UNDER	**THE INQUIRIES ACT 2013**
IN THE MATTER OF	**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Minute: 19 July 2018

MINUTE No 3 OF INQUIRY

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[1] The purpose of this Minute is to set out the Inquiry's preliminary views on how it should deal with relevant material that has been classified on national security grounds, including its powers in relation to challenges to classifications. As previously advised, the Inquiry invites written submissions on the issues covered in this Minute. The Inquiry asks that they be filed by 5 pm on Friday 10 August 2018. Following consideration of participants' submissions, the Inquiry will issue a ruling on the matter.

[2] This Minute is structured as follows:

a) First, there is a brief summary of the national security classification system in New Zealand.

b) Next, there is a section on the powers of the courts in relation to classified material.

c) Following that, the powers of the Inquiry in relation to disclosure and discovery are addressed, including in relation to classified material

d) There is then a summary of the Inquiry's preliminary views.

Security classification system

[3] The security classification system in New Zealand is not created by or under statute but rather is the result of administrative decision-making by Government. In relation to national security, it creates a classification scale in which classifications are based on the risk of harm to New Zealand's interests associated with making the information publicly available – the greater the potential harm, the higher the classification. The classifications with which we are concerned are (in descending order) TOP SECRET, SECRET, CONFIDENTIAL and RESTRICTED. Material which falls within one of these categories must be marked accordingly. There are detailed rules controlling access to information within the various categories and setting out how such information is to be handled, stored and transmitted.[1]

[4] The classification rules deal with foreign-sourced material that has been classified by the foreign source:

a) Where information is provided under a bilateral security agreement for the reciprocal protection of classified information, it must be given the equivalent New Zealand classification.

b) However, where there is no such agreement, the overseas classification will not automatically be accepted by New Zealand Government agencies. Rather, the appropriate New Zealand classification will be determined on a case by case basis.

The rules state that foreign government information must not be released without the prior written approval of the relevant foreign government.

[5] It is important to note that the security classification system is directed at identifying how particular documents and information should be dealt with within Government. In that sense, it is an internal management device. Release outside

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1 A comprehensive explanation of the classification system as at 2010 when the events at issue occurred is found in *Security in the Government Sector* issued by DPMC in 2002, ch 3. This was replaced in 2014 by the *Protective Security Requirements*, of which the *New Zealand Government Classification System* is a part, but for present purposes there are no material changes.

Government is determined by different processes. We deal first with the Official Information Act 1982 (the OIA) before considering the powers of courts and inquiries in relation to information that is subject to security classifications. We note that while the OIA does not bind courts or inquiries in the sense of determining their decisions in relation to classified information, it is relevant to their decision-making.

Classified material and open Government

[6] The classification system exists in the context of a statutory framework, principally the OIA, which places particular emphasis on the public availability of official information. However, it is recognised that the principle of public availability has legitimate limits. This is reflected in the OIA's long title and in its purpose provision, section 4. It is also captured in the OIA's articulation of "the principle of availability" in s 5, which provides:

> **Principle of availability**
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> The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

[7] The concept of "good reason for withholding" is then developed in ss 6, 7 and 9.[2] Relevantly, s 6(a) and (b) provide that there is good reason for withholding official information where making the information available would be likely to prejudice:

a) the security or defence of New Zealand or the Government's international relations; or

b) the entrusting by foreign governments or agencies, or international organisations, of information to the New Zealand Government on a confidential basis.

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2 Section 7 can be ignored in the present context.

Reasons falling within s 6 are conclusive reasons for withholding official information.

[8] Section 9 deals with official information in respect of which there is no conclusive reason for withholding but which may be withheld in certain circumstances. The section contemplates a weighing process. It provides that there is good reason to withhold certain types of information "unless in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available".[3] Among the information that may be protected is information that is subject to an obligation of confidence. Such information may be withheld where its disclosure would be likely to (i) prejudice the supply of such information in the future or (ii) otherwise damage the public interest.[4]

[9] The consequence of this legislative framework is that the fact that particular official information bears a particular security classification is not determinative of whether the information will be disclosed or withheld under the OIA. This point is made in the *Cabinet Manual 2017*. Under the heading "Security classifications and endorsements and the Official Information Act" the Manual says:[5]

> 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

[10] To withhold a classified document under the OIA, then, the criteria set out in s 6 (or one of the other relevant provisions) must be satisfied. That requires an open-minded, objective appraisal. That said, if information has been properly classified at the top end of the scale, and the justification for its classification remains current, it

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3 Section 9(1).
4 Section 9(2)(ba).
5 Cabinet Office, *Cabinet Manual 2017* at [8.43].

is likely that the requirements of s 6 will be met and that there will be a conclusive reason for withholding the information under the OIA.

