

UNDER

THE INQUIRIES ACT 2003

IN THE MATTER

A GOVERNMENT INQUIRY INTO

OPERATION BURNHAM AND RELATED MATTERS

Date of Hearing: 18 September 2019

TRANSCRIPT OF PROCEEDINGS

I N D E X

Wednesday, 18 September 2019

PETER KELLY (on former oath)	338
CROSS-EXAMINATION CONTINUED BY MR ISAC.....	338
CROSS-EXAMINATION BY MR SALMON.....	382
RE-EXAMINATION BY MR RADICH.....	402
QUESTIONS FROM INQUIRY MEMBERS.....	408
(Witness excused).....	410
KARL BAXTER CUMMINS (Sworn)	410
EVIDENCE-IN-CHIEF BY MR RADICH.....	410
CROSS-EXAMINATION BY MR ISAC.....	420
CROSS-EXAMINATION BY MR SALMON.....	428
RE-EXAMINATION BY MR RADICH - nil.....	430
(Witness excused).....	430
JACK RAYMOND STEER (Sworn)	430
EVIDENCE-IN-CHIEF BY MR RADICH.....	430
CROSS-EXAMINATION BY MR ISAC.....	436
CROSS-EXAMINATION BY MR SALMON.....	438
RE-EXAMINATION BY MR RADICH - nil.....	439
(Witness excused).....	439
MICHAEL ANDREW THOMPSON (Sworn)	439
EVIDENCE-IN-CHIEF BY MR RADICH.....	439
CROSS-EXAMINATION BY MR ISAC.....	443
CROSS-EXAMINATION BY MR SALMON.....	451
RE-EXAMINATION BY MR RADICH.....	457
QUESTIONS FROM MEMBERS OF THE INQUIRY.....	458
(Witness excused).....	459
(Affidavit of CHRISTOPHER JOHN AUGUSTINE HOEY read into the record).....	460
RICHARD RHYS JONES (Affirmed)	462
EVIDENCE-IN-CHIEF BY MR RADICH.....	462
CROSS-EXAMINATION BY MS McDONALD.....	464
CROSS-EXAMINATION BY MR SALMON.....	474
RE-EXAMINATION BY MR RADICH.....	477
(Witness excused).....	477
TIMOTHY JAMES KEATING (Sworn)	478
EVIDENCE-IN-CHIEF BY MR RADICH.....	478
CROSS-EXAMINATION BY MS McDONALD.....	495

WEDNESDAY, 18 SEPTEMBER 2019

SIR TERENCE: Good morning. All right, we will resume, and you remain, Mr Kelly, under your former oath.

MR KELLY: Yes, of course.

PETER KELLY (on former oath)

CROSS-EXAMINATION CONTINUED BY MR ISAC

MR ISAC: Mr Kelly, I'd like to begin this morning examining, in some detail, the conversations that you told us yesterday that you had with Chris Parsons in the week or so after his email of 8 September. Did you make any notes of those conversations?

A. Ah, look, I cannot recall specifically the conversations I had with Chris. Of course, we had many conversations over the course of the -- his deployment, and -- and I, if I did make notes, and it's potentially likely that I did scribble some stuff down at the time, as to where they were now or that sort of thing, I couldn't actually provide an answer on that.

Q. You haven't checked your diaries of that period?

A. Well, no. I mean, most of the conversations were classified, so if they were, they would have been retained in the Office of the Headquarters New Zealand Defence Force, and within the Directorate of Special Operations in particular, but they would have been likely on sketch pads or the like.

Q. Right, so there may well be a record of these conversations, but they're not available to the Inquiry today?

A. They may not -- there may well be, but there may also not be a record of the conversations.

Q. Did you actually keep a diary at the time?

A. No.

Q. You mentioned a sketch pad?

- A. Yes, that would have just been for -- yeah, a note, but I didn't keep a diary in the sense that you're inferring.
- Q. Okay. So there may be a documentary record; you're not sure, but if it is, it will be kept in a secure location within Defence Force?
- A. Ah, some of that stuff, at the end of the week, would have just gone for shredding. So, if it was just -- I -- to be honest, I do not recall keeping that sort of information, unless I put it down into a formal minute or something of that nature, and then it was retained that way.
- Q. All right. Prior to Chris Parsons' email of the 8th of September, do you agree that you had received a series of emails from Rian McKinstry, the previous SNO?
- A. Yes, of course, yes.
- Q. And a consistent theme of those emails was that the IAT investigation seemed to be indicating that there was a likelihood or possibility of civilian casualties, correct?
- A. Yes, absolutely.
- Q. And, indeed, you know that Rian McKinstry had obtained a copy of the Apache Air Weapons Team video around the 26th of August, correct?
- A. Yes.
- Q. And he said seen the AC-130 video, hadn't he? He'd been shown that, do you recall? Because he reported to you in an email that he had? I can take you to that if you --
- A. Okay, then -- I certainly know that he saw the -- some of the footage AH-64s?
- Q. Yeah, and the AC-130?
- A. I'd have to confirm again in the notes.
- Q. Okay. Will you accept that there's an email --
- A. Yeah, absolutely.
- Q. -- to that effect?

And again, that was consistent with the ISAF press release, the second one, which publicly recorded the ISAF position, namely that rounds -- errant rounds from the Apaches had

struck buildings and may have resulted in civilian casualties. So you knew all of that, didn't you, prior to Chris Parsons' email of the 8th of September 2010?

A. Yes.

Q. And then, on the 8th, you receive the email, don't you?

A. That's right.

Q. That must have been a red-letter day for you and the SAS, because contrary to all other indications previously received, you're now being told that the IAT report categorically clears both the SAS, but also the Air Weapons Team, of all allegations?

A. Yes, that's right.

Q. I mean, it must have been an incredible bolt of lightning out of the blue for you, given everything else that you'd heard?

A. Taking all the information that we had at that point in time, in a sense, it was all anecdotal; it was commentary from, potentially, legal advisors for ISAF and media releases. We hadn't had anything substantive or factual, from theatre, other than anecdotal conversations, which were relayed to us, and the media release from ISAF.

Q. Might you be wrong on that?

A. We had commentary from the legal advisor from IJC who spoke to the SNO and updated him from time to time, but we had yet to see anything formal in writing in regards to the outcomes of the IAT report.

Q. What had Rian McKinstry been doing?

A. Rian had been passing back information that had been relayed to him by others, but he, at that point in time, had not seen anything in writing.

Q. Right, he had briefings directly by the IAT team investigating the allegations, hadn't he?

A. That's right, but at that point in time, that was still an ongoing line of inquiry, and so we hadn't yet reached a point where we had seen a conclusive summary of the entire event.

- Q. I mean, Rian McKinstry was a Lieutenant Colonel and the Senior National Officer at the time, wasn't he?
- A. Yes, quite right.
- Q. He's been briefed directly by the investigators, instructed by ISAF to look at civilian casualties? Yes?
- A. Yep.
- Q. I mean, the briefings he received, the video he watched, and the video he took with him away from IJC wasn't anecdotal, was it?
- A. But it was not the conclusions at that point in time. The report or the assessment team had yet to make their final summation of the totality of the inquiry.
- Q. He hadn't seen a piece of paper?
- A. Well, we hadn't seen anything formal concluding the report, or concluding the investigation. We had received snippets of information, and yes, to take your point, we probably did expect that the information that was flowing would flow through into the report that we were planning -- well, we assumed, at that point in time, that we would get a copy of that. That wasn't the case, but it wasn't until Chris' email where he actually sighted the conclusive -- what we felt were the conclusive findings of the report --
- Q. When you say, "When we felt" because it was a plural that you used yesterday, regularly in your evidence: "we felt" who are you referring to as "we"?
- A. Well, in a collective sense, Headquarters New Zealand Defence Force, as well as --
- Q. You and Chris Parsons?
- A. No, in this regard, in regards to the information that came out of Theatre, it was shared with a number of different branches within Headquarters New Zealand Defence Force. So of course, strategic commitments and intelligence at the time, and they have a team that helped with the co-drafting of these reports, that went across to the Minister, and they would have been shared with -- normally, information was relayed to

Brigadier Riordan and his team, and the like. So, when I say "we", the information that came to me was then shared, briefed, discussed and then we formulated our respective reports. It certainly wasn't just Colonel Kelly, sole charge, interpreting everything and then drafting notes -- and then the others, as a *fait accompli*, accepting what I'm saying. It certainly wasn't that at all.

Q. You accepted yesterday, when I put it to you, that you were responsible for drafting the 10 and 13 December Ministerial briefings. Are you telling us today that a bunch of other people, now, were involved --

A. I think you'll see --

Q. -- and just let me finish -- that a bunch of other people, now including Brigadier Riordan and goodness knows who else, was involved in the drafting?

A. I think you'll see in my summary of evidence, in one of the initial passages, it said I was responsible for the co-drafting of the notes to the Minister of Defence.

Q. Who do you say today was responsible for drafting the notes to the Minister, other than you?

A. Well, in particular, Colonel Mike Thompson and I would, and particularly the notes of the 10th of December, because Assistant Chief Strategic Commitments, Strategic Commitments Intelligence, were the conduit for the process around that, and so I would often sit in their office, with the relevant information, and we would prepare the notes.

Q. So you and Mike Thompson?

A. Yes.

Q. Right. Kevin Riordan?

A. Normally, for notes that went across to the Minister that were of a topical nature, we would always pass them through legal.

Q. Right. Are they fact-checking the underlying information, or are they just reviewing it for legal issues?

A. Well, you know, I think it's a little bit of everything. Of course, they have an eye more towards the legality of what

we're saying, perhaps, from -- this is the Defence legal staff, is what I'm -- in this relation.

Q. So you're not suggesting that legal staff had any responsibility for the underlying factual information that you and Mike Thompson were conveying to the Minister through the CDF?

A. They were also privy through the Chief of Defence Force updates, the latest information that was coming back to Theatre and was being presented to the Chief of Defence Force.

Q. Was that a yes or a no to the question?

A. Well, if there were issues that they were concerned about, whether it was of a legal nature or they felt that the -- it might not have been as factual, then invariably there was a little bit of to-and-fro between the various branches to get things right.

Q. So maybe Kevin Riordan is involved in factually providing information for the briefing?

A. Well, when I say Kevin, it's principally his staff within the -- the legal staff of Defence Headquarters.

Q. So, Kevin Riordan and his staff now?

A. Well, Kevin sat on top of a number of staff officers, legal staff officers, who would be assigned to support various bodies of work within the New Zealand Defence Force.

Q. So, now we have responsible for the factual content of the briefings, you, Mike Thompson, Kevin Riordan, Kevin Riordan's staff: is there anyone else who you want to identify?

A. Look, there's a process to this. So myself and Mike would typically co-write the brief. We would have the information, the relevant information from the previous correspondence and all that's gone before. We would draft it; we would share it for others to make sure that this was, you know, right in the sense that it could go across the road and be suitable that we could present in front of Chief of Defence Force.

- Q. Are you endeavouring to distance yourself from personal responsibility for the misleading information in the briefing papers?
- A. No, not at all. I take full responsibility and accountability for my actions over that period.
- Q. But you now say that there were a bunch of other people within NZDF who also shared that responsibility?
- A. No, what I'm saying is that there is a process to Notes to the Minister of Defence, and that process meant that it had to be cleared through a couple of bits, you know, branches within the organisation. It wasn't just two Colonels who would draft something, put it in front of Chief of Defence Force, and it would go to the Minister. There were others who would want to cast their eye over it as well.
- Q. Okay. Well let's go back to where we began the conversation, which was about the revelation that occurred on the 8th of September when, contrary to all the other information you'd previously received, Chris Parsons emails you confirming he's seen the report, read it, whatever, and that it clears everyone of any civilian casualties allegations, yeah?
- A. Yeah.
- Q. I mean that must have been a real surprise to you, yes?
- A. Yes, it -- I think it's fair to say it would have been a surprise, because we would have presumed that the report may have come to the -- another conclusion which was reflected in that media release.
- Q. Yeah, so, you know, what did you discuss with Chris Parsons about that at the time?
- A. Well, I know, and it's reflected in the minute that Chris sent back as well, and I certainly accept that -- that Chris did not see the entire report, and that he was only permitted to view a fraction of the report.
- Q. He told you that. You said on oath yesterday that he had told you that at the time, shortly after his email?
- A. And yeah --

- Q. So do you stand by that?
- A. Well, first of all, part of that came out of the email that he sent to us as well, that he said he sighted the report and saw the conclusions, and at the point you made yesterday, around that it was a fleeting opportunity to be able to read the report, I certainly accept that, and I know Chris did not have the time or wasn't permitted to read the entire report and so he -- the opportunity that he had was very fleeting.
- Q. Yeah, and he told you that shortly after he sends his 8 September email, didn't he? That's what you told us on oath yesterday?
- A. Yes, look --
- Q. Yes?
- A. As to when he told me --
- Q. Yes?
- A. -- I can't recall.
- Q. All right.
- A. But I know that his -- he didn't have the time to read the entire report because wasn't permitted to. So the opportunity he had was fleeting.
- Q. So you get this great news on the 8th of September, what did you -- and you are saying, on oath, that he's also not only emailed you, but he's talked to you about it shortly after the email, to explain to you he's only had a fleeting glance; he's read four lines, three sentences, something like that. What did you do then to interrogate with him how the report reached the conclusion there were no civilian casualties, given all else that was known by NZDF?
- A. Well, so, going off his email, and --
- Q. I'm not talking about the email; I'm talking about the discussion you had with him. The discussions, in fact?
- A. I can't recall the exact discussion we had. So, in terms of me raising that with you right now, I literally can't recall the nature of the discussion we had over this particular point, right now, but what I can say about the commentary that

he provided, and accepting that it was fleeting, and on the basis of the email, was that -- from my perspective, that was -- he had sighted the conclusions of the IAT report, which up until that point in time we hadn't seen anything from the -- formally concluding the outcomes of that investigation, and so we did place a lot of emphasis on that information that Chris passed back.

Q. I mean, you placed total emphasis on that, didn't you?

A. Yes.

Q. That that was the whole basis of the reports to the Minister, wasn't it?

A. That's right.

Q. No civilian casualties?

A. A large --

Q. IAT have confirmed that?

A. That's right, and that was on the basis of the -- at that point in time, as I said, everything else up to that, we hadn't seen anything formally concluding -- and even though he'd only seen a small passage, that was more than what we'd seen up to that point in time, in terms of the conclusions of the report, and of course, had we seen the entire report, then our response would have been completely different, but up to this point in time, all we'd been permitted to see was a small extract which made those conclusions. Now we know that they were wrong and that they were relevant to the ground force, and not the entire force that we had thought it was referring to, but at that point in time, that was the most sort of substantial sort of findings that we had.

Q. Chris Parsons gave evidence that not only did he look at only four lines, but he also had a discussion with a representative from IJC, and that, critically, confirmed his misunderstanding of the report, yeah?

A. Well, I have to take your word on that last bit.

Q. All right. So, when he was talking to you, in the week or so after his email, he must have told you, not only that he'd

read the report, but that he'd also had a discussion with staff at IJC. Do you agree with him?

A. Well, I -- that last bit about the IJC, discussion with, he had plenty of discussions with the IJC staff during the term his deployment, but I can't recollect that particular conversation.

Q. So those oral briefings to Rian McKinstry and to Chris Parsons you say are anecdote and of no reliability, but his hearsay report of four lines is written in stone?

A. Yeah, look, I'm no legal advisor or -- and the hearsay piece was -- the fact was, he had seen the report, albeit briefly. Up until that point in time, we had not seen anything regarding the formal conclusions of that assessment. Everything up until that had been commentary by the -- and the team, the legal advisor, letting us know of the updates of what had been flying from the investigation, and so, the email on the 8th and Chris having seen those conclusions, for us, was a -- was a real important piece of information, because up until that point in time, that's what we were seeking. We were trying to -- we were seeking a final outcome to this report and getting the report. As I said, we didn't get the report and that would have changed the entire tone of our correspondence with the Minister of Defence and the Government, but all we had was that Chris had said, I saw a bit of the report and this is what it reflected, and so we lifted that out and put it into our report to the Minister.

Q. Did he say to you, "And I talked to an American officer at IJC and he confirmed to me there were no civilian casualties"? Did he say that to you?

A. I have no -- well, as I've said, I have no recollection of that discussion.

Q. Right. Might you have made a note of these discussions?

A. I may have, at the time, dependent on where they occurred.

Q. But they've been shredded?

A. Well, they are -- typically, for formal correspondence and things like that, if it was passed through to Chief of Defence Force and the likes, then we would have formally recorded that down, and it would have been reflected into the various notes and briefings that were provided.

Q. You relying -- what, on the email and the conversations with Chris in order to prepare a brief for the CDF to the Minister, correct?

A. Yes, but --

Q. You wouldn't want to shred those pieces of paper, would you?

A. No, our formal process was more in the formal correspondence and the regular reporting that came back through our classified systems, in written form, provided the substantial information, flow of information, passage of information, between us and theatre. So invariably all things were documented formally in written correspondence and sent back that way.

Q. Right. It's going to take a long time. If I ask you a question which you can simply answer yes or no to, feel free to do that?

A. Yes, certainly.

Q. If you feel that you need to give a further explanation, that's absolutely fine. Right?

A. Okay.

Q. But we will be here for a very long time if every time I ask you an uncontroversial proposition you give an extensive commentary which is largely irrelevant, okay?

A. Certainly, thank you.

Q. All right. So, I'd like you please to turn --

MR RADICH: I hate to interrupt, but I think the answers are probably reasonably fair in the sense that they're expanding on really vital information here, and my submission is that it's helpful, but I leave it at that.

SIR TERENCE: Yes. I mean, the witness is entitled to explain the process that was followed; that's what the questions were

directed at. So I think you do have to allow the witness to give those explanations. If they do go beyond what we think is fair, then I will intervene.

MR ISAC: Thank you, sir.

Mr Kelly, as Director of Special Operations, I think, DSO, is your title at the time?

A. That's right.

Q. You would have had access, presumably, to all of the Standard Operating Procedures that ISAF operated under in the Afghanistan theatre?

A. Yes, we would have had access to -- we didn't physically hold them in New Zealand; that was all up in theatre.

Q. Right, but if you needed to you, could obtain the information you needed from the SOPs, correct?

A. Yes.

Q. And there was a SOP that specifically dealt with investigations into civilian casualties. Did you know that?

A. Headquarters ISAF has a lot of policies and processes. I have no doubt they would have had one of those.

Q. Did you know that they had one?

A. I couldn't say that I formally saw it, but I would assume a headquarters of that kind would have a policy like that.

Q. So if they had one, you don't know about it?

A. No, what I'm saying is that headquarters, yes. It would have had a policy of that kind.

Q. Right, and what steps did you take to familiarise yourself with that before you prepared the briefing notes for the Minister in December 2010?

A. From -- on that basis, in terms of understanding the process that they use and the likes, that was done with our Legal Advisor in theatre and the Defence legal staff here in New Zealand.

Q. Right, so you did have information coming to you about the ISAF CIVCAS process?

- A. It would have been briefed to the Chief of Defence Force, at some stage, by the Defence legal staff, in consultation with our legal team up in Afghanistan.
- Q. And I take it that, from that, you knew that an IAT, or an Incident Assessment Team, was a preliminary, quick investigation to ascertain if there was any credibility to allegations of civilian casualties?
- A. That's right.
- Q. Yeah, and if the IAT found that there was some merit to those allegations, some substance, then a further investigation team would be appointed to undertake a thorough, often national investigation, correct?
- A. Correct.
- Q. And you knew this at the time in 2010, correct?
- A. Yes.
- Q. Now, just tell us a bit about the period during which you were DSO, from 2009 to 2011. This is a period, I think, you mentioned in your Brief of Evidence. When did you leave that role?
- A. Not long after the Christchurch earthquake. So, late February 2011.
- Q. February 2011? And what was the role that you had after that?
- A. I went down to support the New Zealand Defence Force's efforts in Christchurch.
- Q. All right. Now, as DSO, I think you'd confirm that you ultimately have responsibility for preparation of the briefing papers that were passed to CDF for the Minister?
- A. Correct.
- Q. And you'd confirm, wouldn't you, that an allegation such as the possibility of civilian casualties associated with a New Zealand operation in Afghanistan would be something of considerable concern to Defence Force?
- A. Yes, of course.
- Q. To the Minister?
- A. Yes, of course.

Q. And to the public?

A. Yes, of course.

Q. And, you would accept that Ministers need to be able to rely on the information that's being passed to them, by CDF, ultimately you, correct?

A. Yes, of course.

Q. And if your advice was wrong, there would be a real chance that Ministers would mislead, inadvertently, the public by making statements based on the information that you had provided?

A. Yes, that's right.

Q. And it would be an utmost priority, as you say, to provide the most accurate information to Ministers, yeah?

A. Yes.

Q. And you accept full responsibility, do you, as being Director of Special Operations, ultimately, for the accuracy of the 10 and 13 December 2010 briefings, correct?

A. Yes, I do.

Q. Are there any errors in those briefings that you wish to acknowledge today?

A. It -- when we talk about the briefings, you mean the note that goes to the Minister?

Q. Yeah, the Notes to the Minister?

A. Look, yes, absolutely. In hindsight, and I had an opportunity to reflect on our conversation yesterday overnight, and we did place, as I said, a lot of emphasis on Chris' reporting, that came out. And yes, it was at odds with the previous reporting, but as I have alluded to, we hadn't seen the report up until that point in time, and of course Chris didn't get to see the full report. The language we used, in that particular paragraph, paragraph 7, there were parts there that it was not as precise as it should have been, particularly --

Q. It was plainly wrong, wasn't it?

A. Well, it was written -- yeah, look, of course we would change it now. That last sentence, I think it referred to "read the

report." Well of course, we should have said something like "sighted the report" or the likes, to make it clearer. And, we lifted extracts of Chris' email, you know like the word, like, "categorically", Chris' statement about "no way civilian casualties could occur." Those sorts of things, we lifted those statements out and put them into the Minister's report, principally because --

Q. So put them in quotation marks?

A. Put them in quotation marks, that's right. Should have probably acknowledged that that source of the quotation was the SNO in theatre, accepting that, and so that was another error, but the reason -- they were there, is again -- is because that was our physical link to the report, which, I've said many times, up until that point in time we hadn't had anything. And so, we were placing great stock on getting the outcome of the report so that we could report it across the road to our Minister and to the CDF and everyone.

Q. So, the error that you acknowledge, and you disagree with me if I put this to you wrongly, one of them is: you wrote in the briefing that the IAT report had cleared both the ground and air assets of any allegations of civilian casualties, when we know that, in fact, the IAT report said that there may have been. Do you accept that?

A. Yes, but when we wrote that report, we did not know that, because we hadn't seen the IAT report. All we had seen was that brief passage of the IAT report, which Chris thought was the conclusions of the assaulting force.

Q. You had Chris Parsons' 8 September email?

A. Yes.

Q. And you had your phone discussions with him about what he had read and been told, correct?

A. Correct.

Q. In your Brief of Evidence, do you have that before you?

A. Yes, I do.

Q. Paragraph 29?

A. Oh yes, I have that in front of me.

Q. Yeah, you say there that Chris Parsons' email signified a couple of things, yeah?

A. Yes.

Q. And then, you say -- you conclude that paragraph by saying, "Accordingly, I regarded this information..." that's the information in Chris' email, "...as updating and superseding earlier information that had been conveyed by Rian."

Do you see that?

A. Yes, I do.

Q. Well, what status did the antecedent information, that you had become aware of, have after Chris' email?

A. Well, that was -- Chris' email, in our mind, was the outcome of the IAT assessment, and so that closed -- from our perspective, that was the investigation. That closed that. That was the outcome.

Q. That's the end of the story; I can forget about what we knew previously, because it's been superseded, yes?

A. Yes.

Q. Yeah, and that applied to Rian's emails and reports to you?

A. Yes.

Q. That applied to the Air Weapons Team video the NZSAS had obtained in theatre, yes?

A. Yes.

Q. And that applied also to the ISAF press release, the second one of the 29th of August, yes?

A. Yes.

Q. And it's on that basis, of Chris' email, that you're able to suspend, or put to one side, your knowledge of all of that, right?

A. Yes, on the basis that --

Q. He's saying he's seen the report?

A. He's saying he saw the report and the conclusions of the report, which he relayed to us, the substance of that.

Q. All right. Well, I'd like to take you to some documents, if I can now, please, Mr Kelly. If you turn to the large black bound folder, please. The first page, 77. So this is an email exchange; if you just take a moment to familiarise yourself with it. We've got Edward Poot, in the middle of the page, who is the then Minister of Defence's Military Secretary, yes?

A. Yes.

Q. He's emailing Mike Thompson, who you've mentioned before, who worked closely with you in preparing these briefings?

A. That's right.

Q. And he's emailing you as well, and saying, an early note on these would be appreciated: and what's at the bottom of that email string, if you go over the page, page 78, is the ISAF press release of the 29th of August, the second one, yes?

A. Yes.

Q. So clearly the Minister's aware of this, wants to know what's happening, correct?

A. Yes.

Q. And then you have replied, "At this point in time CDF spoke to Minister last night. Refer this. And we are now awaiting the official HQ ISAF assessment report from theatre." You see that?

A. Yes.

Q. "This will be released once redacted. Once we get the official report the note will then be drafted and forwarded." Yeah?

A. Yeah.

Q. All right, so we know, don't we, that from this point, the Minister's aware of the ISAF public reporting, indicating a possibility of civilian casualties. He wants some answers, yeah?

A. Yes.

Q. And you are on to it --

A. Yeah.

Q. -- you're in that loop?

And if you turn to page 84 now, please -- actually before that, turn to page 79B, it will be. So this is your Special Operations brief for the CDF?

A. That's right, yep.

Q. Dated 31st of August, yeah?

A. Yes.

Q. If we go to 79D we've got a slide about Objective Burnham, Op Burnham?

A. Yes.

Q. Over to page F, you have an intelligence table that's been, I can tell you, uplifted from an intelligence summary prepared for ISAF Special Forces by SAS, about the intelligence reporting as it stands at that date?

A. Yes.

Q. There are individuals in that table who are not marked as insurgents, correct?

A. Correct.

Q. And we've heard from Rian McKinstry that those people would be assumed -- or should be presumed to be civilians, in light of that, and you wouldn't disagree with his evidence. Correct?

A. Sorry, could --

Q. The people who aren't labelled as insurgents in that table?

A. Yes. Yes, that's right.

Q. And then from page G through to I, we have your briefing to CDF about the civilian casualty investigation?

A. Yes.

Q. Page G, first bullet point:

"The Incident Assessment Team has produced a report."

Past tense?

A. Yes.

Q. Second bullet point:

"The report has found."

Past tense?

A. Yes.

Q. And this is your briefing to CDF at the time, correct?

A. Correct.

Q. And over the page at I, last two bullet points, you've briefed the Minister, "rounds from this engagement appear to impact on or over the roof of this house, and this is the likely location, if at all, that CIVCAS may have occurred. Early footage shows a woman and children in and around these houses."

That's what you briefed the CDF?

A. Correct.

Q. And then next bullet points confirms the JTAC's direction. Yeah?

A. Yes.

Q. All right, so if you move through that bundle now please, to page 84, consistent with what you've briefed the Minister, this is your email on the 31st of August, isn't it?

A. Yes.

Q. Jones and Rian McKinstry, Wātea SNO?

A. Yes.

Q. You have attached to it the 29 August ISAF press release that the Minister's secretary had asked for a note, a reply on?

A. Yep.

Q. Take a moment to read that email?

A. Yes.

Q. So, if we can summarise it, you are saying to the SNO, I'd like that report, the IAT report, within 24 to 48 hours, because PM's -- well PM, Minister of Foreign Affairs and MINDEF are quite exercised and very keen to hear the official outcome, yeah?

A. Correct.

Q. So there was a fair bit of pressure to get the answer, correct?

A. There was, yeah, a degree of urgency around this, for sure.

Q. And presumably you were having conversations with Chris Parsons about this issue? He's about to deploy, virtually that day, isn't he, into theatre?

A. Yeah, that's right.

Q. And take over as SNO?

A. Yes.

Q. Now, what discussions did you have with him about this at that time?

A. Well, again, I can't recall the exact nature of the discussions I would have had with Chris, in specific terms, about this. And so, I really can't answer that question to the clarity that you're seeking.

