't he?

A. He had been provided -- to my knowledge, he had been provided a bundle of papers.

Q. Well, let's not split hairs about that. The bundle in the safe came to light the day before, just before the Prime Minister --

A. Yes.

Q. -- made the public statement. That's the position, isn't it?

A. Yes.

Q. All right. And at that point, the balloon went up, if I can use that term. That would be fair, wouldn't it?

A. Once we discovered the IAT report, yes.

Q. Once you discovered the bundle in the safe, including the IAT report?

A. Well, the bundle included Notes to the Minister.

Q. Draft notes to the Minister, to be precise?

A. Draft notes and there were some copies of originals.

Q. Right.

A. To my knowledge, to my recollection.

Q. So can I come now then to, in that black bundle in front of you, there's a divider somewhere towards the back of it, which contains what we're calling the supplementary bundle, and have you got -- towards the back there, if you go to page 72, and when we started -- when I started talking to you this afternoon, you confirmed the existence of the register for the -- for that safe?

A. Yes.

Q. And I think what we're looking at, at page 72 and 73, is a suitably redacted version of that register. Correct?

A. I can only assume that that's --

Q. It's an attachment to Mr Hoey's affidavit, if that helps you --

A. I haven't seen his affidavit, and --

Q. Have you ever seen this register?

A. No.

Q. You've never looked at it?

A. No.

Q. All right. Well, perhaps you can just help us though for the purposes of clarification. If you look along the top, you'll see there reference to serial number, date of entry, sender or originator --

A. Yes.

Q. -- date of origin --

A. Yes.

Q. -- reference number --

A. Yes.

Q. -- and then along the other side, and these pages run as an A3, I gather, so it's all one page -- and then it's referred to, or returned to, dates of receipt, and the like. So it's a comprehensive register --

A. Yes.

Q. -- which purports presumably to keep quite a close record of when something comes in, what it is, what the date is and the like?

A. Yes.

Q. And the bit marked in pink, you may find a little bit hard to read, but I can read it out if you follow closely and you'll just be able to confirm if you look closely what I'm saying is correct, that under the serial number we have 116?

A. 5116, I see.

Q. Yes, 116 I think?

A. Yeah.

Q. Yes, 116. And then the date of entry is the 7th of September 2011. I'm sure someone will correct me if I'm wrong, but I've seen the original. So I think I'm correct. I mean, it's a little hard to read, and then we've got "Sender or originator OCDF"?

A. Yes.

Q. Date of origin the 1st of September 2011, and it's described as a briefing pack on civilian casualties-Kabul August 2010?

A. Yes.

Q. So, you were the Chief of Staff at that time?

A. Yes.

Q. Can you tell us what that bundle would have been -- how it got there, or what it was?

A. No.

Q. Was it a briefing pack prepared for the Chief of Defence by someone in the Office of the Chief of Defence, do you know? Can you surmise? I mean, you were the Chief of Staff. I would have expected you to know what would have been being done with your Chief of Defence, is that fair?

A. Not back in September 11, no.

Q. No, okay, but you did undertake the investigation into this matter, didn't you?

A. Yes.

Q. Right, but you never --

A. But the investigation to respond to a media enquiry.

Q. To respond to a legal enquiry?

A. Media enquiry.

Q. A media enquiry?

A. From my understanding -- Mr Stephenson approached Defence and it was quite a complex issue, a number of years ago, and that's why we took the original step to let's respond to this as an OIA, which gave us time to do a full research and a thorough examination of the question and a full response to Mr Stephenson. Obviously, some time over that weekend, we decided we'll get a quick response to him. Obviously, there

was some pressure on to not be able to do that full investigation. So when we talk about thorough investigation, we are probably looking at previous press releases, what people knew at the time who was in the -- who was around that weekend to be able to answer some of these questions. We didn't go searching every page of every document in every safe.

Q. But the Minister's media advisor -- the Minister's military advisor got hold of this from Mr Hoey?

A. Yes.

Q. All right, and you were then charged with looking at the issue, weren't you? You were involved in that?

A. Yes I was, but I did not go through the bundle of papers that were presented to Commander Chadwick, with respect to getting information across to the Minister's Office. Had we done a page-by-page of every piece of paper that we'd sent across for that particular bundle, we may have found it.

Q. All right. Well, let's just get --

A. But we didn't know it was there, at the time, until the Minister's Office told us about it.

Q. You knew it was there on the 30th of June 2014, when it was found by the military advisor, or Mr Hoey gave it to the military advisor?

A. Yes, and I found out about it, or understood that we had it, following a telephone conversation I had with CDF on the evening of the Monday following his phone call with Minister Coleman, following the broadcast of that *Native Affairs* programme.

Q. And what I was putting to you, and you may have misunderstood me, but what I was putting to you before when I was asking you about what this document was, I thought you would have known, ultimately, the answer to that question, because you subsequently were part of the investigation into how that IAT report got into the safe, weren't you?

A. Yes, we -- yes, and I conducted --

Q. And did you never get to the bottom of that question?

A. No. I conducted a number of interviews and I talked about two of them this morning, but, we still did not know how that IAT report got into the safe.

Q. Despite your investigation about it?

A. Despite that investigation, despite many investigations.

Q. All right, we'll come to that when we go through your diary, but in any event, I assume that as part of that investigation that you did do, you looked at the bundle of documents in the safe?

A. After it -- yeah. Yeah, once the bundle had come back from the Minister's Office.

Q. And you can confirm then that that bundle consists of, I think, five documents which have been compiled and had been stapled together?

A. I can remember a bundle of documents being stapled together.

Q. Right. Do you remember whether they were an original or a copy?

A. I cannot.

Q. Well, can you tell us that the first document on that page -- on that bundle was what's referred to as a story board for Operation Burnham?

A. I don't recall.

Q. Have a look at page 55 of the supplementary bundle. This is Exhibit A to Mr Hoey's affidavit. Are you familiar with that?

A. Not familiar, but it looks like a standard story board.

Q. So that's a story board that was the first page of the bundle?

A. Mmhmm.

Q. By the way, Mr Smith, how many bundles were in the safe, one or two, of this material?

A. I don't know. I don't remember.

Q. You don't remember?

A. No.

- Q. And then come over the page, while we've got this open, and the next document is the August -- it's a draft, August briefing to the Minister, isn't it?
- A. It's unsigned, undated, and it's got some pen amendments, so I imagine this is a draft.
- Q. Did you not look at this material before giving evidence today, the actual bundle, in preparation for giving evidence? I would have thought that you might have reviewed this, given that you were being asked to talk about the investigation into this bundle?
- A. No, I had a copy of the note to the Minister for -- it was the December -- and a copy of the 10th of December 2010 note to the Minister.
- Q. All right. Well, just continuing to go through the bundle, so the next document, so 56 is the draft August, 25 August 2010 briefing. The next document is another -- is a -- you'll be abreast of that, but you'll see and can confirm by looking at it on page 57, that there's some handwritten amendments, edits to it, aren't there?
- A. Correct.
- Q. And just to be clear, are those your edits at all? Did you edit that document? Just asking everybody that we can possibly ask to make sure.
- A. No, I imagine the edits were done in 2010. I was not anywhere near this in 2010.
- Q. And the next document, that's a draft of the December -- 13 December 2010 briefing, isn't it?
- A. Again a draft. And those are not my notes.
- Q. They're not your notes?
- A. No.
- Q. And then the next document is the 10 December 2010 briefing?
- A. Yes, again a draft.
- Q. Yes, draft.

And then, you'll notice on page 64 that paragraph 7 has been marked -- well, the document's been marked up, hasn't it,

and paragraph 7 has some highlighting on it and the latter part of that paragraph has been underlined, correct?

A. Yes.

Q. And the words that have been underlined are "the assessment concluded that having reviewed the evidence, there is no way that civilian casualties could have occurred. The Joint Assessment Team's report has not been released beyond headquarters ISAF and our knowledge of the findings are based on the comments provided by NZSAS Task Force Commander who was permitted to read the report."

A. That's what it says.

Q. That's what's underlined.

And the same -- essentially, the same point is underlined and been highlighted, although it's a bit faded, on paragraph (d) under recommendations, on the next page?

A. Yes.

Q. So those passages -- highlighted passages, I suggest to you, show that the person who's been marking this up has focused on the claims in the paper that the IAT report found the allegations of civilian casualties were baseless? That's what it looks like, doesn't it? Someone's engaging with that point by marking up these passages?

A. It appears that way.

Q. Whoever's done it --

A. Yeah, whoever's done it.

Q. -- it appears that way? In other words, the reader of this document, and the person who's engaging with this document, and we don't know who that was, has marked up the inaccurate and misleading parts of the briefing papers?

A. I wasn't -- not involved in this document. I'm only surmising.

Q. I know, but you did do the investigation subsequently though, Mr Smith?

A. Yeah, but I didn't write this document.

Q. No, no, I'm just asking you whether logically what I'm putting to you is correct? Someone, whoever's marked this up, is obviously engaging with that inconsistency?

A. Yes, but I would also say that in the timeframe that was available, I would not have looked at the drafts if there was a signed note that's gone across the Minister.

Q. No, I'm not suggesting that?

A. So I do not recall reading the drafts, and this is one of the drafts, prior to the signed note being released.

Q. I've moved beyond that issue, just so that this might help you, I'm now focusing on the discovery of the bundle in the safe?

A. Yes.

Q. The unfolding of matters around that, and then I'm going to come, very shortly, to the steps that you took in relation to that issue and that are dealt with in your diary entries?

A. Okay. Yep.

Q. All right, does that help you?

A. Yes.

Q. So the next document, we know, is the document that's not there, which is the IAT report that we're talking so much about.

Sorry, not the next document, the next document -- I'm wrong about that. The document on page 66 is actually the extract from Rian McKinstry's email, so you may or may not know that. Do you know that?

A. Yes, I can see it's from the NZSAS SNO at the time, yep.

Q. And again, the bit that's highlighted at the bottom, you can read that out, and the bit that's underlined, is where he is saying:

"There is no indication at this stage on the evidence presented to the IAT that was there anything other than the correct application of force to a clear and present INS threat and that any CIVCAS caused by the AWT (Air Weapons Team) would

be collateral and unintended. The point is still to be verified".

A. That's what it says.

Q. And then the next page is the IAT report, which as we know, was attached to the bundle in the safe, but that's been redacted, and then there is some talking points.

So -- and you know, and knew then, didn't you, that at the time that you were discussing these matters with your superiors and -- did you -- were you present -- did you attend the Ministerial briefing, when the -- discussions with the Minister when this all came to light?

A. Yes, I think I mentioned that this morning.

Q. Yes, all right. I just wanted to be clear.

A. That's not the weekend briefing, that's the subsequent -- post the Tuesday --

Q. So you would have been aware that the -- of what the IAT report said --

A. Yes.

Q. -- and had found?

And as we know, while we can't refer directly to it, we know from Mr Parsons' Brief of Evidence and from the press release that that report concluded civilian casualties were possible or likely?

A. Yes.

Q. Do you know why these documents were only provided to the Inquiry a week ago, Mr Smith?

A. No.

Q. And I think you've already said you don't know and can't confirm whether there is a further version of that bundle in the safe, presently?

