



## MILITARY POLICE COMPLAINTS COMMISSION

**IN THE MATTER of a conduct complaint under section 250.18 of the *National Defence Act* by Amnesty International Canada and the British Columbia Civil Liberties Association.**

### **RULING ON REQUEST BY AMNESTY INTERNATIONAL AND THE BC CIVIL LIBERTIES ASSOCIATION FOR WAIVER OF UNDERTAKING**

Afghanistan Public Interest Hearings pursuant to  
Section 250.38(1) of the *National Defence Act*

MPCC 2008-042

On November 16, 2009, the Government of Canada provided the Commission with 43 documents in redacted form [hereinafter “the Colvin documents”] that the Government authorized for disclosure. The documents are relevant to the anticipated testimony of Mr. Richard Colvin, a witness summonsed by the Commission in this matter. The Colvin documents were documents that Mr. Colvin had sought to produce directly to the Commission, but because of a notice issued by the Government under Section 38 of the *Canada Evidence Act*, they had to be submitted to Attorney General for review and redaction prior to being given to the Commission. The redacted Colvin documents provided to the Commission represented the outcome of the Government’s review process.

On November 18, 2009, Mr. Colvin gave public testimony as a witness before the House of Commons Special Committee on the Canadian Mission in Afghanistan. It is general knowledge that this testimony generated considerable commentary and public interest.

On November 19, 2009, the Government delivered to the Commission new copies of two of the Colvin documents, with revised redactions.

On November 23, 2009, the Commission disclosed the documents to the Parties in order to assist them in their preparations for the Commission’s eventual hearings. On November 24, 2009, the Commission received an application from the complainants and

their counsel, asking to be relieved of the Undertaking of Confidentiality they had previously executed, in order to make the Colvin documents public. The basis for this request was that the testimony of Mr. Colvin before the Special Committee had generated significant public interest, the Colvin documents had been redacted by the Government for disclosure, and there was a significant public interest in the documents which had been referenced by Mr. Colvin in his evidence. Counsel also pointed to the fact that the Commission's own hearings are presently adjourned for the reasons given by the Commission on October 14, 2009.

On November 26, 2009, Department of Justice counsel representing seven of the subjects and the Government of Canada, filed representations opposing the complainants' request. Counsel submitted that a decision to relieve a party of its Undertaking must be consistent with the Commission's procedures and with the parties' reputational interests, which he argues would not be the case where the purpose of the request has no reasonable connection to the Commission's mandate or proceedings. Counsel further argued that the possibility that conclusions may be reached on the basis of a partial evidentiary record, if documents were released outside of the hearings process, without allowing the subjects and witnesses an opportunity to present "their side of the story in context", could adversely impact the reputational interests of the subjects and eventual witnesses.

On November 30, 2009, counsel for Mr. Colvin delivered representations supporting the complainants' request, on the basis that the documents have been vetted and redacted by the Government and authorized for disclosure. Counsel also submitted that since giving public testimony before the Special Committee, Mr. Colvin's reputation and credibility have been directly undermined by statements made publicly by Government officials, placing him at serious risk of suffering reputational damage. Counsel for Mr. Colvin also submitted that the documents in question have already been widely, but selectively, circulated publicly, causing witnesses and subjects to be unevenly equipped with information. Mr. Colvin's counsel submitted that it is crucial to the Commission's proceedings that the Commission, where merited, take steps to protect witnesses from public attacks on their credibility, and has stated that failing to grant the complainants' request to be relieved of their undertaking might place Mr. Colvin at risk of further reputational damage, by keeping from the public documents that corroborate the evidence he provided in another forum and that could restore his credibility as a witness in these proceedings. The risk of reputational damage that would be faced by Mr. Colvin if the documents are not authorized to be released is argued to outweigh any risk to the reputational interests of the parties before this Commission, who, unlike Mr. Colvin, are not the originators of the documents at issue.

Counsel for Capt (N) (retired) Moore, who is the other party to these proceedings, did not take a position or provide any submissions on the matter.