Q. You don't recall?

A. No, I don't recall.

Q. But we know you must have been talking about it with him?

A. Oh yes, look, Chris was all over this and was up to speed, and we would have talked about this, but we would have talked about many aspects of the operation as well, ongoing.

Q. All right, so next in the sequence, from your perspective perhaps is page 104 Chris Parsons' email at the end of that, essentially?

A. Yes.

Q. And from your perspective, that was the answer at that point. You say, he's sighted the report, albeit fleeting glance of four lines, but categorically clears grounds and air assets of any allegations of civilian casualties?

A. Yes.

Q. You say then, at paragraph 30 of your Brief of Evidence, that you believe you must have briefed CDF verbally about Chris Parsons' email, and you say that because, first, it was such a significant development that you would not have waited until the next weekly meeting, and that makes sense given the pressure for an answer?

A. Yes.

- Q. And the second reason why you believe that you briefed him verbally is that by the 15th of September 2010, and this is your brief at paragraph 31, you say the issue of civilian casualties had "fallen off the radar", yeah?
- A. Yeah. Yes.
- Q. And that's confirmed, isn't it, by the CDF briefing that you gave, the Dot Point Briefing you gave, on 15 September, which is at page 109, a few pages on, where we know that -- well, this note deals with Operation Burnham, but you confirm in the one and a half pages there's absolutely no mention of an IAT investigation, or allegations of civilian casualties, which is why you say it had fallen off the radar, right?
- A. Correct.
- Q. So, by the 15th of September, Chris Parsons' email and your discussions with him, has just closed the issue down, hasn't it?
- A. Yes.
- Q. There was a subsequent inquiry though, wasn't there, by Mr Poot, Edward Poot, to you? Do you recall getting that, the following week?
- A. Could you explain that further?
- Q. Yeah, page 115A?
- A. Yes.
- Q. So, bottom of 115A there's an email that you've actually sent to Edward Poot, yes?
- A. Yes.
- Q. 23rd of September 2010?
- A. Yes.
- Q. And you've said:
- "Ed VCDF [Vice Chief of Defence] just came and spoke to me about part of the discussions this morning with the Minister on casualty allegations." And then you say, "what we know is that ISAF Joint Command raised an interim assessment team headed by a Brigadier to assess the veracity or otherwise of allegations that there were civilian casualties..." etcetera.

"As a result of the IAT assessment it was found there were no civilian casualties. This included viewing all the helo/plane gun tapes, visiting local hospitals, checking claims about two female casualties. In fact, turned out to be fighting aged males."

Yeah?

A. Yeah.

Q. And then you say, over the page:

"As a result of the IAT assessment, all forces were cleared of causing civilian casualties. The matter was closed and no formal investigation initiated."

A. Correct.

Q. That last bit, "No formal investigation was initiated," that's consistent with what we talked about before, isn't it, being that IAT does the initial quick?

A. That's right.

Q. And then, if there's nothing credible that they find, then there's no formal investigation, right?

A. Correct.

Q. So clearly at this point you understand the process and how it's meant to work?

A. Yes.

Q. And then you say:

"The SNO was advised of this and he saw the written report."

A. Correct.

Q. I mean, given what you've told us, that email wasn't particularly forthcoming with the nature of what he saw?

A. Well, he sighted the report; he saw the report.

Q. Fleeting glance of four lines?

A. Well, it could have been tidied up, but it's not -- here I think I -- what did I say? "He saw the report." Well, in Chris' email, he said he sighted the conclusions of the report. So, yes. Of course, I accept that this is again not as precise as it should have been.

Q. Yeah, and then back on page 115A, Edward Poot replies:
"So many thanks for the below. The only critical issue that remains opaque is as follows:"

A. Now, sorry to interrupt, but I do not have 115A in this pack.

Q. Oh it might be 115, sorry. Mine's got an A?

A. Okay, yes.

Q. Yes, so this is an email back to you from Edward:
So, "Many thanks for the below. The only critical issue that remains opaque is as follows: NATO put out a press release at the time. Our recollection is that it talks about an investigation. How does NATO close the loop with the wider public in Afghanistan to advise the outcome of the investigation"?

Do you see that?

A. Yes.

Q. And then over the page, it might be another page 115, you've -- can you put your hands on an email --

A. Yes.

Q. -- that you have sent to Edward Poot, where you have forwarded the ISAF press release? It might be page 117?

A. Yes, I have it at 117. It's the email of 23 September 2010, 4.09pm --

Q. Yes, and you've forwarded to him the ISAF press release?

A. Yes.

Q. -- that the Minister is enquiring about and how that's -- the loop has been closed on that, and you say:
"This was the last word from ISAF on this."
Yes?

A. Yes.

Q. So, "I am not aware of any other releases since. It does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result. I'm not sure how ISAF put the record straight further."
It's what they've said here.
"Not sure what role we have in influencing them."

Yeah?

A. Yes.

Q. So, understandably, Minister's aware of a press release saying there's been an investigation. May have been civilian casualties. Yeah? And wanting to know well, how has that been resolved? You know, given that you were saying that, in fact, the investigation concluded there were categorically no casualties, correct?

A. Correct.

Q. What checking did you do at that time, of press releases, to make sure that there weren't any that you'd missed?

A. Look I, at this particular point in time, I don't recollect checking for any Headquarters ISAF messages.

Q. There had been another one, hadn't there, on the same day?

A. Yes, it was brought to my attention yesterday. I had not seen it.

Q. You'd never seen that press release before?

A. No. No, I hadn't.

Q. I mean very significant, isn't it, that other press release, because if you'd had it, you'd have known that what Chris Parsons had told you was absolute rubbish?

A. That may be the case, but because I didn't see it, I can't answer that question.

Q. Do you think you saw it before you briefed the Minister on the 13th of December 2010?

A. Did I think I saw?

Q. That last press release?

A. Look, I had no recollection of seeing that last press release.

Q. Did you read the 13th of December press release and its attachments before it was signed by the CDF to give to the Minister?

A. Yes.

Q. I mean, that would be a basic thing for you to do?

A. The -- so, now, sorry, what press release are you referring to? I'm a bit confused now.

Q. At page 70?

A. The press release from Headquarters ISAF, but now you're talking about the Chief of Defence Force's press release in December?

Q. Page 70?

A. Oh yes. Look, I have not seen this press release. That's right. That's what I said yesterday.

Q. Next question, you take responsibility, as DSO at the time, ultimately, for the final product of the briefings, the notes to the Minister of the 10th and the 13th of December 2010?

A. Yes, as the draft there, yes.

Q. Yeah, you must have read them carefully to make sure they were accurate?

A. The Note to the Minister?

Q. Yeah.

A. Yes, of course.

Q. Yeah, and the attachments to those notes?

A. Yes.

Q. Yeah, can you please turn to page 168?

A. Yep.

Q. So this is the 13th of December note or briefing paper?

A. That's right.

Q. Yeah, it's got your writing, hasn't it, on page 168?

A. Yes.

Q. "PM and MIN agreed not to release the information into media."
Yeah?

A. Yes.

Q. And we've got the note on page 169 and 70, yeah?

A. Yeah.

Q. Comprising five paragraphs. Then the attachment, restricted attachment there, risks associated with releasing information, because that's what the note related to?

A. Yes.

Q. I'm looking at page 168, the purpose of this note is to provide releasable information on the operations?

A. Yes.

Q. Then you've got a restricted appendix saying, here are the risks of doing so?

A. Yes.

Q. Then you've appended the email you got on the 31st of August, with the reporting from ISAF?

A. Yes.

Q. And then you've appended a number of pages after that, with a whole lot of reporting about the incidents and the allegations of civilian casualties, yes?

A. Yes.

Q. And you've done that because, in determining whether or not it would be safe to make public statements, it's important for the Minister to know how much profile this issue had, as a civilian casualty allegation, both in Afghanistan and internationally, correct?

A. Correct.

Q. And then at the end of that briefing paper and its attachments, you've appended an email, which is an enquiry from TVNZ on the 8th of December, which is presumably what prompted you to write these briefings, right?

A. Yes, so -- well, it didn't prompt me to write these briefings. The Chief of Defence Force requested -- asked that we prepare a statement that could be released.

Q. Okay, all right, but presumably the TVNZ enquiry about the operations is the thing that sparked things into life at that point in time, being three months after Chris Parsons' email?

A. I couldn't answer that.

Q. Okay. So, if you look at the press releases that you've attached to the briefing paper, we've got the ISAF -- what we've been referring to as the second ISAF press release on page 172, haven't we?

A. Yes.

Q. Yeah, and then that's reproduced, effectively, at the top of page 173, isn't it?

- A. Yes.
- Q. Look at the bottom, toward the bottom of page 173. Take a moment to read that, and then go back to page 70, and I'm going to ask you a question?
- A. Yep. Yes.
- Q. That report in the Pajhwok News at the bottom of page 173, that is a report of the third ISAF press release, isn't it, that you say you'd never seen before?
- A. Yes.
- Q. So had you not read these appendices before they went to the Minister?
- A. Well, in answer to that, these are -- the media files here were put together, of course, by that part of Defence Headquarters, NZDF media team, who pooled that information, and we appended it to the report. I obviously accept it's there, but my recollection at the time was that I can't recall it, and I -- up until the other day, my honest belief was that I did not see it.
- Q. So, if you read the briefing paper, and you read just those two reports on page 173, you'd know that Chris Parsons had got it completely wrong, wouldn't you?
- Yes?
- A. No, I wouldn't contend that, because again, we were still -- the fact is Chris had seen part of the report, and what we had been led to believe -- what he had viewed, was the summation of the assessment team.
- Q. Can I put it to you a different way then? After you got Chris Parsons' email, any information, whether previous to his email or after it, that was inconsistent with his advice, you could ignore?
- A. No, not at all. I mean, had we received the report, we would have reflected their outcomes of the report into our notes to the Minister. Up until that point in time, that was the only conclusive information we'd received. And being conscious of Headquarters ISAF and their information operations and the

media plan and the way they communicate to the communities across Afghanistan, and the way they soften their messages, there is often, at times, conflicting views or what's been expressed publicly may be different from what's been expressed privately and through formal channels.

Q. Did you read the attachments to the Minister's briefing paper?

A. It's fair to say that, in this regard, given that the -- as I flicked through them all, that would have been put together by our media team.

Q. So is that no?

A. Yeah -- well, I am familiar with some of these media releases, and I am very familiar with the statement on page 169, which was the piece of work that I was really focused on during the drafting of this particular Note to the Minister.

Q. That's paragraph 4?

A. Is it paragraph 4? It's --

Q. "As a result of their investigation the assessment team concluded 'having reviewed the evidence there is no way that civilian casualties could have occurred'."

That's what you're saying? That was your focus?

A. Well, that entire document, starting from paragraph 1 to paragraph 5.

Q. So, coming back to my question, you didn't read the report at the bottom of page 173?

A. My understanding -- no, because my understanding was the particular operation and the investigation had concluded.

Q. Right.

A. Of course, I see now that I was wrong.

Q. So, someone within NZDF, someone now in press or comms, has gone into the world wide web and sucked out relevant information, haven't they?

A. Correct.

Q. Compiled it, and what they've been able to do, before you give the Minister a briefing, is find not only the second ISAF press release, but the third one too, yeah?

- A. Yes.
- Q. And if anyone had engaged with the content and meaning of those two press releases, they would have rapidly worked out that paragraph 4 of the briefing, that you were focused on, was wrong, right? Because there isn't just an IAT investigation now; there's a formal civilian casualty investigation. Correct?
- A. Correct.
- Q. Yeah, but no-one managed to do that?
- A. Correct.
- Q. Isn't that extraordinary?
- A. So, what we're saying in paragraph 4 here, is again, and that -- our belief was that the IAT assessment team's report was the final conclusion of the outcome of the Initial Assessment Team, and that did draw it to a conclusion.
- Q. Go back to page 117. Your email at 4.09pm in the middle of the page?
- A. Yes.
- Q. You're acknowledging, aren't you, the inconsistency between the second press release and what Chris Parsons has reported on the IAT outcomes, aren't you?
- A. Yes.
- Q. And it's that very inconsistency between Chris' report and the public statements of ISAF that have led the Minister, and his assistant Edward Poot, to raise the question, how is this loop closed off?
- A. Yeah.
- Q. You're telling him that you don't know if there's any other press release at this time; you haven't seen one?
- A. Yes.
- Q. You've confirmed that you made no enquiry at that time to find it, yeah?
- A. Well, I didn't know it existed, so I'm not quite sure what I would have looked for?
- Q. So you don't look for information that you don't know?

- A. No, no, that's not what I'm saying, but the question as it was posed was, I didn't know that -- we didn't know that there was a press release at that point in time that pertained to the follow-on investigation.
- Q. But by the 13th of December, when you were preparing the ministerial note, briefing, someone inside Defence has found it?
- A. Yes.
- Q. But you haven't read it?
- A. I have no recollection of seeing that press release.
- Q. And so, an opportunity to avoid misleading the Minister, again, has been lost?
- A. Yes.
- Q. When you prepared paragraph 4 and 7 of the 10 and 13 December briefing notes?
- A. Yes.
- Q. What information did you have before you?
- A. Well, we had the -- the information that had come from theatre and -- but we tend to put emphasis on the documented information, and not the media releases, because understanding the way the Headquarters ISAF and their information campaign and the likes, it was the formal reporting that's what was really important to us, hence the urgency around --
- Q. And formal reporting being Chris Parsons' 14 line email?
- A. Ah, no, in this regard I'm talking about the IAT report.
- Q. You didn't have it?
- A. No, but what we had was a -- Chris was able to view part of it, and so we put a lot of emphasis on that, because that's -- that's the only tangible piece, connection to the report that we had. Everything else was media release or the likes.
- Q. So what you've said just a moment ago is that you didn't rely on the media releases, yes?
- A. Correct.
- Q. Are you sure about that?

A. Yes.

Q. On oath?

A. Yes.

Q. All right. I'm just going to hand you a document, Mr Kelly. What I've endeavoured to do, Mr Kelly, is to make this as easy as possible for you, and this is a -- an analysis of your paragraph 4 of your briefing paper for the Minister, compared with two other sources of information, namely the second ISAF press release, that you've said you didn't rely on a few moments ago, and an email from Chris Parsons of the 8th of September?

A. Yes.

Q. And I've attached the relevant documents from the bundle, so you can check if I've misquoted them, but in the first quote, you will see at the top left, which is the words taken directly from the briefing paper you prepared for the Minister, are these words:

"A joint assessment team composed the representatives of the Afghan MoI and", or Ministry of the Interior, "and Defense and ISAF officials conducted a full assessment of the operation."

In paragraph 4 of -- sorry, that's paragraph 4 of your briefing, in the second ISAF press release are these words:

"A joint assessment team composed of representatives of the Ministry of Interior and Defense and International Security Assistance Force officials conducted a full assessment of an operation on August 22."

You see that?

A. Yes, I do.

Q. Those quotations are almost identical, aren't they?

A. Yes, they are.

Q. It's not a coincidence; it's because when you prepared paragraph 4 of the briefing paper, you took words from the second ISAF press release, correct?

- A. No. No, the statements in the first column are statements that were made by Chris or Rian in their correspondence at various times, and were represented as a collection in our presentations to the --
- Q. Are you sure?
- A. Well, I know when I spoke to the CDF in some of our briefs we talked about a joint assessment team. We talked about that it was comprised of Afghan Ministry of Interior and Defence personnel and ISAF officials, so that information, we'd already discussed and put before the Chief of Defence Force in our correspondence to and fro around what is the assessment team? Who is it made up of, and the likes? So we didn't rely on the media to provide this information to us, if that's what you're saying?
- Q. So you, or Mr Radich, when he re-examines you, will be able to take us to a document, as you've just said, where you've managed to use almost precisely the same language as the ISAF press release, but rather than taking the information from that source, you say you've taken it from an email?
- A. Well, it's presenting the same information in a very similar way, but it doesn't say that it comes from the same source. Our source was from theatre, was Rian McKinstry, was Chris Parsons.
- Q. I know you don't want to answer the question, but what I'm suggesting to you is that contrary to the evidence you gave shortly before I presented this to you, you did in fact have and rely upon the ISAF press release when drafting paragraph 4. Do you accept that?
- A. No, I don't.
- Q. Okay. So, your evidence on oath is that the remarkable similarity in the language used in that passage is a coincidence?
- A. Well, we are conveying the same message. The source of the information is Headquarters ISAF, and the way we received it is through our people in theatre.

Q. I mean, this press release is actually appended to the briefing paper, wasn't it --?

A. Yes.

Q. -- at paragraph 4? As was the third press release --

A. Yes.

Q. -- essentially? Yeah.

All right, well, in addition to what I suggest to you is a reliance on an inconsistent press release when preparing the brief to the Minister about the outcome of the IAT report, you accept, don't you, that the 13 December briefing that you prepared omitted any reference to the fact that the IAT report hadn't actually been received by NZDF, do you agree?

A. Well, that's factually correct. We hadn't received it.

Q. The sentence -- happy for you to confirm this for yourself, if you turn to page 166?

A. Yes.

Q. Paragraph 7 at the bottom, final sentence:

"The Joint Assessment Team's report has not been released"?

A. Yes.

Q. "Our knowledge of the findings is based on the comments provided by the commander who was permitted to read the report.

You see that?

A. Yes.

Q. Those words are removed, aren't they, from paragraph 4, which is over the page at page 169?

A. That's right.

Q. So that important caveat, even though it was misleading and inaccurate, that important caveat was omitted from the second briefing?

A. Yeah. Look, it was inaccurate, but it wasn't our intent to be misleading, but I accept it was inaccurate.

Q. And indeed, the -- both paragraph 7 and paragraph 4 has words in quotation marks that you touched on before. This is the penultimate sentence, which says:

"The assessment", that's the IAT assessment, "...concluded that 'having reviewed the evidence there's no way that civilian casualties could have occurred'."

Yeah?

A. Yes.

Q. Do you take full responsibility for adding those quotation marks?

A. Yes, I do.

Q. Do you disagree with Sir Jerry Mateparae when he gave his evidence to the effect that, when he read that, it gave the impression it was a direct quote from the IAT report?

A. Yeah. Look, I accept that that was inaccurate and that it was actually quoting directly from Chris Parsons, the SNO.

Q. Right, but the effect of it was to represent it came from the IAT report?

A. Yes, and at the time, that did not occur to me. And I accept that our language there was not as precise as it should have been, but there was certainly no intent to be misleading with that particular statement. It was just adding the emphasis and connecting it to the SNO and his reading of the conclusions.

Q. Why did you put quotation marks?

A. Well -- well, because it was a direct quote, but you know, I mean --

Q. From his email?

A. Yeah, that's right --

Q. Was it worthy of direct quotation?

A. -- it was -- aha, well look, again, I don't have a Masters in English, so I can't answer that, but at that point in time, I just thought it warranted, because it was pulled directly from the email, we'll put quotation marks.

Q. Right, well there are other words that you've uplifted from his email that you haven't put in quotation marks, aren't there? Like the end of the sentence, where it says "...and

the actions of the ground force and Coalition were cleared of all accusations."

Yeah?

A. Yeah.

Q. Why didn't they get a quotation?

A. Look, I can't answer that, but it did -- I accept it gave it an emphasis. At the time, if I think back to that, we weren't -- in my mind, it was a quotation from Chris Parsons, not a quotation from the report. And I should have made that clearer.

Q. Right. Would that have made it more compelling if it was a quotation from his email?

A. No -- well, it would have clarified the matter that it was from the SNO Task Force 81 and not from the conclusions that he read.

Q. So the misleading impression, you putting quotation marks around those words, was not intended to be misleading, but you accept it was?

A. I don't accept that it was. There was certainly -- there was no intent to mislead and it was not as precise as should have been, I accept that.

Q. I think we agreed on that in the end, Mr Kelly.

So, let's have a look then at some of the information that you didn't use to put into the briefing. Is that all right?

A. Yes, of course.

Q. You didn't refer to any of the intelligence reports that you had received over a period of time following the operation, did you?

A. No.

Q. And you'd accept, and I can take you to them if you want me to, that there are five declassified reports all of which consistently indicate a possibility or probability of civilian casualties?

A. Correct.

- Q. You say that Chris Parsons' 14 line email superseded all of that information that you had?
- A. Yes, because at that point in time that was the conclusion of the IAT investigation, as we thought at the time, and so everything that had gone before, had been reviewed by the IAT, and that was the conclusion.
- Q. That was it?
- A. That was it.
- Q. You weren't curious about how your own intelligence could be either so far off beam or how ISAF had concluded that there were categorically no civilian casualties, given everything that you knew?
- A. Well, intelligence is an imprecise nature anyway, and so it's very hard to categorically provide absolute assurance on the information that we were receiving through those types of sources. And, as I said as well, ISAF's public messaging can be different from their private messaging, and so, in the way that they engage with the community, and Afghan, the country at large, there is a subtle change to the language they use.
- Q. You didn't make any use, when you prepared this briefing, of the reports of Rian McKinstry about what the IAT team had reported to him, the video that they'd shown him, the briefings they'd given him, the video they'd given him? You put that all to one side?
- A. Yes. Now, the Minister had been receiving regular updates from the Chief of Defence throughout the entire IAT process, and that information would have been put to him, in the weekly meetings, but when it came to the final report, as I've said, we based -- the basic premise of that report was drawing off the IAT report, which of course --
- Q. Well it wasn't, was it? It was drawing off Chris Parsons' 14/9 email?
- A. Interpretation of the IAT report, but that was -- again, that was the only substantial piece of information we saw in the entire inquiry. Everything up to that point in time was

either media, or again, I use the word anecdotal. It was the conclusive report that we were wanting to hang our hat on, so to speak, and be able to report against that.

Q. Chris Parsons told you what you wanted to hear?

A. No, not at all. Look, I have worked with Chris many years in New Zealand and abroad on operations and I absolutely trust his judgement, and he, in his viewing of that piece of information, again, I accept that it was his interpretation of it, but having now seen that particular paragraph, it's reasonably accurate in the way Chris has portrayed it.

Q. All of these intelligence reports that were coming back, did you read them, and engage with them, in a more thorough way than you did to the attachments to the briefing paper?

A. Ah, the -- I kept abreast of intelligence as it flowed throughout the big picture in Afghanistan.

Q. No, I meant these ones?

A. Yes, absolutely.

Q. Yeah, and that was consistently telling you, your own S2s, Intelligence Officers, PRT and TF81, "Our intelligence is indicating the likelihood of civilian casualties", right?

A. Yes, and -- but, again, the assessment team, in their reporting that was passed back to us, they were unable to substantiate around civilian casualties.

Q. What was the thought process which enabled you to ignore completely all of that reporting and information that you were getting from Rian McKinstry, through him, from the IAT briefing team, and your own Intelligence Officers, and just focus and accept unquestioningly a 14-line email from Chris Parsons? Can you help us with that?

A. Yes, so you know, all of that was part of the investigation that was being conducted by the IAT. They were --

Q. I'm talking about how you rationalise ignoring --

A. Yeah, so my thought process was that this was an ongoing line of inquiry. There was a team of professional experts who were investigating this particular operation and the allegations of

civilian casualties. At various times, press releases were made and information came back, but until the whole investigation was pulled together and the conclusions were formed by the team, everything up until that point in time was just part of an ongoing inquiry. And so, the way I would have rationalised that and thought about that was: okay, this is all, at the moment, being speculated and being investigated in reasonable detail, and the investigation team went out to Baghlan and went to the hospital to try and see casualties and the lives, and speak to the Governor. They were pulling all the information together, looking at the Air Weapons Team, and so on and so on, and speaking to our people. So all that was -- all the balls were up in the air. Chris' report for us, when that came through, was that the report has landed. The team has concluded, and in this particular case, we were wrong in our interpretation, but it was based on the glance that Chris had of the conclusions, that he has assumed were the conclusions for the entire investigation, was that the RTF or the Response Task Force was exonerated, on the basis that they'd looked at all the evidence, all the information, and drawn that conclusion.

Chris saw that; that was reported to us. So in our mind, that was the most conclusive piece of information we had, in that the IAT had done its job, looked at this thoroughly, and this was their findings.

Now we know that is wrong, and had they come back and said to us, and as the report goes on to say, there's a possibility of casualties, or likelihood it may have occurred, we would have reflected that in our reporting, but at that point in time, we didn't know that. What we knew was this was the summary that Chris was permitted to see. That was what we then reflected in our reporting.

Q. Thank you. So just coming back to my question, don't you think that you displayed a remarkable lack of curiosity, given everything else, given all the other information you knew,

when you got Chris' email? You didn't ask him, are you sure? How can that be? What's the explanation? How did ISAF determine there were no civilian casualties? Did you ask those questions?

A. To your first question, no.

Q. Right.

A. But as I have said, I have great faith and trust in Chris' judgement, and what he reported and what he saw, although it wasn't word-for-word, I put a lot of faith in that.

Q. Did you ask him, Chris, how on earth did ISAF manage to conclude absolutely categorically no CIVCAS, given everything we known and what they've said on the 29th of August? Did you ask him that?

A. No.

Q. Why not?

A. Because, again, for the sake of repeating myself, in that what Chris saw was -- in our mind, was the IAT report, which after they'd done all the investigation and pulled it altogether, this was the product of their investigation, was that there was no CIVCAS and -- across the Force. Now, we know that was wrong, but it's -- they were the experts. They looked at the information; they investigated it; this was the findings. So we accepted those findings on the basis that -- of what Chris had observed and passed back.

Q. You and Chris Parsons were under a significant amount of pressure, weren't you, when the allegations of civilian casualties arose, right?

A. Well, in what way?

Q. Ministers were exercised about a report that New Zealand had been associated within an operation where civilians had been --

A. Look, there was absolute -- there was a degree of urgency. I'm not sure pressure would be the word I would use.

Q. There was a strong desire, wasn't there, to have the right answer to give to Ministers and the public?

- A. There was absolutely a strong desire to make sure that we were very accurate in our reporting of what came back to theatre and went across.
- Q. You now need to be able to explain why you're able to dismiss the ISAF press release in favour of Chris Parsons' email, don't you?
- A. Well, I'm not -- in my mind, that was a press release designed to inform the public of Afghanistan that -- in regards to the particular operation. And so, yes, it was -- that it was at odds with the final investigation, when I understand how they do their media operations and information campaigns, I can see how that could occur, but again, until we saw the final report, that was all we had to really latch on to. And Chris' view of that report was what we placed great stock on.
- Q. Have you heard the expression "Nelsonian blindness"?
- A. No, I'm not a nautical man.
- Q. Turning a blind eye?
- A. Well, I absolutely categorically disagree with that assertion.
- Q. So you disagree that you're able to turn a blind eye to the intelligence reports indicating there may have been civilian casualties?
- A. Well, in the nature of my business that I was involved in back then, you had to -- you could not put complete faith in intelligence reports because the sources and the means of verification is incredibly difficult, and so, they were always caveated with these could be accurate, or they -- you know, I mean -- this is not science.
- Q. So you put them to one side, put them to one side, rely on Chris?
- A. No. No, not at all. I mean, they were all part of the informing process, but at the point I keep coming back to is, at that point in time, this was an ongoing investigation. Chris' report was that he saw the final report, or parts of that, which reached this particular conclusion. And so we reflected that in our reporting, because that, for us, was the

most sort of -- it was -- well, you know? It was the anchor that we'd sort of been look for really, because up until then, everything was speculation, intelligence reporting, so on and so on. It needed the IAT team to pull it all together and make a conclusive finding.

Q. Let's try and wrap up soon, Mr Kelly. You were interviewed by Ross Smith, weren't you, on the 1st or 2nd of July 2014 after the discovery of the IAT report? Do you remember that?

A. 2014? I don't remember that.

Q. Stand by, while I try and locate a copy of it. If you look at the back of the bundle, you have the large ring binder. You will see a tab that says supplementary?

A. Oh, yes. Diary notes for Ross Smith?

Q. Yes. Turn to page 20.

A. Oh, okay.

Q. Have you seen this before?

A. No.

Q. All right, so these are his diary notes of the interview with you, held on 2 July 2014. Do you remember him meeting and speaking with you about the IAT report at that time?

A. No, I don't.

Q. Really?

A. No. Look, there were -- 2 July 2014 --

Q. I mean the IAT report had been found in a safe?

A. Yes, I know, but I -- by that stage, I was in a completely different role.

Q. What were you doing?

A. I was the Land Component Commander, so I was now responsible for the operational preparation of the Land Army. So I had little to do with the Special Forces at that point in time.

