

Your Ref: SVC/SGC/JLE/I82

Our Ref:

2 September 2022

**BY HAND AND BY EMAIL (peter@caruana.gi)**

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**For the attention of Sir Peter Caruana QC**

Dear Sirs

**Re: Inquiry into the Retirement of the former Commissioner of Police Ian McGrail ("the Inquiry") – Provisional List of Issues and Policies**

We have been asked by the Commissioner to write to the Core Participants in response to the written submissions received on the draft policies and list of issues, for which the Commissioner is very grateful.

The Commissioner is mindful of the approaching Second Preliminary Hearing ("PH2") and the deadline for exchange of skeleton arguments by Core Participants of 9 September 2022, and therefore wishes to give the Core Participants advance notice of his current thinking following his consideration of the submissions received to date. None of his views set out below should be interpreted as final decisions, but it is hoped that this will assist in narrowing the issues for consideration at PH2 and will permit Core Participants to make further submissions in areas where the Commissioner believes that he would benefit from them.

We have been asked to send this letter out by today in order to afford the Core Participants a week before the deadline for submission of Skeleton Arguments for PH2, which should be sufficient time to consider the Commissioner's current thinking and determine whether they are content with the proposed way forward or wish to make further submissions on any of the matters.

**1. POLICIES****1A – Documents Protocol**

There appears to be an important issue of principle on which the Commissioner would be grateful for submissions from the parties, namely Section 10 of the Commissions of Inquiries Act 1888, which reads as follows:

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*Persons not liable for statements or disclosure in evidence.*

*10. No person who shall give evidence upon any inquiry under this Act shall be liable to any civil proceedings or criminal prosecution for or in respect of any statement or discovery made by such person concerning any matter connected with such inquiry, and no person shall be excused from answering any question put to him by the commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to incriminate such person.*

The Commissioner would be particularly grateful for submissions as to whether Section 10:

- (a) excludes only the privilege against self-incrimination or extends to exclude all forms of privilege, including legal professional privilege (i.e. legal advice privilege and litigation privilege) and public interest immunity (as is suggested by the words “any privilege” and the subsequent separate reference to the privilege against self-incrimination),
- (b) applies to production of documents to the Inquiry as well as answering questions,
- (c) reserves a discretion on the Commissioner’s part as to whether to ask a particular question of a witness in the first place (on the grounds of privilege or immunity).

The Commissioner would be particularly grateful for any decisions or texts referring to equivalent or similar provisions in English or Commonwealth statutes (e.g. Section 9 of the Election Commissioners Act 1852 c.57).

Subject to that point of principle being resolved, and dealing first of all with the submissions made by the Government Parties, the Commissioner considers that the procedure for making a claim to privilege or immunity is adequately set out in paragraph 13 of the Draft Documents Protocol, but would be open to providing more detail as to how the Inquiry will deal with such a claim, as he is invited to do by the Government Parties.

The Commissioner is prepared to revisit the wording of paragraph 13 as necessary once the legal position in relation to the point of principle raised below is clarified. If legal professional privilege and public interest immunity do apply to the provision of evidence to the Inquiry, the Commissioner is minded to set out the test which would be applied to claims for privilege in paragraph 13 of the policy. Such a test would balance (a) the importance of the document to the Inquiry and its work and the public interest in ensuring the public are able to view a record of evidence and documents provided to the Inquiry, against (b) the asserted basis for withholding disclosure or wider dissemination of the document or its redaction. Similarly, when it comes to claims of public interest immunity, he can see the logic of applying the *R v H* balancing test set out in *Beer* §5.79. He notes that paragraph 25 of the Draft Documents Protocol already envisages the possibility of a document being disclosed to the Inquiry team

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only (or alternatively to Core Participants only) without wider dissemination. He would also be prepared to clarify paragraph 25 to expressly provide for the ability to receive evidence in private, although he does not envisage that this power will be exercised save in truly exceptional circumstances. As to the suggestion made by the Government Parties at para 7.3 of their submissions, while the Commissioner agrees that any questions of privilege or immunity are best dealt with as early as possible, it is not clear to us how the Inquiry could create a policy facilitating the raising in advance of known or anticipated issues and questions which will attract a claim of privilege, and the Commissioner would prefer to deal with any such issues as and when they are raised, whether at the time of disclosure to the Inquiry, dissemination to other parties or at the main hearing. Certainly, the Core Participants are encouraged to raise any issue of privilege or immunity at the earliest possible stage.

