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UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND  
RELATED MATTERS

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MEMORANDUM OF COUNSEL FOR THE NEW ZEALAND SECURITY  
INTELLIGENCE SERVICE, GOVERNMENT COMMUNICATIONS  
SECURITY BUREAU, MINISTRY OF FOREIGN AFFAIRS AND TRADE  
AND DEPARTMENT OF THE PRIME MINISTER AND CABINET IN  
RESPONSE TO MINUTE NO 4 OF THE INQUIRY

5 October 2018

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**MAY IT PLEASE THE INQUIRY:**

1. This memorandum is filed on behalf of the Government Communications Security Bureau and New Zealand Security Intelligence Service (together the **Intelligence and Security Agencies**), the Ministry of Foreign Affairs and Trade (**MFAT**) and the Department of the Prime Minister and Cabinet (**DPMC**) (together the **Crown Agencies**) in relation to matters covered in minute number 4 of the Inquiry (**Minute**).
2. Generally, the Crown Agencies support the procedure for dealing with classified information and the Inquiry's preliminary view on procedure, as outlined in the Minute. The Crown Agencies also wish to clarify certain aspects of the process for dealing with classified information, and make submissions on one aspect of the draft allegations set out in Appendix 2 of the Minute.

**Procedure for dealing with classified information**

3. The Crown Agencies support the Inquiry's intent to handle information in line with the Government's Protective Security Requirements.
4. The Crown Agencies do, however, wish to clarify aspects of the proposed procedure.
5. As the Inquiry noted in its minute number 3, the New Zealand Government Security Classification System (**classification system**) is not created by or under statute, and is instead an administrative policy of the Government.<sup>1</sup>
6. Under the classification system, the security classification marking represents the Government's assessment of the risk of damage or prejudice from compromising specific content. A fundamental principle of the classification system is that it is the agency that creates the classified content and assigns a protective marking (**originator**) who is responsible for decisions concerning declassification.
7. While in various parts of the Minute, the Inquiry refers to a power to assess the classification of documents (in particular, at [26] and [27] of the Minute), the

Crown Agencies do not understand the Inquiry to mean that it will ultimately be responsible for de- or re-classifying documents under the classification system. Instead, the Crown Agencies understand the Inquiry to refer to its powers, under s 20(c) of the Inquiries Act, to assess claims to privilege and confidentiality, and under ss 15, 20 and 22 of the Inquiries Act to require production to the Inquiry and disclosure to other participants or publication *notwithstanding* a classification marking carried by a document. Although this may appear to be a fine distinction, it is an important one for the Government in maintaining the integrity of the classification system. Clarity on this point is also likely to be of significance when explaining the Inquiry's procedures to international partners.

8. Accordingly, the Crown Agencies understand the procedure that the inquiry will adopt will be as follows:

8.1 Material falling within the scope of the Terms of Reference will be provided to the Inquiry. In particular, information held by Government agencies that is not subject to the control of partner governments or international organisations will be provided to the Inquiry as soon as practicable. Government agencies are to give high priority to seeking consent from relevant partner organisations and governments to providing the Inquiry with relevant material which they control.

8.2 In relation to classified material, Mr Keith will examine the material to assess whether the classification of that material is justified.

8.2.1 If Mr Keith considers that the material should be protected in line with its classification, then the Crown Agency will have a justifiable reason in maintaining confidentiality and the material will not be provided to other core participants under s 22 of the Inquiries Act, and publication of the material will be forbidden under s 15 of the Inquiries Act.

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<sup>1</sup> The only reference to the New Zealand Government Security Classification in legislation is in ss 78AA and 78A of the Crimes Act 1961, which create offences for unauthorised communication, retention or copying of classified information.

8.2.2 If Mr Keith has doubts about the need for protection of the material in line with its classification, he will discuss the matter with the relevant agencies to see whether agreement can be reached on whether the agencies will re- or de-classify the material or provide an unclassified redacted or summarised version of the material.

8.2.3 If after reconsideration (and any re-classification) by the agencies, Mr Keith remains of the view that protection of the material in line with its classification is not required, the Inquiry is tasked with determining whether the material should be disclosed to other participants or published, after affording the relevant agencies an opportunity to make submissions (which could address factual and legal considerations), and after taking any other procedural steps it considers appropriate.

8.3 Where the Inquiry is to determine whether classified material should be disclosed or published, the Inquiry, in applying relevant legal principles including under s 70 of the Evidence Act and s 15(2) of the Inquiries Act, and having regard to paragraph 14 of the Terms of Reference, will:

8.3.1 for New Zealand-controlled information, consider whether the disclosure of the information would prejudice the security or defence of New Zealand, or the Government's international relations;

8.3.2 for foreign-controlled information,<sup>2</sup> consider whether, in addition, disclosure would risk the provision of information on a basis of confidence from overseas governments or organisations in the future; and

8.3.3 will then consider whether there is a public interest in disclosure or publication of the material, taking into account principles of natural justice and open justice, as they apply in the context of an inquisitorial process.