Q. Okay, let's -- so you have no memory of this?

A. Ah, look, let me read it, but there's so many things that happen in one's day that to go back and say that I can absolutely recall this conversation would be wrong.

- Q. "9am. Pete Kelly categorically stated that he'd not seen the Joint Assessment Incident Assessment Team exec summary. He was aware that an assessment had been verbally briefed to SNO McKinstry?"
- A. Okay, so that was wrong.
- Q. What was wrong? His record, Mr Smith's record of what you told him, or what you told him?
- A. Well, what we think now is that the assessment had been verbally briefed to SNO Parsons. Rian had gone from theatre; he wouldn't have seen the assessment.
- Q. Right, so now you recall that Chris Parsons had had a verbal briefing?
- A. Well Chris Parsons, when the Incident Assessment Team's report was produced, Rian had left theatre. Chris Parsons was in theatre at that point in time.
- Q. Right, so what you've referred to here is not Chris Parsons' email, but a verbal briefing, right?
- A. Yeah.
- Q. And even though you've told Ross Smith that the verbal briefing you relied on was from Rian McKinstry, are you saying that you got that wrong, when you were talking to Ross Smith, and you really meant the verbal briefing that Chris Parsons got?
- A. Well, just from the straight chronological order, Rian McKinstry was outside of the theatre when the assessment team's report was presented; Chris was the first one to see it. So that would have been -- that is now factually wrong, I would think.
- Q. Sorry, what's factually wrong?
- A. Well, the assessment team's executive summary, is that what I'm seeing here?
- Q. Yep.
- A. And that has -- had been verbally briefed to the SNO McKinstry.
- Q. Mmm.

- A. Well, from my understanding of the chronological order of things was that when the assessment team's report was -- we were permitted to see it for the first time, it was Chris Parsons who saw that, and made comment in that email back to us.
- Q. So, you think that you made a mistake?
- A. Oh yes, I -- that's an error. You know, in that I got that wrong.
- Q. So you were telling Ross Smith, in fact, about the briefing verbal that Chris Parsons had?
- A. Yeah, the words are wrong here, but what I'm saying is that Chris Parsons would have been the first person to see, in a sense, the IAT report in some way, shape, or form, albeit briefly.
- Q. Sorry, I'll try and make this clear again for you. Are you saying that what you meant to tell Ross Smith was that Chris Parsons got a verbal briefing?
- A. Well, my use of Rian, to me, that's clearly wrong now, and the way we know it -- understand the sequence. So I got that wrong.
- Q. So that would be yes; I did mean that Chris Parsons had got a verbal briefing?
- A. Yes, or seen -- you know, I said verbal here, but may have seen the report or bits of it.
- Q. Right. Right, so -- and no reference to an email from Chris Parsons, just a verbal briefing that Chris Parsons got, is the mention here?
- A. Yeah.
- Q. And then this briefing, or the note goes on, "And that the Ground Forces' activities were concluded in accordance with ROE and the plan." Do you see that?
- A. Yes.
- Q. There's no record here of you saying that you were told, you say now by Chris Parsons, that the Air Forces had also been cleared, is there?

A. No, there's not.

Q. No, and then you can see conjecture that the exec summary has come into HQ via another channel, e.g. legal, yeah?

A. Oh, where's -- where does it say that?

Q. Bottom of that page?

A. Oh yes.

Q. Yeah, so what was the basis on which you indicated to Ross Smith that it was legal who might be the source of the IAT report?

A. I'm -- I'm not sure, other than the fact that we had a legal advisor in theatre and that, in their role, they may have come across it. I can't tell you how that report came back to New Zealand.

Q. You don't recall actually having that discussion?

A. Ah, it's um -- no. No, I can't. I don't.

Q. Can you turn to page 18? So you understand what these are, these are Ross Smith's notes of a meeting he's had with then Defence Minister Coleman, on the 1st of July?

A. Yep.

Q. Yeah? And this follows discovery of the IAT report and the Minister's rapid conclusion that the briefing papers that you helped prepare of the 10th and 13th were misleading, yeah?

A. Were wrong, but were based on the information that we had at that time.

Q. Right. You'll see the Minister -- or the note of what the Minister refers to as "SAS accountability"?

A. Yes.

Q. "Credibility eroding over time."
Yeah?
"Special Forces are not fallible. No question on their core skills, but in political judgement, lack insight. Confused the desirability of their acts. Having a certain shielding [something] effect [probably] equals unaccountability. DSO, look at this position not being SAS."
Mmm?

- A. And what are you asking?
- Q. Given your evidence yesterday and today, would you take any issue with the views that the Minister appears to express?
- A. I take a lot of issue with the views that the Minister expresses in this.
- Q. All right. Thank you.

CROSS-EXAMINATION BY MR SALMON

MR SALMON: Just before I start my timer, can I check, are we breaking at 11.30?

SIR TERENCE: 11.30, yes.

MR SALMON: Thank you, Sir.

I take it from what you've said to my learned friend, Mr Kelly, that you spoke regularly, not only with Chris Parsons during the relevant time in 2010, but also with the CDF about these issues?

- A. Yes, correct.
- Q. And, you've mentioned a number of times using phrases such as "fleeting glance" or "a fraction", the fact that Chris Parsons had conveyed to you by phone that he had only seen a few lines of the IAT report, correct?
- A. Yes.
- Q. And that's a key detail, you would agree, and you would have known it's a key detail then?
- A. Yes.
- Q. And you would have conveyed that to the CDF at the time?
- A. We would have conveyed it during our regular briefings with the CDF.
- Q. And, Chris Parsons yesterday told us words to the effect that he was aware that it was a bit of a sketchy email he sent, my words, not his, but more his words that even as he pressed send, he realised he might be pressing send too soon. He presumably conveyed that sense to you as well?
- A. Well, it's -- I absolutely understand that in his mind, it was very fleeting, and over time, we have discussed this, but at

that particular point in time, I don't actually recollect the detail of the conversation we would have had on that.

- Q. But it sounds likely doesn't it, if he told you it was a fleeting glance -
- A. Oh, absolutely.
- Q. -- told you -
- A. Absolutely.
- Q. Okay. So, when you keep saying you preferred information from in theatre, rather than other information, for people like me, non-serving people, in theatre normally means the video footage off the gun ships, things like that? In this case, you're disregarding all of what I might call in theatre and picking an email sent with doubt in the mind, summarising a few fleeting lines, and you're calling that theatre, are you? Just for us novices?
- A. Okay. So, what I'm, in that particular example you're referring to, in theatre, I'm really talking about in this particular case, the IAT report.
- Q. No, you're not. You're talking about someone's fleeting glance of a few lines in an email they've expressed doubt about, and you're calling it theatre to make it sound better today, are you?
- A. No, what I mean by that is up until that point in time that all the information we were receiving was from --
- Q. No, sorry. Sorry to cut you off. I'm limited on time, so forgive me --
- A. Oh, okay.
- Q. -- I'm wanting to know why you keep calling it theatre as if it's a special direct source of evidence. It's less direct than all of the other evidence you disregarded, isn't it?
- A. Well, it's more formal correspondence.
- Q. It's less direct than all of the other evidence you have disregarded, isn't it?
- A. It's -- well, it's not the term I would use.
- Q. You think it's more direct?

A. The formal correspondence, to me, is the appropriate sort of messaging that we'd use to pass and relay information between theatre and New Zealand.

Q. It's less direct than evidence such as helicopter gun ship videos, which the Defence Force also had. Surely you can agree with that, with the cameras on you, on oath?

A. What am I agreeing to?

Q. That it is less direct evidence to take a fleeting glance relayed by email from an office?

A. Ah, what I --

Q. Or you don't want to?

A. -- in this particular sense, what I'm saying is that the correspondence between me and the SNO was the direct and formal channel of information.

Q. Okay. That's your evidence then, on that.

All right, your paragraph 37 of your Brief of Evidence has changed, hasn't it?

A. Yes.

Q. And it's changed to remove the text, "Until now that Chris Parsons had not seen the whole IAT report"?

A. Yes.

Q. The effect of that was that, had the brief you had originally prepared been read out by you, you would have been perjuring yourself, wouldn't you, because you would have been telling this Inquiry that only now have you discovered that Mr Parsons had not seen the full report, Brigadier Parsons?

A. Yes, that -- that was removed because it was incorrect.

Q. Right, but you wrote that?

A. Yes, and we detected that it was incorrect, and we rectified it.

Q. Who do you mean by we?

A. Me and supported by my -- our legal team.

Q. But when you wrote it the first time you thought it was true, did you, or you thought you could get away with it here?

A. No, no, I -- it -- in the toing and froing it became quite clear that it was incorrect and it needed to change.

Q. But with what you've told us today, your living memory still is that you knew at all times that Brigadier Parsons had never seen the full report?

A. Yes.

Q. Which means that when you wrote that passage in your brief you knew it was wrong?

A. It -- well, it was wrong; it was a misinterpretation. That's why we rectified it.

Q. Yes, I know you've rectified it; you don't need to say that again with our limited time. What I'm wanting to know is why you wrote something down and had it offered to this Inquiry knowing it to be false?

A. Well, because it --

Q. Was helpful?

A. No, it wasn't helpful at all, it -- again, it was wrong and it needed to be addressed.

Q. But you knew it was wrong when you wrote it Mr Kelly?

A. Well, in this particular case --

Q. Yes?

A. -- I needed to pay more attention to that particular passage, and it was wrong, and so we rectified it.

Q. And is that your way of saying yes; you knew it was wrong when you wrote it?

A. Well, it was wrong.

Q. I take it that's a yes --

A. Yes.

Q. -- you knew it was wrong? Okay.

Let's look at another change in your brief, 35. You also changed that one, didn't you?

A. Yes.

Q. Now, what you have done in 35 is replaced some text that did exist with the new text, that's saying the text in quotation marks et cetera, correct?

A. Yes.

Q. Now, the old version said something quite different, so that your current version of your 35 says that you can now see that the way this is expressed in the note makes it look like it was a quote from the IAT report?

A. Yep.

Q. But you've repeatedly doubled and tripled down with Mr Isac on the fact that you knew when you wrote it that it wasn't a quote from the IAT report and you were quoting just Chris Parsons' email. You've absolutely doubled down on that, so we know that much, don't we?

A. Yes, that's right.

Q. Okay. When you wrote your brief, the first one, you said the exact opposite. You said:

"The way I interpreted that portion of Chris Parsons' email was as though it had been taken directly from the IAT report, that is why I put it in quotes."

Do you remember writing that in your brief?

A. Ah, okay, again, that was wrong, and needed to be addressed.

Q. Do you remember writing that in your brief?

A. My briefs were prepared in consultation with the legal team.

Q. You and I will get on a lot better, given the time limits that I am under, for my client to have his questions put to you, if you can answer the actual questions I ask --

A. Okay.

Q. -- rather than going off on frolics?

A. Okay.

Q. You knew it was wrong --

A. It was wrong.

Q. -- when you wrote that. You knew it was wrong --

A. It needed to be --

Q. -- when you wrote that?

A. -- addressed and rectified.

Q. You knew it was wrong when you wrote that?

A. It was factually incorrect, quite right.

- Q. You knew that it was factually incorrect when you wrote it. Yes or no?
- A. When the first summary was presented to me and I looked at it, I said that is wrong. That needs to be rectified.
- Q. No, you finalised this and had it submitted as your brief?
- A. That's wrong.
- Q. And you knew it was wrong?
- A. Yeah.
- Q. So you were choosing to give inaccurate evidence in your brief, originally, to this Inquiry?
- A. Well, I'm -- it was picked up late in the piece. You are correct in that, but it needed to be rectified because it was wrong.
- Q. It needed to be rectified because it was both wrong and something you were going to be caught out on today?
- A. No, not at all.
- Q. Well, that's right, isn't it, because some of the answers you've had to give show it to be wrong?
- A. Well, the statement that was deleted was wrong, and needed to be deleted.
- Q. Well, other things that were wrong, that need to be deleted, were the entire contents of your briefing to the Minister, which my learned friend has cross-examined you on. You now know that that needs major correction to be accurate. You know that now, don't you?
- A. Correct.
- Q. And you knew that shortly after it was submitted.
- A. No, that's not true.
- Q. That is true, because you knew at the time it was submitted that aspects of it were wrong. You've been through them with Mr Isac; we don't need to go through those again, do we? We know that you know that it was not a conclusion in the IAT report that the allegations of CIVCAS were baseless. That wasn't even in --
- A. No, at that point in time --

Q. -- Chris Parsons' email, was it?

A. -- our understanding of what we reflected to the Minister was correct based on our interpretation of the IAT report, which Chris --

Q. No, Chris Parsons had never said the allegations were baseless, and you put those words in. You know that's wrong.

A. Ah, yes. The -- that exact terminology -- yeah, is not as precise as it could have been.

Q. Okay. You know that it was wrong to imply the whole report had been read, and you knew that at the time, correct?

A. Again, we know -- our choice of words was not as precise as it should have been.

Q. And you know that it wasn't a quote from the report?

A. Yes.

Q. But you have never gone out of your way to correct that, have you, in the way you quickly went out of your way to correct these two points in your brief?

A. Sorry, so what are you saying?

Q. What I'm saying is that you're not really concerned with accuracy; you're concerned with the story you were writing for the Minister, and with keeping the consistent team brief from within the SAS of saying there were no civilian casualties?

A. No, no, that's not correct at all.

Q. That's not correct?

A. No.

Q. All right, you have chosen to dismiss a press release you had seen, correct?

A. Now which press release are we talking about?

Q. The second press release, as Mr Isac has called it?

SIR TERENCE: Let's just be clear by what we mean about the second press release. Do you want to identify it?

MR SALMON: My apologies, I'm talking about the second ISAF press release of 30 August that you agree you saw, but you decided to disregard in favour of Chris Parsons email account of what he'd seen.

A. Okay, so can we -- can you please refer me to that press release?

Q. Page 70, 71 of the big bundle?

A. Okay, now sorry, and your question again?

Q. My question is you chose to disregard the words in that about the possibility of civilian casualties, in favour of a fleeting glance over the shoulder from Chris Parsons, correct?

A. Yes. A fleeting glance looking at the report.

Q. Now, you have spent a long time liaising with the US Military and with ISAF, fair to say?

A. Yes.

Q. You were New Zealand's Military Attaché to the United States?

A. Correct.

Q. And you'd have a pretty good understanding of how ISAF works?

A. Yep.

Q. Okay. Yesterday, Chris Parsons, Brigadier Parsons, suggested that some of general Petraeus' public statements about potential civilian casualties and their seriousness were more General Petraeus playing to, his words, the "hearts and minds" of the public, and that's why he discounted them in favour of things he thought were more accurate. Do you agree with that?

A. Yeah, I would agree with that.

Q. And your way of putting that, is that, and you've said this today, that the General may have other PR reasons for saying something you think is inaccurate?

A. I don't think I used the word "PR" but Information --

Q. You did?

A. -- Operations. Oh well --

Q. We have a transcript, but what word do you want to use now?

A. Well, the US Information Operations and their campaign at that particular time is around portraying a softer messaging, and hearts and minds, and trying to build that across the country.

Q. Now --

A. And it sometimes it at odds with the formal statements that come out.

- Q. And that's what I want to understand from you, as you seek to explain your rather extraordinary selection of the least reliable evidence over all the better evidence and the official statements of ISAF. As you sit here, as someone who has been our Military Attaché to the United States, is your evidence, here, today, General Petraeus and ISAF deliberately misled the public in their press releases? Think carefully about this. Is that your evidence?
- A. No -- it's not my evidence. They don't generally, using your terms -- but the language they use may soften the messaging that is put out in there.
- Q. Well, this isn't something where it's just tone, is it? There are either potential civilian casualties, or there are not and it's baseless. You went with baseless, which means the public statements by ISAF, by General Petraeus, were wrong. Now I want to know whether your evidence, as you try to explain this extraordinary approach you've taken, is that your operating assumption is that he was misleading everybody deliberately?
- A. No, my assumption -- well, my view on this is that, up until, you know, and I've said this before at a point in time, everything was swirling around in terms of the allegations and information. The IAT's job was to pull that all together and provide a factual comment. For us, that was in the report that Chris saw, and that's why we have emphasised that over other media releases.
- Q. You agree that the only direct writing from ISAF on this issue, you had seen at the time you briefed the Minister, was the press release on page 71, and possibly the press release on page 70, which you're now claiming you didn't read even though you attached it?
- A. Yes, that's correct, because I had not seen the IAT report.
- Q. Those were the only official writings that you had ever seen from ISAF?
- A. The media releases.
- Q. Correct?

A. Correct.

Q. And you decided they were wrong?

A. No, what we decided was that they are media releases and should be taken as such. The IAT report is the factual conclusion, drawing together all the threads of the inquiry into an outcome -- as we thought at that particular point in time what Chris saw was the conclusions from that inquiry.

Q. Which you have confirmed you knew he had doubts about his account of, even as he pressed send?

A. In regards to -- but still, he had seen part of the report. Up until this point in time --

Q. That's a yes, is it?

A. -- we had not seen anything.

Q. It's a yes, you knew he had doubts about it?

A. Um, well no, I -- that's not a yes.

Q. You see, it's safe for you to answer yes, if the honest answer is yes?

A. No, what I'm saying --

Q. And you won't be in trouble if you do?

A. -- is, in terms of the information that was relayed to us at that point in time that we saw it, I wouldn't use those words that you've just used.

Q. All right, one thing you would say though, is intelligence is very unreliable. You made a point of saying that to my learned friend?

A. It's -- no, it's not an exact science, is what I would say.

Q. Right, and fleeting glimpses of long complicated documents, where you know someone's seen only a few lines and at speed, are not rock solid, are they?

A. Ah, but in terms of what he did view, was in his mind -- was the conclusions of the report that pulled the investigation together. So that elevated it, and gave it a degree of importance in our mind.

Q. But not a degree of reliability, because it's still second-hand intel, as you would call it?

A. Yes, absolutely. We wanted to have the report, but that was the next best thing.

Q. Well, no. The next best thing is for you to view the very videos that Rian McKinstry viewed, that showed him, and he's given evidence about this, a clear basis that clearly showed, paraphrasing him, that there were potential civilian casualties?

A. Yes --

Q. That's the most direct evidence, isn't it?

A. -- and do I not dispute that.

Q. Did you look at it?

A. I have seen that video.

Q. Did you look at it at the time?

A. What I have seen, I have --

Q. Yes or no?

A. I saw it at the time, yes.

Q. You did. Okay, so you wouldn't disagree --

A. But then when the report came out that said -

Q. Let me ask a question. You don't disagree with Rian McKinstry that once one looks at those, one can clearly see that there are potential civilian casualties?

A. Absolutely.

Q. You agree with that?

A. I agree with that.

Q. Which is a further reason why you must have doubted the accuracy of Chris Parsons' email, the moment you got it?

A. No.

Q. You didn't?

A. No, because Chris, in his quick summation -- Chris is a smart lad. He is a very accomplished officer. When he looked at that, he knew what he was looking at in terms of the conclusions of the report, and the way he presented that to us, that was our only factual connection to the summary of the report.

Q. Well, you were his boss and he was a smart officer. He also knew that you had a general interest in denying civilian casualties on any operation associated with the SAS, didn't you?

A. No, not at all.

Q. He knew that you had a general contempt towards some of the journalists who wrote about --

A. No, I do not.

Q. Oh now, be careful here. Have you ever written anything derogatory or negative about the journalists who've written about this?

A. I may have used derogatory language, but I do absolutely respect the freedom of press in New Zealand.

Q. Might you have gone further than that and said some rather alarming things?

A. I don't know. I may have, but I absolutely believe in free press.

Q. Well, that's easy to say isn't it, but --

A. Yes, absolutely.

Q. -- the proof is in the pudding, would you agree?

A. Oh, look I am -- our former Government, and the way our media interact and challenge us, absolutely.

Q. Right. So for your part then, in terms of freedom of the press and openness of information, and I'll need to ask my learned friend Mr Radich about this over the break, but in terms of your personal writings about such issues, you would consent to some of those being released and perhaps talked to you about after the break, would you? Writings for example about my client, Mr Stephenson?

A. Um, well look, if it's relevant to the proceedings, then?

SIR TERENCE: Well, I must say this is beginning to get away from the purpose of this hearing.

MR SALMON: Certainly, Sir.

SIR TERENCE: I, speaking for myself, am not really interested in going outside the context of the issues.

MR SALMON: And sorry Sir, I'm not intending to go beyond them except for one point, which perhaps I put to this witness, and then we take the break.

I've got the clock at 18 minutes.

Mr Kelly, what I'm putting to you, is that you had a general operating concern not with giving accurate information on issues like civilian casualties or the performance of the SAS in Afghanistan, but a focus instead upon telling a story that put the SAS and the United States in a good light, and that was your focus.

A. No, I absolutely disagree with that one hundred percent.

Q. You do?

A. Yes.

SIR TERENCE: We'll take the break now and that gives you ten minutes after the break.

A 15-minute adjournment.

(Morning adjournment)

CROSS-EXAMINATION CONTINUED BY MR SALMON

MR SALMON: Sir Geoffrey, Sir Terence, just before I turn my timer on again, I know it might be slightly off, but it helps me, it's as convenient a time as any. I've spoken to my learned friends here and for Defence about the possibility that I will try to be much more confined with a few witnesses coming up, and use far less than 30 minutes, on the basis that I might, at least seek an indulgence, on one or two of the final witnesses to go a little bit beyond 30 minutes. I'm not asking you to decide on that now, but rather leaning into the topic now, it's quite a timesaving I think can be made, and more useful to you, and helping the Inquiry is the primary goal.

And so, this witness I'll go close to the 30, but the next few, I will be more brief, with the hope in mind that if there's time I can perhaps be a little longer.

SIR TERENCE: All right, thank you for that.

MR SALMON: And, for completeness, I understand Mr Radich doesn't take a position on that and is comfortable with whatever assists the Inquiry.

MR RADICH: Yes, Sir.

SIR TERENCE: Thank you very much. Well, we will talk about it over lunch and let you know at the end.

MR SALMON: Yes, thank you, Sir. Either way the goal is to assist you.

SIR TERENCE: Yes, thank you.

MR SALMON: All right, and so Sir, you have with me ten minutes to go, I think?

Now, the email you got from Chris Parsons, on 8 September, formed the basis for your December briefing that you wrote for the Minister, correct?

A. Correct.

Q. And in all your discussions with the CDF, was the source- not one of, but the source- for the conclusion, the view that you could announce publicly, there were no civilian casualties, categorically?

A. Correct. Based on the email we received from Chris.

Q. And despite your experience dealing with US military forces and your seniority, and despite your understanding of ISAF, and despite all of the other resources available to you, you took no steps to investigate the issues further once you got Chris Parsons' email. That's right, isn't it?

A. Correct, but our ability to investigate the matter of 20 August was incredibly limited in terms of the -- our ability to get out and about and do what the IAT did.

Q. Well, that may or may not be right. The PRT was looking around and still learning things and writing documents that referred to several possible casualties, wasn't it?

A. But again, the PRT would not have had the reach that the Headquarters ISAF assessment team had --

Q. No, but if they're finding evidence --

A. -- and this ability to --

Q. -- of potential civilian casualties, it's new evidence, isn't it?

A. The PRT, through its engagement, may have, but again, they would not be as broad-reaching or as wide-reaching as what ISAF assessment team would have been.

Q. Well, you don't know that because you didn't know what the ISAF assessment team looked at, because you'd never seen its report?

A. No, but I do know that the ISAF assessment team could travel up and down the country, but the PRT could not.

Q. One thing you did know is that there had been media statements, and you can go to them again at pages 70 and 71?

A. No. No, I absolutely accept that.

Q. Okay. There had been media statements announcing to the world at large the ISAF and General Petraeus' official position on these issues, correct?

A. Correct.

Q. And you would agree, wouldn't you, that if one reads them against your briefing to the Minister, both cannot be true?

A. They are at odds with each other.

Q. Which is, yes. Both cannot be true?

A. Again, I refer back to the way that ISAF does its public messaging.

Q. And I refer again to my request that you try to answer my questions, given the time limits upon me. If it's capable of a yes or no, and the honest answer is yes, you can answer yes?

A. Um, yes. Well, in hindsight now, we know what you are saying is correct.

Q. Not just in hindsight. You're an intelligent educated man who understands what casualties mean. Both could not be true at the time?

A. Ah, but again, the report itself did not conclusively prove that there were casualties. I accept the likelihood that

there were casualties, and that they may have occurred, but that's the language of the report.

Q. But you hadn't read the report at the time. So thank you for that, but please focus on my questions. When you were briefing the Minister, you had on the one hand, direct written statements recording the official ISAF position, correct?

A. Ah, now, are you referring to the media release at that point in time?

Q. Yes.

A. Yes.

Q. And you decided that they were inaccurate, did you?

A. No.

Q. You decided that they were accurate, did you?

A. No. No, okay --

Q. Did you -- do you agree that you knew, when you wrote the report for the Minister, that your report would be false if that media release was accurate?

A. No. No, I accept that the media releases were out there, but until we saw the official report, that was the document that would answer our questions.

Q. Well, I want to ask you two things about this. Here's the first one. If you believed that there was no possibility of civilian casualties, then you believed that the ISAF press release, which remained online, was false, and continued to be false. That must be right, agree?

A. No, I don't believe that there were no possibilities of civilian casualties.

Q. You told the Minister there was no possibility of civilian casualties. You said it was categorically ruled out?

A. Yes, but --

Q. So you didn't believe that when you wrote it?

A. At the time, when we wrote that, we based that off the summation that Chris drew from the report, the brief glimpse of the report.

- Q. You've said that plenty of times, trust me. What you just said to me, though, was that you didn't believe there was no possibility of civilian casualties, and that was an honest answer, wasn't it? When you wrote to the Minister -- when you wrote the report for the Minister, you didn't believe there was no possibility of casualties?
- A. No, there -- again the report, in its findings --
- Q. I'm asking about your belief. Stick to my questions with the time we have, please?
- A. Leading up to the -- Chris' email, there were the media releases.
- Q. I'm asking about your belief when you wrote the Minister's briefing in December --
- A. Well --
- Q. -- you have just told me that you --
- A. -- in the --
- Q. Hear my question. You've just told me that you did not believe there was no possibility of civilian casualties?
- A. In the note that we wrote to the Minister, we based our summation on the email that we received from Chris, that there were no civilian casualties.
- Q. Can you hear my question? You didn't believe that at the time; that's what you've just told me?
- A. No. No, the information leading up to that would suggest -- but when we saw the report, or when the report was relayed to us, that put that issue to rest. It seemed to us that that -- again, it was at odds with the media reporting, but Chris seeing that passage in the report was the information that we were looking for to be able to pass to the Minister.
- Q. It was the excuse to stop looking at all, wasn't it?
- A. No, no, not at all.
- Q. Well, you didn't look further at all. You've confirmed that?

A. No, not at all. Had the IAT report been provided to us, then we would have reported that in its -- what we would have been allowed to, in its entirety.

Q. Or perhaps it was provided to you and put in a safe and you chose not to report that?

A. That's right, and I accept that that would be -- that was an error, because the minute we would have had that, we did need to set the record straight.

Q. Right, but you didn't, and you knew you hadn't?

A. Um, yes, that's correct.

Q. Okay, and you don't seek to excuse the fact that you had it now at all, do you?

A. The New Zealand Defence Force had that information. I don't know when it had that information, but the minute we got it, we needed to rectify our messaging.

Q. Well, the most likely thing is that you got it while you were still in command, isn't it?

A. Ah now, command of what?

Q. While you were still DSO?

A. Ah, well no, I would absolutely disagree with that. Had that report come across to me, in my time as DSO, that would have been made available.

Q. You were a Military Attaché to the United States?

A. Correct.

Q. You knew people at the United States who would have that report?

A. There are over 500,000 soldiers in the United States Army.

Q. It affected you, and you would have been able to ask for it, and you never did?

A. No. No, my arrangement with the United States was on non-operational matters.

Q. You never asked for it. Just answer my questions, please?

A. No, I never asked for it, during my time in Washington DC.

Q. Okay. You never asked for it from Wellington?

A. No -- oh no, that's not correct. We asked for that report but through our team up in Afghanistan on regular occasions.