Turning to Mr McGrail's submissions, paragraph 36 of the Draft Documents Policy was taken from the Information Management Policy for the Independent Inquiry into Child Sex Abuse, which did not list stakeholders either. Nevertheless, the Commissioner is happy to provide an illustrative list of stakeholders referred to in paragraph 36, namely the Core Participants. Further, and in any event, as the submissions rightly note, paragraph 20 of the Draft Privacy Notice sets out the main groups with whom personal data may be shared.

Finally, we do not understand the concern raised with the Inquiry team's use of their professional email addresses to conduct Inquiry business. The submissions rightly recognise that individual professional email accounts are more likely to be secure than personal email accounts. At present, the only options which the Inquiry team understands to be available to them (at least theoretically) are (a) using their professional email addresses or (b) using addresses provided by HM Government of Gibraltar's Information Technology and Logistic Department ("the ITLD"). At the commencement its work, the Inquiry team asked the ITLD about the possibility of securing Inquiry-specific email addresses from the ITLD, but was informed that this would not be possible. Email addresses were provided by the ITLD to the Commissioner and Secretary only, and the remainder of the Inquiry team has used their professional email addresses ever since. We also note that Mr McGrail has raised separate concerns about the provision of IT services to the Inquiry by the ITLD in any event, so even if the option of using ITLD addresses were available, this would not allay Mr McGrail's concerns and would appear to be a less preferable alternative. It is not clear to us why Mr McGrail considers it necessary for the Inquiry team to use Inquiry-specific email addresses for the "*purpose of ensuring effective information walls within organisations*". Counsel's email accounts are not accessible to other members of their chambers (indeed Counsel at 5RB often appear against each other in claims in England and Gibraltar and therefore information walls are of the utmost importance within chambers). Attias & Levy's email accounts are not accessible outside their organisation, and all staff at Attias & Levy are subject to obligations of confidentiality. In terms of retention, archiving and destruction of emails, this is equally achievable through the use of professional email addresses. Notwithstanding the above, the Inquiry team would be willing to consider any proposals by Mr McGrail's team as to

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a viable alternative in terms of secure email accounts which can be used by the Inquiry team.

### **1B – Vulnerable Witnesses Protocol**

Having considered the Government Parties' submissions and the relevant parts of *Beer*, the Commissioner accepts that the question as to whether the witness's fear or perception of risk or threat is genuinely or reasonably held is a relevant consideration when determining whether a witness should be considered vulnerable within the meaning of the protocol (under paragraph 9 of the Draft Vulnerable Witnesses Protocol), and is therefore minded to import consideration of the five factors listed in *Beer* §6.104 into the procedure for a determination under paragraph 9 of the Draft Vulnerable Witnesses Protocol.

The Commissioner does not consider that it would be appropriate to make a statement that current or former police officers are unlikely to be able to benefit from the policy, as he is urged to do by the Government Parties, although he acknowledges that if a witness has experience of giving evidence in court that is likely to be a highly relevant factor which will be taken into account when making a determination under paragraph 9.

The Commissioner is open to the inclusion in the Protocol of a statement to the effect that due regard will be had to the potential for the measures sought to cause injustice to persons against whom serious allegations have been made, and to the erosion of public confidence in the Inquiry which might ensue as a consequence of permitting a witness to remain anonymous (given that these matters are highlighted for consideration by *Beer*).