A. I don't know.

Q. So, what we have at this point is the Minister's advisor, military advisor, finding via Mr Hoey a bundle in the safe. It's correct, isn't it, that the Minister was very angry, because it contained that IAT report, which showed that the

New Zealand Defence Force ministerial briefing statements had been misleading? That's the position, isn't it?

A. Yes.

Q. And we know that the Minister phoned CDF while he was in Australia --

A. Yes.

Q. -- about it?

A. Yes.

Q. And he was clearly angry enough to do that, and exercised enough about the issue?

A. Yes.

Q. And the Minister, you can confirm for us, felt let down by his briefings, and he said that to you, and to those present when he met them, and you were there?

A. Yes.

Q. And you got called, didn't you, into a ministerial briefing at 8.30 on the 1st of July? Didn't you?

A. I think --

Q. 8.30am?

A. I was there. Not so much called, I was there with the Vice Chief of the Defence Force of the day.

Q. Sorry, I didn't -- I just didn't hear that answer.

A. I was there with VCDF of the day, Kevin Short.

Q. Right. So, you got called over to the Minister's Office at 8.30 in the morning because the Minister was furious. That's a fair representation of it, isn't it?

A. He was frustrated, yes.

Q. Well, more than frustrated. He felt he'd been misled, hadn't he, Mr Smith?

A. He was not happy.

Q. No. And this was all about one hour after the Prime Minister had gone -- made a public statement, the one I took you to earlier, in which he said that NZDF refutes Stephenson's claims about civilian casualties and that Mr Stephenson had

got it wrong once again, correct? Pretty embarrassing, wasn't it?

A. Yes.

Q. Okay, can we come then to, I'm getting my bundles mixed up, the supplementary bundle again, and I might need to get you, for this part of my questions, to juggle two bundles, which is not going to be particularly helpful, but, I want to principally work from the big black bundle, which is at page 239, but for some of this, I'd like also for you to have a look at the defence -- no, hang on. Let's get this around the right way. Yeah, so the supplementary bundle at page 18 and 19, and the Defence bundle at page 239?

A. Sorry, 23 --

Q. That's the bound one. That one there?

A. 239 in that one?

Q. 239 in that.

All right, so looking at the supplementary first, if you start with page 13, you'll see it starts on Monday the 13th of June 2014. Now these are your diary notes, is that right?

A. Yes they are.

Q. And so page 16 and 17, I don't think we need to go through in detail, but those really record the details from the television programme, don't they?

A. Yeah, some of these pages are missing the numbers at the top.

Q. So 16 and 17 in the supplementary?

A. 13, 14, 15, 16, I am assuming that's 17, yeah.

Q. All right. And then we come to page 18.

A. Of the supplementaries? Yes.

Q. Yes, and that says, Tuesday the 1st of July 2014, have you got the right page?

A. No, I've got --

Q. Page 18 of the supplementary?

A. I've got that, I think, on 17?

Q. All right, well --

A. I'm missing the second digit of two digit number up on the top right-hand corner; I'm assuming this is page 17.

Q. Oh, there's something gone slightly awry with the bundles in that case.

A. The perforation --

SIR TERENCE: In the binders?

MS McDONALD: No, just in our bundles. Could I just approach the witness and have a look at the version -- I can probably find the right page if I just look?

A. The holes might be on the wrong side of the page, that might be the problem? I don't know what number that is?

Q. No, that's odd. So 19, 18. That should be 18. There's no page numbers on this bundle?

SIR TERENCE: Do you want to use my bundle which is the same as yours?

MS McDONALD: Could I?

MR RADICH: Oh, here it is. Oh, this page here.

MS McDONALD: What we'll do, is we'll just use this one at the moment, if you stick with this one. Something has gone awry in the photocopier.

A. Thank you.

Q. So, if you now -- have you got page 18?

A. Yes.

Q. Right. And that starts off Tuesday the 1st of July 2014?

A. Correct.

Q. Right. All right, brief at 8.30, what's the rest of it says?

A. "In OMD" that would be the Office of the Minister of Defence.

Q. Right. Explanation primary source doc?

A. Yes.

Q. Exec summary, is it?

A. Exec Summary and looks like -- that looks like the word "Difference".

Q. And that's a reference, isn't it, to the IAT document?

A. Yes.

Q. Right. And the difference between that and the Ministerial briefings, presumably?

A. I believe so.

Q. All right. And then we've got Office of the Minister of Defence, 8.30 the 1st of July 14, and then you've got, Rian McKinstry interview, and then what's the little arrow show and what's written beside that?

A. "What did he know? How did he interpret?" So these are notes from the discussion with the Minister.

Q. Right. So this is the Minister saying --

A. This is -- these are notes -- I'm not sure whether the Minister said it, or it's just part of the discussion.

Q. Who was present? Who have we got present at this discussion?

A. The Minister of Defence; I imagine his military secretary would have been there, Commander Mark Chadwick.

Q. Can you come a little bit closer to the microphone? It's just a bit hard to hear.

A. Mr Chadwick?

A. Mark Chadwick.

Q. Yep.

A. His -- I was trying to think of his name -- but the -- Josh Cameron would have been there. I'm not sure whether the press sec was there or not. From Defence side, VCDF, Kevin Short, and myself. That's what I remember.

Q. That's what you remember, all right.

A. And I'm having a guess at Josh Cameron, yes.

Q. So somebody there is saying Rian McKinstry needs to be interviewed and asked these questions. Presumably that's what that means?

A. Yep, and this is in relation to trying to find out how we had that IAT report and didn't know about it.

Q. Yep, exactly.

And then we've got SAS accountability underneath that?

A. Yep.

Q. Presumably, the Minister or one of his staff is raising issues about the accountability -- the issue of accountability?

A. It appears that way.

Q. And then we've got "more formal briefings are required"?

A. "On these types of matters".

Q. On these types of matters.

A. Now, I believe this would have been in relation to the briefing that the Minister received over the weekend.

Q. Now, if you cast your eye, if you've still got it open, over to the Defence bundle, the same version of this document -- or a version of this document at page 239, there's a redaction after that, isn't there? There's a deletion from their bundle, at page 239?

A. It's certainly not the full set that's in the big black bundle.

Q. Sorry, just -- what I'm asking you is to confirm that at page 239 of the Defence bundle --

A. I'm looking at that now, yeah.

Q. There is a deletion been made to the section which is -- in fact you can see in the Inquiry bundle, after the portion you just read to me? There's an obvious deletion, because the page goes blank, isn't there?

A. I think it just goes pale. I've got -- I've got words on mine, but it just didn't come out in the photocopier.

MR RADICH: Just -- sorry to interrupt, but the Inquiry bundle version we have has the same deletion. My page 17 is the same, and I don't know if the witness can help us too much with that?

MS McDONALD: Well certainly, if you look at page 18 of the bundle -- of the big black bundle that's in front of you --

A. This is the bundle I received from Sir Terence, yeah?

Q. Yes.

A. Yeah, are we looking at the same thing?

Q. Yes, we are.

A. Okay.

Q. Can you read from that? The words say "Credibility". Do you see that? Under the bit that you just took me through "credibility erodes over time"? Does that appear there?

MR RADICH: It's not in the bundle we have.

A. I'm --

MS McDONALD: Right. Well, Sir, I wonder if we can take a break because there's clearly been a problem with the photocopying of this, I think?

SIR TERENCE: Yes, we should.

MS McDONALD: We need to sort it out because I need to go through this reasonably carefully.

SIR TERENCE: All right. We'll take our 15 minute adjournment. Start again at quarter past.

MS McDONALD: That's fine. I'm sorry about that.

SIR TERENCE: All right, thank you. 15 minutes.

(Afternoon adjournment)

MS McDONALD: Sir, I understand, I wasn't aware of this, but I understand that Defence have made an objection to the passages which I was about to go to being included in the bundle, and they're claiming some form of confidentiality around that. Mr Radich wishes to maintain that position and I'd ask him to address you now.

SIR TERENCE: All right, thank you.

MR RADICH: Yes thank you Sir Terence, Sir Geoffrey, the version that's in the bundle for NZDF of course has the redaction that you've seen. Also, in the version of the Inquiry's supplementary bundle that we received, it's exactly the same. So, the position that was understood by NZDF was that the redaction was accepted, it's a redaction on the basis that it would engage PSR grounds of free and frank discussions with Ministers, that was the reason for it. And it wasn't until the cross-examination that there was any understanding that the redaction is not supported or is challenged.

My instructions are that the redaction is maintained for the grounds that it goes into matters that are dealing with free and frank discussions between officials and Ministers, and that was the reason that the balance of that page is not in the version of the bundle, and as I say, it was understood the Inquiry was accepting that, given the bundle that we had. There might have just been a photocopying issue by the look of it.

SIR TERENCE: Yes, well obviously there is a difference of view in that in the sense of some misunderstanding, because our bundle certainly did have it. I'll just -- could I get my copy back? Thank you. You'll have to explain to me -- or to us -- how the PSR was, as I understand it, amended at the beginning of the year and it's rather more expansive now than it used to be is that correct?

MR RADICH: Yes, I believe that's so, Sir Terence, though I don't have the right pages with me here and now, I don't know -- perhaps we might be able to -- no, we don't have them with us to enable us to address it on the hoof.

SIR TERENCE: So normally it's free and frank advice isn't it, that's talked about? That is, the flow of --

SIR GEOFFREY: That's the test of the Official Information Act.

MR RADICH: Yes, yes Sir Geoffrey, yes.

SIR TERENCE: So, looking at the extracts here, it's not a matter of advice is it, it's a record of what the Minister has said about the particular issue?

MR RADICH: Yes, yes I'm just being shown -- yes, I think the wording from my memory of the PSR is very similar to, if not the same, as the ground under the OIA, the words are which, and again I just need to check the PSR, are these:

"...maintain the effective conduct of public affairs through the free and frank expression of opinions by or between Ministers of the Crown or members of an organisation or officers and employees or any department or organisation in the course of their duty."

So free and frank expression of opinions, here between Ministers and officers. That is the ground for it. And again, I don't have it in front of me at all, the full version of it, I know my learned friends have shown it to me, but I don't have it now as I'm speaking to you.

SIR TERENCE: Well, I wonder if I could ask that a full version be made available to you, because -- I'll just wait until you get it.

MR RADICH: Yes, thank you. Yes thank you very much. And I think the point that's just been made to me is that it's not restricted certainly to the Inquiry, but it was just that the public discussion of these extracts. But thank you very much. So let me just find the right page.

Can you help me with the language? I'll just have some help with the handwriting.

Sir Terence, Sir Geoffrey, the grounds for the concern over this in terms of public, rather than Inquiry, consumption was that in particular there is, if you look, for example, at the last extract with a circle around it, that when talking about free and frank discussions between Ministers and officials, is well within that framework. If one was to look at, without quoting from them here today, the bullet points that have been redacted, that, in my submission to you, and on my instructions, are the free and frank discussions between Ministers and officials that when one applies a section 70 Evidence Act lens to, in my submission to you, and of course it's your decision, my submission to you is that it would engage the appropriate ground that it would tend to erode free and frank discussion between Ministers and officials if it was possible in situations such as these for the diary of an official who was with a Minister recording real time commentary, which is very free and frank and open, that in terms of the public consumption, section 70, in my submission, the pendulum would fall on these bullet points.