Q. Rian McKinstry asked for it once. No-one else has given evidence of asking again, beyond Chris Parsons at his visit?

A. Okay, well, we did relay to the SNO the importance of that report and wanting to get it back here in New Zealand.

Q. An inquiring mind wanting to get things right would have contacted ISAF and said your press releases are wrong and they're misleading the public. Do you agree with that?

A. Well, I don't take issue with that.

Q. But you didn't think they were wrong, did you?

A. The ISAF press releases?

Q. You didn't think that the public were being misled by those ISAF press releases?

A. Well again, up until the time -- so the ISAF press release you are referring to was 29 August. Up until that point in time, that was the information that was out there. So yes, we did believe that, but then come the report that Chris witnessed, that changed our view on that.

Q. Let's be clear, for all of planet earth, except for the recipients of Chris Parsons' email, the public formal statement of what the ISAF report was, was that press release, for the whole planet?

A. Yes, again, but I would draw your attention to the media --

Q. You're saying --

A. -- policies of the Headquarters ISAF, and their public messaging.

Q. -- and that's to mislead people, is it?

A. It's not to mislead, but it softens the stance. When Headquarters ISAF --

Q. So how is it softening to say something different from you?

A. Well, when it's categorically shown that civilian casualties have occurred, and have been proven, ISAF are very clear in that statement, and I can think of a number of accounts --

Q. Well please don't, because I'm limited in time and you're just not answering my questions. I know why you're not. I can understand your desire not to, but give me some answers, please.

A. Yes, absolutely.

Q. This statement was categorically at odds with what you told to the Minister?

A. Now which statement?

Q. And you -- the statement in the press release that there were potential civilian casualties -- and it remained online even when you briefed the Minister?

A. Correct.

Q. Did you believe that ISAF was deliberately misleading the public, or did you believe that you were? They can't both be true?

A. Look, I've said this a number of times. I don't believe ISAF were misleading the public, but the fact of the matter is, it was the report that drew all those threads together and Chris witnessing that, or seeing a portion of that and relaying that information back to us, was what we used as the conclusive basis for our reporting to the Minister.

Q. You cannot possibly believe -- I'm nearly out of time -- you cannot possibly believe, that if the report came out after that press release, and differed with it so materially, that ISAF would leave a misleading press release online. You cannot have believed that?

A. Look, our reporting to the Minister must be based on facts, and in this regard, it was based around the report, not on media releases.

MR SALMON: Sir, that -- and my time is my time unless you're prepared to let me go further?

Thank you, Sir.

RE-EXAMINATION BY MR RADICH

MR RADICH: I'm going to be brief, Mr Kelly. You were asked some questions by my learned friend, Mr Isac, about the way in which notes are drafted to Ministers?

A. Yes.

Q. Can you just -- and you gave some answers at the time, but just generally -- can you help us to explain how that process works?

A. Yes.

Q. Who's involved, just take us through it?

A. Okay, so there is a process for this. And yeah, people don't just write notes, put it in front of the CDF, and he takes it across the road. The process is -- and depending on the nature of the note that's going across -- so we'll use this one as an example. It would be co-drafted, or in this case, because it was Special Operations, I had a significant hand in that, but it was done with the Strategic Commitments and Intelligence Team as well, because they are the ones who regularly write the notes around operational matters to the Minister. So they know the process. Anyway, we would draft this, put it together. It would normally then -- once we think we've got it about right, we would share it with legal to make sure that they are comfortable with what we're saying and equally it would also probably go to the Assistant Chief Strategic Commitments and Intelligence, because typically, these notes would come through that office into the Chief of Defence Force. And so, there's a series of checks and balances within the process, before it then gets to the Chief of Defence Force's desk.

Q. All right. How long would that sort of process take, if that's possible to answer?

A. Well, it could take days. In this case here, that note was sent in December, but that note could have been worked on as early as, you know, middle to late November. It could have been earlier. It depends on when the Minister and the CDF

wished to engage on this particular topic in detail, as to when they go across the road?

Q. Okay, thank you. Could you look at page 77 of the NZDF bundle? This is the spiral bound version. This is the email from Chris Parsons?

A. Yes.

Q. If you look at the first paragraph in there, just at a general level, what is the subject matter that that's covering?

A. Well, the Accident Investigation Team's conclusions.

Q. Okay, and is there any other information in the email that leads to conclusions?

A. Yeah, and -- well, in that paragraph itself, when he --

Q. Or beyond that paragraph?

A. Oh yes, about the -- he talks a little bit about the allegations of civilian casualties and the two injured females in the hospital, and the -- a little bit of detail further on around the nature of Kalta and Naimatullah.

Q. What relevance did you take from that other information?

A. Okay, first of all, that the investigation team had struggled to find conclusive proof of the injuries -- the casualties, as had been purported by the -- I think the Governor -- or the Assistant Governor of Baghlan, in that there were twenty casualties and they thought they were in this hospital. So that seemed to close that line of inquiry, and that the civilian casualties, as well, that are alluded to here that Chris is referring to, potentially, again, with the way that the information is obtained and the way that Taliban and the insurgent groups would use language, is potentially that the casualties may in fact not have been innocent civilians, but it may have actually been two of the suspects we were looking to apprehend.

Q. My learned friend, Mr Salmon, when he was putting this to you, he asked you about your use of the word "baseless". If you look at that first paragraph, can you tell us please the language, or if you're able to, that you drew that word from?

- A. Okay, well, I guess it categorically clears both ground and air call signs of any allegations, and then it goes on to say, having reviewed the evidence, there is no way that CIVCAS could have occurred. So, I guess, drawing on those particular phrases would have led us to that term.
- Q. I want to just address a point that my learned friend, Mr Isac, made when he was referring you to this document. Do you remember that?
- A. Yes.
- Q. Do you have that there?
- A. Yes, I do.
- Q. Can I just show you, it's a helpful document, but can I show you the source material so that you can visualise the pages?
- A. Yeah.
- Q. If you look at the Inquiry bundle now please, the larger of the two, at page -- first of all, if you go to page 71 and keep your finger on it, and also go to page 169?
- A. Yes.
- Q. And first of all, if you look at page 71, do you see the words that Mr Isac -- I'm just looking at the first of his columns there, the first horizontal columns -- if you look at the right-hand side of that, he refers to the second ISAF press release which is page 71?
- A. Yep.
- Q. And he has the words there, "A Joint Assessment Team"?
- A. Yes.
- Q. Have you found those words in the press release, "A Joint Assessment Team composed of representatives...". It's in the first paragraph?
- A. Okay, yeah, sorry, in the second sentence.
- Q. Yeah, second line?
- A. "A Joint Assessment Team composed of representatives...", yes. I see that.
- Q. Okay, and if you have a look at the briefing, and that's on page 169 at 4, do you see -- it's three lines down?

A. Yes.

Q. Do you see that the language is similar?

A. Yes, I do.

Q. Thank you.

You were asked a question by my learned friend, Mr Isac, about a possible interview with Ross Smith in 2014 --

A. Yes.

Q. -- you remember that exchange? And you were taken to some notes. If you look please at page 82 of the same bundle you have in front of you, does that assist you in any way with the conversation? Just take your time to have a look at that email.

A. So, the email on page 82 is what we're referring to here?

Q. Yes. Yes.

A. And this is in relation to the notes that Ross Smith took of our meeting in July 2014.

Q. Yeah, I'm just asking if you -- if you can find anything in there that just assists with that information any further? All right, shall we just -- so to tune you in, because let's look at what was said in the note -- so keep your hand on that again, and if you can find the supplementary bundle with those handwritten notes from Ross Smith, when they were at page 20 of the supplementary bundle.

A. Yep. So the --

Q. So what it says here, and I'll just take you to it, if you look at the handwritten notes four lines down, "He was aware that..."?

A. Yes.

Q. Do you see that sentence?

A. Yes.

Q. And perhaps if you just read it out so we all know?

A. Yes:

"So he was aware that a --"

Q. An assessment, perhaps?

A. Okay:

"...assessment had been verbally briefed to SNO McKinstry"

Q. Okay, just pause there, and if you look at page 82, do you see -- and is there anything in there that might help?

A. Well, so Rian is referring to the post op report for Objective Burnham in the latest INTSUM. The Incident Assessment Team has produced a report on this operation on the issue of CIVCAS claims, and the report has found that there is no case to answer for Task Force 81".

So yeah, in a sense, yes. Again, that was a conversation that Rian would have had -- he hadn't seen the report at that stage, but we knew, around this time, that certainly, the actions of Task Force 81 had been cleared in the initial investigation, based on his conversations with --

Q. All right.

A. But he hadn't seen the report.

Q. No. So when you were having the conversation with Ross Smith, does -- you referred to it being possibly Chris Parsons. Does this help in any further way?

A. Okay. Yeah, so I mean, of course Rian engaged a lot with the Legal Advisor for the Assessment Team, and so yeah -- but he actually wasn't the one who actually saw the report.

Q. Okay. Thank you.

Now, can we go please to page 71, and this is the press release. I know you've looked at it a number of times, page 71 of the Inquiry's bundle, and would you look please, and I know this has been repeated, but just to get the context, you read the second paragraph, "The team determined..."

A. Okay:

"The team determined that several rounds from Coalition helicopters fell short, missing the intended target and instead striking two buildings which may have resulted in civilian casualties."

Q. In relation to that, what did you understand Chris Parsons' email to then be saying?

- A. Okay, so here there was an understanding that civilian casualties may have occurred, but Chris' email to us answered that particular question, in our mind, in that his viewing of the report said no civilian casualties had occurred.
- Q. So, to take that to the next level of detail, what would that have meant in terms of those two lines in the report?
- A. Well, you know, this report was drafted 29 August, and that -- by the time we got to see it, and what we considered to be the official findings, they had been able to confirm that particular line of inquiry, I guess.
- Q. Just finally, you were asked some questions about alterations to your Brief of Evidence --
- A. Oh yes.
- Q. -- that were made? Would you just explain, quite openly, the process that you went through in relation to the taking of your evidence and up to the point that it was signed?
- A. Okay, so I met with the counsel supporting New Zealand Defence Force and spent some time with them, first of all reviewing the correspondence over the applicable period of time that I was Director of Special Operations, and then we talked through this, and as a result of that conversation, a draft summary of evidence was prepared. And again, it was amended along the way, as parts of it were discussed further, but then this particular -- those last two passages, when myself and a member of the team had an exchange on that -- there were things that I wasn't comfortable with, which weren't right, and they needed to be fixed up. And they were.
- Q. When you first got a draft back, what did you do with it?
- A. Well, I made some amendments, and corrected some of the information that, you know, I had -- I didn't have all the classified information in front of me, and that sort of stuff when I was making those amendments, but again, in subsequent exchanges, we were able to talk through some of the paragraphs and it became clear that there was a difference in

understanding of what was being said and what I actually meant.

Q. I see, and in terms of the point at which you signed a Brief of Evidence, can you just explain when that came in the process?

A. Okay, so that came -- the signing of it was actually last Sunday. Yes, I signed in our meeting -- well, I signed -- maybe that was the amendments I signed on Sunday when we got together? Well, sorry --

Q. That's fine.

A. Yeah.

Q. All right, thank you very much. I have no further questions. Thank you.

QUESTIONS FROM INQUIRY MEMBERS

SIR TERENCE: Just before you go, can I ask a couple of things --

A. Certainly.

SIR TERENCE: -- just to get clear in my mind. Could I just get you to turn up page 173 of that black folder? And that's a series of press releases, media statements, media stories about aspects of this. Now, first of all, each of the releases has a document number underneath it. So if you look at the first one, which is from the Times of Central Asia, it's got document CA TC Asia 002 and so on, is that a NZDF identification number, do you know?

A. I cannot answer that one.

SIR TERENCE: They've all got a different document.

A. No, sorry --

SIR TERENCE: You can't, okay?

A. -- I'm not exactly sure what they refer to.

SIR TERENCE: All right. Now you said that -- when this briefing pack was being put together that -- I think you said the media team or somebody would have done a kind of deep dive and got this collection together?

A. Correct.

SIR TERENCE: Is that right?

A. Yes.

SIR TERENCE: So how does your -- or how, at the time, did NZDF's collection of relevant media material occur? Did you have a comms team that was searching across the media to pick up relevant stories as they were happening?

A. Yes, and equally our colleagues and the Minister of Foreign Affairs and Trade would also be using some of their networks to seek information as well.

SIR TERENCE: Right. So when a relevant story came up in the media, what did the comms team do with it?

A. Well, the exact process, you would have to ask the comms team, but from my understanding, they would draw all that information together and bring it up at their -- at the times where they are part of the discussions on operational matters or other matters, and bring it to the attention of the Chief of Defence Force or through the particular branch that they used to work to.

SIR TERENCE: Well, perhaps I should have put the question a bit more precisely. So if the comms team found media stories relevant to something that was happening in Afghanistan, would they have sent that to people in NZDF Headquarters who they thought it was relevant to?

A. Yes. Yes, of course, yes. And the team inside the intelligence part of the organisation would also be looking at open source reporting as well.

SIR TERENCE: Right. So, if we look at page 173, and we've got the media reports, the first one at the top of the page is the second media release that we've been talking about.

A. Yeah.

SIR TERENCE: And the one at the bottom of the page is the third media release?

A. Yes.

SIR TERENCE: Now if we look at that third media release, it says that the IJC has ordered an investigation, and it then says that the investigation had been ordered based on the

information contained in the Joint Initial Assessment Team's report. So, that indicates, doesn't it, that a further investigation had been ordered once the IAT's executive summary had been received by ISAF and considered?

A. Yes.

SIR TERENCE: And we can assume, can't we, that this media report would have been captured at the time and sent to relevant people within NZDF?

A. Yes.

SIR TERENCE: But you don't recall --

A. Look, I absolutely recall the one above it being sent to me, and being shared, but the second one, I don't recall.

SIR TERENCE: Right. Okay, that's helpful thank you.

Are there any questions arising from that?

MR RADICH: No, thank you, Sir Terence.

SIR TERENCE: All right thank you. You are excused. Thank you for your attendance.

(Witness excused)

KARL BAXTER CUMMINS (Sworn)

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Good afternoon, your name is Colonel Karl Baxter Cummins?

A. Correct.

Q. And you are the Assistant Chief, Defence Human Resources for the New Zealand Defence Force?

A. Yes.

Q. Colonel, you have a written statement of your evidence in front of you, would you please start reading it for the Inquiry at paragraph 2?

A. I enlisted into the New Zealand Army in 1989 as a soldier. I completed Officer training at the Officer Cadet School in 1992, graduating into the Royal New Zealand Corps of Signals. In 1996 I was selected for service with the New Zealand Special Air Service. I served with that unit between 1997 and

2012, fulfilling Troop and Squadron Command roles, as well as staff roles. I was the Commanding Officer of the NZSAS from 2012 to 2013. I have seen operational service in Bougainville, Kuwait, the Solomon Islands and Afghanistan.

Between April and November 2011 I was the Deputy Director of Special Operations. Between 2014 and 2017 I worked at the Ministry of Justice in the senior leadership team, supporting the District Courts, Specialist Courts, and Tribunals. I began my current role with the NZDF in 2018.

I have a Masters in Management from the University of Canberra (2005), and a Masters in Business Administration from the University of Auckland (2019).

Operation Burnham:

I was the Deputy Director of Special Operations on 22 August 2010 when the operation in Tirgiran, now commonly referred to as Operation Burnham, was conducted.

Although this was one of many NZSAS operations in Afghanistan, I remember it specifically because of its location and because it arose out of a need to support the security situation of Coalition troops, including the New Zealand Provincial Reconstruction Team. It also stands out in my mind because one of the members of the NZSAS sustained a serious injury in the course of an explosive entry into a building.

Q. Thank you, now just pause there please, and I think you were looking to make a small addition or a deletion should I say, relating to that paragraph, is that right?

A. That is correct. It also stands out in my mind because one of the members of the NZSAS sustained a serious injury. I'm not aware of exactly how that injury came about, so deleting the words "in the course of an explosive entry into a building" is something I'm not aware of.

Q. All right, thank you.

Please carry on to paragraph 7?

A. I kept abreast of most things that happened in Afghanistan. Although I was not in day-to-day contact with the Senior National Officer in Afghanistan, the way that then Colonel Peter Kelly - the then Director of Special Operations - was, I did receive some emails from the SNO, and I was regularly briefed by Peter Kelly.

Looking at the emails from that time, I can see that within hours of the Operation, Lieutenant Colonel Rian McKinstry, the SNO, sent me a copy of the Operation Summary. I refer to the bundle at page 1.

Q. Just have a look at the bundle please? Now it's not that one in fact, but the spiral-bound one just beyond it. I needn't take you through it, but would you turn to page 1 and please identify that is the email to which you refer?

A. Yes, that is the email to which I refer.

Q. Thank you. Paragraph 8, third sentence?

A. The Operation Summary stated that some insurgents had been engaged; that one member of the NZSAS assault force was injured and had to be evacuated; and that there had been no civilian casualties.

I remember becoming aware of the allegations of civilian deaths and destruction of property in the days after the Operation. Having deployed to Afghanistan earlier that year, I was not surprised to hear that there were allegations of this nature. I was familiar with the --

Q. Just pause there, and you are changing a word there, please explain it?

A. I'm changing the word to "I was familiar with the" -- I wish to change it to "I was familiar with the insurgents' use of Information Operations" as opposed to "Taliban" as it states.

Q. Thank you.

A. I was familiar with the insurgents' use of "Information Operations" in counterinsurgency warfare; it was not unusual for insurgents to spread misinformation, including exaggerated

Battle Damage Assessments, in an effort to turn the local population against the Coalition.

In that context, it was difficult to believe the allegations. I had more trust in what I had read in the Operation Summary, received from Rian McKinstry, than in the open source reporting about civilian casualties. After all, I knew the people involved, and I know the level of consideration with which these kinds of operations were planned and conducted.

Nevertheless, because the Operation had occurred at night in a volatile battlefield and because we knew that communications had been complex, we all felt a great deal of pressure in the days following the Operation. The last thing we wanted was for civilians to have died during the Operation. We were in Afghanistan to gain the trust of the local population, and to retain their support, not to cause them any harm. We went to Afghanistan with that mindset.

As a separate, but related, matter, public confidence in the NZSAS is an issue that I think a lot about. If we, the NZSAS, do something wrong, the public may lose faith in the Government, prompting the Government to lose faith in the Chief of Defence Force, who in turn may lose confidence in us. In my mind, maintaining that trust and confidence is imperative. That is why acting with the utmost integrity is central to everything that members of the NZSAS do.

I recall hearing that, a few days after the Operation, Rian viewed some footage from the AH64s and AC-130 which had recorded their engagements during the Operation. I was aware that the footage indicated that the gun sight on one of the AH64s had not been slaved properly, resulting in rounds inadvertently impacting on or near a building.

Although our goal was to protect the local population and although civilian casualties - whatever the cause - are truly upsetting to all involved, there was some relief to learn that, if there had been civilian casualties, it was due to an

equipment malfunction which was beyond the control of the Ground Forces.

On 31 August 2010, at 1.05pm, I received a copy of the 29 August 2010 ISAF press release. I refer to the bundle at pages 49 and 50.

Q. Just do that if you would? This is the NZDF bundle, yes, at 49. Do you see the email there?

A. Yes, I see the email, yes.

Q. And if you turn over the page to, in fact I think it's probably page 51?

A. Yes, I'm looking at page 51 and I believe that is the email that I'm referring to.

Q. All right, we might adjust that number.

Now just bear with me for a moment, because we're operating out of two bundles and in fact, the larger bundle is the one that people are referring to most frequently when looking at this press release, so I just want to identify it in this one also. So if you turn please to page 71?

A. Yes.

Q. Can you confirm looking at that and look backing at the other bundle they're the same document?

A. Yes, I can.

Q. Thank you. And look, don't -- I think Sir Terence, Sir Geoffrey, we've read the press release a number of times and I could ask the witness to go to paragraph 16?

SIR TERENCE: Yes.

MR RADICH: Thank you.

A. Rian McKinstry's last email to me as SNO, before Lieutenant Colonel Chris Parsons took over, was on 6 September 2010, at 1.32am. I refer to the Bundle at pages 57 and 59.

Q. Again, if you'd just have a look to confirm that to be -- these to be the documents?

A. Yes, they are the documents.

Q. Thank you. Paragraph 16, third sentence?

A. Rian's email attached an exchange from the International Security Assistance Force, which advised that TF 81 had "no case to answer" but that the "air spt [support) aspect of the op[eration]" was "part of an ongoing investigation."

On 8 September 2010, at 7.12am, Peter Kelly and I received an email from Chris Parsons, who had just taken over as the SNO in Afghanistan. I refer to the bundle at page 77.

Q. Again, would you do that to confirm that to be the email to which you refer?

A. Yes that's the email.

Q. Thank you.

A. In that email, Chris Parsons advised us that he had sighted the IAT report; that it categorically cleared both ground and air troops of any allegations; and that, based on a review of the evidence, there was no way civilian casualties could have occurred.

I had no reason to second-guess Chris Parsons' email.

I did not perceive Chris Parsons' email as being inconsistent with Rian McKinstry's emails or with the 29 August 2010 ISAF press release. As I understood it, the ISAF press release was inconclusive; although the assessment team determined that several rounds fell short, it did not determine whether civilian casualties had ensued. Similarly, Rian McKinstry's email of 6 September 2010 indicated that the investigation into the actions of the Coalition air support was ongoing. In my mind, Chris Parsons had now seen ISAF's concluded report.

I know Chris well and have the utmost trust in him; honesty and integrity are of fundamental importance to him and he would have understood the gravity of the situation. I know that he would do nothing other than report accurately what he had learned.

20 April 2011 press release:

On 20 April 2011, One News began, at 6pm, with a report into an operation in Afghanistan. I refer to the bundle, at page 173.

Q. Would you do that please?

A. Yes.

Q. And then would you just flick through the pages to 179 and can you confirm that to be the transcript that you're referring to?

A. Yes, I believe it is.

Q. Thank you. 22?

A. The headline was "SAS deadly Afghan counter attack revealed." The report said that the Government had made an "astonishing admission": That, following the death of Lieutenant Tim O'Donnell in early August 2010, NZSAS troops had launched a "counter attack" to "hunt down" Taliban insurgents believed to be responsible for his death. The phrase "revenge killing" was also used.

The One News report then cuts to pre-recorded footage of the then Minister of Defence, The Hon. Dr Wayne Mapp, in which he acknowledges the NZSAS's participation in that operation.

The news reporter identifies that there were "claims that civilians died in the Kiwi counterattack", before the report cuts back to the pre-recorded footage of the Minister saying that the allegations had "been investigated and proven to be false."

I refer to the bundle at page 181.

Q. And if you'd do that please?

A. This is an email sent to me, at 6.09pm, in which the Strategic Communications Manager of the Defence Communications Group at NZDF, identifies that the story has broken and says:

"At this initial stage there is little that we can add ... But Phil B will give our 'nothing further to comment' line, if required."

Defence Communications brought this to my attention because, as the DDSO, the role of DSO had been deputised to

me. Peter Kelly, who had been the DSO, was seconded to Christchurch in March 2011 to lead the New Zealand Army's response to the Christchurch Earthquake, and the new DSO had not yet started.

As far as I am aware, the NZDF did not have any notice that this story would run.

Our immediate reaction, as the 6.09 pm email suggests, was to say nothing. In general, the NZDF does not comment on operational matters as it can bring about harm to troops and to operations.

On reflection, however, we were troubled that the language of "counter attack", "revenge killing", and "hunting down of insurgents", mischaracterised the Operation as a retaliatory one.

Moreover, the way in which the pre-recorded footage of the Minister had been spliced into the story, gave the sense that he had acknowledged the NZSAS's involvement within that context.

Although I do not recall specifically, I believe I would have had a discussion with the then Vice Chief of Defence Force, Rear Admiral Jack Steer, and - separately or at the same time - with Defence Communications. The reason for VCDF's involvement is that the then CDF was in Gallipoli at the time.

We would have discussed whether to respond at all and, if so, how to respond and on what basis (i.e. what information the NZDF held about that Operation).

It was decided that, although the NZDF does not usually comment on operational matters, some clarification was required to counter One News' assertion that the Operation was retaliatory.

I do not recall who drafted the press release but it was likely to have been someone from Defence Communications, with my input.

At 8.33pm I sent the proposed press release to Jack Steer. I refer to the Bundle, at page 183.

Q. And if you'd do that please and can you confirm that that is the press release in question?

A. Yes that is the press release in question.

Q. Thank you.

A. The draft press release clarifies that:

- the Operation comprised NZSAS forces, together with Afghan National Security Forces and other Coalition elements;
- the purpose of the Operation was to improve the security of the Afghan people; and,
- nine, not twelve, insurgents were killed.

In the email of 8.33pm, I advised Jack Steer that "I have verified the facts."

Q. Just pause there please, and in the explanatory note given to the Members of the Inquiry last Friday it was explained that you're amending this paragraph. Can I hand you this note please and if you look at the very bottom of the page, would you now please read out the words that you are using for the second and third sentences in 36?

A. So permission to be replaced with:

"I do not recall, but my sense is that, in verifying the facts, I would have either called someone like Chris Parsons, or I would have gone back to the source emails, including Chris' email of 8 September 2010, and the CDF notes to the Minister."

Q. All right thank you very much, you can just leave that document there.

At paragraph 37

A. The information contained in the draft press release is entirely consistent with the 10 December 2010 Note to the Minister, which is in the bundle at page 163. In particular, that Note states that the purpose of the Operation was to disrupt the insurgents' ability to target Coalition forces in Bamyán; that the Operation was conducted by a combined Tas

Force; that up to nine insurgents were killed during the Operation; that allegations of civilian casualties were investigated by a Joint Afghan and ISAF Assessment Team; and that the investigation concluded that the allegations were baseless.

I believed that the draft press release was accurate on the basis of Chris Parsons' email and the 10 December 2010 Note to the Minister. As I have said before, there was no reason, and indeed no basis, for me to question the veracity of Chris's email or of CDF's advice to the Minister. I never would have allowed for a press release to go out, knowing that it was based on incorrect information.

I realise now that the press release refers, both in the heading and in the body of the text, to the Operation having taken place in Bamyán province. That is incorrect. The Operation took place in Baghlan province. The reference to the Bamyán province was a mistake that, unfortunately, was not discerned by anyone before it was released.

As you can see from the email of 8.33pm, once VCDF had approved the content of the press release, my intention was to provide it to the Minister's Office. VCDF's response at 8.37pm was to "send it over" (see the bundle at page 183). At 8.47pm I sent it to the Minister's Office; see the bundle at page 185.

Q. Just have a look at those pages please, at 185? Is that the email exchange you're referring to?

A. Yes it is.

Q. Thank you.

A. NZDF issued the press release at 9.41pm; I refer to the bundle at page 187.

Q. And just finally, for me, if you'd look at page 187 to confirm?

A. Yes I believe that's the press release.

CROSS-EXAMINATION BY MR ISAC

MR ISAC: Can you help us understand the period of time during which you were Deputy Director of Special Operations and what your role as the deputy entailed?

A. Yes, I can do my best. In deputising to the Director of Special Operations, I was in some ways his understudy, and would deputise specifically for his role if he was absent. The main part of my role, however, was not involved in day-to-day operational matters, in the normal course of events. My role was within the capability branch of the New Zealand Defence Force, where I worked on specific Special Operations projects.

Q. And hopefully, without asking you to reveal anything that you shouldn't, presumably that means in terms of recruitment, training, equipment, that sort of thing? Is that --

A. Not so much recruitment, but in terms of equipment, and acquisition of capability generally, so that would include training on new capability, or upgraded capability for instance, yes; that is correct. And that could be anything from weaponry to radios to vehicles, to buildings and infrastructure.

Q. Within -- and as I understand it, the office, if you like, of Special Operations was back then referred to as the Directorate. Is that right, an office, a directorate --

A. Yes, that is correct from the best of my recollection.

Q. And look, as we understand it, the -- if there was briefing to the Minister that was required, in relation to anything that fell within the Special Forces remit, then someone within the Directorate would be responsible for preparing draft briefings that the Minister -- sorry, that the CDF would eventually approve or not approve, sign, and give to the Minister. Is that right?