8.4 If, having applied these principles, the Inquiry considers that the public interest in the information being disclosed is outweighed by the public interest in withholding the information, the material will not be provided to other core participants under s 22 of the Inquiries Act, and publication of the material will be forbidden under s 15 of the Inquiries Act.

8.5 If, having applied these principles, the Inquiry considers that the public interest in the information being disclosed is not outweighed by the public interest in withholding the information, and additionally that the interests of natural justice or open justice require disclosure or publication in some form, the Inquiry will exercise its powers to require disclosure or publication of the classified material in full, redacted or summarised versions, first giving the opportunity to Crown Agencies to re or de-classify the information and to take actions to mitigate the prejudice the Crown considers likely to arise due to the disclosure of the information.

*Ongoing discussions with international partners*

9. MFAT is continuing to engage in ongoing discussions with international partners to seek their consent for the production to the Inquiry of partner-controlled material. The extent to which disclosure of partner-controlled information is likely to breach an international agreement or an undertaking of confidence to international partners and/or cause prejudice to international relations will largely be informed by those discussions. MFAT will continue to keep the Inquiry informed on the progress of those discussions.
10. The Intelligence and Security Agencies have also begun discussions with international intelligence partners.

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<sup>2</sup> The Government Agencies note that this will also be relevant to some New Zealand controlled information

*NZDF material relating to ISAF operations*

11. At [14](b)(i) of the Minute, the Inquiry notes the issue relating to production of material generated by the NZDF in the context of ISAF / NATO operations, and the extent to which documents generated by NZDF in this context are within the control of NATO.
12. MFAT has raised this particular issue with NATO. NATO has confirmed that NZDF-originated material generated by NZDF in the course of its ISAF deployment is not covered by the *Agreement between the Government of New Zealand and the North Atlantic Treaty Organisation on the Security of Information* and therefore is not subject to NATO consent.

*Intelligence and Security Agency information*

13. In their submissions in response to minute number 3, the Intelligence and Security Agencies set out the particular sensitivities concerning international intelligence and security relationships. In particular, the agencies noted the need for specific partner approvals for disclosure, even to other members of the Government with appropriate security clearances (including members of the Inquiry). The agencies noted that permissions may need to be sought on a document by document basis in order to provide information to the Inquiry without prejudicing international relationships.<sup>3</sup>
14. The agencies noted that, for some information, a preliminary non-disclosure order might be sought prior to the agencies providing information to the Inquiry that is subject to partner equities. This was suggested as a pragmatic solution as, in some circumstances, having such an order in place would assist the agencies to obtain partner consents for disclosure to the Inquiry. While the agencies appreciate the Inquiry's concerns about this procedure (at [32](a)), there could be circumstances where a preliminary non-disclosure order is the only way for the agencies to obtain partner permission to provide certain partner-controlled information to the Inquiry.

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in which partners have an interest.

<sup>3</sup> The Intelligence and Security Agencies note for completeness that, while at [14](a) the Inquiry refers to material derived by the Intelligence and Security Agencies from, or in co-operation with, international partners and intelligence networks, Intelligence and Security agencies may also hold material that was not derived this way (and that is New Zealand-controlled). See paragraph 25 of the Memorandum on behalf of the Department of the Prime Minister and Cabinet, Government Communications Security Bureau and New Zealand Security Intelligence Service in Response to Minute No 3 of Inquiry (10 August 2018).

15. The Intelligence and Security Agencies also questioned the scope of the Inquiry's interest in information held by the agencies, given the parallel inquiry by the Inspector-General of Intelligence and Security (IGIS). The Inquiry noted at [32](b) of the Minute that it intends to discuss with the IGIS the relationship between the two inquiries and in particular issues about the provision of classified information. To the extent that the Inquiry decides to limit the documents which it wishes to review on this basis, this would provide greater clarity to the agencies in determining the partner permissions that need to be sought.

#### **Proposed inquiry process**

16. The Crown Agencies concur with the submission of the New Zealand Defence Force that the Inquiry's proposed approach appropriately balances the different complex issues that arise in this inquiry. In relation to the question of anonymous witnesses, the Crown Agencies may supplement any oral submissions on behalf of the NZDF at the hearing in November.

#### **Allegations**

17. The Crown Agencies generally do not take issue with the framing of the allegations from *Hit & Run* as set out in Appendix 2 of the Minute.
18. The Crown Agencies (and particularly MFAT) highlight that the terms of reference record that the Inquiry has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials. As a result, where allegations contained in Appendix 2 may be read as impugning the actions of international partners, they must be read as limited to the role of NZDF forces or New Zealand officials in those actions. So, for instance, to the extent that allegation 12 refers to the conduct of ISAF officials, the Inquiry can only investigate the knowledge or actions of New Zealand personnel or officials.

5 October 2018



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