UNDER **THE INQUIRIES ACT 2013**

IN THE MATTER OF **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Minute: 10 December 2018

MINUTE No 7 OF INQUIRY

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[1] In Minute No 6 dated 29 November 2018 the Inquiry made a number of orders under the Inquiries Act 2013, including an order under s 20 that Mr Hager provide to the Inquiry, on a confidential basis, the names and contact details of his sources by Friday 14 December 2018. The Inquiry also made orders to protect the confidentiality of those sources.

[2] The Minute noted[1] that Mr Hager had advised (before the procedural hearings on 21–22 November 2018) that one of his sources would provide information to the Inquiry only if satisfactory protective measures were in place and that Mr Hager had provided the Inquiry with a written set of conditions.[2] The Minute said that these would be addressed in Ruling No 1.

[3] As Minute No 6 explained, the orders referred to above were "intended to protect the names and any identifying particulars of [Mr Hager's] sources who seek confidentiality, so that they can have preliminary discussions with Counsel Assisting about their concerns and the protections that the Inquiry is able to provide …".[3] The purpose was, then, to enable discussions between Counsel Assisting and the source about the type of measures the Inquiry could take to protect the source's identity. The Minute went on to say that the sources could

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1 Minute No 6 at [21](b).

2 https://www.operationburnham.inquiry.govt.nz/assets/IOB-Files/Subs/181107-Document-from-Hager-to-Counsel-Assisting-CONDITIONS-FOR-SOURCE-ENGAGEMENT-WITH-INQUIRY.pdf

3 At [22].

participate in these discussions "with the assurance that protections will be in place to ensure that their involvement with the Inquiry will not become more widely known than (a) the Inquirers and (b) Counsel Assisting and that nothing they say can be used against them subsequently".[4]

[4] In response to Minute No 6, the Inquiry has received a letter from Mr Hager, in which he refers to his earlier discussions with Counsel Assisting about identifying his sources, during which he produced his set of conditions. While his letter is not entirely clear on this point, he seems to indicate that he is not prepared to provide his sources' details until there is "clarity" about the conditions that he proposed.

[5] It may assist, then, if we set out the conditions which Mr Hager proposed and our response to them, in advance of Ruling No 1.

[6] Mr Hager's list of conditions is as follows:

> Conditions for source being willing to meet Inquiry staff and commissioners
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> 1. While a pseudonym for the person on documentation is worthwhile, it is vital that the commissioners and counsel understand that either the content of testimony or a description of their role are in many cases likely, if shared with others, to reveal the source's identity. This is because a limited number of people were involved in the operations and there were few people in each type of role within the operations. The detail of testimony is for many staff near enough to a unique identifier that would allow NZDF to work out and potentially punish the source. Therefore the first condition is that the Inquiry cannot show the written or oral testimony to others ever, i.e. only the commissioners and immediate staff would ever see it; and nor would the Inquiry ever give others even general indications of a source's role and job.
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> 2. In the same way, the information presented in the Inquiry report(s) could similarly reveal the source's identity, simply by its specific details. The Inquiry would agree to check with the source all information in the reports that comes from them before finalising reports and before showing them to others. The Inquiry would meet the source and check they are happy with what was written, that it is what they meant to say and that they are confident that it does not reveal them. This is the approach followed by the IGIS.

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4 At [22].

3. The source will not be cross examined by other parties (especially not the NZDF or other government agencies) and retains at all times the right to pull out from the Inquiry and have all their written submissions and the Inquiry notes and writing based on their input deleted.

4. I note that these are the same conditions that are standard with my sensitive sources, both for their protection and to give them confidence to engage with me in the first place.

5. All contact would be via me, to minimise risk.

6. Travel costs would be covered if the person has to travel long distance. If they are paid travel expenses or other costs, their name and details would not go to [the Department of Internal Affairs] or others. Again, most simply, it could be done via me or, where appropriate, [Mr Stephenson's] lawyers.

7. The sources would be able to see evidence from NZDF-sourced (i.e. non-whistleblower) witnesses and see NZDF documents so they can respond to them. They should be given adequate time to read and think about the materials (eg 28 days).

[7] We note that condition 4 in the foregoing list is not a condition but rather a statement of Mr Hager's standard practice. Accordingly, we address only conditions 1 – 3 and 5 – 7 in turn below.

Condition 1

[8] The Inquiry is, as will be obvious from Minute No 4 and the Sensitive Witness Protocol (the Protocol), well aware of the concern expressed in lead-in to condition 1. The steps set out in the Protocol in relation to closed session interviews and hearings to take evidence are sufficient to meet condition 1.

