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INTERNAL INQUIRY
INTO THE ACTIONS
OF CANADIAN OFFICIALS
IN RELATION TO
ABDULLAH ALMALKI,
AHMAD ABOU-ELMAATI
AND
MUAYYED NUREDDIN

SUPPLEMENT TO PUBLIC REPORT

The Honourable Frank Iacobucci, q.c.
Commissioner

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INTRODUCTION

This supplement to the public report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin should be read together with the Inquiry's public report, released in October 2008. It contains information that could not be disclosed at the time the public report was released because of government concerns that disclosure of the information in the manner then proposed would be injurious to national defence, national security or international relations. As a result of subsequent consultations and discussions, I am now in a position to provide to the public further information relating to my mandate and my findings, without jeopardizing legitimate national security confidentiality concerns.

As explained at page 41 of the public report, the mandate of the Inquiry was to examine the actions of Canadian officials relating to Mr. Almalki, Mr. Elmaati and Mr. Nureddin, who were detained and mistreated in Syria and (in the case of Mr. Elmaati) in Egypt during the period 2001 to 2004 to determine (1) whether the detention and any mistreatment of the three men resulted, directly or indirectly, from the actions of Canadian officials (particularly in relation to the sharing of information with foreign countries), (2) whether, if so, those actions were deficient in the circumstances, and (3) whether there were any deficiencies in the provision by Canadian officials of consular services to the three men while they were in detention.

The Inquiry's Terms of Reference required that the Inquiry be conducted so as to ensure that there was no disclosure to persons or bodies other than the Government of Canada of information the disclosure of which would be injurious to national defence, national security or international relations, or the conduct of any investigation or proceeding. They also directed me to submit to the Governor in Council both a confidential report setting out my determinations and, simultaneously, a separate report suitable for disclosure to the public. In accordance with the Terms of Reference, I submitted to the Governor in Council on October 20, 2008 both the public report of the Inquiry, and a confidential report containing information subject to national security confidentiality.

As the public report explained at pages 59-61, the Terms of Reference set out a procedure for dealing with information that was subject to national secu-

rity confidentiality concerns. According to this procedure, the determination that certain information should not be disclosed was to be made either by me or by the Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received. If I disagreed with a determination of the Minister that disclosure of the information would be injurious to national security, national defence or international relations, I could notify the Attorney General, in which case the notice could lead to a proceeding in the Federal Court under the *Canada Evidence Act* to resolve the matter.

I also explained in the public report that its submission was preceded by an extensive process of consultation and discussion between Inquiry counsel and counsel for the Attorney General, to address and resolve claims of national security confidentiality. During these discussions, at my urging, Inquiry counsel proposed retaining as much information as possible, so that I could provide to the public as complete as possible an account of the actions of Canadian officials and the setting in which they took place, and as full as possible an explanation of my findings.

When the public report was submitted, I was satisfied that, with one exception, the information contained in the confidential report but omitted from the public report was properly subject to national security confidentiality. However, there remained certain information bearing directly on my mandate that I believed could and should be included in the public report, but which the responsible Minister considered should not be disclosed because its disclosure would be injurious to national defence, national security or international relations. I therefore gave notice to the Attorney General concerning this information. Since the difference of view concerning this information had not been resolved at the time the public report was submitted, I was unable to include this information in the public report.

As a result of extensive further discussions, the national security confidentiality concerns relating to the disclosure of this information have now been resolved on a basis that enables me to submit this supplement to the public report setting out a summary of certain additional facts and the role that those facts played in my findings. The following pages set out this summary, together with a supplementary explanation of certain of my findings.

Throughout the Inquiry process, I made my own assessment of the national security confidentiality concerns raised by the government, taking into account my terms of reference and court decisions in the national security context that address what can and what should not be publicly disclosed. I am satisfied that

this supplement to my public report conveys to the public further important information relating to my mandate and my findings, without jeopardizing legitimate national security confidentiality concerns.

SUPPLEMENT TO CHAPTER 4

Actions of Canadian Officials in relation to Ahmad Abou-Elmaati

CSIS corresponds with Egyptian authorities regarding Mr. Elmaati's presence in Egypt

1. According to Service reporting, in June 2002 Canadian Security Intelligence Service (CSIS) sought confirmation from Egyptian authorities that Mr. Elmaati was being held in Egyptian custody. This message stated, among other things, that Mr. Elmaati might possibly have been involved in a plan to commit a terrorist act in Canada.
2. The Inquiry obtained no information to indicate that the Service considered at this time what effect this correspondence might have on Egypt's position towards Mr. Elmaati.
3. Following confirmation in August 2002 that Mr. Elmaati was in Egyptian custody, the Service continued to correspond with Egyptian authorities. By late October 2002, it appeared that the Service would be able to travel to Egypt to liaise directly with Egyptian authorities.

