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**OPERATION BURNHAM AND THE DIMINISHING ROLE
OF DEMOCRATIC ACCOUNTABILITY IN THE MODERN
SECURITY STATE**

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Abstract

On 22 August 2010, six Afghan citizens were killed and numerous others wounded during Operation Burnham, an operation spearheaded by the New Zealand Special Air Service. The New Zealand government subsequently kept details of the Operation secret from the New Zealand public in order to protect state security. However, the 2017 release of the book Hit and Run provoked public interest in allegations of military impropriety in the initiation and execution of Operation Burnham. In response to this significant public interest, an independent inquiry has been established to consider the allegations of wrongdoing. Yet, the inquiry may be conducted - in whole or in part - in private, and public access to inquiry information may be restricted to protect the security interests and international relations of New Zealand.

In this paper, I consider whether democratic accountability is satisfied in regards to Operation Burnham and other situations in which state security purportedly requires public access to information to be limited. After concluding that democratic accountability cannot be satisfied in situations characterized by an absence of transparency, such as has been the case so far with Operation Burnham, I move to consider the way that different states have struggled with the tension between national defence and democratic requirements, particularly in the context of the ongoing “War on Terror”. While I demonstrate that the international trend is increasingly to sacrifice the transparency required by democratic accountability in favour of state security, I argue that this approach threatens the very foundations of the democratic state.

Key words: Operation Burnham - democratic accountability – transparency – state security

Contents

I INTRODUCTION4

II OPERATION BURNHAM6

 A THE OPERATION6

 B HIT & RUN8

 C THE INQUIRY9

 D PRELIMINARY IDENTIFICATION OF ACCOUNTABILITY ISSUES10

III DEFINING ACCOUNTABILITY12

 A CONSTITUTIONAL ACCOUNTABILITY13

 B LEARNING ACCOUNTABILITY14

 C DEMOCRATIC ACCOUNTABILITY15

IV ASSESSING OPERATION BURNHAM’S DEMOCRATIC ACCOUNTABILITY...17

V INTERPLAY BETWEEN TRANSPARENCY, DEMOCRACY AND NATIONAL SECURITY18

 A INTERNATIONAL RESPONSE TO THE TENSION BETWEEN NATIONAL DEFENCE AND DEMOCRATIC REQUIREMENTS22

 1 *New Zealand*25

 2 *Australia*.....26

 3 *Canada*.....28

 4 *United Kingdom*29

 B THE VALUE OF TRANSPARENCY AND DEMOCRATIC ACCOUNTABILITY32

VI ALTERNATIVE SOURCES OF DEMOCRATIC ACCOUNTABILITY FOR OPERATION BURNHAM33

 A THE MEDIA.....34

 B THE INDEPENDENT INQUIRY36

VII CONCLUSION.....39

I Introduction

The public law concept of accountability has become “synonymous... with every desirable attribute of democracy and good government”, suggesting that accountability is fundamental to the establishment and maintenance of democracy.¹ The term ‘accountability’ encompasses political, administrative, and informal mechanisms by which an individual or a group may be held answerable for their action or inaction, ensuring that governmental authority extends only as far as authorised by the consent of the governed.² These accountability mechanisms - along with any consequent sanctions – encourage governing individuals and bodies to perform as required, create opportunities for administrators to justify their actions, and publicly reinforce the expectations that the public has of their government. In this way, effective accountability has the ability to maintain or even increase the legitimacy of the institution of government generally. With Western democracies demonstrating a rising cynicism towards elected officials and the institution of government as a whole, accountability is vital in engendering trust in government and ensuring that this trust is not being abused.³

By this reasoning, accountability is a founding principle of the democratic structure and therefore must be ever-present. However, accountability can also be periodic, stimulated by a specific event. Operation Burnham is one such event. The release of Nicky Hager and Jon Stephenson’s *Hit and Run* catalysed public concern about this New Zealand military operation and its consequences. In response to this public concern, Attorney-General David Parker has established an independent inquiry into the events of Operation Burnham and the actions of the individuals and departments involved. However, due to the nature of the evidence that will be brought before the inquiry, the public release of which may pose a threat to New Zealand’s national security, it is uncertain how much information will be released to the public and how much of the inquiry process will be conducted behind

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¹ Tony Wright “The Politics of Accountability” in Mark Elliot and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge (England), 2015) 96 at 96; Glen Staszewski “Reason-Giving and Accountability” (2009) 93 *Minn.L.Rev* 1253 at 1254.

² August Reinisch “Governance without Accountability” (2001) 44 *German Y.B. Int’l L.* 270 at 274.

³ Moira Paterson “The Media and Access to Government-Held Information in a Democracy” (2008) 8 *Oxford U.Comm.L.J.* 3 at 3.

closed doors. The following paper purports to examine the accountability of situations such as Operation Burnham, where national security concerns potentially limit the quantity and quality of information made available to the public. Of constitutional, learning, and democratic accountability, I will focus on the latter, conducting a democratic accountability assessment of Operation Burnham in accordance with the framework introduced by Mark Bovens.⁴ After considering the requirements of democratic accountability, I will conclude that transparency is vital to the efficacy of this accountability, but such transparency is regularly undermined by the implementation of policies of secrecy for the purposes of protecting or enhancing state security. This paper will argue that when information regarding government action is withheld from the public, as has been predominantly the case so far with Operation Burnham, democratic accountability mechanisms are significantly undermined and the purposes of such accountability are frustrated.

Having concluded that the withholding of relevant information limits democratic accountability, both in the context of Operation Burnham and government action generally, I will then consider whether national security provides sufficient justifications for this limitation. The importance of democratic accountability cannot be overstated, particularly in modern representative democracies where the willingness of a government to operate under public scrutiny is vital to the legitimacy of that specific government as well as the institution of government generally.⁵ However, it is also clear that national security may, in certain circumstances, require that public access to information be limited. Arguably, no society can function with complete transparency, as this can undermine the purpose of security for which the state was formed.⁶ Therefore, it is arguable that both transparency and secrecy are fundamental to state legitimacy, despite each ideal directly conflicting with the other.

The tension between the transparency required by democratic accountability and the secrecy required for state security is heightened by the current security climate. The terrorist attacks on the World Trade Centre in New York on 11 September 2001 dramatically changed legal and political landscapes.⁷ This attack intensified a growing fear in the global terrorism and technological developments that have radically changed the nature of threats

⁴ Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13(4) ELJ 447 at 462.

⁵ Peter Sales “Accountability of Government via Public Inquiries” (2004) JR 173 at 173.

⁶ Stanley Cohen “State Secrecy and Democratic Accountability” (2005) 51 Crim.L.Q 27 at 29.

⁷ Lawrence Friedman and Victor Hansen “Secrecy, Transparency, and National Security” (2012) 38 Wm.Mitchell L.Rev. 1610 at 1610.

to state security. In response, a historically-unparalleled concern for secrecy has developed in both policymakers and the public, with transparency expectations arguably having been diminished in the process. Thus, the modern security state has evolved in response to a conception of the “War on Terror” as ongoing and pervasive. This characterization of the modern war as creating a perpetual state of emergency fortifies the argument that secrecy is increasingly a necessity in the current security climate, and without such secrecy the state will be unable to ensure the security of its people, undermining the very purpose for which the state came into existence.⁸

Against this understanding of the international climate, I will briefly consider the different approaches of international law, as well as New Zealand, Australia, Canada, and the United Kingdom, to the tension between national security and democratic accountability. I do not purport to assess which approach seems best, but simply demonstrate the various ways in which different states are grappling with the tension between the right to information that underpins democratic accountability and the right to security. Having found that, on the whole, the international response to the perceived heightened security climate is to accept significant transparency limitations, I conclude that the withholding of information in regards to Operation Burnham is consistent with this international response, but query whether this general acceptance of diminished democratic accountability is an approach that New Zealanders *should* be willing to adopt. The final segment of the paper will look at two alternative accountability mechanisms operating specifically around Operation Burnham – the media and the independent inquiry – to consider whether these bodies are able to compensate for the diminished democratic accountability that seems to be widely accepted by governments and citizens alike.

II Operation Burnham

A The operation

While agreement has not been reached as to the exact details of Operation Burnham, the general series of events is as follows. The New Zealand Defence Force (“NZDF”) operated in Afghanistan between late 2001 and 2013.⁹ On 3 August 2010, an insurgent attack on a New Zealand Provincial Reconstruction Team stationed in the Bamyán Province killed New Zealand Lieutenant Tim O’Donnell.¹⁰ Local intelligence, as well as intelligence

⁸ Friedman and Hansen, above n 7, at 1612.

⁹ “Government Inquiry into Operation Burnham and related matters” (Terms of Reference) <www.beehive.govt.nz > at 1.

¹⁰ Tim Keating (Chief of Defence Force) “Speech notes for Press Conference on Operation Burnham” (27 March 2017) <www.nzdf.mil.nz > at 1.

provided by the International Security Assistance Force (“ISAF”), identified the perpetrators of the attack and where they were located.¹¹ The New Zealand Government permitted the New Zealand Special Air Service (“SAS”) to be deployed in an attempt to mitigate the threat posed by this faction of the Taliban.¹² In accordance with such governmental approval, on 21-22 August 2010 SAS forces, alongside the Afghan Crisis Response Unit and the Armed Forces of the United States of America, took part in an operation in Tirgiran Valley (“Operation Burnham”).¹³ Lieutenant General Tim Keating, Chief of the NZDF, asserts that the aim of the mission was “to detain Taliban insurgent leaders who were threatening the security and stability of the Bamyán Province and to disrupt their operational network.”¹⁴ At 0030 hours, SAS and partner forces arrived at the target village.¹⁵ The ground forces entered buildings that intelligence had indicated were housing Taliban leadership, and although no insurgents remained in these buildings, significant amounts of weaponry and ammunition were found and destroyed.¹⁶ At the same time, coalition aircraft were given permission to engage (that is, fire at) alleged insurgents armed with weapons, both within the village and on high ground outside of the village.¹⁷ During the raid, two dwellings were set alight, one member of the SAS was injured by falling debris, and SAS ground forces killed between one and 12 insurgents (depending on which NZDF statement is relied upon).¹⁸

Following Operation Burnham, a group of villagers approached the Provincial Governor, claiming that civilians were fired at during the operation, and five adults and a three-year-old child were killed.¹⁹ Consequently, ISAF was tasked with assessing the possibility of civilian casualties.²⁰ The ISAF investigation team reported that, due to a malfunctioning weapon, it was possible that Afghan civilians were injured, but the SAS had complied with

¹¹ Keating, above n 10, at 1.