[9] The Inquiry's obligation to meet the requirements of natural justice may mean that particular propositions drawn from what it is told by particular witnesses must be put in some way to persons about whom adverse comment might be made. The Protocol addresses this in a way that should meet any legitimate concern that a confidential witness might have. Clause 16 of the Protocol provides:

> If the Inquiry considers it necessary to meet the requirements of natural justice for some level of disclosure of the witness's statement to a party to the Inquiry, the Inquiry will consult with the witness before this course is

> taken. The Inquiry will take steps to ensure that any disclosure to an affected party is made in a way that protects the identity of the witness.

Obviously, the Inquiry cannot agree to some arrangement that will prevent it from meeting its natural justice obligations.

Condition 2

[10] In writing its report, the Inquiry will, of course, be concerned to avoid dealing with the evidence in a way that reveals sources who have been accorded confidentiality. The Inquiry is prepared to consult with witnesses whose evidence is of a type that may reveal their identity to ensure that the relevant parts of the report are drafted in a way that both fairly summarises their evidence and does not inadvertently reveal their identity. That is as far as it is prepared to go.

Condition 3

[11] Mr Hager's condition 3 contains two distinct requirements. The first is that the source will not be cross-examined by any core-participant or other party. As Minute No 4 and the Sensitive Witness Protocol make clear, that is the position that the Inquiry has adopted. The testing of the evidence of sensitive witnesses will be carried out by Counsel Assisting and the members of Inquiry.

[12] The second aspect of condition 3 is that the source retains the right to pull out from the Inquiry at any time and have all their written submissions and the Inquiry notes and writing based on their input deleted. That is not something that the Inquiry can properly accept, for both legal and practical reasons.

[13] As to the legal reason, the Inquiry has a range of legal powers that it is entitled to exercise to obtain information and evidence. It must consider whether it should exercise them or not in light of the circumstances at the relevant time. It is not prepared to give what amounts to a blanket undertaking that it will not exercise those powers whatever the circumstances that may arise at some point in the future. As to the practical reason, having obtained evidence on oath and

worked it into its overall investigative undertaking, it is difficult to see how the Inquiry could simply expunge it, particularly if the witness sought to withdraw at a late stage. The source's evidence will, of necessity, become assimilated into the Inquiry's work stream.[5] More importantly, it is difficult to see how the Inquiry could agree to such a condition for Mr Hager's sources but not for other witnesses. Obviously, it would not be viable for the Inquiry to conduct its investigation on the basis that all witnesses had the right to pull out at any time and have their evidence removed from the Inquiry's purview.

Condition 5

[14] Minute No 6 directed that Counsel Assisting were not to make initial contact with Mr Hager's sources without giving him 24 hours' notice of their intention to do so. In condition 5, however, Mr Hager requires that all contact with his sources will be via him. The Inquiry is not prepared to agree to that. Our intention is that all witnesses will be the Inquiry's witnesses. The Inquiry must have the ability to deal with witnesses directly, rather than through an intermediary (in this instance, Mr Hager).

Condition 6

[15] Section 25 of the Inquiries Act provides for the reimbursement of reasonable costs and travelling expenses for summonsed witnesses and for others who participate in an inquiry. Obviously, a sensitive witness's expenses would be met by the Inquiry, even if he or she was not summonsed to give evidence, and that would be done in a way that would not reveal their identity. So there is no difficulty with this condition.

Condition 7

[16] This condition is based on a misunderstanding of the role of a witness such as this in an inquiry. Fact witnesses are there to give evidence about factual matters within their knowledge. Their role is not, gratuitously, to review and

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5 This is, of course, not the position when a court reserves an admissibility issue for determination later in a hearing.

comment on the evidence of other witnesses or the documents provided by other parties. If there are issues relevant to the evidence of a witness arising from the evidence of others or from the documents, Counsel Assisting and/or members of the Inquiry will consider whether they need to be raised with the witness. If they consider that there would be value in seeking comment from the witness, they will do so.

Conclusion

[17] The Inquiry wishes to have discussions with the confidential sources of both Mr Hager and Mr Stephenson about their concerns and the ways that the Inquiry can provide them with protection. It wishes to do this directly, rather than through any intermediary. It was for that reason that the Inquiry made the orders it did. We ask that Mr Hager comply with the order made.

Sir Terence Arnold QC

Sir Geoffrey Palmer QC

Parties:
Mr McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Force
Mr Hager
Mr Salmon for Mr Stephenson