Request to travel to Egypt

4. In early November 2002, a briefing note was sent to the Assistant Director of Operations, Mr. Hooper, requesting permission for Service employees to travel to Egypt for the purpose of obtaining information concerning Mr. Elmaati. The request highlighted that Department of Foreign Affairs and International Trade (DFAIT) officials had already begun meeting with Mr. Elmaati and that the Service had received the results of those consular visits. The request went on to state that the Service's initiative would not interfere with any ongoing Royal Canadian Mounted Police (RCMP) investigation of Mr. Elmaati, and that the Service had its own separate requirements. In supporting that assessment, Mr. Hooper noted that DFAIT, the RCMP, the Privy Council Office (PCO) and

the Ministry of the Solicitor General should be informed of the Service's plans. The Deputy Director of Operations agreed that the travel was necessary and granted approval.

5. Following this approval, the Service prepared a list of questions to which it wished to obtain answers. While the list included questions about Mr. Elmaati's detention in Syria, there were no questions about his physical treatment there. A senior CSIS official stated that the purpose of these questions about Syria was to assist the Service in evaluating what Mr. Elmaati had allegedly told the Syrian authorities. When asked whether questions about Mr. Elmaati's physical treatment would have been relevant to the Service's assessment of the reliability of his alleged statement to the Syrian authorities, the official stated that, in hindsight, they would have been relevant, and that he did not know why those questions were not included. The Service also did not include any questions about Mr. Elmaati's treatment in Egypt. According to this official, the Service was satisfied with the information that DFAIT had provided, and it did not want to raise the issue.

6. When asked about this initiative, a senior CSIS official stated that the Service was interested in the threat-related information Mr. Elmaati had allegedly provided to Syrian authorities. The same official acknowledged that, despite Mr. Elmaati's allegations concerning his treatment in Syria, the Service did not seek to obtain information from Egyptian authorities concerning this issue during the visit to Egypt. The official added that, nonetheless, such information could potentially have been obtained during the visit to Egypt. As for Mr. Elmaati's treatment in Egypt, the same official noted that the Service was satisfied with DFAIT's reporting, based on its consular visits, that Mr. Elmaati was in good condition.

7. In his interview, Mr. Hooper was asked whether any consideration was given, during the approval process, to what signal, if any, visiting Egypt to obtain information concerning Mr. Elmaati might send to the Egyptian authorities. Mr. Hooper responded that this was among the factors taken into consideration, and that in particular, the Service considered whether Mr. Elmaati might be mistreated as a consequence of the Service's visit. However, the Service was of the view that this possibility was not highly likely, and balanced that against the compelling reasons to try to clarify whether there really was a threat to Canada. Mr. Hooper stated that, taking these and other considerations into account, CSIS concluded that it would be appropriate to proceed with the visit.

The Service visit to Egypt

8. In December 2002, CSIS officers traveled to Egypt. As discussed above in paragraphs 5 and 6, during the visit to Egypt, the Service did not make any inquiries with Egyptian authorities about Mr. Elmaati's treatment in either Syria or Egypt. At this time, there was no CSIS policy governing inquiries about conditions of detention in respect of Canadians detained abroad.

Advising RCMP, DFAIT, and foreign agencies of the visit

9. The Service advised the RCMP in mid-December 2002 that the visit had occurred, and provided the RCMP with an oral briefing in January 2003 and a draft report in February 2003. In March 2003, CSIS provided the RCMP, DFAIT, and two foreign agencies with a report.

10. Neither DFAIT's Foreign Intelligence Division (ISI) nor DFAIT's Consular Affairs Bureau had been informed of or consulted about the Service visit to Egypt before it took place. Mr. Saunders of ISI suggested that DFAIT should have been consulted in advance and recalled questioning why ISI had not received a report earlier. He commented that it is helpful for DFAIT in carrying out its mandate to know as much as CSIS or the RCMP is able to share about Canadians detained abroad. Mr. Pardy also indicated that he would have expected that DFAIT would be consulted, given Mr. Arar's situation at the time, so that it could assess the potential impact on the individual in detention and the message that it might send to the detaining authorities.

