

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS

MEMORANDUM OF COUNSEL FOR THE CROWN

10 December 2018

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MAY IT PLEASE THE INQUIRY:

1. In accordance with minute number 6 of the Inquiry, the Department of the Prime Minister and Cabinet (DPMC), under cover of this memorandum and as set out in the statutory declaration of Karen Marjorie Leigh Jones, produces all material relevant to the terms of reference of the Inquiry which is in its possession and control.
2. The material provided by DPMC comprises the following classes of documents:
 - 2.1 Notes created by the National Security Group;
 - 2.2 Notes created by the Policy Advisory Group (PAG) (PAG Notes);¹ and
 - 2.3 Papers and minutes of the Officials Committee for Domestic and External Security Coordination (ODESC).
3. A number of the documents carry national security classifications, and will accordingly be subject to the Inquiry's procedure for handling classified information. As the material is produced to the Inquiry before the final determination of the Inquiry's procedure for handling classified information, the Crown applies for an order under s 15(1) of the Inquiries Act – to remain in place pending further order of the Inquiry – to prohibit publication of, and to prohibit access by the public or non-Crown core participants to, all of the material set out in Appendix 1. The Crown understands that the application may not be determined until the Inquiry has had an opportunity to review the material in accordance with its proposed review procedure. The Crown also understands that, should the Inquiry be minded to lift the s 15(1) order (if issued) or otherwise consider disclosure of the material, the Crown would be given an opportunity to make an application under ss 15 and 22 of the Inquiries Act, with reference to s 70 of the Evidence Act, prohibiting the disclosure of the material to non-Crown core participants on a permanent basis.

¹ The PAG Notes are listed in Schedule A of the Statutory Declaration.

PAG Notes

4. As well as concerns relating to the disclosure of material carrying a national security classification, the Crown submits that there are considerations relating to the PAG Notes, which justify specific confidentiality protections for this material.
5. The PAG is a small group of advisors within DPMC established to provide politically impartial, free and frank advice to the Prime Minister, in his or her constitutional role as leader of the Government. The PAG advisors are the Prime Minister's main advisors outside of her Private Office.
6. The matters that PAG advise on are often high profile and subject to media and political scrutiny. Their advice is often provided under strict time constraints and therefore needs to be developed rapidly. Given these time constraints, the advice is often brief, clear and direct, and is not subject to the more careful drafting advisers would prefer if the advice were to be disclosed out of context.
7. PAG advice also often involves communication of information gathered from many sources, some of them confidential. This can include sources with national security classifications. However, given that the notes are only intended to be viewed by the PAG advisors and the Prime Minister, the specific national security sensitivities, or other confidentiality considerations, may not be noted. For example, the documents will often carry a marking "for the Prime Minister's Eyes Only" (if any), rather than a national security classification marking.
8. The Prime Minister has the unique constitutional position of being ultimately responsible for maintaining a Government's cohesion and ensuring Ministers are operating within the doctrine of collective responsibility. PAG advice is, accordingly, given in a different context to that in which departmental advice is ordinarily generated. At times, the advice provided by the PAG to the Prime Minister requires the free and frank expression of opinions in assessing the views and performance of other departments and ministers. For this reason, PAG advice to the Prime Minister is held closely, and not shared even within the Crown.

9. Importantly, the advice provided by the PAG to the Prime Minister requires an environment of confidentiality and trust between the PAG and the Prime Minister, which enables the expression of candid and, at times, challenging views.
10. In *A New Inquiries Act*, when discussing the proposed statutory regime to allow inquiries to regulate public access to their processes, the Law Commission noted that the grounds for withholding information under the Official Information Act 1982 (OIA) are also relevant to decisions concerning restricting public access to inquiries.² Relevantly, s 9 of the OIA recognises that official information can be withheld where necessary to:
- 10.1 maintain the constitutional conventions for the time being which protect:³
 - 10.1.1 collective and individual ministerial responsibility;
 - 10.1.2 the political neutrality of officials; and
 - 10.1.3 the confidentiality of advice tendered by Ministers of the Crown and officials; or
 - 10.2 maintain the effective conduct of public affairs through:⁴
 - 10.2.1 the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty.
- unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available,
11. Successive ombudsmen, including the current Chief Ombudsman, have accepted that, due to the unique constitutional position of the Prime Minister as Head of the Government, and the unique nature the of the advice, PAG

² Law Commission *A New Inquiries Act* (NZLC R102, 2008) at [6.42].

