

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

WRITTEN SUBMISSIONS

on behalf of

The Chief Minister, The Hon. Fabian Picardo KC,

The Interim Governor at the relevant time, Mr Nicholas Pyle OBE

and

Her Majesty's Attorney General for Gibraltar, Mr Michael Llamas CMG KC

(together "THE GOVERNMENT PARTIES")

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**IN RESPONSE TO MR IAN McGRAIL'S SUBMISSIONS DATED 9 SEPTEMBER 2022
FOR THE SECOND PRELIMINARY HEARING ON 20TH SEPTEMBER 2022 -**

Dated: 15th September 2022

1. These are the Government parties' submissions in response to Mr McGrail's submissions ahead of and for the Second Preliminary Hearing on 20th September 2022 ("**McGrail Written PH2**").

A. ALLEGED FUNDING DIFFICULTIES

2. The submissions made on behalf of Mr McGrail by his legal team at paras 55 -58 of McGrail Written 2PH are completely wrong and unjustified. They appear to be yet another example of the ease and instinctiveness with which Mr McGrail appears inclined to make wild allegations aimed at bringing the Government into disrepute, despite the nature of the inquiry process, and his apparent view that it is wrong for the Government to "have a case".

3. The statement at paragraph 55 that Mr McGrail's legal representatives have not yet been paid for any of the work they have done "since February 2022", followed as it is by allegations of discriminatory treatment in this respect by the Government against Mr McGrail, supposed Government scrutiny of his invoices, the Government acting as "gatekeeper" and the description of the Government's alleged conduct as irrational, unreasonable and unfair, can only be intended to give the reader the impression that the Government is abusively and or otherwise inappropriately delaying and or withholding payments.

4. The reality, which is quite different, is as follows:
 - (i) Charles Gomez and Co's fee note for the period 4 February 2022 – 6 June 2022 is dated 24th June 2022.
 - (ii) Charles Gomez and Co's invoice for the period 7 June 2022 to 30 June 2022 is dated 6 July 2022.
 - (iii) The fee notes of senior and junior counsel for Mr McGrail for the period 1 June 2022 to 30 June 2022 are dated 11 July 2022.
 - (iv) Attias & Levy, the Inquiry's solicitors, forwarded these invoices to the Inquiry Secretary, together with their corresponding Fee Note Recommendation by letters dated 2 and 4 August 2022, respectively.
 - (v) The Inquiry Secretary forwarded the invoices and the Fee Note Recommendations to the Government for payment under cover of email dated 25 August 2022. That is just two weeks before Mr McGrail's submissions.
 - (vi) Despite having the statutory right under section 13 of the Commissions of Inquiry Act to do so (which one would therefore have thought it pointless to ask the Commissioner in submissions to remedy), the Government does not review or examine the invoices which are the subject of a Fee Note Recommendation under the current Funding Protocol (and therefore processes them for payment without review) unless the Inquiry Secretary raises an objection.

5. The quality of the Government's conduct is thus the very opposite of what Mr McGrail submits. He is therefore invited to withdraw paragraphs 55 to 58 of McGrail Written 2PH.

B. MR McGRAIL's "SHORT STATEMENT OF THE FACTUAL POSITION"

6. In paragraph 30 of his amended Ruling following the First Preliminary Hearing, and in paragraph 8 of the consequent Directions Order, the Commissioner ruled and directed that, at 2PH, counsel for Mr McGrail may briefly and to the extent that is relevant to the issues before him at 2PH, set out the factual background of Mr McGrail's claim. Counsel for the Government Parties were similarly to be allowed to respond. Core Participants were invited to submit "suitable short draft statements, which the Commissioner will consider and adjudicate upon (providing reasons if required) in advance of the Second Preliminary Hearing."
7. Instead, and in apparent disregard of the Commissioner's ruling and directions, Mr McGrail has submitted what purports to be a statement of facts in McGrail Written 2PH without first submitting the directed draft for approval.
8. Furthermore, what has been stated on behalf of Mr McGrail is not in reality a "statement of facts", still less one limited to those facts relevant to the issues before the Commissioner at 2PH. It is in fact more akin to a prosecutorial opening statement, and factually incorrect and misleading at that. This is precisely the concern that prompted the Government Parties submissions at 1PH in regard to premature publication of wild, unproven, speculative and self-serving allegations masquerading as "facts".
9. Almost the entirety of it draws from or directly cites from the evidence of one or other of the Government Parties in their Sworn Witness Statements which have not yet been called forth into evidence in this Inquiry. Not only does the "statement of fact" therefor pre-empt the evidence, it also publishes and challenges that evidence publicly before it has been given or tested in the Inquiry.
10. The alleged "statement of facts" are a series of selective statements (some of which are self-evidently untrue) out of their context, and would appear to be designed to cause

maximum reputational damage while being minimally (if at all) relevant to the matters before the Commissioner at 2PH.

