

WELLINGTON REGISTRY

**Under** The Judicature Amendment Act 1972, Part 30 of the High Court Rules, the Bill of Rights Act 1990, and the Search and Surveillance Act 2012

**In the matter of** An application for judicial review

**And in the matter of** A search warrant issued by Judge IM Malosi of the Manukau District Court on 30 September 2014

**Between** N A HAGER  
*Applicant*

**And** HER MAJESTY'S ATTORNEY-GENERAL  
*First Respondent*

**And** THE NEW ZEALAND POLICE  
*Second Respondent*

**And** THE MANUKAU DISTRICT COURT  
*Third Respondent*

Affidavit of Seymour Myron Hersh

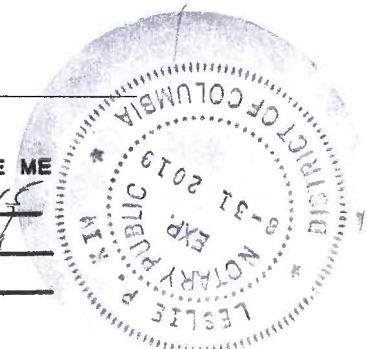
Affirmed: March 2015

My Commission Expires  
August 31, 2019  
Leslie P. Kim  
1718 M St. NW  
Washington, DC 20036

SUBSCRIBE AND SWORN TO BEFORE ME

THIS 26 DAY OF March 2015  
BY Seymour Myron Hersh

NOTARY PUBLIC



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Smyth  
UK

I, Seymour Myron Hersh, investigative journalist of Washington DC, United States of America, solemnly and sincerely affirm:

**Introduction**

1. I have been asked to provide this affidavit to assist the Court on matters relevant to an application for judicial review brought by Nicolas Alfred Hager in relation to a warrant issued to the New Zealand Police to search Mr Hager's residence and examine his documents and computer systems.

**Background**

2. I am familiar with the general background to this case. As discussed further below, I know Mr Hager and am familiar with his work. I am aware that in August 2014 Mr Hager published a book entitled "Dirty Politics", and I am aware of the nature of the contents of that book.
3. I understand that Mr Hager says he based the contents of that book on material given to him by a confidential informant who has been using the alias Rawshark. I know that it is alleged that Rawshark procured that material by accessing a computer system without authorisation, which is a criminal act in New Zealand. I understand that the Police are investigating that alleged crime and that that is the purpose of the warrant.
4. Lastly, I am aware that Mr Hager is challenging the legality of the search of his premises and seizure of his property in these proceedings, chiefly on the ground that the processes leading up to it failed to take account of the public interest in him being able to protect the identity of his confidential sources.

**Code of conduct**

5. I have read the code of conduct for expert witnesses set out in Schedule 4 of the New Zealand High Court Rules. I agree to comply with it.

Smart  
UK

**Instructions**

6. I have been instructed that it will be relevant to the Court's assessment of this case for the Court to understand the impact of the search of Mr Hager's property on:
  - (a) the ability of the news media to access sources of facts and to communicate facts and opinion to the public in the public interest; and
  - (b) the confidential informant(s) or any other person;
7. I have been asked to draw on my experience as an investigative journalist who has made extensive use of confidential informants to give an opinion as to the likely impact.
8. I also understand that Mr Hager's credentials as a journalist may be relevant and I have been asked to comment on my assessment of Mr Hager and his work.

**Qualifications as an expert**

9. I have been an investigative journalist for over 50 years. My articles have appeared in a large number of prestigious publications. I have been a regular contributor to the New Yorker for the last 22 years. I have also published 8 non-fiction books and am working on my 9<sup>th</sup>. A large part of my career has involved investigations into military and security matters.
10. I have received more than 20 major prizes for my work including the 1970 Pulitzer Prize for International Reporting for my disclosure of the Vietnam War tragedy at the hamlet of My Lai. I have been awarded a George Polk Award for Journalism on record five occasions (1970, 1973, 1974, 1981, and 2004).
11. I have made regular use of confidential informants throughout my career.

Sum  
UK

12. I note that my experience is chiefly limited to journalism in the United States of America. In order to express the opinions set out below, I have had to assume that these experiences are transferable to the New Zealand context. I do not claim any significant knowledge of New Zealand. I am not aware of any reason why my views would not be equally applicable in New Zealand, but to the extent that there are material differences of which I am unaware these would need to be taken into account in assessing the relevance of my views.