SIR GEOFFREY: But wouldn't it be true that that test, which is pretty familiar from the Official Information Act 1982, can be outweighed where disclosure would be in the public interest?

MR RADICH: Yes, and that does engage the section 70 test, almost in the same way Sir Geoffrey.

SIR GEOFFREY: Yes.

MR RADICH: Which is why I make the point that it is for the Inquiry to decide. The submissions that I make to you are that the -- where the pendulum sits, in my submission to you, is across in the side of the line that would warrant this type of very free and frank disclosure from a Minister to an official, to be withheld.

SIR GEOFFREY: Well, I can appreciate the point in general terms, but where we're in a situation where an inquiry of this sort has been set up, there are issues that have to be dealt with by the Inquiry in terms of whether there was in lay terms a cover up or not, and there is evidence of a Minister who was disturbed about that, and he's making instructions to the officials, it seems to me that may well be in the public interest.

MR RADICH: Yes.

SIR TERENCE: I wonder if I could just ask, if you take the first three bullet points about which there's to dispute --

MR RADICH: Yes.

SIR TERENCE: -- on what basis do they -- do you say they do not also engage free and frank advice, free and frank discussion? Because each of those is a comment presumably by the Minister, one directing further enquiries to be made of a named person; another saying that more formal briefings are required; another talking about accountability. So what is the basis for the distinction drawn between those three points and the ones that follow?

MR RADICH: Yes, I understand your point, Sir Terence, and it's a very fair one. The way in which I would put it is that the first three would fall within the framework of Minute 19, and

what was sought in terms of this particular public hearing. Whereas the balance, in my submission to you, don't go completely within that framework, and they're not necessary for us to deem with the issues that are before us, this particular week. They may be relevant to your other considerations, which is why you have it all there, of course, in front of you. But I think that would be my answer to it Sir Terence, is that that is where the distinction has been drawn, as I see it. Now as I say, it's not NZDF's intention for a moment to be difficult and to try and, you know, withhold or suppress information that might be useful for us in this Inquiry, we've endeavoured to work as hard and fast and long as we possibly can to get all of the information before you. In the course of that, this is one of those line calls that was made, if you like, along with a number of others. The distinctions that I've mentioned to you, Minute 19, and possibly just outside, I think is the fair way of putting the reason for the distinction. The section 70 test or the OIA test as Sir Geoffrey puts it, is relevant. Our submission is that, if I can use the pendulum analogy, it sits across the line to withhold this, but you may well in your discretion see that it sits in a different place. NZDF is only here to assist and to do what it thinks is right in terms of upholding the PSR, and I can probably take it no further than that.

SIR TERENCE: All right, thank you.

MS McDONALD: Sir, I wonder if I could be heard on a couple of points?

SIR TERENCE: Yes go ahead.

MS McDONALD: The first is that it is my understanding that there is in fact no free and frank ground in the PSR. There is, however, an impede the effect of conduct of Government and breach of constitutional conventions of that type, which I think is PSR IC2 and 5.

As far as I understand it, the redacted versions that have been provided by Defence don't in fact sight a PSR -- don't tell us what is the relevant ground that they're relying on, and it sounds from what Mr Radich is saying it's really talking about relevance.

I wonder sir, whether in fact there's some confusion going on with Defence in terms of whether they're confusing the Official Information Act with PSR?

What I can say sir, is in Counsel's Assisting submission, this is a public inquiry. It is about, as you've observed on a number of times this morning, about allegations of cover up and lack of transparency and openness by Defence. The portions of these diaries that are sought to be withheld, in my submission, do have relevance to that issue, and I would seek to put them to this witness and later witnesses because they, on the face of it, may well provide some insight into what was going on in the minds of those making decisions in 2014, and what might have motivated some of the conduct at that time.

So in my submission, the passages should be made public. It may be that you feel having heard the evidence that it might be appropriate to make some form of wider confidentiality order, that's entirely a matter obviously for you both. But certainly in terms of not being able to question on it, in our submission, that would be unfortunate.

MR RADICH: I think we might be able to find an accommodation, it's being suggested to me.

The reason that we're up and down here in front of you in this way is that -- and it's nobody's fault, but whatever happened, the photocopying didn't bring this point to our attention, and so we're doing it on the hoof. I do note in response to my learned friend's point, having now got some of the PSR information here, that the free and frank expression of opinion by or between Ministers and officials is there, and it lines up with the OIA point. But I think having said that,

if we could -- and I'm sorry to ask again if we could have a moment, we might actually just be able to resolve it between us?

SIR TERENCE: All right. Well we'll just retire. You let us know.

MR RADICH: Thank you, I think we'll be quite short.

SIR TERENCE: Thank you,

MR RADICH: Thank you Sir Terence, Sir Geoffrey.

(A short adjournment)

MR RADICH: Sir Terence, and Sir Geoffrey, thank you for the opportunity. The position is that NZDF doesn't object at all, now, having had the time to reflect and to look at the documents, and you'll forgive me for having gone up and down on the issue, the only reason being that we weren't on notice until that very second that there was an issue. But now that we've actually read carefully the words that are there, we're comfortable to let it in. So, thank you for the accommodation.

SIR TERENCE: Thank you very much for that, and I am sorry that the error occurred and the issue wasn't flagged earlier.

MR RADICH: Thank you.

SIR TERENCE: But it's just, as you know, everybody's been working under a lot of pressure trying to get things ready.

MR RADICH: Yes, many balls in the air, so thank you so much.

SIR TERENCE: Yes, well thank you very much for that.

MR RADICH: Thank you sir.

CROSS-EXAMINATION CONTINUED BY MS McDONALD

MS McDONALD: Mr Smith, I might just to need go back a little bit so that we can recap.

So, going to the unredacted version of the diary, which I think you will have in the supplementary bundle, the black one in front of you, and talking about Tuesday the 1st of July

2014, briefing at 8.30am in the Office of the Minister of Defence, correct?

A. Correct.

Q. And we've established before we broke, the Minister was asking for an explanation as to why -- about the IAT summary, and the difference with the briefings?

A. Yes.

Q. And you've told us that he wanted Rian McKinstry to be interviewed and questions asked of him?

A. Yes.

Q. Raised the issue of SAS accountability, which you've recorded in your diary that's correct, isn't it?

A. Yes.

Q. Wanted more formal briefings?

A. Yes.

Q. And then the portion where we stopped, and you may need to assist me with some of the translation of your handwriting, but does the next section read "credibility eroded over time"?

A. I think it says, yeah "credibility erosion over time".

Q. Then there's a reference, isn't there, to something, is it "Sims case"?

A. That's someone's name, so I'd prefer not to talk about that.

Q. Oh okay.

And then we've got "SF are not infallible..."

And that's Special Forces?

A. Correct.

Q. They're not infallible?

A. That's what I wrote down.

Q. And is that what the Minister was saying?

A. I've underlined it, it indicates to me the Minister said that.

Q. And then he has -- you have no question on -- and you correct me if I've got this wrong please, "No question of their core skills, but " -- what's the next word?

A. "Political judgment".

Q. Yes, "political judgement"?

- A. "Lack of insight".
- Q. "Lack of insight and" what's the next word?
- A. "Confused" perhaps? I'm not sure, but that seems --
- Q. "Confused desirability of their actions"?
- A. "Actions having a certain".
- Q. "Shielding"?
- A. "Shielding" it doesn't seem to make sense when you read it, but that's what those words are.
- Q. "Shielding" and then you've got a number of equals marks "unaccountability"?
- A. Yeah. And "SAS credibility at risk"?
- Q. "SAS credibility at risk."

And just that reference to "shielding", just to assist your memory, and these are notes that are going to be dealt with by Mr Short, his notes of the same conversation refer to, in relation to that particular aspect, the -- he has a reference of "having a particular shielding affect", so presumably that's the same reference that you're noting there, the Minister has said?

And then there's a box or some words that are encased or with a circle around them below that, which is "DSO" which is the Director of Special Ops, that's correct isn't it?

- A. Yes.
- Q. And a dash and it has "look at this position not being SAS"?
- A. That's what that says, that note.
- Q. So was that a reference to the Minister expressing the view or asking the question about whether the position of DSO should remain an SAS position?
- A. It sounds like he has raised a consideration.
- Q. And we know, don't we, that following on from this time, that position did in fact get restructured and reorganised, is that correct isn't it, can you confirm that? There's no longer a DSO position as such, is there?

A. No, no, so over time that DSO position became the Special Operations Component Commander reporting through to the Commander Joint Forces New Zealand.

Q. Right. And at this point the DSO position was a direct report to CDF, is that correct?

A. Yes, I believe so.

Q. And then over the page, just help us again, is it OCE meeting, does that have any -- what's that?

A. OCE, in my language it's the Officer of Chief Executives, that's the CDF and the Secretary of Defence. So I don't think these notes are from that particular meeting. I'm not sure, it might have been just a note to myself saying that meeting took place that day.

Q. And then the next is -- the next heading is "CDF", Chief of Defence Force?

A. Yes.

Q. Now, you've got five numbers there circled, numbers 4 and 5 were redacted, but are in the version that we're now looking at, but the first one says "envelope from JB15/07"?

A. Yes.

Q. What's that mean?

A. I imagine that's an envelope from -- prepared or put together for CDF from JB.

Q. JB is?

A. I'm taking a guess here, yeah, the Director of Special Operations at the time, Jim Blackwell.

Q. Right, so "envelope", what was the envelope?

A. I don't know.

Q. Right, but it was to do with this matter?

A. I can assume that it was, yeah, just looking at bullet point 2.

Q. And can you help us with what would you normally be referring to when you say an "envelope from JB", do you mean a letter in an envelope, do you mean an envelope with papers in it? I've got no concept of what you mean by "envelope from JB".

A. I imagine it's an envelope with classified materials?

Q. Right.

Q. And do you know what that was, that classified material?

A. No.

Q. And the next one says "ISAF report", and then we've got, "is Matt Weston hunting now..."

A. "...now for report at ISAF HQ?"

Q. "...for report at ISAF..."

A. "HQ".

Q. "HQ". And what came of that, did he find it?

A. I don't believe so --

Q. And then the next one --

A. -- not in the short term, anyway.

Q. And the next one says "3x"?

A. "NTMs" which are Notes to Minister.

Q. And they're the ones that we've been looking at today aren't they, the 25th of the 8th --

A. Yes.

Q. -- the 10th of the 12th, the 13th of the 12th?

A. Yes.

Q. And then Josh Wineera, and he's a?

A. Unrelated to this.

Q. It was unrelated?

What's "opinion piece" mean? What's that?

A. He's written the paper.

Q. Well, I ask that question because the version that was unredacted that came through from NZDF had the reference to "opinion piece" included, so I've assumed that that was relevant?

A. Okay, I can tell you it's not.

Q. Okay, well that's fine, if it's not, then that's fine.

A. Yeah.

Q. It's obviously just an error.

And the last reference to "OAG" is that a reference to the Auditor General or -- it is and that's unrelated --

A. Yes.

Q. -- or related?

A. Unrelated.

Q. Okay. If we turn over then at 0900 hours -- well, before we go to that, it's clear that the Minister has asked for the matter to be investigated, that's correct, isn't it?