¹² At 1.

¹³ “Government Inquiry into Operation Burnham and related matters”, above n 9, at 2.

¹⁴ Keating, above n 10, at 3.

¹⁵ At 4.

¹⁶ At 4.

¹⁷ At 4.

¹⁸ At 4.

¹⁹ At 5.

²⁰ Lisa Ferris (Head of Defence of Legal Services) “Speech notes for Press Conference on Operation Burnham” (27 March 2017) <www.nzdf.mil.nz> at 6.

the law of armed conflict in its actions.²¹ The ISAF investigation concluded that no further action needed to be taken.²²

B Hit & Run

Initially, public knowledge of Operation Burnham was very limited, with the government releasing little operational information.²³ However, in March 2017, Nicky Hager and Jon Stephenson significantly improved public awareness of the operation with the release of their book *Hit & Run*.²⁴

Hit & Run makes a number of serious allegations against the NZDF and NZDF operation personnel, claiming that Operation Burnham was a retaliation mission in which the NZDF was seeking revenge for the death of Lieutenant O'Donnell.²⁵ Hager and Stephenson assert that the desire for revenge meant that the ground commander and his troops demonstrated little concern for civilian casualties. The authors also claim that the members of the SAS involved in the operation were seeking vengeance and therefore acted unprofessionally, focusing on punishment rather than enhancing the security of the area.²⁶ The book alleges that there were no insurgents in Naik and Khak Khuday Dad (the two villages attacked during Operation Burnham) but instead nearly all of the villagers were women and children; further, the powerful optical systems of the Apache helicopters should have allowed their pilots to see that their targets were children running with their parents, not insurgents armed with weapons.²⁷ Hager and Stephenson identify civilians who were killed in the raid, including the three-year-old Fatima, as well as naming other civilians who suffered significant injuries.²⁸ The book claims that the operation was under the control of the SAS, and therefore culpability, including the actions of the United States soldiers piloting the helicopters, belongs with New Zealand.²⁹ Yet the NZDF has showed no accountability for their actions, assert the authors, but rather has tried ever since to cover up the unconscionable actions of New Zealand's soldiers.³⁰ *Hit & Run* warns its audience

²¹ Ferris, above n 20, at 6.

²² At 6.

²³ Peter Boshier, *Chief Ombudsman's opinion on OIA requests about Operation Burnham* (Office of the Ombudsman, Case Numbers 45211, 453166, 455308, 450612 and 458164, 9 April 2018).

²⁴ "Government Inquiry into Operation Burnham and related matters", above n 9, at 1.

²⁵ Nicky Hager and Jon Stephenson *Hit & Run* (Potton & Burton, Nelson, 2017) at 16-18.

²⁶ At 24-45.

²⁷ At 49-50.

²⁸ At 50-53.

²⁹ At 55.

³⁰ At 72-75, 77-78, 99-108.

that lines of authority and command within the NZDF are sub-standard, jeopardizing the legitimacy of NZDF actions as well as providing minimal accountability for such actions.³¹

In response to the *Hit & Run* release, on 21 March 2017 a NZDF press release reiterated that the ISAF investigation into the civilian casualties had concluded that “allegations of civilian casualties were unfounded.”³² The statement asserted that “NZDF is confident that New Zealand personnel conducted themselves in accordance with the applicable rules of engagement.”³³ A follow-up statement argued that the central premise of *Hit & Run* was inaccurate, as NZDF forces had never operated in Naik and Khak Khuday Dad.³⁴ The statement referred again to the ISAF investigation, although this time stated that “the investigation concluded that [a gun sight malfunction on a coalition helicopter] may have resulted in civilian injuries but no evidence of this was established.”³⁵

C The inquiry

With *Hit & Run* having established public awareness of and interest in the NZDF’s actions, on 11 April 2018 Attorney-General David Parker announced an inquiry into Operation Burnham, established under s 6(3) of the Inquiries Act 2013.³⁶ Sir Terence Arnold and Sir Geoffrey Palmer were appointed to undertake this inquiry in the independent, impartial, and fair manner required by the Act.³⁷ While it was noted that the establishment of the inquiry was not indicative of the Government’s acceptance of the allegations contained in *Hit & Run* nor any other criticisms of the SAS’s actions in 2010, the Hon. Mr. Parker stated that the footage that he reviewed was not able to conclusively answer some of the questions posed by Hager and Stephenson. In addition, given the importance of public confidence in the NZDF, the Hon. Mr. Parker determined that public interest did warrant an inquiry into Operation Burnham and the consequent allegations of wrongdoing.³⁸

³¹ Colin Peacock “Hit & Run: claims and counterclaims” *Radio New Zealand* (online ed., New Zealand, 9 April 2017).

³² New Zealand Defence Force “NZDF Response to Book” (press release, 21 March 2017).

³³ New Zealand Defence Force “NZDF Response to Book”, above n 32.

³⁴ New Zealand Defence Force “NZDF Statement on Hager/ Stephenson book” (press release, 26 March 2017).

³⁵ New Zealand Defence Force “NZDF Statement on Hager/ Stephenson book”, above n 34.

³⁶ Hon. David Parker “Approval for inquiry into Operation Burnham” (press release, 11 April 2018); “Government Inquiry into Operation Burnham and related matters”, above n 9, at 18.

³⁷ Parker, above n 36; Inquiries Act 2013, s 10; “Government Inquiry into Operation Burnham and related matters”, above n 9, at 16.

³⁸ Parker, above n 36; “Government Inquiry into Operation Burnham and related matters”, above n 9, at 5-6.

Stuff reported that Stephenson was pleased with the inquiry announcement but queried the Attorney-General's mention of unseen video footage during his announcement, suggesting that this appeared to "muddy the waters".³⁹ Hager was also reported to be "over the moon" with the establishment of the inquiry, and suggested that the Attorney-General had likely been shown selective footage "[w]hich will probably crumble down to nothing when it is properly inspected."⁴⁰ The NZDF's responding statement confirmed that "[t]he New Zealand Defence Force stands by the accounts of Operation Burnham that it has provided to the Government and public."⁴¹ Following the inquiry announcement, a NZDF Special Inquiry Office was established.⁴² Lieutenant General Keating stated that the inquiry would have the NZDF's full cooperation and that he was "look[ing] forward to the inquiry confirming the facts."⁴³ Lieutenant General Keating did admit that information sharing between the NZDF and the public could be improved, and noted that all responses to Official Information Act requests in relation to the inquiry would be published on the NZDF website.⁴⁴

D Preliminary identification of accountability issues

A concern in terms of the New Zealand Government's accountability for Operation Burnham is the significant withholding of relevant information from the public. It seems as though many New Zealanders were not even aware of Operation Burnham, let alone the potential war crimes committed during this operation, before Hager and Stephenson released their book. Since the 2010 operation, there has been three general elections – that

³⁹ Jo Moir and Henry Cooke. "Author Jon Stephenson pleased with inquiry, but queries Govt 'muddying waters'" *Stuff* (online ed, New Zealand, 11 April 2018).

⁴⁰ Alexander Robinson "Nicky Hager 'over the moon' about govt inquiry into SAS" *Radio New Zealand* (online ed, New Zealand, 11 April 2018).

⁴¹ New Zealand Defence Force "NZDF Stands by Accounts of Operation Burnham" (press release, 11 April 2018).

⁴² New Zealand Defence Force "NZDF Special Inquiry Office Established" (press release, 15 May 2018).

⁴³ New Zealand Defence Force "NZDF Stands by Accounts of Operation Burnham", above n 41.

⁴⁴ New Zealand Defence Force "NZDF Special Inquiry Office Established", above n 42. Following the release of *Hit & Run*, a number of OIA requests were declined on the basis of state security and defence. The Ombudsman produced a report following complaints about these decisions. For more, see: Peter Boshier, *Chief Ombudsman's opinion on OIA requests about Operation Burnham* (Office of the Ombudsman, Case Numbers 45211, 453166, 455308, 450612 and 458164, 9 April 2018). As an aside, Lieutenant General Keating did not seek reappointment in his position as Chief of the Defence Force when his current term expired on 30 June 2018. He has stated that this decision was not influenced by the "spurious" *Hit & Run* allegations regarding Operation Burnham.

is, three opportunities for the public to assess the actions of their government and consider whether or not those in power at the time should remain in power. If the government is only releasing information that is favourable to re-election, the very system of elections loses its legitimacy as an accountability mechanism, as the public is unable to meaningfully assess the uses and abuses of power by those holding elected office. Further, if the public are not fully informed about government actions, they cannot provide relevant feedback about such actions. In a representative democracy, such feedback should be shaping the decisions made by the current government or future governments, as such governments have been or will be elected under the belief that they are representative of the public majority and will act in a way that accords with the expectations of that public majority. For these reasons, it seems as though Operation Burnham raises significant accountability concerns.

However, it could be argued that the instigation of the Burnham Inquiry alleviates accountability concerns by ensuring that the operation is subject to a process of scrutiny and judgment. An independent inquiry enables trusted individuals to act as representatives for the public, with these individuals able to access the relevant information and perform an accountability assessment on behalf of the public. This ensures that the actions of the government are not going unchecked but also avoids the security concerns that accompany public release of sensitive information. Yet, while Sir Geoffrey and Sir Terence may make findings of fault and recommend that further steps be taken to determine liability, the inquiry cannot itself determine the civil, criminal, or disciplinary liability of any persons or organisations.⁴⁵ Further, the inquiry may be conducted (in whole or in part) in private, and access to inquiry information may be restricted to protect the security interests and international relations of New Zealand, or for any other reason that the inquiry considers appropriate.⁴⁶ The public therefore may have to rely on the inquiry's assessment of the evidence in terms of findings of fault, an assessment made by un-elected individuals. The public perception of both Operation Burnham and the NZDF will consequently be shaped by the information that the inquiry sees fit to release as well as the overall outcome of the inquiry. This has the potential to limit the NZDF's accountability to the public, as it is difficult for the public to determine what it believes should be the appropriate response without fully being informed of what it is that the government and the NZDF should or should not be held accountable for.

⁴⁵ "Government Inquiry into Operation Burnham and related matters", above n 9, at 13; Inquiries Act 2013, s 11.

