

UNDER

THE INQUIRIES ACT 2003

IN THE MATTER

**A GOVERNMENT INQUIRY INTO**

**OPERATION BURNHAM AND RELATED MATTERS**

**Date of Hearing:** 19 September 2019

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**TRANSCRIPT OF PROCEEDINGS**

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THURSDAY, 19 SEPTEMBER 2019

SIR TERENCE: Good morning, and I'm just reminding you, you remain under your former oath.

**TIMOTHY JAMES KEATING (on former oath)**

QUESTIONS FROM INQUIRY MEMBERS

SIR TERENCE: Before we start though, there is just a couple of matters I wanted to deal with.

First, the transcript. The transcript from Monday's hearing will be available tomorrow morning, and thereafter every day there will be another day available. So, Monday will be available on Friday, tomorrow. Tuesday's will be available on Monday next week, and so on. So, they will be posted on the website.

Now just before I ask Ms McDonald to resume, can I just -- I wanted to clarify one thing that I should, perhaps, have clarified with a witness yesterday, but I'll just take the opportunity to do it now, if I may, with you, Mr Keating?

Now, you indicated in your evidence yesterday that you were the Chief of Staff to the Chief of Defence Force in 2010, and the beginning of 2011?

A. Yes, I was.

Q. And part of that role is -- so you're responsible, basically, for the administration and operation and management of his office?

A. Management of his office, but in that period, perhaps the exception was operations. That -- my Chief of Staff, who I think has given evidence, Ross Smith -- was a very different construct that I established.

Q. Right, but what I wanted to understand was, there would have been a system for receipting classified information coming into the office generally?

A. Yes.

Q. And that system for receipting classified information would have contained detail about where the material came from?

A. It should have, yes. A good system -- what you're describing is a good system. I don't believe we had good systems in those days.

Q. Don't you?

A. No.

Q. Well, could I just ask you to look at the supplementary bundle? That is behind the black folder; towards the end of it there's a little folder saying supplementary, and it is at page 55, which is at the top left-hand corner of the particular document, that one, yes. Now that stamp at the top right-hand corner, classified register, is that a stamp linking to the register that the office would have kept for classified material coming in?

A. Yes, it would have done, yes.

Q. And the -- so that says OCDF --

A. So that's the Office of Chief of Defence Force's classified register.

Q. Right. 387 is the number that the document would have been given in the register?

A. I'm not sure Sir.

Q. Not sure?

A. No, and 2011 of course the -- I assume is the year it was brought into the register.

Q. And then there's "In", and it says "1st September 2011", so that's the date on which it came in?

A. That's right.

Q. So, if the system was operating properly, there should have been a -- there should be a register which records these details and also who brought the document in and who received it?

A. Yes, there should be. There should be a -- to the best of my knowledge, a book, a classified register file, where these references are in that file. But -- and it may say the

source; I believe it should say the source of where the document originated from.

Q. Right. Okay, thank you.

A. In a good system. In a well-functioning system.

Q. All right. Well, that's helpful. Thank you for that.

SIR TERENCE: Mr Radich, arising out of that, could I ask you to ask one of your juniors, now, to contact the office and get for us a copy of the entry in the register, relating to this document? That is 387, which came in on 1 September 2011. So, it's not the register for the safe, which we've got.

MR RADICH: I see.

SIR TERENCE: But the register for the office, and if they could please get us a copy of that entry -- as far as I know, we don't have it -- and make sure that we have it, if possible, by the morning adjournment, but certainly by lunchtime.

MR RADICH: Thank you very much Sir Terence. It will be done.

SIR TERENCE: Thank you.

CROSS-EXAMINATION CONTINUED BY MS McDONALD

MS McDONALD: Just before we go back to where we finished yesterday, Mr Keating, just on that point, you, and we know this from the evidence that Ross Smith gave the Inquiry, you were aware, and in fact would have overseen, the investigation that Ross Smith did, as a result of Minister Coleman's direction that there be an investigation into how the IAT report came into the safe, and how it came about that he was misled, and the interviews that were done with Mr McKinstry and Mr Kelly and the like, and then you're aware of that and would have overseen that investigation, I assume?

A. I directed that investigation.

Q. I thought the Minister directed that investigation?

A. Well, he directed me to conduct that investigation within the Defence Force.

Q. Right, and as part of that investigation, and I'm going to come to this in more detail as a separate topic, but as part of that investigation, I would assume that you would have had

your staff make the very enquiry that Sir Terence has just highlighted?

A. I cannot recall. I asked for a thorough investigation to determine how that document came into the Office of Chief of Defence Force, and to the best of my knowledge, recollection, the -- we could not determine how that was done. I assume what Sir Terence has just asked for was part of that.

Q. Was part of that thorough investigation?

A. I assume it was, that the people -- I didn't conduct the investigation myself, but I assume that my staff would have gone to all necessary means to determine how that document came in to the broader Office of the Chief of Defence force.

Q. We didn't get very far with Mr Smith about his recollection of this investigation, perhaps beyond the interviews with Mr Kelly and Mr McKinstry, and a discussion with Lisa Pettigrew from the legal section, but who else in your staff did you direct to undertake this investigation?

A. I can recall most of my direction in that way would have gone through my Chief of Staff.

Q. Who was?

A. Ross Smith.

Q. Right. All right, can we come back then to where we left off yesterday, and I think we'd established that the programme *Collateral Damage* had gone to air on the 30th of June, correct, 2014?

A. I assume so, yeah.

Q. And NZDF's response to that was to repeat its 20 April 2011 press statement, to the effect -- in fact not to the effect, the words were I think, that the ISAF investigation had concluded; the allegations of civilian casualties was unfounded.

A. Yes.

Q. That's the position isn't it?

And I think you got a call, didn't you, from the Minister, Minister Coleman, that evening?

- A. I did.
- Q. And he was very angry?
- A. He was.
- Q. And he told you, didn't he, that the IAT report had been recovered from the safe in the Office of the Chief of Defence, and that the findings of that report were inconsistent with NZDF's statement of 28 April 2011 --
- A. That's right.
- Q. -- was the upshot of it?
- So, here we have, don't we, the Minister telling you that it isn't correct for you to be saying that the allegations of civilian casualties were unfounded?
- A. That's right.
- Q. Mr Keating, why didn't you clarify the position publicly at that point?
- A. Ah, the Minister clarified it.
- Q. So instead of NZDF fronting this and making some form of public statement clarifying the position, are you saying that you relied on the Minister to do that for you?
- A. No, the Minister took the lead to make the public statement, and that's normally the case, and then we wouldn't then follow, and the Minister didn't direct me to. So, I work under ministerial direction. So, the Government speak -- you know, again, so the Minister stepped into an operational matter, which is the Minister's prerogative, has clarified the position that civilian casualties may have occurred, in accordance with the wording in the ISAF report.
- Q. But the Minister surely didn't tell NZDF not to correct the record after he'd made his public statement?
- A. No, I normally sort of follow a precedent. If the Minister has spoken, you know, unless there is a clear direction on a matter such as this, I won't then follow unless I'm directed to do so specifically. So, to me, to the public, the matter had been clarified by the Government and the Minister.

- Q. But that doesn't really make sense though, does it, because NZDF continued through to 2017 to not tell the public what the correct position was? So, you weren't just not coming out and repeating what the Minister said, you were continuing the inaccurate position publicly?
- A. I think what you're referring to is a latter statement that we then corrected -- the evidence has shown that we corrected, yes. We made a statement around the *Hit & Run* release of the book that was inaccurate.
- Q. Right?
- A. And when I returned from Iraq, I corrected that statement.
- Q. Let me just be clear. So, in 2014, the Minister rings you up in Australia, berates you for the fact that the position taken to that point, by NZDF, is utterly inconsistent with the correct position in the IAT's report, which has been miraculously found in your safe?
- A. It's not utterly; it's inconsistent that civilian casualties may have occurred, and we'd used -- again, I won't -- as I said in the press statement, dance on the head of a pin here, that we -- you know, between the terms "unfounded," "may have," and I think an ill-advised term used earlier, you know, utterly refuting that there were casualties. You know, we got it wrong in some of our earlier statements by saying civilian casualties may have occurred. We should have --
- Q. When Mr -- when the 2011 press statement was made, April 2011 was made, the word "unfounded" was used, and it was used in the context, at that time, 2011, when Mr Parsons, the world as Mr Parsons believed it to be, or was conveying it --
- A. Based on the information that he had I believe.
- Q. Based on the information he had, and we've been through this over the last few days, that the suggestion of civilian casualties was categorically wrong, unfounded, that was why the -- I understood, why the 2011 statement was as it was, correct?
- A. What you do is you go back to --

Q. No, just answer that question first and then you can go on?

A. No, I'm sorry. I'm trying to get the context of it. So, the 2011 statement was made when?

Q. In April 2011.

A. Yeah. In response to? I'm sorry, we're sort of jumping around our timeline and I'm trying to see where we are now in the timeline.

Q. We're in 2011, we're in April 2011.

A. Yep.

Q. When NZDF issue a statement saying the allegation of civilian casualties is unfounded. Correct, all right?

A. Right.

Q. Okay. It was done at that time, as I understand the evidence that's been presented, because Mr Parsons' view of the world, and Mr Parsons' view that -- the email on the 8th of September 2011, had said that he categorically confirmed that the report showed that there were no civilian casualties?

A. Yes.

Q. So, what I'm saying to you, is that in 2011, NZDF, when they used the term "unfounded," at least in NZDF's view of the world, apparently that was the position. There was no -- there were no civilian casualties, according to what Mr Parsons had said?

A. Again, you're asking me in 2011 to say what was in the minds of the drafters of that statement?

Q. I'm asking you, really, Mr Keating, is why in 2014 when you again said --

A. So, in 14? Sorry, I've caught up now. You're asking me about questions about 20 -- I'm sorry, I'm --

Q. If you just listen to my question you might find it easier?

A. Yes, I will do. I'm trying to find the question. 2011, you're asking me something that NZDF did that I wasn't party to?

Q. I'm asking -- you reissued a statement in 2014?

A. Yes, in 14.

Q. From a statement in 2011?

A. I understand you now. Where we are, and your question is?

Q. And what I'm saying to you is in 2014 --

A. Yes.

Q. -- when that statement was issued, you knew -- you had the IAT report?

A. Yes.

Q. Right. So how could you say that the allegation of civilian casualties was unfounded?

A. Because we drew back on the previous statement we made, which was incorrect.

Q. All right.

Coming back then to why -- we started off with this conversation when I was asking you about why NZDF didn't take responsibility in 2014 for correcting the record, and you said you relied on the Minister to do that, effectively?

A. Well, the Minister had made the press statement.

Q. You weren't prevented from subsequently making a public statement, correcting the record, were you?

A. No, no, just probably following convention.

Q. What was -- just tell me, what particular convention that is?

A. Well again, I suppose it's a convention of the various Ministers you work to, but at that time, if the Minister had made a statement, either the media followed up with me or the Minister directed me to add to that statement. So, the Minister's statement was complete in correcting the previous statements the Government had made around the possibility of civilian casualties that may have occurred. So, to me the matter was closed, and adding me to then call a press conference or to release a statement was unrequired.

Q. All right. You're not saying though, are you, that Minister Coleman directed you not to make a public statement at that time?

A. No, I'm not saying that.

- Q. No. When did NZDF first make a public statement that there may have been civilian casualties?
- A. I can recall when I made that statement.
- Q. When was that?
- A. I made that statement after the release of *Hit & Run*.
- Q. So, 2017, wasn't it?
- A. I assume so, yes.
- Q. Why did it take NZDF, what -- three and a half years, to make a public statement to that effect?
- A. I think we'll go back to your previous line of questioning, because the statement had been made by the Government, and it was assumed that in the public's mind, that it was well known out there that during Operation Burnham, civilian casualties may have occurred. And it wasn't until -- so, by your inference, three years later, three years went past. There was not an issue in the public mind until *Hit & Run* came out, which provided a different context, completely different context.
- Q. Do I understand from that answer that you think, at least, that the public have been -- have had absolute clarity about this issue over all of these years, have you?
- A. When a Minister of the Crown gets up and says civilian casualties may have occurred, and it's widely reported in the media, then I would assume that the public is well assured that -- with the position that civilian casualties may have occurred as a result of Operation Burnham.
- Q. Now you are aware that on the morning, I think it was, of the 1st of July, the Prime Minister was interviewed, and turn to page 224 of the bundle?
- A. Which year are we in?
- Q. Turn to page 224 of the bundle and you'll see the document I'm referring to; I'm talking about 2014, and we have, don't we there -- this is the morning after -- this is a Monday. This is the morning after the programme's gone to air. The 1st of

July, I think your Minister rang you, did he, on the 30th? Is that right?

A. I assume that's the date, yes.

Q. If you have a look at what Mr Key is saying at the bottom of page 224 and then over on to 225, he's still saying, "but my understanding is that after a thorough review by the CDF in the weekend he is very confident that the New Zealand Defence Force version of events is correct and Mr Stephenson once again is wrong."

So clearly, the Prime Minister is not clear yet on the position, is he?

A. I think he's very clear that civilians were -- the question is regarding -- so the question posed to him is the question beforehand, "In this *Native Affairs* report the claim that, contrary to what Wayne Mapp, the then Minister of Defence said, was insurgents that were killed in this mission were in fact civilians." And he's answering no, that's not true. I believe the New Zealand Defence Force version. So, I think the Prime Minister is right in what he says. You know, the claim made by the reporter here is that civilians were killed, not insurgents, and the Defence Force's claim always has been that its insurgents killed; civilians may have been killed.

Q. No, no, no, no, Mr Keating. I'm sorry; the New Zealand Defence Force position has not always been that -- not -- that civilians may have been killed. Now, that's not correct, is it?

A. No, it's not.

Q. If you come to the bottom of page 224 --

A. But you asked me a question in relation to what the Prime Minister has said --

Q. Have a look at --

A. -- and I think the Prime Minister's correct, in answer to the question that was posed to him.

Q. Have a look at the bottom of page 224, please. Read out the answer from John Key, from "No it doesn't"?

- A. "I mean I haven't seen the programme, but obviously we were alerted to it over the weekend so my understanding is CDF, Chief of Defence Force, came over on the weekend, there was a thorough review of the particular mission that SAS had gone on, and my understanding is they refute the claims that say that there were insurgents killed, but that was it."
- Q. Right, so, what do you think the Prime Minister is saying here?
- A. Oh, he's saying that the NZDF version of events is that insurgents were killed during the operation.
- Q. He is saying, isn't he, that the NZDF version of events is correct, and NZDF's version of events at this time is that the allegation of civilian casualties was unfounded?
- A. No, I think he's saying it in context to the question above, that the claim that we killed civilians, not insurgents, that's the context to the answer of that question, I believe, but you'd have to ask the Prime Minister.
- Q. All right, well let's come to page 222, and this is -- if you can have a look at what Mr Coleman was saying at the time, and this is the 1st of July 2014. He's now saying, post the discovery of the IAT report in the safe, isn't he, "that while you couldn't rule out civilian casualties what's clear is that they didn't die at the hands of New Zealand troops"?
- A. Correct.
- Q. And this is the statement that you're relying on to say that the record's been corrected by the Minister and you didn't need to do anything, correct?
- A. I think -- yeah. Yeah, this is the basis. He may have made several statements around the time, but yeah, this is the essence of it, that -- and again, I think the headline there says that "Coleman can't rule out civilian deaths".
- Q. Right. Do you know why it is that this Inquiry only learnt of the fact that NZDF had the IAT report in 2011 a week ago?
- A. No.
- Q. You can't answer that question?

A. No.

Q. Do you, and I'm asking for your opinion now, do you think it's good enough that there had to be a public inquiry before that came known?

A. I'm sorry, I'm trying to find the context?

Q. Look, you've been in the role for -- as CDF for many years. You're very experienced; I'm asking for your opinion. You've worked in public sector agencies. Is it good enough that there has to be a public inquiry before we find out that NZDF had this very significant report, a week before this Inquiry started, from 2011?

A. I'm surprised that you have knowledge of it a week beforehand, because it appears that the statements made by the Minister back in 2014 drew from that.

Q. Well, how did we know that, Mr Keating, because NZDF never said in 2014 that the IAT report had been found in the safe, did it?

A. No.

Q. Or that it had the IAT report?

A. No.

Q. Well, how -- I don't understand your answer. How would we know until we were told by NZDF --?

A. Well, I don't understand the question, I'm sorry.

Q. All right. Now, Sir Jerry Mateparae acknowledged earlier in the week, and I assume you will as well, that New Zealand has rarely been associated with allegations of civilian casualties, correct?

A. I didn't hear Jerry's evidence; I'm not allowed to hear it.

Q. No, but I'm asking you if you accept that?

A. So, what am I accepting?

Q. I'm asking you whether you accept that New Zealand had rarely been associated with allegations of civilian casualties?

A. In Afghanistan?

Q. Generally?

- A. Throughout the history of New Zealand? Again, I'm not being cute here. I need the context here, you know --
- Q. Well, if you can't answer the question that's fine, just say so, Mr Keating. Sir Jerry didn't seem to have a difficulty with my question, but are you not able to answer that?
- A. What I'll tell you that in contemporary operations, such as we've been involved in perhaps since East Timor, the Solomon Islands, Afghanistan, the New Zealand Defence Force has gone to extraordinary lengths, and their reputation, the mana of the Defence Force, has been built around being a values-based military that actually goes out of their way. You know, we're one of the pioneers in the Laws of Armed Conflict, in following the conventions under the Laws of Armed Conflict, to avoid that horrible term collateral damage, but what we're talking about is the killing of innocents and the destruction of property.
- Q. I'll come back to my question. Do you accept that New Zealand has rarely been associated with allegations of civilian casualties?
- A. In relation to Afghanistan, yes.
- Q. But not otherwise, is that right?
- A. Well, again, I'm sorry, I'm not going to go back, you know, go back in history to look at the artillery barrages conducted in World War 1, the bombing by New Zealanders of Dresden and places like that. You know, again, things have changed, but I'll tell you that since 2001 and East Timor, Solomon Islands, contemporary operations, we have an extraordinary international reputation for transparency and trust in these types of operations, and at the peak of that, is the Special Forces, who are asked to operate in the most demanding environments.
- Q. All right. And you would accept, though, and following on from that answer I suppose, that the issue of civilian casualties is something of the utmost importance, not just to NZDF, but to the Government and New Zealand public?

- A. Certainly, it's the heart of our reputation.
- Q. So, it follows, doesn't it, that any suggestion of New Zealand's association with allegations of civilian casualties has the potential to impact significantly on New Zealand's reputation internationally?
- A. Certainly.
- Q. And at home?
- A. Yes. Yeah, of course.
- Q. What I suggest to you, Mr Keating, is that at this time, what was really happening here was that NZDF were simply not wanting to admit that there was any possibility of civilian casualties, and you didn't want to be associated with any suggestion of civilian casualties, and that is the reason why NZDF did not front the media in 2014, or earlier, but certainly in 2014, and come clean about what the position was?
- A. No, I think you're incorrect.
- Q. You may be able to confirm this, and -- or you may be prepared to take it from me, and I've checked it a number of times, but my recollection is that the New Zealand election in 2014, was in September 2014, three months out from this debacle about the IAT report being found in the safe. Assuming I'm correct about that, and I'm sure if I'm not, someone will tell me, what I'm suggesting to you is that that fact may have had some influence on how this matter unfolded. Was NZDF reluctant to cause any embarrassment to the Government, about this issue?
- A. In my times I was the CDF in 2014 through to 2018, I work in a political environment, but it doesn't influence me, elections, and embarrassing Government. We finished off yesterday with integrity. You can't cover things up or make things look good that are not good. So, no. It had no influence and never has on me.
- Q. All right, but you'd accept, as I think any of us who live and work in Government circles in Wellington, that a pending election has a significant impact on matters, doesn't it, for those of you reporting to Ministers?

- A. Not matters -- not operational matters such as this, no. There's a clear fire wall.
- Q. All right.
- So coming then now back to this issue of the bundle in the safe, so if you go back to that supplementary volume that was in front of you earlier at the back of the black volume, what -- and you would have looked at this bundle of documents, I assume, at the time, 2014?
- A. Yes, I did.
- Q. Well, you must have, you were then --
- A. Yes, I did.
- Q. Yeah, you did. Okay.
- And you would have seen then that the draft briefings had been edited. You don't know whose editing that is from what you told us yesterday?
- A. Looking -- in 2019, looking at those appendixes, no. I can't recognise the handwriting.
- Q. Well, does that suggest that if you looked at them in 2014, you might have? Is that what --
- A. I might have, but I can't recall in 20 --
- Q. Well, you would have recalled, surely, Mr Keating --
- A. I can't recall today in 2019.
- Q. Well, hang on, let's just take that quietly, because this is the bundle of documents that you're being berated by the Minister about. You said you looked at it at the time in 2014, what I'm asking you is in 2014, did you look at those edits and reach any view about them, or can't you remember?
- A. What my focus was, I believe, at the time was to determine how they'd come into our possession and why they were in a safe in the Assistant Chief of Staff's Office.
- Q. And you never got to the bottom of that, is that right?
- A. Never determined that.
- Q. Well, what's the difference between never got to the bottom of it, and never determined it? Is there a difference?
- A. No.

- Q. All right, but surely, in trying to work out how they'd come into the safe, part of that would have been trying to work out who had had the documents, correct?
- A. Yes, yeah, that's how they came into the safe. And again, it's a question Sir Terence asked earlier, and we may be able to find out how they came into the safe through the classified register, safe register.
- Q. Well, let's hope that we can, and get finally to the bottom of this, but what I'm suggesting to you, is you're being told to go and do an investigation; you direct Ross Smith to get on and do that, isn't an obvious part of that investigation to analyse the documents and see what they're telling you? Whose handwriting? Who might have had them? Why is there highlighting on them? Was the highlighting put on them at the same time as the handwriting? All questions like that, did NZDF do any of that?
- A. Yes, I assume we did that, and as I said to your earlier question, I assume my staff, led by Ross Smith, conducted a thorough investigation to find that out. Look again, I'll give you a perspective from me, despite the Minister giving direction how did this come in, what was the critical point here, was this now shows something that we have conveyed previously as factually incorrect: that civilian casualties may have occurred. So, how -- you know, looking at the documentary trail, with all due respect to the direction for the Minister to me, was secondary to okay, we now have clarity of fact.
- Q. Surely, also of the utmost importance to you, would be working out who had done the analysis on these documents, because on any view of it, it's very clear, isn't it, that whoever's marked up and put the highlighting on the relevant sections of the Ministerial briefing papers, and the corresponding relevant sections of the IAT report, has engaged with those documents in a way which suggests they're focusing on the

inconsistency between them. You'd have to accept that, wouldn't you, Mr Keating?

A. I would have to accept that, yeah.

Q. Right. And surely then it's important, and would have been important in 2014, to work out which person, which senior person with the right level of classification clearance, had been doing that analysis?

A. Yeah, it could have been a priority.

Q. Could have been a priority?

A. Mmm. You know, again, I suppose the -- if I looked at it, what was before my mind is the most important thing was to correct what had been told to the Government and the public, that instead of civilian casualties being baseless, we now have moved to a factually correct statement that they may have occurred.

Q. But you didn't do that. On your own evidence, this morning --

A. No, I've said that the Government did --

Q. You didn't do it?

A. -- so, we conveyed that to the Minister, and the Minister conveyed that to the public through a press statement. So yes, no, you can say it again. I didn't do that, because, as you'd previously asked, the Minister did this, and by convention I wouldn't follow with my own statement.

Q. Are you seriously suggesting, after all of the incorrect misleading statements that NZDF had made up until this point about this issue, that you followed some sort of convention, that you can't tell me what that convention is?

A. I have told you the convention, the convention of working with a Minister; if a Minister makes a statement to the public and says, you know, in this case Operation Burnham, you've got the headline there, civilian casualties may have occurred. Unless the Minister directs me, or I'm asked questions by the media for a press conference, then the matter is -- has been reconciled with the public of New Zealand.

- Q. And that's a convention that if I tested that with any other CEO around Wellington would stand up to scrutiny would it?
- A. No.
- Q. That if a --
- A. No, it wouldn't do.
- Q. Right.
- A. As I said, it's based on the context of the individual Minister you work with, within the context of the matter. There isn't a written rule around this, but quite often, you know, you may have a Minister making a statement with his or her chief executive next to him. You may have the Prime Minister making a statement with a Minister and the chief executive. Or you may just have the Minister making the statement. Or the Minister may say, CDF, chief executive, you go out there and you correct the statement. Minister Coleman decided to correct it himself.
- Q. And -- but you just said to me before that Minister Coleman didn't tell you not to make a press statement about it, not to go public about it?
- A. To the best of my knowledge he did, and when the Minister made the statement to the press, there was no further -- to the public of New Zealand through the media, there was no further requirement for me to do so.
- Q. I'm sorry. We just need to take this -- unpack this a bit more. So, are you saying, or not, that the Minister -- that the convention for this particular Minister, Minister Coleman, was that if he made a public statement, NZDF shouldn't? Is that what you're saying?
- A. Not on all matters.
- Q. On this one? Are you saying that Minister Coleman, on this occasion, applied a convention, which meant that he was making a public statement and NZDF shouldn't? Is that what you're saying?
- A. I'm assuming that that's how it occurred, that I wasn't rolled out or directed by the Minister to stand next to him during

that statement, or to follow on for questions and make my own press conference.