A. Yes, that's correct.

Q. Was that part of your role? Were you involved in preparation of briefing papers?

- A. I can't recall specifically drafting Notes to the Minister or documents of that -- like, I may have been involved from time to time, but in the general course of my duties, as we explained before, generally that would have been the Director of Special Operations would have done that. I may have had some input from time to time.
- Q. There are, and you probably know this, there are two briefing papers -- I call them briefing papers, notes to the Minister -- and they're dated the 10th and the 13th of December 2010. Did you have any involvement in the preparation of those, the drafts of those, or not?
- A. I do not recall.
- Q. Possibly?
- A. Possibly, but I -- I'm fairly sure that I did not draft those documents. I may have had input.
- Q. Okay. More likely that that would be Major General -- though he wasn't Major General then -- but Peter Kelly?
- A. More than likely. More than likely.
- Q. Do you remember discussing with Peter Kelly the content of those briefing papers at the time?
- A. I don't recall discussing them at the time, no.
- Q. When Chris Parsons' email of 8 September hit your inbox, I mean I take it that was fantastic news?
- A. It was good news in the context of what had occurred, yes.
- Q. Did you have direct discussions with Chris at that time?
- A. I don't recall having direct discussions with him.
- Q. Possible, you don't remember, or unlikely?
- A. It's possible that I did, but I don't remember, no.
- Q. Okay. What about you and Peter Kelly? Did you have discussions with him?
- A. It's more possible that I did. Again, I don't recall specifically having discussions with him at the time.
- Q. You were aware, in your role as Deputy Director, that there were regular intelligence reports coming back from theatre, prepared by intelligence -- trained Intelligence Officers.

You read those, you were engaging with them, given the significance of the issue?

A. Yeah, from time to time I would have read -- I would have read reports specifically, yes.

Q. And Rian McKinstry was giving quite regular updates and reports of his own based on the briefings he was receiving from IJC --

A. Yes.

Q. -- video he'd seen, correct?

A. Yes, that's correct.

Q. Would you agree with me that all of the independent information feeding in, intelligence reports, briefings from IJC including viewing video footage, all of it was consistent with a picture that there may have been civilian casualties? Do you accept that?

A. Yes, I accept that some of the documents and things that came back accepted that there may have been.

Q. So it must have been a surprise and a very pleasant one, to be told by Chris Parsons categorically the IAT has found that there were no civilian casualties, correct?

A. Yes.

Q. Were you involved in interrogating Chris Parsons' report of what he read at the time?

A. No, not that I recall.

Q. Do you recall your impression back then as being that Chris Parsons' had read the report?

A. Yes, I do. That mainly comes from seeing the emails more recently, and recalling that -- that, if I recall correctly, and if I could have a look at it, I seem to recall --

Q. Yeah, it's page 104 of the spiral bundle?

A. 104?

Q. Oh sorry, other bundle, just to confuse you. You are after Chris Parsons' email?

A. I think the question that you just posed to me it was whether I had -- whether I believed he had sighted it? Is that correct?

Q. Yeah, had read it?

A. Well, in the text of the email he says:

"I have sighted the Accident Investigation Team's conclusion."

So that, to me, clearly says that he had sighted the conclusion.

Q. Yeah, no and we've heard quite a bit about that from Peter Kelly, but what I'm asking you is, at that time when this arrived, was your understanding that he'd read the report?

A. I don't recall. From that it seems that he had read at least some of the report, and particularly the specific bits that related to the information that he relays there. It doesn't -- I would not have drawn an inference in that he had read the entire report.

Q. Were you told either by Chris Parsons or Peter Kelly that all that Chris Parsons had been able to do was take a fleeting glance at four lines, three sentences, of the report?

A. I don't think it was put across in that context. I don't recall having been told that, and I don't recall it being across in that context, that it was a fleeting glance, as you say.

Q. Yeah, or just three sentences, four lines?

A. I'd suggest that he's -- in reading this, that he would have read the conclusion, that again suggested that he hasn't read it entirely, and maybe not fulsomely either.

Q. I mean if, as a person who, as you say in your brief at paragraph 12, about the responsibilities as a Commander, that you have to get it right, because otherwise confidence of the Minister will be lost and there through the Minister the public, you'd accept wouldn't you, that if you had heard all Chris Parsons had done was have a fleeting glance at four

lines, yeah, of the report, that the obvious duty you would have would be to ask him well, are you sure you've got it right? Do we need to make further enquiries?

A. I would have thought that I would have considered that, given the gravity of the situation, my knowledge of Chris, that he would have made sure that what he was -- what he was -- had read and had communicated was to the best of his ability conclusive around the material that he was discussing, but I was also aware that he may not have seen the entire report.

Q. Okay. Just going back to the question though, I mean if you knew all he'd been able to do was have a look at four lines, yeah, you'd be concerned to check, wouldn't you? You wouldn't want to just rely on that, because he might have made a mistake, as we know he had?

A. It could be if I'd known that he'd just seen four lines.

Q. Yeah, in a fleeting glance?

A. I could have, if I had been aware of that, yes.

Q. Because one of the things that we can be sure of is that if the Directorate had a copy of the IAT report, in December 2010, there is absolutely no way that the briefings, inaccurate as they were, would have been prepared, do you agree?

A. I agree with that.

Q. And one way of ensuring that, would have been to have obtained a copy of the IAT report, isn't it?

A. Yes.

Q. Why wasn't a copy of the IAT report obtained?

A. Because I believe, and it does state in this, that IJC wasn't willing to release the report to us. So I could not forward a copy. So, at this time, it is quite clear that they could not obtain a copy and one could not be forwarded.

Q. Yeah, that's what Chris is saying --

A. Yes.

Q. -- in early September, but by December 2010, after three ISAF press releases, which certainly the last two publicly

essentially declare what the outcome, it wouldn't have been a problem to get the IAT report, would it?

A. Well, I can't really comment on that, because I don't know whether there were any attempts made to or what the discussion was around obtaining the report at that time.

Q. Yeah, I mean, I'm not suggesting this is your responsibility, but it would just be so gob-smackingly obviously that someone just needed to ask for the report by that stage, didn't they?

A. It would seem fair, that, yes. We should ask for a copy of the report. Again, I'm not sure whether that was done or not.

Q. And presumably, it wouldn't have been unlikely to have been forthcoming from ISAF because we know that a few -- well eight, nine months later a copy of it is actually in a safe in the office of the Defence Force Chief, yeah?

A. Yes.

Q. All right. So did you have any discussion with Peter Kelly about obtaining the report that you're aware of?

A. Not that I recall, no.

Q. Did he ever talk to you about whether or not the report should be obtained?

A. Not that I recall.

Q. And you have no recollection of being directly involved in preparing the briefings? That's something that Peter Kelly was likely to have done?

A. That's my -- yeah, I don't recall being involved in the production of those or the drafting of those, and I -- it is more than likely that it would have been Peter Kelly or someone like that.

Q. Okay, thank you. That's helpful.

The next, if you like, point in your evidence, as I understand it, why you're here is that you have been involved in April 2011 in terms of the approval, if you like, of the press release by NZDF?

A. Mmm.

- Q. I don't believe you're suggesting that you were involved directly in drafting the words of that brief?
- A. No, I -- it would have been unlikely that I would have. It would have been drafted, more than likely, by someone in Defence Communications, but I would have had input into that.
- Q. All right. The particular line, I can take you to it if you want to see it, but you would be aware, presumably, that there is a line in that which essentially indicates, wrongly, that the IAT report found that the allegations of civilian casualties was unfounded. That word, "unfounded", was that anything that you had some input into? Is that something that the comms people prepared?
- A. Look, I don't recall who -- I don't recall whether I drafted it or where that came from.
- Q. You agree, presumably though, that the term "unfounded", that the allegations were unfounded, is essentially an accurate reflection of the contents of the briefing notes that had gone to the Minister in December 2010?
- A. Yes, that's correct.
- Q. And in terms of verifying the facts, as I understand it, you're saying, well, I can't believe that we'd get it that wrong in the briefing notes, the verification under pressure probably means looking at what we told the Minister of Defence, yeah?
- A. Ah yes, because nothing to this and point -- to that point in -- up until that time, had led me to believe that -- both the things that I'd seen and understood was that there was nothing to specifically say that there had been civilian casualties.
- Q. Finally, responsibility for reporting and briefing CDF on Special Operations, that was fully and fundamentally the responsibility of Peter Kelly, wasn't it?
- A. It would have been the responsibility of the Director of Special Operations, yes.
- Q. He was the boss?

A. Yes, he was, yep.

Q. And it would be his decisions about what he would brief the Chief of Defence on and what he wouldn't, correct?

A. Yes, if he was there. If he was -- had deputised to -- in this case me, and depending on what the subject matter was, I may have been able to make those decisions myself if I had been -- if that had been deputised to me, but generally speaking, throughout his tenure, it would have been something that he would have either done or been consulted on.

Q. All right thank you. And as I indicated, a final question, but I'm wrong, I've got one further question for you. If you turn to the final tab in that large bundle that you have behind supplementary, if you wouldn't mind turning to -- you'll see the pages are numbered -- paragraph 55, but more particularly 56 -- sorry, page?

A. Page 56.

Q. It's been a long morning.

A. Oh yes, page 56.

Q. Just take a moment to have a look at what we can see are handwritten amendments on an August 2010, a draft August 2010 note, 58 has got a few revisions, and then if you look at page 60, again, you can see handwritten amendments to that draft. Is that your handwriting?

A. No, I don't believe it is. It doesn't look like my handwriting.

Q. Do you recognise it?

A. No.

Q. You'd be familiar with Peter Kelly's handwriting?

A. Hmm, yes, it's been a few years since I've seen his handwriting, but I --

Q. Doesn't look like that?

A. Doesn't look like it. I couldn't say that I recognise it readily or could connect it with who would have written it.

Q. All right. Thank you Colonel.

CROSS-EXAMINATION BY MR SALMON

MR SALMON: I'll be very brief and be done by lunch if that's of assistance. So you don't even need to start your timer, Sir Terence.

One of the themes that seems to come through in the account we're hearing is that civilian casualty allegations are often false and so, to some degree, there was nothing new here, and that was the view your team took. Is that a fair way to put it?

- A. Civilian casualties were often discussed or encountered throughout the operations in Afghanistan. When I -- when we first heard of the open source reporting about potential civilian casualties in relation to this operation, it was certainly things I'd heard before, and it was certainly, as I remember it, relatively commonplace to have allegations of civilian casualties made after, in this case ISAF or Coalition, operations.
- Q. But actually, in real terms, allegations like this against the NZSAS or the NZDF were very unusual, weren't they? There really are no other occasions where there have been, in recent times, allegations of civilian casualties that have had the attention or the nature of this, are there? Or can you point me to others?
- A. Not that I recall sitting here, no.
- Q. So we're not really living in a world where incorrect allegations of civilian casualties were routinely made against New Zealand's SAS or the NZDF, are we? This is --
- A. No, not that I recall specific ones, no -- of this nature, no.
- Q. And similarly, we haven't had other ISAF reports into civilian casualties that New Zealand Defence might have been involved in, have we, in recent times?
- A. Not that I'm aware of.
- Q. And so really this wasn't a situation where there's nothing new here as we've heard some people say, or where there -- where this might just be another false allegation?

This was a very significant allegation and a novel one, in its seriousness, correct?

A. I think in terms of the initial -- the initial allegations, which were made through, if I recall correctly, open source reporting, that wasn't. Clearly, in the days following this there became more concern that there may have been, and so that changed the colour of those, I suppose, and certainly would have made people take more notice of this.

Q. But for present purposes, we can agree that this is the biggest and most prominent and most serious allegation of civilian casualties involving New Zealand in modern times?

A. Again, sitting here, I believe that to be the case. Certainly, in the forefront of my mind.

Q. Okay. And in terms of just the environment your team operates in, public image is obviously part of what your job involves, and the public image of the Defence Force and the SAS is a very important factor and kept in mind during media statements, correct?

A. I personally wouldn't call it public image. The trust -- the integrity of operations and the trust and confidence of the Government and thereby, the public of New Zealand, is important. "Public image" isn't the words that I would use for that.

Q. Okay, whatever it might be, you'd agree that in the environment you work in, the team you work in, and that team-like spirit, there's an instinctive reaction to deny serious wrongdoing such as civilian casualties because it would harm the image and respect shown to the New Zealand Defence Force? That must be the instinctive reaction, to say we wouldn't do that?

A. No, it's not.

Q. It's not the instinctive reaction?

A. No, that's not.

Q. And just before we go to lunch, I just want to put to you, you can see why it seems that such a selective seizing on such an

unreliable intel source, Brigadier Parsons' email, would look to an outsider, when there was so much other intel available that suggested it was unreliable, as a knee jerk grasping for the not guilty answer, regardless of the facts? Can you see how it looks like that?

A. I can see how that might look, yes.

Q. And just sitting here, on oath, and with the benefit of hindsight and with all of us wanting to see how we do it better next time, can you see that that might in fact be what's happened on a number of levels here? If not by you, generally within the Defence Force?

A. I can see there's certainly lessons that can be learnt from this.

Q. And one of those might be that that's a factor that drove the way the comms unfolded? That's fair, isn't it?

A. That could be fair, yes.

RE-EXAMINATION BY MR RADICH - nil

SIR TERENCE: Thank you Colonel Cummins for coming and you're excused now.

(Witness excused)

(The luncheon adjournment)

JACK RAYMOND STEER (Sworn)

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Good afternoon, now you are Rear Admiral, retired, Jack Raymond Steer?

A. Yes.

Q. And you have a Brief of your Evidence in front of you Mr Steer?

A. Yes.

Q. Would you please now read it for the Inquiry beginning at paragraph 2?

A. I enlisted in the Royal New Zealand Navy in 1973 as a Seaman Officer. In the early days of my career, I served on a number of HMNZ Ships, including two commands. My career progression involved a mixture of sea and shore postings, overseas professional courses, and two overseas postings.

I have held a number of senior roles at the NZDF. From 2003 to 2004, I was the Chief of Staff at Headquarters Joint Forces New Zealand. From 2004 to 2006 I was the Maritime Component Commander. For a short period in 2006 I was Deputy Chief of Navy, before taking on the role of Commander Joint Forces New Zealand. I was in that role until 2008 when I became the Vice Chief of the Defence Force or VCDF. I was VCDF from February 2008 until November 2012. In November 2012 I was appointed Chief of Navy. I spent three years as Chief of Navy before I left the NZDF to take up the position of Chief Executive for the Royal New Zealand Returned and Services Association. I retired in July 2019.

In 1996 I was appointed an Officer of the New Zealand Order of Merit.

Q. And just pause there, for a moment, I think there was a small addition to the version the Inquiry might have, which says 2016, and it was 1996 was it?

A. Yes.

Q. Thank you.

A. The 20th of April 2011 press release:

On 20 April 2011, the then Chief of Defence Force, Lieutenant General Rhys Jones, was out of the country, en route to the ANZAC commemorations in Gallipoli, Turkey. I was responsible for addressing issues that arose in his absence.

At 6pm on 20 April 2011, One News opened with a story about a counter-insurgency operation conducted in Afghanistan in August 2010. The news story portrayed the Operation as being a "counter attack" for the purpose of "hunting down" insurgents responsible for the death of Lieutenant Tim

O'Donnell, who was part of the New Zealand Provincial Reconstruction Team based in the Bamyan province. One News reported that 12 insurgents had been killed and I refer to the bundle, at pages 173-179, which is a transcript of the One News story.

Q. And just refer to that please for us, you'll find the bundle with the spiral binding just in front of the one you have your hand on, that one there, yes thank you, if you turn to page 173?

A. Yep.

Q. Will you have a look at that page and just flick to page 179? And do you confirm that that is the transcript that you refer to?

A. Yeah, that's the one, yes.

Q. Yes, thank you. So back now to paragraph 7 please?

A. The then Minister of Defence, The Hon. Dr Wayne Mapp (the Minister), acknowledged that the New Zealand Special Air Service, the NZSAS, had been involved in that operation, which is now commonly referred to as Operation Burnham (the Operation). In response to a question from the One News reporter about the prospect of civilians being killed during the Operation, the Minister said that the allegation had "been investigated and proven to be false." The Minister then reiterated that he was "satisfied around that."

My understanding is that the NZDF was unaware of this story until minutes before it aired. I refer to the bundle at page 171, which is a small exchange between staff in the Defence Communications Group, starting at 5.57pm, saying they had been asked "to confirm that the SAS have killed insurgents suspected of killing Lieutenant O'Donnell."

Q. Just pause there for a moment; if you would look at that same bundle please, at page 171, just a couple back from where you were, is that the email exchange to which you refer?

A. Yes, it is.

Q. Yes, thank you.

Paragraph 9?

A. I had no knowledge of the story until it was broadcast at 6pm. My recollection is that, after the report had aired, I had a discussion with the then Deputy Director of Special Operations, Lieutenant Colonel Karl Cummins. We are likely to have discussed whether to make any comment in response to the story. Ultimately, we decided to respond in order to counter the suggestion that the NZSAS had been involved in a revenge "counter attack."

I recall that we also talked about what information the NZDF had about the issue of alleged civilian casualties. Karl told me that then Lieutenant Colonel Chris Parsons, who was the Senior National Officer of the NZSAS in Afghanistan at the time, had seen the report prepared by the International Security Assistance Force, the IAT report. Karl told me that Chris Parsons had advised that the IAT report had investigated the allegations of civilian casualties and had concluded that there was no way that civilian casualties could have occurred.

I remember that Karl Cummins either showed me a hard copy of the 8 September 2010 email from Chris Parsons, which is in the bundle at page 77.

Q. Just go to that for a look please, do you recognise that and confirm that is the document you are referring to?

A. Yes, it is.

Q. Thank you.

A. Or he described its contents to me. He also showed me a hard copy, or described to me, the former CDF's Notes to the Minister on this subject; I refer to the bundle at pages 23-26, and 163-169.

Q. Just if we could have a look? Look at page 23, which is the Note to the Minister of 25 August 2010, is that one of the documents?

A. Correct, yes.

Q. And if you just go through to page 26, is that the end of the document?

A. Well, yeah the front page is the cover sheet, and the 25 and 26 are the document.

Q. Thank you.

And then secondly, at page 163?

A. Yeah.

Q. And again is 163 the cover page?

A. Correct. Dated --

Q. 10 December 2010?

A. Yeah.

Q. At the bottom there.

A. Yes.

Q. And 164, 165, 166 are the document?

A. Yes.

Q. Thank you.

A. It wouldn't have crossed my mind to doubt this information, coming - as it did - from an officer who I trust completely, who had seen the report, and who had relayed its conclusions to us. I knew Chris Parsons well; he is an honourable person.

I approved the draft press release. I refer to the bundle at page 183.

Q. If you'd do that please, do you see the email there at the top of the page?

A. Correct.

Q. Can you just describe for us please who it's from and who it's to?

A. It's from me to Karl Cummins, Mr Christopher Wright and Mr Peter Coleman, who were both from the NZDF communications team.

Q. Thank you. And the content of the email, just the three lines if you wouldn't mind reading it?

A. My email?

Q. Yes please, or two lines?

A. "Okay, send it over, thanks.

Q. Thank you.

So we are at 13?

A. Yes.

I approved the draft press release. I refer to the bundle at page 183, which we've just done. This is an email from me to Karl Cummins, at 8.37pm on 20 April 2011, advising him to send the draft to the Office of the Minister of Defence. My understanding is that the draft press release was then approved by the Office of the Minister and duly issued.

I believed at the time that the press release was factually correct. It is inconceivable that I would have approved it if I thought it might not be true.

I didn't see the IAT report at the time and I cannot read it now because I no longer hold a security clearance. From the material now in the public domain, I understand that there was a possibility of civilian casualties as a result of a gun not having been slaved correctly to its sight in one of the helicopters and we were not correct to say what we did in 2011.

Although the press release was not correct, I will say resolutely that I did not intend to mislead. If I had seen the IAT report back in April 2011, I would not have approved the press statement as drafted.

I had no more involvement because, at 9.23pm on 20 April 2011, I received an email from the Office of the Minister saying that "it's been decided that the Minister will front this not VCDF." This email is in the bundle at page 185.

Q. If you'd look at that please and do you see the email in the middle of that page?

A. From Geoff Davies.

Q. Yes, and the time of that, just to orient us?

A. 2123, or 9.23pm.

Q. Yes, and it's copied to you?

A. Yes it's to Commander Bradshaw and -- who was in the Defence Comms Group, and to me.

Q. Thank you. Just your last sentence?

A. As, upon CDF's return, there was no cause for me to have any ongoing involvement, and I do not recall having any further involvement.

CROSS-EXAMINATION BY MR ISAC

MR ISAC: Good afternoon Mr Steer, I only have a few questions for you.

You were VCDF as I understand it in September of 2011, is that correct?

A. Correct.

Q. And was there a Mr Mike Thompson, a Colonel Mike Thompson also working in the Office of the Chief of Defence Force at that time?

A. I believe so.

Q. And this isn't a trap, and if you're not sure, say so, but at that time do you recall that he was the Deputy Chief of Staff, possibly?

A. Possibly.

Q. Do you recall if he had a safe in his office or room?

A. I don't know, I can't confirm. There are a lot of safes inside the Defence Headquarters.

Q. Right, what about specifically in terms of the Office of Chief of Defence Force, more than one?

A. I don't know.

Q. You, I think, were in your role as VCDF in December of 2010. One of the issues, or questions that have arisen during the course of this hearing, relates to two briefing notes that were prepared and then provided by Chief of Defence at that time to the Minister of Defence. Did you have any involvement in the preparation or approval of those notes?

A. Probably. I cannot confirm it though.

Q. Who would normally -- so these, and I can take you to them in the --

A. Yes, I've seen them.

Q. -- large bundle. Okay, so these are notes that have essentially come from the Director of Special Operations,

Peter Kelly, at the time, are you able to indicate who would be involved other than him, or who might be involved other than him at that time, in the preparation of those notes, briefing papers?

A. Oh I think every briefing paper would have a different number of people involved depending on the subject and who was available at the time.

Q. Was there a process that was generally followed in terms of X does this job, Y does that job?

A. Yes, but it varied depending on the subject.

Q. With Special Operations, so briefing papers arising out of the DSO's office, were the people involved generally a smaller tighter group?

A. Yes.

Q. And that would presumably be Peter Kelly principally?

A. And his Deputy.

Q. Karl Cummins at that time?

A. Mmhmm.

Q. What about Mike Thompson, would he be involved in preparation of briefing papers for the Minister at that time?

A. Oh I -- it would depend on the subject. I can't categorically say yes or no.

Q. Your Brief of Evidence at paragraphs 10 and 11 refers to a discussion that you had with Karl Cummins in relation to the IAT investigation and the outcome of that, and report from Chris Parsons?

A. Yes.

Q. Middle of paragraph 10 you say:

"That Karl told me that then Lieutenant Colonel Chris Parsons had seen the report prepared by ISAF."

How clearly do you remember this discussion?

A. Not terribly clearly.

Q. And if you can't answer this, just say so, but was the impression you were left with from the discussion you had with

Karl Cummins at that time, that Chris Parsons had read the IAT report?

A. Probably. I don't know. I don't recall it.

Q. Okay.

A. He had he seen the -- the information I had was that he had seen the report, now whether that was page 1 to page 101, I don't know.

Q. But your working understanding was that he'd seen it and read it, is that fair?

A. Yes.

CROSS-EXAMINATION BY MR SALMON

MR SALMON: Good afternoon Mr Steer.

We are led to understand that the IAT report was stapled to, or attached to, a number of draft documents, is that your understanding too, or do you not know?

A. I don't know.

Q. Would it be your experience from your time in, as Deputy CDF, that in the course of preparing press statements and so forth and briefings to Ministers there would be a number of drafts made, changed, altered and so on, and a reasonable collection of drafts built up?

A. Firstly, I was the Vice Chief of Defence, I was not the Deputy, there is a difference.

Q. Sure.

A. And it would depend on what the press release was about, the number of drafts that were developed.

Q. But a key document relied upon in creating the drafts could well be left with drafts and attached to them in that way, would that be normal practice?

A. I don't -- I don't know what you are a -- actually I don't know what you're insinuating, can you -- I just don't understand the question?

Q. That's fine, that's fine, it was in case you had a reaction to that.

The other thing, I just wanted to check is whether you're someone who'd be able to help me understand what level of security protocols would apply to the IAT report, is that something you can help with me, in terms of whether it could be transmitted electronically or whether it would have come in by hard copy?

A. I've never seen it.

Q. No, but do you know enough about that to answer that?

A. I don't know what classification it is.

Q. Okay.

A. I've never seen the IAT report.

Q. Okay. And you don't know its security classification?

A. No.

RE-EXAMINATION BY MR RADICH - nil

SIR TERENCE: Thank you for coming Mr Steer you're excused.
(Witness excused)

MICHAEL ANDREW THOMPSON (Sworn)

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Good afternoon, your full name is Michael Andrew Thompson?

A. That's correct.

Q. And you are the Director (Asia) of the International Branch at the Ministry of Defence?

A. That's correct too.

Q. Mr Thompson, would you now please read your Brief of Evidence for the Inquiry beginning at paragraph 2?

A. Before my appointment at the Ministry of Defence, I had an extensive career in the New Zealand Defence Force. My most recent appointments include: Director of Strategic Commitments at the Headquarters NZDF from 2005 to 2006; Chief of Joint Operations at Headquarters Joint Forces New Zealand from 2006

to 2008; and Deputy Chief of Staff in the Office of the Chief of Defence Force from 2009 to 2012.

I completed a number of operational tours as the Deputy, then Chief, Military Observer to the United Nations Mission in Haiti; Deputy Chief of Operations at the Multinational Force and Observers in the Sinai; and served on two United States Headquarters in Operation Enduring Freedom, Afghanistan.

I have a Bachelor of Arts from Canterbury University (1977), and a Post Graduate Diploma in International Relations from Victoria University of Wellington (1999).

I understand that, in 2014, when the NZDF was responding to a number of questions raised by Jon Stephenson, the Director of Coordination at the NZDF at the time, Chris Hoey, found a bundle of relevant documents in his classified safe at work in the NZDF National Headquarters in Wellington.

I understand that one of the documents in the bundle was a report prepared by the International Security Assistance Force, or ISAF, Incident Assessment Team, which had been tasked to investigate allegations of civilian casualties arising out of an operation conducted in Baghlan province on 22 August 2010 (the IAT report).

I have been told that, in the course of preparing for this hearing, Chris Hoey reviewed the Classified Document Register in his safe and made a photocopy of one of the pages. The Register, if maintained properly, records when a classified document is placed into the safe, and whether it is subsequently removed, archived, or destroyed.

I refer to the bundle at page 191-192, which is the extract from the Register.

Q. Just pause there if you would. At your left-hand is the bundle, yes, that one you have your hand on, the spiral bound version, could you turn please to page 191? Do you recognise that page?

A. Yes, I do.

- Q. Can you just by reference to the page, rather than your brief at the moment, explain what the columns are, what the words are, and in whose handwriting it is?
- A. So there's a serial number which is allocated to each document. There's a date of entry for it. There's the where it came from. The date of origin, which is usually found on the document. And a title -- a brief description of what it is.
- Q. All right. And whose handwriting is that?
- A. That is my handwriting.
- Q. And can you please just take us through the entries themselves, so looking at the serial number, where does that come from?
- A. That is a sequential number from the register.
- Q. All right. Date of entry, can you explain what that date is?
- A. That's the date you actually enter it into the register itself.
- Q. And what is the date that you have entered there in your handwriting?
- A. I can hardly read that I'm afraid.
- Q. Yes, it's difficult, isn't it?
- A. I think it's -- is it 7 September 11, I think?
- Q. Yes, thank you. And the next column, sender or originator, what are the letters there please?
- A. OCDF, which stands for Office of the Chief of Defence Force.
- Q. And date of origin?
- A. I can't read that one I'm afraid. September 11, but I can't just --
- Q. Yes --
- A. Is it 1? No I can't see.
- Q. Yes, I think you're right.
- Title?
- A. Briefing -- sorry that's very --
- Q. It's the photocopy I think that's made it much harder to read --

A. It is indeed.

Q. -- than other versions of this, isn't it?

A. Yep.

Q. What I might do is I wonder if my learned friends would, because I can just make it out, would be concerned if I endeavoured to read it?

SIR TERENCE: There's no dispute about it is there?

MR RADICH: No, no, thank you:

"Briefing pack on civilian casualty Kabul August 2010."

And if you look over the page, just explain what that is in relation to what we're seeing, is it an A3 page, if you look over the page?

A. Yes, over the page there's only one column more there, which is the classification of it, which "S" stands for secret.