⁴⁶ "Government Inquiry into Operation Burnham and related matters", above n 9, at 14; Inquiries Act 2013, s 11.

III Defining accountability

This preliminary identification of accountability issues suggests that the handling of Operation Burnham raises accountability issues that may not be satisfactorily addressed by the instigation of the Burnham Inquiry. However, before the accountability of Operation Burnham can be accurately assessed, the concept of accountability must first be clearly defined. Intrinsic in the idea of democracy is the principle of popular control of power.⁴⁷ In this conception, power is in the hands of the electorate but is delegated to elected representatives, who act as agents of the electorate and spearhead a chain of further delegation.⁴⁸ Consequently, an assortment of power-controlling mechanisms are required to ensure that the delegated power of the people is exercised in accordance with the expectations that those people have of their government.⁴⁹ One such mechanism is the principle of accountability, generally used to refer to the ability of citizens to hold those who rule them to account.⁵⁰ However, the nuances of this principle vary from academic to academic, depending on the definition of accountability adopted by the academic in question.

Mark Bovens moves away from the common usage of “accountability” as a “conceptual umbrella” covering a variety of other distinct concepts such as “transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity,” and instead frames accountability as:⁵¹

... a relationship between an actor and a form, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment and the actor may face consequences.

In this understanding of accountability as a specific social relationship, the actor may be an individual or an organisation, while the accountability forum can be a specific person or an agency, and the obligation on the actor may be formal, informal, or even self-imposed.⁵²

⁴⁷ Wright, above n 1, at 97.

⁴⁸ At 97.

⁴⁹ At 97.

⁵⁰ At 96.

⁵¹ Bovens, above n 4, at 449-450.

⁵² At 450.

While Bovens' definition demonstrates flexibility in regards to the types of agents, accountability forums, and obligations, he does identify three elements that are usually present in the actual account-giving.⁵³ Bovens states that "it is crucial that the actor is obliged to inform the forum about his or her conduct," an obligation that may often extend to a requirement for explanations of and justifications for this conduct rather than mere notice-giving.⁵⁴ The second element creates a connection between "accountability" and "answerability", as the forum must have the possibility of questioning the actor about both the information that has been provided and the legitimacy of the conduct.⁵⁵ The third element is that the forum may pass judgment on the actor and their conduct.⁵⁶ In this final stage, the possibility of consequences (encompassing both negative and positive, as well as formal and informal, outcomes) is essential, as it is this possibility that differentiates between an actor being held to account and the mere provision of information in a non-committal manner.⁵⁷

Bovens recognises that an assessment of accountability within his framework will be shaped by the theoretical perspective adopted as to the purposes of accountability.⁵⁸ He notes that the importance of accountability is commonly credited to one of three purposes: the prevention of corruption and abuse of power, the enhancement of government efficacy, or the maintenance of popular control. To examine all three accountability perspectives to sufficient depth would be beyond the scope of this paper; therefore, while each form of accountability is briefly outlined below with reference to Operation Burnham, and while there are overlaps in the purposes and concerns of each perspective, the remainder of this paper will primarily focus on a democratic accountability assessment of Operation Burnham and other circumstances concerning state security.

A Constitutional accountability

The constitutional perspective suggests that the main concern of accountability is to prevent "overbearing, improper, or corrupt government."⁵⁹ The mission to avoid tyranny and corruption rests heavily on the principle of separation of powers and the accompanying

⁵³ Bovens, above n 4, at 451.

⁵⁴ At 451.

⁵⁵ At 451.

⁵⁶ At 451.

⁵⁷ At 451-452.

⁵⁸ At 462.

⁵⁹ At 463.

system of “checks and balances.”⁶⁰ This scope of accountability considers whether there are mechanisms in place to sufficiently deter abuses of authority by officials and agencies.⁶¹ In order to respond to the expansive powers of public office and the tendencies of those in power to attempt to evade control, visible and powerful public accountability forums are essential in ensuring constitutional accountability.⁶² A constitutional scholar might ask him or herself whether the accountability mechanisms in a certain instance have the sufficient inquisitive powers to reveal any corruption or failings of government, and whether the responding sanctions are strong enough not only to bind those who are acting in an improper manner, but also prevent others from attempting to do so.⁶³

The accountability of Operation Burnham, as well as similar instances in which secrecy is imposed for security reasons, could be assessed from this constitutional perspective. It is difficult to ensure that a government is not acting in a tyrannical manner or exceeding its designated scope if the public is denied information about its government’s actions. The Burnham Inquiry will act as one check on the powers of the Department of Defence and the responsible Ministers; however, it is questionable whether a report compiled by two individuals, particularly one based on information that may be partially or completely withheld from the public for reasons of state security, satisfies the accountability requirements of this constitutional lens. The inquiry may suggest further action to be taken, and if this is the case such further actions would feed into an assessment of the constitutional accountability of this operation.

B Learning accountability

According to the learning accountability lens, accountability acts as a tool to encourage the executive branch to learn.⁶⁴ The threat of sanctions should governments, agencies, and individual officials fail to act in the way that is expected of them encourages a search for more efficient ways of carrying out the business of government.⁶⁵ From a learning perspective, the mechanisms of accountability oblige governments to reflect on their successes and failures; learning from these experiences may increase the job security of the government in question, while a failure to do so is likely to result in disappointing election

⁶⁰ Bovens, above n 4, at 463.

⁶¹ At 463.

⁶² At 463.

⁶³ At 463.

⁶⁴ At 463.

⁶⁵ At 463-464

outcomes for members of that government.⁶⁶ Furthermore, an accountability process conducted in public facilitates the learning of others who are currently or will in the future be in similar positions by demonstrating the public's expectations and how these can best be met.⁶⁷ This form of learning works to create future governments that can improve upon the processes of their predecessors and theoretically avoid the repetition of their mistakes. In order for a system to effectively promote learning accountability, the accountability mechanisms must not only ensure that sufficient feedback can be provided and received, but also ensure that there are incentives in place for this feedback to be reflected upon and used to produce positive change.⁶⁸

Secrecy for reasons of national security could also be assessed in terms of the learning purposes of accountability. Arguably, regardless of the truth of the allegations contained in *Hit & Run*, the media coverage of these allegations and consequent public uproar provide current and future government officials with a gauge of where the public currently stands on certain military issues. Similarly, the instigation of the inquiry plays a role in this governmental feedback loop, as it suggests that the level of ambiguity and uncertainty in the government's reporting of Operation Burnham is dissatisfactory. Beyond this, the results of the inquiry, even if not released to the public, will provide the relevant individuals and departments with the fully-informed opinions of two well-educated and well-respected members of the public, which in turn may influence and inform future decisions made by these individuals and departments. However, the discretionary secrecy of the inquiry process may impact upon the ability of accountability to act as a tool to encourage learning beyond those currently in power. If the purpose of learning accountability is ultimately to ensure that governments continue to improve, enhancing the legitimacy of governmental institutions generally, accountability at a public level will be key to the learning aim of accountability; otherwise, only the current government will have the ability to learn from their mistakes, and this will not ensure that future governments are any less likely to make such mistakes.

C Democratic accountability

Democratic accountability helps citizens to ensure that those elected into office, or who have been delegated power from such elected individuals, are acting in the way that the public expects of them.⁶⁹ When considering power within the state as a series of principal-

⁶⁶ Bovens, above n 4, at 464.

⁶⁷ At 464.

⁶⁸ At 464.

⁶⁹ At 464.

agent relationships, the question that democratic accountability is interested with is whether there are mechanisms in place to ensure that a principal is able to monitor their agent's use of delegated power, as well as whether there are mechanisms in place to ensure that an agent's actions are respecting and reflecting the wishes of their principal.⁷⁰ In a representative democracy this is vital, as it is the public's transferal of sovereignty through elections to representatives that facilitates the formation of governments, who in turn delegate this public power further down the chain as needed.⁷¹ Accountability justifies this delegation of power by allowing the delegator can hold the delegatee to account, theoretically ensuring that delegated power is not exercised beyond the scope for which it was delegated.⁷² The accountability chain acts in the reverse direction to the delegation chain, and at the end of this accountability chain are the citizens from whom the original power has been sourced with the cession of individual sovereignty.⁷³ If the public is displeased with the government's use of this delegated power, they will be disinclined to vote for the same individuals and parties to remain in power, meaning that, while public power has been delegated, the public still retains significant control over the manner in which this power is exercised.⁷⁴

In order to satisfy the democratic purposes of accountability, it is essential that the accountability process be a public one. Should this not be the case, the public will lack the relevant information required to determine whether their representatives are acting properly and efficiently.⁷⁵ It is arguable that this is one of the biggest concerns with the shrouds of secrecy that accompany matters of state security, as the exchange of individual sovereignty for accountability that sits at the core of a representative democratic system is undermined when public accountability is limited or non-existent. Individuals face the threat of their delegated power being used for purposes with which they do not agree, and beyond this, potentially not knowing that this is the case and allowing such actions to continue by repeatedly voting along the same lines. It is this form of accountability, democratic accountability, that will primarily be used to assess Operation Burnham.

⁷⁰ Bovens, above n 4, at 465.

⁷¹ At 463.

⁷² At 463.

⁷³ At 463.

⁷⁴ At 463.

⁷⁵ At 463.

IV Assessing Operation Burnham's democratic accountability

The first element to Bovens' test of accountability requires a relationship between an actor and a forum. In the context of democratic accountability, the relationship of interest is that between the NZDF, led by the Minister of Defence and other involved Ministers, and the public. In this relationship, the actor must feel obliged to explain and justify their conduct. The shield of state security seems to prevent any such obligation being felt by those responsible for Operation Burnham in terms of explanation to the general public. The release of *Hit & Run* sparked numerous Official Information Act requests to the NZDF for information about Operation Burnham, but initially much of the requested information was withheld on the basis that the "release of the information would be likely to prejudice the security and defence of New Zealand or the future entrusting of information to New Zealand."⁷⁶ This response demonstrates that there is no feeling of obligation to explain or justify the actions of the NZDF in this instance.

