COMMISSION OF INQUIRY INTO THE ACTIONS OF
CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

RESPONSE TO SUBMISSIONS BY MAHER ARAR Re:
DISCLOSURE OF DOCUMENTS

ON BEHALF OF:

THE REDRESS TRUST

THE ASSOCIATION FOR THE PREVENTION OF TORTURE

and

THE WORLD ORGANISATION AGAINST TORTURE

(INTervenors)

INTRODUCTION

1. The Redress Trust, the Association for the Prevention of Torture, and The World Organisation Against Torture (“the Intervenors”) support the application of Mr. Arar for the following orders:

(a) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information that is in the public domain;

(b) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information subsumed or made obvious by the information in the public domain, when considered in its entirety;
(c) that the Government of Canada disclose to the Applicant and the public, on an ongoing basis, records, in whole or in part, containing information that becomes public during this inquiry;

(d) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, containing information emanating from the Applicant or his counsel, including but not limited to statements made by the Applicant in the United States and Syria; and

(e) that the Government of Canada disclose to the Applicant and the public any and all records shown or provided to the Applicant during his interrogations in the United States and Syria.

2. This application engages, for the first time in this Inquiry, the general principles governing national security privilege that have been the subject of earlier submissions by many parties.

3. All parties appear to agree that there is a necessary balance between the public interest in national security on one hand, and other public interests on the other. Where the Attorney General departs from some parties, including the Intervenors is on how the balance is to be achieved, and what evidence is required.

4. Two assertions lie at the heart of the Attorney General’s position.

(a) First, that national security and diplomatic confidentiality are a super-important public interests that overweights, or even trumps, all other public interests; and

(b) Second, that the Attorney General’s views on what constitutes national security interest should be given special deference.

It is submitted that neither of these assertions is consistent with Canadian law or internationally recognized principles. The Intervenors will not repeat the submissions of others on the applicable Canadian law, but will instead focus on internationally recognized principles.
The Johannesburg Principles on National Security, Freedom of Expression and Access to Information,

5. In October 1995 a group of experts in international law, national security, and human rights convened in Johannesburg to develop principles, applicable to all governments, for determining where the balance lies between the public interest in open government and the public interest in national security secrecy. The principles adopted are known as the Johannesburg Principles. The principles are attached to this submission as Schedule 1.¹

6. Among the principles are the following:

**Principle 11: General Rule on Access to Information**

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

**Principle 12: Narrow Designation of Security Exemption**

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.


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¹ [http://www.article19.org/docimages/511.htm#intro](http://www.article19.org/docimages/511.htm#intro)

8. At the third Summit of the Americas, held in Quebec City in 2001, the assembled heads of state agreed to a “Plan of Action” under which member states would work towards national and international standards on access to information and government accountability. The Plan of Action was succeeded by a Resolution adopted by the Fourth Plenary Session of the Organization of American States concerning Access to Public Information. In that resolution the Organization of American States gave express recognition to the Johannesburg Principles, as well as the “Lima Principles” (discussed below): see Schedule 3.

9. Canada and the United States of America are members of the Organization of American States.

The Lima Principles

10. In November 2000 a group of eminent experts on human rights convened in Lima, Peru to establish principles applying to access by citizens to information of the government, including information over which the government claims secrecy on national security grounds. The principle adopted are known as the Lima Principles: see Schedule 4.

11. As noted above, the Lima Principles have been recognized by the Organization of American States.

12. The Lima Principles include the following:

8. Exceptions to the Right of Access to Information

The exceptions to access to information may be legitimately regulated only the by the constitution and by law in accordance with the principles of a democratic society and only where these regulations are needed to protect a legitimate national security interest or the individual's legitimate right to privacy. It will not be possible to maintain secret information under the protection of unpublished regulations. Any person or official who denies access to information will have to justify its denial by means of a written

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4 [http://www.article19.org/docimages/902.htm](http://www.article19.org/docimages/902.htm)
reply and to demonstrate that it is included within the restricted categories of exceptions. If requested by an individual party, an impartial and competent authority should review such a denial and may order the release of information.

The withholding of information under the aegis of a broad and imprecise definition of national security is unacceptable. Any restrictions on the grounds of national security will be only be valid when orientated to protect the territorial integrity of the country and in the exceptional circumstances of extreme violence that threatens the imminent collapse of the democratic order. Any restrictions based on grounds of national security are not legitimate if their purpose is to protect the government's interests rather than those of society as a whole.

Privacy laws may not inhibit or restrict investigation and dissemination of any information in the public interest.

