

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND  
RELATED MATTERS

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**Procedural protocol for review of classified information / claims to withhold information from disclosure**

***A Introduction***

[1] In Minute No 4<sup>1</sup>, the Inquiry advised that it had retained a barrister, Mr Ben Keith, to review all classified information provided to the Inquiry in order to assess the basis of classification claims and consequent requests for non-disclosure of the information to core participants and/or the public. In Minute No 6,<sup>2</sup> as a result of an increased volume of material to be considered, the Inquiry advised that it had also retained the services of Mr David Johnstone to work with Mr Ben Keith in undertaking this review. This protocol sets out the procedure for review of classified information. This protocol was released in draft form on 9 November 2018, and was confirmed in the Inquiry's first Ruling on 21 December 2018.<sup>3</sup>

[2] As set out in Minute No 4 at [5] and [21], the Inquiry has the power under s 27 of the Inquiries Act 2013 and s 70 of the Evidence Act 2006 to assess claims to withhold particular information from public or other disclosure. As also set out, the Inquiry will deal with classified information in accordance with protective security requirements unless the information is declassified or disclosed by agreement, or an order for disclosure is made.

[3] The review procedure will enable the basis for classifications of information to be identified and assessed, and the possibility of disclosure in some form to be discussed by the reviewer (or reviewers, being Mr Keith, Mr Johnstone, and/or any other persons the Inquiry may retain in the future to undertake this work) and the relevant agency (or agencies). Ultimately, it may be necessary for the Inquiry to determine claims to withhold information from disclosure, following receipt of submissions.

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<sup>1</sup> Minute No 4 of the Inquiry dated 14 September 2018.

<sup>2</sup> Minute No 6 of the Inquiry dated 29 November 2018.

<sup>3</sup> Ruling No 1 of the Inquiry dated 21 December 2018, at [91].

[4] As has occurred in other inquiries and in court proceedings in New Zealand and elsewhere, the Inquiry anticipates that some classifications may be overbroad, outdated, overtaken by disclosures that have already occurred or outweighed by contrary public interest considerations favouring disclosure. It is expected that the review process, with the full and prompt cooperation of the parties seeking to withhold information from disclosure, will provide an efficient way to progress such matters.

***B Outline of procedure***

[5] The review procedure involves three steps:

- (a) Identification and assessment of the claimed grounds for non-disclosure;
- (b) Consultation with the relevant agency or agencies concerning claims;
- (c) Referral of matters to the Inquiry.

[6] In addition:

- (a) The reviewer will consult with and report to the Inquiry as required. They will also report to core participants and other interested parties from time to time.
- (b) The Inquiry may seek further submissions from core participants and others on matters of disclosure.

***Step 1: Identification and assessment of claimed grounds for non-disclosure***

[7] Claims to withhold evidence from public or other disclosure on public interest grounds must be made scrupulously and on a cogent and specific factual basis.<sup>4</sup>

[8] This step of the review process will therefore involve:

- (a) Identification of the particular grounds claimed for non-disclosure of information;  
and

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<sup>4</sup> See, for example, *Choudry v Attorney-General (No 1)* [1999] 2 NZLR 582 (CA), 590 and 596.

- (b) An assessment of those grounds, including whether they are tenable, relevant and current on their facts; whether all or any of the withheld information is already in the public domain; whether similar information has been previously or is routinely made publicly available, including, for example, in other inquiries; and if grounds to withhold are made out, whether there is nonetheless a compelling and contrary public interest in terms of s 70(1) of the Evidence Act.

[9] If the reviewer accepts that the information justifies classification, and that the public interest in disclosure is outweighed by the public interest in withholding the information from disclosure in terms of s 70 of the Evidence Act, they will advise the relevant agency and the Inquiry accordingly. If the Inquiry agrees with the reviewer's assessment, it will make orders for non-disclosure and non-publication of the information. If it disagrees with the reviewer's assessment, it will advise the relevant agency and the reviewer and will proceed to resolve the matter as set out in step 3.

***Step 2: Consultation with relevant agencies concerning claims***

[10] Where the reviewer doubts whether there is due reason to withhold all or part of particular information from public or other disclosure, the review process will entail:

- (a) Provision by the relevant agencies of any additional explanation or justification for the claim to withhold, including, for example, in light of prior public disclosure;
- (b) Consultation between the reviewer and the relevant agencies over whether all or some of the information may be disclosed by agreement, including in redacted or summary form.

[11] Any agreement reached between the reviewer and a relevant agency will be subject to approval by the Inquiry. If the Inquiry does not approve the agreement reached, it will proceed to resolve the matter as set out in Step 3.

***Step 3: Referral of matters to the Inquiry***

[12] In the event that:

- (a) the Inquiry either does not agree with the reviewer's assessment at the conclusion of Step 1 or does not accept any agreement reached at Step 2; or
- (b) a difference of view emerges at Step 2 between the reviewer and the relevant agency as to disclosure,

the Inquiry will determine the matter in accordance with the criteria in s 70 of the Evidence Act, after considering any submissions from the relevant agency and the reviewer.

### ***Consultation and reporting***

[13] The reviewer will consult with the Inquiry throughout the review process and so as to provide necessary transparency will, as directed, report to the Inquiry and as appropriate to others on that process.

### ***Submissions or comment from participants***

[14] The Inquiry may seek submissions from participants relevant either to general aspects of disclosure/non-disclosure or to particular matters. By way of example, such submissions might address whether the same or similar material to that at issue is publicly available elsewhere or, if information is disclosed to participants in redacted or summary form, whether further disclosure is required.