A. His main issue that day was how did we not know we had that IAT report.

Q. Right. So did the Minister not demand an investigation and answers to this issue?

A. He said he wanted answers to questions, and that's when I set about trying to find out.

Q. And did he not ask for there to be a report back in two days?

A. He may have, but I didn't record that, I certainly don't remember it and I don't record it in my notes.

Q. Can I ask you then, because this may help you, these are not your notes I'm now asking you to look at, but they are Kevin Short's notes, and you go forward to page 9 of that supplementary bundle, and this is Mr Short's notes -- sorry 10, it starts at 9, but really pages 10 and 11. And this is Mr Short's notes of attending the same meeting, he was at the meeting with you, correct?

A. Correct.

Q. And if you just look at the bottom of page 11 for the moment?

A. Yes.

Q. You'll see there that under the heading "Actions taken", and then if you move your eye down to the last bullet point on that page -- well, start at the beginning, he's recording "the PM spoke to media saying no civilians were killed and that Stephenson was again wrong. MINDEF wants a brief on how the assessment team summary document was not available to CDF."

And then coming to that last bullet point, "report back in two days on McKinstry interview, ATS document, how did we get it, handled by whom et cetera. Request for full assessment

document. Assurance on veracity of briefs, particularly involving SAS."

So does that line up with your memory of that meeting?

A. Yes.

Q. So what role did you have then in the investigations that had to be made and the report back to the Minister in two days?

A. As I briefed earlier, interviewing Peter Kelly and Rian McKinstry and making some enquiries with the Defence Legal Services with respect to how did we -- or how did that IAT executive summary get into the Headquarters and we didn't know about it.

Q. So you only interviewed Peter Kelly and Rian McKinstry, is that correct?

A. That's correct.

Q. And you met them both on the 2nd of July?

A. Yes.

Q. And if you look at the page that we had before, page 20 of that supplementary bundle, it shows the notes of your interview with Peter Kelly, doesn't it?

A. Yes.

Q. Now, he tells you, doesn't he, that the IAT report, he says "conjecture" at the bottom of that page, "that the exec summary has come into HQ via another channel, eg legal", correct?

A. Yes.

Q. And what follow-up did you make when he said that?

A. I made enquiry on the Defence Legal Services, I think it's on page 22, my note in my diary at 10.27, "spoke to Leishia Pettigrew, will do a trawl through the DSL".

Q. And that's the computer system?

A. SWAN is the classified computer system.

Q. Okay, and what came of that?

A. Nothing.

- Q. So what was the outcome of the enquiries through legal, did you find anything out through that -- had the IAT report come in through legal?
- A. No.
- Q. What analysis did you do on the actual documents in the bundle in the safe to see if you could ascertain where they'd come from?
- A. There was only one document in question, that was the IAT executive summary.
- Q. What investigations did you do -- did you do anything on that document? Did you have it tested in any way to see whether it had been sent via -- had it come electronically, had it come hard copy, how did it --
- A. Well that was the nature of the interviews I had with Peter Kelly and Rian McKinstry.
- Q. Which told you nothing?
- A. Which told me nothing.
- Q. Right. Did you do anything else, other than talk to those two people? Did you make any further enquiries?
- A. I imagine I did, but the source, noting the content of the IAT report, would have been either through the DSO, or from Rian McKinstry in theatre.
- Q. Well, didn't they both tell you effectively that they didn't know where it had come from either?
- A. Correct.
- Q. And you said the IAT report stapled to a bunch of documents which on their face showed that the person -- that somebody had engaged with the relevant parts of the IAT report and the relevant parts of the Ministerial briefing that went directly to the issue about inconsistency relating to civilian casualties as between what was in the IAT report, and what was in the MIN briefings, correct?
- A. Correct. So in the bundle there was the IAT executive summary. But I don't think it was actually singled out as an

entry into the classified register, it was just briefing materials.

Q. The register said it was a briefing material about civilian casualties from Kabul in 2010, a briefing pack?

A. Yeah.

Q. The IAT report was stapled to the other documents that I've now referred to a number of times?

A. Yes.

Q. What I'm suggesting to you is that anybody carrying out an investigation to answer the Minister's question about where this had come from and why he had been misled, would try to ascertain from that material, that bundle, who had had it, who'd written on it, who'd highlighted it, whose handwriting was on it, you didn't do any of that?

A. Not at the time we made -- we had two days to get a response back to the Minister. At that point in time we had no idea how that document arrived into the Headquarters.

Q. Did you make -- sorry Mr Smith, but did you make any enquiries to ascertain whose handwriting was on those documents?

A. No.

Q. Why?

A. I thought I would have spoken to the people who would have received that document, had it come in through formal channels, or informal channels, which would have been the DSO or the person who'd sent the document back. And the most likely person to have sent that back was Rian McKinstry who did not send that back.

Q. So your investigation that was demanded of you by the Minister consisted of effectively nothing more than talking to Rian McKinstry, Peter Kelly, and Leishia Pettigrew, and you made no enquiry or investigation of the documents on that bundle which highlighted the fact that someone had put the IAT report with the incorrect and misleading Ministerial briefings?

A. I personally did not, but others were also looking for how this document had --

Q. Who? Who?

A. Chris Hoey.

Q. So he did some investigation and enquiry as well, did he?

A. Oh he had the closest interest, because the document was inside his safe.

Q. But he wasn't at the ministerial briefing where the Minister demanded an answer in two days, you were, correct?

A. Correct.

Q. And where is the result of your investigation that went back to the Minister in two days? Where is that? Because we haven't seen it, Mr Smith?

A. I don't know whether it was in verbal form or in written form --

Q. Surely --

A. -- I do not remember.

Q. Surely there would have been a written note of the investigation that the Minister demanded about such an important matter as he and the Prime Minister having been misled by the Chief of Defence? Are you telling me that there was no written note of that?

A. I have no recollection of a written note on that specific issue.

Q. And was that intentional, that NZDF did not make a written note of the outcome of this investigation?

A. I don't know.

Q. Not one single piece of paper that records what the outcome of the investigation was, is that what you're telling me?

A. I'm telling you my recollection is that the Minister had probably received a verbal response from the Chief of Defence Force who had been briefed and provided the information that we searched for a way -- or searched as to how that document got into the Headquarters without our knowledge, or just how that document got into the Headquarters. We --

- Q. Where's the briefing for CDF so that he could do the oral briefing to the Minister then? Was that not in writing either?
- A. That may not have been, that may have been a verbal briefing.
- Q. So what we've got is a bundle of documents miraculously appears in a safe in the office of the Chief of Defence; no-one can tell us who put that bundle together. It contains an IAT report that miraculously came to New Zealand; no-one can tell us how. Did you -- you searched the computer system, did you?
- A. I personally did not.
- Q. Why not?
- A. Because I don't have access to the sort of --
- Q. Who did?
- A. The DSO's office.
- Q. Who in the DSO's office should we talk to about their search of the computer system to find out how the IAT report came back to New Zealand?
- A. Now, or then.
- Q. Then.
- A. Oh I'm -- I imagine DSO would have instructed his administrative staff to trawl through the system. I think in the note that I wrote with regard to Rian McKinstry meeting, he has had a trawl through the NZSAS database at Papakura. Nothing found.
- Q. We've spent the best part of today, one way or another Mr Smith, talking about the IAT report. We haven't got it because it's of such a level of sensitivity and security, because it's a partner document. It can't be released. We -- and yet NZDF are telling the Inquiry that they don't know how this highly secret document came back into its office, by what route and who. Isn't that extraordinary that a sensitive classified partner document came back to New Zealand and no-one knows how? It's not a particularly good indictment on NZDF's systems is it?

A. On that one particular document, no.

Q. Did you speak to Chris Parsons about the matter?

A. I don't recollect and it's not noted in my diary, my notebook.

Q. And Mr Kelly never mentioned that he had relied on Chris Parsons' email for his briefings when he spoke to you, is that correct?

A. He may have, but I didn't write it down.

Q. All right, and you've got no memory of it now --

A. No.

Q. -- so you can't tell me he did?

A. No.

Q. And there's no mention of Chris Parsons' email in that bundle in the safe, is there?

A. Not in my notes, no.

Q. In the bundle that was found in the safe? Or did you not look at the bundle that closely?

A. I personally did not look at the bundle page-by-page.

Q. Without wanting to labour the point, I would have thought that looking at the bundle would have helped you to try and work out where the IAT report might have come from, because it was in the bundle?

A. But -- yes, it was. But there was no covering note on it, there's no indication of how it came, what system, who it was sent to, where it came from.

Q. Well, maybe perhaps you could have looked at the extract from Rian McKinstry's emails and had a look at those, and was there any analysis done of that document which might have led you to work out who had that material, because they might have also had the IAT report. Did you do that?

A. My understanding at the time was that the IAT report had been verbally briefed to those in theatre and that that information was relayed back to New Zealand via classified means.

Q. How often does secret partner material find its way back into New Zealand and come into the safe and the Office of the Chief

of Defence without anyone knowing about it? Is that a rare event?

A. It would be, because most of those types of documents would end up in safes at Joint Force Headquarters, or in the Commitments and Intelligence Directorates.

Q. Right, well let's move on.

Can we come then to 2007?

A. 2017?

Q. 17 sorry, 2017. Now we know that the book *Hit & Run* was launched and you've told us this in your brief on the 21st of March 2017?

A. Correct.

Q. And your position is that in all of the rush and pressure of responding to media, no-one connected the book and the programme *Collateral Damage* as being related, that's correct, isn't it?

A. That's what I stated, yep.

Q. And it was for that reason that your March 2017 press release reaffirmed the misleading 2011 press release, correct?

A. Correct.

Q. And just so that we're all clear, that reaffirmed a press release that said that the IAT investigation had concluded allegations of civilian casualties was unfounded?

A. Correct.

Q. And we know that that's not right, because that's not what it did conclude, correct?

A. Correct, it stated that there may -- there was a possibility.

Q. The 2011 press release was about Operation Burnham, wasn't it?

A. Yes.

Q. The press release in March 2017 was about the same operation, wasn't it?

A. Allegedly.

Q. What do you mean by that?

A. We were still coming to terms in those first couple of hours of reading the book that we were talking about the same thing.

Q. Are you suggesting that you did not know that this book was about the operation called Operation Burnham in 2010?

A. No, I'm just suggesting there was some inconsistencies which took us a while to actually get there.

Q. The press release in March 2017 was about Operation Burnham, wasn't it?

A. Yes.

Q. So someone must have connected those two operations or those -- that one operation at those two times? Are you seriously suggesting that no-one made the connection between *Hit & Run* and *Collateral Damage*?

A. Well no-one in those first couple of hours did. And certainly -- they certainly didn't bring it to my attention. Noting that in my office I don't have people who were close to that particular incident.

Q. I just want to come to your notes from 2017, and this is -- it should be in the supplementary bundle. I think it's 23. Page 23? Now I note sir, that there are large sections of this diary that have also been redacted and that appear in the Inquiry bundle, does the same prevail Mr Radich, are you happy for me to proceed?