The law, having defined specified categories of classified information shall establish reasonable deadlines and procedures for declassification as soon as the national security interest allows. In no case may information be indefinitely classified.

13. From these internationally recognized principles the following points emerge:

(a) First, national security as a broadly defined category is not deemed to be more important than the public interest in full disclosure of the activities of governments. Therefore, internationally recognized principles do not support the Attorney General’s assertion summarized in the heading on page 56 of its May 17th submission: “No Public Interest More Important than National Security”. Indeed, if one wishes to speak in generalities one could argue persuasively that the rights of citizens are at greater risk from the actions of unaccountable domestic governments than from aggression by foreign governments or terrorists.

(b) Second, the government cannot itself be the arbiter of what is, or is not, a matter of significant national interest. Rather, determining the weight to be given to a claim of national security secrecy is a matter for an impartial and objective tribunal. The Attorney General’s submissions do not go so far as to say that the government’s own opinions are decisive, but when the Attorney General submits
that the Inquiry should give special deference to the Attorney General he moves down that path. While the Federal Court has recognized that the Attorney General’s opinion regarding risks to national security are to be given considerable weight if they are reasonable, it nevertheless remains that the court (or judicial inquiry) must weigh the reasonableness of the Attorney General’s opinion, and must do so by reference to evidence:

“[The court] must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence.”: Ribic v. Attorney General Canada 2003 FCA 246 at para. 17-19.

In other words, under both internationally recognized principles, and under Canadian law, the Attorney General must justify continued secrecy with evidence. This is of particular importance in the context of the claim that release of information by this Inquiry will cause other agencies, domestic and foreign, to withhold cooperation (discussed further below).

14. Third, a government may not “categorically deny access to all information related to national security” but must limit secrecy to “narrow categories” for which secrecy is “necessary.”

15. Fourth, a government cannot maintain secrecy under “unpublished” regulations. It will be argued below that the so-called “third party rule” invoked by the Attorney General is in the nature of an “unpublished” rule.

16. Fourth, no classified information may remain classified forever. All formerly classified information must be declassified as soon as possible.

17. Fifth, privacy laws must not impede investigations into matters of public interest.
THE ATTORNEY GENERAL’S CLAIMS TO NATIONAL SECURITY INTEREST

Risk to Inter-Agency Relationships

18. One of the central claims in the submissions of the Attorney General is that the relationships between the government of Canada and other agencies, both domestic and foreign, will be seriously harmed if information from those other agencies is released to the parties or the public during this judicial inquiry. This claim is not made on the basis of actual evidence about actual danger to actual relationships. The Attorney General does not cite evidence of any agency that has in the past withdrawn cooperation because a court or judicial inquiry in Canada ordered information originating from that agency be made public. The government makes this claim on a broad, categorical, theoretical basis. (See, for example, paragraph 139 of the Submission of the Attorney General on Rule 37(A), 17 May 2004.)

19. The essence of the argument appears to be that the Inquiry should give deference to what the Attorney General calls the “third party rule”; that is, that when one agency (foreign or domestic) gives information to another agency, the receiving agency cannot use the information without the consent of the first agency. The Attorney General claims that failure to respect the “third party rule” would injure Canada’s national interests because other domestic and foreign agencies will no longer cooperate with Canada. When made as a generalized claim it cannot withstand scrutiny.

20. First, it is submitted that there is no basis in Canadian law or internationally recognized principles to recognize such a rule. There is no general rule that a government agency is entitled to withhold information from judicial or quasi-judicial proceedings merely by asserting that the information must not be used without its consent. Rather, the person claiming secrecy has to establish a recognized privilege. The Canada Evidence Act does not recognize an automatic “third party rule”. The absence of consent from a foreign or domestic agency to use the information is not, by itself, a lawful or logical reason for withholding disclosure. In the context of international cooperation on security matters, if such a rule were binding on domestic courts and judicial inquiries the international police
and security community could cooperatively shield their activities from review simply by perpetually invoking the so-called third party rule.

21. To the extent that the argument about potential future non-cooperation is made in the context of the relationships among federal agencies and other domestic Canadian agencies it should be dismissed out of hand. It would be improper, and likely contrary to police agencies’ constituting statutes, to refuse to provide necessary cooperation on the ground that another agency has in the past provided information or documents required by a judicial inquiry lawfully convened by the government of Canada. It is to be expected that other Canadian agencies have a proper respect for the rule of law, and in particular the law and tradition surrounding judicial inquiries. It strains credulity to suppose that non-federal Canadian agencies will withhold cooperate from federal agencies because the latter have disclosed documents while carrying out their duties to a properly constituted judicially inquiry.