Q. So now you're assuming it?

A. What's that?

Q. So now you're not assuming it. So, it's not a protocol for that particular Minister?

A. So, each issue that you deal with, as a chief executive, or as a CDF, has a -- you know, a convention, a protocol for itself.

Q. What was the protocol for Minister Coleman, in 2014, in relation to this issue, about NZDF making a public statement saying they'd got it wrong?

A. I assume --

Q. What was it?

A. You know, I assume, because Minister Coleman made a press statement and I wasn't directed to get out there in the media, and I didn't take it upon myself to get out in front of the media and make a statement, that the Minister's statement to the public, settling the matter that civilian casualties may have occurred, ended the matter.

Q. What I suggest to you, Mr Keating, is what this in fact shows, and what your answers show, is a total lack of maturity, and a failure to understand that an acknowledgment of the importance of candour and openness is hugely significant to ensuring the reputation of New Zealand Defence Force is maintained. And what you have done, at this time and subsequently, is failed in every respect to be open and transparent about NZDF's failings. What do you say to that?

A. I say you're wrong. I've made every -- you know, this is a Defence Force, that under my watch, won the top award, you know, was rated number one in transparency, by Transparency International, throughout my tenure.

Q. Did you tell them about this issue, when you applied for that award?

A. What's that?

Q. Did you tell whoever gave you that award about this issue when you applied for it?

A. Is this a joke?

Q. No, it's not, but I mean you're telling us here, on oath, that NZDF got an award for transparency and in the same breath, you're admitting, on oath, that NZDF did not tell the public about this issue until March 2017, despite a bundle of documents of the utmost significance being found in a safe in 2014?

A. The fact that the documents were found in the safe was not of public interest. What was of public interest was the fact that -- did civilian casualties occur in Operation Burnham? Under my time with the Defence Force, I worked significantly to improve the systems and processes around the conduct of operations, the keeping of records, and where those operations were directed from. So, if you're asking me a direct question about my incompetence, you're wrong.

Q. I'd like you to have a look at a document, please, and there's been reference to General Petraeus a number of times already this week in the Inquiry. Given that we're talking about candour, openness, truthfulness, I'd like to take you to this document, because it's dated 1 August 2010. It is from General Petraeus, who was the Commander at the time, of the International Security Assistance Force, ISAF, correct? General Petraeus, do you know that name?

A. I do know that name.

Q. Right, and he was the Commander of ISAF in 2010, wasn't he? Have you got an ISAF document?

A. Yes, I have, and I'm just confirming. Yep, 2010, yes.

Q. I'm just asking you to confirm who he was?

A. Yeah, I know General Petraeus, and I'm just trying to confirm -- yep, in 2010, he was the Commander of ISAF.

SIR TERENCE: There's a signature on the back.

A. Yep, I've got it.

MS McDONALD: Okay. Pick up that document again, if you wouldn't mind.

And it is General Petraeus' Counterinsurgency Guidance, isn't it?

A. Yes.

Q. And he starts off, doesn't he, at the front of it, saying:

"Team, here is my guidance for the conduct of counterinsurgency operations in Afghanistan in keeping with the admonition in this guidance to learn and adapt."

A. Right.

Q. Do you not want to look at the document, or do you know it?

A. I know it well.

Q. You know it well?

A. I know General Petraeus's philosophy and where he based a lot of it from.

Q. What does he say about truth, in the document?

A. Oh, truth and integrity in those operations, and working particularly with the population and the Government of Afghanistan was imperative.

Q. Could you read out, please, on page 3, his paragraph halfway down the page, starting with "...be first with the truth"?

A. I'm sorry, give me the paragraph? What does it start with? Down the first page?

Q. It's got a heading. It says, "be first with the truth."

SIR TERENCE: It's the third page.

A. Oh, third page, sorry.

SIR TERENCE: About the middle of the page.

A. "Beat the insurgents and malign actors to the headlines. Pre-empt rumours. Get accurate information to the chain of command, to Afghan leaders, to the people, and to the press as soon as possible. Integrity is critical in this fight. Avoid spinning, and don't try to dress up an ugly situation. Acknowledge setbacks and failures, including civilian casualties, and then state how we will respond as we've learned."

- Q. Is that what you believe NZDF have done in relation to this incident, followed that guidance?
- A. I believe NZDF made every attempt to be honest about what happened during Operation Burnham. Despite the first sentence in that paragraph, which I think is really important, "beat the insurgents and malign actors to the headlines", which is Taliban propaganda.
- Q. Yes. I'm sorry, I'm not understanding what point you're making. I'm simply making -- asking you whether you agree that it's important to be truthful and open?
- A. So, after every operation -- after every operation conducted by ISAF forces in Afghanistan, including my time in the Provincial Reconstruction Team, you could have gone and delivered humanitarian assistance to a village, and the Taliban spin machine would go in and say that you killed women and children, you disrupted crops. So, this is where Petraeus is putting the two -- there's your context for that whole paragraph by General Petraeus. So, we're up against a propaganda machine, if you like, that maligned every action that ISAF undertook in Afghanistan, and what Petraeus was saying, is truth, open, honesty and integrity will beat that.
- Q. Yes. That's right, and ISAF, of course, would be -- he would be wanting ISAF to be truthful, open, honest, in their reporting, wouldn't he?
- A. Certainly.
- Q. Yeah, so you wouldn't expect an ISAF press release to be wrong or untruthful or embellished, would you?
- A. No, and the ISAF press release was accurate in this case.
- Q. Right. Well, I'm glad we agree about that. Thank you.
- So, coming back to the bundle in the safe, Mr Parsons' email, interestingly enough, wasn't in that, was it? The material, the bundle, in the material?
- A. No, it appears not.

Q. No. How did you report back to the Minister about his demands that an investigation be undertaken, and he have a report back within two days? How did you do that?

A. I can't recall.

Q. Oh, surely, Mr Keating, you're getting told off by the Minister; it's a very significant document that's been found, and the Minister's asking you to undertake an investigation and report back to him in two days and we haven't seen one single piece of paper about that?

A. You know, I can only assume I verbally briefed him.

Q. And you've got no memory of that now?

A. No.

Q. You are on oath, Mr Keating. Are you seriously saying that something as significant as this, you have no idea what you told the Minister? And no note of it?

A. I think the -- as I say, the point to me, the priority was -- was to correct the assertion that there were no civilian casualties. And the Minister was -- had, and again, so I assume the Minister had moved on then, that he'd made the public statement. He'd righted the wrong; he'd gone out and said yep, civilian casualties may have occurred. And I'm assuming, then, that Dr, Minister Coleman was less interested about a document of the safe and the poor systems in NZDF that led to the previous years of making the statement around unfounded or not well-founded, or the different interpretations that the NZDF had made on something that ISAF had declared, in their own public statement back, straight after the operation, is that there was a likelihood of civilian casualties.

So, I think Minister Coleman had probably got over how, if I could put a word probably used by the Minister of Defence of the day, and I'm assuming here, "incompetence", you know, how has this occurred? My job was to correct it, then go back. Couldn't find. Move on. What I did in moving on though, is then used this as a point to change the systems in NZDF.

Q. Well just before we talk about your changed systems, if you have a look, and perhaps the easiest handwriting to read is Mr Kevin Short's, which is in the supplementary bundle again, towards the end of that folder, page 11, 10 and 11. At the bottom of page 10, we have, this is Mr Short's note of the conversation with the Minister:

"Minister felt let down by his Saturday brief"?

A. Yes.

Q. "This is casual and did not contain all the information held. Critical piece of information left out."

And then over the page "assessment team summary". That's the IAT document. "When, how, did NZDF get this document?" What was your answer to that ultimately, to the Minister, "don't know"?

A. We didn't know.

Q. Don't know, but you didn't do an examination --

A. Like I say, we didn't know, and we conducted an investigation and we haven't been able to find out how we got that document.

Q. But you can't tell me what investigations you conducted, can you?

A. I said the Chief of Staff would have gone through all the systems and tried to ascertain where that document came from.

Q. And there's no pieces of paper to show us what he did?

A. No.

Q. And he's very vague about it.

You wanted McKinstry interviewed, and we know there was a discussion with McKinstry, and then there's this reference about SAS accountability, isn't there, in the document?

A. Yes.

Q. And he raises issues, doesn't he, about credibility eroding over time. "No question about their core skills, but there's a lack of insight, confusing desirability of activities having a particular shielding effect."

What did he mean by that?

A. I don't know.

Q. And then there's this reference, in both this note and in Mr Smith's note of the same conversation, about the DSO, the Director of Special Ops position, "look at this position not being SAS."

So, is this debacle, is this incident, what led to the restructuring of the DSO position, Mr Keating?

A. What I got out of the 2014, having just recently been appointed the Chief of Defence Force, and this may have been the first sort of operational issue I was sort of dealing with, albeit from well before my time, is I wasn't satisfied with the systems that we had in place to manage operations within the Defence Force, and you know, with this particular case in point, manage coherently all of the information around our operations, where they're coming from, from various sources. The fact that critical documents ended up in the safe of the Office of CDF, operational documents, I considered was inappropriate. You know, we have long practiced systems in Defence Forces for managing operations. I don't think they were followed, and therefore, we get inaccuracies in our briefings to the Minister, in our document control, which Sir Terence has asked for this document. We're going to go back and track. I was not satisfied with the way those operations had been compartmentalised, because I think we'd dropped a lot of our standard procedures. So, you got missteps like this, which was information that perhaps wasn't its fullest being passed to the Minister. You know, we're sitting on documents in different parts of the organisation that should have been pulled together coherently. That's what I set about doing over the remainder of my time in SF, including directing that operations of this nature be conducted by the Joint Commander.

Q. Thank you, Mr Keating, and you used words in that answer like misstep and inappropriate, but I would suggest to you, it's a lot more serious than misstep or inappropriate when you have a document, which demonstrates unequivocally that what NZDF have been saying since 2011 is wrong and misleading, a document

which shows that the Minister was misled in 2010 about the position, and a document that shows, on its very face, because of the analysis that's apparent on it, that some senior person in NZDF has worked that out. And that document has been stuffed in a safe in the Office of the Chief of Defence Force and buried, is that not significant?

A. Well, your term "buried" is sort of -

Q. Well, it never came to light, did it?

A. -- it has a connotation --

Q. It never came to light?

A. -- it had been lost in the safe. Again, as I said, I think there were poor systems in the New Zealand Defence Force. There wasn't anything -- you know -- I don't think it has a sort of a clever conspiracy that this was deliberate.

Q. How do you know that? You don't even know the outcome of the investigation, Mr Keating. You can't tell us what was done?

A. The outcome of the investigation --

Q. You can't tell us what was done.

A. -- what investigation?

Q. The investigation to find out how this bundle got in the safe. You don't even know that. You don't know what investigation was undertaken by Mr Ross, do you -- Mr Smith, I mean?

A. I know Mr Smith, and he would have conducted a thorough investigation to see how that document came into the safe.

Q. Have a look at page 11 of that supplementary bundle, because I suggest to you, you're trying to minimise the significance of this. If you have a look under the heading "actions taken", we have Mr Short, who's the current Chief of Defence, at this time he was what, Vice Chief of Defence?

A. He was the Vice Chief.

Q. He is recording there, three lines down, under the heading:

"Actions taken. MINDEF wants a brief on how the assessment team summary document was not available to CDF." Where is the brief?

A. Probably a verbal brief was given.

- Q. Probably a verbal brief. And we don't have any note of that, right?
- A. No.
- Q. Come down another couple of lines, "report back in two days on 1) McKinstry interview; IAT document, how did we get it? Handled by whom etcetera. Request for full assessment document." And importantly, the last line, "Assurance on veracity of briefs, particularly involving SAS." Where is that? Where is that assurance? How was that given?
- A. It was given personally by me.
- Q. How did you do that? How could you give him that assurance when you haven't got one single piece of paper that can show us what was done, who was spoken to, how this analysis on this material was undertaken?
- A. No, I think what he's referring to here is going forward. You know, I couldn't go back and address the systems that led to this issue. What I could give him assurance is going forward, in my role as CDF, is that I'd put in place a system to make sure we didn't do -- err in this way again.
- Q. So, you put systems in place, did you, at this point, to show NZDF wouldn't err again. Is that right?
- A. Yes, I did.
- Q. Right, and what were they, that ensured that?
- A. I made a point of shifting all operations to the control of the Commander Joint Forces at Trentham, Major General who runs operations. Up until that point, SF operations at large in Afghanistan were run out of Headquarters New Zealand Defence Force. My assessment, again, looking back, I don't think there were the processes to handle the documentation required, you know, very -- you know, the wealth of documentation that came in, the operational documentation into the New Zealand Defence Force was not well managed in that time. There was a lot of briefings that were given were based on less than good processes. That's not to say that the briefings were not true and accurate. In this case, obviously, it showed one of those

ones that wasn't, to the Minister, that the fact that the Defence Force, the Chief of Defence Force, who I assume has given evidence, Sir Jerry Mateparae, my looking back, to say what he told the Minister of the day, was probably based on the information he had, true, but me having the benefit of hindsight to look back through all those systems, can see where that broke down. My role, my assurance to the Minister going forward, was to make sure we didn't err again. Not to say that we wouldn't, but we did everything possible to make sure that the information that we're passing to the Minister, the management of the operations, was coherent and followed military best practice.

- Q. Right, so we've got you bringing in best practice models, restructuring of the DSO position, to change the reporting lines?
- A. Yep.
- Q. So, it wasn't SAS anymore, straight directly to CDF, correct? It goes through Joint Command?
- A. Operations are managed through Joint Command.
- Q. So, what's in the diary about the restructuring of the DSO position is correct, and what I asked you earlier was correct. This incident led to the restructuring of that position, didn't it?
- A. Yeah, this and -- but again, I suppose --
- Q. Did it lead to it?
- A. No, it wasn't entirely this. You know, this wasn't it. It was -- again, I came in as the CDF having been, you know, in senior positions around the Defence Force and wanted a different approach to my command. This was just one incident. You know, we're subject to a bunch of Acts; I didn't think we were following our military best practice with the management of operations, and the management of information, and I was determined that we manage things as -- you know, we actually reset the dial, if you like. So, it wasn't -- no, no -- so this -- again, this is I think the point, you're taking this

as a major catalyst to me, and certainly, when you've got an incensed Minister, it's a catalyst. The Ministers tend to get incensed on a number of issues, and chief executives live with that each day. Was that a major driver? Yes, it was a driver. Was it the sole driver, to me, no, it wasn't --

Q. Fine. We'll leave it at that?

A. -- my professionalism -- my professionalism of what I demanded from my people and my systems was my major driver. Doing right was my major driver.

Q. All right. So, doing right's your major driver, and we agree at least it was an incensed Minister, is what you said, and this was a significant catalyst for it, but not the only catalyst?

A. That's right.

Q. Right, okay. And the other things that you did, were you brought in new processes for document management, you said, correct?

A. Yes.

Q. And coordination of processes? And so from this point on we have far better systems in place for document management, do we?

A. Yeah, we're starting to improve all those systems around to what I'd regard as best practice management of operations.

Q. Well, you used the term best practice. You said you brought in best practice in that regard, so --

A. Well, it doesn't happen overnight. So, you -- you know, over the period of my command or command as the Chief of Defence Force, I strove to have best practice. I strove to have transparency; I strove to do what was right.

Q. You strove to have transparency. Is that right?

A. Yeah, greater transparency.

Q. Right.

A. And again, one thing that I said earlier, part of the thorough analysis of New Zealand Defence Force and Ministry of Defence, by Transparency International, to see the path we're on, to

lead to greater transparency, was a good marker to us along the way, to say we're on the path, but you're never there. You're always -- again, one of the tenets I follow is to pursue excellence, and we do make mistakes along the way, and we learn from those mistakes -- we should learn from those mistakes. So yeah -- yeah, so best practice didn't occur and throughout this, we still sort of learned throughout this process of *Hit & Run*, Operation Burnham, that we're still learning.

Q. So, before we leave this topic, I just want to try once again to see if we can find out where this document might have come from, and we know we've got the inquiry that Mr Radich is having made, but it had to have come back from Afghanistan?

A. It must have come from ISAF; it must have come from the Special Operations element in ISAF. Oh no no, that's -- you know, it may have come from the Special Operations element, but it was actually the -- in fact, I think the role probably up there was the Inspectorate General, which is the legal section of ISAF, which oversaw it. It wasn't the Special Operations command; it was done by Petraeus' legal staff. So it could have come through our legal system. It could have come through the SF chain; it could have come through Joint Headquarters. I'm sorry, I don't know.

Q. You don't know?

A. And that's a mistake.

Q. Right. It's a mistake that you don't know?

A. Yeah, I don't know how it arrived and why it would have arrived into a safe in the Office of Chief of Defence. That is wrong, and, as I said, some of the processes -- you know, Office of Chief of Defence Force and their safe is not set up to manage operations, and you have issues like this because of poor systems.

Q. But Mr Keating, this is a partner classified document.

A. Yes.

Q. It must have been emailed back from Afghanistan, surely?

- A. Not sure, could have been hand delivered.
- Q. Hand delivered?
- A. Could have been.
- Q. Hand delivered? What some --
- A. By some Coalition visiting officer. It could have been hand -- it could have come back from one of our people re-deploying back. It could have been emailed over our classified systems. I am not sure.
- Q. So, if it had been hand delivered by a Coalition visiting officer, wouldn't it have been hand delivered to somebody very senior in the organisation?
- A. Not necessarily. Depends -- I mean, again, I'm not being cute here, define "senior"? You know, you can have, you know, a courier can come back who's not senior, and it gets into the system.
- Q. So -- it's a classified partner document? You know, Mr Keating, we've been arguing about this for weeks to try and get this declassified. This is not a simple matter. It's not coming by a courier, is it?
- A. All documents in operations in Afghanistan largely were classified. There are millions of them.
- Q. And this is a partner document --
- A. And there are probably hundreds of thousands, and you know, I'm not going to exaggerate, maybe millions of documents in the NZDF regarding ten years in Afghanistan. So, it's not a -- you know, again, context here is really important. As I said earlier in some of my evidence, you go from one operation to the next; you deal with issues, and then you're onto the next -- terrible metaphor in the current time, "game". You analyse what you did wrong; you correct it with a statement, then you move on, because the next imperative is not -- is the next mission that you're involved in.
- Q. Mr Keating you're not suggesting this is not an important document?

- A. You're saying this is a really significant document and it was a very significant operation. Now, it is in this Inquiry. In the time, it was just another, you know -- again, this is before my time. My assuming is -- my assumption is for Sir Jerry, is yep. Let's deal with this one; now the next operation. Now the next operation, and very soon Operation Burnham goes into insignificance. I will restate Operation Burnham -- all operations are significant. The ones you tend to reflect on, are the ones where there are known collateral damage, where you got it wrong, or where you had your own casualties. Look at the operation in Intercontinental Hotel, look at the operations where NZDF people died. Those were the ones that you put the full core press of your time and your staff and your energy into.
- Q. Mr Keating, are you suggesting -- in the middle of all that answer, you suggested, I think, that this was not a significant document? This is a document --
- A. No, I'm saying all documents are significant because they have their classification --
- Q. Can you let me finish my question?
- A. -- but there are millions of documents.
- Q. Can you let me finish my question, please?
- A. Yes, certainly.
- Q. This is a document that we have not been able to have available for the public because of its partner interest, and its status, and its significance, and you're now suggesting it's not significant?
- A. Let me go back and unpack your question. Yes, I think it's significant. Yes, I have told you that I think it was significant that the NZDF wasn't aware of this particular document in their system and that's wrong.
- Q. What I'm suggesting to you is that a significant document, this document, came back to New Zealand. It must have only -- it could only have come back to New Zealand in 2011 or

earlier, either by somebody bringing it in a Rifkin secure bag, presumably, or through your electronic system, correct?

A. Yes.

Q. Right. There must be -- have been mechanisms in place, in 2011 or 2014, when you conducted the investigation, to ascertain how a document with that status came into the country. Is that not a reasonable thing to assume?

A. Yes, it is, and we've covered that, that we conducted an investigation. It was inconclusive, but we're talking about the significant -- what was the significance of the document. The significance of the document, it showed, you know, it started -- it clarified that civilian casualties may have occurred.

Q. And the significance of the document to NZDF is that it showed that the ministerial briefings and the position that you'd taken up to that point, and beyond that point actually, was wrong, correct?

A. Correct.

Q. New Zealand Defence Force had told the Minister in two briefings in 2010, that having reviewed the evidence, there was no way civilian casualties could have occurred. That's right isn't it? I'll take you to the briefings, if you like?

A. Yes, please.

Q. Pages 166 and 169, paragraph 7 on 166, paragraph 4 on 169.

A. Yes. That's 2010.

Q. That's right.

A. Yep.

Q. And that was --

A. And sorry, what are the paragraphs?

Q. Paragraph 7 on page 166.

A. Yep.

Q. And paragraph 4 on page 169.

A. Yep. Yes.

Q. And that was directly at odds with the ISAF press release, which NZDF had from 30 August 2010, correct?

- A. Yeah, I believe what NZDF were going on, at that time, was the information provided from our people in theatre, which read the paragraph regarding New Zealand troops or what they thought was regarding New Zealand troops, that New Zealand troops were not involved in casualties.
- Q. That's not the question I asked you. What I asked you was, is it correct that those ministerial statements that I've just taken you to, ministerial briefings, that they were directly at odds with the ISAF press release which NZDF had from 30 August 2010?
- A. Yes.
- Q. New Zealand Defence Force staff and the Office of the Chief of Defence had the IAT report at some point prior to 1 September 2011, correct?
- A. We're not sure.
- Q. Well, you must have had it prior to 1 September 2011, because that's what the register says?
- A. Oh okay, yes.
- Q. All right. The report -- that report contradicts the official NZDF denial of any civilian casualties and Mr Parsons' email of 8 September 2010, doesn't it?
- A. Mmm.
- Q. Is that right, yes?
- A. Yes.
- Q. Someone in Defence, in 2011, was aware of it, but despite that, nothing was able -- nothing was done to bring it to the attention of the Minister of Defence or the Prime Minister, correct?
- A. I'm sorry, what are you reading from?
- Q. My notes.
- A. Okay. So, I'm sorry your question -- could you just restate it?
- Q. My question is that it must be the case that someone in Defence in 2011 was aware of it, because they had it, as at September 2011. That must be right, mustn't it?

A. I'm not -- I don't know.

Q. Well --

A. So --

Q. -- someone had the document on the 1st of September 2011?

A. So, what I believe, the document arrived in a bundle, into a safe, that then stayed dormant.

Q. Mr Keating, you're making this more difficult than you need to, really. Someone must have had the document on the 1st of September 2011?

A. Yeah, somebody must have, and it appeared that it appeared in a safe.

Q. Right. So, my question to you, what I put to you, was someone in Defence, in 2011, was aware of it?

A. Yes.

Q. Thank you, but despite that, nothing was done to bring it to the attention of the Minister of Defence or the Prime Minister, at that time, correct?

A. Correct.

Q. All right. And that had the effect of misleading the public when the statement was made on the 30th of June and the 1st of July 2014?

A. By the Defence Force. That was then corrected by the Minister of Defence. Yes.

Q. Thank you. I'm right, aren't I?

A. Yes.

Q. Thank you. And despite the IAT report coming to light, NZDF, for the reasons that you've explained, have never told the public the reason why, in 2014. NZDF have never said anything about this IAT report materialising in 2014, have they, until now?

A. No.

Q. Is this a case of NZDF --

A. I'm sorry, not until now -- no, I have actually.

Q. When did you mention the IAT report being found in the safe?

A. Oh, not being found in the safe, but I mentioned that the IAT report, which assumes I had read it, I made it in the press statements prior -- post the book being released. And I drew heavily on that IAT report and references to that in my public statements then.

Q. When, what year was this?

A. When the book was released and I --

Q. 2017?

A. Yeah.

Q. All right. My question was --

A. You said up until now, so that's incorrect.

Q. All right. Well, we'll put it this way then. Despite the IAT report coming to light, NZDF have never told the public the reason why from 2014?

A. I told the public what?

Q. Why you changed the position? Why the position changed in 2014 when the IAT report came to light, because that's the reason why things changed in 2014? You found the bundle in the safe?

A. Yes.

Q. Right.

A. Well, Minister Coleman addressed and said civilian casualties may have occurred and addressed that issue, but the fact that -- why that was changed, was addressed by the Minister, but it wasn't about a bundle in the safe, no. No, so, you're quite correct.

Q. Thank you.

Right, let's move forward to 2017 -- actually, let's move forward to a little earlier than that. Can you have a look at page 231 of that bundle, please? This is a letter dated 15 March 2017, from Mr Smith to the Human Rights Foundation of New Zealand. Have you ever seen this letter before?

A. Yeah, I would have.

Q. You would have. At the top of the third page of it, page 233, you'll see in that top paragraph, the first little sentence:

"NZDF does not hold a copy of the investigation undertaken by the Joint Afghan Ministry of Defense, Afghan Ministry of Interior and International -- [well, and] ISAF. A copy of the investigation has not been released publicly."

Now that's not right, is it?

A. No, that's not right.

Q. No. Did you know about that at that time, that that was wrong? That Mr Smith, your Chief of Staff, had made that statement?

