

Provision of information about Operation Burnham to the Ombudsman

Legislation	Official Information Act 1982, ss 4, 6(a) and (b); Ombudsmen Act 1975, ss 13(3), 22(3) and 30; Public Records Act 2005, s17(2); Evidence Act 2006, s 70
Agency	New Zealand Defence Force
Ombudsman	Peter Boshier
Case number(s)	540915
Date	February 2024

Self-initiated investigation by Ombudsman into allegations Ombudsman was misled by NZDF in previous OIA investigation relating to information about Operation Burnham—additional relevant information identified and released in Burnham Inquiry—Ombudsman of the opinion NZDF acted unreasonably as a summary released under the OIA was incomplete, the Ombudsman was not provided with access to all relevant information, and there were poor record keeping practices at NZDF—Ombudsman did not form opinion he was wilfully misled by NZDF—No recommendations made as a programme to improve information management systems and practices underway at NZDF

Background

On 21 March 2017 the book *Hit and Run* by Nicky Hager and Jon Stephenson was published. It described a 22 August 2010 joint military operation involving NZSAS soldiers in Baghlan province in which it stated a number of civilians were killed or injured, including a child (Operation Burnham). The book prompted a number of requests for related information under the Official Information Act 1982 (OIA).

In 2018 the Chief Ombudsman conducted an ‘omnibus’ OIA investigation into complaints from various requesters about the refusal of the New Zealand Defence Force (NZDF) to release information about Operation Burnham. The information requests were wide-ranging, under the broad headings of:

- the rules of engagement in force at the time of the operation;
- the location of Operation Burnham;

- post activity reports;
- video footage and photographs;
- International Security Assistance Force (ISAF) documents;
- information relied on to explain whether there were civilian casualties; and
- identity of insurgents killed.

On the strength of representations from NZDF as to the serious harm to New Zealand's international relations that would result should the information be released, the Ombudsman formed the opinion that most of the information requested was appropriately withheld under sections 6(a) and (b) of the OIA, but recommended that a summary of Operation Burnham should be released publicly.

In response to continued public concerns relating to the allegations in *Hit and Run*, the Government initiated an inquiry (the Burnham Inquiry) into Operation Burnham in 2020. Its purpose was to:

...seek to establish the facts in connection with the allegations [in Hit and Run] with a focus on civilian casualties, and compliance with the rules of engagement and humanitarian law.

The Burnham Inquiry reported in 2020.

Following the Burnham Inquiry's report, the Ombudsman received a complaint about NZDF's conduct during the earlier OIA investigation. The complaint was that the Burnham Inquiry report, and documents published as a result, demonstrated that NZDF had misled the Ombudsman in the context of the OIA investigation and that as a result, documents were wrongfully withheld.

Investigation

The Ombudsman decided to investigate on his own motion under section 13(3) of the Ombudsmen Act 1975. The investigation centred on whether he was misled in the earlier OIA investigation into NZDF's refusal to release information on Operation Burnham.

The Ombudsman identified specific areas to be considered in the investigation as:

- the accuracy of the summary of Operation Burnham events prepared by NZDF during the OIA investigation;
- whether NZDF omitted to provide the Ombudsman with access to all information relevant to the OIA requests; and
- NZDF's advice to the Ombudsman regarding the harm that would result from release of the information.

During the investigation, the Ombudsman considered the findings of the Burnham Inquiry and relevant information and comments provided by NZDF, and conducted interviews with key NZDF officials. The interviews included consideration of briefs of evidence from each of these officials.

NZDF Summary of Operation Burnham

In March 2018, the Ombudsman formed a provisional opinion in his earlier OIA investigation that while much of the material withheld by NZDF about Operation Burnham could be protected by sections 6(a) and (b) of the OIA, NZDF should release a summary of the events. In response to this, NZDF compiled and published an information pack (the summary).

During the investigation, the Chief of Defence Force acknowledged the summary from the earlier OIA investigation was *'overly brief and general and that the framing of the air attacks had the effect of underplaying the scope of Operation Burnham'*.

The Ombudsman considered the specific wording of the summary and compared that with the findings of the Burnham Inquiry.

The summary described the air attacks as follows:

The supporting aircraft soon identified and reported numbers of insurgents with weapons taking up positions on high ground, and within Tirgiran, that the Ground Force Commander deemed to be a threat to the helicopters and the Coalition forces on the ground.

At 0054, after the targets were positively identified as direct participants in hostilities and that collateral damage would be avoided, coalition aircraft were given permission to engage the insurgent groups. Those engagements took place in an area to the southwest of the landing zone.

The summary went on to say:

...during this time Coalition aircraft observed that rounds from a Coalition helicopter had fallen short of its target. According to the report of a later joint ISAF/Afghanistan Government investigation, civilian casualties may have occurred as a result of these rounds falling short and striking two buildings.