Q. I see. Thank you.

All right. If we can come back now please to paragraph 8, your second sentence?

A. What it shows is that, on 7 September 2011, the bundle containing the IAT report was placed into the safe.

On 7 September 2011, I was the Deputy Chief of Staff in the Office of the Chief of Defence Force, and had responsibility for that safe. I can confirm that the handwriting in the Register on that date is mine. This means that it must have been me who placed the bundle containing the IAT report into the safe, and duly recorded it.

I have never read the bundle, including the IAT report. I believe that someone must have asked me to put it in the safe; in other words, my safe was simply used as a classified repository. I cannot recall who that person may have been. And, in the absence of any sort of covering note, I cannot speculate as to where the IAT report may have come from.

CROSS-EXAMINATION BY MR ISAC

MR ISAC: Mr Thompson, I want to begin by talking with you about what your role was as at December 2010. As I understand it, were you -- what was your role, can you help us?

A. So the role when I started it was to provide the coordination between the Headquarters New Zealand Defence Force and the then two -- the Office of the Minister of Defence and also the Office of the Associate Minister of Defence.

Q. What was the title of that job, the role?

A. Deputy Chief of Staff.

Q. Right, were you previously a Director Strategic Commitments?

A. Yes.

Q. When did that role come to an end?

A. I've read it out in the statement, it's -- I'll have to refer to this back now to find the dates.

Q. 2006?

A. I finished in 2006, yes, correct.

Q. In your role in 2010 though as Deputy Chief of Staff, were you involved in the preparation of briefing notes for the Minister?

A. Sometimes. Sometimes.

Q. Are you aware that there are two briefing notes in particular of relevance to the issues that are under consideration in this hearing?

A. To which are you referring?

Q. If you take the large bundle, not the one that you have there, the ring binder and if you would turn please through to page 165? There are two briefing notes in particular, and I'll be silent in a moment and give you time to look at these if you haven't reviewed them recently, but the first one is a note dated 10 December 2010. And then over the page, 13 December 2010.

A. So as for the first one, I can't recall, and I mean there was so many notes and stuff would go across to the Minister, I can't recall this one specifically.

- Q. There are, if you look at page 164 of that document at the top there's a table at the bottom left of the first table there is a contacts?
- A. Yes.
- Q. And unhelpfully for you and me, the names have been redacted, but presumably that will identify?
- A. Yes, so what I can tell you with that is the primary person responsible for every briefing note would be the first name in those lists, and I would quite often be the second name, because that was what the Minister would use to contact someone particularly after hours if he wanted to follow up.
- Q. If your name -- do you know if your name was on that?
- A. I can't remember to be honest.
- Q. It's not on this version?
- A. No. I mean it quite often was.
- Q. So if your name's on that, and that's a fact that we can probably check and confirm for you, would that suggest that you did have some involvement in the preparation of the draft before they were sent?
- A. Again it could, or it could not, because I was routinely placed on a number of submissions going to the Minister's Office which I had not been party to putting together, but was a point of contact for. And my role in that was to get hold of the people who needed to answer the question when the Minister wanted someone to speak to.
- Q. Presumably your name wouldn't get put on contacts without you having read and engaged with the material, because you'd be of no help at all to the Minister if you got contacted otherwise?
- A. No no, on a number of occasions it would be without my knowing about it.
- Q. Okay. If you look at that bundle, you'll see a tab towards the back of it that says "supplementary"?
- A. Yes.
- Q. I'll get you to turn to page 55, this is a -- just so you know what you're looking at, hopefully you've had a chance to

review this before coming in today, this is what we've been referring to as the IAT bundle, the package of papers that you appear to have put in the safe on the 7th of September 2011?

A. Yep.

Q. The first page is the storyboard we can see from Objective Burnham, or Operation Burnham as we've been referring to it?

A. Yes.

Q. The next page is a draft Note to the Minister, a draft of a Note which we know is dated in fact 25 August 2010. And there are handwritten amendments to it, which if you take it from me, indicate that those handwritten amendments were made before the Note to the Minister was finally signed. Looking at that handwriting, is that yours?

A. No it's definitely not my handwriting.

Q. Do you recognise whose it is?

A. No, I don't, I can't speculate on whose writing that might be.

Q. I'll have you turn through to page 60, more handwriting?

A. Definitely not my handwriting.

Q. We can see at paragraph 4 the last sentence has been underlined, do you see that?

A. Yes, I do.

Q. Does that look familiar to you in any way?

A. No I can't recall that either.

Q. Page 64, paragraph 7, and paragraph 11d have been underlined by someone. Again, I take it you don't recall?

A. I don't recall that, I don't recognise that, no.

Q. If you turn through to page 72 that's a copy of the register, another copy that Mr Radich referred you to?

A. Yes.

Q. I don't know if that's any more legible?

A. It is more -- yes.

Q. But you've indicated already that you'd given this a serial number --

A. Yes.

Q. -- this document?

The date of entry is the 7th of September 2011?

A. Yes.

Q. I don't think there's any argument about that. Where you've written in as the originator or sender OCDF or Office of Chief of Defence Force, that indicates, doesn't it, that the bundle, if you like, that you've taken receipt of, has originated within the Office of the Chief of Defence?

A. That would indicate that, yes.

Q. How often would you just write the Office generally, rather than the name of an individual?

A. Commonly.

Q. Then we have the date 1 September as the date of origin. So at the time that you logged this you clearly knew that not only it had originated within the Office of the Chief of Defence, but that in fact it had been created 6, 7 days before it goes in the safe, correct?

A. Yes.

Q. So I mean you would only know that if you'd discussed it with someone, wouldn't you, if you're not the creator of it?

A. Yeah, I can't recall, this is eight years ago now; so, I can't remember any of that stuff there about a discussion, or where that date came from. Commonly it would be on a document, but I can't -- I don't know.

Q. If you look at the description column, the heading's been obliterated something by the exhibit note, but the description is "Briefing pack on civ casualty Kabul August 2011"?

A. Yes.

Q. How do you think you've been able to write that? Because the pack isn't labelled or entitled in any way to indicate that, is it

A. I'd have looked at the page to see what it was and then put that title on it.

Q. What page would have --

A. I think if you look at the one you referred to me before, the -- it has got the number on it 116.

SIR TERENCE: 55.

A. 55.

MS ISAC: Well that's a storyboard, it doesn't have any reference to civilian casualties?

A. I just put what I wrote on it at the time.

Q. Yeah, so you've either read the pack beyond the first page to know how to label it, or someone's told you what it is, is that fair?

A. Yes that could be correct, yep.

Q. And we know that the information including the IAT report indicates that the brief notes which are in draft within the bundle you received in your possession, and registered into the safe, were wrong?

A. Wrong?

Q. Yes. Isn't that something that you would remember?

A. No because I didn't read them in any detail, that's the point, I was looking to get something to register it into the classified register.

Q. Do you have any explanation as to how you were able to describe the bundle as a briefing pack, knowing that the date of origin was a week before you put it in the safe, knowing that it originated within the Office of the Chief of Defence, without being told that by someone or reading the report, the bundle itself?

A. No, I don't.

Q. Is it possible that you put that pack together?

A. No, I did not put that pack together.

Q. You had been involved, you think, possibly in relation to the creation of the briefs to the Minister in 2010, December 2010?

A. I could have been part, but if you look at the briefs, again, they've got different originators. I think, one is from DSC or -- and the other is from the DSO, sorry the Director of Special Operations, and the other one is from the Director of Strategic Commitments. Which are quite different parts of the organisation.

Q. Sure. When you say "DSC", you're referring to the August 2010 note, aren't you, rather than the two notes in December, is that right?

A. So the first one that you referred me to on 56 has come from DSC, because it has an NZDF file reference on it.

And the second one comes from the Director of Special Operations because it has one of their file references on it. So they would have prepared those.

Q. How often would you receive material like this which includes secret partner material, and place it in the safe without reading what it is, or knowing what it is?

A. There would be plenty of documents in that safe at the time which I had not read.

Q. Who would give you documents to put in the safe which --

A. They'd come from the Office of CDF, they'd come from other branches, and they would -- they'd be put in the safe. My main role in those was to make sure they were accounted for in the sense of that they were classified documents.

Q. What went into your safe?

A. Pardon me?

Q. What was your safe for? What was the purpose of your safe? We've heard that there were a number of them within the Office of Chief of Defence, what was your one for?

A. So I had things like Courts of Inquiry, I had intelligence reports, that type of stuff.

Q. But this is really important --

A. Yes I understand.

Q. -- information? It's described as a briefing pack, isn't it?

A. Yes.

Q. It attaches drafts of the misleading and inaccurate Ministerial Briefing Notes to the IAT report with sections of all of those documents highlighted indicating that the person who engaged with the material had probably worked out that there was a problem, that the briefing notes are inconsistent with the IAT, correct?

A. Yes.

Q. It ends up in your custody?

A. Yes.

Q. You know enough in September 2010 to describe it as a "briefing pack" and you're saying you have no idea --

A. No.

Q. -- recollection who gave it to you, or what was in fact contained within the bundle?

A. You're quite correct. If I had read that and seen that discrepancy, I would have certainly brought it to the attention of one of a number of people in the Headquarters.

Q. Immediately, wouldn't you?

A. Yes.

Q. Because it's inconceivable isn't it that whoever was aware of the information in the pack would just put it in a safe to be forgotten about. You'd need to tell the CDF and the Minister that there'd been some errors in December 2010, correct?

A. Absolutely.

Q. Do you have any explanation now as to how that ended up in your custody with you having no memory of anything of relevance to the Inquiry about it?

A. No, no, I don't. I can't recall anything like you've said. If I, again, if I reiterate if I'd read it and would have known there was a discrepancy in it, I would have brought it to the attention of those people who needed to know.

Q. Who within the Office of Chief of Defence provided you with briefing packs at that time?

A. Not sure, because not everything we get is a briefing pack. Some of the briefing packs --

Q. Well this is a briefing pack. Who within the Office provided briefing packs to you?

A. Well they come out of DSO -- it depends who has been staffing them within the Office.

Q. Right, so DSO is one possibility?

- A. Yep, could be Vice Chief. Occasionally the Chief. And also it would be people outside the Office of OCDF who could have pushed stuff through there like it was described in there, the DSE.
- Q. You'd agree, wouldn't you, that the way that the material is being compiled together: storyboard, part of an email, you think email from Rian McKinstry from out of theatre, dealing with issues on reporting on what the IAT briefing had been, the report itself, and the briefings all indicate that the person who put it together has engaged with the material and created a briefing pack, right?
- A. Yes.
- Q. And the logical person that we would want to brief with that information is the Chief of Defence?
- A. Yes, it wasn't me, I can tell you now, I did not put that pack together.
- Q. It remains in a safe for three years before it's re-discovered by Mike Thompson?
- A. No, by --
- Q. Sorry, by Chris Hoey.
- A. It was put in a safe and then within three months, I finished in that job and moved on to my current job.
- Q. Chris Hoey knew that that bundle was in the safe, because he remembers about it when the Minister's Military Assistant came over in July 2014, yeah, that's how we know about it now?
- A. Yeah.
- Q. So, he'd engaged with the contents of his safe, your safe in fact, because he inherited it from you?
- A. Correct.
- Q. You didn't engage with the contents of your own safe in the way that he did?
- A. No, because he was looking for something specific by then.
- Q. But he'd looked in the safe and knew what was in it, because he was able to find that briefing pack, do you see what I'm suggesting?

- A. Yep.
- Q. You're indicating that you had no idea what material was in your safe?
- A. No that's not true, what I said to you was I put the briefing pack in the safe, recorded it in, and that was it. If I'd been asked subsequently to that, like Chris Hoey, if I'd still been in the job when Chris Hoey was in the job, I would have said yes, there's a briefing pack in the safe.
- Q. Just in fairness to you, I'll try and put this as blandly as I can, how do you think it looks, this briefing pack in your safe, that you have no recollection of receiving or how the information you put in the register got there?
- A. It's pretty open. I received a briefing pack. It was a classified pack. I had to register it, which I did, and I put it in the safe.
- Q. All apparently without engaging with its contents --
- A. Yes.
- Q. -- or remembering who must have therefore told you the information that you put in the register?
- A. As I say, this was a busy office, this was a year after the initial flurry of activities. There was lots of other stuff going on. I did not -- I did enough to get it registered to get it into the register.

CROSS-EXAMINATION BY MR SALMON

- MR SALMON: An observation from an outsider is that the CDF's Office do not tend to keep drafts of materials such as briefing notes for the CDF or for Ministers, I'm just basing that on the documents that I've seen?
- A. Yep.
- Q. That's a fair observation, isn't it?
- A. Yes, it is.
- Q. And so it would be quite unusual to retain drafts of anything once there's a finalised document?
- A. Yes.

Q. And even more unusual to keep them as classified documents in your safe?

A. I'm not sure what that question is?

Q. Well, given it's quite unusual to have retained drafts, and given this briefing pack, but for the IAT report, really was just drafts, that was a particularly unusual thing for you to put in the safe, wasn't it?

A. No, not really, if it came in as part of a pack it would be -- it would go in the safe. There would be other occasions when there'd be drafts also included.

Q. But we know from hearing Mr Isac's questions that you must have looked through it at least enough to see it was draft at the front --

A. No.

Q. -- you must have seen that at the time?

A. Well, I probably did, yes.

Q. Right. And so that's an unusual thing, isn't it, to be putting in something that's not a briefing pack, because it's a draft, and calling it a briefing pack?

A. It depends how it was given to me, and I can't remember, recall, what happened in September 2011.

Q. Right. Can you help us understand why your safe might have been chosen for this, there are other safes on the floor, aren't there?

A. Yep, and there will be some stuff that will be held in the other safes as well, so this was not the only safe that sort of material would be held in.

Q. Who were the principal people who would come to you and tell you to put something in the safe without giving you details on what it was, your safe?

A. CDF -- CDF staff I should say, not CDF himself, Vice Chief Staff.

Q. And this would happen a lot would it?

A. Yes, there's quite a bit of stuff in there that I --

Q. Your register would have a lot of activity where you put things in without looking at them and logged them like this?

A. I'd log them, I'd look at them enough to put the title and the substance of them, yes.

Q. When we have a partner document like this one with a high security status things would be different, wouldn't they?

A. In what respect?

Q. Well, the PSR presumably requires quite a level of care in documentation regarding who has personal custody of a document like the IAT report?

A. Oh no I don't think that's the case at all.

Q. It's not?

A. No --

Q. It's just handed around?

A. -- there's lots of secret material.

Q. Sorry?

A. There's lots of secret material that comes through with partner stuff as well.

Q. Right, but it has certain requirements for the handling of copies?

A. No more than what we have for our own secret documents.

Q. Which is what, that you register them?

A. You register them, yep.

Q. You don't take copies without registering those?

A. Correct.

Q. Or you do?

A. Correct.

Q. You don't. And so this document would have been registered somewhere else when it first came in before it entered your safe as part of a briefing pack?

A. I don't know, I'd have to see the document again to see whether it's got any registration details on it.

Q. But I'm just asking, as a matter of normal process it should have been registered somewhere?

A. Yes.

- Q. And that could have happened at any time from the date of its creation as far as you know right now?
- A. From the date it was received.
- Q. But you don't know that date?
- A. No.
- Q. So the date of receipt by NZDF --
- A. No, correct.
- Q. -- at the CDF's Office could have been the very day that document was finalised?
- A. Yep. Yep.
- Q. And you're not aware, are you, of anyone registering it prior to it reaching your hands at the back of the briefing bundle?
- A. No, I'd have to see the document again to see if there's any numbers on it, but, no.
- Q. And you would be aware from your time in the CDF's Office that the ISAF report on potential civilian casualties was a big deal?
- A. Yes, from the previous year.
- Q. And you would have understood the significance of it being in the possession of someone within the CDF's office?
- A. If I'd read it, I would have, yes.
- Q. If you had read it.
- So what we have here is someone, and you can't remember who, bringing you the ISAF report bundled behind various stale drafts, and telling you to register it with a title that does not indicate to anyone who might look at the register that this important document is stapled to the back, is that what's happened?
- A. It's there. That's all I can say.
- Q. But you're saying someone will have told you the words to write on the front from within --
- A. No, not at all, I would have worked out that this was a briefing pack. Briefing pack is a generic term we use for a lot of material.
- Q. But you --

A. It's not --

Q. But you looked at it enough to know this was all one set of documents?

A. It was Afghanistan stuff, yes.

Q. Afghanistan stuff. So to know it was a briefing pack and not multiple packs stapled together, you must have flicked through it enough, is that right?

A. I looked to see enough to put a title on the pack.

Q. How do you remember that you did that and you chose the title and not that someone else told you to?

A. Because whenever you get a -- whenever you get a document to put in the register, it's what you put in the register.

Q. So you're saying that you can remember that no-one told you what it was, or that it would be unlikely --

A. Well no I can't recall that, I could not say with certainty that was the case.

Q. But you can say with certainty that you thought something was a briefing pack that in fact had this secret part of the document at the back?

A. Only because I have written in the register that way.

Q. Right, but you accept, don't you, that you might have written something in the register that someone told you was the description of the bundle?

A. That's possible, but I can't -- I can't recall that specifically.

Q. You can't say who that would be?

A. No.

Q. Is it normal, especially when one might have the only copy of such a key document stapled to the back, to put such a general descriptor on the register?

A. The descriptor on the register has got to be enough to identify what the documents are about, and that's what it was.

Q. Right, well it wasn't, was it? Because what one of the documents was about -- was this Holy Grail ISAF report and

nobody looking at the register would ever have known to look in that bundle?

A. And we now know that.

Q. Right. And is that unusual?

A. It could be, but if you're looking for Afghanistan stuff you would have pulled out briefing -- all the material that was in there, because this would have been with other documents as well, I'm not sure what other documents.

Q. But the net effect, for whatever reason, is that this report, which contradicted the official line taken by NZDF, was put in a place and in a way where no-one would find it, based on the register or any internal records?

A. I don't agree with that necessarily.

Q. Because?

A. Because if I had -- because -- I go back to what I said before, if I had seen that report and known that that was the report, I would have brought that to the attention of someone who needed to see it.

Q. I know you might have, I don't dispute that, what I'm saying is the net effect of what you wrote of your own volition, or were told to write, but you can't recall, was that no-one was likely to find this report, except the people who knew it was in there already?

A. Or were working with that material subsequently, yes.

Q. Right, which no-one would be doing based on public statements made which put the matter to rest? Is that right?

A. I don't understand the assertion you're making here?

Q. Well, let me finally just ask you this, is it normal with highly sensitive classified military secrets for them to be put away and filed in this way where no-one quite can tell what's where, that mustn't be normal must it?

A. Well, when it's a briefing pack, if you were looking for something and you saw a title briefing pack you'd go through the briefing pack.

Q. If you knew to look that?

A. Well, you'd know to look there because there's not -- there was a bundle of stuff which was Afghan stuff. I don't think this was the only part of that.

Q. What I'm asking is if it's normal that such an important document might just be bundled in under a heading that gives no indication it's there; the only copy of an important partner document that the NZDF holds, normal or not?

A. Well it happens, and it happened on this occasion.

Q. But is that common or rare, that's all I want to know?

A. Rare I'd say.

MR RADICH: Perhaps you could clear that issue up --

SIR TERENCE: I've got some questions; oh you're going to clear something up?

MR RADICH: Yes, it might be right, would you mind if I lead on that?

MS McDONALD: That's fine.

RE-EXAMINATION BY MR RADICH

MR RADICH: The issue arose when we were looking at the 10 and 13 December briefing notes to the Minister as to who the contacts might have been in the box, you remember that, at the top?

A. Yes.

Q. Because the copies we have had the names removed.

I can tell you having now -- people, having gone back to the originals, that your name was on, I understand both of them, yes, your name was on both of them, just to be clear, Sir Terence, Sir Geoffrey, and with you as the second point of contact with Colonel Kelly as the first.

A. For both of them?

Q. Yes.

And that's something that wouldn't surprise you?

A. That's common, that's common across a lot of papers, not just these type of papers.

QUESTIONS FROM MEMBERS OF THE INQUIRY

SIR TERENCE: I just had a couple of questions, could you go to that supplementary bundle, again to -- it's at the back of the black one and it's the material that went in to the file -- into the safe?

A. Which page is it.

SIR TERENCE: And it is page 55, which is the front page. Now you said you -- you put, am I right, you put the number S116 on it?

A. Yes.

SIR TERENCE: And then there's a number 133?

A. Yeah.

SIR TERENCE: Did you put that number on it?

A. No, I don't recognise that number. My numbers are always circled like that one is there.

SIR TERENCE: And the stamp, would you have put that on as well?

A. No.

SIR TERENCE: Turning to page 72 that you took us to before, and I just wanted to make sure I understand what you're saying, the sender or originator, so the Office of the Chief of Defence Force. Now you said that either people, for example, DSO, would give you material to put in the safe?

A. Mmhmm.

SIR TERENCE: If DSO had given you this material, what would you have recorded under sent or original originator?

A. I would have put DSO.

SIR TERENCE: DSO. Right, so we know then that this came from the Office itself and not from someone else?

A. Correct.

SIR TERENCE: And the people in that office were CVF, the Vice --

A. Chief.

SIR TERENCE: Sorry, I forget how you --

A. Vice Chief of Defence Force.

SIR TERENCE: Vice Chief of Defence Force, that's right, and who else?

A. It would be the military assistants for both of them, you know, the officers that work for that staff. There would be the executive assistants from both of those offices. And in the broader sense there would be other people such as media people and so on. There would probably be about a staff of 15 across the two parts of it.

SIR TERENCE: Now of that group would it be common, for example, for media people to give you information of this type to go in your safe?

A. No.

SIR TERENCE: So we can cross them out. Is there any other of that group who it would not be common for them to give you --

A. No.

SIR TERENCE: So all the rest of them?

A. Yeah.

SIR GEOFFREY: Were there any applicable document protocol, procedures or directives about how this material was to be managed and what was to go into what safe and how would people know?

A. No, there wasn't.

SIR GEOFFREY: Does that strike you as odd?

A. No, because it was a busy office and the actual CDF's Office didn't want to hold very much of the material themselves. So it either came to my safe or it went to one of the other branches that was responsible for a particular issue. So, for example, the briefing note that was from DSE, from the Director of Strategic Commitments, that stuff associated with that would have gone back to their safe, yeah.

SIR TERENCE: Thank you very much for that and you're excused.

(Witness excused)

MR RADICH: I think Sir Terence, Sir Geoffrey, at this stage the affidavit -- the plan is to read the affidavit?

SIR TERENCE: Oh yes, we just want to get it into the record.

MR RADICH: Thank you that's appreciated.

SIR TERENCE: [Audio begins] ...going to read the affidavit that Mr Hoey has sworn about finding the file we've been talking about in the safe. Our manager is going to read it. He has been excused from attending.

(Affidavit of **CHRISTOPHER JOHN AUGUSTINE HOEY** read into the record)

MS WILSON-FARRELL: I, Christopher John Augustine Hoey, Wellington, Director of Coordination at the New Zealand Defence Force, solemnly and sincerely affirm:

In April 2012, I retired as a Captain in the Royal New Zealand Navy. In mid-April 2012 I became the Director of Coordination for the New Zealand Defence Force (NZDF). I am still in that role. My principal responsibility is to coordinate the flow of information from NZDF to the Office of the Minister of Defence (Minister's Office).

The IAT report:

When I began in my current role, I inherited a safe that had previously been used by Mike Thompson, Deputy Chief of Staff in the Office of the Chief of the Defence Force. The safe contained a number of documents.

I was at my desk on 30 June 2014 when someone - I do not recall who it was - advised me that the Minister of Defence, Jonathan Coleman, had asked NZDF to provide any information we had about an operation in Afghanistan in August 2010.

I opened my safe to retrieve all the notes to the Minister that were stored there. While the safe was open, I remembered that I had previously seen a small bundle of documents relating to Afghanistan, so I pulled that bundle out too. I quickly scanned the pages of the bundle to confirm that the documents related to an operation in Afghanistan in 2010.

I handed over to this person the Notes to the Minister and the bundle of documents which were stapled together. The

bundle is attached to this affidavit and marked as "Exhibit A".

Within that bundle was a copy of an International Security Assistance Force report titled Incident Assessment Team Executive Summary, 26 August 2010: CIVCAS Allegation during TF-81 Level II Deliberate Detention Op in Tirgiran Village, Tala Wa Barfak District, Baghlan Province, RC North (IAT report).

The IAT report was highlighted, underlined, and marked, but I do not know by whom. I also do not know who put the IAT report into the safe as it was already there when I took over the safe in mid-April 2012.

When I handed over the documents, I had no concept of the importance of the IAT report. I had never read it in detail; I only knew that the stapled bundle of documents in the safe related to an operation in Afghanistan.

It was not until the morning of 22 March 2017, the day after the book *Hit & Run* was launched, that I read the IAT report in detail. I used the IAT report as the basis for drafting the talking points for the Vice Chief of the Defence Force, Kevin Short, to use in his meeting with the Prime Minister at 12:30pm on 22 March 2017.

The talking points are attached to this affidavit and marked as "Exhibit B".

Transfer to the Minister's Office:

I can see from the Classified Document Register (Register) which is stored securely within my safe, that on 30 June 2014, the same day as the Minister of Defence had asked NZDF to provide relevant information, the IAT report was provided to "M Chadwick". Commander Mark Chadwick was the Military Adviser to the Minister of Defence. A copy of that page of the Register is attached to this affidavit and marked as "Exhibit C".

I can also see from the following page in the Register that on 1 July 2014 the IAT report was provided by "MA" (which

stands for Military Adviser) to "MINDEF" (the Minister of Defence). A copy of that page of the Register is attached to this affidavit and marked as "Exhibit D".

Attendance at the September hearing:

I understand that the Inquiry will convene, in the week beginning 16 September 2019, a public hearing on the accuracy of public statements made by NZDF about the possibility of civilian casualties.

I will be undergoing surgery on 26 August 2019. The surgeon's view is that, once the procedure is performed, I will need about six weeks for recovery and convalescence. A copy of the surgeon's letter is attached to this affidavit and marked as "Exhibit E".

Unfortunately this means that I will not be available to give evidence at that hearing. I am, however, able to be contacted directly by the Inquiry after I have recovered from the surgery.

SIR TERENCE: Thank you.

RICHARD RHYS JONES (Affirmed)

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Good afternoon, you're Lieutenant General, retired, Richard Rhys Jones?

A. Yes.

Q. And you are presently the Chief Executive Officer of Fire and Emergency New Zealand?

A. Yes.

Q. You have a Brief of Evidence in front of you there, would you please read it for the Inquiry beginning at paragraph 2?

A. I enlisted in the New Zealand Army in 1978, and attended the Royal Military College, Duntroon, from 1979 until 1982. I was commissioned into the Royal New Zealand Armoured Corps, and in 1997 became the Commanding Officer of New Zealand's Armoured Regiment, Queen Alexandra's Mounted Rifles.

I have held a range of senior command positions. From 2004 to 2005, I was the Brigade Commander of the 3rd Land Force Group. From 2007 to 2008, I was the Land Component Commander responsible for the training of all Army operational forces. From 2008 to 2009, I was the Commander of the Joint Forces Headquarters, responsible for all overseas operational deployments. I was Chief of Army from 2009 to 2011. In 2011 I was appointed Chief of Defence Force. I was Chief of Defence Force until my retirement from the New Zealand Defence Force in January 2014.

After leaving the New Zealand Defence Force I worked with the Ministry for Culture and Heritage on the World War One Centennial. In July 2017 I was appointed the Chief Executive of Fire and Emergency New Zealand.

I have a Bachelor of Arts from the University of New South Wales, and a Master of Arts in Strategic Studies from Latrobe University, Melbourne (2001).

In 2011, I was awarded the rank of Commander of the Royal Military Order of Saint George, by the King of Tonga, for services to the Pacific. In 2014, I was awarded the Companion of the New Zealand Order of Merit. In 2016, I was awarded the Commander of the French Legion of Honour for services to the French-New Zealand relationship.

IAT report:

In the course of preparing for this hearing, I was shown a copy of a report prepared by the International Security Assistance Force Incident Assessment Team, which had been tasked to investigate allegations of civilian casualties arising out of an operation conducted in Baghlan province on 22 August 2010.

I understand that the IAT report was placed into the safe of my Deputy Chief of Staff, Mike Thompson, on 7 September 2011. I was CDF at the time.