As to the point raised by Mr McGrail, we can confirm that the authority for imposition of a reporting restriction emanates from sections 3 and 6 of the Commissions of Inquiry Act 1888 and the Issue of Commission, which taken together afford the Commissioner a wide discretion as to the procedure of the Inquiry.

### **1C- Core Participants Policy**

The Commissioner is minded to delete the fifth bullet of paragraph 3 as proposed by the Government Parties, for the reasons given in their submissions. This does not mean, however, that the Commissioner would be prevented from giving participants advance notice of criticisms or comments that he proposes to make of them or others in the final report.

The Commissioner is not minded to amend the third bullet of paragraph 4, which caters for remote attendance (where permitted following an application).

The Commissioner also agrees to make the amendment proposed by the Government Parties to paragraph 2.

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Finally, as to paragraph 17, the Commissioner is happy to make the position clear by amending it to read as follows:

*17. Where a Core Participant in receipt of a Legal Expenses Funding award pursuant to the Funding Protocol appoints a qualified lawyer to act on their behalf, the Commissioner will determine whether to designate that lawyer as that Core Participant's recognised legal representative for the purposes of ~~this Inquiry~~ the Legal Expenses Funding award.*

#### **1D – Appropriate Policy Document**

The Commissioner does not agree that there are no terms of reference for the Inquiry. Brief terms of reference are set out in the Commission of Inquiry. The Commissioner is happy, however, to clarify the position by amending paragraph 4 to read as follows:

*"The Inquiry is investigating the matters set out in its Terms of Reference set out in the Commission of Inquiry dated 4 February 2022"*

#### **1E – Privacy Notice**

The Commissioner is happy to make a similar amendment to that set out above in respect of the Appropriate Policy Document to paragraph 5 of the Privacy Notice.

As to the concern raised by Mr McGrail as to the ITLD's provision of IT services to the Inquiry, while the Commissioner is content with the current arrangement, he would be prepared to consider any proposals which any of the participants may wish to make in terms of viable alternative IT providers.

## **2. LIST OF ISSUES**

### *Relevance of issues*

The Commissioner is grateful for the parties' submissions as to the provisional List of Issues, and recognises that the both Mr McGrail and the Government Parties urge him to signal that he will not necessarily commit himself to investigating and descending into the detail of each specific issue, particularly where it becomes clear that they are tangential to the matter under inquiry each of the issues in order to ascertain all facts. It is right that he should reserve the right to ensure that the investigation is kept within reasonable bounds, and he notes Mr McGrail's submissions in relation to the inclusion/omission of specific reasons in (1) the Gibraltar Police Authority's correspondence with Mr McGrail and (2) the Chief Minister's and Attorney General's correspondence with the Gibraltar Police Authority, as well as the point made by Mr McGrail that the Airport Incident took place prior to his tenure as Commissioner of Police.

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Having said that, he does not consider it appropriate to rule out investigation of any issue from the outset on the basis that it appears to be tangential, particularly where the issue has been raised by one of the Core Participants as a potential “*reason or circumstance*” leading to Mr McGrail taking early retirement. For this reason he is not minded to create a hierarchy of issues within the List of Issues, with some being identified as worthy of full investigation and others pre-determined as not requiring detailed factual evidence.

Nevertheless, he is minded to amend the first paragraph of the introductory section as follows, which will afford him the flexibility to investigate matters only to the extent that is necessary in fulfilling his obligations under the Issue of Commission:

*Pursuant to Legal Notice 2022/034, the Commissioner is required to inquire into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement. The issues listed below define more closely the issues that shall be investigated to the extent that he considers necessary and appropriate to address the matter under inquiry.*

Similarly, he is minded to amend the first paragraph to the section titled “**The issues**” as follows:

*In relation to each of the issues listed in paragraphs 1-9 below:*

*A. What were the relevant facts (which the Commissioner will seek to ascertain only to the extent that he considers necessary and appropriate to address the matter under inquiry)?*

*B. To what extent, if at all, did the issue constitute a reason or circumstance leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking an early retirement (either because they led to a loss of confidence in Mr McGrail or for some other reason)?*

As to paragraphs 16 to 19 of Mr McGrail’s submissions, the Commissioner is currently of the view that the phrasing of B already provides for an investigation as to the extent to which the identified issues influenced the decision-making of the Chief Minister and Mr Pyle, particularly given the words in parenthesis, which would require an examination as to whether the issues did in fact lead to a loss of confidence by the Chief Minister or Mr Pyle in Mr McGrail (which they could not have done if they were either not known to the Chief Minister or Mr Pyle or did not form part of their decision-making).