A. No.

Q. Do you know whether it was ever corrected?

A. No, I'm not sure.

Q. It should have been, shouldn't it?

A. It should have been.

Q. So, the book *Hit & Run* was launched, as I understand it, on the 21st of March 2017. Does that line --

A. I believe so.

Q. -- line up with your recollection?

A. Yeah.

Q. And I'll take you to page 239 of the big bundle, and you'll see this is an NZDF draft press release, and the -- it's at the bottom under the heading draft statement?

A. Mmhmm.

Q. It's dated 21 March, and the email above it shows, doesn't it, that VCDF, who was Kevin Short at the time, had discussed this with CDF, and that was you at the time, correct?

A. Yes. Yes.

Q. And it was good to go?

A. Good to go.

Q. And that press release says, doesn't it, that the investigation, that's the IAT investigation, concluded that the allegations of civilian casualties were unfounded?

A. That's correct.

Q. And that wasn't correct, was it?

A. So, here's an interesting point --

Q. All right.

A. -- and I think this is something that started to conflict with public statements and legal positions. So, in my mind, we started to -- again, I was leaning heavily on legal advice. What the book had claimed was that New Zealand Defence Force troops had committed war crimes, and we needed to respond to that. It wasn't about if civilian casualties may or may not have occurred. What I think -- what was going through my mind at the time: was there a legal basis for the claims being made by the authors of the book, that New Zealand Defence Force had deliberately targeted civilians through the actions in Operation Burnham? To the best of my knowledge, I think we started to then use the term "unfounded", and my perspective. And again, this is one of the may have, baseless, but unfounded, we started to look at the potential of an investigation and drawing back on the claims against New Zealand troops, which was the claims made in the book, were unfounded; they weren't well-founded. And you understand the term here. So, I wasn't being -- following the party line, that they may or may not have occurred, because we'd already admitted and the Government had admitted, although you're quite right, we hadn't publicly gone out and said they may have occurred. Here was a serious allegation against the conduct of New Zealand troops, and the statement here, I believe, was to say that was unfounded. It hadn't been -- the evidence provided, what we'd known to date, and on first glance of the book, was not well-founded.

Q. Okay, well let's just have a look at some of that --

A. So, whether that was good in a press statement or not, was probably, you know, you could argue either way, but I was arguing -- everything I said from that point, when those allegations were made, could be tested in a court of law.

Q. All right. Well, the first public statement I can find, not really public, but the first open statement I can find from NZDF, in 20 -- it was in that letter that I took you to from

Mr Ross, about civilian casualties. So we've debated the issue with the Minister going public earlier, but I can't find anything before that letter of the 15th of March, which is wrong, as you've acknowledged, and the paragraph immediately before the one I took you to, and I'll take you back to it if you want to, we looked at it with Mr Ross, it says that there was one -- suspected one civilian casualty, just one.

Is there any other public statement, up to this point, by NZDF as opposed to the Minister, about the possibility of civilian casualties?

A. To the best of my knowledge, no.

Q. So, you're saying in the answer that you just gave to me, a number of things, but one of them was that, in your mind, this was a legal issue, and we'll come and work our way through that, but that's one thing you're saying?

A. In my mind, that it had shifted from the issue around civilian casualties occurring, as -- you know, it's an unfortunate term -- as "collateral", but to one that the story had now shifted to revenge and deliberately targeting of civilians by NZDF personnel.

Q. You're not suggesting the book doesn't make an allegation of civilian casualties, surely? Have you read it?

A. I just said that the book had made an allegation of -- that the civilian casualties were caused by NZSAS troops. Yes, I have read the book.

Q. All right. And this statement says the investigation, the IAT investigation, concluded that the allegations of civilian casualties was unfounded. That's just wrong?

A. No, again, I'll give you a context. In one perspective -- in one perspective, yes; you're right. It's wrong, because civilian casualties may occur, but in the context of the book and the thing that was front and centre to me, and there were a number of imperatives that were front and centre to me once this allegation, you know, of the most serious nature had been made against NZDF troops, was the fact that we had

deliberately killed, targeted and killed in a revenge attack, women and children and villages -- in the village of -- or the village, as the book says, of Naik and Khak Khuday Dad.

Q. The media statement, let's just go through it, says "the investigation", and you accept that that's referring to the ISAF IAT investigation?

A. Yep.

Q. "The investigation concluded that the allegations of civilian casualties were unfounded."

This is not a matter of context; that's just a wrong statement. You'd have to agree with that, Mr Keating?

A. No, that's from your perspective. From my perspective, I'm telling you, so I'm on the stand here. I'm saying from my looking at it now, against the context of, you know, the most serious accusation being made against the Defence Force, I, whether I was correct or not, started to look at this through a legal lens, as opposed to a public media lens.

Q. Could you read out the paragraph in the draft press statement on page 239, the paragraph immediately above the quote that I've just taken to you? I'll get you to read that out, and then I want you to tell me, where in that statement the context that you're referring to is set out, because that's a paragraph that talks about allegations of civilian casualties having been made, doesn't it?

A. Well, the context isn't there.

Q. Isn't there. So how are the public supposed to know what's in your head?

A. I'm not -- not sure. The public were aware that civilian casualties may have occurred. The public -- what was in the public's mind, as was in my mind, is this book had alleged that New Zealand Defence Force troops had deliberately targeted civilians. My response to that is that was not well-founded.

Q. I'll go to the statement?

- A. The public had already been told by the Minister of Defence that, in this operation, civilian casualties may have occurred.
- Q. Three and a half years earlier?
- A. Yes.
- Q. This statement says:  
"The New Zealand Defence Force stands by the statement it made dated 20 April 2011", correct?
- A. That's what it says. That's the draft. What did we actually release?
- Q. All right, well I'll go to that one if you want to; it's no different. 245. 245, it's the final -- the sentence I just read out to you:  
"The New Zealand Defence Force stands by the statement it made dated 20 April 2011."  
See that?
- A. I'm reading it now. So, this is 245:  
"The investigation concluded the allegations of civilian casualties were unfounded"
- Q. First line of the press release as it was released:  
"The New Zealand Defence Force stands by the statement it made dated 20 April 2011."
- A. Yep.
- Q. And that's the statement that was made, and we know the context; it was made conveying to the public that there were no civilian casualties?
- A. That's right.
- Q. All right. So, this is about civilian casualties, isn't it? It's not about -- this statement's not saying anything about war crimes?
- A. No, it is, because again, if we look at it in the context of what it was responding to -- so in my mind, I was responding to the allegation of war crimes, which were against New Zealand Defence Force troops or in -- you know, even if I go to the point -- a lighter point, that the casualties were

caused by NZDF actions, the context of what I'm responding to there, rightly or wrongly or confusing previous statements, in my mind was the most serious allegations that had been made against New Zealand Defence Force troops, and those allegations were unfounded, which meant I had to look at them.

Q. Mr Keating, this statement in the middle of that press release is telling the public what the IAT investigation found. It's doing it completely inaccurately, and the IAT investigation wasn't investigating the allegations in *Hit & Run*. The book hadn't even been written then?

A. No, but we're now -- now talking about when this press statement had been made.

Q. I am talking -- I am talking about a statement which is talking about an IAT investigation?

A. No, we're talking about a response to a book that alleged war crimes against New Zealanders, and the part of the IAT report that cleared New Zealand Defence Force troops from any actions on the -- any actions that may have resulted in casualties against civilians, were unfounded.

Q. Why didn't you just issue a press release saying NZDF didn't commit war crimes?

A. Because I hadn't investigated that yet; I had to go back to what the IAT report had said --

Q. But the IAT report wasn't about the allegations in *Hit & Run*. You are misrepresenting, in this statement, what the IAT investigation concluded?

A. No, in the context I was responding to the book.

Q. That's your answer, is it?

A. That's my answer.

Q. It's as good as it gets?

A. That's my -- that was my judgement on the day that I was responding to the allegations in the book, around the conduct of New Zealand Defence Force troops, what the IAT report had said.

Q. Mr Keating --

A. Could it have been clearer and said, you know -- and added but civilian casualties may have occurred as a result of the Apache gunship? Yes, probably. And maybe that clarification, you know, in hindsight should have been there, but our response was to respond to the accusation that New Zealand Defence Force troops were deliberately involved in civilian casualties, to the extent that we deliberately targeted civilian casualties -- civilians.

Q. When we started this cross-examination yesterday, you said to me that you didn't believe there were any mistakes or any matters with the benefit of hindsight that you would like to correct. I'll ask you now on oath, is this a matter that you think you made a mistake about, and that with the benefit of hindsight, you'd like to correct?

A. Yeah, mistake is an interesting word. With the benefit of hindsight, yes, I might have, you know -- to where we are today, and the issue that has arose, you know, looking back, which has only come out through this inquiry -- here's probably the point for me to say. That when this matter came to my attention, for *Hit & Run*, my focus wasn't going back in to see what we'd said about civilian casualties in the past.

Q. Why not?

A. Because there was something more imperative before me that had my full attention. That was that the claims being made were -- or at that time, putting at risk the lives of New Zealand Defence Force people deployed around the world in Islamic countries. So, if you recall that when claims were made, and in fact they were quite true, about burning Korans in America, the challenges to Coalition troops serving in Afghanistan, at that time, against both civilians, the Government of Afghanistan, and Coalition troops was significant. If somebody makes a claim that New Zealand Defence Force troops have gone and targeted innocent women and children and murdered them, then that was what was in front of me, and I had to get to the bottom of that and investigate

that. That was my imperative; that's where all the energies that NZDF -- not going back and looking at what we'd said in the past -- was to get truth of the matter. Did we kill women and children in Afghanistan? Because I owed it the troops that I had deployed around the world, and I was with those troops at the time. Our biggest shield for the Defence Force, a largely limited funded Defence Force, was our mana and our reputation, our doing good deeds for people on the ground. To be accused of being exactly the opposite, put my people at risk.

Q. So, because you were dealing with -- and I'm not minimising the significance of any of that, but I mean because you were -- you're saying because you were dealing with those important matters, that's the excuse for getting this wrong? Is that really what that means?

A. I won't use the term "excuse". My full attention, from the time that book was released, was to examine the claims made in that book. It wasn't to go back -- and in fact, quite deliberately, when I undertook that investigation, I didn't go back through history and look at, you know, what we'd told the public and what we'd told the press in the past. You know, I didn't ring up Sir Jerry and say what went on in his position, or previous commanders. I dealt with the facts that were presented before me, rather than go and look at the publicity around this.

Q. You didn't even need to look at the publicity, did you? 2017, you were involved in this investigation that Minister Coleman demanded in 2014, three and a half years earlier. So, you knew about the IAT report. It was only three and a half years earlier?

A. Yeah, but the context shifted. The story had shifted yet again. So, if we looked at the *Native Affairs* story, and we looked at *Hit & Run*, this was new. This was serious. These were serious allegations.

- Q. The IAT report is what you're talking about in that press release; that's the same IAT report that you were talking about with the Minister in 2014?
- A. The IAT report was not dealing with the accusations made in *Hit & Run*, that New Zealand Defence Force troops -- no, you're shaking your head here -- so, I'm sorry, I'm giving you a response. The IAT report dealt with the potential of Apache strayed rounds, misdirected rounds, from a slaved gun, impacting on buildings which may have contained civilians. So that was one issue. What was presented to me, at the time, was something quite different, very serious, New Zealand Defence Force troops deliberately targeted civilians and civilian property on a revenge attack. Now, with the benefit of hindsight, maybe the IAT report would have been significant, and what we'd said publicly, but I was dealing with an issue that I had to address for the reasons I've spoken about. Completely different claims to the ones that had been made before.
- Q. Your statement at this time led both the Prime Minister and Minister Brownlee, who was by now Minister of Defence, to make public statements which repeated the misleading position, didn't they -- didn't it? Do you want to have a look at page 34 of the supplementary bundle, 33 and 34 of the supplementary bundle?

If you have a look on page 34, and probably help you, from Defence Minister Gerry Brownlee, said, about just over halfway down the page. I'll read it:

"Defence Minister Gerry Brownlee said it was difficult to comment without reading the book, though he had been given an outline of the allegations. He echoed comments by NZDF that the operation had been widely investigated and that no civilian casualties had been found. Our position hasn't changed since 2011. I can't see why it would be changing. What I've been told is that he is talking about an incident that has been extensively investigated based on previous

accusations of civilian deaths and those accusations have not been proved at all accurate, quite the opposite. There have been several investigations, including an ISAF International Security Assistance Force itself, and the allegations that are made simply have not been substantiated in any way whatsoever."

That's completely -- he's been misled by you, hasn't he?

A. No, he's completely accurate.

Q. Well, that's not what the IAT report -- the IAT report said there was a possibility of civilian casualties?

A. Yep, and Gerry is not saying -- Minister Brownlee -- is not saying that there weren't.

Q. Right.

A. You know, the report has said they may have occurred. The book, the response to the allegation, saying they did occur, and New Zealand Defence Force killed them. You know, it has been shown in the IAT report and every subsequent investigation there is no material evidence of civilian casualties. There is a conclusion that because of the mis-slaved gunsight, that rounds impacted on the roof of a building where civilians were in, and therefore, civilian casualties may have occurred.

Now we could sort of examine -- you'd have to ask Minister Brownlee and his press staff what they said, but my reading in there, is there's accuracy. It says, "no evidence of civilian casualties" and I'd also say, that Minister -- no proof that they did occur -- and I'll also say Minister Brownlee is acting under the same context that I had -- I was at the time -- that they were then, by extension, caused by New Zealand Defence Force troops deliberately.

Q. It's hardly transparent and open though, is it, Mr Keating, because it leaves the clear impression that there's no -- nothing in -- not even a possibility of civilian casualties, when you knew full well that the IAT report said there was a possibility of civilian casualties, and that was

entirely consistent, also, and I'm not going to trail through all of this again, but entirely consistent with NZDF's own intel and BDAs at the time, its own viewing of the gun tapes, all of that material?

What I'm suggesting to you -- I'll just put this final question and then you can answer. What I'm suggesting to you, to cut through this, is that at this time, what NZDF are doing are trying to create the impression, publicly, that there's no suggestion, cannot possibly be any civilian casualties, because if it was anything other than that, why -- for goodness sake, why didn't you just come out and say openly that the IAT report had found that there was a possibility of civilian casualties?

A. Within days of this press statement, I did.

Q. Because of the pressure?

A. No, because I sat at the end of a chain of information that had come in through various officers of CDF, and I sat, after my thorough investigation, with the complete story, went to the public of New Zealand in a press statement, and laid it all out, including the IAT report.

Q. We'll come to that in a moment, but just staying with around this time at the moment, we've got the -- still got the 22nd of March 2017, and as well as Minister Brownlee's statement, we've got the Prime Minister -- I don't think this is in the bundle, but just for completeness, we've got the Prime Minister at the time, the Honourable Bill English, answering questions in the house, and he says -- Andrew Little asks him a question:

"Given the high regard with which New Zealanders hold their Defence Force and from the advice he has received [he being the Minister, Prime Minister] can he be sure that no civilian casualties were killed or injured in the New Zealand SAS raids in Khak Khuday Dad and Naik in August 2010?"

And the Prime Minister says:

"I have asked that question. The New Zealand Defence Force stands by the release that it put out last night, that is that on the basis of independent investigation by the Afghan Government and the Coalition forces back in 2011, they believe that New Zealand Defence Force personnel conducted themselves according to the Rules of Engagement, and that civilian casualties have not been substantiated."

A. That's right. Civilian casualties have not been substantiated.

Q. It's hardly open and fulsome, is it?

A. I'm not going to -- that's the Prime Minister's press statement.

Q. Based on what you told him?

A. Yes, and the claims of civilian casualties were not substantiated.

Q. However, at this time Dr Wayne Mapp started advising the media that he now believed there might have been civilian casualties, didn't he? You became aware of that?

A. I can't recall.

Q. You can't recall, all right. Well it's in the documents.

So, we'll come now to page 308, and this is your press release of 26 March 2017?

A. Yes, it is.

Q. Why was there no comment, in this press release, that NZDF's press statements of the 21st of March 2017, or indeed the 20 April 2011 press statements, were inaccurate and misleading? Do you think that might have been a good thing to say at this stage?

A. In the context of this Inquiry, yes, but in the context of what I was dealing with at the time, not a priority. In fact, as I said, I hadn't gone back -- you know, I wasn't looking back. I was looking at the allegations made at the time in the book and going forward where they would sit.

Q. You were --

- A. I wasn't conducting a press -- a -- sorry, a publicity -- I was looking at a -- if you like, and this is where I say I go to the terms "unfounded" rather than media statements -- I was dealing with things under the law.
- Q. Mr Keating, you were the Chief of Defence. Are you saying that it wasn't a priority to be upfront and transparent and open with the New Zealand public?
- A. The priority for me was to follow the process of law and make sure that our investigations for the allegations -- was not to sit out there and redress something, which in hindsight, may have been an adjunct to the priority placed before me, which was the serious allegations laid in the book.
- Q. Well, I'd suggest to you Mr Keating, if you had decided this might have -- or should have been given some priority, certainly in 2017 and I'd suggest earlier, we might not be here today, because it was a priority for the New Zealand public to know what the correct position was, wasn't it?
- A. Oh, there's a lot in your statement there which I could -- I will disagree with in time, as I sort of unpack it. No, the priority for me, as you say, is -- yes, it was a priority, and it was afforded necessary priority, and I think within 48 hours or 72 hours of that statement, I addressed the public of New Zealand, by saying -- you know, by being unequivocal, by saying civilian casualties may have occurred. I referred to the enquiries made by NATO, as did my Legal Officer. At this point though, when you start a process of serious allegations, the last thing before a chief executive is actually to start to make press statements, although there is great pressure to do so and start to address the public, what I am then sort of compelled to at this stage is follow correct legal process. And I didn't want to make statements until I sat down and looked at all the evidence and the facts presented before me, so any statements we made going forward would be true and accurate and would stand up in any subsequent court of law,

which was where this could be heading if I found a well-founded case.

Q. I don't really understand a lot of that, but we'll work our way through it. Do you -- you said that you wanted to be -- I think your words was utterly transparent, or no, may not quite have been the words. When you made the statement, utterly accurate?

A. Well, there is no scales of transparency, so transparency will do.

Q. Right.

A. And coherency means that I have all the facts and all the evidence and can look at what transpired.

Q. So you wanted to be coherent, have all -- because you have all of the facts, and the evidence, and you wanted to be -- these weren't your words, but I think the meaning of them was you, were intending with this press statement to be totally open with the public, is that right?

A. As open as I could be.

Q. Well, what does that mean?

A. Well, there is operational imperatives. So, I -- there is a raft of information that is not only owned -- not proprietary of the New Zealand Defence Force, ISAF and NATO, but also our own procedures, which we wouldn't be giving away through press statements.

Q. When you said in this press statement, on page 309, and you're talking about the ISAF investigation here finally, that this investigation concluded that this may have resulted in civilian casualties, but no evidence of this was established. Do you not think that was fairly disingenuous, given what you knew at that time? You were trying to suggest that it wasn't true; that there weren't civilian casualties, weren't you, when you said that? That's what you meant?

A. To this day, we don't know if there were civilian casualties, and in fact all the material evidence that we have to date

doesn't provide, you know, me the evidence of civilian casualties.

Q. There was evidence presented in the book from people who said that they'd lost family members, and there was evidence, wasn't there? You might not have believed it; you might not have liked it, but there was evidence?

A. A book isn't -- I didn't regard the book as evidence.

Q. Right. Well, there were a number of ways you could have made your point, perhaps, I suggest to you, Mr Keating, by saying there may have been civilian casualties. There's some accounts in the book; these need to be examined. I mean, there are all sorts of ways you could have done that, but I'm suggesting to you that this statement was clearly intended to suggest to the New Zealand public that there was no evidence of it. No evidence of civilian casualties. Didn't happen. Unfounded. Not right. That's what you were trying to tell people, wasn't it?

A. No, I think in the whole dialogue, and again, we're talking about a period of 48 hours, I've stood up publicly, at a press statement, and said civilian casualties may have occurred.

Q. But there was no evidence of it. That's what you said?

A. Yes. I've talked about and I've given a description of Apache rounds falling on houses, but we have no evidence of casualties.

Q. That's not in this press statement though, is it?

A. No, no, that was the statement before I'd gathered all the evidence, real evidence, evidence that was available to me in the form of evidence.

Q. Like intel statements, Battle Damage Assessments, gun tape recordings, videos from gun tapes? That's evidence, isn't it?

A. A myriad of operational evidence including the investigation.

Q. Including the IAT vehicles, which found on the basis of looking at the gun tapes that there was a possibility --

A. Yeah --

Q. -- of civilian casualties?

A. -- there's a possibility civilian casualties may have occurred, but they couldn't find any evidence of the casualties themselves, and in fact, I believe that the villages later retracted their statements to the Governor.

Q. Now, you, in this press release, just staying with that, for the first time I think, as I've found it, introduced the issue of location of where this all happened, don't you? You say that, page 1 --

A. What document are we in now?

Q. Page 308:

"Upon review of *Hit & Run* it is evidenced there are some major inaccuracies. The main one being the location and names of the villages where the authors claim civilians were killed and property was destroyed wilfully during a New Zealand-led operation. The villages are named in the book as Naik and Khak Khuday Dad, but NZDF can confirm that NZDF personnel have never operated in these villages."

You said that?

A. Yes.

Q. Why did you say that?

A. Because it's accurate.

Q. Because it's accurate.

Sir, I wonder if we could take the break now. I know it's five minutes earlier, but I just -- from this point on I need to go to a lot of documents, and I wonder if it would be easier if I could do it in a run?

SIR TERENCE: All right. We'll take a break for 15 minutes, thank you.

(Morning adjournment)

MR RADICH: Sir Terence and Sir Geoffrey, following your request this morning, Sir Terence, for further enquiries to be conducted, not of the register that we've heard evidence of, but of the broader NZDF register, for reasons that we will all

learn together and I haven't yet learned myself, the -- the -- there is a register that has been discovered this morning, and I am going to have the person who located it called, if you will. Her name is Lieutenant Colonel Louisa O'Brien, and she can explain to all of us, as we go, what the entries are, what the dates are, and what it says, what it tells us.

SIR TERENCE: All right.

MR RADICH: So, I understand the Inquiry's preference might be to do that now, rather than to delay this.

SIR TERENCE: Yes, that would be the preference, so that we can find out as soon as possible what happened and then we can -- or the details of what it shows, so that we can then consider what happens next.

MR RADICH: Yes, I understand entirely, and clearly, it's significant to all of us. May I just add this now, to get a sense of it from you, if I may, what I was proposing to do as well as that, if the Inquiry Members please, is to call -- unusually, but given the context of the Inquiries Act, I think appropriately -- my co-counsel, Lucila van Dam, who is a barrister with me, who conducted the investigatory work that uncovered the first register that we have heard about, so she can explain to you the investigation trail, if you like, that got us to that point, but not beyond.

SIR TERENCE: Okay. That will be fine.

MR RADICH: All right, thank you very much. I appreciate that.

Well on that basis, I call Lieutenant Colonel Louisa Jane O'Brien. Can I just say, as she comes up, that of course she wasn't expecting to give evidence today, isn't in her uniform, and you'll understand that the position -- this was something she didn't realise she was doing until five minutes ago.

SIR TERENCE: Yes, no, we do understand, and thank you very much for becoming available.

**LIEUTENANT COLONEL LOUISA JANE O'BRIEN**

**EVIDENCE-IN-CHIEF BY MR RADICH**

MR RADICH: Now your full name is Lieutenant Colonel Louisa Jane O'Brien?

A. It is.

Q. And you are, at the moment, are you, the lead researcher in the Special Inquiry Office of the New Zealand Defence Force?

A. I am.

Q. And the Special Inquiry Office is an office that is created to assist in this Inquiry process?

A. It is.

Q. Can I -- sorry, I should hand these out before I just ask introductory questions.

Colonel O'Brien, can you please, first of all, before we look at the document itself, tell us what you did when following receipt of the request that was relayed to you from Sir Terence this morning?

A. Sure. What happened was after Sir Geoffrey, Sir Terence's request we went -- myself and a colleague went over to Freyberg House.

Q. And just pause there, your office is where, at the moment?

A. The Inquiry Office is out of the Reserve Bank building.

Q. Thank you, and tell me Freyberg House is -- what is housed there?

A. That is the main employment workplace of the New Zealand Defence Force.

Q. Thank you. Please carry on?

A. I went to -- we went to the 9th floor, which is the Office of the Chief of Defence Force. We had phoned ahead and asked the Staff Support Officer, a Major, if -- to say that we were going to be looking for a document, or a register, and if he was available to assist us.

When we arrived, we made -- he said that he -- we showed him the document -- this document here.

- Q. And, so for the record, you are holding up in the supplementary bundle of the Inquiry, page 55, I think it will be? Would that be right?
- A. It is, yes. So, I showed him -- we showed him page 55 of the bundle, and we referred to the stamp that Sir Terence had particularly mentioned, that reads, "classified register serial number OCDF/387/2011", that shows it went in on the 1st of the 9th 2011 and has no out date.
- Q. Yes.
- A. We said, do you know to which this refers? And he said, he did.
- Q. All right.
- A. In the 9th floor of the Office of CDF, there are a number of places, I understand -- I haven't been there before -- where secure documents are held. He had gone and got a register from a safe, and --
- Q. So, when you say from a safe, can you describe where that safe is?
- A. It was a secure room that you needed a pass card to, in the middle of the 9th floor. So, it was not within the Office of CDF space itself, but within the whole floor area, and inside this room there's a four-drawer safe and it was in there.
- Q. Yes, and what is the -- can you tell us what the nature of the documents generally held in that four-drawer safe are?
- A. The drawer that he -- that was opened that I saw showed a number of old registers that on the cover have the annotation MD392, and that's the cover that --
- Q. So, you're looking at the document we now have in our hands, and I'll have you produce in a moment, but tell us where those numbers appear? Oh, I see, handwriting --
- A. It's -- actually, in this particular one, it's handwritten at the top, MD392 -- it looks like, folio 11.
- Q. I see.