Bovens also requires that the forum is able to ask questions of the actor. There does not seem to be anything stopping the public, or the media acting on the public's behalf, from directing questions regarding Operation Burnham to the relevant actors. However, the ability to pose questions by itself is not sufficient – such questions must also be answered in order for the forum to be able to pass judgment. While the inquiry has the ability to require that its questions be answered, this power of investigation is not extended to the public; therefore, for the public's queries to be answered, the inquiry will have to both channel these queries and release the answers. The quantity and type of information that will be released at the conclusion on the inquiry will depend on the balance between security and transparency that Sir Terence and Sir Geoffrey deem appropriate. Such discretion undermines the democratic accountability of this process, as it provides an opportunity for information to be withheld, perhaps without the public being aware of the extent to which such information is being withheld.

In response to the gathered information, both freely volunteered by the actor and provided in response to probing by the forum, the forum must then be able to pass judgment. As discussed above, such judgment may result in the actor facing consequences, although these do not necessarily need to be formal or negative in effect. Information is vital in order for genuine judgment to be passed, for a public cannot meaningfully judge that which they do not understand or are not aware. Further, effective and relevant consequences cannot be implemented without an understanding of the need for such consequences; this again relies

⁷⁶ Boshier, above n 38, at 2.

on the provision of full and frank explanation. While mechanisms are in place in New Zealand's representative democracy to hold a government and its organs to account, it seems that when the public is denied relevant information, such mechanisms are reduced to a perfunctory nod to the concept of democratic accountability while failing to operate in the intended manner.

By this assessment, it is arguable that democratic accountability is and will continue to be lacking in the context of Operation Burnham as well as many other events and issues where state security acts as a barrier to the provision of information to the public. Access to information is fundamental to the meaningful operation of democratic accountability; without transparency, democratic accountability can never be fully satisfied, as the public's ability to pass fully-informed judgment is significantly impeded by the denial of information about government activity and decision-making. This is particularly concerning given the nature of state security, as decisions regarding state security often have significant consequences, and therefore public awareness of, and accompanying democratic accountability for, these decisions seems vital. With this in mind, the question that follows is whether the public, as the source of state power, is willing to give up this fundamental form of accountability for reasons of state security.

V Interplay between transparency, democracy and national security

Crucial to the creation of modern nation-states was the allocation of control over the use of force.⁷⁷ The government was permitted monopoly of coercion on the understanding that there would be accountability for the use of such coercion, particularly when military forces were engaged.⁷⁸ While a fundamental requirement for democratic accountability - in particular, the democratic accountability of individuals and state organs responsible for national security - is the timely disclosure of relevant information to the public, the necessities of national defence do not always align with democratic requirements, as demonstrated by the democratic accountability assessment of Operation Burnham.⁷⁹ Secrecy in governmental affairs can be critical in matters of state survival and preservation, as conducted through the formulation of foreign and defence policies in peace time and the waging of war in times of conflict.⁸⁰ To insist on transparency without qualification would

⁷⁷ Charlotte Ku and Harold K. Jacobsen, "Accountability and Democracy in the Case of Using Force under International Auspices" (2000) 94 ASIL PROC. 19 at 21.

⁷⁸ At 21.

⁷⁹ Ku and Jacobsen, above n 77, at 21; Murray Rankin "National Security: Information, Accountability, and the Canadian Security Intelligence Service" (1986) U.T.L.J. 249 at 249.

⁸⁰ Friedman and Hansen, above n 7, at 1611.

be to fail to recognise the practical exigencies of state defence and the importance that the public places on national security.⁸¹ Further, full information disclosure may, in certain circumstances, be detrimental to good governance, such as by causing unnecessary panic with premature disclosures of threats before the threat can be assessed properly, or by limiting the ability of the state to defend itself against any such threats that have been fully assessed.⁸² This suggests that democratic transparency has its limits, beyond which a strict adherence to the principle of availability of information may in fact be counter-productive to the governance systems that transparency is designed to keep in check, as well the matters of security that the government was originally designed to address.⁸³

With the high value of liberty, restrictions on such liberty are only likely to be accepted if doing so demonstrably strengthens the system of liberty shared by all.⁸⁴ A range of governments have claimed that the protection of national security is vital to the maintenance of individual liberties, and therefore issues of national security justify restrictions upon individual rights and freedoms, as without such security there would be no individual rights or freedoms to begin with.⁸⁵ These claims may be rooted in an understanding of the state as a security mechanism. Thomas Hobbes and John Locke articulated the state as an exchange of a portion of individual liberty for personal security; by extension, this includes the concept of national security, which encompasses the interests of the nation as a whole.⁸⁶ In this way, a powerful argument may be made for the restriction of rights and freedoms in response to the requirements of state security. The goals purportedly pursued by national defence organs, including the enhancement of security for civilians and soldiers, the maintenance of diplomatic relationships, and the minimisation of the enemies' strategic knowledge, appeal to an overarching desire for security, arguably the most compelling of individual and public interests and the *raison d'être* of the state itself.⁸⁷

⁸¹ Cohen "State Secrecy", above n 6, at 30.

⁸² Fanie Cloete and Christelle Auriacombe "Counter-productive impact of freedom of access to Information-related legislation on good governance outcomes in South Africa" (2008) J.S.Afr.L. 449 at 451.

⁸³ At 451.

⁸⁴ Stanley Cohen "Law in a Fearful Society: How Much Security" (2005) 54 U.N.B.L.J. 143 at 147.

⁸⁵ Rankin, above n 79, at 250.

⁸⁶ At 252.

⁸⁷ Lesley Wexler "International Humanitarian Law: Transparency" (2013-2014) 23 J. Transnat'l L. & Pol'y 93 at 94.

The phrase ‘national security’ itself can be interpreted in a multitude of ways; the report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (“the McDonald Commission”) stated that “[s]ome view the concept [of national security] as one that they cannot define, but, like obscenity, they know it when they see it...”.⁸⁸ Despite this ambiguous start, the McDonald Commission recognised two concepts included within national security: the need to preserve the territory for which the government is responsible from attack, and the need to preserve and maintain the democratic processes of government generally.⁸⁹ While the first concept, defence of the realm, was traditionally central to the notion of national security, the concept of national security has expanded to include the second concept, defence of democracy itself.⁹⁰ This expansion was a by-product of the Second World War, ignited by the fear of structural change and the economic instability of post-industrial capitalism, as well as a response to the technological developments of an increasingly inter-connected world.⁹¹ The technology of destruction has evolved, changing the nature of war and in turn threatening the state’s legitimacy as the ultimate source of security.⁹² As a result, alongside the traditional protection of sovereign territory from foreign interference, current understanding of national security often encompass counterterrorism and immigration as responses to both territorial threats as well as threats to the ideological principles upon which the democratic state is founded.⁹³ Further, in order to effectively respond to the transnational nature of terrorist threats, significant international cooperation in intelligence gathering and sharing is required.⁹⁴ This means that the security of one state becomes interwoven with that of other states, requiring an expansion of understanding of national security to include activities directed against certain foreign governments.⁹⁵

In the current atmosphere of perceived perpetual crisis (due, in part, to the ongoing “War on Terror”), the need to protect the republic, the collective rights of citizens, and homeland security is particularly apparent.⁹⁶ While the implementation of such protective measures can be at odds with the obligation to protect individual rights, the transnational terrorism facilitated by globalisation has caused many to reconsider the way in which a state is

⁸⁸ Rankin, above n 79, at 250.

⁸⁹ At 250.

⁹⁰ At 250-253.

⁹¹ At 253.

⁹² At 253.

⁹³ Hitoshi Nasu “State Secrets Law and National Security” (2015) 64 Int’l & Comp.L.Q. 365 at 372.

⁹⁴ At 373.

⁹⁵ At 373.

⁹⁶ Paul Haridakis “Citizen Access and Government Secrecy” (2006) 25 St. Louis U.Pub.L.Rev. 3 at 4.

expected to balance security and liberty.⁹⁷ The judiciary provides one example of the way in which heightened anxieties around state security affect the balance between transparency and security measures that is deemed acceptable; in a safe nation, judges may look to give the liberty interest a greater weight, while “[t]he greater the threat that an activity poses to the nation’s safety, the stronger will be the grounds for seeking to repress that activity, even at some cost to liberty.”⁹⁸ If transparency is a key element of liberty, in that an informed public has the ability to fully assess their government and therefore challenge inappropriate behaviours, an argument can be made that that prioritising liberty is an error in circumstances of challenged security in which liberties are already being threatened.⁹⁹

In theory, it seems difficult to argue with limited restriction of knowledge when the alternate (that is, full disclosure) would jeopardise diplomatic, military, and covert intelligence-gathering and security-enhancing activities; these activities can all be vital to the security of a state, for which Hobbes and Locke argue that public has already demonstrated its willingness to relinquish some individual liberty.¹⁰⁰ However, secrecy in the name of national security undermines the accountability that government control is conditional upon.¹⁰¹ Without transparency, the public is required to trust that the government to whom they have delegated power is using this power in accordance with both context-specific expectations and general democratic principles. Further, the public is unable to assess whether or not their nation is more secure due to the withholding of requested information, as such an assessment would require access to the withheld information; this catch-22 demonstrates how the theoretic justification of secrecy for purposes of state security is ripe with potential for abuse.¹⁰² Given the importance of openness and transparency in protecting citizens against corrupt or incompetent governments, an information disclosure scheme must attempt to find the delicate balance between the strong public interest in disclosure in all areas (as necessary for an effective democratic accountability regime) and the legitimate reasons to refuse such disclosure.

⁹⁷ Haridakis, above n 96, at 4; Cohen “How Much Security”, above n 84, at 145.

⁹⁸ Cohen “How Much Security”, above n 84, at 146.

⁹⁹ At 146.

¹⁰⁰ Morton Halperin and Daniel Hoffman, “Secrecy and the Right to Know” (1976) 40 *Law & Contemp. Probs.* 132 at 132.

¹⁰¹ Craig Forcese “Clouding Accountability: Canada’s Government Secrecy and National Security Law Complex” (2004) *Ottawa L.Rev.* 49 at 52.

¹⁰² Friedman and Hansen, above n 7, at 1611.