It has a number of marks and annotations and I do not recognise them. Prior to being shown the IAT report ahead of

this hearing, I had never seen it before. I do not know how it came to be placed in Mike Thompson's safe.

On 20 April 2011 I was in Gallipoli, Turkey, when One News broadcast a report about the New Zealand Special Air Service being involved in an operation in Afghanistan. I do not recall having been involved in any way in the response provided by the NZDF.

By the time I returned to New Zealand the story was no longer in the news so I do not recall having any other involvement.

CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Lieutenant General are you happy for me to call you Mr Rhys Jones just to make things a little easier?

A. Certainly, yes.

Q. You've told us that you were the Chief of Defence between 2011 and 2014 and I just wanted to clarify when you started in that role, my researchers tell me that that was the 24th of January 2011, would that be right?

A. Yes.

Q. And I understand also that you hadn't come from an SAS background into that role, is that also --

A. No --

Q. That's correct too is it?

A. -- no that's right. That's correct.

Q. What were you, Army?

A. Armoured Corp. Armoured Corp, tanks.

Q. All right. And the CDF immediately before you I think was Sir Jerry Mateparae?

A. Correct.

Q. And he was a former SAS person?

A. Yes.

Q. And indeed the CDF immediately after you was Mr Keating, is that correct --

A. Correct, also SAS.

Q. -- he was also SAS?

A. Yep.

Q. And as you've alluded to in your brief, significantly for the purposes of this hearing you were CDF at the time that the bundle of documents, including the IAT report, was put into the safe in the Office of the Chief Defence Force?

A. Yes.

Q. Now, we've heard quite a bit about this and I might be able to cut through this fairly quickly, but -- and I know you've said that you didn't personally know anything about it, but you might be able to just help us a little bit about how this might have come about, perhaps.

So, this safe, did you know at the time how -- that the safe existed?

A. Yeah, there is a safe where secure documents are kept. Now physically I had nothing to do with that, that was managed by the Chief of Staff.

Q. So you knew where it was, but you didn't have anything to do with it directly, is that what you mean?

A. Yes, so the Chief of Staff handled the receipting of documents and putting them in the safe and drawing them out.

Q. Was the purpose, though, of having a safe in the office so that it would, and I am assuming and I may be wrong, so please tell me, that it's there so that important documents that are worthy of being in the Office of the Chief of Defence can be held there? I mean, important documents would go into that safe presumably?

A. Yes, particularly classified documents. So it had to be held at a certain level of security in a safe of the right standard, yep.

Q. And a limited number of people would have access to that safe?

A. Yes.

Q. What would you say at that time about how many people would have access to that safe?

A. Very few. So, for example, I never knew the combination, I didn't handle that. The Chief of Staff was the one who would

be handling that. Maybe one or two others. But I actually can't answer that honestly.

Q. But anybody could go to the Chief of Staff, for example, and ask for a document to be put in that safe, or was there some protocol around even what sort of documents were even to be held there?

A. Yes anyone could go and ask it, and if it met kind of the classification of, well here's its security clearance, it could go in there, yep.

Q. So the Chief of Staff you would expect to engage with the document to see whether it was worthy of being put in the safe, if I could put it that way? He wouldn't just put everything in there?

A. Probably, yeah, I would assume so, yes.

Q. In 2011 when you were in the chair, if I can put it that way, who was your Chief of Staff?

A. Mike Thompson.

Q. In 2011, right.

Now Tim Keating was Chief of Staff at one stage, wasn't he?

A. He was at the end of Jerry Mateparae's time. But when I moved up from Chief of Army to Chief of Defence Force, one of the first things I did was appoint Tim Keating as my replacement, so he spent no time, or very little time, only a number of weeks perhaps as Chief of Staff during my time.

Q. Hang on, I might have got that wrong. So was he Chief of Staff before you moved into the CDF position?

A. Yes. Just for a very brief period of time though. I can't recall how long.

Q. And then when you came in, you appointed a new Chief of Staff?

A. Yes.

Q. Mike Thompson?

A. Yes.

Q. Was there a particular reason why you made that change?

A. Because Tim Keating had left that job of Chief of Staff to become the Chief of Army, so the vacancy needed to be filled.

Q. I see. Okay.

What was your knowledge of Operation Burnham at the time that you were there at Chief of Defence?

A. So, when I was Chief of Army, I had no knowledge of the Operation. So, operations, particularly Special Forces operations were pretty compartmentalised and really a need to know basis. So the Chief of Army is responsible for the in-country training, but not for overseas operations. So, I knew nothing about it apart from the very limited briefs of limited scope that were given to us after the event, certainly not during the event.

When I was Chief of Defence Force, the first time this came up was when I was coming back -- or when I was over in Gallipoli, as I said I was at Gallipoli during that time. When I came back, and my memory is not exact here, but I'm assuming this is the cause for it, I did get a briefing on the media report and either asked or was shown all the information. I do recall that the information that I saw was merely the briefings to the Minister and I did say is this all there is and was then explained yes, it was based on the verbal reports out of theatre. I asked whether we had a copy of the report, was told no it was a classified one, but we had seen it. I did later -- I can't remember if it was immediately or later on, got to see the video of the helicopter gun ship I think it was, or the UAV video footage. So that was my knowledge. Merely going over so I was proficient or at least understood or saw the documentation and it was, as I said the briefings to the -- to Parliament at the time over the end of 2010.

Q. So when you said to me a minute ago that you were told that it was a classified document, but we'd seen it, referring to the IAT report, who told you that?

A. I can't recall, but most of my briefings were done by Jim Blackwell who at that time was -- I think it was Jim Blackwell, who was the then just appointed the Head of

Special Operations, or it might have been Karl Cummins, I actually can't recall who gave that -- who gave the brief, but I do remember seeing the documents.

Q. But your understanding was in terms of the IAT report, NZDF didn't have it but it had been seen?

A. Yeah. And I do recall saying there, I had no questions about the validity of it, but I said, hey this isn't really a paper trail, it's more (inaudible), it would be good if we can --

Q. Sorry, I'm having trouble hearing you a little bit because you're speaking quite quickly and you're a wee bit away from that mic. So what did you say, that you remember what?

A. What I did say is because I was quite taken that this was -- the only information we had was the written briefs to the Minister and Parliament, was that it -- and why didn't we have the IAT report? Told it was classified and that we had asked for it previously, couldn't get it. And I said well if there's any chance of getting it in the future it would be good to actually have that. That was, I suppose a comment I made at the time. But was told pretty clearly, unlikely because we've already asked for it.

Q. And this was when?

A. I don't know the exact date, but it was probably when I returned from Gallipoli and was then briefed on here was the media issue that went out there and the questions that were in Cabinet. Sorry, questions that were in the public eye.

Q. So this was all around about April 2011ish?

A. Probably, because that was the only time when this issue came up as a topic.

Q. If we go to the bundle in the safe, and it's in the supplementary -- if you look in the big black ring binder in front of you, at page 55 it starts, these are -- this is a copy, an unclassified copy of the documents from the documents that were found in the safe. It's at the end, there's a tag saying "supplementary". If you go to that? 55 it starts. That's right.

A. Yep.

Q. Now, just so that I know the level of detail that we need to go through with these documents, I think you indicated in your brief prior to coming to the hearing today you've actually had the benefit of looking at the actual IAT report, that's true, isn't it?

A. Merely shown it for purposes of identifying the hand scripts on it, not reading it in full, yeah.

Q. And have you -- were you also shown these documents that were a part of the bundle?

A. No I don't think so.

Q. Well, I'll just identify them for you, the one marked A, the one that you've got open there now, is the storyboard from Operation Burnham?

A. Yep.

Q. Turn over, you'll see a draft of a ministerial briefing note, and I can tell you that's a draft of the 25 August 2010 note with handwriting on it. Presumably you were asked about these documents though, Mr Rhys Jones, because you, I think you confirmed that you didn't know who the handwriting was, is that correct?

A. No, it was on the ISAF report itself.

Q. Okay. So just looking at these edits on the Ministerial Briefing draft, do you recognise those on pages 57 and 56?

A. No, I do not, no.

Q. And again, over on to page 59, that's the 13 December 2010 briefing, page 60, more handwriting, and again, just get you to confirm that's not your handwriting?

A. No not my handwriting.

Q. And you don't know it?

A. Ah, no.

Q. And you'll see that there's a, the last part of paragraph 4, is underlined from the words "As a result of their investigation", and that's also I can tell you on the original on the copy that we've seen, as highlighted?

A. Okay.

Q. And then over the page the next draft, Ministerial Briefing 10 December 2010. And again if you turn over to 64, you'll see paragraph 7, it's got a circle around the entire paragraph, it's been highlighted and the latter part of it underlined, as has the 11D on the recommendations side of the page. Page 66, I can tell you is extracts from an email from Rian McKinstry, and there's a portion of that underlined at the bottom. And the document that's not there obviously on page 67 and following is the -- is where the IAT report was attached and stapled to this bundle. And you've seen that document.

So, having -- well, perhaps just to focus you a little bit, because you haven't seen these before, but paragraph 7, for example --

A. Sorry, can I clarify, so the documents I saw were the final ones, because I do recall it had Jerry Mateparae's signature on it, not the drafts when I was briefed.

Q. Yes, that's why I wanted to make sure you saw these ones, because you have seen the marked up IAT report though, haven't you?

A. Yes, well as I said, but only for the hand -- to identify the handwritten comments, yep.

Q. What I want to just suggest to you though, is if you look at page 60, paragraph 4, and in particular focus on the bits that are underlined, you'll see there that that briefing says, and if you've read the original signed one, you'll know what I'm referring to:

"As a result of their investigation team the assessment team concluded that:

'Having reviewed the evidence there is no way that civilian casualties could have occurred.'

And the actions of the ground force and Coalition air were cleared of all allegations."

And then, again, on page 64:

"The assessment concluded that having reviewed the evidence there is no way that civilian casualties could have occurred. The Joint Assessment Team report has not been released beyond Headquarters ISAF and our knowledge of the findings are based on the comments provided by the NZSAS Task Force Commander who was permitted to read the report."

The reason I'm referring you to those passages is simply to put, and you may just be able to answer this and confirm this fairly quickly, that it seems clear from looking at those and looking at what you saw in the IAT report, that whoever is engaged with these documents, marked them up, highlighted them, is drawing a comparison and doing some sort of analysis as between the contradiction, if I can put it that way, between what's in the IAT report, and what's inaccurately recorded contrary to the IAT report in those draft ministerial briefings. Do you accept that from me?

A. Sorry, can you explain that again, I'm not following you there?

Q. There's a contradiction, isn't there, between what's in the ministerial briefings and what's in the IAT report about the outcome of the IAT report, i.e., we know what the outcome -- findings of the IAT report were?

A. As I understood at the time, we -- as I understand it, we did not see the full report; so didn't see many of the recommendations. The comments that came back were based on what they did see and the interpretation they took from that.

Q. Yes, we may be a little bit at cross-purposes. I know you've seen the IAT report quite recently for the purposes of preparation for this hearing, and we know from what's in the ISAF press release and what Mr Parsons has told us at paragraph 27 of his affidavit that the findings of the IAT report were that there were -- there was a possibility of civilian casualties -

A. I get you, yeah.

Q. -- right?

- A. Yep.
- Q. And all I'm doing is drawing the comparison between that finding in the IAT report and the statements here in the Ministerial briefings?
- A. Sure.
- Q. Which are contrary to that, correct?
- A. Yes, but I will say I didn't read the IAT report, only was shown it for the purposes of do you recognise the handwriting on there. So I have not seen the detail of what was in the IAT report.
- Q. I completely accept that Mr Rhys Jones.
- A. But I do accept that that's what the IAT report said, yeah.
- Q. And what I'm putting to you is that the person who's engaged and marked up this draft appears, it's a matter of logic, appears to have been focusing on the difference between what's in the draft Ministerial Briefing and what's marked up in the IAT report, because there's an obvious conflict between them, correct? And if you don't want to accept that, that's all right.
- A. So I'm just checking when the dates were. It was probably just comparing, rather than the IAT report, I would actually read that just comparing what was actually said word-for-word of the various briefings, rather than the IAT report itself which at this stage they probably wouldn't have had.
- Q. What I'm really wanting to get to is that I want to suggest to you that if I'm right about that, if somebody is looking at those two contradictory -- the differences between the IAT report conclusions and the ministerial briefing notes which are different, putting those together, stapling them together, they're in a bundle, they're in the safe in your office, does that suggest to you that somebody is wanting to, or has intended that that be brought to the attention of somebody in the Office of the Chief of Defence?
- A. That would just be supposition. I don't know, so I don't know whether the IAT report itself was also marked up and had that

similar ones in here. So I'd have -- possibly, but I also would have said this -- if this is a draft, then this would have been back in 2010, but the first time as I understand that the IAT report came in was 2011. So these -- I would have said this handwriting and these highlights would not have -- would have occurred without the IAT presence being there. And I would have said that was someone probably trying to make sure that the wording was the same, or to emphasise the conclusions from it. So, no I don't think that -- no -- it's perhaps useful for me not to make a comment, because it would be total --

Q. It's probably a little unfair for --

A. -- supposition.

Q. -- me to put these questions to you, because you're not as familiar -- you know, you haven't engaged with the documents really in any detail prior to coming today.

Perhaps I could put it this way though, it would be a matter of -- it would be fair, wouldn't it, to suggest that whoever's engaging with these documents, including the IAT report, would need to be somebody with sufficient level of seniority and clearance, security clearance within NZDF to be able to have access to that document?

A. Yes, that would be true. That would be fair.

Q. And also, I suppose it would narrow it down a little bit, because it would also need to be somebody who would be able to access drafts of the Ministerial Briefing papers, wouldn't it? So somebody with security clearance, sufficiently senior, and in the know to have access to an IAT partner document, and to be engaged with Ministerial Briefing papers. Does that -- what sort of person would fall into that category, what level of person?

A. Well can I just clarify? So, as I understand those things would have been in different timings, but to access the safe; so the Ministerial briefings, they were secret at the time I'm

looking at, they would have been held in there as well. But yes, I suppose the supposition -- yes it would --

Q. Perhaps if I make it -- if you assume for the purposes of the question, that the person has access to the IAT report --

A. Yep.

Q. -- draft Ministerial briefing papers and an ability to get them into a safe in the Office of the Chief Executive?

A. Yes. They would be probably someone quite senior with the appropriate security clearances, yeah.

Q. Perhaps we'll leave it there. Thank you.

SIR TERENCE: Do you have anything?

MR SALMON: Only a very little bit sir, assuming that I might have some leniency tomorrow with the different witnesses, I can be very quick with this one.

SIR TERENCE: Yes, we are going to -- we'll talk to you about that later, but yes, we will make an allowance for that.

MR SALMON: Thank you sir. In that case I can -- it might be more efficient just to finish the witness now rather than keep him waiting. I'm sure he doesn't want to spend more time with me again.

CROSS-EXAMINATION BY MR SALMON

MR JONES: Hello.

MR SALMON: Hello, how are you, good to see you again. And I call you Mr Jones?

A. Please, yep.

Q. Very briefly, you have security clearance still that you've seen the IAT report or has it lost its security clearance -- the need for clearance?

[WITHHELD]

Q. All right. And you observed that you understood from your briefing process that the IAT report would have come into the CDF's office during 2011?

A. Yes, during my time, I said that, yep.

Q. Now, I just wanted to be fair on you to give you an opportunity to comment in the event that that's not right, one of the witnesses who we've just had before you, has agreed that in fact all we know is that it was there by 2011 and it may have come in during 2010, but not been logged?

A. Okay.

Q. You would agree, wouldn't you, that as a careful CDF, you probably would have known, unless there was some failure in the chain of command, if such an important document had come in when you were in charge?

A. Particularly if, you know, with the briefings which gave me the background to that, I should have known at the time whether we had the document or not.

Q. And indeed, I saw you gave interviews some years later in which you stood by the understanding you had in the media, after you'd left the Defence Force --

A. Yes.

Q. -- where you were still operating on the understanding that it wasn't there.

It's rather likely, isn't it, unless there was some real failure by someone under you during your time, that the document didn't arrive during 2011, but in fact it arrived earlier?

A. It's a possibility, but again I don't know. The first time -- as I understand, the first time it was acknowledged or recorded or registered was during my time in September.

Q. I'm going to bring up one name, and we've talked about it before, which is Jim Blackwell, he was -- you mentioned him earlier as someone who was handling some of these things. Was he closely involved in the handling of this report, or the issues around this report?

A. As I said, I think it was him who briefed me on that and showed me the video, but they may not have all been all in one time, because we were --

Q. Sure, but he would have been as also an SAS man, in pretty close contact with some of the other people we've heard from in this Inquiry, from the SAS, correct?

A. Yes, he would have been at that level and with a security clearance, yes.

Q. And where is he now?

A. I don't know.

Q. Just finally, and this is final, had you been the CDF back in 2010 when the ISAF report first came out, you would agree, wouldn't you, that whether by Ministerial contact or by you contacting General Petraeus' Office, it would have been possible, on whatever security level, for you as CDF to obtain the ISAF report? You weren't Chief then, but had you been, it's the sort of thing that would be easily asked for, isn't it?

A. I don't know because the Americans are very sensitive around information around their issues. And I don't know whether the IAT report would have been looking at things that were classified such as surveillance systems or weapon effects, and that may have been why they didn't even want their allies to have certain information. So, I wouldn't say categorically yes, a personal approach would do it.

Q. But it could well --

A. It really depends what -- what the -- it depends why the Americans were so sensitive about not releasing the bits that they weren't releasing to it.

Q. But in a context where they're letting you see their real time footage of misaligned gun-sights and so on and impacts --

A. Yep.

Q. -- that would be the sort of situation where they're obviously not that sensitive about those sorts of issues and asking would have been worth it?

A. Yeah, possibly, yes.

Q. Thank you Mr Jones, nice to see you again.

A. You too.

RE-EXAMINATION BY MR RADICH

MR RADICH: There is just one matter. My learned friend

Mr Salmon's last point, you may or may not be able to help us with this, but you were asked a question about had you been CDF in 2010 would it have been quite easy for you to get hold of a copy of the report. Do you have an understanding of something called the Wellington Protocol and or the Associated Washington Protocol?

A. Not that I recall, but it's been a while ago since I was briefed on how information exchange goes, yeah.

Q. Has information exchange between New Zealand and the USA changed over the course of your time in the Defence Force, and if so, can you explain how?

A. No I'm sorry I can't, out of my memory, if I ever knew that. All I would say is relationships did thaw during that time. So if that's what you're saying, in that we had better agreements in here, yeah we did see, as time went on, better relationships, partially because of our operations, but yeah but Afghanistan operations were still held pretty centrally by the US. And then there was a slightly outer layer of with UK, and then there was a slightly outer layer of Australia, New Zealand, Canada and then an outer layer of who they conducted. So it was still -- many operations were still held very compartmentalised at various times. So again, I go back and say it would depend on what the Americans were sensitive about in that document, would depend on what they were releasing or what they were not releasing.

MR RADICH: I see. All right. Thank you very much indeed.

SIR TERENCE: I have no questions.

Thank you, Mr Rhys Jones, for your attendance. And you are excused.

(Witness excused)

(Afternoon adjournment)

SIR TERENCE: Mr Salmon, we can allow an hour for each of the next two witnesses.

MR SALMON: For both, thank you sir, I probably won't need it for one of them, but thank you for that, that's helpful.

SIR TERENCE: Right, but the only thing is, we're not interested in past battles.

MR SALMON: Not at all sir, and if it's of any comfort sir, the only reason for that question that may have seemed off piece is that I judged it in the moment relevant to an answer just given. So no, I'm not either sir.

SIR TERENCE: Right, yep, good, thank you.

MR RADICH: There is one thing I meant to raise with you, in the last piece of evidence you had, former CDF Rhys Jones referred to having a certain security clearance, it's one of those things that while it was relevant to the question, it is problematic and I wonder if we could ask for a confidentiality over that part of his evidence please?

SIR TERENCE: Yes, right. So it's the evidence relating to his current clearance status?

MR RADICH: Yes sir.

SIR TERENCE: All right, so there will be a confidentiality order in respect of that.

MR RADICH: Thank you very much.

TIMOTHY JAMES KEATING (Sworn)

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Good afternoon, you are Lieutenant General, retired, Timothy James Keating?

A. I am.

Q. And you are the Chief Executive of New Zealand Health Partnerships Limited?

A. Not currently, I've just retired from that role.

Q. Have you?

A. Yes.

Q. Thank you. You have a Brief of Evidence in front of you now, perhaps at your right-hand, would you please read the brief now to the Inquiry beginning at paragraph 2?

A. I enlisted in the New Zealand Army as an Officer Cadet in 1982, graduating into the Royal New Zealand Infantry Regiment. I was posted to the New Zealand Special Air Service (NZSAS) in 1986 and served in the NZSAS, including as Commanding Officer, until 2001.

I have had a range of senior roles in the New Zealand Defence Force (NZDF) including Commandant of the Officer Cadet School in Waiouru from 2001 to 2003, Special Projects Officer at Headquarters Joint Forces (2004 - 2005), Commander of the New Zealand Provincial Reconstruction Team in Bamyan Province, Afghanistan in 2005, Assistant Chief of General Staff (2006 - 2007), Commander 2nd Land Force group (2007 - 2009), Deputy Chief of Army (2009 - 2010), Chief of Staff to the Chief of Defence Force (2010 - 2011), Chief of the Army (2011 - 2012), Vice Chief of the Defence Force (VCDF) (2012 - 2014), and Chief of Defence Force (CDF) (2014 - 2018).

I have a Master's Degree in Strategic Studies from the US Army War College in 2004; a Postgraduate Diploma in Defence and Strategic Studies from Massey University in 2006.

This year I was made a Companion of the New Zealand Order of Merit.

The Native Affairs report:

I understand that on 27 June 2014, Jon Stephenson contacted the NZDF to advise that he had information about an operation conducted by the NZSAS in Afghanistan in August 2010, now commonly referred to as Operation Burnham (the Operation), and to request a response from the NZDF on a number of questions.

I do not recall having any involvement in responding to these questions. I was in Australia from mid-afternoon on Sunday, 29 June 2014 until mid-afternoon on Tuesday, 1 July 2014 at the Change of Command Ceremony for the then...Chief of

Defence Force. The then VCDF, then Air Vice Marshal Kevin Short, acted as CDF in my absence.

I understand that Commodore (Retired) Ross Smith, formerly my Chief of Staff, will give evidence, or has given evidence, about the questions raised by Mr Stephenson, the circumstance in which the NZDF's response was provided, and the basis for that response.

I am aware that the then Minister of Defence, The Hon. Dr Jonathan Coleman, received a briefing from the NZDF about the Operation on the afternoon or evening of Saturday, 28 June 2014. I do not recall having briefed the Minister. It is possible that I briefed him as I had not yet departed for Australia, but I am unsure. Sometimes I send a subject-matter expert to undertake briefings, in the first instance, but I simply cannot remember if I did so on this occasion.

If I did, in fact, meet with the Minister on Saturday, 28 June 2014, then I would have briefed him on the basis of the August and December 2010 CDF's Notes to the Minister, which are in the bundle at pages 163-169.

Q. Now, just to identify them, at your left-hand but in the very front of the table is the -- beyond that, the spiral bound volume. Yes thank you. Would you please just turn to those pages? So 163, the numbers are at the bottom. And if you have a look at that page, and then through please to page 169, are you able to confirm that they are the Notes to the Minister to which you have referred?

A. Yes they are.

Q. Thank you. So back to your evidence, paragraph 10, last sentence?

A. As I recall, this is all the information I had personally reviewed about the Operation at the time.

The first involvement that I can recall with this matter was receiving a call from the Minister on the evening of 30 June 2014. I remember that I was at a formal dinner for the

Change of Command Ceremony in Australia when the Minister called me. He was upset.

He said that his Military Secretary had given him a report prepared by the ISAF (International Security Assistance Force). He said that the report described an investigation, by an Incident Assessment Team, into allegations of civilian casualties arising out of the Operation (the IAT report). The Minister relayed that the assessment team had totally cleared the Ground Forces but had found a likelihood of civilian casualties. This was inconsistent with the NZDF's statement made on 20 April 2011, and repeated that night, that ISAF had investigated and found that the allegations of civilian casualties were unfounded.

I immediately called my Chief of Staff, Ross Smith. I conveyed the conversation to him and asked whether we had ever seen the IAT report. I couldn't believe that the NZDF had the IAT report, without knowing it, and without having read it. Ross Smith didn't know either.

I needed to make sense of what had happened. I asked Ross Smith to put together a reading pack, including the IAT report and the August and December 2010 Notes to the Minister, that I could read immediately upon my return to New Zealand the next day.

On 1 July 2014, I flew back to New Zealand. I arrived in the middle of the afternoon and met Ross Smith to collect the information pack so that I could read the IAT report ahead of my meeting with the Minister and Secretary of Defence. This was the first time that I had seen or read the IAT report.

The meeting with the Minister and the Secretary of Defence took place just ahead of the Defence Weekly Meeting scheduled for 4pm. I do not recall what we discussed at that meeting but I would have assured them that I had never seen the IAT report, and that I hadn't known we had a copy of it at NZDF Headquarters, but we'll make inquiries. I understand that Ross Smith has given evidence as to the steps we took to

ascertain when and how the IAT report ended up in the safe of the Director of Coordination, Chris Hoey.

By the time of my meeting with the Minister on the afternoon of 1 July 2014, he had already spoken to the media. I believe the Minister was asked some questions on his way to the morning caucus meeting. The Minister used that occasion to clarify the position on civilian casualties arising out of the Operation.

It was reported by the media that the Minister had acknowledged that "you probably can't rule out" civilian casualties caused by a gun that had not been properly slaved to its sight in a Coalition helicopter. It was also reported that civilian casualties were not caused by New Zealand troops. I refer to the media reports at pages 243-252 of the bundle.

Q. Would you just have a look for that please, again it's that same bundle. And is this the media report that you are referring to?

A. Yes, it is.

Q. If you go through to page 252 and can you confirm that these pages all are the reports to which you refer?

A. Yes, they are.

Q. Thank you. Para 19?

A. Although I do not specifically recall, I believe that in the following days I would have briefed the Minister again on the outcome of Ross Smith's inquiries that had been agreed upon during the meeting with the Minister on 1 July 2014, including interviewing Rian McKinstry and seeking to track the arrival into NZDF of the IAT report.

Hit & Run:

I was in Iraq with the then Minister of Defence, The Hon. Gerry Brownlee, on 21 March 2017, the day of the launch of *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour*. That night I spoke briefly to the then VCDF, Kevin Short. I do not recall exactly what we discussed; I would

imagine that he would have provided an overview of the allegations made against the NZDF and he explained the proposed response.

I realise now that the NZDF's initial response of 21 March 2017, we repeated the 20 April 2011 statement that "the [ISAF] investigation concluded that the allegations of civilian casualties were unfounded." With all that was going on, I did not pick up on this at the time.

Despite being overseas, I considered it imperative to get clarity on the veracity of the allegations made in *Hit & Run*. I asked the Director of Legal Services, then Colonel Lisa Ferris to gather as much information as possible about the Operation. I refer to the bundle at page 269.

Q. And if you do that please. Feel free to just keep that bundle handy rather than the large one at the moment if it makes desk management any easier.

If you have a look at that email please?

A. Yes.

Q. And can you confirm that to be the email you refer to?

A. Yes.

Q. Thank you. Second-to-last line of 22, which I think you might have read?

A. From Lisa Ferris to Brigadier Evan Williams, on 22 March 2017, at 8.41am, conveying my request.

I also made a number of requests for information to my Chief of Staff, Ross Smith, who made a record of it in his notes from the time; see the bundle at page 275.

Q. Perhaps if you just go to that page and confirm that is the reference you intend to make?

A. Yes it is.

Q. Thank you.

A. Where he records on 23 March 2017 that the team had a "huddle" regarding "H+R" [*Hit & Run*] so as to "work share" about meeting the "RFI" [requests for information) that I had made.

We were able to obtain quite quickly, from NATO, a classified copy of the Air Weapons Team (AWT) video footage and accompanying audio from the Operation.

26 March 2017:

I returned from Iraq on Saturday, 25 March 2017. The following morning, on Sunday 26 March 2017, I spent some time perusing the reading pack that had been prepared for me.