MR RADICH: Look, I haven't done the comparison just yet. I wonder if -- generally, yes, I think we would like to be, but I just would need to check what we're looking at, so it's page 23 of the supplementary, which is the new material we got today.

SIR TERENCE: So whereabouts is it on page 23, 24?

MS McDONALD: In the Defence bundle.

SIR TERENCE: It's not in the Defence bundle.

MR RADICH: I note the telephone number in the version we've just got.

MS McDONALD: Oh I'm not worried about that --

MR RADICH: In the version we've just got this afternoon, which I wouldn't be too comfortable with being on a public record.

MS McDONALD: That can remain redacted.

SIR TERENCE: Yeah, well we can redact that, we'll make a confidential order in respect of that.

MR RADICH: Thank you Sir Terence.

MS McDONALD: Perhaps as I'm not going to spend too much time with these notes, but perhaps if Mr Radich can object if I touch on something that's particularly sensitive?

A. I can explain those two pieces at the top there, which are unrelated to the matter in question. That was "update on" dah dah dah. That's totally not what we're discussing today --

Q. I haven't asked you the question yet Mr Smith.

I was actually going to come to halfway down the page where under the heading "*Hit & Run*", which clearly is related to the incident?

A. Yes.

Q. And underneath it you've got "Untrue. Nothing new"?

A. Yes.

Q. Correct?

A. Yes.

Q. What's the "nothing new" refer to?

A. I can't give the full context on that.

Q. Well, presumably it's a "nothing new" in terms of there's nothing new in this story, it's the same as the one that was trotted out in *Collateral Damage*?

A. I can't -- I don't know, I don't know the context.

Q. Well, it rather suggests Mr Smith, doesn't it, that there's been a connection between the two, *Collateral Damage* and *Hit & Run*?

A. It could also mean nothing new in that there are allegations against Defence Force's activities some time ago.

Q. All right. "Challenge to Hager. He is challenging integrity of NZDF. Hold our" what up?

A. It looks like "ourselves".

Q. "Hold ourselves up. Integrity professionalism in"?

A. "War"?

Q. "In war is"?

A. "Exemplary".

Q. Is what sorry?

A. Exemplary.

Q. "Exemplary. We are not"?

A. "War criminals".

Q. "War criminals. This is important. Second to none. Unpatriotic", is it?

A. Yes.

Q. "Second to none in this space"?

A. Yes.

Q. "No evidence to suggest otherwise"?

A. Yes.

Q. And then over the page you've got a reference to all previous press releases. So why were you making a connection to all previous press releases if you hadn't connected it to Operation Burnham?

A. I'm not saying we hadn't, I think we were just trying to understand the inconsistencies between the book, for example, the names of the villages, and the Jon Stephenson piece in 2014 where it talked about Tirgiran.

Q. So you had made the connection then between the book *Hit & Run* and *Collateral Damage*?

A. No, I think that's the reason we hadn't made the connection. Inconsistencies like that.

Q. And then over on the --

A. And can I --

Q. Sorry, you go?

A. I think I mentioned it this morning, that those notes, when I read them now, a couple of years after the event, sound like I was writing down things that came to me via telephone call.

Q. All right. And then you go on under the heading "Allegations" and then over the page a bit that was redacted which relates to "Jon Stephenson's defamation action", why has that come into the discussion? It's at the top of the page 24.

- A. It looks like a note I've made from perhaps a legal officer just letting me know that that matter was still outstanding.
- Q. What was still outstanding, the name -- the suppression orders in relation to the individuals the subject --
- A. In the matter of *Stephenson v Jones*.
- Q. Question time you've got a reference there, and then over the page there's the blue section which has been redacted and I forget, just move past the phone number, they can remain confidential, it's the bit at the bottom that I'm interested in. That says:
- "Strategy defend SAS against the allegations. Stand by statement. PM..."
- What's that say?
- A. It's hard to read.
- Q. Something "defence brief" possibly. But in any event, that bit seems to be quite relevant, doesn't it, it relates to this?
- A. Yeah, well the first three quarters of that blue post-it note looks like a message from someone to me who took a phone call for me, Kevin Burnett is the Chief of -- well was then, the Chief of Staff to the Secretary of the Ministry of Foreign Affairs and Trade, probably ringing in just to say what's Defence's stance on this, they'd have an interest.
- Q. But the reference, "The strategy defend SAS"?
- A. I don't think it says "strategy", it says "strongly".
- Q. Oh okay, "strongly", well okay, "strongly defend"?
- A. "The SAS" -- I'm finding it very difficult to read.
- Q. "strongly defend SAS against the allegations. Stand by statement."
- A. Yeah.
- Q. That relates to this issue though, doesn't it, it's relevant to what we're talking about?
- A. Yes it does, yes.
- Q. And then over on page 27 there's a reference to Peter Hughes, was that anything to do with this matter? He was

SAS -- sorry, State Services Commissioner at the time, is there anything --

A. I'd suggest not.

Q. And then underneath that, "Minister of Defence meeting"?

A. Yeah.

[WITHHELD - Subject to a confidentiality order]

MR RADICH: Thank you sir.

MS McDONALD: That's fine.

I just want to be clear what you're actually saying Mr Smith, because I'm not sure I fully understand your position. You must have made the connection, surely, between Operation Burnham, which was the same operation that was the subject of both the *Collateral Damage* programme, the *Hit & Run* book, and indeed the bundle in the safe debacle in 2014, surely?

A. I can't explain how -- we did not make the connection. We didn't sit down and say hey we're talking about the same thing in Jon Stephenson's piece back in 2014. I don't remember doing that. I don't remember discussing it, I don't remember asking a question about it.

Q. Just think about that though Mr Smith, you've got the same location, the Tirgiran valley. You've got the same profile, civilian casualties, allegations of civilian casualties. You've got the same journalist involved, Jon Stephenson. You've got the same date of the original operation. You've got the same background in relation to the connection, the sad events concerning Tim O'Donnell. I suggest to you that it beggars belief that you could not have and did not connect those matters?

A. What we did do was call for press releases on the issue.

Q. How many other operations were there on the 22nd of August 2010 in Baghlan involving allegations of civilian casualties, if any?

- A. Not to my knowledge.
- Q. Right. And the book explicitly discusses the television piece in the preface at page 7, doesn't it?
- A. Yes.
- Q. You know that, don't you, and in detail at pages 105 to 107?
- A. I couldn't quote the page numbers, but I have read the book.
- Q. Well, does that not make what you're saying, and I don't mean any personal disrespect to you, but it makes what you're saying complete nonsense. The book itself talks about the television programme?
- A. Yes, but we weren't connecting the book with the television programme on that particular night. We were dealing with the book. And we had to get out a press statement quite quickly, we were under a lot of pressure. We looked at what we had previously released. We overlooked Minister Coleman's statement he made to the media. We overlooked the fact that the IAT executive summary had been discovered, three years earlier.
- Q. And you were intimately involved in that issue in 2014?
- A. Yes, but we have a lot of issues going on every single day in that office.
- Q. How many times have you been called up to a Minister's Office and berated because the Minister feels let down by the Chief of Defence?
- A. More than once.
- Q. All right. Over an issue as significant and serious as allegations of civilian casualties?
- A. Not on that particular -- certainly not on that subject matter, but I have been before Ministers subsequently and have been growled.
- Q. And been what, growled at?
- A. Growled at, yes.
- Q. It was a bit more than growling wasn't it? The Prime Minister had made a public statement which was wrong. A report had been found; a mysterious report had turned up miraculously in

a safe. You'd been asked to undertake an investigation in two days. You hadn't been able to find an outcome for that.

There was all this publicity swirling around in 2014 with *Collateral Damage*, and here we have it again with *Hit & Run*, and you're saying you never made the connection?

A. That's correct. Or what connection we did make, we didn't make it to the point of actually going back and looking at, other than formal media releases from NZDF.

Q. If you turn to page 308 please of the bundle? Now that's NZDF statement on the 26th of March 2017, correct?

A. Yes, that's the subject heading.

Q. And if you come halfway down the first page, you'll see the paragraph saying:

"The villages are named in the book as Naik and Khak Khuday Dad of the NZDF but can confirm that NZDF personnel have never operated in these villages?"

That's there, isn't it?

A. Yes.

Q. When Mr Radich opened this morning, he said at paragraph 26 of his opening statement that NZDF had worked out that this was the same operation by the 22nd of March. This press release is dated the 26th of March, do you not see an inconsistency there? Do you think Mr Radich might be wrong?

A. I'm not sure if I was in the room for --

Q. So are you saying that by the 26th of March you were still confused about whether this was the same operation?

A. That's what it says on this statement.

Q. Right. How many people were working on this incident -- this issue, at this time in 2017 trying to sort all of this out, get the press release out, presumably a number?

A. Yes.

Q. And they were all -- they all failed to make the connection, is that right? Not one of you worked it out that it was the same thing? Same operation?

- A. I'm not saying we didn't work it out that it was the same thing, we just didn't relate back to the statements that were made by the Minister --
- Q. But I don't understand that --
- A. -- and the executive summary.
- Q. I just don't understand that, if you know it's the same operation, and you know then that in 2014 there's been this major mess up, and the press releases that have gone out previously are wrong, surely someone in your group said hang on, we need to think about this a bit more carefully. Can't make the same mistake we made last time and the time before. We need to get the right press release out, not just repeat the same mistake?
- A. So on recollection, I'm just starting to think if I was actually part of this on the 26th of March? There was a significant team of SAS personnel, army personnel, legal team and others involved in looking into a serious allegation that had been made in *Hit & Run*. And that was the focus.
- Q. So what -- I'm not sure I understand what you're saying?
- A. So rather than go back and look at the *Native Affairs* programme, I think the concentration -- people were concentrating on looking at actual reports within our system of the events of that night.
- Q. But you knew that the *Hit & Run* programme made an allegation of civilian casualties?
- A. And so did the *Hit & Run*, and the *Native Affairs*, yes.
- Q. Right. Well what did you think your press release was saying when you put it out in 2017, when you put a press release out in 2017 saying you "stand by your statement", or words to that effect, what did you think you were saying to the public? What were you standing by?
- A. The inconsistencies with respect to the naming of those two villages and not Tirgiran. So I imagine we're trying to reconcile the information that was provided in the book with what we actually knew happened on the ground at night.

Q. All right, well, you would have been aware, wouldn't you, that Mr Stephenson's defamation against NZDF was between July 2013 and 2015, were you aware of that at the time?

A. I knew the matter was proceeding, but I was not close to it. I didn't follow it closely.

Q. It was only one year before the incident relating to the bundle found in the safe, wasn't it, 2013?

A. Yes.

Q. And can you confirm what the relationship was between NZDF and Mr Stephenson at around this time? And I guess what I'm saying to you, would you accept that there was at least a degree of tension between NZDF and Mr Stephenson?

A. I can't --

Q. You can't comment?

A. No, I was out of the country at the time, 2013.

Q. Okay.

One final matter, can you please come to page 232 and you'll see it starts on page 231, and this is a letter to the Chairperson of the Human Rights Foundation of New Zealand. It's dated the 15th of March 2017?