A International response to the tension between national defence and democratic requirements

International law can indicate what is expected of domestic legislation and policies, and therefore provide a measure by which information disclosure schemes generally and information disclosure decisions in specific circumstances, such as Operation Burnham, may be assessed. Additionally, if a state has specifically signed or ratified an international instrument, it would be reasonable to anticipate that the goals and expectations of that international instrument will be reflected in that state's domestic legislation and policies. Article 19 of the Universal Declaration of Human Rights establishes that everyone has the right to freedom of opinion and expression, including the right to seek information and ideas, therefore creating a default right to disclosure of information.¹⁰³ Passed as a resolution of the United Nations General Assembly, the Declaration was conferred moral and political, but not legal, force; however, widespread international recognition of the principles of the Declaration suggests that it contributes to customary international law, providing a universal standard against which the conduct of governments can be, and are regularly, assessed.¹⁰⁴ Further, New Zealand voted in favour of its adoption, suggesting that New Zealanders can expect their government to demonstrate an active commitment to the rights, including the right to information, that the Declaration advocates.¹⁰⁵ However, the right to information is delimited in the International Covenant on Civil and Political Rights, an international instrument that New Zealand has also demonstrated commitment to through signature and ratification.¹⁰⁶ The Covenant specifies that the right to information is subject to certain restrictions, including those restrictions provided by laws that are necessary for the protection of national security.¹⁰⁷ This demonstrates both international and New Zealand acceptance for the general principle that the right to information can be limited for reasons of national security, although the Covenant itself does not provide much guidance as to the application of this security exception.

While various international guidelines have been released regarding the right to information, the 2013 *Tshwane Principles* ("the Principles") provide specific guidance

¹⁰³ Universal Declaration of Human Rights, art 19; Commission on Human Rights *Civil and Political Rights Including the Question of: Freedom of Expression* E/CN.4/2000/63 (2000) at 42-44.

¹⁰⁴ Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1 at 6.

¹⁰⁵ At 6.

¹⁰⁶ International Covenant on Civil and Political Rights; United Nations Treaty Collection "Human Rights: International Covenant on Civil and Political Rights" <<https://treaties.un.org>>.

¹⁰⁷ International Covenant on Civil and Political Rights, art 19.

around laws and provisions relating to state authority to withhold information on grounds of national security.¹⁰⁸ The Principles suggest that “legitimate national security interests are, in practice, best protected when the public is well-informed about the state’s activities”, but acknowledge that certain circumstances may require information to be kept secret in order to protect the full exercise of human rights as well as legitimate national security interests.¹⁰⁹ While ‘national security’ is not defined in this document, the Principles specify that this term “should be defined precisely in national law, in a manner consistent with the needs of a democratic society.”¹¹⁰ In order to restrict the right to information on national security grounds, the Principles state that a government must demonstrate that:¹¹¹

- 1 The restriction
 - a) is prescribed by law, and
 - b) is necessary in a democratic society
 - c) to protect a legitimate national security interest; and,
- 2 the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.

While the Principles are non-binding, they are based on international and national law, standards, and best practices, as well as expert literature, suggesting that these guidelines are reflective of the international understanding as to the best approach to the withholding of information for reasons of state security.¹¹²

The approach advocated by the Principles does not specifically recognise democratic accountability – in fact, by asserting that, in some instances, information must be kept secret in order to protect legitimate national security interests, the Principles suggest that the diminution of democratic accountability may in certain instances be justifiable and even desirable. However, the Principles do require that adequate safeguards against abuse be in

¹⁰⁸ *The Global Principles on National Security and the Right to Information (Tshwane Principles)* (Open Society Foundations, 12 June 2013) at 5-6; for wider reading of international guidelines regarding freedom of expression and access to information more generally, see *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* E/CN.4/1984/4 (1984) and *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1995).

¹⁰⁹ At 6.

¹¹⁰ At 12.

¹¹¹ At 14.

¹¹² At 5.

place. While such safeguards may not ensure that the public can directly hold their elected officials to account, they may be sufficient to satisfy the public that governmental power is being exercised in accordance with their expectations - for example if the public in question has faith in the judgment of an independent oversight authority or the judiciary. Further, by requiring that national security be defined precisely in the law, and that the law be “accessible, unambiguous, drawn narrowly and with precision”, the Principles promote a legal framework that allows the public to be generally aware of what type of information is being withheld from them; this in turn allows for the engagement of democratic accountability mechanisms if the public does not agree with the standards for secrecy that its government has established.¹¹³ In addition, the public authority seeking to withhold the information in question must establish the legitimacy of its claim to secrecy.¹¹⁴ In order to do so, the authority must provide specific and substantive reasons for the necessity of the restriction.¹¹⁵ This again provides traction for democratic accountability; while the public may not be able to hold the government to account in terms of the information that is being withheld, they can demand democratic accountability for the withholding of that information. Therefore, while the Principles do permit the withholding of information in certain circumstances regarding national security (suggesting that complete transparency and therefore complete democratic accountability cannot always be justified against threats to national security), these guidelines do seem to promote elements of limited, alternative democratic accountability as well as other protections against abuses of power.

However, the Principles also permit a state to derogate from its obligations in a state of public emergency “which threatens the life of the nation”, so long as the derogation is only to the extent required by the situation.¹¹⁶ Should a government respond to the threats posed by global terrorism by declaring an ongoing state of emergency, it could be argued that “the life of the nation” is permanently being threatened. Further, derogation “to the extent required by the situation” seems a largely subjective assessment. Subjectivity in the exercise of power can lead to abuse of power, and therefore is a key danger that accountability protects against. However, if the subjective decision is one to withhold information and derogate from usual abuse safeguards, the public lacks an ability to hold elected officials to account in situations in which democratic accountability seems particularly important, both because of the subjective exercise of the power to withhold information and the significant consequences of the use of state force. In the principal-

¹¹³ *Tshwane Principles*, above n 108, at 15.

¹¹⁴ At 16.

¹¹⁵ At 16.

¹¹⁶ At 18.

agent understanding of the state, military power is derived from the people, and therefore its exercise is in their name and should be for their benefit with their assent, whether express or implied; if the use of this power is not subject to democratic accountability mechanisms, because the “War on Terror” is deemed to justify the ongoing diminution of this accountability, the legitimacy of the state and the authenticity of democracy is then uncertain.

1 New Zealand

As transparency sits at the heart of democratic accountability, a state’s freedom of information legislation may offer insight into the legislative balance that a state has deemed appropriate to strike between democratic accountability and state security. New Zealand’s Official Information Act 1982 (“the OIA”) establishes a principle of availability and a default regime of openness by requiring the release of requested information unless there is a good reason for refusing such release, with a focus on the likely consequences of the information’s disclosure.¹¹⁷ In this way, the OIA reflects New Zealand’s commitment to the right to information as a signatory of the Universal Declaration of Human Rights. The OIA is concerned with the provision of information, rather than documents; further, the OIA provides a very broad definition of ‘official information’ as information held by any one of the agencies identified in the OIA.¹¹⁸ In addition, the New Zealand regime does not lay down rules about categories of legislation, a structure evident in other jurisdictions, allowing each case for release or retention to be assessed on its own merits.¹¹⁹ This combination of factors results in a flexible system in which information is arguably less likely to be withheld arbitrarily, but rather only withheld after appropriate assessment of the competing interests of national security and democratic accountability. However, the level of discretion in the OIA that allows New Zealand’s freedom of information regime to be so flexible and situation-respondent also has the potential to undermine democratic accountability if discretion is consistently being exercised in favour of information being withheld while purporting to be exercised on a case-by-case basis.

¹¹⁷ Official Information Act 1982, s 5; Geoffrey Palmer, *New Zealand’s Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 31-33; Paterson, above n 3 at 7; Law Commission *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, June 2012) at 1; Rick Snell “The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand” (2000) 28 FL Rev 575 at 592.

¹¹⁸ Official Information Act 1980, s 5; Snell, above n 117, at 584.

¹¹⁹ Law Commission, above n 117, at 11.

One conclusive ground for withholding information under the OIA is where the making available of the requested information would be likely “to prejudice the security or defence of New Zealand.”¹²⁰ An individual or group wishing to appeal the application of this provision would refer the decision to the Ombudsman – however, while generally the Ombudsman can recommend the disclosure of information, if the Prime Minister certifies that the release of such information would be likely to prejudice New Zealand’s security or defence interests, the Ombudsman cannot recommend that the information in question be made available.¹²¹ In this instance, the Ombudsman is limited to suggesting that the availability of the information be reconsidered by the appropriate department or Minister.¹²² This has the potential to render the Ombudsmen ineffective as a checking mechanism in instances of national security.

2 *Australia*

Similarly to New Zealand, the Australian Freedom of Information Act sets out that a document is exempt from disclosure if such disclosure would, or could reasonably be expected to, cause damage to Australia’s security, defence, or international relations.¹²³ The Freedom of Information guidelines released by the Office of the Australian Information Commissioner state that, along with the content of the document, the context is also relevant, as while the document by itself may not cause harm, it may do so in combination with other information.¹²⁴ The “mosaic principle” significantly widens the amount of information that may be withheld (as harmless information may be withheld if it may assist individuals and groups threatening the state when pieced together with other information that they *may* obtain) which conversely reduces transparency, and therefore democratic accountability. This element of the Australian information disclosure regime seems to suggest that the legislation is predisposed to asserting the importance of state security over democratic accountability.

While an attitude of deference towards national security concerns existed in Australia before the 9/11 terrorist attacks, it is arguable that these attacks reinforced the value of a policy of the primacy of national security, even when such security comes at a cost to

¹²⁰ Official Information Act 1980, s 6(a); Law Commission, above n 117, at 7.2-7.3.

¹²¹ Official Information Act 1980, ss 28-31; Law Commission, above n 117, at 36.

¹²² Official Information Act 1980, s 31.

¹²³ Freedom of Information Act 1981 (Cth) s 33.

¹²⁴ Office of the Australian Information Commissioner *FOI Guidelines* (May 2018) at 5.26.

democratic accountability.¹²⁵ In response to 9/11, the Howard Government declared an indefinite “War on Terror”, asserting that this war required a curtailment of legal rights in Australia.¹²⁶ Therefore, despite Australian Freedom of Information Act 1982 providing a legally enforceable right to access to government documents, the government has clearly stated that this right is subordinate to the security interests of the state.

