

Memorandum of Understanding

between

The Right Honourable Stephen Harper, Prime Minister

and

The Honourable Michael Ignatieff, Leader of the Official Opposition

and

Gilles Duceppe, Leader of the Bloc Québécois

- I. Recognizing that the House of Commons adopted an Order on December 10, 2009 for the production of Government documents related to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities which contain information the disclosure of which would be injurious to national defence, international relations or national security if publicly released and which made no provision for confidential treatment of the material.
- II. Recognizing that the Speaker of the House of Commons, in his ruling of April 27, 2010, concluded that it is within the powers of the House of Commons to ask for the documents sought in that Order and suggested that a mechanism be put in place by which these documents could be made available to the House without compromising the security and confidentiality of the information they contain.
- III. Recognizing that the Speaker stated in his ruling that: “the House and the government have, essentially, an unbroken record of some 140 years of collaboration and accommodation in cases of this kind” and further that “The House has long understood the role of the government as ‘defender of the realm’ and its heavy responsibilities in matters of security, national defence and international relations. Similarly, the government understands the House’s undoubted role as the ‘grand inquest of the nation’ and its need for complete and accurate information in order to fulfil its duty of holding the government to account.”
- IV. Recognizing that Cabinet confidences and information subject to solicitor-client privilege are classes of information that the Parliament of Canada has long recognized are sensitive and may require protection from disclosure.

In order to comply with the Order of the House of Commons from December 10, 2009, and further to the Agreement in Principle reached by all parties on May 14, 2010, the parties agree as follows:

1. An *ad hoc* committee of parliamentarians will be established external to the House of Commons and consisting of one Member of Parliament designated by the leaders of the governing party and each opposition signatory party with recognized status in the House of Commons. Each party may designate one alternate Member of Parliament who may act as a replacement of a member of the *ad hoc* committee when that member is absent; no more than one Member from each party can participate in the *ad hoc* committee at a given time.
2. The *ad hoc* committee will have access to all documents listed in the House Order of December 10, 2009 including all relevant documents related to the transfer of Afghan detainees from the period 2001 to 2005 in order to understand the transfer arrangements post-2005, pursuant to the following confidentiality measures:
 - a. access to the documents is conditional on each Member signing a confidentiality undertaking and taking an oath of confidentiality, as prescribed hereinafter;
 - b. each Member, before receiving access to documents, will obtain a security clearance at the "Secret" level;
 - c. access to documents shall take place at a secure location under the control of the Government of Canada, subject to the following security conditions on access to, and the handling of, classified materials:
 - Members of the *ad hoc* committee will be required to provide identification;
 - no staff of the Members are to be included;
 - no electronic, photographic, cellular or recording devices are permitted;
 - no materials are to be removed from the designated location;
 - no copies of materials are permitted to be made;
 - no notes are permitted to be removed from the location at any time; and
 - any notes made by Members of the *ad hoc* committee may only be accessed by the author of those notes or his or her alternate and any such notes shall be destroyed six months after the completion of the review of documents;
 - d. the review of documents is to take place with all the procedural protections normally accorded to *in camera* proceedings, including a ban on the publication of the proceedings and on the disclosure, directly or indirectly, of any information which is protected from disclosure; and

- e. any Member violating the confidentiality of the information will be immediately expelled from the *ad hoc* committee by the Panel of Arbiters established in paragraph 6, with no other Member of Parliament permitted to be substituted in the place of that expelled Member.
3. In order to understand what information has been protected from disclosure for the purpose of national security, national defence and international relations and shall not be disclosed by Members, the Members will be provided access to documents in both redacted and non-redacted form.
4. Any support required by the *ad hoc* committee will be provided by an ongoing group of public servants with the appropriate security clearances and subject-matter expertise. The group of public servants, from the relevant departments, will provide briefings and contextual information initially, and then as necessary, to the *ad hoc* committee to assist Members in carrying out their work and to understand the security implications and reasons for protecting certain information from disclosure.
5. With respect to every document that has been redacted, the *ad hoc* committee will determine whether the information therein is relevant to matters of importance to Members of Parliament, particularly as it relates to the ongoing study on the transfer of Afghan detainees currently under way at the House of Commons Special Committee on the Canadian Mission in Afghanistan, and whether the use of such information is necessary for the purpose of holding the government to account. The decisions of the *ad hoc* committee related to relevance shall be final and unreviewable.
6. Where the *ad hoc* committee determines that information is both relevant and necessary, or upon the request of any Member of the *ad hoc* committee, it will refer the disputed information to a Panel of Arbiters, who will determine how that relevant and necessary information will be made available to Members of Parliament and the public without compromising national security, national defence or international relations – either by redaction or the writing of summaries or such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. The Panel of Arbiters should regularly consult with the Members of the *ad hoc* committee to better understand what information the Members believe to be relevant and the reason why. The decisions of the Panel of Arbiters with respect to disclosure shall be final and unreviewable.
7. The Panel of Arbiters can determine, at the request of the government, that certain information should not be disclosed due to the solicitor-client privilege. The Panel of Arbiters, after consultation with the Clerk of the Privy Council, can also determine, at the request of the government, that information constituting Cabinet confidences should not be disclosed. In both such cases, the Panel of Arbiters shall determine how information contained in the documents may be made available to Members of Parliament and the public without compromising the solicitor-client privilege or the principle of Cabinet confidentiality, by such

techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. Should the Panel of Arbiters decide that certain information should not be disclosed, the Panel will provide the rationale for its decisions to the *ad hoc* committee.

8. The Panel of Arbiters will be composed of three eminent jurists, who shall have judicial expertise. Composition of the Panel must be agreed upon by both the Government and the Opposition signatories.
9. The *ad hoc* committee may produce a report at the end of the review of documents, outlining the methodology, practices and procedures used and containing any recommendations for improvements to the process of review. Should the *ad hoc* committee deem that circumstances warrant, it may also produce an interim report at any time before the production of a final report. Before any report is finalized, it shall be submitted to the Panel of Arbiters for decision regarding disclosure to ensure that the information in the report does not compromise national security, national defence or international relations, taking into consideration the factors outlined in paragraph 6.
10. This Memorandum of Understanding survives a dissolution of Parliament provided that the leaders of the governing party and each opposition party with recognized status in the House of Commons following a general election sign a Memorandum in the same terms in the next Parliament.
11. The documents mentioned above will continue to be tabled in the House of Commons as they become available.
12. Before receiving access to the aforementioned documents, each Member (including alternates) shall take the following oath:

I, ..., swear (*or* solemnly affirm) that I will be faithful and bear true loyalty to Canada and to its people, whose democratic beliefs I share, whose rights and freedoms I respect and whose laws I will uphold and obey. I further swear (*or* solemnly affirm) that I will not communicate or use without due authority any information obtained in confidence during the review of documentation.
13. Before receiving access to the aforementioned documents, each Member (including alternates) shall sign the following binding undertaking of confidentiality:

The House of Commons adopted an Order, on December 10, 2009, for the production of Government documents related to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities which contain information the disclosure of which would be injurious to national defence, international relations or national security if publicly released.

While Members of the House of Commons need to obtain the information that is necessary to hold the Government to account, such disclosure must be balanced by the Government's obligations to protect information, including information that would be injurious to national defence, international relations or national security if publicly released.

In recognition of the above concerns, I, _____, therefore undertake as follows:

1. I will take the prescribed oath before obtaining access to any confidential information, which is defined as information that the Government of Canada has identified as being protected from disclosure and that the Panel of Arbiters has not determined can be disclosed without compromising national security, national defence or international relations.
2. I will obtain a security clearance at the "Secret" level before obtaining access to the information described in paragraph 1.
3. I will treat all information described in paragraph 1 as strictly confidential.
4. I will not use or communicate, directly or indirectly, any of the information described in paragraph 1, including in parliamentary proceedings, to any other individuals, including to other Members of Parliament or to my staff.
5. I will take best efforts to ensure that there is no inadvertent disclosure of the information described in paragraph 1.
6. I will not remove any of the documents that include information described in paragraph 1 from a secure Government of Canada facility.
7. I will not make any copies of the information described in paragraph 1; any notes will not be removed from the secure Government of Canada facility and will be destroyed six months following the completion of the review of documents.
8. I understand that this undertaking is a continuing obligation, which survives the dissolution of this Parliament.

Date: _____

Signature: _____

Memorandum of Understanding signed at Ottawa, Ontario, June _____, 2010

For the Government of Canada:

Stephen Harper

For the Opposition in the
House of Commons:

Michael Ignatieff

Gilles Duceppe