11. When asked why the Service failed to advise DFAIT of its plan to visit Egypt, CSIS responded that it is required to advise DFAIT of its operational activities outside of Canada only when those activities have been assessed by the Director as being high risk. Factors deemed to constitute high risk include a clear threat to human life, grave damage to Canada's international reputation, or severe damage to the reputation of the Service. In this instance, the Service's travel to Egypt was not considered to present a high risk, in part because Mr. Elmaati had received consular visits and was assessed by DFAIT to be in good health.

SUPPLEMENT TO CHAPTER 11

Findings in relation to Ahmad Abou-Elmaati

CSIS' correspondence with Egyptian authorities and travel to Egypt

Did any mistreatment result directly or indirectly from these actions?

1. In my view, the Service's June 2002 correspondence with Egyptian authorities, preparation of questions, and travel to Egypt for the purpose of obtaining information concerning Mr. Elmaati - all without consultation with DFAIT - likely contributed indirectly to Mr. Elmaati's mistreatment in Egypt.
2. While the evidence (not all of which I am in a position to recount here) is not conclusive, it is in my view reasonable to infer on all of the evidence available to me, including that of Mr. Elmaati, that Mr. Elmaati suffered mistreatment of some form as a consequence of the Service's interaction with Egyptian authorities.

Were CSIS' actions deficient in the circumstances?

3. I find that the Service's June 2002 interaction with Egyptian authorities (as referred to above) was deficient in the circumstances in two respects.
4. First, CSIS did not take into account the potential consequences for Mr. Elmaati. The Service did not consider what effect its actions might have on the Egyptian authorities' position towards Mr. Elmaati and the manner in which he might be treated. The Service eventually considered these factors, but only after the June 2002 contact with Egyptian authorities had already been made.
5. Several witnesses, from both CSIS and the RCMP, told the Inquiry that it was not the responsibility of intelligence or law enforcement officials to be concerned about the human rights of a Canadian detainee, which were for DFAIT alone to consider. This approach is not, in my opinion, satisfactory. While consular officials may have primary responsibility for monitoring the health and

well-being of the Canadian detainee, it must at least be an incidental responsibility of the Service and the RCMP, to consider the potential effect of its actions on the detainee and adjust its actions to minimize those effects. As stated by Justice O'Connor, "Conflicts between the investigative interest of Canada and the need to respect the consular and human rights of Canadians held abroad must be resolved on a case-by-case basis, but I would think that officials would strive to ensure the greatest possible respect for human rights." No Canadian officials should consider themselves exempt from this responsibility.

6. Second, CSIS did not consult with either DFAIT ISI or the Consular Affairs Bureau about its visit to Egypt and did not advise DFAIT of the visit until March 2003, well after it had taken place. In my view, the Service should have consulted with DFAIT before traveling to Egypt.

7. I am unable to conclude that if DFAIT had been advised of the Service's actions, the mistreatment that I found likely resulted would have been prevented. However, at the very least, involving DFAIT would have enabled Consular Affairs to take the Service visit to Egypt into account in its efforts to provide consular services.

8. I also note that in its list of questions and during its visit to Egypt, the Service did not make any inquiries with Egyptian authorities about Mr. Elmaati's treatment in either Syria or Egypt, despite knowing that Mr. Elmaati had alleged that he was tortured in Syria. One CSIS witness told the Inquiry that, in hindsight, it would have been relevant to make such inquiries. I agree. This CSIS witness also told the Inquiry that the Service did not inquire about Mr. Elmaati's treatment in Egypt because, at the time, it was satisfied with the information that DFAIT had provided and it did not want to raise the issue with the Egyptians. While I am satisfied by this explanation, I find the apparent compartmentalization of human rights concerns within agencies of the Canadian government to be troubling.

9. Justice O'Connor recommended that in all cases where Canadians are detained in other countries in connection with terrorism-related activities (where intrusions on individual liberties and human rights are more frequent), Canadian agencies should adopt a unified approach that includes consultation and collaboration with DFAIT. I agree with this recommendation and would note that, further to Justice O'Connor's recommendation, CSIS and DFAIT have since established a Memorandum of Understanding on consular cases with a national security dimension to ensure that this consultation and collaboration now takes place.