Department of Justice Canada

East Memorial Building
Room AA552
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Ministère de la Justice Canada

Édifice commémoratif de l'est
Pièce AA552
284, rue Wellington
Ottawa, Ontario
K1A 0H8

Telephone: (613) 948-9800
Fax: (613) 948-9802

May 22, 2008

Our File Number: 2-367482

VIA FACSIMILE

The Honourable Frank Iacobucci
Commissioner of the Internal Inquiry
1700 - 66 Slater Street
Ottawa ON K1P 5K6

Dear Commissioner Iacobucci:

Re: Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin – Intervenors Access to Draft Narratives

I am writing to follow-up on John Terry's email of May 20, 2008. In it, he attaches two letters of that same date by Jasminka Kalajdzic and Alex Neve requesting re-reconsideration of the Commissioner's November 6, 2007 ruling, which, according to Mr. Neve's letter, was reconfirmed on May 15, 2008. Those two rulings limited access to the draft factual narratives to counsel for Inquiry Participants and Intervenors. At the request of the Commissioner, Mr. Terry's email invited comments on the two letters. For the reasons set out below, the Attorney General submits that the Participants and Intervenors request for re-reconsideration should be rejected by the Commissioner.

As with all matters relating to the Internal Inquiry, the necessary starting point is the Terms of Reference and the nature of the inquiry defined therein. This is an internal inquiry. It is to be conducted in private unless it is essential to the effective conduct of the Inquiry that specific portions be conducted in public (Terms of Reference, paragraphs (d) and (e)). Participants and Intervenors cannot, therefore, claim any right, entitlement or even a presumption in favour of access to information in this Inquiry.

Similarly, there can be no suggestion that the Participants and Intervenors are entitled to a different process or to any process in particular. By virtue of paragraph (d) of his Terms of Reference, the Commissioner is authorized "to

adopt any procedures and methods that he considers expedient for the proper conduct of the Inquiry "subject to the duty to take all steps necessary to ensure the Inquiry is conducted in private". In short, the Commissioner is the master of his own process and he has already ruled twice.

In his *Ruling on Application Made by Notice of Application Dated October 2, 2007*, dated November 6, 2007, the Commissioner stated that Inquiry Counsel were to review the draft narratives "with counsel for Inquiry Participants and Intervenors on a confidential basis." That ruling introduced the rather extraordinary step of permitting counsel to review and comment on the draft factual findings of the Inquiry. This step, which alone might be said to press the bounds of the Terms of Reference in an effort to serve the interests of Participants and Intervenors, was nevertheless expressly limited to making the narratives available to counsel and on a confidential basis. The Commissioner's extraordinary ruling cannot be a foundation for a demand for further or broader disclosure.

In addition, the November 6, 2007 ruling clearly puts all parties on notice as to how the process in respect of the narratives would unfold, including, that access would be limited to counsel and on a confidential basis. The ruling established the expectations by which all counsel should have governed themselves. It is simply wrong to say, as Ms. Kalajdzic does in her May 20, 2008 letter, that the first she learned of the possibility that review would be limited to counsel was "in mid-March, in a conversation with... John Terry."

Regardless, the Attorney General has quite properly relied upon the Commissioner's November 6, 2007 ruling in making decisions about how to proceed in respect of this matter and analogous matters such as access to the transcripts of interviews of Messrs. Almalki, Elmaati and Nureddin. The Attorney General has also relied on this ruling in foregoing an objection to the disclosure of the narratives at this time. As well, the Attorney General has laboured under restrictions both in the handling of the transcripts of the interviews of the three individuals and the factual narratives to avoid the risk of inadvertent release and to maintain the integrity of the ongoing evidence gathering process. This included foreclosing access to the narratives by potential witnesses. In other words, the Attorney General has respected the same principles that are in issue here.

The draft factual narratives cannot be disclosed to potential witnesses because to do so may affect their evidence. This is the common legal procedure of "excluding witnesses from the courtroom" which in no way reflects on the integrity of the individuals involved. The three individuals may be required to give further evidence following analysis of their interviews, analysis of the forthcoming summaries of their testimony, further developments in respect of the factual narratives, the results of the independent medical examinations, etc. Similarly, the possibility cannot be ruled out that Kerry Pither may be called as a witness

before this Inquiry in light of her interactions with the individuals, particularly in regard to their allegations of torture. For these reasons, there is no reasonable objection to following the equivalent procedure of "excluding the witnesses" in this Inquiry. Indeed, it is limited access on a confidential basis that, in this case, promotes the effective conduct of the Inquiry.

It is untenable to suggest that the Intervenors should have access to the draft narratives when the individuals cannot. By definition the Intervenors before this Inquiry have a diminished interest as compared with the individuals. By virtue of paragraph 6 of the Rules of Procedure and Practice Respecting Participation and Funding, a Participant is a person with "a substantial and direct interest in the subject matter of the Inquiry" while paragraph 7 provides that an Intervenor is someone who merely has "a genuine concern about the subject matter of the Inquiry."