This policy of secrecy towards the release of military information is evidenced by the Australian government’s response to public concern about the actions of Australian military forces overseas. In 2005, *Time* magazine reported that, during “Operation Slipper”, an Australian Special Air Service patrol killed 15 innocent tribesman and wounded 16 more.¹²⁷ In response to this article, General Peter Cosgrove stated that he was satisfied with the disciplinary action that had been taken at the time, but could not provide any further information as the Australia Defence Force “treat[s] these issues confidentially to allow the correct and appropriate application of military law.”¹²⁸ General Cosgrove asserted that it was Australian Defence Force policy to refrain from releasing information to the public about international investigations and any resulting disciplinary action, despite there not being any obvious need to keep disciplinary action secret in order to protect national security.¹²⁹ With secrecy surrounding the evidence, investigation, disciplinary actions, and the applicable rules of engagement, the consequent lack of transparency inhibited the public’s ability to effectively assess the Australian Defence Force’s actions during Operation Slipper, and therefore hold their government to account for its delegation of military power and monitoring over such delegated power.¹³⁰ Similar policies of secrecy surrounded the Australian military’s presence in Iraq and the Solomon Islands, suggesting a blanket application of the national security defence to requests for transparency.¹³¹ While the Australian position generally seems more geared towards the protection of national

¹²⁵ For example, a 2000 amendment to the Defence Act 1903 empowered the federal government to call-out Australia’s armed forces on domestic soil against perceived threats to Commonwealth interests without requiring the agreement of a State government, as well as allowing members of the Australian Defence Force to fire at civilians without ministerial approval if there is insufficient time to obtain such approval; for more, see Michael Head “Calling out the Troops – Disturbing Trends and Unanswered Questions” (2005) 28 UNSWLJ 482.

¹²⁶ Michael Head “Calling out the Troops – Disturbing Trends and Unanswered Questions” (2005) 28 UNSWLJ 482.

¹²⁷ At 491.

¹²⁸ At 491.

¹²⁹ At 491.

¹³⁰ At 491.

¹³¹ At 492.

security at the cost of democratic accountability, the similarities between Operation Slipper and Operation Burnham, as well as official responses to queries about both operations, may suggest that the New Zealand public should be concerned that claims to national security are also being used in a sweeping manner by their own government, limiting democratic accountability to an unjustifiable extent.

3 *Canada*

In the Canadian jurisdiction, access to information legislation has been recognised as vital to democracy by enabling citizens to participate meaningfully in the democratic process as well as ensuring that politicians remain accountable to the public for their exercises of power.¹³² However, at least eight federal statutes authorise the limitation of citizen access to government information on grounds of national security.¹³³ Despite this legislative acceptance of national security as a justified restriction on the right to information, no single definition of ‘national security’ is provided, with each governing Act setting out its own triggers for security; the resulting matrix of statutory definitions and judicial applications enables the concept of ‘national security’ to continue to expand, which has the converse effect of decreasing public accountability by increasing the potential application of the national security defence to requests for information.¹³⁴ Canada’s Access to Information Act 1985 sets out the grounds for national security exceptions to the right to information with reasonable clarity, often requiring evidence of harm to national security should the information be released.¹³⁵ Further, no strict non-disclosure requirement is imposed, implying that a public interest test should be included in the government’s use of the discretion as to whether or not to disclose requested information.¹³⁶ However, changes to the Canada Evidence Act 1985 made in 2001 (after the 9/11 terrorist attacks) incorporated vague and broad categories of information, therefore creating an uncertainty of scope in the application and acceptance of the national security defence.¹³⁷ Further, the 2001 amendment also allows the government to issue a certificate by which a Federal Court judge’s order to release information under the Anti-terrorist Act 2001 can be quashed, as well as proceedings under the Access to Information Act.¹³⁸ Thus, not only does Canada’s

¹³² Forcese, above n 101, at 55-56.

¹³³ At 54; examples of such statutes include the Access to Information Act 1985, the Canada Evidence Act 1985, and the Security of Information Act 1985.

¹³⁴ Jason Gratl and Andrew Irvine “National Security, State Secrecy and Public Accountability” (2005) 54 U.N.B.L.J. 251 at 257.

¹³⁵ Forcese, above n 101, at 83.

¹³⁶ At 83-84.

¹³⁷ At 84.

¹³⁸ At 84.

Evidence Act facilitate a broad application of a national security defence to requests for release of information by lacking clear boundaries for this defence, but the Act also enables the government to prevent any effective judicial oversight of the way in which the national security defence is being applied.

The Canadian acceptance of the ever-expanding national security state, as facilitated by the broad legislation regarding national security and access to information, is shaped by a political tradition grounded in parliamentary, not popular, sovereignty, with the Canadian government traditionally being expected to promote “not life, liberty and the pursuit of happiness, but peace, order and good government.”¹³⁹ The Canadian narrative fosters a culture of docility, with “peace, order and good government” being dependent upon the public’s acceptance that they have no inalienable rights, but only rights that Cabinet has deemed to allow them, at least for the time being.¹⁴⁰ This reflects the Hobbes and Locke assertion that a desire for security has provided the foundation of the state, with the people being willing to sacrifice individuals rights in order to achieve such security. However, it is arguable that Canada’s information and secrecy laws are broader than is required for the protection of legitimate national security interests, and could be used instead to conceal government incompetence or abuses of power.¹⁴¹

4 *United Kingdom*

Like freedom of information legislation in New Zealand, Australia, and Canada, the United Kingdom’s Freedom of Information Act 2000 provides a general right of access to information held by public authorities, but recognises that there are exceptions to this right, including where the withholding of requested information is required for the purpose of guarding national security.¹⁴² Although no definition of ‘national security’ is provided in the Act, in *Norman Baker v the Information Commissioner and the Cabinet Office*, the Information Tribunal found that:¹⁴³

- a) “national security” means the security of the United Kingdom and its people;

¹³⁹ Rankin, above n 79, at 254.

¹⁴⁰ At 254.

¹⁴¹ Forcese, above n 101, at 87.

¹⁴² Freedom of Information Act 2000 (UK), ss 1 and 24(1); Information Commissioner’s Office *Safeguarding national security – (Section 24)* (2012) (accessed at ico.org.uk) at 7.

¹⁴³ *Norman Baker v the Information Commissioner and the Cabinet Office* (4 April 2007) EA/2006/0045 (Information Tribunal); Information Commissioner’s Office, above n 142, at 8.

- b) interests of national security are not limited to actions by an individual which are targeted at the United Kingdom, its system of government, or its people;
- c) the protection of democracy and the legal and constitutional systems of the United Kingdom are part of national security, as is military defence;
- d) action against a foreign state may indirectly affect the security of the United Kingdom; and,
- e) reciprocal cooperation between the United Kingdom and other states in the effort to combat international terrorism is capable of promoting the United Kingdom's national security.

Norman Baker therefore establishes a wide-ranging set of circumstances in which national security concerns may apply and therefore information may be withheld. Alongside this broad definition of national security, it has also been found that it is not necessary to show that the disclosure of the information would lead to a direct or immediate threat to the United Kingdom.¹⁴⁴ In addition, the Information Commissioner's Office also expressly recognises the 'mosaic arguments' seen in Australia.¹⁴⁵ While the exemption from the duty to communicate information is subject to a public interest test, the expansive set of circumstances in which national security can be deemed to be at threat seems to suggest that the United Kingdom's balancing of the transparency required for democratic accountability and national security favours the latter.¹⁴⁶

The value placed on national security in United Kingdom legislation, policies, and practices, even when doing so is detrimental to democratic accountability, is demonstrated by the case of Binyam Mohamed.¹⁴⁷ Mr. Mohamed was arrested in April 2002 in Pakistan, and was consequently detained in a variety of United States detention facilities and subject to repeated 'interrogation techniques' that were cruel, inhumane, and degrading.¹⁴⁸ In order to respond to charges of terrorism that were in part based on confessions that he allegedly made during his detention, Mr. Mohamed's lawyers sought information from the United

¹⁴⁴ *Philip Kalman v Information Commissioner and the Department of Transport (8 July 2010)* EA/2009/0111 (Information Tribunal); Information Commissioner's Office, above n 142, at 13.

¹⁴⁵ Information Commissioner's Office, above n 142, at 13.

¹⁴⁶ Paterson, above n 3, at 7-8.

¹⁴⁷ Adam Tomkins "National Security and the Due Process of Law" (2011) 64 CLP 215 at 223; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

¹⁴⁸ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [60]-[61].

Kingdom government which they believed would establish that the alleged confession had been obtained as a result of torture.¹⁴⁹ This request was denied on grounds of national security.¹⁵⁰ In the first instance, the court felt unable to order disclosure of the requested information because the United States government threatened to limit future cooperation with the United Kingdom on the transfer of intelligence.¹⁵¹ However, following a change in the United States' presidency as well as a finding by the United States Court for the District of Columbia that Mr. Mohamed *had* been subject to torture, the Court of Appeal found that the requested information should be released.¹⁵²

Mr. Mohamed's case demonstrates the significant human rights violations, like torture, that can occur when arguments of national security are used to justify withholding of government information. Further, despite Mr. Mohamed's 'win', the judgements still demonstrate a commitment to national security at the expense of democratic mechanisms.¹⁵³ The United States government had already accepted the responsibility of the United States for the torture of Mr. Mohamed, and had themselves released the 42 requested documents to Mr. Mohamed's lawyers, by the time the United Kingdom Court of Appeal judgment was released.¹⁵⁴ But for this development, two of the Court of Appeal judges would have reached the conclusion that national security still required the requested information to be withheld.¹⁵⁵ With the threat of diminished intelligence-sharing by the United States no longer applicable, arguments about the implications of limited intelligence-sharing were no longer being used to bar the release of information; therefore, the outcome was not reflective of a decision that the right to information was greater than the right to security, but rather that the danger of diminished intelligence-sharing by the United States that posed the threat to state security was no longer relevant. In addition, Lord Neuberger expressly stated that "as a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary" and that "any judge must accord every substantial

¹⁴⁹ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [62].

¹⁵⁰ At [62].

¹⁵¹ Tomkins, above n 147, at 226; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [11]-[13].

¹⁵² Tomkins, above n 147, at 239; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [4], [48], [59] and [208].

¹⁵³ Tomkins, above n 147, at 239.

¹⁵⁴ Tomkins, above n 147, at 239; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [82].

¹⁵⁵ Tomkins, above n 147, at 238-239.

weight to the Foreign Secretary's view as to the existence and extent of [a risk to national security]”, suggesting that the judiciary is not able to act as a checking mechanism over the use of executive power in matters of national security.¹⁵⁶ If the United Kingdom judiciary has accepted that the system of checks and balances does not apply to decisions regarding state security, it seems even more important that the government should be transparent in its actions to allow the public to assess the legitimacy and desirability of such actions.