22. The argument about future non-cooperation is no stronger when considering foreign agencies. It is submitted that the principles governing national security secrecy set out in the Johannesburg Principles and the Lima Principles represent an international consensus on the requirements of openness of governments. Mr. Arar is not asking this judicial inquiry to break radical new ground. He is asking only that the norms of international practice be honoured. Governments with legal systems similar to Canada’s would expect that their own agencies may come under the scrutiny of judicial, congressional, or parliamentary inquiries. One could understand a foreign agency being concerned if, for example, the RCMP or CSIS was careless with sensitive information. But it would be quite surprising if foreign agencies withdrew cooperation with Canadian agencies – and denied themselves the assistance they receive from Canadian agencies – on the ground that a properly constituted judicial inquiry required information or documents to complete its business. One would not expect the RCMP to refuse to cooperate with the FBI simply because the FBI was obliged to turn over documents originating in Canada to a congressional hearing. It is unrealistic to suppose that the FBI or other US agencies would act differently towards Canada. The fact that counties like Jordan or Syria may not have a tradition of judicial inquiries similar to Canada’s is not grounds for honouring
a blanket “third party rule” for information emanating from them. One would have thought that the position of Canada when dealing with less progressive regimes would be to insist on respect for international law and consensus rather than seeking the lowest common denominator. In any event, when Canadian officials act on the basis of documents received by foreign agencies their conduct is to be judged, both procedurally and substantively, by Canadian and international standards, not by the standards of states who do not respect the internationally accepted principles of openness.

23. The Attorney General’s claim about potential damage to relationships is not an argument based on facts that can be tested by an impartial trier of fact. In principle it may be open to the Attorney General to attempt to establish, in a particular case, that a foreign agency has stated officially and authoritatively that if information is ordered disclosed by this Inquiry that it will no longer cooperate with Canadian agencies. Absent such evidence, the claim about potential injury to inter-agency relationships should be given no weight. If evidence of such a threat is led, it still remains to the Inquiry to judge whether the threat is credible, and whether it is consistent with international and Canadian values for a Canadian judicial inquiry to be fettered by a threat of future non-cooperation.

24. It is submitted that the so-called “third party rule” is a rule of perpetual classification that violates the principle that no secrets should remain secret forever. It is submitted that under both Canadian law and internationally recognized principles the onus is on the government not only to demonstrate that the information was compiled in a context that required secrecy, but that the need for secrecy continues. This will be particularly relevant in considering whether the government has a duty to disclose documents containing information that has become part of the public domain.

Risk to Diplomatic Relationships

25. The Attorney General makes a similar argument about diplomatic relationships. Just as internationally recognized rules do not deem national security to be a public interest of greater importance than public access to the actions of government, so too those principles do not recognize diplomatic confidentiality as being of greater importance than public accountability.
26. Further, the general claim that disclosure of documents or information in the context of a judicial inquiry would injure foreign relations is simply a claim without evidence. It is submitted that it is not a reasonable claim. It is one thing for diplomats to reveal confidences casually. It is another matter entirely for the diplomatic service to provide information or documents to a properly constituted judicial inquiry for the purposes of that inquiry. The claim that Canada’s foreign relations would be injured because of documents were disclosed in the context of a properly constituted judicial inquiry is one that should be established on evidence, not on mere assertion.

ACTUAL RISK

27. The Intervenors accept that informant privilege is inviolable under Canadian law. However, the Intervenors do not accept that the categories of secrecy that the Attorney General claims, on behalf of CSIS, in paragraph 88 of its May 17th submission. For example, CSIS claims that identifying “investigative techniques” would compromise national security. In R. v. Mentuck, [2001]3 S.C.J. 442 the Supreme Court of Canada rejected a claim by police agencies that revealing investigative techniques would imperil police investigations. The question is not whether revealing investigative techniques in general would render security investigations less effective. The question is whether the Attorney General can establish, on evidence, that the disclosure of information specific to Mr. Arar would imperil national security in a way that overweighs the public interest in accountability of government.

APPLICATION TO MR. ARAR’S NOTICE OF MOTION

28. The information that Mr. Arar seeks to have disclosed falls into three categories:

(a) information that is in the public domain at the time of disclosure, or is made obvious by information that is in the public domain (above, paragraph 1 (a-c));

(b) information from Mr. Arar himself, or his counsel (above, paragraph 1(d)); and

(c) information that has already been shown to Mr. Arar (above, paragraph 1(e)).
29. The first question governing the disclosure of documents is: are they relevant to the
issues in the proceeding? The purpose of disclosure of documents in civil proceedings is
to facilitate an inquiry by the parties into the facts. That is the same purpose as the
present Inquiry. However, the investigative mandate of this Inquiry is much broader than
in the usual civil case, so the limits of relevance for the purpose of document disclosure
should be broader as well.