A. And then in printing you can see MD392 large, which sort of indicates the nature of the 392, because they come in a small size as well.

So, there was a stack of these documents -- of these registers there. They looked through, and we found one with the date that says, "date opened 26th May 2011".

Q. And is that the document that you're now referring to?

A. It is.

Q. Would you just produce that now to the Inquiry, please? You can just say yes, rather than physically hand it?

A. Yes.

PRODUCED AS EXHIBIT - page from register

Q. Now, looking at the document and the page that's photocopied from it, can you please describe, and we'll just go sequentially through each of the entries there. The first thing I'd like to ask you though, is that there are lines through all, but I think one entry. Can you explain why the lines are through the other entries?

A. That's correct. I understand, when I asked the Major about the lines, and this one entry is not lined through, is that all the other documents being marked in -- around in the year 2011, had no longer been required by the NZDF, or had gone somewhere else, and they had, you'll see that about three quarters of them have the annotation "shredded".

Q. Show us where that is please?

A. In the column entitled "final", which is the second from the right.

Q. Yes, I see. Yes, "shredded".

All right, and tell us, the one entry that remains there, can you take us now, please, through, if we go through column by column, serial number? Are you able to help us with those numbers, 387/11?

A. Yes. So, in the first column, on the far left of the page, headed "serial number", and the numbers there have been given consecutively. So, the page starts with number 371, ends with 390.

So, at number 387/11, that document is not scored through, which shows the document still exists.

The next column, date of entry has 1/9/11.

And the next column is entitled "Sender or originator", and the initials there -- the word there is "DSO".

Q. Which is an acronym for?

A. The Director of Special Operations.

Q. Can you tell us, please, with an eye to the date of entry, who that person was on the 1st of September 2011?

A. I cannot. I cannot confirm that myself, but we can find that.

Q. All right, there might be someone who can give evidence of that, perhaps? I imagine CDF Keating could do that? All right, thank you.

Take us, please, to the next column.

A. The next column is date of origin, which is 1/9/11, and that would have been the date that the document entered this register.

The next column is reference number, and there's just a dash, indicating there was no reference number given to it.

Q. All right.

A. The following column is title or subject, and that has nothing written in it.

Q. Do you think they might be, you know, and I don't like to lead, but I think this is probably permissible -- are they ditto marks?

A. They appear to be, and they appear to link it to document 386 in the line above, and the entry for that line is "4 MinDef (2 secret docs)".

Q. All right, yes. Yes, I see.

Thank you, and then if you go to the next column, total number received or produced.

A. That has the numeral one beside it, and then the following column copy number has one, and the following column is classification, and it has the letter "S", for secret.

- Q. And looking down that column some have "C". What does "C" signify, please?
- A. I would understand that to mean confidential.
- Q. And from that, are you able to understand the nature of the documents that are placed into the safe through this register -- that are registered in this book?
- A. I would understand that this means this register caters for classified documents and documents that have a sensitive marking on them.
- Q. Okay, thank you.
- A. And if I may add, that the cover of the original book also had the security classification "secret NZEO".
- Q. And what does that signify?
- A. "New Zealand Eyes Only".
- Q. I see, thank you. All right if we go back to the entry, then we come to the column which says, "Referred to or returned to"?
- A. Yes, the following column is over-titled "Temporary" and it then has three sub-columns, one of which is "Referred to or returned to", and in that column, it has the letters "DCOS", which I would understand to mean Deputy Chief of Staff.
- Q. I see.
- A. And then the following sub-column is "received on date".
- Q. Just before we go beyond that, do you know, and please just say if you don't, what is meant by "Referred to or returned to"? What does that mean has happened to the document?
- A. I would understand that that is the person to whom the document has been referred to, to sort of say, this document has come in, and you're the overseer, as it were, o that document.
- Q. I see.
- A. However, I don't fully know what the system within the Office of CDF would mean.
- Q. Do you have any personal knowledge of who CDOS was on the 1st of September 2011?

- A. Through this Inquiry, I understand that to be Colonel Mike Thompson.
- Q. Yes, thank you.
- Now to the next column, please, which is -- well, it's -- there are three sub markings, aren't there? "Temporary," "Received on," and "Receipt"?
- A. Yes, it appears that there's an initial, of a person, whose initialled receipt of it, potentially, and a date 1/9.
- Q. Thank you, and the next column?
- A. The next column is entitled "Final," and it too has three sub-columns, and over that, it actually has the word -- over the word "Final" is printed on the book, "Disposal", which would mean, where did the document eventually end up?
- Q. Yes, and the entry that is made by hand against the lines we're looking through?
- A. That is -- has the words, "Hoey folder."
- Q. And do you understand what that means?
- A. I understand -- my interpretation of that, because there was no-one else in the office to ask, would be that Christopher Hoey was the person whose folder this document eventually went into, and as it's in the disposal column, it has moved from one safe to another safe.
- Q. All right. And are there any other entries on the page?
- A. There -- the only thing is, is a lightly annotated date in the same pen as that as the Hoey folder.
- Q. Oh, are you looking back at the sender or originator column?
- A. Yes.
- Q. And tell us what you see there, please?
- A. It appears to be in the same pen and hand as whoever's written "Hoey folder". The date, either 28 or 24 of the 1st, 18.
- Q. Yes, all right. And tell us for the record, there are blank columns to the right, can you just give us, please, the headings of those columns?
- A. So not filled in, in the final disposal column, is the date.
- Q. Yes.

A. And the date receipt returned, presumably because the document still exists.

Q. And the last column?

A. The last column is "remarks, to include destruction particulars when applicable or signature of the recipient if receipt form is not used", and that form -- that column is empty.

Q. Thank you. Now, again only answer to the extent that you have personal knowledge, but based upon your understanding of the document in the -- if we can say, the Hoey safe?

A. Mmm.

Q. And based upon these entries that we've just been through, do you have a sense of the carriage of the document, as to how it was registered here, and then where it went?

A. It -- in as much, unfortunately, the person who would fully know that is not available. My understanding of how this would have happened is that the document -- because every safe has its own 392 register?

Q. And when you say "392 register", that's what this is?

A. Yes.

Q. And so, every document, if it's ever moved, it must be re-written into the register of that one's safe, even if it has previously been registered in another.

Q. So, tell us the difference, please, between this register and that that we've referred to in the Inquiry over the last few days, which was in the Mike Thompson, Chris Hoey safe?

A. Right. I have no knowledge myself of the original safe, but I understand that when we moved -- certainly, when we moved buildings from Defence House to the Freyberg Building following the earthquake, or at some other time, the safe that documents were in, was transferred, and so, as we -- can be seen from the top of page 55, there are a number of numbers written there, and for instance, we see S116, which has been circled.

Q. Do you know what that document number relates to?

A. I understand it refers to the register that Mike Thompson operated for his safe.

Q. Thank you.

A. So, it suggests to me that the document was moved from the safe that this register applied to, and it was moved into another safe where it was -- we would use the phrase "marched in."

Q. And what does "marched in" mean, please?

A. It's just a -- I guess, it's a phrase we use to say that every document must be put into a register. So instead of saying we put it into the register; we marched it in.

Q. Okay. Thank you. And, do we know, from these entries, when it would have gone from general receipt and into that other safe? Are you able -- again, only if you can help us?

A. No, I -- there's nothing in my reading or understanding of the working of a 392 register that tells me, from this entry, when it was moved from one safe to another safe.

Q. All right, thank you very much.

Is there anything else do you think that that would -- and this is a broad question I know, but given our collective understanding of this, just at this moment together, is there anything else from these entries that you think would be relevant to explain to the Inquiry? There may not be?

A. No, I would say that the only thing we can take from the documentation, as it exists, is to say that it was received on the 1st of the 9th of the 11th and at some point in its life cycle, it was moved from one safe to another safe, and it hasn't been destroyed.

Q. All right, thank you. Please, there may be some questions for you from the Inquiry members or from other counsel, please would you answer them?

SIR TERENCE: Anything that you -

CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Just one matter while it occurs to me, and we'd like the opportunity to reflect on this, because we've only just seen it.

SIR TERENCE: Of course.

Q. I just wonder if -- I'm sorry, look I --

A. Colonel O'Brien.

Q. Thank you, Colonel. If you just go to the line above in the column where we have the title or subject, on the left-hand side, in that column, above the words "for MINDEF (two secret docs)", you'll see the reference to Baghlan Province Brief. Mmhmm?

Q. And I just wondered whether you can help us? I noted -- I see it's got a red line underneath it, but it doesn't seem to relate to the matter above it, obviously, and I just wonder whether that is in some way related to the entry?

A. I think you're correct there. There appears to be, like, you might say two sub-lines for entry, and so on the entry 3/8/6, it would appear that the full title of that is Baghlan province brief for (22MINDEF (two secret docs)).

CROSS-EXAMINATION BY MR SALMON

MR SALMON: I'm just interested to know how long it took you to find this today? I know you only asked today. Can you give us a sense, please, of how long it took from being asked, i.e. at what time you were asked, to finding this document? Was it minutes, or more?

A. I was fortunate that the person who controls the safe and understands the administration workings was actually there himself, and so, he understood what the 387 number was, and so then he knew where to find that old register.

Q. But any delays had he not been around, would have been about just connecting the number with the safe, is that right?

A. I would have said it would have gone from maybe 15 minutes to an hour or so to work out which -- what it was? What the register actually looked like, and where it was?

Q. So, if you were asked to make an enquiry and the person happened to be around, 15 minutes? If they happened not to be around, maybe an hour?

A. Possibly.

Q. And that would be the same today as a year ago, broadly speaking?

A. I don't know.

Q. You've been involved in these issues for a while though?

A. Yes.

Q. Any reason to think it would have been different over the last five or ten years or --

A. No.

Q. -- generally the same?

A. Yeah.

Q. Generally the same?

A. Mmhmm.

MS McDONALD: Sir, I just wonder if there's one other matter, and it may be that this could just be made available to Counsel Assisting for us to have a look at to determine whether it has any relevance, but I wonder whether it would be useful to look at the document 386 immediately above that?

SIR TERENCE: Well look, why don't you take that up with Mr Radich, rather than trying to deal with it now?

Is there anything arising?

MR RADICH: Is there a confidentiality order at this stage? There are a lot of entries on that page of course that aren't relevant to the Inquiry.

SIR TERENCE: For this document?

MR RADICH: For this document, at this stage, and of course we might be able to isolate out this particular entry, but at the moment, we have a document circulating the room with a lot of entries in it that are not relevant.

SIR TERENCE: Right.

Well, I certainly understand the point. I'm just wondering whether we -- whether the confidentiality order should just relate to the other entries in this document?

MR RADICH: Yes, yes, absolutely.

SIR TERENCE: Rather than the one we've been talking about?

MR RADICH: Absolutely, I think that would be appropriate, Sir Terence.

SIR TERENCE: All right, so there will be a confidentiality order under section 15 of the Inquiries Act in respect of the entries in this register, apart from the particular entry that -- entries that counsel have discussed in taking the evidence.

Thank you, Colonel for -- sorry we've disrupted your day, but it's been very helpful to us, thank you.

(Witness excused)

MR RADICH: It is a most unusual course, and I've never done this, before but I call my, if I may?

SIR TERENCE: No, let's go.

MR RADICH: Sir, will you give me a moment?

There is a very sound point that's been made to me, which is that the Attorney needs to waive privilege, which I'm sure won't be a problem, over legal counsel giving evidence, which is being done right this very moment. The -- Aaron Martin, the Deputy Solicitor General, is attending to it through the good offices of Mr Auld, just now. So, I wonder -- maybe there's a lag for that to occur?

SIR TERENCE: Yes, that's fine. That's not a problem. It's understandable; the Attorney does have to give his consent. So, we can get back to Mr Keating, because I don't want to hold him up.

MR RADICH: No, indeed, thank you.

SIR TERENCE: And we'll deal with this whenever convenient later on.

MR RADICH: Thank you, Sir Terence, appreciate that.

SIR TERENCE: Well thank you for having those enquiries made.

**TIMOTHY JAMES KEATING (continued)**

SIR TERENCE: Thank you, Mr Keating, I'm sorry that we've held you up. I was just -- we were getting the results of the enquiry that I made this morning. So that's been sorted out. Thank you for your patience.

**CROSS-EXAMINATION CONTINUED BY MS McDONALD**

MS McDONALD: Before we stopped, Mr Keating, we were looking at the document on page 308, which was the 26 March 2017 NZDF press release, and I think you'd said something to the effect that the villages referred to in the book were wrong?

A. Yes.

Q. And then, if I can take you now then to -- well, just on that, perhaps just for completeness, we'll look at page 308, and I'll just read out, for the benefit of those that don't have the documents, page 308. What has been said in that press release by NZDF is:

"Upon review of *Hit & Run* it is evident that there are some major inaccuracies. The main one being the location and names of the villages where the authors claim civilians were killed and property was destroyed wilfully during a New Zealand-led operation. The villages are named in the book as Naik and Khak Khuday Dad, but NZDF can confirm that NZDF personnel have never operated in those villages."

And I think I read that earlier.

And then you did a stand-up media conference, I think on the 27th, and that's shown at page 316, 317, and 318?

A. That's right.

Q. And at page 317, under the heading, "*Hit & Run* key facts and conclusions", you have said, haven't you, "as you will note from the book the authors have been precise in locating these villages with geo-reference points, so I have no doubt they are very accurate in the villages they are taking their allegations from. The villages line the Tirgiran Valley some

two kilometres north from Tirgiran village. In straight distance this is like comparing the distance from Te Papa to Wellington Hospital. However, if you overlay the elevated terrain, you will see we're talking about two very separate distinct settlements."

That's right?

A. That's right.

Q. And then over the page:

"The book provides detailed lists of the dead and wounded from Khak Khuday Dad village and Naik village. It provides detailed lists...the underlying premises of the book is that New Zealand SAS soldiers conducted an operation in Khak Khuday Dad village and Naik village that inflicted considerable damage to property, deliberately killed civilians, which add up to war crimes that need to be investigated."

Just on that, and I'll just stop there, so it's your -- was it your view that the book alleged deliberately killing civilians?

A. Yes.

Q. Right, okay.

I'll leave that with Mr Davey Salmon to deal with.

And then you go on to say:

"It seems to me that one of the fundamentals, a starting point if you like, of any investigation into a crime is to tie the alleged perpetrators of the crime to the scene, then we would examine the motive and means and other scene evidence."

A. Yes.

Q. So, isn't it the case that NZDF's own information told you that one of the villages for the operation was in fact Naik?

A. I think the issue we're going to get here is around nomenclature of the names. What I am referring to in these notes is location.

Q. No, no, no, sorry; I need just to stop you there Mr Keating, because what you've just said, and I've just read out, the

passages, is the reference to two villages, one being Khak Khuday Dad and the other being Naik village?

A. That's right.

Q. And you have said in those statements that those -- that the authors have got that wrong?

A. Yes.

Q. Right, and what I'm saying to you, is doesn't, to your knowledge NZDF's own information show that one of the villages, of the -- where the operation occurred was Naik?

A. No.

Q. Can you have a look, please, at page 46 of the bundle? Go to the start of this document, which I believe is at page 36. And that's the BDA and current NZPRT analysis from the operation, correct? If you go to page 36, you'll see the title to it?

A. Yes.

Q. And if you look at page 46, you will see a map, correct?

A. I see a map.

Q. And if you look at the bottom of the map, you'll see a reference to the village, Dahane Nayak, correct?

A. No, you'll have to help me.

Q. In a black box?

A. Yeah, I see a label that says Dahane Nayak, yeah.

Q. And then the very next page --

A. Question mark.

Q. All right, the very next page, 47, a heading --

A. 47, yep.

Q. -- on that map, Dahane Nayak, no question mark?

A. Yep.

Q. And the very next page, page 48, another map or image, labelled Dahane Nayak?

A. That's right.

Q. Well that material was compiled at the relevant time of the operation and it identifies the village Naik, correct?

A. Yes.

- Q. So, when you say NZDF didn't have relevant information at the time identifying one of the villages as Naik, that's not correct, is it?
- A. No, the question as I took it, is -- and again, this is what I'm talking about nomenclature -- the operation that we conducted was in a village that we -- you know, my investigation had all this information, topographical information from the past, and I took all the labels from the past, and said where did we operate, and made it quite clear in the press statement, it was -- in the press release and the public information -- it was the village that I have labelled, as in the briefings, as Tirgiran. If that is the geo-location to something called Naik, then it's the same village. It's not Naik and Khak Khuday Dad, which are two villages to the -- further north.
- Q. Mr Keating, you've said in the press release to the public that the authors got this wrong because they claimed that this operation took place in two villages, one of them was called Naik, and I've shown you now some maps from the time of the operation, which show that the operation occurred in a village called Naik. Doesn't that suggest that what you've said in the press release is not right?
- A. No, the press release is entirely accurate.
- Q. How can you say that?
- A. I've talked to you about the issue of nomenclature. The names throughout the village throughout history, in there, are interchangeable. The evidence that I examined was topographical evidence that pinpointed to where we operated regardless of the names. The information provided by the lawyers -- so let's call -- again, for a matter of clarity, not being cute here -- let's call where the NZSAS and Coalition forces operated Village C. The book's topographical and material evidence of layout, of structures, of buildings, of people, were of two villages to the north, B and C. I've

labelled this Tirgiran, and that's where we operated. We did not operate in the villages as described in the book.

Q. I suggest to you that is all very cute, really, Mr Keating --

A. It's not cute; it's -

Q. -- because --

A. -- it's perfectly accurate. I don't do cute.

Q. What is accurate? What is accurate is the book says the operation occurred in two villages, one called Naik. It might have got other stuff wrong, but the operation did occur in a village called Naik. That's correct, isn't it?

A. No, it occurred --

Q. It did; didn't it?

A. -- in a village called Tirgiran. On the evidence that I looked at, and again, producing a wealth of topographical evidence, and the actual footage of where we operated, it was in Tirgiran, which was the -- which was the location 2.5 kilometres to the south of what I have labelled on the maps as Naik and Khak Khuday Dad.

Q. Your own maps that NZDF had at the time called the village Naik, don't they?

A. I'd have to go back and look at this map and see where that location is, of that one, but if it was called Naik, my clear briefing in the public disclosure of where we operated went to some pains, because the public and the media would have looked at the account in the book, and would be referring to two villages to the north of where we operated. So again, as I said, nomenclature confuses the issue.

Q. Yes, and if you look at page 28 and 29 of the bundle, this is a reproduction of the New York Times article from 25 August 2010, a third of the way down page 29, you have the sentence:

"Eye witnesses said the raid began Sunday morning at about 2am where a number of helicopters descended on Naik." So the New York Times seemed to be able to identify the village as Naik as well, that's --

A. No, the New York Times haven't identified the village.

- Q. Right, and it's --
- A. So just to carry through, the New York Times has taken what villagers who presented themselves to the Governor -- as fact.
- Q. The point is, there's a link isn't there? The village is being called Naik from the time of the Operation?
- A. No, it's been called a number of names, and again, this is the thing that I had to sort out at the start, is again, I put the names to one side.
- Q. Did you?
- A. And again -- yeah, I did, because the names are almost, almost inconsequential. They're a part of the puzzle, but what I had to do is match the material topographical evidence with the evidence of what buildings existed, where were streams, where were helicopter landing zones, where did troops move, and they bore no resemblance to the book's account of villages A and B or Naik and Khak Khuday Dad, to the north.
- Q. So you weren't trying to suggest by the statements that I read out earlier that the authors had got it wrong? They're in the wrong village, and there's -- you didn't operate in these villages called Naik and Khak Khuday Dad?
- A. No, what I set out to do, in trying to clarify the issues, you know, in any military briefing, you start out with, you know, it's one of our disciplines we learn very early on, is to cover over the ground. And I think it was really important to describe, and again, I had a pre-briefer go over and described the ground. So, all -- arguably, that the public has, and the media has is the account of *Hit & Run* and they've gone through there, the maps in the book; they've gone and referenced the maps to the buildings and so on, and that's their account of the book, and that's fine. What I then -- have looked at my evidence, and said, this doesn't stack up, and the more and more I try to match the facts -- so I'll go to where we operated, and I haven't contradicted the book, because they have an account from the villagers of Naik, and I think, Khak

Khuday Dad. What I have, to me, is material evidence of where we operated in a village to the south called Tirgiran.

Q. The book had photos, didn't it, of the buildings alpha one and alpha two, or the compounds alpha one and alpha two, and they were correct photographs of Operation Burnham and of the Kalta and Naimatullah compounds?

A. Look, I'm not going to be specific here. The confusing element of the book is it had, you know, as our consequential, or our subsequent investigation showed, it had photos of buildings in what I call Tirgiran; it has photos of building in Khak Khuday Dad. It has photos of buildings in Naik, and it has photos of people in Iraq. So, it has a lot of information --

Q. It had correct photos of alpha one and alpha two, didn't it?

A. What's that?

Q. It had correct photos of alpha one and alpha two, where the operation was centred?

A. Look, I can't recall.

Q. And in fact it might have had, or it did have, some of the satellite imagery or geo-location wrong, but it identified Naik and Khak Khuday Dad where the Operation occurred, and it had correct photos of the two alpha buildings that were the subject of the Operation, correct?

A. What's incorrect in that statement is it didn't have correct information around Naik and Khak Khuday Dad.

Q. What were you trying to achieve by publicly saying that the location was wrong? Were you trying to suggest that this was a different operation, in a different place?

A. Not at all. Not at all, I was trying to right at the start, as I -- throughout the briefing, as I say -- we start with ground. So, people -- you know, ground; what forces were involved, what the intelligence was. I could lay out a coherent story of what occurred in the operation. What I wasn't doing, because again, at the time and that imperative,

was doing a compare and contrast for the book, because the book didn't stack up with the evidence that I had before me.

Q. Are you sure, Mr Keating, that you weren't trying to suggest that -- or weren't trying to undermine the credibility of the book by trying to suggest that they had the wrong place, and that you didn't operate in this village?

A. No.

Q. You weren't? All right, because I suggest to you that this was a whole -- this whole business about location was a massive distraction and confused the public?

A. Well I think the public would have been confused if I hadn't laid out where the Operation was, and in fact I can -- I seem to recall whether it was in the Q and A or the statement itself, and I commended the authors for the work that they'd done and the diligence they'd had in the story that they'd put together for the book. However, I had to deal with evidence of -- and fact, and the evidence that was presented to me, where we operated and what we did. So, there is no distraction in here. Quite the opposite I was trying to point out, was the facts and evidence of what we did and where we operated and what we -- what operation we conducted.

Q. I'm going to show you -- I'm sorry, I've only got one copy -- but I'm going to show you the book and I'm pointing here to page 60?

SIR TERENCE: What page?

MS McDONALD: Page 60, Sir.

And my friend has highlighted -- actually I'd like to -- I'm sorry, Sir Terence, if I could just show the witness this section because it's been circled which will make it a little easier. I'm showing you this version, which my colleague has put a circle around some buildings, and you'll see a photograph there? It's correct, isn't it, that that photograph identifies the areas that I've circled, alpha one, alpha two, and at the bottom of the photograph, alpha three.

- A. Yep, it's possible it does. Look, again, I haven't come prepared to go and re-go over my investigation that I've conducted, but no. It's quite possible that this particular photo shows Tirgiran and the objectives of the operation.
- Q. Will you take it from me, Mr Keating? We've been looking at this for 18 months and I can tell you with some confidence that's alpha one, alpha two, and alpha three. Do you accept that?
- A. I accept your assertion, but I'm not going to go down and say that's exactly right, because I haven't got that before me.
- Q. Right, all right?
- A. What I have -- what I have knowledge of is that there will be other photos in this book, like the one I go over, but we won't sort of go into there, that also purport to show elements of the operation, which are factually incorrect. This is the challenge we had.
- Q. Operation Burnham occurred in the villages that are identified in the book. There might be other mistakes in the book, but that's --
- A. No. No, they didn't.
- Q. They didn't?
- A. No. The book --
- Q. Operation Burnham didn't occur there?
- A. -- talks about two villages to the north and in the book it has photos of all three villages, and as I say, even some imagery that isn't even in Afghanistan.
- Q. That one page, just to take an example, I'm not going to go through the whole book with you, but that one page identifies the three target buildings of the operation, alpha one, alpha two, and alpha three? Do you accept that?
- A. No, well again, I'm not going to --
- Q. You're not going -- you didn't come prepared to talk about location today. Is that what you're saying?

A. I'm prepared to talk about the broad location of what we did in our investigation, but I haven't come to do a detailed analysis of each photo.

Q. All right. If we come now then to -- and you can -- I can take the book back. Given that answer, I won't go any further with location.

27 March 2017, this is your press conference, and at page -- did I say the page? 248 -- no, sorry, it doesn't start there. It starts at 240. Now, if you go to the passage on page 248 -- sorry, 348 -- in fact it just starts just over the bottom of the page, 347 -- you're talking there with the interviewer about the operation and the buildings.