The summary referred to no other air attacks.

However the Burnham Inquiry revealed there were in fact three other air attacks. This included an attack in a residential setting with apparent civilian casualties. The attack involved an Apache firing at a man¹ twice, close to a residence where women and children were seen running and huddled.²

¹ Video footage from international sources viewed by the Burnham Inquiry indicated the man was wounded and unarmed.

² The airforce personnel were found by the inquiry to be unaware of the proximity of the women and children.

Based on this context, the Ombudsman formed the opinion that the summary of Operation Burnham released as a result of the OIA investigation was incomplete, and significantly underplayed the nature and scope of Operation Burnham.

The Ombudsman noted comments by NZDF that the summary was not intended to be a summary of the complete operation. However, if so, the Ombudsman considered the summary should have been clearly labelled as such.

The Ombudsman considered the subsequent findings and report by the Burnham Inquiry comprehensively demonstrate that the summary released in 2018 was incomplete in relation to the requests for information that were made. The Ombudsman noted that the OIA requests and the summary that was released were a missed opportunity to be more candid about the scope of the operation.

Access to information

During the Ombudsman's earlier OIA investigation, he asked NZDF to provide all information relevant to the OIA requests, in accordance with his standard investigation procedures.

Following consideration of comments from NZDF, the Ombudsman accepted that at the time, Ombudsman staff were advised by NZDF about the possibility of other relevant information. However, it was clear that NZDF failed to provide all relevant material to the Ombudsman (and his staff), and that this failure was attributable to NZDF's poor record keeping practices at the time.

The NZDF officials responsible for locating documents relevant to the earlier OIA investigation went to considerable lengths. A brief of evidence provided to the Ombudsman described the extensive review that had been undertaken to locate documents, including an exhaustive search of four NZDF networks as well as relevant drives. All relevant information identified was recorded in a master repository of 3,200 documents. Three months was spent reviewing files, including videos, images, and various other documents, in total searching 150,000 documents. Network repositories were also searched but that that did not yield further documents. These efforts were stated to be to ensure that Ombudsman staff were given unlimited access to the master repository and the networks from which they were drawn.

The Ombudsman noted the thorough and methodical approach by NZDF to locating information in the networked systems. However, there was other relevant offline material held elsewhere within NZDF that should have been provided. During subsequent NZDF support to the Burnham Inquiry, additional data was found in hard drives that had been stored in safes.

The Ombudsman considered it clear there was material held elsewhere in NZDF which was relevant to the OIA requests and the subsequent OIA investigation, which he was not given at the time. It was apparent from documents released in the context of the Burnham Inquiry that NZDF failed to provide various information relevant to the OIA requests, including important documents relating to civilian casualties.

While NZDF did advise Ombudsman staff at the time there was a possibility that further information existed off the networks, the OIA investigation required NZDF to provide the

Ombudsman with all the information that was relevant to the OIA requests (and, indeed, NZDF was required to source and review all relevant material in responding to the OIA requests in the first place).³ That did not happen and nor did NZDF staff assigned to respond to the OIA requests and the Ombudsman's subsequent OIA investigation seem to be aware of the relevance of the material in these hard drives at the time.⁴ The Ombudsman considered this attributable to the barriers which arose due to NZDF's internal information management practices at the time.

The OIA requests and the Ombudsman OIA investigation presented NZDF with an opportunity to identify the information and issues which were later canvassed at length in the Burnham Inquiry. The Ombudsman acknowledged there are logistical challenges for NZDF in handling public records given the diffuse and wide ranging nature of its work. However, this reinforces the need for investment in record keeping and consideration of how staff who are assigned to respond to OIA requests are able to identify and have access to all relevant information. This is a responsibility of NZDF as a whole, and ultimately the chief executive, in terms of ensuring both adequate record keeping practices in the first place, and that processes are in place to enable OIA staff to check with all relevant personnel who may have knowledge of the existence of information relevant to an OIA request.

As section 17(2) of the Public Records Act 2005 states:

*Every public office must maintain **in an accessible form, so as to be able to be used for subsequent reference**, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.*
[emphasis added]

The Ombudsman therefore formed the opinion that NZDF unreasonably omitted to provide him with access to all information relevant to the OIA requests.

Advice as to harm that would result from release

During the earlier OIA investigation, NZDF advised the Ombudsman it considered most information relating to Operation Burnham was appropriately withheld under sections 6(a) and 6(b) of the OIA.

These sections apply where making the information available would be likely to prejudice the security or defence of New Zealand, or the entrusting of information to New Zealand in confidence by another country or international organisation. 'Would be likely' means there must be a real risk of the harm eventuating. In light of NZDF's highly specialised operational and technical expertise, successive Ombudsmen have placed considerable weight on NZDF's advice about the sensitivity and likely operational impacts of release of defence information.