A. Yes.

Q. And it's signed by you, isn't it?

A. Yes.

Q. And I think you probably know what I'm going to draw your attention to do you?

A. I have an idea.

Q. If you go to the bottom of page 2?

A. Yes.

Q. You have written in this letter:

"The 2010 raid in Baghlan involved a suspected civilian casualty"?

Who was the one suspected civilian casualty?

A. I can't answer that question.

Q. Why did you say "a suspected civilian casualty"?

A. I don't know. I didn't draft this letter. I did not write it. I signed it out.

Q. You signed it?

A. Yes. And one of the Chief of Staff's roles, certainly during the time that I was the Chief of Staff, I signed out every OIA. And checked most of the press releases that went out.

Q. I understand that Mr Smith, but you are nonetheless responsible for this letter and you can't move away from that.

A. I take full -- no no, I take full responsibility for it. Yeah.

Q. Because that's just wrong, isn't it, no-one's ever said there was only one civilian casualty?

A. No.

Q. It goes on though:

"There was a formal Coalition CIVCAS investigation team assigned relating to the Baghlan province raid," sorry "incident. The NZDF does not hold a copy of the investigation undertaken by the Joint Afghan Minister of Defence, Afghan Ministry of Interior and International Security Assistant Force (ISAF) Assessment Team into the raid in Baghlan. A copy of this investigation has not been released publicly. NZDF has no reason to believe that New Zealand personnel conducted themselves..."

Now that's just wrong, isn't it?

A. So what --

Q. Is it wrong to say that NZDF do not hold a copy as at 2015 of the report?

A. Is this -- I don't know if this is reporting to the -- you're asking me a question about the IAT report?

Q. Yeah.

A. The executive summary?

Q. Yeah. Is that not what this refers to?

A. I don't think so.

Q. Oh what does it refer to then?

A. I don't know.

- Q. "Does not hold a copy of the investigation undertaken by the Joint Afghan Minister of Defence" I see, that's the AR-15 is it? Do you not know what you're referring to in the letter?
- A. This would have been drafted by a subject matter expert, peer reviewed, passed through legal, passed through the OIA team, passed through Director of coordination, to me.
- Q. I suggest to you, Mr Smith, that that is a fact, a reference to the IAT report and if I'm right about that, that's just patently wrong, isn't it, because we've just been spending the last few hours talking about the fact that in 2014, you became aware of the IAT report in the bundle in the safe, which we know it had been there from at least the 1st of September 2011, possibly earlier, correct?
- A. Correct.
- Q. Thank you.

#### CROSS-EXAMINATION BY MR SALMON

- MR SALMON: Would you prefer I called you Mr Smith?
- A. Mr Smith is fine.
- Q. Just to be fair to you, I just wanted to clarify that the quality of your memory on a few things you have acknowledged; that there are some matters you can't remember in your brief, and had to speculate as to what your thinking was. An example would be your paragraph 15 where you refer to the plan originally to respond to Mr Stephenson under the OIA, but then a change from that, you know, that you cannot recall why that happened, do you remember that?
- A. Yes.
- Q. And then there are some things you do recall, for example, in your paragraphs 18 through 21, you do recall your reasoning for favouring the contents of the proposed 2010 statement over the ISAF official press release as to what it had concluded, that's right, isn't it?
- A. That's correct.
- Q. So the simple point is, there are some things where you're trying to infer what you might have done based on documents

because you can't recall, and there are some things you specifically do recall, quite clearly, fair to say?

A. It's fair to say.

Q. And some of them indeed you recall quite viscerally because you've made a point in your evidence about talking about how you were sick to your stomach when you discovered that there was in fact a copy of the ISAF report in the CDF safe?

A. That is a moment I recall clearly.

Q. Yes, that would be one of those special moments --

A. Yes.

Q. -- in a career, correct?

A. Yes.

Q. And when you discovered that the ISAF report was in NZDF's possession, you immediately knew, and this is why you felt sick to the stomach, that it meant the 2010 statements were incomplete or inaccurate, correct?

A. Once I had sighted the IAT report.

Q. Well indeed, you already knew that based on the press releases, didn't you?

A. Are you talking --

Q. The ISAF press releases from 2010? Reading it would have confirmed what the press releases had already told you?

A. Yes, so the following day when I sight the report, yes.

Q. Right. So in terms of that sick to the stomach day, you immediately connected the ISAF conclusions about possible civilian casualties with the same events that in 2010 had been the subject of denials of any civilian casualties?

A. I think the statement was more around unfounded, the evidence -- yeah, not a denial, I think it was more of a --

Q. But to step back a bit from your perspective, you had in 2014 overseen the release of a statement denying civilian casualties in Operation Burnham, correct?

A. We stood by our statement, yes.

Q. That's a yes?

A. Yes.

Q. Right. And then -- and in doing so you repeated the denials effectively from 2010 about Operation Burnham, correct?

A. We stood by the statement.

Q. Right. And then you discovered the existence of the ISAF report and read it and realised with a sickness in your stomach that they were wrong, correct?

A. No, the sinking in the stomach was when I got the phone call from CDF Keating sayings that the Minister has seen this thing, we don't know anything about it. So sickness as in -- feeling in my stomach as in why did we not know about this.

Q. Correct. But the reason it was important was because it was the ISAF report about Operation Burnham?

A. Yes.

Q. Right?

A. And then once we had that, and briefed the Minister, the Minister then basically corrected the situation. He talked to the press.

Q. Well, did he correct it? Did he explain on your behalf that your original statements to the press were wrong?

A. No I think his words were something along "you can't rule out".

Q. Yes, which is language that falls short of the actual language in the ISAF report, isn't it?

A. It's different.

Q. Did you rush out and correct that?

A. No.

Q. So the sickness in your stomach wasn't about the fact that the public and the former Minister and the Prime Minister had been misled, it was about the fact that there was evidence of the inconsistency within CDF, correct?

A. No, the fact that we had the report and did not know it.

Q. Well, and that your statements had been wrong, surely there was some degree of concern about that, or is that not a concern within CDF?

A. It was a concern, and when briefed to the Minister, the Minister then made a statement.

Q. Right. We've had some questions from my learned friend about your lack of investigations or limited investigations into how this could have happened. It's fair to say that we know from Mr Thompson's brief that he was not the person who would have received and read the report, do you agree with that, or have you not read his brief?

A. I have not read his brief -- I've not read anyone's brief.

Q. You've read no-one's brief?

A. No.

Q. Has yours been prepared in isolation?

A. Well, in isolation with me, yes.

Q. Okay. All right. There are no other documents, I take it, other than what we can see and what the Inquiry can see, showing what investigations were made as to who might have handed it to Mr Thompson?

A. I don't know, I haven't got access to those documents.

Q. Okay. You made the suggestion that Chris Hoey had undertaken an investigation to my learned friend when she asked if it was only you, you said you thought he might have, do you recall that?

A. I do recall that.

Q. Have you seen his affidavit that contains no reference to any such investigation by him?

A. No, I have not.

Q. Did you just speculate when you said that, or is that something you genuinely think happened that we'll find documents on?

A. I imagine I would have had a conversation with Chris Hoey, we worked closely together, in fact desks apart; we would have -- I would have asked him how did that document get in there? Have you --

- Q. So that's one of those moments where you don't remember though, isn't it? You said "I imagine I would have", and "I would have"?
- A. Yeah.
- Q. So you don't remember him in fact doing an investigation, that's speculation, isn't it?
- A. I don't remember him doing an investigation.
- Q. All right.
- A. And I don't remember instructing him to look.
- Q. Why did you tell my learned friend that he would have, when you don't remember it?
- A. Because that's sort of -- I know Chris Hoey and I know that he is quite particular about things, and he would also have been wondering very very hard how that document got into his safe.
- Q. I'm asking why you told this Inquiry, in answer to my learned friend, that he would have done an investigation, when all you really mean is it's the type of thing he might have done?
- A. Yes.
- Q. So that's the evidence you should have given half an hour ago, that's the answer we should substitute, really?
- A. I think -- well -- okay.
- Q. All right. Was any investigation done into Jim Blackwell's involvement in receiving the ISAF report or seeing the ISAF report?
- A. I don't remember.
- Q. What involvement have you had in any decisions as to whether Jim Blackwell has been made available for this purpose, and to talk about any involvement he's had in this process?
- A. None.
- Q. You said to my learned friend that you weren't around in 2013 when she talked to you about Mr Stephenson's defamation claim which ran from -- in fact before 2013, a trial in 2013 and through to 2015. Your answer was I wasn't in the country in 2013?
- A. I was in the -- in Canberra from 2011 through to 2014.

Q. You were in the CDF's office in 2015 though, weren't you?

A. Correct.

Q. And you will recall that the Defence Force settled a proceeding with an apology to Mr Stephenson, do you recall that?

A. Yes.

Q. Why didn't you mention that you knew about that to my learned friend, why just mention that you didn't know about 2013?

A. Because that was the nature of the question.

Q. Oh was it?

A. In my mind, yes.

Q. All right. It was something I took from your answers at least that you didn't really have a sense of the NZDF perspective on Mr Stephenson. We shouldn't have taken that, should we, because you would be aware of attitudes towards Mr Stephenson in 2015?

A. I don't think you can.

Q. So you do know or you don't know?

A. When you talk about "attitudes towards Mr Stephenson", is that towards Mr Stephenson or to the media?

Q. To Mr Stephenson, I just want to clarify your answers to my learned friend. Were you aware of any antipathy towards him and NZDF in 2015, or not?

A. Yes, but not in any substantive way.

Q. Okay.

A. It's not a matter I discussed with anyone.

Q. In 2014 you immediately connected the 2014 stories or story on *Collateral Damage* and *Native Affairs* with Operation Burnham and therefore, with the 2010 press releases about Operation Burnham, we've agreed that, haven't we?

A. I don't think I did in so many words.

Q. I think you did, but let's check now, you agree that you immediately connected the 2014 *Native Affairs* story with the same events that press releases had been issued about in 2010, we know you did, because you went back and checked them?

- A. Yes.
- Q. Okay?
- A. Yes I got there in the end. It may not have been on the evening of the launch of the book.
- Q. I'm not talking about the book, I'm talking about the *Native Affairs* programme in 2014, all right, that was immediate, wasn't it?
- A. Connecting?
- Q. The 2014 story about Operation Burnham with the 2010 media about Operation Burnham?
- A. Yes, yes.
- Q. Okay, now we've had Sir Jerry Mateparae in the witness box already today who's confirmed that there was no NZDF investigation into Operation Burnham and civilian casualties, the only investigation was by ISAF.
- You didn't, in 2014 suggest any fresh investigation, did you?
- A. I did not.
- Q. And of course there was none, was there?
- A. No, no formal investigation.
- Q. And instead, you merely repeated the same story, which we know to be wrong, denying any basis for civilian casualties, correct?
- A. We stood by that 2011 statement.
- Q. And then we get to your stomach sinking. This must mean that from that moment, given this is something you still remember today, you had fixed in your mind the knowledge that a terrible mistake had been made in all media statements about Operation Burnham and civilian casualties, from that moment your stomach sank?
- A. The moment my stomach sank was the fact that a report existed which we did not know about.
- Q. Which showed your releases to be wrong and embarrassed the Minister?
- A. Yes.