Question: "So, how was it determined that there were no civilians in that building?"

You've said: "I've said there were civilians in that building."

Question: "(Inaudible) in that building, question mark?"

Answer: "Well this is what we've said that may have occurred."

Question: "Can I just clarify the statement, 'allegations of civilian casualties were unfounded', how does that -- [I don't know what the next word is]?"

And your answer is: "Well, I think that's -- that's a word that they use which I think is unfounded, it comes back to that report and that's the official response. There may have been, as opposed to unfounded. You could look, I'm not going to get cute here and say it's a twist on words, but it's the same thing, unfounded, there may have been."

A. Yep.

Q. The official line is there may have been casualties, but there haven't been.

So, you are suggesting in that answer that "unfounded" is the same as there may have been?

A. This comes back to my earlier statement, and again it's in my head at the time, in dealing with a legal issue, but the

bottom line, I've said here, is there may have been civilian casualties, as we've said in the actual statement itself, but the term "unfounded" -- I am now, you know -- I have my hat on that I still have an open investigation and I'm looking for well-founded allegations.

Q. You're saying, though, in that answer --

A. I'm not talking to the public of New Zealand at that stage; although I'm being interviewed by the media, my head is in a legal space at the time and still, an open investigation, which hasn't ceased at this press conference, into finding well-founded allegations based on fact and evidence.

Q. This is a press conference to the media, so --

A. Yep, yeah, you balance that with everything, you know, and again, you can't sort of go out and perhaps just say what you want, because I have the responsibilities, still, to -- ensuring the appropriate process of the (inaudible), to make sure that justice was managed in the way it should have been under the AFDA, under New Zealand law.

Q. So, your -- your use of the word "unfounded" here, you're saying, is because of the legal implications?

A. Yeah, I've said, they may have occurred, but my well-founded -- because what I'm doing, is I'm facing a press conference, as I've said before, based on serious allegations of war crimes by New Zealanders.

Q. When the word "unfounded" was first used in 2011, there were no legal issues of that type, were there?

A. First use in 2007? By?

Q. NZDF?

A. Yeah, but by who?

Q. NZDF, in your press statement, in April 2011? You used -- the word "unfounded" was used.

A. Yeah, I think what we're seeing here is, though, it's being used, "unfounded", may have, baseless -- again, I think the case has well been made that there is confusing -- there is some lack of coherency in our response to here, but we're

talking about here and now, you know? I'm saying -- I'm clearing the record?

Q. What do you think "unfounded" means, Mr Keating?

A. Not well-founded, in a legal sense.

Q. In a legal sense, all right, well we'll come --

A. It needs to cross a threshold for me to go to the next stage of a disciplinary investigation. So, as a Commanding Officer, which I took over the role, which I have the responsibility in this case, because the imperative -- I conducted a Commanding Officer's investigation to see if a well-founded case was going to present itself. I couldn't find well-founded evidence of civilian casualties caused by New Zealanders.

Q. What you're saying in this press release, is you're being asked to justify the use of "unfounded". The word "unfounded" was used in 2011 as well, by NZDF, no issues of legal issues at that time. It's a straight issue of, categorically, no CIVCAS, right?

A. So, I'll go back to what I've said in the past, what I -- what was presented to me, as a -- for *Hit & Run*, was a cold investigation. I didn't go and do a PR, what we'd done and said to the public in the past. I was presented with allegations of a serious nature. I sought to determine the nature of those allegations, whether it was well-founded, and issue press statements going forward, which clarified the matter. I did not cast back and look at what Sir Jerry had said, what Rhys had said, and -- and in the past, and again, that was quite deliberate in a way, because that might have seen, to me, to taint and -- and me to start to make early judgements around the facts and evidence that were being presented in *Hit & Run*.

Q. We will get through this a lot more quickly, and Mr Radich will have ample opportunity, I'm sure, to re-examine you; we will get through this a lot more quickly if you can just answer my questions as succinctly as you can.

What I said to you, was that you would have to accept from me that in 2011, no issues of a legal nature arising, at all. The word NZDF used was -- in its press release, was "unfounded," and that meant, at that time, in NZDF's mind, that there were categorically no civilian casualties. Now that must be right?

A. I don't know.

Q. You don't know?

A. Well, I don't know what -- in what context that was used in 2007.

Q. All right, you don't know. Okay. You don't know. All right, so you then come and you use the word again in -- it was used again in 2014, and now we're talking about it being used in 2017, and in this context, as I understand it, you're saying here, in this interview, that "unfounded" means the same as may have been. That must be what you're saying at page 348?

A. So, I'm saying two different things. I'm confirming the fact that civilian casualties may have occurred. I'm confirming the fact that, based on the allegations made in *Hit & Run*, which were -- they were caused by New Zealand Defence Force people -- those allegations were unfounded.

Q. So where in this answer, on page 348, do you say those two things? Can you just help me?

A. Oh, it's probably both in there. I've used the term, "it may have been" as opposed to "unfounded." If you look, I'm not going to get cute here and say it's a twist on words, but the same thing, "unfounded," "there may have been." The official line is there may have been casualties but there haven't been.

Q. Right, so you're saying, when you say "unfounded", you mean that's the same as there may have been? That's all I'm putting to you, and that must be what you said? It's just what you've read out.

A. Yeah, I'm not sure if I'd put it that way. Again, you're sort of --

Q. Well, you put it that way though, Mr Keating. You put it that way. These are your words, "unfounded", "there may have been." It's what you've said?

A. Yep, that's what I've said.

Q. Right. Now, I suggest to you, to -- that any member of the public, if you asked them what they think "unfounded" means, I suggest to you that they would say not right, baseless. Do you accept that?

A. No.

Q. You don't?

A. No.

Q. Okay. Now, just moving on with the same issue, Prime Minister English, in a post-Cabinet press conference, was asked whether it was misleading for NZDF to use the word "unfounded," and his reply is seen at page 385 of the bundle. Towards the top of the page, third entry, media, just on the misfire, "I mean the book talks about the fact that civilians could have been killed. And the ISAF investigation and the CDF say civilians may have been killed, unfounded I believe was the word used, but may have been killed. Is it worth having a broader inquiry into this misfire, into how that happened, and whether that could actually -- whether we can confirm if that did kill civilians?" Prime Minister: "Well that's exactly the matter which the CDF has looked into, and as has been stated now a number of times, there hasn't been evidence the civilians were killed. The allegations in the book, I think, you'd have to discount because they appear to be about different places and different people." It seems he thinks that's what you were saying. If there was any further evidence around the civilians that the CDF would be obliged to investigate those, and we would want him to do so. Jump down to the bottom of the page, third entry from the bottom, media:

"What about them saying that civilian deaths were unfounded and then later they came out and said they made an error? Was that not misleading to use the word unfounded?"

Answer from the Prime Minister: "Well as I understand it, it's a legal term. What has been clear from seven years ago is that there was a possibility of civilian casualties, but what's also become clear, is that there hasn't been evidence that there were casualties, which is not to say it certainly didn't happen..."

So, he's saying there, and I assume this has come from you, that the word unfounded has some legal significance. Has that come from you? Is that the explanation that you gave the Prime Minister or the Prime Minister's staff?

A. That could have come from me. And again, as I say, around the legal context that I was dealing with on behalf of the Government of New Zealand.

Q. And that's going back to what you were telling us earlier, that's because you say "unfounded" means the same as not well-founded?

A. Yes.

Q. All right, and then we'll go on to the next matter. So, during the Ombudsman's investigation, NZDF, you will recall issued or released an information pack, and it's at page 568?

A. Sorry, what was the page?

Q. 568. That might not be the start of it. That's halfway through it; it starts earlier than that. It starts on page 551. Here, I suggest to you that NZDF's explanation for the use of the word "unfounded" is different, and here you're saying, in explanation to why you've used the word "unfounded", "the term unfounded was intended to address the suggestion that the NZDF was responsible for civilian casualties."

So, this, depending on your view of things, is either the second or the third explanation for the use of the word "unfounded", isn't it?

A. I'm dealing with when I've used it, and I think that's quite accurate, that I'm using it at that stage in a -- what I

consider to be an appropriate legal context, the context I was operating, against the allegation that had been made.

Q. Well, let's just have a look at them. When it's used by NZDF in 2011, "unfounded" means categorically no civilian casualties. We've been through that and you've accepted that in 2011 that was the meaning attributed to the --

A. No, I haven't actually accepted that.

Q. All right.

A. I think one of the things that I will accept is that NZDF hasn't had a consistency throughout it, in addressing the -- you know, using the terminology, which is now coming to this Inquiry, about the assertion of civilian casualties. And again -- so, if we'd been consistent in our approach, which I then sought to address, you know, you might have got -- may have been, may have been the term, but again, once you link it, as in my time when the story changed yet again under *Hit & Run* to a deliberate targeting, I think the use of the term "not well-founded," in spite of what the public may think, was an appropriate response in a legal context. I can't go back and sort of say what was the advice to CDF in the past for the use of the term --

Q. I'm not asking you to do that, Mr Keating. I'm just asking you --

A. Yeah, so I can't answer your question.

Q. You can't answer the question. Well, I want to put these propositions to you and it's a matter for the Inquiry how they interpret the evidence they've heard this week.

But I'm suggesting that the evidence heard from other witnesses this week makes it pretty clear that when NZDF issued a press release in April 2011, which was all based on what we understand to be the understanding at that time, because of what Chris Parsons had said in his email of the 8th of September 2011, categorically, no civilian casualties, and that that was why the press release said the allegations of

civilian casualties was unfounded. Right? Now you've told us what you think about that?

A. Yep.

Q. But that's the evidence that the Inquiry has heard, broadly, and it's a matter for them what they make of it.

So that's the first -- so I'm saying that that suggests, that when it's used in 2011, it means categorically, no CIVCAS. You've come along and you're using it in 2017, and you've told us that you've -- in the transcript of the interview, the insignia interview that we went to -- you said "unfounded" means the same as may have been, and you read those passages out?

A. Mmhmm.

Q. The third explanation seems to be it means the same as not well-founded, for the legal reasons that you've given, and then, in this public release document by NZDF that I've just taken you to at page 568, "unfounded", here is said to mean because we're only talking about it in relation to New Zealand's actions. So that's a -- on my count, four different explanations for the use of "unfounded"?

A. I think this one here is consistent with my statement, and it may be your explanation three and four, that after *Hit & Run*, in my mind, the term "unfounded" had a legal context. So -- and it was directly related to the accusation against New Zealand troops deliberately targeting Afghan civilians.

Q. In that public release document that we just looked at, at page 568, it says, "unfounded was intended to address the suggestion that NZDF were responsible for the CIVCAS."

In the press release that you approved on 21 March 2017, which is at 245, that's not what that press release says, is it? It doesn't qualify it in that way, does it?

A. I don't know what it qualifies, or what it doesn't. Are you referring to the second paragraph?

Q. I'm referring to anything in that press release that says "unfounded," as in relation to New Zealand's actions only?

A. So, let me ask you -- this was the press release made before I conducted the investigation?

Q. No, this is 2017?

A. Before I conducted the investigation into *Hit & Run*, was this the whole -- this was the holding statement while I was in Iraq?

Q. I don't know, you tell me, Mr Keating.

A. Well, again, I'd have to look at this. I believe --

Q. Mr Radich can re-examine you on that. I don't know?

A. Yeah, I believe this was the statement made while I was in Iraq, a holding statement that Defence made prior to me getting back and conducting the full and appropriate and proper investigation. So, Defence has gone back -- you know, again on my watch -- so I'm in charge, I'm responsible for that, and given their previous statements. I've gone in and said look, let's get all the stuff together and now are going forward.

Q. Okay. Well, Mr Radich can re-examine you on that if he chooses to, but just to cut through this, would you accept from me that it is undeniable that NZDF's handling of its explanations about its position and your use of the term "unfounded" is a shambles?

A. No.

Q. Or was a shambles?

A. No, I think what it shows is that over the years, since the operation, since the ISAF operation, that our -- yeah, shambles is a tough term. I think that our processes as a Defence Force weren't coherent in giving the response that we should have been able to give, in hindsight now, and I'm sure Sir Jerry has given that, with the information that he had at the time, and the various sources. So, is that -- it appears that the -- from the information he had, the accusation of civilian casualties was baseless, and regardless of ISAF press releases and everything else that's gone out, I think Defence could have been far more coherent, now, in hindsight, if you

sort of look back to where this has got to, and used defined -- you know, because we're not -- again, I'm not being cute here. We're not lawyers. Our terminology, between educating a public, legal processes, international processes -- be more defined about what we have been full and frank with, with the possibility of civilian casualties by the helicopter. So, shambles is one term; my term is we didn't have good processes to explain that to our Ministers, to our Government, and the public.

Q. Well, if I could have the indulgence of the Inquiry, because I'm very nearly finished, and if I could perhaps just go for five minutes?

SIR TERENCE: Five minutes, all right.

MS McDONALD: And bearing that in mind, because everybody wants, I'm sure, to go to lunch, if we could just keep the answers as short as we can, with a view to Mr Radich re-examining you later if he wants to.

I want to draw a contrast between New Zealand's position and public statements about this, and the position that ISAF took in their public statements, Mr Keating, and ask you whether you would accept that, by comparison, they're strikingly different, and by comparison, ISAF were open, clear, not confused, and made it very clear both that there was a possibility of civilian casualties and importantly, that New Zealand ground troops weren't responsible for those. That's what their press release says. You'd have to accept, that wouldn't you?

A. I do accept that.

Q. All right, and I suggest to you that that contrast, in handling of the matter publicly, has created what I suggest to you, is a matter of great sadness for New Zealand, and for New Zealand Defence Force, and particularly for the men on the ground, Mr Keating, because you'd have to accept that with that lack of clarity, that lack of candour, and the confusion around all of this, the very men who put their lives at risk

for New Zealand could well feel that New Zealanders were left completely in the dark and unclear about whether they might have been responsible for these possible civilian casualties? Do you accept that?

A. No, not in its fullest. I accept that the processes used by Defence Force over those years were not coherent and well thought through, because based on what we know now, and looking back through, and again, if you look at an ISAF report, and a media statement, maybe that was the opportunity for the CDF of the day to fall in line with what ISAF had said publicly. What influenced the CDF of the day, and the other information that he had, I can't be sure, but you're right, in hindsight, if you look back through what we know now, and what I ascertained when I did this Inquiry, it became quite apparent that ISAF and others agreed that civilian casualties may have occurred, and from that point, I sought to address that, but yes. Prior to that, the handling by NZDF as far as publicity is concerned, is -- was less than professional.

Q. Thank you for that acknowledgment, and I'll just take it one step further, do you accept that it is understandable if your soldiers feel that headquarters, in Wellington, have let them down?

A. You know, I think our soldiers, sailors, and airmen rely on their senior commanders to represent them well.

Q. And do you think you have?

A. In all their theatres. Are you asking me, personally?

Q. Yes?

A. Or the Defence Force?

Q. You?

A. I think from when I took this matter up as a -- you know, as the Chief of Defence Force, yes. I think I have represented them well.

MS McDONALD: Thank you Mr Keating.

SIR TERENCE: All right, we'll take the lunch adjournment now. So, we'll adjourn for one hour.

MR GEIRINGER: Sir, I was wondering if I could have just 30 seconds of your time? Sorry to interrupt. I was wondering if I could have 30 seconds of your time before we break for lunch, just to clarify on the suppression order that was made during the session?

SIR TERENCE: Yes.

MR GEIRINGER: You've suppressed all the columns in this new document apart from the one we've discussed, but as per the evidence we've heard from the witness, making sense of that one line seems to require reference to the one line above? I wonder if we could just make a minor alteration in the suppression order to (inaudible)?

SIR TERENCE: I think the order was in terms of the lines discussed. So that was the line of 387 and half of the line on 386.

MR GEIRINGER: Sorry, if I misunderstood. Thank you for that clarification, Sir.

SIR TERENCE: All right we will take an adjournment for one hour.

(The luncheon adjournment)

MR RADICH: Sir Terence, with the leave of the Inquiry, just so we can -- the waiver that we spoke of a little earlier of privilege has come through, I understand from the Solicitor General, Mr Auld, so Ms Van Dam is able to give you the information we were looking at doing now. So, with your leave we'll actually do that now to get it done.

SIR TERENCE: All right thank you very much.

**LUCILA IRINA VAN DAM (Affirmed)**

**EVIDENCE-IN-CHIEF BY MR RADICH**

MR RADICH: Your full name is Lucila Irina van Dam?

A. Yes.

Q. And you are a barrister practising in Wellington?

A. Yes, I am.

- Q. Please would you explain the role that you have had in this Inquiry, what has been your work?
- A. In this Inquiry I have acted as an independent counsel, so as a barrister, assisting with various things that have come up in the Inquiry. And in this particular context, I was tasked with looking at who within NZDF could give direct evidence on each of the moments in time that we've been asked to account for.
- Q. And who else were you working with, were you part of a team on that?
- A. I have been working with you and then with the Special Inquiry Office.
- Q. Thank you. Please would you just let us know, and of course the reason for this is so we can think about ultimately this document, which can I ask just at the outset, have you ever seen before today?
- A. No.
- Q. Could you just take us through the steps in a forensic basis that we use to prepare the evidence?
- A. I've just written some notes, I hope that's okay, I was trying to refresh my memory, because I've been involved with all 12 of the witnesses, I've conducted about 30 interviews, and so, just getting clarity has been a little bit tricky, so I've made some notes about the timeline.
- Q. Yes.
- A. So, I started from the position of understanding what NZDF has said from 2010 all the way through to 2018. So, I did a big timeline to understand how things have progressed and changed. And it occurred to me that on the 30th of June 2014 and the 1st of July 2014 something must have happened at that point in time, because the narrative changed quite significantly from the allegations being "unfounded" to that "you probably can't rule out the possibility of civilian casualties." So, in my mind, something happened at that point in time and my instinct was that the IAT report must have come to light at that point

in time. So that was just my hypothesis, but it made sense to explain the change in narrative at that point.

Q. All right, so having come to that view, what did you then do to interrogate that further?

A. So, I asked at the Special Inquiry Office if they could look at whether there'd been any correspondence, any documents around that time that might explain the change in that narrative. An email was found from Rian McKinstry that was sent at midday on the 1st of July in which he provided an email that he'd written in September 2010, but the timing of that didn't make sense because it was midday by the time that Rian had emailed, but the comments from the Minister had been earlier that morning; so that didn't really help. So then, in the course of talking to many many many people, someone made a comment completely unspurred that "wasn't it in 2014 that the IAT report was found in Chris Hoey's safe?" And so that was the first that I'd heard of it. So of course I immediately called Chris Hoey and asked him about that. Chris Hoey's recollection was that yes, he had a bundle in his safe and that at some point in time someone had come to him and asked him for all the material that the Minister had been briefed with, and that in that context he had pulled out this bundle and given it to them. But in terms of my hypothesis that that had happened either on the night of 30 June 2014 or the morning of 1 July, he couldn't help me with that timing, he couldn't remember when it was. And I kept trying to say, you know, is there anything you remember about that time? He was saying there was a lot going on, it was obviously there was a juncture point at that time. He remembered it was winter, he remembered details like that, he remembered which building it was in, but he could not pin down the time. So, we were left with a position where we knew it probably had come from his safe, but we didn't know the time, and if it didn't correlate with that timing it was of no value at that point. So, I went back to the Special Inquiry Office to relay

what I'd found, and they suggested that I ask Chris to look in the classified register. They showed me what it looked like and what the entry would look like.

Q. Is that the register that we've been using that's in the bundle documents?

A. That's right, not the one from today, but the earlier one. So I went back to Chris and said would you mind opening your safe, having a look at that classified register, and seeing what more information we can find out about this report? That took a little while because he couldn't remember the code for his safe and it had to be broken into. When that was done, he found the register and he called me in to come and have a look at it. So, I went in and had a look and he showed me that in fact it was on the 30th of June 2014 and as well on the 1st of July 2014 that that bundle of documents that did contain the IAT report was provided to the Minister's Office. So that hypothesis was correct. But also, in the course of looking at that he then saw the entry in which it came in to NZDF's -- into Chris Hoey's safe, which was then Mike Thompson's safe. So, I then called Mike Thompson and asked him to come and meet me and have a look at the handwriting. And he could confirm that it was his handwriting. So, I asked him where did it come from, who gave it to you, what was the context? And he couldn't provide any clarity on that.

So what I did was with every witness that I spoke to I showed them, if they didn't have a classification, I did it in a way where they were looking at the annotations rather than the text of the IAT report, but I wanted to ascertain did any of my witnesses at any point in time see this and make these annotations? And I had a resounding no, none of my witnesses had seen it.

So the other thing that came up is I, as I said, I've spoken to a lot of people, somewhere between 20 and 30, and in the course of that I spoke to the -- the person who I believe

was the Director of Special Operations at the time it was put into the safe, and that's Jim Blackwell. And I contacted him and I asked him -- there were two things I wanted clarity on, one was we didn't know who it was who had briefed the Minister on the Saturday ahead of the *Native Affairs* report, so I asked him if he recalled whether he had briefed the Minister, and he couldn't recall if it was him. He knew he had on previous occasions briefed the Minister, but he couldn't say if it was him then.

And the other thing I wanted to find out was whether he had been the one to receive the IAT report and to give it to Mike Thompson to put in the safe and he again couldn't recall whether he had seen this report, he said he'd seen many and he didn't know if this was one of them. But he said that I should contact his analyst who's still within NZDF. So, I contacted her, and she checked their email records and she also checked their classified register in their safe, and she didn't find any mention of this bundle or of the IAT report, so I got to a dead end there.

And it didn't occur to me that there was another clue on that bundle, which is the one that Sir Terence Arnold found this morning, which was for a different register. So, I hadn't made that connection, I didn't explore that avenue, which is why we've never seen that register until this morning.

Q. Yeah. Did you ever know there was more than one register?

A. No.

MR RADICH: Sir Terence, Sir Geoffrey, I think that's as far as we can take it, and I think Ms Van Dam would happen happy for there to be any questions if there are any?

#### QUESTIONS FROM INQUIRY MEMBERS

SIR TERENCE: You don't have any questions? No. No, I've got no follow-up questions except this, presumably the DSO, I think you just said the DSO's office would have its own register would it?

- A. Yes.
- Q. So, if this document came from the DSO's office, if the system had been working properly, it should have been entered in the DSO's register when the DSO got it, is that right?
- A. That was my understanding, which is why I contacted the analyst.
- Q. Okay, thank you very much. That's helpful.  
(Witness excused)

**TIMOTHY JAMES KEATING (continued)**

SIR TERENCE: Thank you Mr Keating, again, I'm sorry we've held you up, but we've just resolved something.

**CROSS-EXAMINATION BY MR SALMON**

MR SALMON: Mr Keating, do I call you?

- A. Yes, you can.
- Q. As you will be aware, I have time limits upon me and I appreciate there's a lot you've wanted to say already, but if you can work with me to make your answers focused and confined to the actual questions, we'll have a better chance of finishing everything we need to in time.
- A. We'll try and meet that challenge together, shall we?
- Q. Yes, let's.

Now your brief doesn't talk about what you were doing and your involvement in these issues in 2010 and 2011, but you were Chief of Staff then to the CDF, correct?

- A. Yes.
- Q. And that would mean that you were reasonably familiar with the key events surrounding Operation Burnham at the time?
- A. No, as I've said on previous evidence, the Chief of Staff in that era had a very different role, administrative and was not in the operational chain.
- Q. But you presumably as a former SAS man would have been aware that there was briefly, at least, alarm within the SAS that

there may have been civilian casualties, you were aware of that weren't you?

A. No.

Q. You weren't? Were you dealing with the DSO in that role at the time?

A. No, as I said, the Chief of Staff to the CDF at that stage was an evolving role, it was mainly administrative. I wasn't included in any of the briefings.

Q. See that's an example --

A. Pardon?

Q. That's an example of a question that if it's just a yes or a no, we'll save a lot of time if you can answer just yes or no.

A. Okay you keep that, but I'll give the context of it, because I'm sorry that's just the way I'll respond here.

Q. Well --

A. But no, so if I'll go back to my answer, I was not involved in operational matters.

Q. That's not what I asked you though, so let me ask you a different question first, are you endeavouring to be as helpful as you can to this Inquiry today?

A. Yes.

Q. All right. One of the things that my questioning is required to do is to be efficient, and part of being helpful will be that we both focus on my answers and not on repeating the same proposition a lot.

A. And my focus is giving a truthful response, and I will continue to do that.

Q. Great. So, I asked you if you had much contact with the DSO at that time, yes or no?

A. On operational matters, no.

Q. I asked you if you had much contact with the DSO at the time, is the answer yes or no?

A. The DSO at the time, I believe -- in fact, who was the DSO at the time?

Q. Are you asking me questions?

A. Yes, I am. Again, so would somebody clarify me the facts, who was the DSO at that time?

Q. No no, we don't have time to do that, you just need to answer the questions --

A. So, the answer is I don't know --

Q. -- you're on oath.

A. -- then because --

Q. I'm not asking if you know who the DSO is, you've just said you don't. I'm asking if you in your role then had regular contact, or much contact with the DSO in 2010 and 2011, you must remember that?

A. The answer is no.

Q. You had little contact. All right.  
Do you know when Jim Blackwell became the DSO?

A. No.

Q. Do you have an approximate idea of when Jim Blackwell became the DSO?

A. No.

Q. Do you know Jim Blackwell?

A. I know Jim Blackwell well.

Q. You've served with Jim Blackwell?

A. I've served with Jim Blackwell.

Q. Do you know from your subsequent handling of this case that Jim Blackwell was involved in some of the events surrounding the fallout from Operation Burnham?