[11] The material issued by the Government about the classification system emphasises three points that are important in the present context:

a) First, it is critical that material be properly classified in the first instance. Normally, this will be the responsibility of the originator of a document or the compiler of the information. Classification should not be a matter of routine; rather, it should be a purposive exercise, in the sense that classification is intended to meet an identifiable risk of harm if disclosure were to be permitted. Classifications are not to be used to hide unlawfulness, inefficiency or administrative error or to prevent embarrassment to an agency.

b) Second, protection may not be required for an entire document. Classification of part of a document may be sufficient, perhaps only a sentence or paragraph. A discriminating assessment is required.

c) Third, classifications should be re-assessed periodically. A document that merits classification at one point in time may not merit it later. As circumstances change, classifications may need to change. It is for this reason that the *Protective Security Requirements* require agencies to keep the classifications assigned to particular documents or information under regular review.

[12] There is an added complexity in the present case. NZDF has advised that most of the relevant classified material is subject to a claimed security interest by foreign governments or agencies and/or international organisations. This includes material originally generated by NZDF as part of the NATO International Security Assistance Force operations at issue and material generated by the United States Government.

Classified material and court proceedings

[13] Where a claim is made in court proceedings that a document is protected by a national security classification and should not be disclosed, s 70 of the Evidence Act 2006 comes into play.[6] That empowers a judge to direct that a communication or information that relates to matters of State not be released in a proceeding if the judge believes that the public interest in disclosure is outweighed by the public interest in withholding. Under s 70(2), a communication or information that relates to matters of State incudes communications or information in respect of which a reason advanced in support of the application for non-disclosure is one of the reasons set out in ss 6, 7 or 9(2)(b)-(k) of the OIA.

[14] Despite the references in s 70(2)(a) and (b) to an application for a direction, a judge may give a direction under s 70 either of his or her own motion or on application.[7] A judge may also give any directions that are necessary to protect the confidentiality of, or limit the use that may be made of, any communication or information that is the subject of a s 70 direction but is disclosed to the judge in compliance with a judicial or administrative order.[8]

[15] Section 70(1) is framed in a way that is consistent with the principle of availability, in the sense that a judge has the power to order that material *not* be released where the public interest in withholding outweighs the public interest in disclosure. This suggests that the starting position is that official information should, in principle, be released.

Classified material and inquiries

[16] In its report entitled *A New Inquiries Act*, which led to enactment of the Inquiries Act 2013, the Law Commission discussed s 70 and the other provisions in the Evidence Act dealing with confidentiality and privileges.[9] It recommended that "the privileges relating to confidentiality, religious communications, matters of state

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6 Section 69 of the Evidence Act 2006, which deals with confidential material, may also be relevant, but we will focus on s 70.

7 Evidence Act 2006, s 52(2).

8 Section 52(4).

9 Law Commission *A New Inquiries Act* (NZLC R102, 2008) ch 9.

and confidential journalistic sources should apply before inquiries in the same way as they apply before courts."[10] That recommendation was accepted and is reflected in s 27(1) of the Inquiries Act, which provides:

> **Other immunities and privileges of participants**
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> (1) Witnesses and other persons participating in an inquiry (other than counsel) have the same immunities and privileges as if they were appearing in civil proceedings and the provisions of subpart 8 of Part 2 of the Evidence Act 2006 apply to the inquiry, to the extent that they are relevant, as if—
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> (a) the inquiry were a civil proceeding; and
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> (b) every reference to a Judge were a reference to an inquiry.

Subpart 8 of Part 2 of the Evidence Act deals with privilege and confidentiality and includes s 70.

[17] Sections 20 and 22 of the Inquiries Act are also relevant. Section 20 provides:

> **Powers to obtain information**
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> An inquiry may, as it thinks appropriate for the purposes of the inquiry,—
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> (a) require any person to—
>
> (i) produce any documents or things in that person's possession or control or copies of those documents or things:
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> ...
>
> (c) examine any document or thing for which privilege or confidentiality is claimed, or refer the document or thing to an independent person or body, to determine whether—
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> (i) the person claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality; or
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> (ii) the document or thing should be disclosed.

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[10] At 144.

[18] Although s 20(c) applies to claims based on both privilege and confidentiality, the Evidence Act treats such claims differently - they are different concepts with different effects. In particular:

a) If a claim of privilege is established, a judge has no power to remove the resulting protection because he or she considers that there is a greater countervailing public interest in disclosure.[11] In that sense, the protection is absolute.[12]

b) By contrast, where a claim of confidentiality (other than one arising from a privilege) is established, a judge has a discretion whether or not to allow disclosure.[13] The judge must weigh the competing interests: if the public interest in disclosure outweighs the other relevant interests, disclosure will be ordered.