B The value of transparency and democratic accountability

As demonstrated by the brief comparison of New Zealand, Australia, Canada and United Kingdom, while nations have developed different systems by which to find the balance between transparency and the protection of national security, national security is widely recognised as an acceptable justification for the limitation of transparency.¹⁵⁷ As discussed, transparency sits at the very core of democratic accountability. Yet, if all four jurisdictions, as well as international guidelines, in certain circumstances prioritise state security over democratic accountability, perhaps society has decided that the balance between security and public accountability should generally favour the former, and that the consequences of the lack of accountability are less important to us than the potential security consequences should the balance tip the other way. Alternatively, perhaps public willingness to accept arguments of secrecy in the name of security is reflective not of a measured choice between democratic accountability and state security, but rather a desire to avoid public responsibility for the use of publicly-sourced power. Although the public initially responded to the scandal of Operation Burnham, it seems it was the scandal rather than the culpability concerns that drew public attention, as public interest in the matter waned relatively quickly despite the matter not yet having reached a conclusion. In remaining blissfully unaware, the public are unable to judge, and therefore unable to be held accountable for, difficult decisions such as whether or not to endanger children like Fatima, the three-year-old killed during Operation Burnham, in the pursuit of national security.

The above examination of international frameworks and comparative jurisdictions demonstrates that New Zealand is not alone in limiting information on the grounds of state security, such as the limitation of information regarding Operation Burnham, nor is the New Zealand public alone in accepting such limitations. However, *should* the New Zealand

¹⁵⁶ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, above n 147, at [131].

¹⁵⁷ Cloete and Auriacombe, above n 82, at 451; Nasu, above n 93, at 371.

public be so accepting of limited democratic accountability simply because it is being done elsewhere? It could be argued that, in instances of national security, the public does not have the ability to properly assess the actions of governmental individuals and bodies, because that public does not have the requisite special knowledge or skills.¹⁵⁸ Yet the response to this line of reasoning would be that the purpose of democratic accountability is not to ensure that the objective best action is taken, but rather to confirm that the government is using the power that has been delegated to it from its citizens in a manner that generally satisfies the expectations and requirements of those citizens. Voters place their trust in certain public officials to serve the voters' interests, and knowledge of the officials' actions is required in order to assess these actions and determine whether or not the trust was well-placed in terms of state power being exercised in a manner that is reflective of public will.¹⁵⁹ In this way, denial of knowledge challenges the very foundations of democracy. The chain of power delegation starts with the public as the ultimate source of state power; therefore, a failure by the public to monitor state use of power is a failure to acknowledge public control over, and therefore responsibility for, state action.

VI Alternative sources of democratic accountability for Operation Burnham

I have asserted that transparency is essential for effective democratic accountability, which in turn is essential to the democratic principles that underpin New Zealand's state structure. For modern democracies, clandestine activities are central to state defence; yet, as covertness is contrary to the principle of openness by which a government earns its legitimacy, these secret activities should in some way still be subject to oversight and control.¹⁶⁰ While it has been demonstrated that certain circumstances justify the state's keeping of secrets to enhance the security of their citizens, the purpose of national security is not to provide governments with an escape from accountability.¹⁶¹ Government efforts at controlling public access to information must be closely scrutinized, as the limitation of information in the public domain threatens the integrity and accountability of government bodies.¹⁶² If it is accepted that, in certain circumstances, citizens need to be denied knowledge of government activity in order to avoid undermining the security aims of such activities, it seems that there must be mechanisms in place to ensure that the absence of direct democratic accountability (that is, the direct provision of information and

¹⁵⁸ John Goldring "Public Law and Accountability of Government" (1985) 15 F.L.Rev 1 at 3.

¹⁵⁹ Mark Lauchs "Rational Avoidance of Accountability" (2007) 7 Queensland U.TechL. & Just.J 295 at 297.

¹⁶⁰ Cohen "State Secrecy", above n 6, at 48.

¹⁶¹ Forcese, above n 101, at 65.

¹⁶² Haridakis, above n 96, at 25.

explanation by the state to the public in order to facilitate judgement and consequences) does not result in the collapse of democracy itself.¹⁶³ Operation Burnham is one such instance in which the right to the direct government provision of information has been limited for reasons of state security; however, democratic accountability may still find a foothold in this instance through the provision of information by secondary parties, namely the media and the Burnham Inquiry.

A *The media*

As demonstrated by the release of *Hit & Run*, the press plays a key role in the dissemination of information that may be of public interest.¹⁶⁴ A free press, one that is able to both gather and communicate information, can contribute to the creation of an informed citizenry, a condition that is vital to the success of democratic accountability and hence democracy itself.¹⁶⁵ The European Court of Human Rights has stated that freedom of the press “enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society”, not only enabling the public to have access to the information necessary to form opinions about their government but also providing a forum for such opinions to be accessed by politicians, informing responsive political change.¹⁶⁶ In this way, the media are gaining power as an informal political accountability mechanism.¹⁶⁷ Further, the media are increasingly challenges traditional ideas of official secrecy and government privilege, creating greater levels of transparency and accountability.¹⁶⁸ In addition, where publicity stimulates public awareness, and such awareness creates a demand for the release of information, the refusal of this demand itself generates further concern about the contents of the information and greater demand for release.¹⁶⁹ In such circumstances, the outright refusal to provide any accepted justification suggests concealment of malfeasance.¹⁷⁰

¹⁶³ Gratl and Irvine, above n 134, at 251.

¹⁶⁴ Alfred Chanda “The State Security Act vs Open Society: Does a Democracy Need Secrets?” (1997) 29 Zam.L.J. 33 at 34.

¹⁶⁵ At 34.

¹⁶⁶ At 34.

¹⁶⁷ Monika Djerf-Pierre, Mats Ekström, and Bengt Johansson “Policy failure or moral scandal? Political accountability, journalism and new public management” (2013) 35(8) Media, Culture & Society 960 at 962.

¹⁶⁸ Dean Wilson, Amanda Third, and Sharon Pickering “Media, Secrecy and Guantanamo Bay” (2004) 16 Current Issues Crim. Just. 79 at 81.

¹⁶⁹ Gratl and Irvine, above n 134, at 154.

¹⁷⁰ At 154.

However, in order for the media be able to compensate for the democratic accountability concerns surrounding a government's ability to withhold information in the name of state security, it would have to be that the media not only had the ability to gather this information (despite the government's best efforts to maintain secrecy), but also that they could be relied upon to present such information without bias or agenda.¹⁷¹ The way in which the media frames an event is critical to the public perception of that event and the evolution of the event itself.¹⁷² If the media is passing judgment before a story is run, and only presenting the evidence that supports this predetermined conclusion, the public are again being denied the ability to fully and fairly examine government exercise of publicly-sourced power. The media themselves may be exercising discretion, perhaps under the influence of the competitive media market, in determining what to publish, and so would consequently need in some way to themselves be able to be held accountable for their exercise of this discretion.¹⁷³ This discretion in reporting can be evidenced by *Hit & Run*, which arguably presents Operation Burnham in a particular, accusatory light. If this is the only source from which the public are able to access information about Operation Burnham, then the public again are unable to hold their government democratically to account in a meaningful manner, as their judgment of the NZDF is based on incomplete information. While the government arguably could release the information it holds if concerned about the media's biased reporting, if this government is hamstrung by legitimate national security concerns and therefore legitimately unable to respond to accusations by the media, the public may unwillingly be exercising democratic accountability measures on the basis of media misinformation.

Even if it were accepted that the media could be factored into this democratic assessment as a modern constitutional safeguard and advocate of accountability, it does not always have the freedom to act in this manner. Reporters Without Borders has alleged that reports on Guantanamo Bay have been significantly limited, with the few journalists who have been able to visit the facility being intensely surveilled while on site and limited in the questions that they could ask.¹⁷⁴ This demonstrates that times of national security crisis often result in hyper-control of the media, limiting the ability of the media to act as a facilitator of democratic accountability by providing information to the public.¹⁷⁵ Such limitations are arguably necessary for the preservation of state security, particularly in the

¹⁷¹ Djerf-Pierre, Ekström, and Johansson, above n 167, at 964.

¹⁷² At 964.

¹⁷³ Friedman and Hansen, above n 7, at 1625.

¹⁷⁴ Wilson, Third, and Pickering, above n 168, at 81.

¹⁷⁵ At 81.

“War on Terror”, in which tools of intelligence are key to avoiding attack.¹⁷⁶ However, in terms of democratic accountability, limiting the media to producing a sanitized, if any, version of events arguably coopts the public into consenting to actions of which they are not fully aware, actions that are carried out in *their* name to protect *their* national security.¹⁷⁷ Thus, while the media has a powerful role as a democratic accountability mechanism, it fails to completely fill the void left by government retention of information in the name of state security.

B The independent inquiry

The *Tshwane Principles* suggest that “courts in many countries demonstrate the least independence and greatest defence to the claims of government when national security is invoked.”¹⁷⁸ However, within our constitutional structure, the independent judiciary is one of the main institutional safeguards against government abuse.¹⁷⁹ In this instance, the independent inquiry seems to be taking on a quasi-judicial role, hearing all of the evidence and passing judgment. Although this judgment, unlike that of a court of law, has no direct legal consequences, the outcome of the Inquiry may trigger further investigation, and consequent legal and democratic sanctions, by other forums.

Independent inquiries can be argued to have three key functions: informative or educative, facilitating restorative justice, and socio-democratic.¹⁸⁰ The principal aim of investigative inquiries is to uncover facts; these facts can be used to inform policy development as well educate the public.¹⁸¹ Hearing evidence openly seems to be of great importance in terms of public education, allowing the public to be informed directly rather than relying on a second-hand recount.¹⁸² The second function, which casts the inquiry as a tool of restorative justice, refers to the ability of the inquiry to publicize wrongs, legitimatise the grievances of those who suffered as a result of these wrongs, and begin the process of redress by suggesting appropriate next steps.¹⁸³ Along these lines, the “public voicing of grievances” may have potential therapeutic and restorative effects – yet it is arguable that,

¹⁷⁶ Friedman and Hansen, above n 7, at 1618.

¹⁷⁷ Wilson, Third, and Pickering, above n 168, at 81.

¹⁷⁸ *Tshwane Principles*, above n 108, at 5-6.

¹⁷⁹ At 6.

¹⁸⁰ Jasminka Kalajdzic “Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry” (2010) 36 *Queen’s L.J.* 161 at 185.

¹⁸¹ At 184.

¹⁸² At 184.