A. I assume he was.

Q. Do you know?

A. No, I don't know.

Q. Have you asked?

A. Have I asked who?

Q. Him?

A. Jim's no longer serving, and neither am I, no.

Q. So that's just a no again.

A. That's -- the answer's no.

- Q. Great. Have you asked anyone else whether Jim Blackwell had a significant role?
- A. Through the matter -- through the process of compiling the evidence that I've given and that's -- so going back and looking at the historical accounts, yes, I am aware that Jim Blackwell at a point was a DSO who was probably involved in briefing Ministers.
- Q. And if you were to guess the period of time in which he was DSO, what would your guess be, you don't need to be precise to the day, but approximately what --
- A. I cannot recall.
- Q. Just approximate?
- A. No, I'm not going to give a guess, I don't do guesses.
- Q. I'm asking you to give your best recollection in a context where you claim to recollect a number of events from years ago, is your honest evidence that you can't even put approximate years on when a friend of yours was DSO? Is that your evidence, or not?
- A. My evidence is Jim ceased being the DSO while I was the CDF, I believe in my first year. So, Dr Coleman was still the Minister, and probably with my first year, so around, he ceased around 2014/15, but I can't recall when he was appointed.
- Q. One thing we do know is that your memory has had the benefit of you taking a vibrant interest in the events of the Burnham Operation in 2017, you're quite clear on that, you investigated it, didn't you, personally?
- A. Yes, I did.
- Q. So, you would know who the key people were on the ground in Afghanistan within the SAS, and who the key people in New Zealand were dealing with the SAS -- from within the SAS around Operation Burnham, you must know that?
- A. From my investigation I focused on the people that were on the ground and I do know the Commander.

Q. Right. But again, my question is about whether you knew the people, who they were. And let me just be very specific, you're not claiming that you're not aware that Jim Blackwell was involved in events following Operation Burnham and surrounding concerns about Operation Burnham, you know that, don't you?

A. So what period are we talking about? So, Jim would have come in as the -- I don't think Jim Blackwell --

Q. Can I interrupt you again if I may?

A. Yeah.

Q. You're asking me a lot of questions.

A. No, I'm not --

Q. If you don't understand --

A. -- I'm trying to --

Q. -- my question that's fine, I'll be specific for you. In the months following Operation Burnham when there was first awareness that there may have been civilian casualties you know, as you sit here today, that one of the people involved in handling that fallout was Jim Blackwell?

A. No, I don't know that.

Q. You don't know that?

A. No, I don't know the individual who was involved in the operation post, this is an operation before my time as the CDF.

Q. But you claim that you've investigated how those events happened and what was done afterwards, haven't you?

A. No, I claimed I investigated the events that occurred in Tirgiran village on the night of the book.

Q. You're calling it Tirgiran village with me, are you?

A. Yes.

Q. Dealing then with what your investigation involved, it might help if I just let you know that we've had some fairly clear evidence so far that's established that in the time before you became involved NZDF undertook no investigation of its own into whether or not there was civilian casualties from

Operation Burnham because it regarded its legal obligations regarding the possibility of civilian deaths as met by co-operating with ISAF, you're aware of that? You're aware that that's NZDF's position?

A. Yes.

Q. And you're aware that the Defence Force opened its submissions this week, before this Inquiry, confirming that the day after the book was launched, by that time, within a day after the book was launched, this is paragraph 26 of the opening, I'm sure you've seen it, your team had established that the villages being described in the book were the ones that were the subject of Operation Burnham, you're aware of that, aren't you?

A. I'm not sure of your question?

Q. My question is you know that NZDF has acknowledged that it was not confused about which villages were described in the book as early as 22 March 2017?

A. So NZDF was never confused, in my mind, about where it operated.

Q. No, it never was. Do you agree that the public was led to believe that NZDF was confused?

A. No, I think the public -- I made the public very clear, we were very clear of where we operated.

Q. Do you agree that you gave great focus to the question of location, despite knowing that it was a case of one minor map error, and that the village is being described and the village is photographed where the exact same village is that had been the subject of Operation Burnham, you knew that throughout, didn't you?

A. No.

Q. You didn't?

A. No. What the book described was two villages, which again I'll remove the name, B and C, were completely irreconcilable with the village that we operated in --

Q. You've said --

- A. -- topographically and physically.
- Q. -- that repeatedly. The photographs match though, don't they?
- A. No, the photographs are of three villages in that valley, and, in fact, the photographs are also of topography and physical structures that didn't exist when the operation occurred.
- Q. You're running that line again?
- A. I'm stating a fact. I don't run lines.
- Q. One line you ran, and I am going to use those words, and I stopped counting at the double digits, is your assertion that your entire media strategy in 2017, and since, was reacting to the express allegation in the book *Hit & Run* that there had been a deliberate targeting of civilians by New Zealand forces?
- A. That's correct.
- Q. But you know, don't you, that one, the book does not accuse New Zealand troops of deliberately targeting a single civilian, and two, that the authors have repeatedly made that clear in public statements, ever since you started announcing that's what the book meant. You know that, don't you?
- A. No, I know the inference from the book and the press conference by the authors afterwards. And the inference in the book that when several instances that are described by their eye witnesses in the book, to me, account to an allegation of deliberate targeting and war crimes. And that was certainly the inference by the authors in the press conference after the release of the book where the Government, you know, the question was posed by the media were these war crimes, and they said they need to be investigated. So, I took the inference at the high end that the authors were -- had portrayed a story which alleged war crimes, and it was my responsibility to investigate those.
- Q. So, when you're answering my question did you know, and do you know, that they were repeatedly making public statements that you were wrongly inferring, your answer is yep I knew that, but I carried on announcing that's what the book meant?

A. No that's not my answer. My answer is you can't at one end say look we trust the troops and they did well, however, they disembarked a helicopter and immediately engaged unarmed civilians --

Q. You need to listen to my questions please.

A. -- that's a war crime.

Q. You need to listen to my questions.

A. Well, you need to listen to my answers, Mr Salmon.

Q. And if you answer my questions, I'll listen.

A. Well, you posed me the question, I'll give you the answer.

Q. I will again. You knew, and you know now, that they have repeatedly rebutted your claim that the book says that in their public statements. You know that, don't you?

A. No, I don't, I'm focusing on the release of the book and the press conference around it, and the inference drawn and the strong thesis in that book that the New Zealand Defence Force were responsible for war crimes, that's what I know. I don't know what they've said since.

Q. So, let me be clear, you've engaged in this media process and deliberately not read what's being said by the people you're criticising?

A. The only one thing, you know, and again I'll give you an honest --

Q. Yes or no?

A. -- answer, the only one thing I've read is an interview from one of the authors that said he believes the authenticity of Taliban commanders and considers their evidence to be irrefutable.

Q. Again, you're giving speeches and not answering my questions, with respect, Mr Keating?

A. I gave you the answer. The only thing I've followed in this, I haven't followed what the two authors have said --

Q. No --

- A. -- other than this rather interesting assertion that we'll believe known Taliban commanders over the New Zealand Defence Force. That certainly piqued my interest.
- Q. Mr Keating, what you're really doing, isn't it, is in failing to answer a question of mine, taking the opportunity to try to smear an author again while in the witness box?
- A. No, I've never smeared an author. In fact, in the press conference I actually praised the author for the story they'd put together. I just said it wasn't our story of the Operation.
- Q. You've said repeatedly words to the effect that the authors claim that New Zealand troops "deliberately killed women and children", you said that repeatedly today?
- A. There's a passage --
- Q. You agree you've said that?
- A. -- in the book where we -- where the New Zealand Defence Force troops leave the helicopter and immediately a group of women and children are engaged. And several passages. We went from house to house, 20 houses, and destroyed the houses.
- Q. You said that they --
- A. That's a war crime Mr Salmon, and I'm obliged to investigate it.
- Q. Good, let's talk about that then, that we can engage with is an answer. You are, aren't you, obliged to investigate the war crime and not the book, that's something you agree with me about? If there's a possibility?
- A. If it reaches a well-founded level.
- Q. Right. And the reason that you say it didn't; the reason the NZDF says it didn't, for so long, is that there was no way that there could have been any casualties?
- A. No no, not in -- that's not the reason. I looked at --
- Q. No that's not --
- A. Are you going to tell me my answer now?
- Q. I'm going to engage with you in the time we've got.
- A. Okay, you give me my answer then.

Q. No, I'm going to clarify my question.

A. Or are you going to allow me to respond to your question?

Q. Are you trying to be helpful?

A. I'm trying to be helpful to the Inquiry.

Q. Okay. I'm breaking my question down into two parts.

A. Good.

Q. Prior to 2017, do you agree that the reason there was no further investigation by NZDF was because it had taken the position that there simply were no civilian casualties. That's clear, isn't it?

A. No that's not the reason. I think the reason was is that the ISAF had conducted a thorough investigation and found that there was a possibility of civilian casualties, but they weren't attributed to the New Zealand Defence Force, and the New Zealand Defence Force cannot investigate an ISAF or a Coalition partner's operation. That's the reason why New Zealand Defence did not conduct an independent operation.

Q. Pause there.

So, you're saying in 2010, 2011, 2014, through up until the book, you knew that there were potentially civilian casualties, and NZDF knew that there were, but believed it couldn't investigate, is that what you're saying?

A. It wasn't appropriate to investigate, and there wasn't a link to New Zealand Defence Force troops.

Q. Is that a yes or a no, you knew that?

A. What did I know?

Q. That there were potential civilian casualties?

A. That's become evident.

Q. I'm asking you what you and NZDF knew?

A. That there may have been civilian casualties.

Q. Right, so you're accepting that was known from 2010 and 2011?

A. The evidence brought out in this Inquiry has shown that.

Q. That NZDF knew that?

A. That elements of the NZDF did know that.

Q. Which elements do you think knew that in 2011, for example?

- A. I'm sorry, I'm not being -- I'm trying to get the timeline here that civilian casualties may have occurred had been a common element throughout the NZDF leadership, including my time when *Native Affairs* was run.
- Q. And in 2011, you've said that?
- A. Where was I in 2011? I'm sorry the timeline -- so you're asking me to say what Sir Jerry and General Jones knew? I can't.
- Q. You can because you were Chief of Staff to the Chief of the Defence Force in 2010 and 2011, we've agreed that. You've agreed that it was known there were potential civilian casualties in 2010 and 2011?
- A. Yep.
- Q. So, you, unless you're moving from your position that you're not being cute, you would agree, therefore, that it was immediately misleading for any statement to be made by anyone within CDF that the possibility of civilian casualties was "baseless"?
- A. Yes, we've conceded that.
- Q. But also, you'd concede it was knowingly misleading?
- A. No, I haven't.
- Q. You must, because you're saying that you knew, and it was known, that there were potential civilian casualties?
- A. Yeah, but I'm not conceding that it was deliberately deceptive to the Government, you know, again there's -- the term you're using is "deliberate", there was "deliberate intention" in there.
- Q. Are you aware that there was concern within the office you were working in in 2010 and 2011 that there might be calls for an Inquiry around this even then?
- A. No.
- Q. Are you aware that there were concerns to close down media access because that might lead to the calls for an Inquiry around Operation Burnham even then?
- A. No, I wasn't aware.

Q. Are you aware of negative attitudes to journalists in relation to issues that led to an Inquiry such as this --

A. No.

Q. -- around Operation Burnham?

A. No.

Q. Not aware at all.

Are you aware of Colonel Blackwell having negative views of those persons and those journalists and seeking to undermine steps they might take that might lead to an Inquiry?

A. No.

Q. Have you ever asked him if he was involved in such things?

A. No.

Q. Do you know why he's not been briefed as a witness by NZDF?

A. No.

Q. Have you asked why he's not being briefed as a witness by NZDF?

A. No.

Q. Do you know if anyone else has asked why he's not being briefed as a witness by NZDF?

A. No.

Q. Do you know if he's ever had a copy of the ISAF report?

A. No, I don't.

Q. Did you ever ask whether he had had a copy of the ISAF report when you did your detailed investigation in 2014 into how Defence had it?

A. No, as I said, that was conducted by my Chief of Staff.

Q. Did you ask your Chief of Staff whether he'd checked all relevant logbooks?

A. No, I didn't ask him how he'd conducted his investigation, just that he had conducted an investigation.

Q. Are you aware that as a result of Sir Terence's questions this morning, NZDF has made a further log available of -- from Defence, which has shown that the DSO on 1 September 2011 had a copy of the ISAF report?

A. No, I'm not aware of that.

- Q. Well if you can take it from me that it does, can you also take it from me that the DSO at the time was Colonel Blackwell or do you not know?
- A. Well if you say he was and it matches the timeline to when Colonel Blackwell was the DSO, then your assertion is correct based on your facts, but I can't -- I don't know when Jim was the DSO, when he started. As I say, I know when he ended.
- Q. Do you agree that questions asked of you regarding the logging of such documents by the Inquiry Member this morning were fairly obvious questions that you could have asked your Chief of Staff in 2014?
- A. Yes, they are.
- Q. Do you agree that you did not ask your Chief of Staff those questions?
- A. I can't recall if I conducted an inquiry into how Chief of Staff conducted his particular investigation here. He would have come back to me with a conclusion saying look I haven't been able to source where this came from, how it got into our safe, and I wouldn't have then gone through have you done this, have you done that around this particular issue?
- Q. But this was an intelligence failure?
- A. What's that?
- Q. This was an intelligence failure?
- A. No, it wasn't, I wouldn't describe it as an intelligence failure.
- Q. Well, maybe we're using "intelligence" in different terms?
- A. We are.
- Q. It was a failure?
- A. It was a failure of good systems, of good processes within the Headquarters New Zealand Defence Force and the offers of the Chief of Defence Force.
- Q. Who takes responsibility for that, do you or does your Chief of Staff?
- A. The Chief of Defence Force of the day is ultimately responsible for the processes for running operations.

- Q. So, in terms of you taking responsibility, you didn't follow up on whether the other logs had been checked, but you agree it was easy to ask?
- A. There's probably lots of questions you could ask, yes.
- Q. Well, let's ask some of them, you earlier have said there wasn't time to undertake the sort of investigation that might have unearthed it further, I think you said you only had two days or something like that?
- A. Sorry, what's your question?
- Q. You have said to this Inquiry, I'm sorry I didn't take a note and we don't have the transcript yet, that your Chief of Staff only had two days to try to track down how the report was there, do you recall saying something like that?
- A. No, I recall the two days being the Operation Burnham post *Hit & Run*, but I can't recall saying he only had two days. I think they're -- so go back to the transcripts, but there was an imperative by an incensed Minister to get to the bottom of how this document came into our possession, but I can't remember the two days to do it. It was probably relatively open ended that we had time to go and investigate it.
- SIR TERENCE: Can I just, sorry, be clear about what time period we're talking about? Are we talking about 2017 or 2014?
- MR SALMON: 2014 now.
- SIR TERENCE: 14.
- MR SALMON: My apologies, I'm just endeavouring to cover too much ground in my time.
- A. The 17 was the 48 hours.
- Q. Okay that was that.
- Would it surprise you that we've had evidence from Colonel O'Brien today that if the relevant person's around, it took her 15 minutes to find this key document, but if they weren't around it would have taken her an hour, you wouldn't disagree with that?
- A. Yeah, it does disappoint me.
- Q. That you didn't ask for such an obvious document?

A. Not that I didn't ask, that the inquiry conducted on my behalf didn't unearth that fact.

Q. And remind me who was the person who did the looking for you?

A. The Chief of Staff.

Q. Which was who?

A. Ross Smith.

Q. Yes, he would have known too that a document like this existed, wouldn't he?

A. I would assume so.

Q. Right. Can you think of any reason why he wouldn't have looked for that?

A. No.

Q. He's a competent Chief of Staff, or he was, wasn't he?

A. He's a very competent Chief of Staff.

Q. Isn't it possible he did find it?

A. I would say no if he told me that he hadn't found the source.

Q. Yes, if he did, but did he really tell you that?

A. What's your question?

Q. Did he really tell you that he hadn't found the source?

A. He told me he hadn't found the source.

Q. You can remember that, can you?

A. Otherwise I would have revealed in the evidence that we found the source and I was able to report back to the Minister that we'd found the source.

Q. So, you can crisply remember in 2014 that your Chief of Staff told you we haven't found the source?

A. What I can crisply --

Q. Yes or?

A. No no, I can't crisply remember.

Q. Why are you saying you remember it, then?

A. I remember that the outcome was inconclusive. And I've said --

Q. You mean you can't remember what he said to you?

A. Going back to 2014 I can't remember the specifics, other than the outcome of the inquiry was inconclusive.

- Q. So, you agree this highly confidential partner document entered the office in a way that was not known and whatever checking your Chief of Staff did for you, either did not find the obvious document to look at, or did find it and it's been not disclosed to the Minister?
- A. Ask me the questions in two parts?
- Q. We've got two possibilities, haven't we here, in a world that you say on your memory is inconclusive. One is he found it and found that the person who had lodged it in September 2011 was Colonel Jim Blackwell. And that he knew, and possibly you knew, one possibility?
- A. Okay the possibility that I knew --
- Q. Hold on, the other is that he didn't look at the obvious document, at all. Which are we going with do you think?
- A. You'd have to ask Ross Smith that. But I'm not going to say here that I discovered the document and didn't take it to the Minister.
- Q. Well, I couldn't ask Ross Smith before now, because you and he hadn't told us that this obvious document to look at would exist. So here we are. And you're telling me you can't remember what he told you? On oath.
- A. So, I have publicly stated that document exists after the *Hit & Run* inquiry.
- Q. It's not what I asked. I'm talking about the log that we've only now got out of Defence?
- A. Nobody has ever asked me. Sir Terence asked me when we came to this Inquiry how would we keep those documents, and I said through a log. So, I have admitted to how these documents are recorded into the Headquarters.
- Q. But you see the question he asked you is one that you must have been asking yourself every time this topic came up, since 2014?
- A. No, no it didn't, after 2014, the myriad of things that takes over running things like a Defence Force; so, the fact that this document existed or didn't exist was not front and centre

of the Chief of the Defence Force's mind. What existed was the fact that we'd dealt with the end outcome that civilian casualties may have occurred, and the Minister has made that statement. The follow-up to how that document came in was inconclusive and not complete.

Q. Well you think. Your own memory is inconclusive, I think?

A. It certainly is, yeah.

Q. Right. So, you don't know what the outcome of that investigation really was, if you don't remember, do you?

A. Based on your inference to the questions, one thing I can be quite conclusive about is that we haven't discovered here's the source, here's how it got into the safe, therefore bury it. It appears to me that what we've done is the Minister now has that, he now has the evidence that civilian casualties may have occurred and made a public statement. He's asked me to say CDF, and again I'll put some words in there, looks like a bit of a stuff up, they were probably stronger words than that, go and find out how you stuffed it up. But more importantly, and again, I suppose this is the way I operate, fix it.

Q. Right, and then you just let it drop?

A. No, I fixed the system.

Q. Have you fixed the system by going and checking the logs and making sure they were correct?

A. No, not around this issue, because there were a myriad of soldiers, sailors and airmen deployed around the world and this was just one instance. We'd reached the -- we'd fixed this issue.

Q. But here and now we both know, don't we, that of all the fire-fights you have to deal with, those are quite remote, and an angry Minister is clear and present danger for you, isn't it? It is. Everything gets dropped for an angry Minister, that's been a key theme in this whole week.

A. Ah yeah, to one extent answering a Minister's demands is one issue, balanced with the CDF's role, again, over a range of other responsibilities.

Q. Right. So, you had an angry Minister wanting to know how this had happened and you let it drop --

A. No.

Q. -- that's your evidence on oath?

A. No, it's not.

Q. There's a tick here --

A. No, I didn't say I let it drop, I said I then went on and fixed the system.

Q. How did you fix the system?

A. Did I get to the bottom? I removed all the operational documents and the operational processes from the office of CDF and I put them in an appropriate place and I continue to do that, which included removing the command.

Q. You uplifted all of these logs?

A. No.

Q. How is that fixing the system that relates to these logs?

A. Because that's historical. I'm talking about going forward so we wouldn't repeat this type of incoherence and inconsistency in the future, I took operations out of the Office of CDF and took them out to Joint Headquarters where they have the staff and the processes and the systems to ensure that documents like this get recorded in a coherent manner.

Q. But any problems with existing top-secret documents in your office, you were happy just to leave in whatever chaos they were in?

A. No.

Q. You fixed them?

A. I fixed the system and the processes.

Q. But part of that system is this very logbook which you're needing to say you didn't look at?

A. CDF doesn't look at those logbooks of stuff going in and out of safes.

- Q. No, CDF gets someone to look at them for them?
- A. CDF gets his staff and his organisation to do those types of investigations. CDF trusts the competence of his staff.
- Q. Yes, but the CDF doesn't delegate something that's easily done and then just let it go when the Minister's angry. So, I just want to check, are you seriously going to say that you just let all this slide, is that really the way you want your evidence to sit?
- A. No that's not what I said Mr Salmon. I said I took it very seriously and said we wouldn't do this again and we wouldn't run operations as they'd been run in the past and all the information that was required to be built up in the history in events like this, and I would fix it and the evidence that's shown in my brief is I continued to fix a system.
- Q. But the fundamental problem, systemic problem, here was that a top-secret document had come in without you knowing how, and you claim without you knowing it was in your possession at all?
- A. That's right.
- Q. And you've never fixed that?
- A. Yes, I have.
- Q. Or --
- A. I can't -- so what do you mean "fix".
- Q. Go and find out who brought it in?
- A. We attempted to do that and again, as the Inquiry has shown, just how flawed our systems are, it's now discovered that document has been marched in in that way. The fact it was not marched into a coherent staff system is the issue. It was marched into, as I say, I was the Chief of Staff for Headquarters, I dealt with administrative issues, it was marched into a safe, which isn't the way you should manage at a senior level operations.
- Q. Okay. There's a pencil or what looks like pencil tick beside the fact the DSO marched it in, that's dated 18 January 2018, is that yours?

SIR TERENCE: Well you'll have to show the witness.

MR SALMON: Do you remember looking at this document in January 2018, perhaps I'll put it that way?

A. No.

Q. I'll show the witness.

SIR TERENCE: That is very faint, the writing on this.

MR SALMON: You'll see in the second column from the left beside the word "DSO" is a tick and on an earlier version it was easier to see, but it says 18/1/18.

A. Sorry, I'm looking at the wrong document then, so 18/?

Q. Second --

A. Are you asking me to identify a tick?

Q. Yeah, can you see the tick beside DSO?

MR RADICH: Could I assist by using this one and pointing to it?

A. Yes, it looks like the tick of a, I don't know, I'm not into forensics.

SIR TERENCE: Mr Salmon, just wait a moment, we'll give the witness a more legible copy.

MR SALMON: Shall I pause my clock or not sir?

SIR TERENCE: You can have a minute.

A. I think the tick looks like a left-handed person and I'm not left-handed and the handwriting is certainly not mine, it's far neater than mine.

SIR TERENCE: Right. Thank you. So, you heard the answer Mr Salmon?

MR SALMON: I did sir, thank you.

You're aware of the handwriting on the documents that was stapled to the ISAF report, you've talked about that with my learned friend, haven't you?

A. Could you -- could I see them again what we're -- I mean, we talked about a lot of documents over the last --

Q. We're talking about the draft briefing papers that were attached to the ISAF report when it was found in the safe, do you remember --

A. Oh, the bundle of documents?

- Q. Yes. And you didn't know whose handwriting it was?
- A. No.
- Q. There can't be that many people who work on briefs to the Minister on potential -- or on war crime allegations, which is what you now say you thought you had. How many might have done it, six people in your office?
- A. No, with all the staff who could have penned and annotated, dozens.
- Q. Well, it had to be someone who was okay with seeing the ISAF report, isn't it?
- A. Yep, which again, which could include a large part of the legal staff, the operational staff, the SCE staff, so, yeah. The answer is much more than six.
- Q. You haven't mentioned the public relations staff that NZDF has in that office though, have you, and it could have been them as well, couldn't it?
- A. Could have been, yeah.
- Q. So that's maybe, on your view of things, potentially a pool of people as big as those in this room, but possibly down to maybe half a dozen?
- A. Anywhere in that range.
- Q. Right, a bit of questioning would probably help us narrow that down if we were repeating history and going back in time, agree? We could narrow that down a little bit with some enquiries if we were investigating at the time whose handwriting it was?
- A. Could do.
- Q. How long do you think it would take for someone who wanted to know the answer to identify handwriting in such a small office? A day or less?
- A. If it was a focus, it would happen very rapidly.
- Q. Really rapidly?
- A. Yeah.
- Q. You haven't done that, have you?
- A. Not me personally.

Q. You haven't asked someone to do that, have you?

A. No, I don't direct how investigations occur, I ask that we, you know, the answers that we're after are forthcoming to me.

Q. Right. So, you would direct someone to find out whose handwriting it is, but not tell them how to do it?

A. No, because I wasn't aware of the handwriting on the document. I've directed somebody to find out how we missed this document in our safe.

Q. You were aware of it?

A. What's that?

Q. Mr Keating, you were aware of the handwriting. You have said in your evidence that while you were in Australia you asked for a reading bundle to be put together of all of that and had it put together and read it. You know whose handwriting that was?

