

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS

MEMORANDUM OF COUNSEL FOR THE CROWN

5 December 2018

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MAY IT PLEASE THE INQUIRY:

1. As indicated in the Crown's various submissions, and reflected in Minutes number 3, 4 and 6 of the Inquiry, the New Zealand Defence Force (NZDF) holds material relevant to the Terms of Reference of the Inquiry, which is subject to the control of the United States Government.¹ The Ministry of Foreign Affairs and Trade (MFAT) has been liaising with the United States Government to request consent for the Inquiry to access this material. The United States Government has now confirmed its consent for the Inquiry to be provided access to this material.²
2. The material has been provided to the New Zealand Government by the United States Government on the basis of confidence. The consent from the United States Government to provide the Inquiry access to the material is based on its understanding that the material will be handled in accordance with the Government's Protective Security Requirements, and in-line with the process outlined in Minute 4 of the Inquiry. While the United States Government has consented to the Inquiry being provided access to the material, it has not consented to disclosure of the material beyond the Inquiry members and staff who hold appropriate security clearances. The terms of the consent apply to all material listed in Appendix 1, including material which may be marked as 'unclassified' or contain no 'classification', but which was nevertheless received in confidence from the United States Government.
3. The Crown submits that disclosure of the material beyond the members of the Inquiry, and Inquiry staff holding the appropriate security clearances, would be likely to lead to prejudice to New Zealand's relations with the United States, and the entrusting of further information to the New Zealand Government by the United States Government on a basis of confidence. Accordingly, if the Inquiry considers that it is required to disclose any of the material beyond the terms of the consent in order to fulfil its function, we invite the Inquiry to

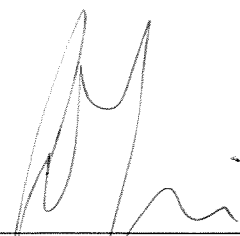
¹ The material is listed in the index at Appendix 1. There is one document which the New Zealand Government understands to be within the control of the United States Government, but which also potentially engages the interests of NATO. This document is not included in the material provided. MFAT intend to clarify the status of this document with NATO, and will update the Inquiry on this issue no later than Monday 10 December.

² The exchange of letters setting out the consent of the United States Government is appended to this memorandum at Appendix 2. Given the convention that diplomatic correspondence is conducted in private (described in the submissions of MFAT on minute 3), and the corresponding likelihood that disclosure of the

liaise with the Crown, for the Crown to discuss the terms of the consent with the United States Government.

4. As the material is produced to the Inquiry before the final determination of the Inquiry's procedure for handling classified information, the Crown applies for an order under s 15 (1) of the Inquiries Act – to remain in place pending further order of the Inquiry – to prohibit publication of, and to prohibit access by the public or non-Crown core participants to, all of the material set out in Appendix 1.³ We understand that the Crown's application may not be determined until the Inquiry has had an opportunity to review the material in accordance with its proposed review procedure. We also understand that, should the Inquiry be minded to lift the s 15(1) order (if issued) or otherwise consider disclosure of the material, the Crown would be given an opportunity to make an application under ss 15 and 22 of the Inquiries Act, with reference to s 70 of the Evidence Act, prohibiting the disclosure of the material to non-Crown core participants on a permanent basis
5. Alongside the material produced here, the Crown will continue to provide NZDF-generated and held material that engages US equities and/or relates to the US material. Where material is closely related to the material produced with this memorandum, it is likely that disclosure of that material beyond the Inquiry could also prejudice New Zealand's relations with the United States, and the entrusting of further information from the United States Government, on the same basis as disclosure of the source material. Accordingly, the considerations discussed above will also apply to that material.

5 December 2018



Aaron Martin / Ian Auld
Counsel for the Crown

letters themselves will prejudice New Zealand's relations with the United States, the Crown seeks an order under s 15(1)(a) of the Inquiries Act prohibiting publication of these letters.

³ The Crown notes that Appendix 1 is itself also classified. Accordingly, the Crown also seeks an order under s 15(1)(a) of the Inquiries Act prohibiting publication of the appendix.