**Public importance of confidential informants**

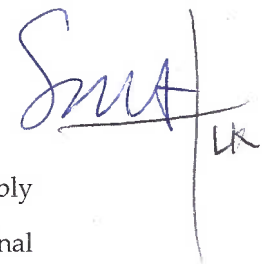
13. The use of confidential informants has been essential for my work. I could not have produced the stories I have without their assistance.
14. The information I have been able to impart to the public through the use of confidential informants has included matters of major public importance. The first and most famous example is the information I was able to expose over the massacres at My Lai.
15. That article needs to be understood in its context. There was extreme censorship during World War II. The American public had very little idea what war was like. The My Lai story put pay to the notion that American soldiers were brave pilots flying with no headgear, their canopies open, wearing a white scarf, and giving a thumbs up sign as they flew off to fight a noble fight. It showed the ugly reality of war and that our good, decent boys could behave as beastly as the hated enemies of World War II.
16. That story would not have been possible were it not for people in the United States military who were willing to share with me the proceedings of the Army's own secret investigations as they took place.

Smith  
LK

17. That is just one particularly well known example. It illustrates both the vital part that confidential informants play in exposing stories, and the enormous benefit to the public that such stories are exposed.
18. The sad, but inevitably true, fact is that claims of national or state security are, in the overwhelming majority of cases, done for political purposes. In my experience, claims of national security cannot be taken at face value. They need to be evaluated. Far more often than not, they are not justified. It is therefore necessary for there to be people willing to breach those claims of confidentiality.
19. By claiming confidentiality, State agents are able to avoid scrutiny. Unjustified claims of confidentiality are therefore easily used to hide wrongful acts by the State. In far too many case, they are used to protect the State from criticism or embarrassment, rather than furthering the legitimate interests of the public. Without people willing to give material deemed confidential, to the news media, it would not be possible for unjustified claims of confidentiality to be challenged.
20. That is not to say that I necessarily reveal all confidential information that is provided to me. I have withheld stories because I, my editor, my publishers, and, very often, senior military and intelligence officers in whom I had trust, had concerns that there were legitimate reasons for withholding the relevant information. It is my experience that competent news media can be relied on to access material and to publish only where there is a public interest in exposing the information that outweighs any reasons for confidentiality. Indeed, they are, in general, far more reliable in that regard than the agents of the State.

### Nature of confidential informants

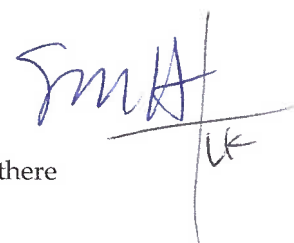
21. I never use information from a confidential informant unless I know who the confidential informant is. I am not interested in being used as a pawn in a political battle or as a means of revenge for some disaffected person. It is therefore important that I know and understand the sources of the information and their motivation for providing it to me.
22. It is also important for my editors and publishers. They may not be able to confirm that everything a source says is true, but they will want to at least verify that the person giving me the information is a person who is in a position to know that information. The New Yorker is particularly well regarded for such fact checking.
23. In my experience, in the field in which I work, confidential informants are intelligent thoughtful people. They are serious people with a legitimate complaint that deserves to be shared with the public. They are people who are engaged with society. They include senior public officials of all kinds. They have access to the information they are providing through their roles and are frequently still involved in those roles. They are often people who intended to make a positive contribution to society through their work but who are for some reason, usually political, being prevented from doing so.
24. Going public, and losing their jobs, or facing criminal prosecution, is not an option for most informants, who view truth as vital to democracy. It is not reasonable to expect everyone who is in a position to reveal information for the public good to be willing to destroy his or her career to do so.
25. It is an inevitable feature of being confidential informants that by disclosing the information they are doing something wrong in someone's eyes. Someone has deemed that information to be



confidential. By providing the information they are inevitably breaking some or other rule and are frequently risking criminal sanction. As is clear, they are thoughtful people, are aware of those risks, and balance that risk against the good they are doing in providing the information.