A. No, I don't know whose handwriting that was.

Q. You knew there was handwriting there?

A. No, I'm not sure I was.

Q. You didn't look at the fact that these were draft statements to the Minister annexed to the ISAF report you claimed not to have?

A. So, I've looked through those documents. So, what's your question again?

Q. My question is you knew in 2014 that there was handwriting on those documents that would have helped you find out who had had the report?

A. I would have reviewed all those documents and, you know, focused on what was important at that time, which was getting an answer to the Minister who was incensed about so what do these documents tell us.

Q. No, the Minister was incensed also about why you had a report you'd said you didn't have and why it contradicted public statements?

A. Two issues, after the fact. One we've sought clarity now. And absolute confirmation.

- Q. The Minister wasn't angry because the Minister had read the ISAF report, the Minister was angry because the Minister had discovered that we, the New Zealand Defence Force, had had it all along. And you've told us you wanted to find out how that happened and you got your Chief of Staff to look at it?
- A. Yes.
- Q. But isn't it strange that the two most obvious things to do, look at that log, which was found in 15 minutes by Colonel O'Brien, or work out whose handwriting it is, are things that every single witness called by the NZDF has chosen not to do, ever?
- A. Yes, it is.
- Q. And isn't there a possible reason for that, that no-one wants to know the answer within the NZDF?
- A. No, I don't think that's -- that would be my approach at all.
- Q. Is it possible that you already know the answer and it's the person who's not being called as a witness, Colonel Blackwell?
- A. I don't understand your question there?
- Q. In your mind right now, are you thinking that it could well have been Colonel Blackwell who wrote those notes and who had possession of that document?
- A. No in my mind it was inconclusive where that document came from.
- Q. Are you thinking now --
- A. No.
- Q. -- that it's starting to look more likely?
- A. No.
- Q. You're ruling it out?
- A. I'm not ruling it out or in, I haven't -- you know, I don't jump to conclusions, I look at facts and evidence and I haven't conducted the investigation myself.
- Q. Okay. Time's cracking on, so I will talk to you now about the investigation you claimed to do at paragraph 45 of your brief.
- A. Which investigation do I claim to do?
- Q. The one at paragraph 45 of your brief.

In this paragraph --

A. Which page is that?

Q. -- you talk about your steps following -- it's page 83 of the bundle, your steps following seeing the book?

MR RADICH: Can I just ask, he's been directed to his Brief of Evidence, which I don't think he's realised he has been directed to, nor found. So, I just wonder if he can get the document?

MR SALMON: My apologies, not in that bundle, you have a Brief of Evidence you read out when you began giving this evidence.

A. Oh yes.

Q. Okay, and you'll probably recall it, in paragraph 45 you say:

"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 wrong doing."

Now pretty much everything I can see you doing, all of your documented efforts involve picking at details of the book, rather than investigating primary sources elsewhere, agree or not?

A. Disagree.

Q. Now, this is something that we could all form a view on based on the documents the NZDF has disclosed, are you really saying on oath that you think we'll see more documentary evidence of you trying to find out or investigate what happened with civilians in that period after the launch of the book than we will find you criticising the book? Are you really saying the actual facts will match that?

A. I think there's two things --

Q. Are you saying that?

A. No, I'm not going to give you a cute answer or a yes or no to that.

Q. I don't want a cute answer.

A. Okay, I'm going to give you a factual answer and allow me to do that. There were two things going through my mind, initially, in those 48 hours --

Q. Sorry to cut you off Mr Keating, but you're not answering my question and I don't have the time for this process.

A. Well if you don't have the time, I'm sure the Inquiry will have the time, because this is material to what we're saying.

Q. I'm asking you --

A. And I'm not going to be trapped into a yes or no around here.

Q. Fine, you don't have to answer the question.

A. Because there's two answers to that.

SIR TERENCE: Hold on. Let the witness answer.

MR SALMON: Sure. My apologies sir.

A. So there are two things. And the imperative that I have, I looked at facts and evidence that that would lead to me determining whether I went to a disciplinary investigation well-founded. Initially looking at the book it was confusing, it wasn't clear evidence, and although I called for first-hand evidence it wasn't forthcoming. A book isn't evidence. So, the first tranche of it was purely on evidence that I could produce to go to well-founded. Consequently, subsequent to that, we then started to examine the book and examine the inconsistencies between what we knew as evidence and the book. So, the answer is yes and no to that question, if you like.

Q. Okay. All right. Let's talk about things you could have done if you wanted to investigate the possibility of civilian casualties at the time, and you tell me if you did them or not, just if you did them.

Review the tapes again and see where the rounds landed? You could have done that, did you do it?

A. I reviewed the tapes.

Q. Do you agree that they don't just show a few rounds from a mechanical slaving issue, but in fact show repeated firing near houses, do you agree they show that?

A. No.

Q. Do you agree they show firing near individuals who are huddled?

A. Yes.

- Q. Do you agree they show firing near women and children?
- A. No.
- Q. Do you agree that the fact that someone might not be aiming at a house, if they are firing exploding 30 mm rounds, doesn't mean people in houses aren't hurt, that's just obvious, isn't it?
- A. The nature of the tapes I reviewed, which included the dialogue that went through and the dialogue from the pilots themselves, and the ground controller, extraordinarily lengths were gone to by the ground controller and the Apache crews to avoid civilian casualties and damage to civilian property.
- Q. Again, just my question, you agree that the fact that someone's not aiming at a house doesn't mean there's no damage to the house or the people in the house, if the round they're firing near the house is explosive. You must agree?
- A. Yeah if a round is close by a house, if it goes outside -- if it goes inside a range that wasn't part of a SOP, yes of course.
- Q. Right. Do you agree that that was happening, that there were rounds, they were all explosive, that were going near people and houses?
- A. What we've agreed to is that the rounds -- the rounds from the Apache where the gunsight wasn't slaved hit civilian houses. The other rounds that were used throughout the operation were outside the zone of civilians and collateral damage.
- Q. Do you agree that those improperly slaved guns didn't just fire once off target, they fired off target and then fired again and again. You agree with that or not, we can all watch the video?
- A. Pardon?
- Q. Do you agree with that, or not?
- A. What was your last comment?
- Q. We can all watch the video, I just wanted to know whether you agree?

- A. No. We'd observed through that video that it took some time for the Apache crews to recognise on firing that their rounds were not falling where they were intended to.
- Q. I'm asking about you?
- A. Pardon?
- Q. I'm asking about you. Rian McKinstry said on one watch he clearly, the word "clear" or "clearly" was his, here, could see that there were potential civilian casualties. You could see the same?
- A. No -- sorry, no, I couldn't see there was potential civilian casualties, you've linked two things. I've said two issues here and let's not conflate them. That the Apache firing at the insurgent -- identified insurgents in the hills, the rounds were not going where the cross-hair was going and it took some time for the Apache crew to recognise that. Subsequent in that tape also, there is an instant where some of those rounds enter the house and civilian casualties may have occurred from that instance.
- Q. Right, so you saw it, that's a yes? You saw that and saw that there were potential civilian casualties?
- A. Civilian casualties may have occurred. There were civilians in that building.
- Q. Right, but you didn't then go or commission anyone to go and contact locals from the village, contact the alleged victims and find out what had happened to them, you didn't do that?
- A. As part of my investigation, no.
- Q. Right. You didn't contact the Independent Directorate for Local Government in Afghanistan to get a list of dead or wounded?
- A. No, I went off the evidence provided in the ISAF report.
- Q. The ISAF report of course was done in what, two days, without visiting the area and without doing those things?
- A. For reasons that are described in the report by ISAF at the time, that they could not get into the village.

Q. Right. And, also because the "I" stands for "initial", and there were other reports and investigations being done, is that right, isn't it?

A. No, the complete report on the incident as far as ISAF and the Government of Afghanistan was that report conducted by Brigadier General at the time, Zadalis. What I -- so I'll answer your question --

Q. Yeah, please do.

A. -- no, I didn't stop there.

Q. You did go and get lists of dead and wounded from the Directorate of Local Government? Your OIA response to Mr Hager says you didn't?

A. No, I didn't go and get lists, but I continued to pursue the evidence which could have included those lists by deploying an officer to Afghanistan, by deploying officers to NATO in Europe to find out if there were any more evidence that could be forthcoming.

Q. Are you saying you did that?

A. I did that.

Q. Well you didn't go and check the hospital records, that Mr Stephenson says he's done and obtained, confirming female victims, you haven't done that. Why not just go to the hospitals, if you want to know?

A. No, I haven't conducted that level of inquiry.

Q. You haven't talked to aid organisations?

A. What we normally find in these circumstances is the aid organisations talk to us.

Q. You haven't talked to aid organisations, though, have you, no?

A. We went into Afghanistan to talk to a variety of organisations, including NATO, to see if the claims that were being made were verified and put forward by any other agency.

Q. Did you go and talk to the CRU members? Mr Stephenson tells me he has, and they have accounts of civilian harm, did you do that?

A. We talked to our people who were part of that operation working with the Ground Forces, and the evidence that I have is that the CRU operating with our people, and the physical evidence I saw, did not back up the claims.

Q. Have you got some documentary evidence that I haven't seen in all of this? It sounds like you have?

A. What's that?

Q. Are you describing stuff that's in documents somewhere, when you say, "we did this"?

A. I'm describing the accounts of the initial investigation that I conducted which included reviewing the gun tapes, interviewing people who were part of the operation who were willing to come forward and give evidence.

Q. Sorry, I just can't see that described in the document what you're saying happening?

A. Well, that was my initial investigation.

Q. Where did you write it down?

A. It was part of my initial investigation.

Q. Where did you write that down? All of these things you did, or didn't do, where's it written down? Where are the emails? The file notes?

A. In full documents that we made throughout the time.

Q. And we have them here do we?

A. Well, I assume you have --

Q. Okay, so we've got records of everything you did do?

A. Yes.

MS McDONALD: Sir, if I can just say, just to be clear, I'd be very interested, as Counsel Assisting, in any interviews with any CRU or any of that sort of investigation. As far as I am aware, we haven't received that material, and if this is an indication it exists, it would be wonderful if Mr Radich could provide that to the Inquiry.

SIR TERENCE: Yes, Mr Salmon?

MR SALMON: Yes, thank you sir, and I apologise for my voice, to Mr Keating. As paragraph 46C of your brief, you say that in the course of this investigation the -- and I'm quoting here:

"The NZDF became aware for the first time of a further investigation conducted domestically by the United States"

Is that really true?

A. Yes.

Q. But from early on your team knew from the ISAF report that there was a second investigation ongoing. We know that, do we not?

A. You're talking about my team, what period are we talking about that we knew?

Q. Well, the ISAF report itself says that there was to be a comprehensive investigation to review the IAT findings, you know that, don't you?

A. What I am aware of is that the Americans conducted their own investigation into the behaviours of -- the behaviours, the actions of the air team.

Q. But you knew from 2014 when you read the ISAF report that there was a second investigation being undertaken, because the ISAF report says that clearly?

A. So, the secondary investigation conducted by the Americans we're aware of, into the actions of their people, which is proprietary for the Americans.

Q. Well, it's not, because it's got "for release to US and NZ" written on it as you now know. So, it's not proprietary just to the Americans, is it?

A. When I talk about proprietary, under their jurisdiction.

Q. Okay. But my question to you --

A. To prosecute, or not.

Q. My question to you is you knew that there was such an investigation from at least 2014, didn't you, because the ISAF report says so clearly, and you read it carefully following your return from Australia before briefing the Minister, the IAT report?

- A. I recall, yep, going through that bundle and looking at the information I had.
- Q. And it told you that there was a further investigation, didn't it --?
- MR RADICH: I'm just -- I need to get to my feet here because a) I don't think that's right, and b) we don't have --
- SIR TERENCE: No, well it's been troubling me. The --
- MR SALMON: My apologies, I'm probably conflating the press release which I have seen.
- SIR TERENCE: That's exactly right, you're talking about what we've described as the third press release.
- MR SALMON: Yes, my apologies --
- SIR TERENCE: It's not the IAT report.
- MR SALMON: -- I am conflating, and I haven't seen the IAT report, you'll appreciate. So, I'm just conflating in my notes, and at the time of day and running out of time and voice, my apologies Mr Keating.
- You agree that you knew from those releases that there was a further investigation?
- A. Yes. You know, whether it was from the releases, but I'd be -- again what triggered that is that I'd be aware that the Americans, if they had that issue with their gunsight, would conduct their own investigation. That's just a standard procedure. If that was the trigger that I'd seen it in a document, I don't know. But taking, you know, when I became fully aware of everything of this operation, it's just a -- it's not a natural assumption. This would occur. A would follow B.
- Q. But you're not saying that your understanding of the Laws of Armed Conflicts was such that you didn't think that there might be a need to investigate by New Zealand still? You've acknowledged that, haven't you? And said you were doing it even though you knew the New Zealand troops were not the people who pulled the trigger, because New Zealand was, I assume, in charge of the operation, is that not right?

A. What's the question?

Q. I'd understood you to agree that the Laws of Armed Conflicts required you to investigate unless there weren't good grounds for an investigation?

A. Yes.

Q. Even though the potential --

A. Not the Laws of Armed Conflict, the Armed Forces Discipline Act.

Q. Right, which is one of the laws that cover armed conflict by New Zealand, isn't it?

A. Well Law of Armed Conflict is not strictly a law.

Q. Okay. Well let's not get distracted by that.

Your paragraph 46C implies that that report by the United States was into a discrete issue about wrongful editing, you don't really mean that do you?

A. What the Americans look at is the gun tapes and to ensure that crew haven't edited tapes out to hide crimes.

Q. But you're not suggesting that that's what the report was actually about? Because that's how I read your paragraph, you're not suggesting that are you?

A. No, I'm not suggesting that.

Q. Okay. And you've actually looked at that report, haven't you?

A. I can't recall in detail, that report.

Q. Well, it suggests there's potential civilian casualties, which is quite a change from there being none and it being baseless?

A. But we all knew that at that stage anyway --

Q. And so, where's your investigation -

A. -- from the IAT report.

Q. -- into those?

A. Pardon?

Q. Where's your investigation into those possible civilian casualties then?

A. I did that as a result of the book into the civilian casualties that were -- the book alleged were as a result of New Zealand Defence Force actions.

Q. But you had the NZDF, including with the JTAC, calling in the fire from the air --

A. Yes.

Q. -- fully involved in this operation?

A. I was. And I looked at the action of the JTAC in calling in the fire and was satisfied that they met all the standards required to ensure there was no collateral damage, inadvertent collateral damage --

Q. You interviewed them?

A. -- deliberate collateral -- pardon?

Q. I understood there was no investigation that involved any of that by NZDF?

A. I investigated that as part of the ground force actions. Part of the ground force actions was the influence of the JTAC.

Q. In 2017?

A. In 2017.

Q. Why wait three years when you knew there were possible casualties three years prior?

A. So, the casualties that were mentioned in -- again, this is where the story -- that the story of the accusations, if you like, I'll use another term, the "conspiracy" changes from 2014 to 2017 which changed to a deliberate targeting by New Zealand Defence Force. That's what triggered my preliminary investigation.

Q. I'm not talking about that. You'd agree --

A. You are.

Q. -- if New Zealanders were involved, I'm talking about 2014?

A. Yeah, New Zealanders --

Q. If New Zealanders were involved --

A. As part of a Coalition operation.

Q. -- and calling in fire --

A. And calling in fire.

Q. -- and civilian casualties, they had several obligations, one is to investigate if there were any grounds --

A. Yep.

Q. -- you agree on that?

Another is to take all steps to help the wounded, agree with that?

A. Of course.

Q. Right, you never went out and found out who the wounded were though, did you?

A. No we looked at, you know -- so our obligations there as part of the NATO operation as being a partner in that, albeit a New Zealand ground force-led operation, was to look at the evidence that was presented, look at the inquiry conducted by the appropriate theatre authorities, and see if it triggered the requirement for New Zealand to conduct an independent investigation. It did not reach that threshold.

Q. It said there were possible casualties?

A. Yep.

Q. It said there's another report you didn't bother looking at?

A. No -- no I didn't say --

Q. You knew there were possible wounded?

A. -- I didn't bother looking at it, I could have looked at it, and I probably did, and it would have referred to the errant rounds from an Apache.

Q. So, you probably saw --

A. It's a far cry between that and 2017 in *Hit & Run* and a deliberate targeting of civilians and their property.

Q. Which we don't need to bring up right now, I'm focusing on 2014. So, you think you saw the AR15 report in 2014?

A. You know, I think I saw evidence that presented, you know, that something had occurred with an Apache; that the NATO commander on the ground; that the Government of Afghanistan, were satisfied was a mistake of war, and not a deliberate action.

And therefore, there isn't a trigger for the NZDF to go and investigate that further.

Q. Are you saying if there's an operation in which we know there may be wounded, but we think that the particular rounds were

fired by the partner rather than our troops who outnumber them and are present, we have no moral or legal obligation to go and check? Is that your evidence?

A. And check?

Q. Check for wounded?

A. So, I believe we did check, and we checked that NATO and the Government of Afghanistan were satisfied with the investigation that they'd conducted independently.

Q. No, it's been pretty clear in the evidence that right through these years we're talking about, there was no independent investigation, and all that was done was to rely on the IAT report?

A. Which was an independent investigation conducted by General Petraeus' legal branch.

Q. Which did not involve checking for wounded --

A. I think it was as thorough as --

Q. -- after the fact and seeing if they needed help, did it?

A. -- it could have been and the processes used were well rehearsed, which included, going back to your earlier question, in all potential drawing information from ICRC and other aid agencies in theatre who are normally the first to trigger this type of investigation. The fact that they were largely silent, including the United Nations, were silent on this at the time, and continue to be, speaks volumes. The only people claiming this, are the authors.

Q. Well, the only people who have been to talk to the villagers --

A. And the villagers.

Q. -- that you know of --

A. No, they haven't been to talk to the villagers.

Q. Sorry?

A. They haven't been to talk to the villagers.

Q. Who has?

A. Where's the evidence?

- Q. Well you worry about that when other people give evidence. You haven't been to the -- talked to the villagers?
- A. No.
- Q. You haven't had lawyers talk to the villagers?
- A. No, we haven't seen any physical evidence from the villagers of Tirgiran village.
- Q. Would you agree that you're certain not to find any of that evidence if you never look for it?
- A. It hasn't been forthcoming.
- Q. You haven't looked for it?
- A. I think we have looked for it.
- Q. I'll try to wrap --
- A. In fact, at the end of the investigation I requested that any further evidence that anybody has, at the end of several announcements that I've made, including the press conference, was if there's any evidence that people can present me which would allow me to investigate further, and then subsequent to that I've continued to -- in fact, there's a directive on file where I've sought facts and evidence that would stand up in a proper court. Not a court of a media court.
- Q. Any rate, if we come back to paragraph 46C of your brief we can disregard the suggestion there that you did not know of the second investigation until 2017, we did know of that earlier, didn't we?
- A. I'm sorry I haven't got the document in front of me.
- Q. Well, you did know of the second investigation before 2017?
- A. So in the documents I must have been aware, you know, when I read it and briefed Minister Coleman, that the Americans had -- and again, we're going over old ground again, that I would have either got it from that document or assumed that if an Apache helicopter had misdirected fire, that the Americans would have investigated.
- Q. Okay. You answered my learned friend that you were comfortable with how all of this process was done. Do you agree that it is unfortunate that there remains the

possibility that there were deaths and injuries from an operation initiated by the New Zealand Defence Force, but the New Zealand Defence Force has never proactively checked on the people involved, do you agree that's unfortunate?

A. Give me your first statement? Am I comfortable with what?

Q. You were asked by my learned friend whether, my words, you look back and saw mistakes in any of the ways that these things have been handled. I'm asking you now if you think it's unfortunate that NZDF has never gone to check on these people who might have been hurt or killed?

A. I think NZDF has gone to extraordinary lengths to look at the evidence, or draw evidence, to see if civilian casualties actually occurred and if they were attributed in any way directly or indirectly to the actions of the New Zealand Defence Force.

Q. By "extraordinary lengths to look at the evidence", you mean by reading and seeking to rebut one book?

A. No.

Q. And just finally, I think I do need to put it to you, there's a possibility that the reason that the ISAF report which showed the media statements to be wrong was not discovered until later was the responsibility of one or more other people. I just want to put to you that here we have multiple former and current SAS operatives who know each other well at key times in this process, from you, to Jim Blackwell, to Rian McKinstry, to Colonel Parsons -- Brigadier Parsons, and so on, Peter Kelly. A real SAS contingent in the key positions throughout this process, and an unusual degree of lack of knowledge about a couple of key points. Do you agree that an outsider might think that the amount of ineptitude and the number of mistakes that NZDF has needed to claim were made to make this look innocent, seems unusual? And in fact, to an outsider, this looks like there was a degree of coordination between multiple members of your office to conceal the true position from the Minister and the public?

A. I'm not going to give a speculative answer of what it looks like from the outside. I'll give you an answer from the inside. That I was the CO of the SAS and a proud CO who left in 2001. And I hold those people who were under my command, and many of them that you spoke to, to extremely high standards of integrity. Because I know instances like this can and will continue to occur. You can't brush anything under the carpet. And, again, I won't use the term, we're not smart enough for a conspiracy.

What I'm not proud of, and again I'll say this here and, again, I'm not going to say it was a cock-up or anything like this, is the processes used and how we communicated what happened during Operation Burnham throughout, through the various CDFs and offices that communicated throughout and our document keeping. It wasn't tidy. It was unprofessional. But it wasn't a conspiracy. I think there's been enough throughout -- you know, you'd have to be -- you'd have to be a dumb CDF to say that actually, you know, what was in an ISAF report, which was broad knowledge to a Coalition, that we were inept in some of our communications going out. But a conspiracy from within, sir I take that as -- professional umbrage to that.

Q. And I'm sorry that you do, you'll understand why I ask.

Can I finally ask then, I understand the sense of teamwork and backing each other that the SAS must have, or at least I can imagine it. And I can understand why you pull together and take a common line, but you'll --

A. Not to back a lack of integrity. So, one of our characteristics --

Q. Well, hear my question --

A. - is comradeship, and comrades don't back a lie. That's one thing that would unhinge us as an organisation.

Q. But you know --

A. There was no sort of --

Q. -- Colonel Blackwell, for example, to be someone who doesn't have a routine association with accuracy on issues like this, you know that, don't you?

A. I know Jim Blackwell as one of the most professional officers that I've served with.

Q. Does that mean that you think he is always honest with the public and the press?

A. I think Jim Blackwell has a high level of integrity that I would not question.

Q. Even on those issues of the press?

A. Even on those -- again, all of us in Defence Force are bound by this, and again, you can't go rogue yourself, and I'm not sure that Jim Blackwell has made any statements himself to the media.

Q. Or about the media?

A. I'm not aware.

Q. Well, we may find out. Thank you for your time Mr Keating.

SIR TERENCE: All right it's 3.30 so we'll take a 15-minute break and then Mr Radich can begin the re-examination.

(Afternoon adjournment)

#### RE-EXAMINATION BY MR RADICH

MR RADICH: Mr Keating, good afternoon to you. Just a few matters to cover with you before we finish your evidence.

Could I ask you to please -- to look at the large bundle, page 245?

A. NZDF responds to book?

Q. That's right. Do you see the date on that and the title?

A. 21 March 2017.

Q. And so, do you understand which press release this one is?

A. I believe it was the one made on my behalf by the Vice, while I was travelling back from Iraq.

Q. All right, and do you recall, again, you've mentioned this in your evidence, but just to recap what your involvement was in the drafting of this particular press release?

- A. Look, I recall having a conversation with my Vice once the book was released, in Afghanistan, and our -- there was a requirement -- appropriate requirement by the Government to issue a press statement, immediately, in response to that book, and I would have discussed with Kevin the contents of that press statement.
- Q. Yes, thank you, and the relevance of this is some questions from my learned friend, Ms McDonald, about this statement itself, and in particular the third paragraph. Do you see the third paragraph there, and would you please read it out?
- A. "The NZDF does not undertake --"
- Q. Oh, sorry, one back?
- A. Sorry, yes, you're right:  
"The investigation concluded that allegations of civilian casualties were unfounded."
- Q. Thank you. Now please keep that page open, and would you pick up the other bundle please, only because this is -- it is in the big bundle, but just my reference is here, and please go to page 183. Do you see page 183?
- A. I've got that.
- Q. And just have a little look down it to orient yourself with the date and with what it is, but can you help us with what you're looking at there, please?
- A. Wednesday 20 April, so the day before the press statement, and an email from Lieutenant Colonel Cummins to Jack Steer, the -- who I -- Rear Admiral, I assume was the Vice Chief of Defence Force at that stage.
- Q. And the date on that -- the year that that email was --
- A. 2011.
- Q. Thank you. Now, do you, if you would look, please, at the fifth paragraph down that page, the last paragraph on that page, and would you read out, please, the first sentence in that paragraph?
- A. "The investigation concluded that the allegations of civilian casualties were unfounded."