Intervenors bring to the Inquiry a concern about the subject matter generally supported by a perspective or expertise. Intervenors, be it at an inquiry or before the courts, do not normally play a role in respect of the evidence. Indeed, Amnesty International, for example, did not seek to participate actively in the evidentiary stage of the Internal Inquiry but merely sought to make opening, closing and other occasional submissions as well as "observing portions of the Inquiry which are open to it" (Motion in Support of Participation, Amnesty International, March 14, 2007). Properly speaking, Amnesty International and the other Intervenors should play no role in respect commenting on the factual narratives. Nevertheless, while the Attorney General does not seek reconsideration of the Commissioner's November 6, 2007 ruling allowing Intervenor's counsel access to the draft narratives, the Intervenors should not now be able to use that access as a foundation for claiming greater access even beyond the access granted to Participants.

The task of reviewing and commenting on the draft narratives falls to counsel. The point of the exercise is to comment on the facts and recommend any further lines of inquiry. This is counsel work and has been framed that way since the Commissioner's November 6, 2007 ruling. Furthermore, the Participants and Intervenors should not be able to found a claim for access beyond counsel on the basis that counsel are not properly prepared and do not know the facts well enough, especially when they argue that the facts were made public years ago and have remained consistent throughout (Letter from Jasminka Kalajdzic, May 20, 2008). In any event, no right can flow from a lack of preparation.

In addition, it cannot be said that the individuals bring greater knowledge of the facts born from their experience because only a very small portion of the facts deal with information about which the individuals would have any first hand knowledge. To the extent they have knowledge, it is limited to their interactions with Canadian officials. They may again be called upon to give evidence on

those matters and, therefore, they must be excluded from review of the evidence set out in the narratives.

It must be noted that counsel for the three individuals have already disavowed the need to have their clients review the facts, arguing instead that they can effectively represent their clients based on counsel's review of the facts (see the April 11, 2007, Submissions on behalf of Mr. Nureddin (p. 13), Mr. Almalki (p. 14) and Mr. Elmaati (p. 11)). While those arguments were made in relation to the issue of national security confidentiality, the underlying point which was admitted is that counsel for the individuals can properly proceed without their clients having access to information which is available only to counsel.

To be clear, this is not a situation in which counsel are entirely precluded from communicating with their clients. There is scope for counsel to consult with their clients, including discussing lines of inquiry and seeking information, opinion or facts from their clients. They are simply precluded from disclosing directly, or by necessary implication, the contents of the draft narratives.

Maintaining the confidentiality of the draft factual narratives is essential. The narratives are not final. The evidence gathering continues and the narratives are subject to change, including as a result of the comments of counsel for the Participants and Intervenors. It would be damaging, both for the officials whose actions are under review and for the integrity of the Inquiry, for incomplete or inaccurate facts to be disclosed. A leak, inadvertent or otherwise, would risk pre-empting the analysis of the Commissioner and would, in any event, be received in the absence of the context that might properly be provided by the submissions of the parties and the contextual portions of the Commissioner's Report.

The individuals and several of the Intervenors have persistently called into question the integrity of the Commissioner's process and have repeatedly demanded that the Inquiry be transformed into a public inquiry contrary to the Terms of Reference. They have also called for the disclosure of information contrary to the Terms of Reference. By so doing they have effectively created a reasonable apprehension of a conflict of interest in relation to the ongoing confidentiality of the draft factual narratives.

Issues Raised in the Letters

The foregoing summarizes the core reasons why the request of the Participants and Intervenors for reconsideration of the Commissioner's rulings to limit access to the draft narratives must be rejected. In setting out these reasons, I have addressed the substantive matters raised in the letters of Ms. Kalajdzic and Mr. Neve. However, there are two additional points that require comment.

First, Ms. Kalajdzic raises a number of concerns about procedural fairness. It must be clear that no duty of fairness is owed to anyone other than the

government officials whose actions are under review in this Inquiry. Counsel for the individuals continue under the misapprehension that their clients' reputations are in issue before this Inquiry. The Commissioner has been clear that this is not the case. Accordingly, they have no procedural fairness rights. As explained above, they also have no right to any particular procedure as the Commissioner remains master of his own process.

Regardless, Ms. Kalajdzic cannot reasonably claim a lack of sufficient notice in regard to the issue of access to the draft narratives given that this was addressed in the Commissioner's November 6, 2007 ruling and was again brought to her attention in mid-March.

Ms. Kalajdzic also cannot reasonably assert that unfairness flows from the fact that as counsel for the Attorney General, I briefly identified in an email to Inquiry Counsel key reasons why access to the draft factual narratives must properly remain limited to counsel for Inquiry Participants and Intervenors, an issue on which the Commissioner had already ruled. Not only does Ms. Kalajdzic acknowledge that the substance of that email was disclosed to her in a meeting with Inquiry Counsel, Ms. Kalajdzic also acknowledges corresponding with Inquiry Counsel on this very issue in a March, 2008 letter that was not copied to the Attorney General. Indeed, the very structure of this Inquiry calls for confidential discussions and correspondence between the different Participants and Intervenors and Inquiry Counsel. That is one of the primary vehicles by which the Participants and Intervenors participate in this Inquiry.

Finally, the argument that Mr. Neve is not a practicing member of the bar cannot possibly entitle others to access to the draft narratives. The Attorney General will not object to Mr. Neve's having access to the draft narratives as though he were counsel, given that he has effectively assumed the role of counsel throughout these proceedings.

Conclusion

In conclusion, the Commissioner has repeatedly ruled that the draft narratives will be made available to counsel for the Participants and Intervenors on a confidential basis. There is no basis for disturbing these rulings and as set out above, the effective conduct of this Inquiry cannot sustain any other procedure.

Yours truly,

Michael Peirce
Lead Counsel

MP:pd