**Importance of offering confidentiality**

26. As noted above, the confidential informants I have dealt with frequently still maintain their public position. This extends to people holding the highest of public offices. It is absolutely essential to their ability to provide me with the information they have that I can guarantee them confidentiality.
27. In my mind there is simply no question. Were it not for a guarantee of confidentiality, many of the people who provide me with information would not do so. Were they not able to provide the information to the news media in confidence, a significant number of them would simply not feel able to provide the information to the public.
28. I have no doubt that there would also be an increasing number of other people who would chose to distribute the information directly to the public without going through the filter of the news media. One can already see this happening through such sites as WikiLeaks.
29. I am supportive of the general philosophic intent of sites like WikiLeaks – that sunshine is the best disinfectant. However, the news media have an important role to play as a filter of leaked material.
30. The news media do not simply parrot leaked material. The news media applies a rigorous process to information it receives from confidential sources. We do what we can to carefully fact check material and ensure the accuracy of material we are publishing. We seek to put material we do publish in its proper context. As noted



above, there are occasions where I have withheld publication as there were good reasons for doing so.

31. In my view, sites like WikiLeaks have published material they should not have published. There were some things published that did not have to be. There were names published of people who were talking confidentially to our state department. They were talking about things that were rational and good. It was contrary to the public good for those names to be exposed in that way.
32. Another possibilities is that a potential confidential informant may instead send information to the media anonymously. Documents provided in this was might appear to contain highly valuable information. However, it is almost never be able to be used. I do not know any responsible journalist who would make use of information when they did not know its source.

**Impact on the availability of confidential informants**

33. I understand that the New Zealand Police are seeking information about the identity of Rawshark. I also understand that in order to do that they wish to review essentially all of Mr Hager's correspondence including all of the material related to all of his other confidential informants.
34. It seems obvious to me that this will have an enormous detrimental effect on Mr Hager's ability to receive confidential information and on the ability of other New Zealand journalists to do likewise.
35. I appreciate that Rawshark is accused of a crime and I understand the legitimate interest that the Police have in investigating allegations of crimes. However, in my decades of experience every confidential source, without fail, has broken some rule or some law in providing the information.



JK

36. I understand that Mr Hager's case has received public attention. As stated above, the confidential informants I deal with are socially engaged, intelligent people. They could be expected to be aware of what happens in a case like this. Given the nature of Mr Hager's work, which is in a similar field to my own, I would expect the same to be true of the type of confidential informants he uses.
37. In my view, the people who are considering whether or not to be confidential informants to the news media in the future will know and consider the outcome of this case. If the outcome is that it is lawful for the New Zealand Police to act in this way, then that will inevitably deter many people from being confidential informants. This is contrary to the public interest. It aligns instead with the interest of those who wish to continue to misuse claims of confidentiality to hide their malfeasance.
38. The result may be that potential confidential informants may choose to simply dump their information wholesale on the internet. If that happens, then it is my view that society is worse off without the filter provided by the news media. Others will simply not risk distributing the information at all, or try to provide it anonymously and in a way that means that the media cannot make use of the information. There will therefore be matters of significant public importance which I would expect would stay hidden because of the deterrence that this case will represent.

#### **Opinion of Nicky Hager**

39. Nicky Hager has produced a body of work whose importance will only grow with time. He was warning about intrusive government surveillance, without appropriate warrant, many years before the current revelations by Edward Snowden (important as they are).

40. Mr Hager's brand of fearless reporting is essential to democracy and to the sometimes uneasy peace that exists between the State and its citizens. I believe that it is essential for the well-being of New Zealand society that Mr Hager be allowed to continue doing what he does so well -- protect those whose information allows him to report on governmental abuse of authority.
41. We in the press who share Nicky Hager's values and purpose in journalism are appalled at the State action against him. I know Mr Hager. I know he is immensely proud of New Zealand and that he does what he does because of his love for New Zealand. That mirrors my own reason for my work for the love of my country.

Affirmed in Washington, District of Columbia, USA

by

  
Seymour Myron Hersh

this day of March 2015, before



My Commission Expires  
August 31, 2019  
Leslie P. Kim  
1718 M St. NW  
Washington, DC 20036

SUBSCRIBE AND SWORN TO BEFORE ME  
THIS 26 DAY OF March, 2015  
BY Seymour Myron Hersh  
Leslie P. Kim  
NOTARY PUBLIC

a person authorised to administer oaths by the laws of the District of Columbia in the United States of America