³ OIA, s 9(2)(f)(ii), (ii) and (iv).

⁴ OIA s 9(2)(g)(i).

advice must be provided in an environment of confidentiality. Accordingly, successive ombudsmen have accepted that, generally, disclosure of PAG advice could be detrimental to the effective conduct of public affairs and good orderly government. As a result, the ombudsmen have found that the withholding grounds under ss 9(2)(f)(iv) and 9(2)(g)(i) will generally apply to PAG Notes. The current Chief Ombudsman has also noted that there would need to be particularly strong countervailing public interest considerations favouring release to outweigh the valid public interests in protecting the effective conduct of public affairs by inhibiting ability to express free and frank expression of opinions, and / or the constitutional convention protecting the confidentiality of the advice tendered by PAG advisors to the Prime Minister.

12. While the Crown acknowledges that the list of factors in s 15(2)(a) to (f) of the Inquiries Act does not specifically include the matters dealt with under ss 9(2)(f) and (g) of the OIA, the Inquiry has a broad discretion under s 15(2)(g) to consider other factors. Accordingly, the Inquiry is entitled to consider the matters in s 9(2)(f) and (g) of the OIA.
13. The Crown submits that disclosure of PAG advice would damage the constitutional convention that protects the confidentiality of advice provided to the Prime Minister. The Crown also submits that disclosure of PAG advice, reliant as it is on a confidential and unguarded environment, would not only be likely to inhibit the ability of PAG officials to express their opinions candidly, quickly and in the neutral form required, but may also inhibit the willingness of the Prime Minister to receive this type of advice in future. This could in turn hinder the effective administration of government. Accordingly, it is submitted there is a public interest in restricting public access to PAG Notes generally, and specifically in relation to this Inquiry.
14. Based on the above, the Crown respectfully requests an order, under s 15(1)(c) of the Inquiries Act, that the Inquiry consider the PAG Notes in private, to the exclusion of other participants, including other Crown agencies. The Crown also seeks a related order, under s 15(1)(a), prohibiting publication of the PAG Notes.
15. If it transpires that the Inquiry considers the information contained in the PAG Notes is required to be disclosed in some form to other participants, in

the interests of natural justice, or to the public, in the interests of open justice, the Crown would be happy to work with the Inquiry to generate an appropriate summary of the advice for disclosure.

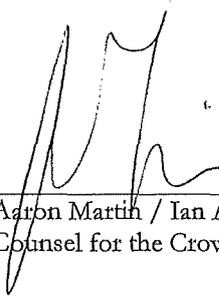
16. As a result of the particular sensitivities of PAG Notes, and particularly the fact that they are generally kept confidential even from other parts of the Crown, the office of the Ombudsman has undertaken to handle PAG Notes in accordance with a unique protocol. Under this protocol, a limited number of senior officials within the Ombudsman's office are able to receive or access them for the purpose of an Ombudsman's investigation. The Ombudsman's office also employs safe-handling techniques and returns the PAG Notes to DPMC at the conclusion of its investigations (or otherwise inspects the PAG Notes onsite at DPMC's offices). The Crown respectfully requests the Inquiry consider similar arrangements.
17. Should the Inquiry wish to receive further submissions on this matter, the Crown would be happy to assist.

Material potentially relating to paragraphs 7.9 and 7.10 of the Terms of Reference

18. The documents listed in schedule 1 of this memorandum potentially relate to matters covered by paragraphs 7.9 and 7.10 of the Inquiry's terms of reference. However, the Crown considers the scope of these paragraphs is unclear and, accordingly, it is unclear whether the material listed in schedule 1 is required to be produced pursuant to the terms of the order under s 20 of the Inquiries Act.
19. At this stage, the Crown proposes to provide this material to the Inquiry for its review, to determine whether it is within the scope of the Terms of Reference, rather than to formally produce this material pursuant to the order contained in minute number 6. The Crown makes this distinction only because the Inquiry's decision as to whether the material is in scope, and therefore covered by the order, will have an impact on the scope of the duties imposed on other agencies under the respective s 20 orders that apply to them. The Crown also anticipates that reviewing the material listed in schedule 1 will assist the Inquiry in considering the scope of paragraphs 7.9 and 7.10 of the Terms of Reference. If the Inquiry determines that the material is within the scope of its Terms of Reference, the Crown will formally produce the material.

20. The Crown would appreciate any further direction the Inquiry is able provide as to its interpretation of the scope of paragraphs 7.9 and 7.10 of the Terms of Reference.

10 December 2018



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