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

Submissions for New Zealand Defence Force in response to Minute No 3 of Inquiry

10 August 2018

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1. The New Zealand Defence Force (the NZDF) agrees with the preliminary views expressed by the Inquiry in its Minute No 3 of 19 July 2018 (**Minute 3**).

2. Drawing from the views expressed in Minute 3, the NZDF's position is that:

   (a) The security classification system, being a device for the management of particular documents and information within government, is not determinative of the use and disclosure of documents and information by the Inquiry.

   (b) It does not envisage that it will need to invoke the public interest immunity to withhold any material from the members of the Inquiry.

   (c) The legislative framework, and the principles of natural justice, allow the Inquiry to rely on information that has been withheld from other participants.

   (d) The participants' natural justice interests are likely to be sufficiently protected in circumstances where the NZDF discloses to them all information within its control where that disclosure does not pose an *existing* and *real* risk of prejudice to the security, defence, and/or international relations interests of New Zealand.

   (e) In assessing whether material poses an existing and real risk of prejudice to the security, defence and/or international relations interests of New Zealand, each document should be considered individually to assess whether a risk of prejudice can be avoided by redactions, or the provision or summaries or 'gists'.

   (f) The evaluation of prejudice by NZDF and other Crown agencies may be scrutinised by the Inquiry with or without the assistance of an independent person.

3. The NZDF does not address, at this stage, the need for particular restrictions on publication under s 15 and s 22(1), or the potential use of a special advocates. It understands from Minute 3 that at this stage submissions are to be focused on the disclosure of material beyond the Inquiry in a general sense and that the potential application of the provisions of the Act to particular material, predominantly evidence but also submissions, is something that may follow in

due course. It understands, from the Inquiry's Minute No 1,[1] that the process the Inquiry proposes to follow will be the subject of further submissions in due course.

National security information

4. The NZDF agrees with the way in which the members of the Inquiry have described the application of the New Zealand security classification system in Minute 3.[2]

5. In circumstances where the classifications themselves are not determinative, principles that may be of relevance to the use and disclosure national security information[3] might be drawn from the New Zealand Law Commission's paper on national security information in proceedings. In that paper, the Commission said that national security information is information that, if disclosed, might risk prejudice to:

- New Zealand's security;
- defence operations;
- New Zealand's international relationships, including information-sharing relationships;
- the ability to prevent, investigate, detect and prosecute offences;
- the safety of any person, both in New Zealand or overseas; and
- vital economic interests, including interests related to international trade.[4]

[1] Inquiry Minute No 1 of 10 July 2018 ("Minute No 1") at [14].
[2] Inquiry Minute No 3 of 19 July 2018 ("Minute No 3") at [3] – [5] and [9].
[3] The New Zealand Law Commission used this term in its Issues Paper 38 on National Security Information in Proceedings ("Law Commission, Issues Paper 38"), at [1.12] ("Several statutes contain provisions that limit the disclosure of information when the disclosure would adversely affect New Zealand's national interests. We refer to this information as "national security information" for brevity.")
[4] Law Commission, Issues Paper 38 at [1.12].The issues paper draws on relevant legislation which contains provisions limiting the disclosure of information to non-Crown parties where such disclosure would adversely affect New Zealand's national interests. See for example s 29AA(7) of the Passports Act 1992.

6. Considerations of this sort are reflected in general terms in the provisions of the Inquiries Act relating to potential restrictions on access to information before the Inquiry[5] and are reflected in the New Zealand Law Commission's report on the Inquiries Act.[6]

Disclosure to the members of the Inquiry

7. The starting point is that the Inquiry is empowered to require a person to provide to the Inquiry any information or to produce any documents in his or her possession or control.[7]

8. The Inquiry's power to compel the provision of information is qualified, to an extent, by a participant's right to invoke any immunities or privileges that would otherwise be available in civil proceedings, including a public interest immunity.[8]

9. It follows that a participant may seek a direction, for instance, that information relating to "matters of State" does not have to be disclosed to the Inquiry. The Inquiry would be entitled to inspect the information and could give such a direction only where the public interest in disclosure is outweighed by the public interest in withholding the information.[9] In civil litigation, if the balance is struck against disclosure, the information is then excluded altogether.[10] Under the Inquiries Act, if the balance is struck against disclosure, the information may be excluded altogether or considered in private.