[19] A claim that a document should not be disclosed in a proceeding because it relates to matters of State is similar to a claim for confidentiality under s 69 of the Evidence Act in that the judge is required to undertake a balancing exercise. The fact that s 20(c) of the Inquiries Act authorises the use of a third party to assess claims of privilege or confidence would permit the use of an independent person to assist with claims based on national security. Such a person might also perform the role of a Special Advocate in relation to material in respect of which the national security claim was upheld.

[20] Section 22 provides:

Disclosure of evidence

(1) An inquiry—

(a) may, on its own initiative or on the application of another person, order any person to disclose to any person participating in the inquiry any specified document, information, or thing that the person has produced before the inquiry; but

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11 Evidence Act, s 53. A judge may disallow a privilege in certain circumstances, however: see s 67.

12 The person with the benefit of the privilege may, of course, waive it.

13 Section 69.

(b) must not make orders for general discovery.

(2) An order given under subsection (1)(a) may impose appropriate terms and conditions in relation to—

(a) any disclosure required under that subsection; and

(b) the use that may be made of the information, documents, or things.

[21] Section 22 is important for two interrelated reasons:

a) First, it prohibits an inquiry from making orders for general discovery.

b) Second, it makes it clear that there is a distinction between disclosure of material to the inquiry by a participant and disclosure of that material to other participants. Under s 20(a)(i), an inquiry is entitled to call for the production to it of all relevant material;[14] under s 22(1), an inquiry has a discretion as to what of the material it receives should be made available to other participants.

The effect of these provisions is that participants in inquiries do not have the right to obtain all relevant material produced by other participants.

[22] Natural justice considerations may become relevant here, however. For example, although an inquiry may not determine the criminal, civil or disciplinary liability of any person, it may make findings of fault.[15] In making a finding that is adverse to any person, an inquiry must comply with the principles of natural justice. This requires that the person affected is aware of the matters on which the proposed finding is based and has the opportunity to respond to them.[16]

[23] The availability of classified material sourced from foreign governments or agencies or from international organisations will presumably be affected by the terms of any relevant inter-governmental agreement. NZDF advise that there is a

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14 This excludes privileged material, unless there is a dispute in relation to privilege.
15 Inquiries Act, s 11.
16 Section 14(3).

relevant agreement here – the Agreement between the North Atlantic Treaty Organization and the New Zealand Government on the Security of Information. In addition, to the extent that classified material was sourced through the Government Communications Security Bureau and/or the New Zealand Security Intelligence Service, they may also have relevant agreements.

[24] Given that this Inquiry was established as a Government Inquiry, and that the Inquiry's personnel will have appropriate security clearances and facilities, there should be little problem with the classified material being disclosed to the Inquiry. Disclosure beyond that may be problematic, however. In any event, we seek further submissions on this aspect.

Summary

[25] By way of summary, our preliminary views in relation to the Inquiry's approach to classified security information are as follows:

a) In principle, the Inquiry is entitled to call for the provision to it of all relevant information whatever its status (s 20(a)(i) of the Inquiries Act);[17]

b) There may be some complications in relation to foreign-sourced classified material, on which we seek further submissions;

c) Documents provided to the Inquiry will not automatically be provided to all participants in the Inquiry. Disclosure to participants is a matter for the discretion of the Inquiry (s 22 (1)(a) of the Inquiries Act);

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[17] The Prime Minister has the power under s 31(a) of the OIA to certify that the making available of any information would be likely to cause prejudice to the security or defence of New Zealand or the Government's international relations; if she does so, the Ombudsman may not recommend that the information be made available but only that making the information available be given further consideration by the appropriate person or body. The Prime Minister also has the power under s 27(3)(a)(i) of the Crown Proceedings Act 1950 to certify that disclosure of the existence of a document would be likely to prejudice the security or defence of New Zealand or the Government's international relations; in that event, the existence of the document may not be disclosed in interrogatories answered, or discovery made, by the Crown. We have taken no account of the existence of these powers.

d) If NZDF claims that particular material is subject to a national security classification, the Inquiry can assess that claim with a view to determining whether the material should be withheld from disclosure to other parties, with the assistance of an independent person if necessary (ss 20(c) and 27 of the Inquiries Act and s 70 of the Evidence Act);

e) The fact that material is not disclosed to all participants does not, of itself, mean that the Inquiry cannot take it into account, although natural justice concerns may arise in some circumstances.

[26] We ask that any further submissions on the matters covered in this Minute be filed with the Inquiry by email at the Inquiry's email address by 5 pm on Friday 10 August 2108, with copies to counsel assisting.

[27] We are providing copies of this Minute to the GCSB, the NZSIS, the Ministry for Foreign Affairs and Trade and the Department of Prime Minister and Cabinet, all of whom have an obvious interest in the issues it addresses, so that they have an opportunity to comment.

Sir Terence Arnold QC **Sir Geoffrey Palmer QC**

Parties:

Richard McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Forces
Mr Hager
Mr Stephenson