



27 August 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: Operation Rahbari/Burnham-related documents

1. Further to our letter of 7 August, and in accordance with our appointment and instruction under the Inquiry's *Procedural protocol for review of classified information / claims to withhold information from disclosure*, we advise that we have reached agreement for disclosure of a further tranche of documents broadly related to Operation Rahbari/Burnham.
2. As part of that agreement, we have accepted claims to redaction, of the following parts of these documents, mitigated and/or replaced by gists where and so far as possible:
 - 2.1. Detail of operational methods, including for example particular equipment; personnel; information- and intelligence-gathering sources and practices; and other resources, that are still in use and that, if disclosed, would cause prejudice to national security and to the safety of New Zealand personnel;
 - 2.2. Reference to unrelated operations and persons, outside the scope of the Inquiry;
 - 2.3. Information provided in confidence by partner governments, which if disclosed without consent would prejudice New Zealand's international relations and future provision of such information;
 - 2.4. Information concerning partner governments, so far as that information would if disclosed prejudice New Zealand's international relations; and

- 2.5. Detail of individuals, so far as disclosure of that information would prejudice the safety of those individuals and/or unduly intrude into their privacy.
3. On this last point, we were not able to reach agreement to disclose the names of certain New Zealand personnel, which we did not consider there to be reason to withhold. However, as discussed with you on 16 August:
- 3.1. The Crown agencies took the position that disclosure of these individual names at this time would lead to unfair public perceptions in the context of this Inquiry prior to the next hearing and so, in their view, prejudice the maintenance of the law. The Crown agencies sought to rely upon the 9 April 2018 opinion of the Chief Ombudsman, who in part upheld a claim against disclosure of certain NZDF records while an NZDF investigation into allegations of assault of a prisoner and related matters.¹
- 3.2. We did not accept that reasoning. The ground of prejudice to the maintenance of the law can protect against disclosure of information by a public inquiry where, in particular, there is a coinciding jury trial on related facts, such that an accused person might be at risk of unfair trial as a result of that disclosure. However, even that protection is limited: see, for example, *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA); *Fitzgerald v Commission of Inquiry into the Marginal Lands Board* [1980] 2 NZLR 368; and *TAIC v Wellington District Court* [2008] NZAR 595. We could find no authority that, as asserted, general public perceptions around an inquiry could engage that ground.
4. However, and rather than delay and complicate inquiry proceedings by seeking a determination by the Inquiry at this time, given the relevance of these documents to the imminent hearing:
- 4.1. We understand from you that the documents, without the relevant names redacted, will be made available to core participants under your 26 August 2019 confidentiality order, which will lapse at the time of that hearing;

¹ Chief Ombudsman's opinion on OIA requests about Operation Burnham, 9 April 2018, [112] & [115].

- 4.2. Copies of documents without the relevant names can be made publicly available now and copies including the relevant names will be disclosed at the time of that next hearing; and
- 4.3. We have indicated to the Crown agencies that, if they wish to rely on the claimed ground in respect of any future documents, it will be necessary to substantiate that ground more fully and, particularly, to address criticisms such as that set out above.
5. Leaving aside the material covered by the confidentiality order, we recommend that the documents be made publicly available in line with our assessment. We are continuing to work through further tranches of documents.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Ben Keith / David Johnstone', written in a cursive style.

Ben Keith / David Johnstone
Specialist advisors