



25 March 2019

Hon Sir Terence Arnold QC
Rt Hon Sir Geoffrey Palmer QC
He Uiuinga i a Inquiry into Operation Burnham
PO Box 12008
Wellington 6011

Dear Sir Terence and Sir Geoffrey

Review of classified/withheld material: Cabinet papers relevant to Inquiry

1. Further to our appointment and instruction under the Inquiry *Procedural protocol for review of classified information / claims to withhold information from disclosure*, as finalised on 20 February 2019, and to our discussion of 11 March, we are able to report under paragraph [6](a) of the *Protocol* that we have reached the point that the first tranche of documents that have been withheld to date can be released.
2. This first tranche comprises a set of Cabinet documents concerning New Zealand deployments to Afghanistan at the relevant times. In accordance with paragraphs [5](a) and [5](b) of the *Protocol*:
 - 2.1. We have identified and assessed the claims to non-disclosure made in respect of those documents; and
 - 2.2. We have consulted with relevant Crown agencies – the Department of Prime Minister and Cabinet, the Government Communications Security Bureau, the Ministry of Foreign Affairs and Trade, the New Zealand Defence Force and the New Zealand Security Intelligence Service and also Crown Law – over those claims.
3. We are able to advise that:
 - 3.1. We have required the Crown agencies to indicate the specific and cogent grounds on which they seek to withhold passages of these documents.

3.2. We have tested these claims in terms of paragraph [8] of the *Protocol*, and:

3.2.1. The relevant Crown agencies have withdrawn a substantial number of claims to withhold passages of those documents. A number of the documents are now able to be disclosed in full;

3.2.2. In respect of the remaining claims to withhold passages of the other documents in this tranche, the Crown agencies have agreed to provide both an indication of the nature of that claim and, where appropriate, some description of the withheld passages; and

3.2.3. The Crown agencies have agreed that disclosure of these documents, other than the withheld passages, does not prejudice or does not unduly prejudice national security or other interests found in s 70 of the Evidence Act 2006.

4. As a result, and leaving aside certain passages that we discuss below, we consider that there are specific and cogent grounds, not outweighed by public interest in disclosure, for withholding passages still withheld by the Crown. In particular:

4.1. A number of short passages currently withheld from the documents relate to the technical, logistical and other details of the deployment and resourcing of military and intelligence personnel. The Crown agencies have sought to demonstrate that:

4.1.1. Disclosure of those details, though relating to past deployments, would materially prejudice national security and the safety of those personnel; and

4.1.2. Given the very limited nature of that detail, there is not a sufficient contrary public interest to warrant disclosure.

As noted, we had contested a number of similar claims that the Crown has now withdrawn. We consider that these claims are made out in respect of these remaining passages.

4.2. Several longer passages comprise statements made in confidence by foreign government officials, along with some shorter references to the detail of assistance provided by other governments. The Crown agencies have sought to demonstrate that disclosure of such statements would prejudice New Zealand's international relations and its national security. While we challenged some such claims, and these have been withdrawn:

4.2.1. We accept that assessment as it relates to these passages; and

4.2.2. Having reviewed the relevant passages, we do not consider that there is a sufficient contrary public interest to warrant disclosure.

- 4.3. The Inquiry may wish to consider whether, if this material is relevant to its work, to ask the New Zealand government to seek agreement by these other governments to disclosure of the statements separately below.
5. There are four other categories of passages that the Crown agencies presently seek to withhold:
 - 5.1. One is awaiting waiver of privilege.
 - 5.2. One passage comprises detail of the relevant New Zealand Defence Force Rules of Engagement, reproduced as an appendix to a Cabinet document. We have, as directed, undertaken a separate and again substantial process of consultation with relevant Crown agencies over claims to withhold parts of the Rules of Engagement. We expect to conclude that process within the next four weeks, if not sooner, at which time this passage and related documents may also be able to be disclosed.
 - 5.3. A small number of shorter passages comprise parts of New Zealand government assessments of and/or comments upon other governments. The Crown agencies considered that these passages would, if publicly, disclosed, prejudice New Zealand's international relations. We consider that while these are short passages of potentially limited relevance here:
 - 5.3.1. The passages are unremarkable in nature and, in substantial part, do no more than restate comments made in the public domain by the New Zealand and/or other governments, such that it is difficult to accept the claim of prejudice; and
 - 5.3.2. We would be happy to pursue these further in terms of paragraphs [5](b) and/or [5](c) of the *Protocol*.
 - 5.4. Last, one substantial passage that is currently withheld comprises a copy of a document sent by a senior official of another government. The Inquiry may again wish to consider whether to request the New Zealand government to obtain necessary consent.
6. More widely, we acknowledge that the Inquiry has, in light of the imminence of the module 1 hearing and the utility of this material to that hearing, not made any specific ruling, or sought submissions, on these remaining redactions. Instead, the documents may be published as they stand, subject to the possibility of such ruling and/or submissions and any further disclosure of presently withheld passages.
7. Last, and in addition to reporting on this first tranche of document under paragraph [6](a) of the *Protocol*, we can also report that:

- 7.1. As noted above, we have consulted at length over a tranche of documents comprising the NZDF Rules of Engagement applicable at relevant times and related training and other documents and expect to conclude that process shortly, with the objective of making that material available well in advance of the second module hearing.
- 7.2. We are also working on two further tranches of currently withheld documents and will report further on progress with those. Some of the relevant Crown agency personnel have been diverted into work arising from the tragic events in Christchurch, but we are now to meet to discuss one tranche tomorrow, Tuesday 26 March.

Yours sincerely



Ben Keith / David Johnstone
Special advisors