- Q. Thank you, and now just looking back at the one we looked at for 2017 in the big bundle, that same paragraph you read at number 3, do you comment -- can you comment please on those two -- these two paragraphs when you look at them together?
- A. Yes, I think that's the -- that's the theme that we've been discussing in my time here, that Defence Force has used, in its public statements, around the potential of civilian casualties.
- Q. And do you see, when you look at that paragraph, the first three words of those two equivalent paragraphs, can you comment on that please? Do you see the first three words of those two?
- A. Yeah, "The investigation concluded", yeah.
- Q. Yes, and in relation to 2017, are you able to make any comment on those three words?
- A. I think it's still referring -- in fact, I'm sure it's still referring to the IAT investigation and concluding that civilian casualties -- so the allegation, and again, this is I suppose the operative term to me here, and again, I'm having a look at this -- the allegations of civilian casualties were unfounded.
- Q. So, looking again at the first three words, in 2017, was that your understanding?
- A. In 2017, that -- I suppose as far as allegations being made -- you know, if I'm sitting in Iraq and looking at a series of allegations being made, my understanding in that statement would be that the allegations being made, and again, you know, from my perspective, being made about how those occurred, are unfounded, that, you know, there was deliberate targeting of civilians. I -- you know, was aware that civilian casualties may have occurred, but the allegations regarding them are unfounded, you know, which sort of leads to how they occurred --
- I don't -- so sir, you know, in hindsight, there needed to be qualifications there. In hindsight, in that statement,

going off this other statement, I think, you know, my explanation wouldn't be an explanation that would go well with the public -- you know, would be accepted by the public. You know, the allegations of deliberate targeting of civilians, you know, breaching the Laws of Armed Conflict, or law, were unfounded. However, you know, there should have been a statement, qualifying there somewhere, saying but civilian casualties may have occurred, which Minister Coleman had said in 2014.

Q. Yes, and let me take you back in time, and again, please just tell me immediately if you weren't involved with these events, and you're not the right person to talk to them, but please would you look at page 77 of the smaller of the two bundles? Is this an email you recognise? If you look at the email in the middle of the page from Wātea SNO, it's dated September 2010, just have a moment? Do you recognise that?

A. No, I don't.

Q. No, all right.

And if you look at the -- if you just take your time to read the first paragraph, is that -- is there anything in there that's within your knowledge in terms of the information that's conveyed? It's fine if it isn't.

A. Well again, I wasn't aware, you know -- I'm drawn to the fact "clears of allegations", but again, that paragraph, "no way civilian casualties could have occurred", I think is, you know, my review now going back, that's a statement which is obviously incorrect.

Q. All right. Thank you.

Now, would you please go to the Inquiry bundle, the larger one, at page 46, and this is in relation to the questions from my learned friend Ms McDonald about Tirgiran?

A. Yes.

Q. And I just wanted to, without detracting from anything in that exchange, ask you please to look at page 47. And can you please just give us -- in the circle there are three names in

boxes -- can you refer to each of them, please, and tell us what you understand of them and where they are?

A. In the page on 47?

Q. 47, yes?

A. Yeah, again, I think the interpretation is going to be really difficult with this black and white, without any sort of -- you know? I've got names and contours on a line. The information that was given to me through the Inquiry was obviously in colour and had far more sort of detail. So, it's very, you know, could be anywhere?

Q. Yes, my learned friend took you to the name, where the word "Naik" appears. Are there any other names in that?

A. Well, there is Dahane Nayak, you know, and again I believe -- I'm just not sure. I think there are many locations in Afghanistan called Naik; it's a common phrase used to describe, I think, a settlement in Afghanistan. So Dahane Nayak may have -- you know, be a descriptor of a village.

Q. Yes. Are there any other names on that page?

A. Yeah, Tirgiran, and likely graveyard.

Q. Before these were put to you today, or this particular page, had you seen this particular page before?

A. No, I can't recall seeing this particular page -- I cannot recall seeing this particular page. It's not that I hadn't, but I reviewed a wealth of information in my preliminary investigation.

Q. Yes, all right. Thank you.

There's been some mention of the AR15-6 investigation report. Mr Keating, have you -- could I ask you please to go to the Inquiry bundle, the one you have in your hand, and go to page 123? Do you see what you were looking at on that page?

A. I do; that's the ISAF inquiry conducted, I believe, by General Zadalis and the authorities in the Afghan Government.

Q. I think that if you look at page 132, I think yes, the person's name is blanked out. Might it be someone other than General Zadalis. I don't need a name?

A. Oh, it could be. Yeah, if I can just have a look at this inquiry again?

Q. Yes, please.

A. Yeah, so I'm sorry sir, your question?

Q. If you look please at paragraph -- well, let me go back one-step. Do you understand what this is in the context of the IAT report?

A. Yes.

Q. And if you could explain that, please?

A. This is the specifics around the operations of the Task Force Nighthawk and the air elements investigation.

Q. And would you look, please, at paragraph number two on page 123 of the bundle, and if you wouldn't mind working your way back from the end of that paragraph to the beginning of the sentence, and read it out for us, "Based on...".

A. "Based on additional review of the weapons systems video from the Air Weapons Team in the AC-130, the IAT lead recommended a comprehensive investigation to review the IAT findings to thoroughly review the WSV."

Q. Which means, do you know?

A. I'm not sure.

Q. No, all right?

A. "...and determine..." -- it's a video -- weapons system video, sorry.

Q. Thank you.

A. "...and determine if somebody intentionally edited the Weapons System Video to shape the IAT's report".

Q. Thank you, just stop there. Having read that, do you have a sense of the purpose of this report?

A. Yeah, again, I think it was, you know, to the best of my knowledge and looking at the procedures conducted by these types of operations in Afghanistan and something that General

Petraeus and successive NATO commanders have put in place, was to sort of double check the investigation hadn't been tampered with in any way, to see that sort of crews had tampered with the videos, you know, the crews or the grouped crews, to sort of edit pieces out.

Q. Would you turn now, please, to page 128 of that bundle, still in the same document? And could I ask you to read also, into the evidence, the first paragraph there. You'll see the heading "Conclusions"?

A. Do you want me to read that out?

Q. Yes, if you wouldn't mind?

A. "The IAT executive summary stated that all engagements appeared to be in accordance with the appropriate Rules of Engagement and the tactical directive, exhibit 3, IAT executive summary. This investigation concurs with the IAT findings. Although there are areas where things could have been done differently or better, the unit effectively used this mission as a way to make improvements in their processes with regard to weapons maintenance, crew training and the overall understanding of the tactical directive. It is also important to understand the stresses placed on the crew at the time of the mission, night terrain, poor communications and a high threat level to friendly forces all played into the situation."

Q. Thank you, and could you now please turn to page 130, and do you see the heading at the top of that page, "Conclusions," and would you read that one, please?

A. "The investigation concurs with the IAT observations that, based on the Weapons System Video evidence, it is possible that CIVCAS occurred, because at the time of the Air Weapons Team engagement, women and children appear to have been present (Exhibit 3 IAT executive summary). However, there is no evidence in the video that confirms there were civilian casualties. The only piece of information that can be confirmed is that rounds impacted on the roofs of some

buildings, where it was possible that civilians were located. Based on evidence that I reviewed, I concur with the IAT findings that civilian casualties are possible, but cannot be confirmed."

Q. Would you like to add anything to that?

A. No, I think it confirms what Dr Coleman, in his statement, had made and I laid out, you know, comprehensively in my press conference, post the release of the book *Hit & Run*.

Q. Yes, thank you. My learned friend, Mr Salmon, referred to the JTAC having called in the fires. Could you comment, please, on that phrase?

A. Look, JTAC has some responsibility on the ground for some of the fires and particularly those fires that are closely related to the New Zealand Defence Force ground troops actually in the village itself. The air element still have relative freedom outside those boundaries, but sticking as the report noticed within the tactical directive, you know, the mission itself, the tactical directive, is not a -- you know, a search and destroy, or a kill mission. The mission itself, the tactical directive, was there to arrest and detain the insurgents, and all the evidence that I observed showed the forces had done that.

Also, the air elements had been confined to meeting the elements of their tactical directive, which was protect the ground forces. They weren't there to kill insurgents; they were there to protect ground forces. All the engagements that I noted, in the -- either around the village, directed through the JTAC, or seeking permission from the JTAC, or in the hills surrounding, they were extremely disciplined in not going for targets of opportunity, but targets that would present a threat to the ground forces or the extraction force of the helicopters when they came in.

Q. Thank you.

QUESTIONS FROM INQUIRY MEMBERS

SIR TERENCE: Mr Keating, I just have just one quick matter and Sir Geoffrey has some issues.

Can I just ask you to take the spiral bound volume at page 345?

A. Yes.

SIR TERENCE: And that's your letter to General --

A. Pavel.

SIR TERENCE: -- Pavel. And just -- can I just ask you to take a moment to read the final paragraph again -- just read -- oh sorry, not the final paragraph; the final paragraph on page 345?

A. "The North Atlantic Treaty --

SIR TERENCE: Oh, you don't have to read it aloud. Just read it to yourself?

A. Yes.

SIR TERENCE: So, the letter is written on the basis that there's an executive summary of a fuller report.

A. That was our belief at the time, that it was sort of entitled executive summary.

SIR TERENCE: Right, and the only reason I raised this is that you were taken to another letter on the 15th of March, the date of your letter to General Pavel I think is in 4 April 2007. You were taken to a letter of 15 March and you -- of 2007, which you can find in our -- in the Inquiry bundle at 231?

A. Oh, this is this other one?

SIR TERENCE: And you were taken to the passage at the paragraph beginning at the very bottom of page two and the top of page three?

A. Oh, this is NZDF. No, does not hold a, yep.

SIR TERENCE: So, the -- I may have it wrong, but when I read this, I understood it to be talking about the full report?

A. I see your point, Sir Terence, and again, I can assume that -- I'm just trying to look in this period. You know, I continued to -- you know, again, question whether the executive summary was actually the full report and why it had

deployed the Colonel acting Brigadier to go to -- and in fact two, one to Kabul, and one to NATO to talk to General Zadalis, and the conclusion was, this was the full and comprehensive report. Therefore, I assume in here, you know, there is an assumption that can be made; I'm writing back to Peter Hosking and saying look, we haven't got the full report, you know? The qualification should be, but we've got an executive summary, and it's not releasable at this stage.

SIR TERENCE: Well that's just what I wanted to clarify, because you accepted in cross-examination that this was -- statement was incorrect, but when you look at the contemporaneous documents, that's not necessarily the position at all. It depends which --

A. And can -- I could look at it -- I could look at it either -- you know, again, as with many of these things, in hindsight and where we were at the moment, you know, we had a really good relationship with the Human Rights Commission, as we did with Judge Boshier, and we were trying to be as transparent as possible with this. I couldn't, you know, again, with the way we were approaching this, be holding something, you know, through a lie, saying we haven't got it. You know, it just wasn't the style that we operated in. And it would soon have been uncovered by Judge Peter, anyway.

SIR TERENCE: Okay. I just wanted to clarify that for the record. Sir Geoffrey?

SIR GEOFFREY: Mr Keating, I want to change gear and concentrate on some different issues than we've been looking at, for the future. What lessons can we learn? I was quite struck by your characterisation of the NZDF's systems with which we have some familiarity now, about the poor nature of the systems, and they weren't tidy, you said, and not professional, and they didn't have good processes. So, let's leave that on one side and ask what good processes would look like, going into the future?

A. I think -- so I'll answer your question directly. They look like what the CDF today has, and the removal of operations out of the Office of Chief of Defence Force, and what we'd call compartmentalised operations, you know, which always -- you know, the need to know and the highly sensitive, highly risky operations, for risk on a range of reasons, I was always struck by what I thought was a great danger of the CDF himself, and they always have been his to this day, you know, running those out of his office with the processes. We have a Joint Headquarters, it's been around -- it's been maturing around since, you know, 20 odd years, but we had a reluctance to hand Special Operations to a full staff who, you know, had an independent commander, the person who's responsible to CDF for all operations, if there was a frigate going, a humanitarian, or SF operations, and what I'd instituted was that the operations, and even compartmentalized ones, were run out of there. I and my staff would be a conduit to oversee those and be a conduit to the Government. I think you start to conflate, when you're running operations and the communications for it, it just -- it doesn't work, and I think what you see here is a result of that, that the NZDF didn't have the processes to look at how this operation unfolded, and the rhetoric around it, and the commentary around it, and say, you know, let's go and examine this. This is a whole old chain that needs to be brought together in a coherent way. I believe that has been done. There's one element -- if you'd allow me permission to also say, the other thing that struck me, and again, I knew with a lot of the commentary post this sort of -- you know, the accusations made in *Hit & Run* -- and I ran a workshop to say, is this the best practice, and looked at international best practice, what our Australian colleagues had done, the Americans had done, you know, other similar militaries, with how we would investigate this type of accusation more appropriately in the future. Now we have a military justice review currently under way, and I think this

is, you know, the findings out of the workshop that I'd initiated, you know, had a very open sense to let's look at a better way, rather than CDF, you know, again under -- which was appropriate under the Armed Forces Discipline Act to investigate it themselves.

SIR GEOFFREY: Yes, I --

A. That doesn't meet, I think, contemporary standards for public scrutiny.

SIR GEOFFREY: It's interesting you mention the Australians here because one of the first hearings we had, Sir Angus Houston, who was a respected head of the Australian Defence Force, said that whenever accusations were made of civilian casualties, that is allegations or facts, they did their own investigation. He told us that. Don't you think it would have been much easier if that had happened here, at the beginning?

A. You know, so I don't think we had the -- I think the contrast is the size of the New Zealand -- you know, we had one lawyer and our one -- you know, it sounds corny in a way, but our one lawyer was there as an Officer of the Court, as all our lawyers are, as well as an Officer of the Defence Force, and you can see the conflict there straight away, but again I judge the professionals to do those investigations, to raise to the Director of Legal Services, there's something here. We New Zealanders need to trigger our own investigation. What became apparent in this case, we looked at this case, was it hadn't reached that trigger level. There wasn't evidence -- in fact there was no -- apart from what the villagers had said at the time and come, and the Inspector General of -- General Petraeus did the investigation -- there were no other well-founded claims or evidence to say hold on a minute, there may have been a crime conducted by the New Zealand Defence Force, and I'm relatively confident -- no, I'm very confident, that our lawyer on the deck would have picked that up and said -- because they do; they've done it on

a number of occasions -- this is not right. We need to investigate it. We haven't got a choice.

SIR GEOFFREY: I appreciate that answer, I just -- when you look at this, there are about five occasions over the years when the same thing is looked at. We look at it when the New York Times starts it off, and then there's advice in December to the Minister of Defence, which isn't right. Then we look at it again in 2011, when there's a *Q and A*. Then we look at it again in 2014, which you've been through. We look at it again in 2017, and then you set up a task force, which is -- you've told us about, and the task force was sent all around the world and it produced a one and a half page sort of report which was given to the Minister on the 5th of July 2017, I can take you to it if you want, but it's not -- I'm just saying that nowhere, anywhere that I have seen, has there been a detailed analytical effort to put together what happened, how it happened, when it happened, and what the consequences of it were. And had such a document been prepared early on, none of this would have happened, probably.

A. Yeah, I think the -- again, so I will assume on behalf of Sir Jerry and Rhys, in their time when this occurred, that they relied heavily on the investigation that was conducted by the ISAF and NATO at the time, and Petraeus being satisfied and Pavel, or whoever was the NATO CMC, Chief in Command at the time, they took these investigations, you know, pretty seriously and involved the Government of Afghanistan. The fact that the Government of Afghanistan, the fact that the United Nations, the fact that aid agencies hadn't said -- you know, nobody had said that this is incomplete. There was a dialogue going on through New Zealand, which continued to change, and I draw -- that the accusations made from the villagers and the initial thing that triggered the investigation by NATO to *Hit & Run*, the stories are very very different, and the story that triggered me conducting a preliminary investigation were based on, you know, a very

different account and very different facts than the ones that were presented to General Petraeus and General Zadalis back in -- you know, when the operation occurred.

SIR GEOFFREY: I accept that, but what I want to put to you is this, that the ISAF investigation does not preclude New Zealand doing its own investigation.

A. No, it doesn't.

SIR GEOFFREY: And I appreciate that the Armed Forces Discipline Act looks like it's all a question of discipline, but it isn't, is it? What you really need to do is to have an analytical study of the facts, not to try and point the finger at a soldier, but to find out what happened so you've got a record of it?

A. Yeah, so let me give you the military context, and I agree with you to a large extent, and this is the thing I explored in the workshop, the challenge that we have with sort of formal processes, and look, I'll take some sort of liberty by saying these accusations are made all the time, and I think you'll find that in NATO, that the type of investigation is only triggered when you reach a certain threshold. There is a culture in certain nations that we serve in, third world nations where there is always an accusation, whether it comes from the villages themselves, or whether it comes from the opposing forces dialogue, that will continually try and discredit the military operation, that's the nature of contemporary operations. What we rely on is both professional military judgement, and the in-built legal processes to say has this reached a trigger of threshold with the other five -- you know, a little bit of embellishment, I apologise here -- that have been made today. So, in any one day in Afghanistan theatre, there were probably, at times, hundreds of operations underway. You know this was a theatre of -- you know, without defining -- you know, getting into war, of significant conflict, of which stories are coming in. You haven't got the ability -- and again, even NZDF operations,

PRT operations, you know, accusations are a -- you know -- so, what occurs first is a professional military judgement to look at what's happened. You de-brief the people and the lawyers sit in. If it reaches a trigger -- look, I'm absolutely confident -- if it reached a trigger of -- I'll come back to the term again "well founded evidence" that a crime had occurred, I had every confidence that the CDF of the day would have deployed to Afghanistan -- and we've done this before; we've done this on other occasions. If it reaches that trigger, that threshold, we would have deployed an appropriate investigation to investigate, within our bounds, you know, which was -- we were bound to --

SIR GEOFFREY: Yes.

A. -- the accusations made against New Zealanders.

SIR GEOFFREY: You see, I've looked at the Armed Forces Discipline Act 1971, and you can set up, under it, Courts of Inquiry, but it's a very -- fairly elaborate process. It's not the sort of thing --

A. A Court of Inquiry is not an appropriate process for this.

SIR GEOFFREY: -- not for this, although I notice they set up a Court of Inquiry when Lieutenant O'Donnell, sadly, was killed.

A. Yeah.

SIR GEOFFREY: And that must -- is that always done when one of our soldiers dies in a foreign theatre?

A. Yes, it's -- when a soldier dies a Court of Inquiry is automatic.

SIR GEOFFREY: Yes. Well, you see --

A. You know, the Court of Inquiry does not compel people to give evidence under it, and you know -- and that can't be used afterwards? In this --

SIR GEOFFREY: No, no, but you see, what I'm worried about is that you've got a lot of good lawyers in your operation, to some extent you may be over-lawyered. Let me just ask you this, all you need is a detached kind of piece of work that says, factually what happened, is rigorously checked, and is on the

record, so that when it's revisited, you don't have to do it all again. It was done all again, several times here, and not well.

A. Yes.

SIR GEOFFREY: And I want to get a mechanism that stops that happening. I mean, the Australians have an Inspector General that they can call on; I don't know whether that's a good institution or not, but it seems to me that there are, as you've said, some pretty serious defects in the processes, and some of your legislation's pretty old.

A. It is.

SIR GEOFFREY: And let me ask you another question that's really bedevilled me through this Inquiry, where does the Ministry of Defence sit in all this? What do they actually do? I mean they seem to go to all the meetings, but you know, are they a check and a balance on the military side or are they just an ornament?

A. No, they give policy advice to -- but again, non-operational policy advice and you know, under statute, don't have a responsibility. Not that various Ministers haven't sought Secretary of Defence's opinions, but, you know, CDF is not answerable to the Secretary of Defence for operations.

SIR GEOFFREY: Well, this workshop that you ran, which sounds a creative thing to do, what sort of conclusions did it come up with?

A. The conclusions were that our system is not fit for purpose, for contemporary operations, to give assurances to the public that we're behaving professionally. You know, there was lots of models suggested, but it was determined that with the -- I'm just trying to see the time; it must be almost occurring now -- with the review of the Armed Forces Disciplinary Act and Ministry of Justice System, this needs to be an issue that's addressed in that, and whatever construct comes out, it gives the Government, the public, but I'd say equally, the New Zealand Defence Force and the CDF, comfort

that this is done. And talking with my Australian counterpart, one of the successes to Angus Houston, he's very comfortable that this is passed over, that it has that independence, but equally, I mean, the balance for us, it has the professional nous to understand military operations.

SIR GEOFFREY: You see, the way I read the system now from the soldiers' point of view, it's sort of Sydney or the bush. You either get disciplined or there's no real inquiry, and I don't think that's the way to do it.

A. Yeah, I'd like to -- perhaps I'd push back at that if I can, Sir Geoffrey? You know, I sat down, with our lawyers, who then go to Crown Law, and you know, spent 48, 72 hours looking for something. You know, my view is to, book aside, everything aside, serious accusation, where is the crime? Where is the evidence to sort of pursue, you know on a fact and evidence based -- a crime that has been committed that I can take to the next level?

SIR GEOFFREY: Yeah, but I -- you know, I don't think it's a question of crime. I think it's a question of what happened and knowing what happened. I don't -- I'm not talking about criminal responsibility here; I'm talking about getting information so you can tell the Minister accurately what happened.

A. Yeah, I think that's the legacy, you're right, but I'd say on my watch, with *Hit & Run*, what I was confronted with and whichever way you dress it up, and my briefings to the Prime Minister and the Minister say, was the operation. You know, the assertion that it was a revenge attack, conducted unlawfully -- and conducted unlawfully, was the front and centre of my investigation.

SIR GEOFFREY: Well, can I --

A. Not what went on.

SIR GEOFFREY: -- just ask you one last question? It's a really serious matter for anyone in your position to provide

information to a Minister that isn't accurate, because the Ministers rely on it; that's how the system works.

A. They do.

SIR GEOFFREY: And there has to be greater rigour put into the advice to Ministers, doesn't there, to ensure that it doesn't contain error in it?

A. Oh, absolutely. It's, I mean -- as a -- particularly as a CDF on operational matters, but any chief executive, you have to be pretty sure of the -- the facts, or if you're providing information that can't be, you know, completely verified, that has to be absolutely clear to the Minister too. One must caution early on, you know, in -- when accusations are made, that you don't come up with definitives and I think this is one of the things here, is that, you know, in particular -- and particularly -- let's say particularly for military operations where there are all sorts of interpretations, in a confusing chaotic environment, what went on. To be able to go back to the Minister and say, absolutely, this is what occurred, early on in the piece, I think you're sort of damned to live by that advice and be damned by that advice. I sat at the end of it, can look back over a number of years, and read, ah okay. This is why he said that at that time, that piece of evidence, but as it became all clear to me, you know, against -- you know, so my review against the accusations made, there's a very clear Swiss cheese model that I'm sort of looking back and saying okay. This is how it didn't occur; let's deal with this, but to your question, and your line, how do we prevent this from being done? I think the lessons are being learned over there and I'm optimistic that the Military Justice Review, which isn't conducted by Defence, it will be conducted by the Attorney General, and the Solicitor General, will lead to better processes in the future for this.

SIR GEOFFREY: Thank you.

SIR TERENCE: Well thank you very much for your time, for your attendance.

(Witness excused)

MR RADICH: Well, Sir Terence and Sir Geoffrey, at this stage, the next thing that I need to do is to apply to you for an adjournment, to have this hearing now in its present form come to an end, part-heard. The reason that I ask for that is the discovery this morning of the document that we have been looking at. The fact that we now know more than we did, for the reasons that have unfolded. The fact that we now have some information about people involved, at the time, that we didn't have before, and my submission to the Inquiry is that a little time needs to be taken now for us, or for the Inquiry -- certainly with Counsel Assisting, to interrogate some of the information that we now have, and that it would be appropriate -- most appropriate for the current CDF, Kevin Short, to just give us to wrap this Inquiry up after those steps have been taken and you have all of that relevant information in front of you.

So, on behalf of NZDF, I apply, at this stage for an adjournment of this hearing, so that those steps can be taken and followed through to assist you with getting to the bottom of the matter properly.

SIR TERENCE: All right. So just -- would you envisage that you may need to call further witnesses?

MR RADICH: Yes sir. Yes, I think at this stage we have work to do, but there are -- there is a name or two there that we certainly would want to follow up, and I think in terms of the obligations we all have in this room to assist you to get to the heart of this matter, we need to do that and potentially have people before you, or recalled.

SIR TERENCE: Yes. All right.

Thank you. Ms McDonald, do you have any view about this?

MS McDONALD: Thank you Sir, and Sir Geoffrey. Yes, I have discussed the matter with Mr Radich. I think it is appropriate that Counsel Assisting in the Inquiry work with Defence to have a look at some of the original registers and original material, and also, I think that it will be necessary to have additional witnesses called. I think it seems pretty clear that Mr Blackwell will need to give evidence, to the Inquiry and possibly also a recall of Mr Smith, possibly Mr Thompson, and we may be able to hear from Mr Hoey who has been unwell for this hearing, but is central to this issue as well. So, yes. The short point is, I think we do need an adjournment, and those matters need to be attended to.

SIR TERENCE: Thank you. Mr Salmon, do you have a view about this?

MR SALMON: It all sounds sensible Sir, and obviously whatever assists you, Sir Terence, and you, Sir Geoffrey, is the right course.

SIR TERENCE: Right. Thank you.

All right, well, we'll grant the application. So, we'll adjourn now, and we will reconvene at some point. So, the manager will be in touch with everybody to see if there's a convenient time.

MR RADICH: Thank you. We will work as steadfastly as we can.

SIR TERENCE: Right, well thank you very much, and thank you to all counsel for your assistance for over the last four days. We are adjourned.

(The hearing adjourned part-heard)