10. The NZDF does not envisage the need to invoke the public interest immunity to exclude material from the Inquiry. The nature of an inquiry under the Inquiries Act is very different to that of a proceeding in a court, where the immunity may well become relevant in circumstances such as these. The immunity does not arise here because the NZDF has committed to providing *to the Inquiry* all

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[5] Inquiries Act 2013, s 15(2)(d).
[6] Law Commission, "A New Inquiries Act" (2008), at [6.23] and [6.42].
[7] Minute No 3 at [25](a); Inquiries Act 2013, s 20(a).
[8] Inquiries Act 2013, s 27(1), which provides that persons participating in an inquiry 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. S 70 of the Evidence Act 2006, which codifies the common law public interest immunity, falls within subpart 8 of part 2 of the Evidence Act 2006 and has been the subject of discussion in cases such as *Choudry v Attorney-General* [1999] 3 NZLR 399.
[9] Evidence Act 2006, s 70(1), as discussed in Minute No 3 at [13] and [16].
[10] *Al Rawi v The Security Service* [2011] UKSC 34 (UKSC) at [23] and [80].

material that may be relevant to the Inquiry's Terms of Reference, irrespective of the security classification that the information may have.

Disclosure to the other participants of the Inquiry

11. The NZDF does, however, need to resist the disclosure of highly sensitive information – the disclosure of which would be likely to prejudice New Zealand's national security, defence, and international relations interests – to other participants in the Inquiry.

12. The NZDF agrees with the Inquiry's preliminary view that the effect of sections 20 and 22 of the Act is that participants in inquiries do not have the right to obtain all relevant material produced by other participants,[11] and that the Inquiry is still able to have regard to that information.[12]

13. The NZDF agrees also that, in determining whether to order the NZDF to disclose specified information to other participants, the Inquiry must have regard to the principles of natural justice.[13]

Factoring in natural justice principles

14. The requirements of natural justice are flexible,[14] elastic,[15] contextual, [16] and infinitely variable.[17] As the Supreme Court said in *Dotcom v United States of America*:[18]

> The content of natural justice, however, is always contextual. The question is what form of procedure is necessary to achieve natural justice without frustrating the apparent purpose of the legislation.

15. It is of relevance to note, in the context of s 7(4) of the Inquiries Act,[19] the following comments of the New Zealand Law Commission:[20]

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[11] Minute No 3 at [21] and [25](c).
[12] Minute No 3 at [25](e).
[13] Minute No 3 at [22]; Inquiries Act 2013, s 14(2)(a), s 3(1)(c), s 10; see also *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 (CA) at 653.
[14] *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 132.
[15] *Canterbury Pipelines v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 357.
[16] *Dotcom v United States of America* [2014] 1 NZLR 355 at 399, per McGrath J.
[17] *R v Home Secretary ex p Santillo* [1981] QB 778.
[18] *Dotcom v United States of America* [2014] 1 NZLR 355 at 399, per McGrath J.
[19] Which enables terms of reference for an inquiry to include administrative or procedural matters
[20] Law Commission, "A New Inquiries Act" (2008), at [6.45].

> We think the Government should remain free to include access restrictions within the terms of reference. Inquiries are after all tools of the Executive, which must be free to fashion their construction, and will face any political consequences of doing so.

16. Consistent with the terms of the Inquiries Act, the terms of reference enable the Inquiry, where appropriate, to restrict access to Inquiry information in order, amongst other things, to protect the security or defence interests of New Zealand or the international relations of the government of New Zealand, to protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation and to protect the identity of witnesses.[21]

17. The NZDF acknowledges that, where sensitive information needs to be withheld from other participants, those participants will not be in a position to assist the Inquiry in evaluating and challenging that information. But the NZDF's view is that the concerns of other participants need to be considered within the context of the way in which natural justice principles come to be applied in an inquiry such as this.