¹⁸³ At 186.

in addition to the public voicing of grievances, a public process of acknowledgement is key to achieving these aims.¹⁸⁴ Thirdly, the socio-democratic aspect of an inquiry refers to its role as a mechanism of political accountability.¹⁸⁵ If public inquiries enable the public to understand all of the circumstances of an event or decision, they can promote ethical government conduct and restore public confidence in the system of government by ensuring that inappropriate actions are recognised and addressed appropriately.¹⁸⁶ However, if information is only partially released, or not at all, the public's assessment of a government body or individual will be shaped by the analysis of the persons undertaking the inquiry; it is arguable that this will not be the public exercising their democratic right to assess their representatives' actions at all, but rather two individuals exercising this right on their behalf. While the independence of inquiries may promote public confidence in its processes and outcomes, such confidence is difficult to verify if the outcome of the inquiry cannot be analysed against the evidence examined by those undertaking the inquiry.¹⁸⁷ Therefore, while an open independent inquiry may satisfy the requirements of democratic accountability, an inquiry that is conducted in secret may not address the democratic accountability concerns raised when a government withholds information in the name of state security.

Consistent with Canada's post-9/11 policies of concealment, the Canadian Iacobucci Inquiry was characterized by secrecy.¹⁸⁸ In late September 2001, a multi-agency terrorist investigation force named Project A-O Canada began to aggressively investigate Mr. Almalki, Mr. El Maati and Mr. Nureddin.¹⁸⁹ Under an information-sharing policy also instigated after the 9/11 attacks, Canadian officials shared the raw intelligence gathered by Project A-O, not vetted or verified in any way, with the United States, who subsequently shared the information with other foreign agencies.¹⁹⁰ Based at least in part on this intelligence, the three men were arrested by Syrian Military Intelligence, severely tortured, detained for long periods of time, and then released without being criminally charged.¹⁹¹ A Commission of Inquiry into a separate incident of Canadian complicity in torture recommended a full and independent investigation into the cases of Mr. Almalki, Mr. El

¹⁸⁴ At 186-189.

¹⁸⁵ At 189.

¹⁸⁶ Kalajdzic, above n 180, at 190.

¹⁸⁷ Sales, above n 5, at 174.

¹⁸⁸ Kalajdzic, above n 180, at 162-163.

¹⁸⁹ At 166.

¹⁹⁰ At 166.

¹⁹¹ At 166-167.

Maati and Mr. Nureddin.¹⁹² The terms of reference for this subsequent inquiry emphasized that the Commissioner should “take all steps necessary to ensure that the Inquiry was conducted in private” but allowed for specific portions of the Inquiry to be conducted in public if the Commissioner thought that this was “essential to ensure the effective conduct of the Inquiry.”¹⁹³ The resulting inquiry was conducted almost entirely in secret – no documents were released to the public, not even documents to which claims of national security were not even remotely relevant, and none of the 40 witnesses were examined in public or by the counsel for the three men whose treatment sparked the Inquiry.¹⁹⁴ Mr. Almalki, Mr. El Maati and Mr. Nureddin were displeased with a process that was marked with “obsessive secrecy” to the extent that they were isolated from an inquiry into their own experiences, and applied three times for public hearing; however, these applications were resisted by the Attorney-General.¹⁹⁵ After the “invisible inquiry” reached its end, the public version of Commissioner Iacobucci’s report states that the actions of Canadian officials had indirectly led to the detention and torture of Mr. Almalki, Mr. El Maati and Mr. Nureddin.¹⁹⁶ However, the Commissioner also praised Canadian officials for doing their best in difficult circumstances.¹⁹⁷

While the Iacobucci Inquiry took place in a different jurisdiction, it demonstrates that independent inquiries do not necessarily compensate for limitations on democratic accountability. Although the Iacobucci Inquiry started with a presumption of non-disclosure, the Commissioner was given a vast amount of discretion as to the release of information. Given the impact of the exercise of this discretion upon democratic accountability, it seems arguable that this discretion should have been limited by providing clear definitions of “private” and “effective conduct of the Inquiry.” To do so would have at least allowed the public to understand what information they were being denied, rather than having to place their trust in the balance between security and liberty that was decided by an un-elected official. It is arguable that the three key functions of an inquiry are significantly undermined when those conducting the inquiry are given a relatively wide discretion over the release of information. There may be a need for stricter guidelines and less discretion regarding an inquiry’s release of information; this would increase certainty of outcome as well as clarifying where a government sits on the spectrum between

¹⁹² At 167.

¹⁹³ Kalajdzic, above n 180, at 171.

¹⁹⁴ At 176.

¹⁹⁵ At 176.

¹⁹⁶ At 177.

¹⁹⁷ At 177.

information retention and release, facilitating public debate and feedback about the balance between transparency and accountability that their government has deemed appropriate. However, as demonstrated, state security is permanently evolving within an ever-changing world, and if access to information was not assessed on a case-by-case basis, the right to information or the right to security would eventually be arbitrarily curtailed by inflexible policies.

Further, this wide discretion enables an inquiry's publicity as well as its secrecy. I would like to see Sir Geoffrey and Sir Terence use this discretion to conduct the Burnham Inquiry in an open and public manner, in recognition of the importance of government transparency in the democratic state. I have argued that state power is sourced from its people, and a condition of this power delegation was that the state should be able to be held accountable for its use of publicly-sourced power. While state security may, on occasion, justify limitations upon the availability of information to the public, I would suggest that this limitation should remain the exception and not the rule, as seems increasingly the case in matters of national defence. Sir Terence and Sir Geoffrey are well-placed to assess the legality of Operation Burnham; however, this legal assessment of state action cannot replace the public assessment that underpins the entire democratic structure. While it may be easier to place the burden of an accountability assessment onto a private inquiry, enabling members of the public to avoid deciding upon the balance that they would like to see between transparency and security, it is arguable that the public has both a right and a responsibility to evaluate the actions of their elected officials, as it is this public from whom state power – past, present, and future - is sourced. I submit that excessive transparency limitations threaten the very foundations of the democratic state, and would encourage Sir Geoffrey and Sir Terence to exercise their discretion to withhold information with caution.

VII Conclusion

“Knowledge will forever govern ignorance... a people who mean to be their own governors must arm themselves with the power which knowledge gives.”¹⁹⁸

In this statement, James Madison, one of the authors of the United States' Constitution, emphasises the importance of an informed citizenry in ensuring that their government is operating in accordance with democratic principles.¹⁹⁹ However, Madison's conception of

¹⁹⁸ Chanda, above n 164, at 35

¹⁹⁹ At 35

knowledge as power could also be used to bolster arguments for the retention of information, as, should this information fall into the hands of our nation's enemies, they too will be granted this power. Further, force is also the most basic form of power, and an individual's capacity for force will always be less than that of state. It is arguable that a public powered by knowledge may still not have the capability or resources to successfully respond to displays of strength or terror-inducing activities, but the government in whom they have entrusted the care of their nation will.

Yet it is artificial to discuss theoretical conceptions of power without considering the source of this power. In the democratic context, the public is the ultimate source of power, with state action relying on express or implied public assent. In this conception of the state, democratic accountability is fundamental to governmental legitimacy, as it justifies the delegation of power from the public to elected officials. It does so by ensuring that the delegators, the public, can hold the delegates, elected officials, to account for their direct use of the delegated power, or for the manner in which this power has been further delegated. Transparency is vital to the chains of delegation and accountability, as without the provision of relevant information, a public cannot accurately assess a delegatee's use of power nor determine whether this power needs to be removed. Thus the democratic accountability that is essential for state legitimacy relies on transparency.

However, as I have demonstrated, the transparency required for democratic accountability to function meaningfully is often curtailed in the name of national security. Thomas Hobbes and John Locke both assert that the formation of the state was due to society's willingness to sacrifice various liberties in exchange for heightened security at both an independent and collective level. By this reasoning, state security is key to the emergence of state structures as well as the state's ongoing legitimacy; the need for such security was so great that society deemed its importance above that of individual liberties. However, Hobbes and Locke also assert that the state's monopoly on force was granted in exchange for accountability for the use of this force. Therefore, the tension between state security and the transparency required by democratic accountability seems to highlight a contradiction in the fundamental foundations of the state.

But accountability is not singular in form. Perhaps the secrecy that is purportedly necessary for state security does not impede the operation of other forms of accountability as it does democratic accountability. While democratic accountability is significant in that it regulates the principal-agent relationship by which the state receives power from the public, it may be that this particular form of accountability has been deemed by society to

not be vital in the context of issues of national security, with alternative forms of accountability being sufficient to prevent state abuse of power. Alternatively, although the government may exercise a right to withhold information for purposes of state security, perhaps other mechanisms, such as independent inquiries, are able to satisfy the goals of democratic accountability in a different manner than envisaged by Mark Bovens' accountability model.

The democratic accountability of the New Zealand Defence Force for Operation Burnham will heavily rely on the outcome of such an independent inquiry, the Burnham Inquiry. The ability of the public to perform its own assessment of the government and the NZDF's actions in relation to this operation will depend on the manner in which the inquiry chooses to exercise its discretion. Having conducted the very balancing act between right to security and right to information that this paper has grappled with, Sir Terence Arnold and Sir Geoffrey Palmer will make a decision to release all, some, or none of the evidence that comes before them. The ability of the public to pass their own judgment on Operation Burnham will directly correlate to the amount of information released; as such release is in the hands of the inquiry, the democratic accountability of this NZDF operation will remain uncertain until the inquiry is concluded.

I have argued that the importance of democratic accountability necessitates as liberal an approach to information release by Sir Terence and Sir Geoffrey as possible. However, the public might in fact prefer that this is not the case. The tension between national security and transparency, and the resulting balancing act that seems to favour the former, may be reflective of society's willingness to turn a blind eye to the actions of their elected officials; as long as the majority of New Zealanders are not suffering as a result of the actions of the NZDF, perhaps it is easier for the public not to have to face difficult decisions about how defensible the actions of their government are. It could be that the decline in democratic accountability could be credited to public, as opposed to governmental, response to a heightened international security climate. The public may be willing for state power to be wielded in a more aggressive manner, but be unwilling to accept the accompanying responsibility for permitting such aggression. Democratic accountability, at its essence, places responsibility back with the people to ensure that their government is acting in the desired manner. Perhaps the public are turning their back on democratic accountability in situations of state security so that they do not have to face difficult questions of morality, neglecting democratic accountability in order to alleviate accusations of personal accountability.

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