- Q. Moving on then a few years to when you say you reacted the way you did to *Hit & Run*, and firstly, briefly, you've suggested that there was no prior warning of *Hit & Run* being launched by Mr Stephenson; that's on my instruction not right, and he made a call to the Ministry of Defence 90 minutes before the book's launch to ensure that there wouldn't be any blow-back for soldiers in the field, are you aware of that or not?
- A. Well, when I say "no prior knowledge", we knew the launch was going to take place, because Chris Hoey went down to it, attended it, at Unity Book Shops. So in that respect, we knew it was coming, but we did not know what was in the book.
- Q. Okay. So you're not disputing that he made that sort of call and gave some warning --
- A. Not at all.
- Q. -- for safety reasons for soldiers?
- A. No.
- Q. Okay.
- A. But I was unaware of what that message might have been, but, yeah.
- Q. Okay. So then you received a copy of *Hit & Run* and you say in your brief at paragraph 41 "there was nothing new in it"?
- A. No, I don't say that. At paragraph 41 I said I took some notes on the night of. And then at paragraph 42 I imagine I was making a note of a phone call I received. So those notes are not from reading the book.
- Q. Okay, they may not be your thoughts as you've noted, they might have been notes of someone talking to you down the phone?
- A. Correct.
- Q. Okay. So by that point you hadn't read the back, or you had?
- A. I had not.
- Q. So you can recall that or you're guessing?
- A. I'm guessing, but depending on the, if I go back to my notes, but that phone call would have come in the -- oh it's been redacted at the top of that page.

Q. Well you say in your following paragraphs that you were scrambling to read the book?

A. Yes I know, I'm going back to my source document now.

Q. I understand?

A. There. And so that would have been on the evening of the --

Q. The 21st?

A. -- 21st, so no, I would not have read the book from cover to cover. I think at that stage we had a number of people who had taken on a couple of paragraphs each just to try and get to the nub of what the -- what would be of concern to us, what were the allegations.

Q. Well the key part's a little over a hundred pages, that's -- it's not a big book, is it?

A. It's not a big book in the scheme of things, no.

Q. You would have read the preface, wouldn't you?

A. I don't recall.

Q. Well, you wanted to understand roughly what the book was about, didn't you, before making this statement you were under pressure to make?

A. Yes, but I don't know whether I was reading the book right at the moment the copies became available.

Q. Right, but you would have read it by the time you made a statement, can we agree that much at least? You would have known which operation it was about?

A. I would have been briefed from the people who were closer to following that particular -- those particular operations, yes.

Q. Okay. So you would have known what country it was about, Afghanistan?

A. Yes.

Q. Which date?

A. Yes.

Q. Which province?

A. Yes.

Q. The operation name?

A. Yes.

- Q. That it was the same story as that in the *Native Affairs* report of 2014?
- A. I guess, with the inconsistency around the naming of the villages.
- Q. Well that's something that was deployed a little later, wasn't it? At the time when you were trying to understand the book, the very preface refers to the *Native Affairs* story and it's littered with references to it, do you accept that, don't you?
- A. I accept that.
- Q. So it's absolutely clear that you did in fact immediately know it was the same story, the big story, about the most concerning story of civilian casualties or potential civilian casualties of the war for New Zealand. It was the big one, wasn't it?
- A. It was the one that had received most, I guess public attention.
- Q. But you knew it was that one? You're not going to pretend today on oath in front of the Inquiry that you thought it might be a different set of civilian casualties that had somehow not occupied the attention of the NZDF?
- A. No I'm not.
- Q. Okay, because you seemed to be saying to my learned friend that you didn't make that connection, have I misunderstood that, because if I have I'll just move on?
- A. Well I think the connection was made, but we didn't connect back to the IAT report, the Minister's statement and --
- Q. I can completely understand why you now want to say that, but let's unpick that.
- A. Okay.
- Q. We have a discovery which in 2014 prompts an actual visceral reaction in you, of your stomach sinking?
- A. Yes.
- Q. That sense of dread when you discover that you have the ISAF report. And you've confirmed that that shows that the original statements were wrong.

- A. Yes.
- Q. That's something you have confirmed you still remember today, that sense of stomach sinking?
- A. That phone call that night, the passing of the information, yes.
- Q. So of all of the things you do remember about Operation Burnham, the one that is strongest in your mind is that you have the ISAF report and that the earlier statements were wrong, that's just obvious isn't it, here on oath? On oath?
- A. Well I'm -- we did not -- I did not.
- Q. Not "we", you?
- A. I did not make that connection back. I did not remember the statement that Minister Coleman had pushed out. It was not in our database.
- Q. You might not have remembered Mr Coleman's statement --
- A. No.
- Q. -- but you have confirmed that you retained the memory of feeling sick to the stomach, discovering you had the ISAF report?
- A. Correct.
- Q. And that reading of the ISAF report in 2014 confirmed that the press releases of the ISAF report were right, and the 2010 statements, and the 2014 statement were wrong. And I'm putting to you, you knew that in 2017? You're on oath. If the honest answer is that you knew, it's absolutely fine to say it Mr Smith?
- A. I'm just trying to -- I didn't -- when we were putting together the immediate press release following the launch of the book, I did not knowingly say that we were going to maintain our position, as in I did not -- I guess there are so many things going on. The -- I was not trying to change the record.
- Q. You knew the primary documents were in your hands, the ISAF report, the only investigation?

A. I certainly knew that back in 2014.

Q. And we know that you knew it in 2017, from your long silences, we know that, don't we, Mr Smith?

A. We did not --

Q. "We", just talk about you.

A. I did not refer to that, or look at, or ask for, or read, that ISAF report, the IAT report at the time of the launch of that book.

Q. But you did in 2014, and you remember it, so the reason you didn't go back to it was the same reason your letter under the OIA of a week or two prior was wrong, that my learned friend just took you to, which is that you were not concerned with accuracy when making the statement, were you, you were concerned with rebuttal?

A. No.

Q. When you wrote the letter, when you signed the letter that's at the main bundle at 231 that you were just at with my learned friend, which said there were at least one suspected civilian casualty, were you concerned with the truth then?

A. I am always concerned with the truth.

Q. Okay.

A. And that OIA responses provide the most accurate information we have.

Q. All right, so the most accurate information you had on 15 March 2017 was that there was a suspected civilian casualty, bottom of page 232?

A. Yes I see that.

Q. 15. And yet when you made your press release moments, days, later, you said there were none?

A. We stood by -- yeah, we stood by our previous statement.

Q. It's you Mr Smith, it's not we, it's you.

A. I was --

Q. Which one was the truth? They're different?

- A. Looking at this OIA response now, there are some inconsistencies there. There's some incorrect information in there. I'm not --
- Q. Well, in that respect -- on that respect, it's more correct than your press release; so I'm wanting to know were you intending to be more truthful to the Human Rights Foundation or in your press statement? Presumably in the response under the OIA, correct, with legal obligations around what you were saying?
- A. No, there were no considerations about being more truthful here and there.
- Q. When you said it at the top of the next page that you don't hold a copy of the report, were you intending to be accurate then, the ISAF report?
- A. All I can think of is that when I read that, it wasn't referring to the IAT executive summary.
- Q. How many other ISAF reports are there on these issues that I should know about? Have there been other alleged civilian casualties involving the New Zealand Defence Force that the ISAF's enquired into from that time?
- A. I don't know. I can't answer that question.
- Q. Well, given you don't know, you will have assumed it's the only one you know about, it's a big deal that makes your stomach sink, isn't it?
- A. The knowledge we had it made my stomach sink.
- Q. Only because you knew its context --
- A. I did not know its context.
- Q. -- and content?
- A. Not at the time when my stomach sank. I knew we had a report that contradicted the statement we'd put out. I didn't see the text of that report. It couldn't be read to me. I had to see it the next day because of the classification of the report.
- Q. But from then you knew that you 1) had it, and 2) that it was on point showed the prior statements to be wrong?

- A. At that time in 2014.
- Q. And here you are though, under the guise of an OIA response on 15 March 2017 denying having it, even though you know you have it?
- A. Again, I take full responsibility for the document. I signed the document. I would have read the document quickly before signing it. The document would have been drafted by subject matter experts. It would have been peer reviewed. Defence legal would have cast their eyes over it. And at the point it got to me, I would just read it for sense, does it answer the questions? Quickly read through. Sign and send. This was an OIA that was sent into us in October 2016, we were way outside the time limit for it. Other incidents intervened. The November 2016 earthquake. We were dislocated. We lost a lot of material. We were under pressure.
- Q. So, your concern to respond to that OIA was such that you didn't focus closely even on the sentence about the ISAF report that had made your stomach sink?
- A. I'm putting -- I'm saying that it didn't jump out at me, that this was the same report we're talking about.
- Q. All right. In the press release you did release, which is at 267 of the defence bundle, you don't just repeat the earlier denials, but say "that the investigation concluded that the allegations of civilian casualties were unfounded." And we're talking here in this press release, aren't we, about that very ISAF report that sank your stomach, is what you're talking about in the press release, isn't it?
- A. Yes.
- Q. Which you've confirmed just maybe a minute and a half ago, made your stomach sink because it contradicted those old accounts?
- A. I go back to my stomach sank when I was told that we had a report I did not know about. So when I read the report, the following day.
- Q. You realised it contradicted those statements?

- A. There were inconsistencies.
- Q. Right. Such that it was no longer possible to say with honesty that the allegations of civilian casualties were unfounded or that the ISAF report supported that position. You knew that?
- A. Yes, when I had read the report.
- Q. Right. And so you knew when writing this press release that it was wrong?
- A. This press release there?
- Q. Yes. Read the third paragraph:
- "The investigation concluded that the allegations of civilian casualties were unfounded."
- You've agreed that you knew already that that was wrong?
- A. Yeah, I knew -- yep, so I knew in 2014. We were raked across the coals for it in 2014. By the time that we put together this press release --
- Q. Are you going to say you'd forgotten the ISAF report now?
- A. I am about to say that I forgot the contents of the ISAF report or the fact we did not refer to it when we put this press release together.
- Q. So you can vividly remember being raked over the coals, feeling sick to the stomach, and knowing that it meant all the media was wrong even today in 2019, but you forgot it for a moment when NZDF wanted to undermine the book, is that right, on oath that's your evidence?
- A. Yes, at the time that this press release was released, I was not trying to -- I was going on the press releases that we'd put out in the past; had overlooked the Minister's statement; had overlooked the fact that we had this document still in the safe.
- Q. Well, just to be fair to you, because this is your one shot, the truth is that NZDF was seeking to spin the point, and that you knew, just as you've been very honest about knowing today, and in 2014, you knew that the ISAF report didn't say that, and it went out anyway, that's the truth isn't it, here today?

A. This is inconsistent when you put it alongside the IAT report.

Q. Yes, and I'm just giving you a chance to, I guess clean the slate, it was knowingly inconsistent at the time, wasn't it, albeit with the best will in the world, it was knowingly inconsistent?

A. At the time that this press release went out, it went out under my approval, I did not know that it was inconsistent, that it was wrong.