18. Concerns in the nature of those expressed by other participants were explored by the UK Supreme Court in *Al Rawi*.[22] The plaintiffs had brought a civil claim alleging that the Security Service was complicit in their false imprisonment and torture by foreign authorities.

19. The Security Service applied for an order that part of the proceeding be conducted by way of a "closed material procedure". The procedure would enable the Security Service, in circumstances where it was necessary in the interests of national security and/or international relations, to disclose sensitive information to the Judge but not to the other parties.

20. On appeal, the Supreme Court dismissed the application on the basis that the proposed procedure, which would involve a departure from the principles of open justice and natural justice,[23] is a matter for Parliament.[24] The Court

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[21] Terms of Reference: Government Inquiry into Operation Burnham and Related Matters at [14].
[22] *Al Rawi v The Security Service* [2011] UKSC 34 (UKSC).
[23] Ibid., at [14] and [22].
[24] Ibid., at [44] and [48].

observed that the "closed material procedure" would result in an "inequality of arms"[25] and that:[26]

> To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.

21. These observations are highlighted here because the position under the Inquiries Act is very different. While the NZDF is mindful of the participants' concern that they will not be in a position to consider and to challenge actively documents that the Inquiry decides not to provide them, the position reached in *Al Rawi* is distinguishable here for two key reasons.

22. The first is that, in this context, there *is* a statutory foundation for, and an approach that, protects the disclosure to participants of national security information where a claim for protection is well made.[27] As the Inquiry has noted, the effect of sections 20 and 22 of Act is that participants do not have the right they would otherwise have at common law to obtain all relevant material that is before the Inquiry.[28]

23. The second reason is that courts and inquiries are entirely different creatures. Whereas "it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process",[29] the function of an inquiry is "inquisitorial in nature".[30]

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[25] Ibid., at [41].
[26] Ibid., at [93].
[27] Incidentally, the Justice and Security Act 2013 now allows the use of closed material procedure in the United Kingdom.
[28] Minute No 3 at [22].
[29] *Al Rawi v The Security Service* [2011] UKSC 34 (UKSC) at [22].
[30] *Re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (CA) at 115.

24. Inquiries do not have the power to determine the liability of any person,[31] and their findings and recommendations do not bind any one. The corollary is that inquiries do not come with all the protections of a court hearing.[32]

25. On this point, in *Al Rawi*, the Supreme Court noted that in "cases of this kind, necessarily involving highly sensitive security issues"[33], the matter should go for determination to a body "which does not pretend to be deciding such claims on a remotely conventional basis ... That, of course, explains why ... they are to be the subject of an inquiry under the chairmanship of Sir Peter Gibson".[34]

26. Examples are available of the ways in which inquiries are able to manage natural justice interests without document disclosure prejudicing security, defence and international relations interests:

(a) In the Baha Mousa Public Inquiry in the United Kingdom (an inquiry under the UK Inquiries Act 2005 which concluded in December 2011), the *Protocol for the Production of Documents and Other Evidence to the Inquiry by the Ministry of Defence*[35] required the Ministry of Defence to provide all relevant material to the Inquiry and, in so doing, to identify whether the material was capable of being provided, in redacted form or otherwise, to other core participants in the inquiry. In deciding whether to provide the material at all or subject to redactions, the Ministry was to have regard to ss 19 and 22 of the 2005 Act which permits withholding of information if it is privileged or of disclosure could cause "harm". The Chairman of the Inquiry was empowered to accept or refuse applications by the Ministry to withhold or redact.

(b) In the Al-Sweady Public Inquiry in the United Kingdom (an inquiry under the UK Inquiries Act 2005 which was concluded in December 2014) the *Protocol for the Redaction of Documents and Other Evidence Provided to*

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[31] Inquiries Act 2013, s 11(1).
[32] Law Commission "The Role of Public Inquiries – Issues Paper 1" (Wellington, 2007) at [103].
[33] *Al Rawi v The Security Service* [2011] UKSC 34 (UKSC) at [86].
[34] Ibid., at [86] and [87].
[35] The Baha Mousa Public Inquiry, Key Documents, available at: http://webarchive.nationalarchives.gov.uk/20120215203943/http://www.bahamousainquiry.org/key_documents/index.htm

the Inquiry by the Ministry of Defence provided for essentially the same scheme as that in the Baha Mousa Inquiry. [36]