In the course of the Ombudsman's OIA investigation, the NZDF repeatedly emphasised the high sensitivity of the information, in particular the extent to which release of the information

³ See *Kelsey v Minister of Foreign Affairs and Trade* [2015] NZHC 2497.

⁴ If they were then the failure to provide them to the Ombudsman would be a much more serious matter.

would likely compromise New Zealand's operational security and international relationships. In a 12 March 2018 letter the NZDF reiterated the seriousness of the likely operational security and international relations harms that would result from release of operational information about Operation Burnham. It stated that release of much of the information would '*seriously compromise operational security and New Zealand's reputation internationally*'. At the time, the Ombudsman was persuaded to accept the NZDF's expert advice.

The sensitivity of the information was subsequently reviewed independently as part of the Operation Burnham inquiry. As a consequence of this process, many of the documents that NZDF had advised the Ombudsman needed to be withheld under sections 6(a) and 6(b) of the OIA were declassified through security experts appointed by the Burnham Inquiry, and remain publicly available on the Inquiry website.

The subsequent *Report of the Expert Review Group* found there was a '*culture of persistent over-classification*'.

In the course of the present investigation, the Chief of Defence Force acknowledged the ongoing over-classification of information and assured the Ombudsman that he would undertake a continual review of NZDF information classification processes in accordance with the principle of availability.

A NZDF official's brief of evidence provided as part of the current investigation noted:

- The distinction between classified material that was subject to partner control (i.e. information that originated from foreign partner governments) and other information held and controlled by NZDF.
- That the Burnham Inquiry sought and obtained the consent of the partner controlled information to be declassified and released.
- Partner consent was not forthcoming at the time of the OIA investigation.
- Declassifying information against the will of partner governments risked prejudicing New Zealand's relationship with those partners pursuant to section 6(a) and (b) of the OIA.
- A substantial amount of non-partner information originating from NZDF was declassified and released during the Burnham Inquiry.
- The three step process used by the Burnham Inquiry to declassify documents was pursuant to section 70 of the Evidence Act 2006, which includes a public interest test.
- A view that the Burnham Inquiry had a heightened public interest compared to that of the OIA investigation as allegations of war crimes were being investigated, and release of such information to an inquiry engendered a greater public interest than release to individuals under the OIA.

The Ombudsman was advised that as a result of the Burnham Inquiry the NZDF were now more vigilant about over-classification, but that the tendency to over-classify has not been '*fully corrected*'. It was also stated that following the Burnham Inquiry NZDF now looks to ensure

that the sensitivity of information is discussed at a paragraph by paragraph level, to ensure that only genuinely sensitive material within documents is withheld.

Partner controlled information

While NZDF accepted inquiries need to be made of an originator government in assessing whether partner controlled information should be released under the OIA, it advised that partner consent was sought only for 'key' documents that had been identified as relevant to the OIA investigation.

The Ombudsman accepted that where a partner agency objects to release of partner controlled documents there will generally be grounds to withhold those documents under sections 6(a) and 6(b) of the OIA. The Ombudsman considered it clear there were objections at the time to the release of information, and so did not consider it necessary to pursue the issue of the advice given by NZDF at the time of the OIA investigation into the harm in release of the partner controlled documents.

However, the Ombudsman did have some residual concerns about how rigorous NZDF's processes to consult with partners were during the OIA investigation (especially when compared to the efforts during the Burnham Inquiry). The Ombudsman was also concerned that the way this process is conceptualised as '*partner consent*' could undermine the purposes and provisions of the OIA, which requires an independent decision by the NZDF on requests that are made for information. The Ombudsman suggested NZDF undertake a more detailed overview of its current processes in this area.

NZDF controlled information

In contrast to partner controlled information, NZDF had full authority to declassify its own information.

The Burnham Inquiry Report in its concluding chapter⁵ suggested that much of the classified information that it considered in the inquiry was not in fact sensitive, and that '*it remains classified, in circumstances where the particular information does not appear to require protection because it reveals nothing other than what happened a decade ago.*' It also questioned the sensitivity of classified documents that included '*Factual information about what happened on an operation that occurred in 2010 as part of a coalition that no longer exists before it.*'⁶

The Expert Review Group set up pursuant to recommendation 1 of the Burnham Inquiry to review NZDF information management commented more generally on NZDF's over-classification of documents in a section of their report titled '*Transparency and accountability are undermined by the tendency to over-classify information*'. It stated '*a lack of critical*

⁵ Chapter 12 para 91.

⁶ Chapter 12 Para 92.

thought was applied to classification decisions', and that 'classification may be used as an excuse not to share information to avoid scrutiny'.