11. The “statement of facts” is in some respects manifestly untrue:-

- (i) The statement at paragraph 15 that “the Chief Minister says he lost confidence in Mr McGrail as a result of the execution of the Op Delhi warrant” (underlining added for emphasis) is untrue. The Chief Minister has not said anything of the kind. Indeed, the Chief Minister has said in his sworn statement (paras 55, 108 and 112-113) precisely the opposite, namely that he had not lost confidence in Mr McGrail because of the execution of the search warrant. He told the GPA the same thing on page 6 of his letter dated 5th June (FP1/332) : *“I have not lost confidence in him because he obtained and executed a search warrant in circumstances in which I believe it was inappropriate to do so. Nor is the reason “how the criminal investigation we refer to above has been handled” (para 35, and elsewhere in the Letter). The primary reason is that the COP has clearly lied to me.”*
- (ii) Accordingly, what “the Chief Minister says” is that he lost confidence in Mr McGrail because he believes that Mr McGrail lied to him when stating to the Chief Minister that, in relation to the execution of the warrant, he was acting on the advice of the DPP, which was not the case. It would be wrong to allow a factual statement made on behalf of Mr McGrail, which is plainly untrue (“the Chief Minister says he lost confidence in Mr McGrail as a result of the execution of the Op Delhi warrant”) to be published. This applies also to the reference to “execution of the search warrant” in paragraph 22 of McGrail Written 2PH.
- (iii) Similarly, in para 17, the supposed “statement of facts” ignores and therefore mischaracterises the principal underlying reasons for Mr Pyle’s loss of confidence in so far as it related to the Incident at Sea, namely that Mr Pyle considered that Mr McGrail had misled him (the Governor), and through him the Foreign and Commonwealth Office, as to the location of the incident and his best information and intelligence about that diplomatically important fact.
- (iv) Nor is it true that the criminal investigation or any detail relating to it “precipitated the loss of confidence”. This is not a fact. It is a speculative allegation by Mr

McGrail for which there is no evidence, not even adduced by him, save his bald assertion of it.

- (v) The statement in paragraph 24 that Mr Pyle had supposedly said that “*he would*” invoke his powers under section 13 of the 2006 Act to call for Mr McGrail’s resignation is untrue and contrary to the available evidence, namely:
 - (a) The Governor’s letter dated 6 June 2020 to Mr McGrail (at NP1/54a) in which Mr Pyle refers to the fact that he would be reading all the papers before the meeting on Monday, i.e. before making a final decision;
 - (b) Mr Pyle’s evidence at para 17.1 of his Witness Statement: “I said that I would review all the papers in my possession over the weekend.....I said that whilst I had not made up my mind as to whether I would use the powers invested in me, I would be prepared to do so”;
 - (c) Mr McGrail’s own evidence (at para 96 of his Witness Statement): “he said that he would be taking all the correspondence away for the weekend to study. He asked me to return to see him on the following Monday (the 8th instant) with a view of invoking his powers under section 13.” (underlining added by us for emphasis).

There is accordingly no basis in evidence for the statement that Mr Pyle told Mr McGrail (as stated in para 24) that he would exercise his power.

- (vi) The Chief Minister was not “at the relevant time, himself a person of interest in the Op Delhi investigation”. There is no evidence of this and it is not sustained even by Mr McGrail’s own witness statement. Being invited by the police to make a witness statement not under caution does not make a person a “person of interest in the investigation”, as alleged by Mr McGrail (see para 10 McGrail Written 2PH).

12. There is no basis in law or logic for Mr McGrail’s submission (also in apparent non-acceptance of the Commissioner’s ruling and directions) that “this prior restraint approach risks undermining open justice”. The principle of open justice is that justice will be held transparently and in public, subject to the procedural rules of the court or inquiry. The principle does not have it that a party (even to contentious *inter partes* proceedings, which

this Inquiry is not, or not supposed to be) can say, do and have published to the world at large what they please and when they please.

13. The Government Parties are concerned that Mr McGrail is abusing the process and purpose of this Inquiry to give premature vent, for publicity reasons and effect, to his outlandish speculations of improprieties by others. That is not the purpose of this Inquiry, or of its procedure, and he should be restrained from doing so, not least when what he speculates is so obviously self-serving and factually incorrect.
14. Submission: it is self-evident from paras 26-37 of McGrail Written 2PH that the only extant issue for Mr McGrail in relation to the list of issues relates to Issue 5, and specifically his desire to include language around motivation. His factual position statement plainly is not limited “to the extent that is relevant to [that issue] before [the Commissioner] at 2PH”.
15. The Government parties wrote to the Inquiry Solicitors in the above terms on 13th September 2022. The Inquiry Solicitors replied by email of the same date to all Core participants indicating the Commissioner’s position and urging the parties to proceed as they did with success at the first Preliminary Hearing, namely to engage and seek to agree their proposed factual statements in accordance with the guidance laid down in his Ruling (as amended) dated 25 August 2022. Pursuant to that request, the Government Parties Solicitors emailed Mr McGrail’s solicitors proposing a way forward to reach such agreement. No substantive response has been received save a communication this afternoon to say that a response would issue before close of business today. Since the Government Parties must file these responsive submissions by 4pm today, it has been necessary to deal (above) with Mr McGrail’s purported “Statement of Facts” and (in Section C below) to set out the Government Parties’ Statement of Facts and Position so that they will be in the public domain should and to the extent that Mr McGrail’s version is permitted to remain on the record and or be published.
16. However, it is the Government parties’ position that both Mr McGrail’s “Statement of Facts” and Sections B and C of these submissions should be redacted before publication and not referred to orally in current terms. The Government parties accept, consistently with the Commissioner’s Ruling, that Mr McGrail’s counsel must be allowed to orally refer to facts, and indeed allegation in appropriate terms as may be necessary to articulate submissions on his behalf in relation to the (it appears) sole remaining issue in relation to

