

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

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

MEMORANDUM OF COUNSEL FOR THE NEW ZEALAND DEFENCE FORCE

18 July 2018

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Direction from Inquiry

1. The purpose of this New Zealand Defence Force (“NZDF”) memorandum is to respond to the direction from the Government Inquiry on Operation Burnham and Related Matters (“Inquiry”) contained in Minute No 1 of 10 July 2018.
2. The Inquiry directed in Minute No 1 that the NZDF provide by 5 pm on Wednesday 18 July an indication of:
 - (a) *How much of its material relevant to the issues in the Inquiry is presently classified; and*
 - (b) *How much of that classified material is subject to control by a foreign government or entity such that its consent to disclosure will or may be required.*

Publicly available and unclassified material

3. The NZDF provided copies of a bundle of publicly available and unclassified material (“public and unclassified bundle”) to the Inquiry on 25 June 2018. Following the direction of the Inquiry in Minute No 1, NZDF sent copies of the unclassified bundle to other core participants on Wednesday 18 July 2018.
4. This bundle represents the extent of publicly available and unclassified information held by NZDF on matters relating to the Inquiry. Most of the material in the bundle comprises classified documents that have been redacted in accordance with the Official Information Act 1982 (OIA).

5. The NZDF notes that classification of material or absence of classification does not alone indicate if that material is able to be publicly released. In the context of the OIA, the Cabinet Manual 2017 at paragraph 8.43 provides:

A security classification or endorsement does not in itself provide good reason for withholding a government document. A decision to withhold must be made under the criteria of the Official Information Act, as for all other official information. The security classification or endorsement determines how a document is handled within the government system, not whether it can be released externally. However, a high security classification or endorsement may provide a useful “flag”, indicating that there may be good reason for withholding the document (or part of it) under the Official Information Act. It is good practice therefore to consult the author of the document before releasing it. Such a flag may become less relevant with the passage of time.

6. The NZDF estimates that it holds over 50 unclassified items of material, including correspondence with the United States Government and NATO respectively, which it proposes to provide to the Inquiry but for which it is likely to seek protection from public disclosure under the Inquiries Act 2013 (“the Act”).

Identifying the classified material

7. The NZDF is prioritising its effort and resources, including its consultation with other agencies, to work conscientiously through the steps that are necessary to enable it to provide classified material to the Inquiry. The NZDF is committed to providing all relevant information to the Inquiry.
8. The NZDF has conducted an electronic and manual search for classified material relevant to the Inquiry. This search focused on material within the Scope of the Inquiry as set out in the Terms of Reference provided by the Attorney-General (2018-go1763).
9. The NZDF is taking a broad approach to identifying material that may be relevant to the scope of the Inquiry. This approach includes identifying classified material for which another agency was the originator. The intention of the NZDF is to enable the Inquiry to analyse, test, and challenge the facts and legal standards, in accordance with the Inquiries Act 2013 (“Act”) including the general requirements of ss 10 and 14(2).

10. Based upon its work to date, the NZDF is able to provide a best estimate of the material that it holds currently. The NZDF has not inspected or reviewed the majority of the material. As a first step, the NZDF conducted a general search relating to Afghanistan material for the time period of the relevant NZSAS deployment and the subsequent consideration of Operation Burnham and related matters.
11. As a second step, the NZDF reviewed a sample of material titles and texts to estimate the quantum of classified material that is within the Scope of the Inquiry, and which the Inquiry may consider relevant for its work. Due to the limits of this overall approach, the numbers provided below will change as the material is able to be compiled and copies secured for the Inquiry.

General indication of classified material

12. The NZDF estimates that there are over 2000 items of classified material that are within the Scope of the Inquiry and which may be relevant to its work. Of this material, NZDF estimates that around eighty percent is subject to the control of a foreign government or international organisation (“classified material of partners”). However, the remaining twenty percent will need to be reviewed to determine the extent to which it may contain or be derived from the classified material of partners.
13. The NZDF estimates that, of the classified material of partners, around seventy percent is subject to the control of the North Atlantic Treaty Organization (NATO), and that the remaining thirty percent is subject to the control of the United States Government.
14. Within all of the material, on the NZDF’s assessment, there is a core bundle of documents and other information of particular relevance to the Inquiry (“core bundle”). This core bundle includes Cabinet papers and Ministerial submissions, diplomatic formal messages, intelligence reporting, operational planning and reporting, video, imagery and sound recordings, and investigation reports. The core bundle comprises over seventy documents and recordings.