(c) In the Iraq Inquiry (a Privy Counsellor Committee of Inquiry which concluded in July 2016), the *Protocol between the Iraq Inquiry into Her Majesty's Government regarding Documents and Other Written and Electronic Information*[37] required the Government to supply all relevant information to the Inquiry on the basis that the Inquiry committed to adhere to Government security rules and procedures concerning levels of security classification and to commitments or understandings the Government had in place with foreign governments or international bodies in relation to security and non-disclosure of information originating from that foreign government or international body. If the Inquiry decided that any information was relevant information that it wished to include in its proceedings, a process was prescribed to avoid harm or damage to (amongst other things) national security, defence interests and international relations involving originators of the information proposing that material be withheld or redacted and potential agreements with the Cabinet Secretary, in the absence of which information was not to be released.

(d) The current Australian inquiry by the Inspector-General of the Australian Defence Force into possible breaches of the Laws of Armed Conflict in Afghanistan by members of the Australian Defence Force Special Air Service (SAS) is being conducted privately.[38]

27. Although *Al Rawi* is distinguishable, to the extent that participants need to be able to respond meaningfully to material that may adversely affect them,[39] the

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[36] Al Sweady Inquiry, Protocol for the Disclosure of Documents and Other Information provided to the Inquiry by the Ministry of Defence, Core Participants and others, available at: http://webarchive.nationalarchives.gov.uk/20150115120102/http:/www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/amendedprotocolforthedisclosureofdocuments6march2012.pdf

[37] Protocol between the Iraq Inquiry and Her Majesty's Government regarding Documents and Other Written and Electronic Information, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61337/protocol.pdf

[38] Inspector-General ADF Afghanistan Inquiry, see: http://www.defence.gov.au/mjs/igadf-afghanistan-inquiry.asp

[39] Inquiries Act 2013, s 14(3); *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC) at 671: "any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

NZDF is committed to providing to the other participants the information it is able, without jeopardising New Zealand's national security, defence, and international relations interests.

International obligations – an additional layer

28. As the Inquiry has observed, a relevant factor when considering New Zealand's national security, defence and international relations interests is the fact that much of the sensitive material to be provided to the Inquiry is material in relation to which foreign governments or agencies and international organisations may assert control.[40]

29. Section 15 of the Inquiries Act, considered alongside paragraph 14 of the Terms of Reference, place a focus on whether disclosure may prejudice the security or defence of New Zealand or the international relations of the government. Information sharing relationships form a part of those international relations.

30. The existence of an international obligation that would be breached by disclosure to a non-Crown party is particularly relevant. But it is not the only means by which such prejudice may arise. As the New Zealand Law Commission said:[41]

> The notion of protecting national security must also take into account the importance of New Zealand's intelligence-gathering partnerships and the confidence our allies have in us as well is the methodologies and sources used and the potential consequences of these being made public.

31. The Chief Ombudsman, in considering NZDF's refusal under s6(b) of the Official Information Act to release the national security information that is subject to the control of foreign governments or international organisations, said:

> The test under section 6(b) is not whether there is a public interest in release of the information, or whether the disclosure of the information itself would be damaging for security reasons. Rather the test is whether the disclosure of information would prejudice the New Zealand Government from receiving such information in the future. If there is a clear understanding that New Zealand received such information in confidence and the source of that information is opposed to its disclosure, then it is axiomatic that ignoring that obligation of confidence by releasing the information publicly will have

[40] Minute No 3 at [23] - [24].
[41] Law Commission, "A New Inquiries Act" (2008), at [2.28].

serious consequences on the future supply of information from that source.

32. At this stage, and with deference to the caution that NZDF understands is to be expressed in a memorandum from the Ministry of Foreign Affairs and Trade (**MFAT**), NZDF hopes to be in a position to provide all potentially relevant information held by it to the Inquiry, including information where international partners have equity. As to onward disclosure to core participants and others, NZDF shares MFAT's very real concern about partners' willingness to consent to production to the Inquiry where that might lead to disclosure beyond the Inquiry.