The Ombudsman considered the sensitivity of the NZDF controlled documents was exaggerated, as can be demonstrated by the fact that a very large amount of information was subsequently declassified and publicly released during the Burnham Inquiry. No prejudice to New Zealand's international relations or security has become evident as a result of these releases.

While the Ombudsman was therefore satisfied that the harm in release was exaggerated during his OIA investigation, he did not form an opinion that this was unreasonable. It is not uncommon for agencies to believe there is a greater risk of harm in release than an Ombudsman does, or for that anticipated harm to not be borne out when information is actually released. The Ombudsman was satisfied that NZDF is taking steps to address the culture of over classification which has been identified.

The Ombudsman did note that in future cases he intends to ensure his office has robust processes in place to interrogate, and challenge as necessary, risks of harm that are asserted by NZDF and partner agencies in relation to classified information.

In summary, while there were some concerns identified, the Ombudsman did not form an opinion that NZDF acted unreasonably in its advice as to the anticipated harm with release of the information at the time of the OIA investigation.

Was the Ombudsman misled?

As noted above, a central issue in this case was whether the Ombudsman was misled by the NZDF in the course of the OIA investigation. Wilfully misleading an Ombudsman, or refusing or wilfully failing to provide them with information, is an offence under section 30 of the Ombudsmen Act 1975.

The Ombudsman considered there were some poor administrative practices by the NZDF that had a major impact on the OIA investigation. The incomplete nature of the summary of information created by the NZDF for release under the OIA, and the fact the Ombudsman was not provided with all relevant information, appeared to be attributable to complex and diffuse information management practices within NZDF. It also appeared these practices prevented the relevant NZDF officials dealing with the OIA requests from being fully aware of the extent of relevant information about Operation Burnham until the completion of the Burnham inquiry.

However, it also appeared the NZDF officials that interacted with Ombudsman staff had themselves not been apprised of the existence of other documents. The Ombudsman noted the dysfunction and fragmentation of the record keeping systems at NZDF and the lack of appropriate processes available for staff who are assigned to respond to OIA requests to be able to identify and have access to all relevant information.

In this context, the Ombudsman did not form an opinion that he was wilfully misled for the purposes of section 30 of the Ombudsmen Act.

However, irrespective of the intent or actions of individual officials in NZDF, the Ombudsman was not provided with all relevant information by NZDF at the time.

A fundamental purpose under section 4 of the OIA is to promote the accountability of officials and ministers. NZDF's response to the OIA investigation had the reverse effect, rendering NZDF unaccountable for the full extent of its actions until the Burnham Inquiry, thereby undermining the very purpose of the OIA.

It is crucial that an agency presents a balanced and complete picture of the information at issue and likely harm in release when engaging with an Ombudsman investigation, especially on topics such as New Zealand's security and international relations. This includes putting effective processes in place to record, retrieve and consider information and ensuring that all staff across the whole agency who might have relevant knowledge have been queried as to the existence of relevant information and the potential for harm if released.

In light of the above, the Ombudsman formed the opinion that NZDF acted unreasonably, as its poor record keeping practices and processes for retrieving information in responding to OIA requests resulted in relevant information not being made available during the OIA investigation.

Outcome

The Ombudsman formed the opinion that NZDF acted unreasonably in relation to the earlier OIA investigation:

- as the summary of Operation Burnham that was publicly released was incomplete, and significantly underplayed the nature and scope of Operation Burnham;
- in omitting to provide the Ombudsman with access to all information relevant to the OIA requests; and
- as NZDF's poor record keeping practices and processes for retrieving information in responding to OIA requests resulted in relevant information not being made available during the OIA investigation.

However, the Ombudsman did not form an opinion that NZDF acted unreasonably in its advice as to the anticipated harm with release, and did not form an opinion that he was wilfully misled by NZDF.

Where an Ombudsman forms the opinion that an agency has acted unreasonably, the Ombudsman can make any recommendations to the agency they think fit (section 22(3) Ombudsmen Act).

During the investigation, the NZDF provided detailed information about work underway to improve its information management systems and practices, many of which arise from the recommendations of the Expert Review Group. The Ombudsman was assured there is a

significant programme of work underway and was satisfied this will help to ensure there is not a repeat of the matters outlined above.

In this context, the Ombudsman did not consider it necessary to make any formal recommendations.

However, the Ombudsman requested:

- a further update in six months on progress NZDF has made to give effect to the recommendations of the Expert Review Group; and
- that NZDF give consideration to utilising the Ombudsman's 'OIA self-assessment tool' and implementing any improvements and changes which it highlights.⁷

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

⁷ <https://www.ombudsman.parliament.nz/resources/oia-self-assessment-tool>