Providing material to the Inquiry

15. The NZDF is currently working to compile a full list of classified material for the Inquiry. It is working towards providing copies of this classified material to the Inquiry, with the approval of other relevant agencies, and subject to appropriate protections from public disclosure in accordance with the Act.
16. The Cabinet has provided a Directive on the Security of Government Business (CAB Min (14) 39/38) which requires that the NZDF and other agencies manage classified documents according to the Protective Security Requirements (PSR) (see also paragraph 8.6 of the Cabinet Manual 2017). The NZDF has met with other agencies, including the Department of the Prime Minister and Cabinet (DPMC), the Ministry of Foreign Affairs and Trade (MFAT), the New Zealand Security Intelligence Service (NZSIS), the Government Communications Security Bureau (GCSB), and the Ministry of Defence (MOD). The NZDF has proposed to those agencies that it will consult and, as appropriate, seek their approval to provide relevant classified material to the Inquiry.
17. The Cabinet Office Circular on *Access to information of a previous administration* (CO (17) 9) of 30 October 2017 provides in paragraph 10 that:

A Minister or department that proposes to release the Cabinet records of a previous administration, in response to a request under the OIA or for any other reason, should advise the Cabinet Office as soon as possible. The Cabinet Office, on behalf of the Prime Minister, will consult the Leader of the Opposition about the proposed release (see paragraphs 8.133 – 8.134 in the *Cabinet Manual*).

The NZDF is working with the Cabinet Office in DPMC and other agencies towards engaging in consultation in accordance with these requirements.

18. In addition, the NZDF will work with other relevant agencies to identify any further material (not presently in its possession and which has not, therefore, been included in the public and unclassified bundle referred to in paragraph 3 above) to provide to the Inquiry and which may be released publicly by the Inquiry. This material will comprise both unclassified material and classified

material that is redacted in accordance with the OIA and the Chief Ombudsman's opinion on OIA requests about Operation Burnham dated 9 April 2018.

19. This additional publicly releasable and unclassified material will need to be addressed in the course of the consultation referred to in paragraph 17 above, in cases where classified material to be redacted forms part of the records of Cabinet.
20. In addition, the NZDF is in the process of preparing a redacted version for public release of the New Zealand Defence Doctrine Publication on Rules of Engagement (NZDDP-06.1 ROE).

Classified material of partners

21. The NZDF is working closely with MFAT to facilitate the Inquiry's access to classified information of partners and has already taken concrete steps toward seeking the approval from NATO Headquarters in Brussels.
22. The *Agreement between the North Atlantic Treaty Organization and the New Zealand Government on the Security of Information* dated 3 October 2007 provides the international legal framework for this process.
23. As New Zealand was a member of the NATO International Security Assistance Force (ISAF), the documents and communications that the NZDF prepared during the ISAF operation and, as part of that operation's activities, are subject to the control of NATO. In contrast, classified material in the form of internal New Zealand Government and NZDF communications and documentation relating to the ISAF operation does not fall within the control of NATO.
24. The NZDF, in consultation with other agencies, is currently reviewing the arrangements that apply to the classified information which the United States Government has provided to the New Zealand Government. In this context, there is a broader range of inter-governmental and inter-agency obligations and arrangements to discern and apply.

25. The NZDF understands that separate arrangements may be required with NZSIS and GCSB to access classified material held by those agencies, including that obtained through their relationships with partners of New Zealand.

Summary

26. In summary, the NZDF is currently prioritising the identification of relevant classified material for the scope of the Inquiry, the securing of copies, the approval of partners as appropriate, and ultimately the provision of this material to the Inquiry. The NZDF will liaise and consult with Counsel Assisting the Inquiry on a continuing basis on this process.

DATED 18 July 2018.



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