It should also be borne in mind that the List of Issues will be a live and evolving document, which can be amended as the Commissioner may deem appropriate in due course.

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### **Issue 5.3**

As to Issue 5.3, having considered the parties' submissions and the relevant sections of *Beer*, it appears clear that the Commissioner can make evaluative findings and draw conclusions (including, where appropriate, in judgmental terms) from its findings of fact, but should endeavour to avoid making findings in terms that are the same as or similar to those used by courts to express findings of criminal or civil liability. The Commissioner is currently of the view that drafting the issue as follows would address matters adequately:

*"Did the AG and/or CM **place any or any inappropriate pressure** on Mr McGrail regarding the Criminal Investigation or otherwise interfere with the investigation, and in particular the decision to execute the Search Warrants?"*

The Commissioner considers that the term "*inappropriate*" is preferable to (and in any event encompasses) "*undue*" and "*improper*".

On the other hand, the Commissioner does not consider it necessary explicitly to include a question within Issue 5.3 as to what the AG's and/or CM's motivations for doing so were, because those would form part of the "*relevant facts*" (given that the state of a person's mind is a matter of fact), which the Commissioner has already committed to ascertaining through the introductory wording to the list of issues.

### ***The GPA process***

The Commissioner is open to including the following as an additional issue:

*12. The Gibraltar Police Authority's process and decision in purported compliance with Section 34 of the Police Act, and subsequent withdrawal of that decision ("**the GPA Process**").*

However, at present the Commissioner considers that the other questions proposed by Mr McGrail at paragraph 20 of his submissions (namely questions 12.2 and 12.3) should not be given the prominence of being included in the List of Issues. Further, a decision as to whether the Section 34 process was exercised appropriately would appear to be a legal finding rather than a factual one. As stated above, it would be open to the Commissioner to draw conclusions as he may deem appropriate, and also to make recommendations as to future conduct if necessary, but he does not consider that he should commit himself to doing so in the manner that Mr McGrail invites him to.

### ***Mr Pyle's stated intention to invoke Section 13 of the Police Act***

The Commissioner is also open to amending Issue 9 to read as follows:

*13. Mr Pyle's statement, made to Mr McGrail on 6 June 2020, that if Mr McGrail did not resign he would exercise his powers under Section 13 of the Police Act and therefore*

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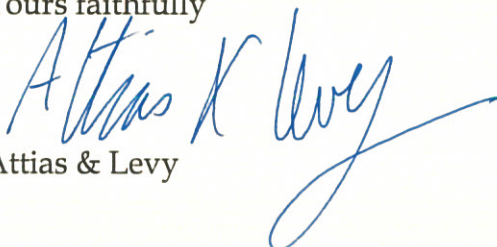
*require him to do so. This will include consideration of Sir David Steel's imminent commencement as Governor, and particularly the date on which NP learned of the date on which that was expected to occur ("the Governor's Commencement").*

This addresses the parties' submissions on this issue, except that, for the same reasons, the Commissioner currently does not consider that including the further questions proposed by Mr McGrail explicitly in the List of Issues would be appropriate.

### CONCLUSION

The Commissioner invites the Core Participants to consider the matters set out above, reflect on their respective positions in relation to these matters and then address any matters which they wish to address further in their submissions due by 4pm on 9 September 2022. He requests that the Core Participants exchange submissions shortly after that deadline.

Yours faithfully

  
Attias & Levy