Q. Had you read it you would have known it was wrong, agree with that?

A. I would have read this before it went out.

Q. But it refers to the ISAF report, so you can't have forgotten the ISAF report when reading that. It refers to the report, you knew which report it was, there's only one.

A. Yes.

Q. You would have known at the time it was wrong?

A. My part to play in this was that this press release didn't go out with me knowing it was wrong. I did not intend it to go out incorrect.

Q. And I'm not saying that you personally were wanting people to be misled, I appreciate you're in a chain of command and that there's a team aspect to this, but just in terms of what was going on in your mind, you knew that that sentence was wrong. I'm not saying you could stop the release going out, or stop the NZDF response being what it tends to be, but you did, in your heart of hearts know it to be wrong at the time, didn't you, Mr Smith?

A. At the time it went out, I don't know whether I -- it was wrong or not.

Q. Was that not something you thought about when hurrying to get it out?

A. I'm just trying to recall back if this is the 21st of March response, I would have been party to the discussion, but I don't believe I've briefed or that I actually had the -- was the final arbiter on this.

Q. Right.

A. I may have been, as Chief of Staff with the Chief of Defence Force absent.

Q. Who was then the final arbiter of that?

A. Well it may have been me, it might have been the Vice Chief of Defence Force, when we're in the room together discussing what it was we're going to put out.

Q. You wouldn't have got on the phone to the CDF?

A. No, I did not get on the phone to the CDF.

Q. Okay.

SIR TERENCE: That's 30 minutes, it's a little over.

MR SALMON: It is sir. Yes I've been passed a note saying that.

Sir, I know it's 5 o'clock, just one point, I don't want to jump up about this in the morning, but I didn't object during my learned friend's re-examination on some of my questions, albeit at times, and I don't mean this critically, we're all trying to save time, that moved into some fairly leading questions. I probably will take more of an issue tomorrow morning with this witness, just if it does go in that direction, unless you prefer to control that yourselves? But for my part I think, given time and given the limits of my time, that re-examination took probably more than the allocated time I had for just re-examination. And the nature of these issues are such that leading questions on re-examination are a risk to accuracy, and that's not to be critical of my learned friend at all.

SIR TERENCE: Yes I understand the point you make. But I do make the point this is in a rather different environment.

MR SALMON: Yes.

SIR TERENCE: And, I mean, we are conscious of the sort of issue that you raise.

MR SALMON: Yes sir, and I raise the point I guess by way of range finding whether it's a point where you're content to look at it yourselves or -- and whether it will irritate to have me leap to my feet, or whether it's enough just to note this now.

SIR TERENCE: Yes. Well, thank you for that.

MR SALMON: Thank you sir.

SIR TERENCE: Now Mr Radich, I know Mr Smith has to get away.

MR RADICH: He does.

SIR TERENCE: Do you want to do a re-examination now?

MR RADICH: Are you content for me to do that if I endeavour to do it as smartly as I can, because he will nod if I am correct, he needs to be in an aeroplane overseas first thing in the morning.

SIR TERENCE: Well that's what I'd understood. And I am sorry to everybody, but we will do that now and so this witness can be excused.

MR RADICH: All right thank you very much, Sir Terence.

#### RE-EXAMINATION BY MR RADICH

MR RADICH: Mr Smith, you were asked some questions about the -- and I'll do this quickly so as not to take too much time, between the press releases that came out on around 30 August 2010 and then other documents you looked at which were a briefing note to the Minister in December 2010 --

A. Mmhmm.

Q. -- do you have any understanding of what happened in-between those two times from NZDF's perspective?

A. No.

Q. Can you look please at page 222 of the large bundle, 222? You were taken to these documents by my learned friend Ms McDonald, and also have a look at page 224. Now you see the 224, this is the -- and I hope my learned friend won't mind if I just lead on this point here, this is the John Key, the then Prime Minister, statement at 7.16am?

A. Yes.

Q. And do you see going back to page 222, do you see who is making the comments that are being reported in this document?

A. Yes, the Minister of Defence.

Q. Yes. And do you know if the Minister of Defence's comments were early or later than the 7.16am from the Prime Minister?

- A. I don't know.
- Q. All right. And would you look please at page 222 at the -- yes, over at page 223 and that's the point that you were making in the third paragraph there, is it?
- A. "Mr Coleman said you probably can't rule out civilian deaths from these gun ships fired".
- Q. Yes.
- A. Is that the one you're referring to?
- Q. Yes.
- A. Yes.
- Q. Can I take you, and I'll come back to this point in just a moment, but to the two days that you had in terms of the discussion with your Minister to respond to the IAT report finding, were there others involved in the work? You've mentioned I know Chris Hoey, but was there anyone else?
- A. I can't recall, I know my part in the investigation was to talk to Peter Kelly and Rian McKinstry. I'm not sure what was directed to other people. I don't know who else was actually doing information collation. There may have been some direct correspondence through DSO through to the SAS, but I am unaware of that.
- Q. Do you recall if you had any other tasks to undertake that were directed to you?
- A. No, I think the central issue was the IAT report, how did we have that, how did it get to us?
- Q. How often are your briefings to the CDF or DCF to Minister oral versus written? Can you give us a sense of the way in which they go generally?
- A. Well, there's a weekly Defence Minister's meeting where the Chief of Defence Force and the Secretary of Defence go across and discuss a range of topics, generally verbal with a small perhaps written dot point brief that goes across to the Minister's Office beforehand. There are other issues that get raised in the meeting which weren't put on the agenda, raised by either the CDF, the Secretary or the Minister himself.

There is a record of the meeting, but it's not -- it's not substantive, more just assigns tasks and who's required to do them.

Q. You were asked some questions by both my learned friends about making a connection in your mind, first of all, you know, between the 2010 allegations of civilian casualties, then the *Collateral Damage* programme, and then the *Hit & Run* book.

Can I ask you first, do you know the answer to this, how many operations by the SAS generally might have taken place by the New Zealand SAS during Operation Watea?

A. I don't have a definitive number, but I know it is dozens, if not hundreds.

Q. In your first look at this in terms of the book I'm talking about in 2017, what was it in the book that was different from what you understood about Op Burnham, in terms of joining dots or not joining the dots?

A. Well, I mentioned earlier the Tirgiran versus the other two villages that were in the book. The assets that were available at the time. I mean, I haven't brought this up in my briefings because I've never been asked this question, but there seemed to be some shortage of information from the assets that are available at that particular raid.

Q. So when you say "assets"?

A. Platforms, aircraft.

Q. Aircraft, yes?

A. Yes.

Q. Thank you. Tell us, 2014 to 2017, a three year period, can you tell us generally about the work in the office of the CDF, the level of activity, the types of things that you're doing?

A. Yeah, I guess coming back to a question I had earlier, you know, what is the role of the Chief of Staff? Well the Chief of Staff is to monitor everything that's going on in the NZDF. I'd describe it as a mile wide, an inch deep. So you have a little bit of knowledge about everything, and you reach out, reach down to get information and suck it up. That goes for

OIAs, that goes for questions that are coming out of CDF, that goes for media responses, that comes for any legacy issues that are coming through the system, and there are a number of those, and they go before the courts; I keep a bit of a brief on those, not deep, but everything. There are things going on every day. It's a job that consumes you. It's every day, it's 24 hours. And if you're not getting a phone call from, I don't know, MFAT asking why did the CDF happen to be in a meeting in this place in the States and the President of the United States turned up, my answer is I don't know. Why didn't he tell you? He probably couldn't tell me. And all those sorts of things all the way through. Any search and rescues that happen I know about because I then have to brief up, not just to my principal, but to the Minister's office, so that he's aware of a number of issues. In the heat of the moment, on a number of occasions, you just get things wrong.

Q. Yes. You indicated you needed to respond immediately that night, why was there that need for something immediate?

A. Well you could imagine that there was a bit of pressure coming on from across in the Beehive.

Q. Yes.

A. And also noting the fact that CDF was with the Minister overseas and they were wanting information quick.

Q. All right. You said you didn't make the connection immediately, can you explain how soon after did you make it if it wasn't immediate, what period of time?

A. I don't remember. I mean, I'm just trying to work out in my head the days between their launch of the book and I guess another significant date was the 27th of March when CDF Keating provided the media -- or had the media conference. In-between times there were a lot of people searching back through archives, looking at reports, looking at story boards, looking at any footage we may have on file in our possession, asking questions, back into theatre, and talking to the people who were on the ground that night.

Q. Yes, all right. When you did make the connection and bring it all together, what steps were then taken by you?

A. Well, I was just part of the team. I was sort of running the office, while a lot of people were focused on this one event. There were other things going on at the time, I don't remember what they were, but the office continued to run. I kept a watching brief on how the material was being brought together. I sat in on the briefings that were provided to the CDF at the time. I sat in on the briefings that were provided to the Minister. And I was at the press conference on the 27th of March.

Q. Right.

A. So rather than investigating at that point, I was more keeping a watching brief on the people who were pulling together that information.

Q. Had you joined all the dots immediately, tell us generally what you would have done then or said in the press release?

A. I think our press release would be more aligned to Minister Coleman's statement he made in an interview, I'm not sure how that interview took place, whether it was on the run to the House or one-on-one, but, mmm.

Q. In 2017?

A. 2014.

Q. It was 2014, yes.

A. Yes.

Q. And could I just ask you, it was one of the references I was looking for earlier, page 220 please, this is 2014, so this might be the point you're making, do you see it starts at 219, can you see what the nature of this media story is and when it was? You'll see the date at the top, date published?

A. The 1st of July 2014?

Q. Yes.

A. Yep.

Q. And who is it that's giving information to the media here, which Minister?

A. Is this the Prime Minister?

Q. There's a photo of the Prime Minister, but it might not be quite accurate in its own right?

A. No, no I think Defence Minister Jonathan Coleman, he was categorically there.

Q. And if you look at page 220, fifth paragraph down, is that the -- would you read that out and comment on whether that's the sort of comment that you're making?

A. "That Coleman could not rule out"?

Q. Yes.

A. Yes.

Q. Would you read it right out?

A. "Coleman could not rule out civilian deaths occurred after fire from US helicopter gunships".

Q. All right. What is your personal position in terms of your own mantra about accuracy of information to Ministers and to the public?

A. To provide the most accurate information in a timely fashion as possible. And sometimes we've gone quicker than we should have and sometimes we provided Ministers with inaccurate, we have to correct later on. But if we're given more time, we can provide more accurate information.

SIR TERENCE: Do you have any questions?

SIR GEOFFREY: No.

SIR TERENCE: I don't have any questions either, but thank you for your attendance and you are now excused.

(Witness excused)

SIR TERENCE: Can I ask that either the secretariat liaise with the Defence people, and perhaps Counsel Assisting, to make sure there are no further gaps in those diaries, because we really don't want you taken by surprise by them. And if there are issues that you want to maintain an objection about, perhaps those could be identified and we could have a look at them in the morning?

MR RADICH: Certainly. We have all the pages now, so we will be certainly doing that, thank you Sir Terence.

SIR TERENCE: Thank you.

All right we'll adjourn and start again at 9.30 tomorrow morning. Thank you.

(The hearing adjourned until 9.30 am on Tuesday, 17 September 2019)