I cannot remember its exact contents, but I believe it contained, at a minimum, the August and December 2010 CDF Notes to the Minister, the IAT report, a synopsis and analysis of *Hit & Run*, and the talking points used by VCDF in briefing the Prime Minister, the Rt. Hon. Bill English, on 22 March 2017.

Between 12pm and 3pm, I was briefed by the Ground Force Commander of the Operation, together with my VCDF, my Chief of Staff, the Director of Legal Services, the Commander of Special Operations, and the Chief Adviser of Defence Public Affairs.

I met with the Minister of Defence at 3pm, before briefing the Prime Minister at 4pm. I refer to the bundle, at pages 279-285, for a copy of my briefing notes.

Q. And if you'd do that please, are they the notes that you are referring to?

A. They are.

Q. I think shortly you refer to an extract from it, so we might go back to your brief, second sentence of 28?

A. The briefing comprised an overview of intelligence which led to the Operation, a detailed analysis of the conduct of the Operation, an analysis of the relevant legal framework, and footage from the AH 64s. On the subject of civilian casualties, I explained to the Prime Minister that (at page 281):

"The Operation has been subject to an International Security Assistance Force investigation team headed by an ISAF Brigadier General and supported by a team including an ISAF

Legal Officer as well as the Government of the Islamic Republic of Afghanistan representatives from the Ministry of Interior and the Ministry of Defence.

The investigation team concluded that civilian casualties may have been possible due to the malfunction of an air weapon system, as was made public by ISAF on 29 August 2010."

I reiterated that message at the end of my briefing (at page 285):

"[The ISAF] report concluded CIVCAS may have occurred by gunship - Ground Forces operated lawfully."

That evening we put out a new statement in response to *Hit & Run*; NZDF had not made any comment after the initial response on the night of the book launch a few days earlier. We wanted to communicate NZDF's position which was, by this point, more considered and informed.

The statement, which is in the bundle at page 287-288 --

Q. Just look at that, is that the statement?

A. That's the statement.

Q. Yes, it is, and then back to your brief then at 31?

A. Identifies a number of inaccuracies in *Hit & Run*, before acknowledging that:

"The ISAF investigation determined that a gun sight malfunction on a Coalition helicopter resulted in several rounds falling short, missing the intended target and instead striking two buildings.

This investigation concluded that this may have resulted in civilian casualties but no evidence of this was established.

The NZDF reiterates its position that the New Zealand personnel acted appropriately during this operation and were not involved in the deaths of civilians or any untoward destruction of property."

27 March 2017:

The following afternoon, on 27 March 2017, I held a press conference. My speech notes from the press conference are in the bundle at pages 289-295.

Q. So if you have a look please between pages 289 through to 295 and can you confirm that they are the notes?

A. They're the notes from my press conference.

Q. Yes, thank you.

A. In the press conference, we discussed:

a. the context for the Operation and, in particular, the need to ensure the security of the New Zealand Provincial Reconstruction Team, the Afghan people, and Coalition forces operating in Bamyan province;

b. the intelligence-gathering and planning of the Operation;

c. the conduct of the Operation; and

d. the nature of the ISAF investigation into allegations of civilian casualties.

Addressing the issue of civilian casualties, the Director of Defence Legal Services, then Colonel Lisa Ferris, explained (at page 294) --

Q. Yes, I needn't take you to the page.

A. Yeah, it's her speaking notes.

"Information, received after Operation Burnham indicated that civilian casualties may have been possible. The International Security Assistance Force was required to assess all allegations of possible civilian casualties ... In doing so ISAF stood up an investigation team... The investigation team concluded that civilian casualties may have been possible due to the malfunction of a weapon system ... The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander's tactical directive, the Rules of Engagement, and accordingly the Law of Armed Conflict."

After the press conference I participated in a "Question and Answer" session, the transcript of which is in the bundle at pages 297-309.

Q. Yes, and if you have a look at those pages and can you confirm, having done so, that that is the transcript you are referring to?

A. Yes.

Q. Yes, thank you.

A. In that session, on the subject of civilian casualties, I reiterated that there may have been civilian casualties caused by rounds falling short as a result of a mechanical malfunction, but that the claims had not been corroborated.

Notes to Minister:

On 29 and 30 March 2017, I submitted two Notes to Minister Brownlee describing the legal framework for undertaking an internal Defence Force inquiry. I refer to the bundle, at pages 311-324 and 325-329.

Q. And again, if you'd look at those pages please?

A. Yep.

Q. On both counts they are the documents?

A. Yes they are.

Q. Thank you.

A. In summary, the legal position is that:

a. where an allegation is made against foreign service personnel, there is no statutory authority to conduct an investigation;

b. where an allegation is made of unlawful conduct on the part of NZDF personnel, the relevant jurisdiction is a disciplinary investigation under the Armed Forces Discipline Act 1971 (AFDA);

c. the allegation of unlawful conduct must be investigated unless it is considered to be "not well founded";

d. having regard to the content of *Hit & Run*, the intelligence and the operational material available to me, the rules of engagement, and the IAT report, I was satisfied that the allegations were "not well founded" and, therefore, no further action was required under the AFDA.

3 and 4 April 2017:

On the morning of 3 April 2017, I briefed the Prime Minister again. My recollection is that I used the same

written briefing from the 26 March 2017 briefing, but provided updates verbally where appropriate.

The Prime Minister conducted a post-Cabinet press conference on 3 April 2017, a transcript of which is in the bundle at pages 333-343.

Q. And can you confirm looking at those pages that they are the pages you refer to?

A. Yes I can.

Q. Thank you.

A. The Prime Minister:

- a. stated that he had reviewed the intelligence and operational material on the Operation, the Rules of Engagement, the IAT report, and the video footage of the Operation;
- b. acknowledged the possibility that there may have been civilian casualties as a result of a misfire from a Coalition helicopter;
- c. found the allegations of war crimes and misconduct by NZDF personnel had no substance to them; and
- d. determined that there was no basis for ordering an inquiry.

The Prime Minister reiterated these points during Parliamentary Question Time on 4 and 5 April 2017, transcripts of which are in the bundle at pages 347-350.

Q. Can you confirm they are the pages?

A. I confirm that.

Q. Thank you.

A. On the morning of 4 April 2017, I met with VCDF, Kevin Short; the Director of Legal Services, Lisa Ferris; and the Director of Coordination, Chris Hoey. Up until this point, it felt as though we had been operating in a "pressure cooker"; scrambling to make sense of everything. Now, with the pressure relieved to some extent, I wanted to gain some more clarity. The purpose of this meeting was to shift gear from "what we know" to "what more can we know." Even though the Prime Minister had decided not to conduct an inquiry, I still

wanted to do further fact finding, to ascertain if there was anything I was missing. I wanted to leave no stone unturned.

The significance given by NZDF to location errors in *Hit & Run*:

The Inquiry has asked the NZDF to address "the significance given to location errors when addressing publicly the allegation that civilian casualties resulted from the Operation."

At the outset, the location errors in the book were significant to the NZDF because they tended to discredit the entire account. To be clear, our concerns about the book's treatment of location went well beyond the name given to the village in which the Operation took place. The geo-reference points provided in the book, together with the orientation of the river, the layout of the buildings, and the description of the topography within the narrative, were at odds with what we knew about the valley in which the Operation was conducted.

That is not to say that I used the location issues as a diversion; to the contrary, I refused to be diverted by a narrative that did not make sense alongside what I knew of our Operation. In my public statements I wanted to be clear that all I could speak to was what the NZDF knew to have happened in the early hours of 22 August 2010. I did not want to be drawn into, or distracted by, the book's alternative narrative which, with all its fundamental inaccuracies, simply made no sense to me.

As the days went on, however, we set to one side the geographical discrepancies. For instance, I refer to the bundle, at pages 325-329, which is my Note to the Minister of 30 March 2017.

Q. And again, just to look at those pages please to confirm they are the pages to which you refer?

A. Yes they are.

Q. Thank you.

A. In that Note I say, at paragraph [12], "[in making my decision], I have set aside any inaccuracies of location."

Instead of seeking to rebut the book, I was motivated to gather more information so that we could evaluate, with greater precision, the allegations of wrongdoing. To that end, I took a number of steps:

a. on 31 March 2017, I wrote to General Dunford, the Chair of the US Joint Chiefs of Staff to request declassification of the Air Weapons Team video footage and accompanying audio so that it could be released to the New Zealand public. A copy of that letter is in the bundle, at page 331-332.

And that is the letter to General Dunford.

Q. And just to pause there, can you explain please the general's position, I know his title is Chairman of Joint Chiefs of Staff, but why was he the person to write to?

A. He is my equivalent in the US Military, so that he's the equivalency that would -- the relationship that I have.

Q. I see, thank you.

A. And that's, I suppose, again, to me, it was going to the highest level, there was no-one other than Joe that could -- that I could write to down in the system, he was at the top.

Q. Could I ask you please just as we have this letter in front of us, could you just read in to the Inquiry the third and fourth paragraphs?

A. "I have reviewed the information currently available to me thoroughly. The information I have seen clearly shows the New Zealand Defence Force and Coalition personnel involved in this operation taking deliberate steps to ensure that the Operation was conducted in accordance with the Law of Armed Conflict and the Rules of Engagement. My current view of this matter is there was no unlawful contact as alleged. However, I currently have some limitations around the information I can release publicly in support of my position. It is on this basis that I'm seeking your support to declassify the Air

Weapons Team video footage and accompanying audio which was captured by Coalition aircraft during the operation. This material presents critical evidence on the manner in which the Operation was conducted. It identifies the exact location of the engagement, it positively identifies that insurgents were carrying weapons, and confirms the efforts that our personnel went to in order to minimise the risk of harm to civilians and their property."

Q. Thank you. And are you able to help us with whether there was a response?

A. At that time I believe that Joe could not declassify the video.

Q. Thank you. Paragraph 45b?

A. On 4 April 2017, I wrote to General Pavel, the Chair of NATO, to request a copy of the full IAT report, on our understanding that we only had a summary of it. A copy of that letter is in the bundle, at pages 345-346.

Q. Again, would you look at those pages please?

A. And that's my letter to General Pavel.

Q. Thank you. And again, did you receive a response to that letter?

A. Yes, again, Peter said he would help where possible and on that basis, I was able to direct my people to look through NATO in Brussels, or to assist them to look for any information they had on the Operation. The response was though that the information was held forward in Afghanistan.

Q. So at 45c?

A. In mid-April 2017 I directed that all material relevant to the Operation *Hit & Run* - including correspondence, media releases, media articles - be consolidated into a single record so that we could ensure consistency in the future. I refer to the bundle at page 351.

Q. Is that the email you are referring to from Chris Hoey?

A. Chris Hoey, yes.

Q. Yes, thank you.

A. This is the email from the Director of Coordination, Chris Hoey, on 18 April 2017, at 10.02, advising of this step.

In mid-April 2017, I directed the New Zealand Defence Attaché (DA) in the Middle East to travel to Afghanistan to check whether there was any other material relating to the Operation remaining in ISAF headquarters. I refer to the bundle at page 353. This is the email from Brigadier John Boswell to me, on 19 April 2017, at 8.40, confirming that the DA has been advised.

Q. Yes, and you confirm that to be the page you are referring to?

A. I do.

Q. Thank you.

A. In early May I established a fact finding team to gather more information. I refer to CDF Directive 27/2017: Due Diligence Task, on pages 355-359 of the bundle.

Q. Again if you'd look at those pages and confirm them to be the pages to which you refer?

A. I do. That's correct.

Q. Thank you.

A. This records that:

Hit & Run had made allegations of unlawful conduct; Although the NZDF had a volume of information, a more complete set of information is required regarding the allegations of civilian casualties and property damage; and.

iii. I established a fact-finding team, comprising three NZDF personnel, to gather information, including from Major General Zadalis, who had conducted the ISAF investigation, and to undertake a due diligence examination of the information.

On 21 December 2017, I wrote again to General Pavel, the Chair of NATO, to request the release of a redacted version of the IAT report. A copy of that letter (without its classified enclosure) is in the bundle, at page 367.

Q. Which is in fact the very last page of this bundle, if you could just check that that is the document you refer to?

A. It is.

Q. And could I ask you please to read the penultimate, the second to last paragraph there?

A. "To date I have declined to release a copy of the report under the appropriate sections of New Zealand's Official Information Act 1982 because the document is the property of NATO ISAF. However, I believe that the release of the redacted version of the executive summary would go a long way to promote transparency in this case and resolve complaints lodged with the New Zealand's Ombudsman. Its release would demonstrate the efforts our personnel went in order to minimise the risk of harm to civilians and their property during this operation.

To that end, the enclosed copy of the executive summary is marked with proposed redactions and I ask you to approve its release."

Q. Yes thank you, and are you able to help us with a response you received?

A. I cannot recall his response.

Q. Paragraph 46?

A. The due diligence exercise I directed resulted in a number of outcomes:

Following a meeting with Major General Zadalis, who conducted the ISAF investigation and who wrote the IAT report of 26 August 2010, Brigadier Motley reported back, in an email of 24 May 2017, at 1.23pm (which is in the bundle at pages 361-365).

Q. If you just check that. There are a number of redactions, but if you'd look through those pages please?

A. Yes that's correct.

Q. Thank you.

A. He reported that:

The Ground Forces were not a factor in any potential civilian casualties; and

If there were any civilian casualties, the likely cause was a malfunction in a helicopter gun-sight.

The NZDF obtained confirmation that the IAT report in our possession, despite being titled as an "Executive Summary", was in fact the full report.

The NZDF became aware for the first time of a further investigation conducted domestically by the United States into a discrete issue arising out of the Operation, namely, whether the AWT video had been wrongfully edited by their forces with the intent to mislead the IAT or shape their report. The investigation concluded that the editing was undertaken in accordance with Standard Operating Procedures for the management of limited recording devices and storage capacity. The editing was completed before the IAT was asked to see the footage and was not intended to mislead. The NZDF received a copy of the classified AR15-6 report on this investigation in May 2017. In June 2019 a redacted, unclassified version of this report was released by the US Government in response to a private request under their Freedom of Information Act, and it was published on the Inquiry's website on 1 July 2019. A copy of the publicly available, redacted version of the AR15-6 report is in the bundle at page 89-162.

Q. Thank you, and if you could look at those pages?

A. And that's the investigation.

Q. Yes?

A. Redacted, yep.

Q. Thank you. 46d?

A. The NZDF was provided with the video footage from the unmanned aerial vehicles which captured approximately seven hours of footage before, during, and after the Operation.

Until my retirement from the New Zealand Defence Force in 2018, I strived to gain as much information as possible on Operation Burnham because it was important to me that the NZDF was as clear and open as possible on the relevant events.

CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Lieutenant General, are you happy for me to call you Mr Keating?

A. Yes, I am not a Lieutenant General anymore.

Q. Thank you.

You were Chief of Defence between 2014 and 2018, correct?

A. Yes I was.

Q. Mr Keating, do you believe that you made any mistakes during that time in your handling of this matter?

A. In my handling of this matter?

Q. The matter that we're concerned with in this Inquiry during your time as Chief Defence between 2014 and 2018?

A. Not that come to mind.

Q. So no matters that you would have done differently?

A. Again, it's all a matter of context.

Q. Contest or context?

A. Context.

Q. What does that mean?

A. Again, if you're looking at my hindsight sitting back here, it's hard to judge when you're under certain pressures on the decisions you make, and of course when you review actions you take in nature as serious as this, there may have been things that I would have done differently.

Q. What would they be?

A. As I say, I can't recall, I'm satisfied in the context that I followed an appropriate process under my written responsibility, so I was fulfilling my responsibilities under the Armed Forces Discipline Act.

Q. So looking back with the benefit of hindsight now you can't identify any single thing that you can tell me you would have done differently, is that what you're saying?

A. It is.

Q. Can you tell us now when after 2011 did New Zealand Defence get a clean copy of the IAT report, can you help us with that?

A. No, this is one of the issues, and I think before -- when that came into the possession of the New Zealand Defence Force, I'm not sure.

Q. Well, we know there was a marked up copy of it in the safe of the Office of the Chief of Defence in September 2011?

A. Yes.

Q. And we know, don't we, that when you were meeting with Minister Coleman in 2014 -- your staff were meeting with Minister Coleman, I think Mr Smith was directed to find out where that had come from, and to get a copy of it?

A. Yes.

Q. Clean copy of it. Well, did NZDF get a clean copy of it?

A. I'm not sure of your question?

Q. Did a clean copy, as opposed to a highlighted marked up version of it, which is the one that's in the bundle in the safe, ever come into NZDF's hands to your knowledge?

A. I can't recall.

Q. You can't recall?

A. No.

Q. The reason I ask that question is that the Inquiry was provided towards the beginning of this Inquiry process with a clean copy of the IAT report, it came in in book 23 into the Inquiry some months ago. Now that's a different version to the version that's in the bundle in the safe, and I'm making the assumption that at some point NZDF got a copy of it, and I'm asking whether you know when that happened, and you don't?

A. No I don't know when that happened.

Q. You were Chief of Staff to CDF between 2010 and 2011, correct?

A. Yes I was.

Q. You were then VCDF between 2012 and 2014?

A. Yes.

Q. And then you took over as Chief of Defence in 2014, I think in February?

A. I did.

- Q. And you were then Chief of Staff to the CDF when the Operation Burnham unfolded, so you knew about the Operation presumably at that time?
- A. Not necessarily in my role, Chief of Staff to the CDF was more administrative. So various operations throughout that time were compartmentalised for security reasons and matters, operations of that nature were sometimes need to know and only certain people in the Defence Force were included in the briefings.
- Q. So does that mean that you didn't know about -- are you suggesting you didn't know about Operation Burnham?
- A. So I can't -- you know, again, one thing I think it's important, I put into context, that this was one of numerous operations that were occurring throughout that period. A period of hundreds of SAS operations or SAS associated operations. So you're asking me if I can recall that I was in a briefing around what we refer to as Operation Burnham, I can't recall back then if I sat in a briefing to Operation Burnham.
- Q. You're not suggesting though surely that this operation was run of the mill, it was a significant operation, wasn't it?
- A. No, it is run of the mill.
- Q. It is run of the mill?
- A. The significant operations were ones where SAS, you know -- what we considered that required significant review and we brought in all the resources of Headquarters were ones where there were identified civilian casualties or identified friendly force casualties, because, again, be careful about the term "run of the mill" that's your term, not mine, it was a routine operation, arrest and detention operation, one of numerous operations that the SAS conducted and other New Zealand troops conducted throughout that period.
- Q. All right. You're not suggesting though that the Prime Minister wasn't interested in this operation, are you?
- A. No I'm not suggesting that.

- Q. That it didn't have a level of heightened, I guess, consciousness at a political level, because of the nature of it?
- A. So I don't know as the Chief of Staff, you'd have to ask the CDF of the day those questions, that would be speculation on my behalf.
- Q. All right. Well, will you take it from me that others before you this week have talked about the significance this operation had at a political level and we have documents that indeed refer to the fact that the Prime Minister, the Minister of Foreign Affairs and the Minister of Defence were quite exercised about the suggestion of civilian casualties following the Operation; the Prime Minister was told and briefed when the Operation was unfolding. It was a matter that was of some moment back in New Zealand, would you accept that from me?
- A. So what I accept, and my knowledge because of the Chief of Staff to the Defence Force in those days I wasn't in the operational chain, to the best of my knowledge they at a senior political level, Ministers and members of Cabinet, which may have included the Prime Minister, gave some authorities to the SAS operations and received debriefs on the operations themselves, as a matter of course over the numerous operations, the several hundreds of operations conducted by the SAS in their time in Afghanistan.
- Q. Well, did you have anything to do with the briefings to the Minister of Defence about this operation?
- A. To do with the briefings about the Minister of Defence? I cannot recall, but as the Chief of Staff I recall CDF being aware and signing out some information on behalf of the CDF of the day, which was one of the roles I undertook if the Vice Chief wasn't available, as the Chief of Staff I was sort of third in the signature blocks.
- Q. Right, so if you have a look at 164 in the black bundle in front of you, is that your signature on that briefing?

A. That is.

Q. So you signed that out. Did you read it before you signed it?

A. Of course.

Q. Did you take any steps to check its accuracy?

A. I would have.

Q. What would you have done?

A. I would have reviewed the documents and the information that I had to sign out that document.

Q. What would that have been?

A. The information that was provided through the operational chain.

Q. Can you tell us now what that was?

A. I can't recall what that was. I think it's information that's probably been made available to the Inquiry.

Q. Did you have any role in editing these briefings before they were finalised?

A. Editing which briefings?

Q. These briefs, like the one that you signed out, would you have made any amendments to them?

A. Look I can't recall, but as a matter of routine I may have changed information based on the information that was presented to me if I felt it needed further clarity for Ministers or Prime Minister or whoever I was briefing, or any other editing that was required.

Q. While we're with this document can I just take you to the back of that bundle? There's a divider that says "supplementary bundle" and there's another sort of set of documents at the back and I just want to clarify something while it occurs to me. If you go to page 55, just have a look at 56 for me, this is a different briefing, this is 25 August 2010, the page --

A. Sorry, I've got a jump here, so I've got page 53, and then I jump to page 57. Let me go through --

SIR TERENCE: 55 is --

MS McDONALD: 55, is it the storyboard.

SIR TERENCE: -- a storyboard.

MS McDONALD: Are you behind the tag? That's right, 55, you've got that there, yes.

A. Oh this one, oh here we go.

Q. So if you turn over you'll see 56 after 55. If you turn over to page 56, that's right, and you'll see there, that's the -- it's not the one that you just looked at, but that's an August -- 25 August 2010 draft briefing, but I just want to ask you, you see the little -- the edits to that document and then you'll see some handwritten edits to the page of 57, and then page 58, and then keep going you'll see other briefings from December with edits to them. I just want to ask you whether you recognise any of the handwriting?

A. No I don't, and it's definitely not mine.

Q. All right, that's fine. Thank you for that.

And could you, just so that we're really clear, Mike Thompson was the Deputy Chief of Staff to you, was he, was your Deputy at the time?

A. I believe he was.

Q. You believe he was?

A. Yeah, I believe he was.

Q. And then Mike Yardley became the Chief of Staff after you in 2011, is that correct?

A. I believe so.

Q. And you were Chief of Defence then in 2014 when the bundle of documents was found in the safe in the Office of the Chief of Defence?

A. Yes I was.

Q. And let's just turn to that now for a few minutes before we stop. We know that the *Collateral Damage* programme aired on the 30th of June of that year, 2014, and the allegations of civilian casualties re-emerged, correct?

A. That was from *Collateral Damage*?

Q. Yes.

A. Yes.

Q. And I think you've told us that you were in Australia at that time and you were contacted by your staff?

A. I was.

Q. And we know that NZDF's response to that programme was to re-affirm, or re-confirm its April 2011 stance, don't we?

A. Yes.

Q. Can you explain why you approved that position?

A. I believe it was -- the initial response, and again, so I believe, and I'm not going to be certain in this, you're asking me to look at a point back some time in 2014, I believe I would have instructed my Chief of Staff, my Vice Chief, to what's our position on this; what have we said in the past; and is there any new information here? And the response would have been consistent with the response that the NZDF had given in the past.

Q. And that was that the investigation -- the ISAF investigation into the allegations of civilian casualties was unfounded, correct?

A. That's right.

Q. And --

A. Which we now know, based on the IAT report, is inaccurate.

Q. All right, and of course, to be fair, NZDF did have ISAF's own press release from August 2010 in which it said what it's -- the outcome of its investigation was --

A. That's right.

Q. -- which was in fact that there was a possibility of civilian casualties?

A. That's right.

Q. Could you have a look at page 212 for me? Now this is an email in the middle of a page from Geoff Davies, do you know who Geoff Davies is?

A. I do.

Q. And it's to some people who've had their names redacted and we've had some evidence about them already, but this is Mr Davies commenting on the -- if you look at the email chain,

and just take a moment to do so, but what I want to suggest to you is that this is Mr Davies commenting on the proposed NZDF response at the time, so you'll see if you look at the chain. Have you read that?

A. Yes I have.

Q. So he's saying there, isn't he, and I'll read it out because there are people present who haven't got the benefit of the documents, he's saying:

"Still this is not as smart as it could be"

And that's a reference to the proposed response, which is a response which is "NZDF stands by its statement made on the 20th of April 2011 and will not be making any further comment."

And he's saying:

"I still think this is not as smart as it could be. Our PR of 20 April 2011 contradicts the ISAF PR of 29 August 2010 headed 'Joint Assessment Team Confirms Possibility of Civilian Casualties in Baghlan' and that we say allegations of civilian casualties are unfounded and ISAF says there could have been. And Stephenson plans to present evidence that there was as per his Friday email. I believe we could cover ourselves better and look sensible to the public by saying, if it's accurate."

And then there is an insert below which is in quotes which I assume is what he's suggesting should be said, and that reads:

"As no new evidence has been presented to NZDF we stand by our statement made on 20 April 2011 and will not be making any further comment."

He then goes on:

"I realise we're saying no further comment, but this way is an out to any question about why we don't believe ISAF."

So here we have Mr Keating -- sorry what was Mr Davies position at the time?

A. I believe he was in our communications branch.

Q. Was he a senior --

A. Dealing with media issues.

Q. So he was a senior media person, advisor, advising NZDF?

A. Senior media advisor he might have been, yes.

Q. And here we have a senior media advisor obviously identifying the inconsistency between the ISAF press release in which it reports on its own findings of its investigation that there's a possibility of civilian casualties and the inconsistency with NZDF's position and fundamentally saying it might not be too smart to simply say you are reaffirming the position you took in 2011. Now that was ignored wasn't it by NZDF? Because did you just go on and reaffirm your 2011 statement?

A. Initially we did.

Q. Why was that? Why was -- can you explain why Mr Davies' advice was not accepted?

A. No, I can't.

Q. Wasn't this an opportunity for NZDF to correct the position?

A. You know, I think there's a number of opportunities for NZDF to acknowledge the outcomes of the IAT report from the Operation and the publicity which came out from ISAF throughout. I think those opportunities were missed for a variety of reasons and through a variety of advice that CDFs whom handled this matter, including me, would have been aware of at that time. And again, the fact that you have before you -- one of the things that's apparent to me is that the, you know, one of the things that you as a military commander learn very early on is your first information out of an operation, out of a contact, is invariably wrong. And you're very reluctant to go publicly to brief up with information that's hot of an operation. And I think as we find, whether inquiries of this nature, or historians looking back at the Operation, that various accounts of what went on, which almost form a 360, cloud the issue, we call it in our parlance "the fog of war." And I think what NZDF or CDFs were trying to ascertain is the best facts available. If I could look back and perhaps place myself where I was at that time, I'd be

seeking legal advice to say have we absolute evidence that there were casualties? And perhaps we were a little bit stubborn to say terms like "unfounded" or "not well-founded", or you know, "may have or may not have occurred" because what we didn't have was irrefutable evidence of civilian casualties that you needed to sort of to go forward. And I think that probably clouded our judgment. When we had the IAT report we could make that statement. And Minister Coleman made that statement. The Prime Minister made that statement. And I certainly made that statement when I had a fact before me. So to answer your question --

Q. That would be good.

A. -- yes there were missed opportunities for us to clarify the fact that civilian casualties may have occurred, and that should have been the Defence Force's position earlier, but we didn't.

Q. Okay. Is that all you wanted to say in answer to my question?

A. Yes.

Q. Just a couple of matters to unpack from that and then we might be able to stop for the day, perhaps and start again tomorrow.

But thank you for that explanation, and as I recall it, when you started it, you started by saying to me that one of the matters that we learn in the military, I assume you meant, was that you need to, what did you say, check matters and check your facts and you proceeded from there?

A. Yeah, and different information comes in over time.

Q. Is one of the matters that you've learnt in the military or learnt through all of your career that you also admit when you've made mistakes? Is that one of the matters that you would accept that you've learnt over your time in the senior roles that you've had?

A. In fact, one of the first lessons that we learn in the military is integrity. You learn that from day one, and the basis of integrity is when you've mucked up or you've made a mistake.

Q. You fess up?

A. You fess up.

Q. Right. Perhaps we could leave it there sir, for the night if we could stop a few minutes earlier? Thank you.

SIR TERENCE: Yes.

Okay, we'll adjourn now. Mr Keating you are under cross-examination, so that means you can't discuss your evidence with anyone else overnight.

But we'll adjourn until 9.30 tomorrow morning.

(The hearing adjourned until Thursday, 19 September 2019 at 9.30am)