the List of Issues (i.e. Issue 5). That will be a matter for the Commissioner at the oral hearing of 2PH.

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D. LIST OF ISSUES

27. Ref issue 5

27.1 It is submitted on behalf of Mr McGrail (see McGrail Written 2PH para 33) that “as currently drafted Issue 5 is framed to focus on the RGP investigation rather than the underlying facts relating to it: the opening words of Issue 5 are “The RGP’s handling of an investigation...”. It is submitted that these words do not result in the focus alleged by Mr McGrail. They in no way constrain or inhibit the Commissioner’s inquiry into whatever aspect, if any, of the criminal investigation he considers relevant and wishes to investigate, nor the required extent of any such investigation. The wording leaves the matter fully and properly at large to the Commissioner.

27.2 Mr McGrail’s concern appear to be derived from his incorrect belief that “at present Issue 5 is framed according to the Government Parties’ account, which is that the RGP’s handling of the investigation was the fundamental issue” (see para 36). This is not correct. The RGP’s handling of the investigation is not an issue in this inquiry for the Government Parties, let alone “the fundamental issue”. If it would assist the Inquiry to placate Mr McGrail’s concerns in this respect, the Government Parties would be content for Issue 5 to be reformulated as follows:

“5. In the context of an investigation by the RGP into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud (“the Conspiracy Investigation”) including but not limited to the

RGP's execution of search warrants as part of that investigation on 12 May 2020 ("the Search Warrants")":

5.1 Stet

5.2 Stet

5.3 Stet."

28. Mr McGrail's concerns that the current proposed wording of Issue 5 focuses on the RGP's handling of the investigation does not require anyone's motivations to be reflected in the articulation of the issues, which appear to be his real (and inappropriate) objective.
29. The Government Parties respectfully submit that the Commissioner's current position that it is unnecessary to include a question within issue 5 about the AG's and/or the CM's motivations is correct. It is further submitted on their behalf that it would be wrong to do so because it assumes that there were motivations.
30. Contrary to what is submitted by Mr McGrail in para 35 of McGrail Written 2PH, it is most certainly disputed that the Chief Minister was "a person of interest in the investigation". There is no evidence of this and it is not sustained even by Mr McGrail's own witness statement. Being invited by the police to make a witness statement does not make a person a "person of interest in the investigation".
31. The list of issues is supposed to identify the issues which the Commissioner considers should be investigated in the context of the issue under inquiry. It is not supposed to capture the case theories or allegation of any person or party, which is what McGrail appears to want in this respect.
32. As the Commissioner has indicated, if he makes findings which include findings of motivations, that will have been open to him without the need for it to be specifically reflected as an "issue" (which it is not). Nor is it necessary to do so for RGP officers to give whatever evidence they wish in that respect, nor for the Chief Minister to respond to it.
33. Furthermore, it is wholly unrealistic and inappropriate to invite the Commissioner to cast an issue around the language that the Chief Minister may have been part of a criminal hacking and/or sabotage of NSCIS and conspiracy. The language submitted for the opening

lines of Issue 5 (stripped of the conflation of separate issues) effectively reads (as relevant to our submission) as follows:

“The Chief Minister’s involvement (if any) in.....the alleged hacking and/or sabotage of the National Centralised Security System and alleged conspiracy to defraud.....”.

This is self-evidently tendentious and inappropriate, and optically accusatorial, and this is not cured by adding the words (“if any”). It also breaches the established common law principles that an inquiry should not make finding against any person in terms that amount to a criminal offence.

34. It is respectfully submitted that both Mr McGrail’s submission, namely (i) specific inclusion of a motivation issue and (ii) the above proposed language for the opening para of Issue 5 about the CM’s involvement in the hacking/sabotage/conspiracy, are wrong and both should be rejected. The Commissioner should be alive to the possibility that the latter (patently outrageous as it is) has been included as a counter-weight in the hope of its refusal attracting sympathy to allow the former in the spirit of striking a compromise.

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15th September 2022