33. The NZDF has already sought the approval of international partners to release publicly particular key information on Operation Burnham. The requests have not been granted by those partners.[42] Should the Inquiry request that further attempts be made in relation to identified material, in line with the model proposed below, MFAT and the NZDF and other relevant agencies would continue to work with international partners to explore the request and report back to the Inquiry.

34. With this collection of considerations in mind, the NZDF submits that the participants' natural justice interests (insofar as access to material is concerned) can be addressed in an inquiry such as this, where significant national security interests are at stake, through a careful assessment of the nature of the relevant documents so that all information that can properly be released is released.

35. NZDF suggest that the relevant issue, when considering whether certain material should be withheld, is whether the release of particular material would pose an existing and real risk of prejudice to the security, defence and/or international relations interests of New Zealand.

A proposed approach

36. The NZDF suggests, for the Inquiry's consideration, the following approach:

(a) Initially, the Inquiry alone will hold all sensitive material provided to it by NZDF and other Crown agencies, whether by a preliminary restriction

[42] Chief Ombudsman's Opinion on OIA requests about Operation Burnham (Case numbers 452111, 453166, 455308, 450612, 458164) (9 April 2018), at [93]-[100].

order or other means, so that having regard to its Terms of Reference the Inquiry is then able to undertake a review, culminating in an indication of the material that it considers should be disclosed to particular participants on the grounds that

(i) it is relevant to those participants;

(ii) disclosure would be unlikely to pose a present and real risk of prejudice to the security, defence and international relations interests of New Zealand.

(b) The NZDF would then evaluate the material to consider whether in its view, in each case, disclosure would pose a present and real risk of prejudice to the security, defence, and international relations interests of New Zealand.

(c) In relation to each item of material that is subject to New Zealand control, the NZDF and other Crown agencies would then consider whether the material is able to be disclosed to the other participants in full or in redacted, summary or 'gisted' form.

(d) In relation to each item of material that is subject to foreign control, if the item was unable to be disclosed in some form to participants, the NZDF would demonstrate that:

(i) the material is controlled by an international partner; and

(ii) genuine and appropriate attempts have been made to ascertain if the material could be disclosed in some form to participants.

(e) If the Inquiry takes a different view in relation to particular documents, the matter might be addressed in a closed hearing.

Assistance by an independent person

37. The NZDF understands that the Inquiry might wish to obtain assistance from an appropriate independent person for purposes of undertaking, reviewing, or evaluating the NZDF's conclusion that certain documents cannot properly be

disclosed to the other participants[43] and it has no objection to an approach of that sort if additional resources are needed.

38. However, the NZDF reserves its position in relation to the use of an independent person beyond this scope, including the potential use of a special advocate. It anticipates that this is a topic that will arise for discussion on the further submissions that are to be made in due course when the Inquiry members have given their preliminary views on the process they propose to follow.[44] For now, NZDF notes that there is no precedent for the appointment of a special advocate in an inquiry in New Zealand or the UK. That is because, as noted by the Chairman of the UK's Litvinenko Inquiry, the circumstances in which it would be necessary to make such an appointment would be *"wholly exceptional, bearing in mind the inquisitorial nature of an Inquiry constituted under the Act".*[45] Accordingly, the necessity of appointing a special advocate in an inquisitorial procedure cannot properly be considered in the abstract and should be addressed only once the Inquiry has a proper understanding of the material that will be available to the Inquiry and to Core Participants.

39. In compiling this memorandum, the NZDF has worked closely with the Crown Law Office, the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Department of the Prime Minister and Cabinet and the MFAT to ensure that an overall Crown view is presented to the Inquiry on the key matters addressed in this memorandum and to be addressed in the memoranda of other agencies.

Dated 10 August 2018

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[43] As proposed in Minute No 3 at [19] and [25](d).
[44] As indicated in Minute No 1 at [14].
[45] The Litvinenko Inquiry, *Ruling on the Application for the Appointment of a Special Advocate,* 9 October 2014 at [5] http://webarchive.nationalarchives.gov.uk/20160613090338/https://www.litvinenkoinquiry.org/documents