Rule S7(4) of the *Afghanistan Public Interest Hearing Rules* provides that the Commission may, upon application, release a person in whole or in part from an undertaking in respect of all or part of a document or information.

The Undertakings given by the Parties are a very serious obligation, not to be lightly dispensed with. In order to assist the Parties in preparing for the hearings, the Commission has provided them with access to documents that they otherwise might not receive. The Commission has also expressly warned, in the decision rendered by this Panel on October 14, 2009, about the dangers of drawing conclusions or implications from information that is incomplete and that has not been tested in the context of fair, impartial and public hearings. The Commission reiterates once again the dangers in rushing to judgment or leaping to conclusions on the basis of redacted documents and an incomplete record.

However, the Commission is presently faced with an exceptional set of circumstances. The documents in question were originally produced, voluntarily, by Mr. Colvin. They were then reviewed and redacted by Government agencies so as to remove any information that the Government deemed to be injurious to national security. The documents so redacted were authorized for disclosure. Accordingly, these documents have been reviewed by the Government and redacted with a view to eventual public release by the Commission.

As noted by Mr. Colvin's counsel, the documents now seem to have received selective public circulation. A number of the Colvin documents are claimed to have been obtained by at least one media outlet who, it is generally known, recently reported that they have obtained the entire collection of the emails that Mr. Colvin sent on the subject of Afghan detainees during the 17 months he spent in Afghanistan. (The complainants' counsel has provided his assurances to the Commission that the complainants were not responsible for the release of those documents.) Accordingly, it appears that the danger of selective release about which the Commission expressed its concerns has somehow happened.

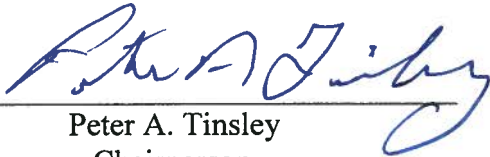
The Commission has therefore decided to grant the complainants' request for the following reasons:

1. The documents have been reviewed and redacted by the Government and authorized for disclosure in their redacted form.

2. The documents appear to have been publicly disclosed to the media, such that a selective release has already occurred.
3. Counsel for seven of the subjects and for the Government of Canada has not established that specific reputational harm would be caused to the subjects he represents by the public release of the Colvin documents, aside from the general potential for reputational damage which arises from the release of incomplete information without proper context. The Commission notes that counsel for the other subject, Capt (N) (retired) Moore, has not taken the position that such disclosure poses a risk of harm to the subjects. The Commission further notes that no tangible evidence has been provided that any of the subjects has suffered reputational or other harm from the public testimony already given, or from the selective disclosure of documents that has already taken place.
4. A selective release of information and documents has already occurred through means outside of the Commission's control that threatens the reputational interests of at least one witness, Mr. Colvin.
5. It was Mr. Colvin, in an effort to cooperate with the Commission and to comply with the summons for testimony and documents issued by the Commission, who caused the documents at issue to be provided to the Commission in the first place.
6. The Commission believes that Mr. Colvin was entitled to expect, when he caused the documents to be provided to the Commission, that they would be treated in accordance with due process and that they would only be released publicly in the process of impartial public hearings providing context and a full opportunity for parties and witnesses to protect their reputational interests. Despite the Commission's best efforts to secure Undertakings, and the Parties' compliance with such Undertakings, a selective public release of those documents without proper context or safeguards has now occurred, and Mr. Colvin has become subject to the surely unwelcome glare of unwanted publicity. Mr. Colvin's counsel submits that in these circumstances, it is now essential for the Colvin documents to be made public so that Mr. Colvin can take steps to protect his reputation from being publicly impugned. The Commission finds merit in these submissions.

IT IS HEREBY ORDERED that the request presented by the complainants to be relieved of their Undertaking of Confidentiality is granted with respect only to the 43 Colvin documents provided by the Government to the Commission on November 16, 2009, and the revised versions of two of those documents provided on November 19, 2009.

DATED at Ottawa, Ontario this 2<sup>nd</sup> day of December, 2009.



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Peter A. Tinsley  
Chairperson