30. Without knowing precisely what documents are at issue, it is difficult to comment on
relevancy. However, the following general comments may be made. While the mandate
of this Inquiry focuses on the actions of Canadian officials, their actions can be
understood only within the context of their dealings with officials of other states, and
documents relevant to those discussions would be directly relevant. Further, as the
Inquiry has an investigative aspect, documents that could lead to a line of inquiry relevant
to the Inquiry’s mandate would also be disclosable to the parties.

31. Whether documents on the periphery of relevance would be immediately disclosable to
the public (as distinct from parties who have given undertakings), or whether would
remain subject to undertakings until they are introduced as evidence, is a separate debate.
The Intervenors make no submissions on whether documents should be initially disclosed
only to parties subject to undertakings, or whether they should be immediately disclosed
to the general public as well.

32. Once it is established that documents are relevant to the Inquiry, the onus of establishing
a privilege that would justify non-disclosure of relevant documents lies on the party
asserting it. Therefore, it is submitted that it is not up to Mr. Arar to establish why he is
entitled to the documents: it is up to the government to establish a legal basis for not
providing them.

33. The question, then, is whether the government is able to establish a bona fide objection to
disclosure on the grounds of national security or diplomatic privilege, or on some other
basis that the Intervenors have not anticipated.
34. At this stage, it is impossible to anticipate the arguments that the Attorney General will raise, or the evidence (if any) that the Attorney General will advance in support of its claims. Indeed, it is difficult to anticipate why the Attorney General would oppose disclosure of documents that appear to be so obviously central to the mandate of this Inquiry.

35. One may surmise that the so-called “third party rule” will be central to the Attorney General’s submissions, especially concerning the documents relating to questioning of Mr. Arar in Syria. For the reasons set out above, arguments of a general nature based on the so-called “third party rule” should be rejected. If, on the other hand, documents at issue did not emanate from other countries like the United States or Syria, but instead originated from Canadian officials, the third party rule would have no genuine application. The documents themselves, and the fact that the documents were transmitted to Syria, would be at the very heart of this Inquiry’s mandate.

36. Further, any claim by the Attorney General that the public interest in national security or diplomatic confidentiality are, by their inherent nature, superior to the public interest in disclosure of government action, should be rejected. As noted above, internationally recognized principles do not deem national security to be categorically more important than government accountability. The Canadian law reviewed in Mr. Arar’s notice of application is to the same effect. The point is of particular relevance in these proceedings. It cannot be overlooked that the present Inquiry was called by the Government of Canada and announced by the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness. One must conclude that the Deputy Prime Minister, speaking for the Government of Canada, considered the matters within the terms of reference of the Inquiry to be matters of great national and public importance. The documents Mr. Arar now seeks are central to the Inquiry that the Government of Canada itself called. It cannot be claimed that Mr. Arar’s request is a collateral attempt to obtain documents at the periphery of the Inquiry’s mandate. One must infer that when

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5 In the APEC Inquiry the RCMP Public Complaints Commission conducted a public inquiry into allegations that members of the RCMP had engaged in improper conduct on a specific day, at a specific location (the day and location of the APEC heads of state conference at the University of British Columbia in Vancouver). In that
the Deputy Prime Minister announced the Public Inquiry she was aware that the documents in the class that Mr. Arar now seeks would be relevant to the Inquiry’s mandate. One must therefore infer that, when making the decision to call the Public Inquiry, the government itself had concluded that the balance between the public interest in national secrecy and the public interest in full disclosure weighs in favour of public disclosure. In this context, the Attorney General, speaking on behalf of certain agencies of the government, is far from determinative of the views of the government as a whole, much less is it decisive on the weight that this Inquiry should accord the national security interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[original signed]

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case the government of Canada disclosed hundreds of pages of diplomatic communication in which Canadian officials expressed frank opinions about the government of Indonesia’s requests that Canadian officials prevent demonstrations against the Indonesian president. Those documents were at the fringes of relevance for an inquiry that focused on actions of the RCMP, on a specific day at a specific location. They were, nevertheless, disclosed (subject to minimal redaction), without apparent loss of effectiveness of Canada’s diplomatic officers.