
***Inquiry into the Retirement of the Former Commissioner of Police Mr
Ian McGrail (“the Inquiry”)***

**Determination of an application for funding of legal representation for
Thomas Cornelio, John Perez and Caine Sanchez**

1. This is a determination of an application for Legal Expenses Funding made to the Inquiry on behalf of Thomas Cornelio, John Perez and Caine Sanchez (**‘the Applicants’**).
2. The Inquiry was commissioned under the Commissions of Inquiry Act 1888 (**‘the 1888 Act’**) 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 Inquiry has now settled a Provisional List of Issues,¹ which more closely define the issues that shall be investigated. Relevantly to this application, Issue 5 provides that the Inquiry will investigate:

“The investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud (**‘the Conspiracy Investigation’**), and the RGP’s handling of the same, including but not limited to the RGP’s execution of search warrants as part of that investigation on 12 May 2020 (**‘the Search Warrants’**). In particular:

5.1. Did Mr McGrail seek or receive advice from the Director of Public Prosecutions (**‘DPP’**) or the AG as to the execution of the Search Warrants, and did Mr McGrail accurately communicate any advice from the DPP or the AG on the Search Warrants (or lack thereof) to the CM and/or AG?

5.2. Was the RGP’s execution of the search warrants on 12 May 2020 contrary to an agreement or understanding with the AG and/or the DPP?

5.3. Did the AG and/or CM place any or any inappropriate pressure on Mr McGrail regarding the investigation or otherwise interfere with the

¹ Available here: <https://coircomp.gi/wp-content/uploads/2022/09/Provisional-List-of-Issues-22.09.22.pdf>.

investigation, and in particular the decision to execute the Search Warrants?”

3. The Applicants are the three individuals who were charged following the Conspiracy Investigation. Their prosecution was discontinued on 21 January 2022. The Inquiry, through the Solicitors to the Inquiry, has sought evidence from each of the Applicants in the form of a statement under oath on matters relevant to the subject matter of the Inquiry, including any interactions between the Applicants and a number of individuals. However, upon being contacted by the Inquiry Solicitors, the Applicants indicated that they were already in the process of preparing a joint statement pursuant to the Inquiry’s Public Call for Evidence,² which was published on 23 September 2022.
4. On 21 October 2022, the Applicants applied for a legal expenses funding award (**‘Funding Award’**) pursuant to paragraph 12 of the Inquiry Protocol relating to Legal Representation at Public Expense (**‘the Funding Protocol’**).³ The Applicants seek a Funding Award to cover the following matters, which loosely correspond to the matters in paragraph 11 of the Funding Protocol:
 - a. Considering initial instructions, including a review of a voluntary joint submission and material submitted by the Applicants pursuant to the Call for Evidence dated 23 September 2022;
 - b. Considering the Requests issued by the Inquiry to make a witness statement, so far as is necessary properly to represent our interests in the Inquiry;
 - c. Advice in relation to and for the purpose of making a witness statement, in accordance with the Requests;
 - d. Representation during oral evidence; and
 - e. Any other matters that the Chairman may deem necessary.
5. The Applicants seek to engage the same legal team that represented Mr Cornelio and Mr Perez in the discontinued criminal proceedings, and who are presently representing all three Applicants in related proceedings. Namely:
 - a. Ben Lion Cooper KC (KC 2020), Doughty Street Chambers (London); and

² Available here: <https://coircomp.gi/wp-content/uploads/2022/09/Call-for-Evidence-FINAL.pdf>

³ Available here: <http://coircomp.gi/wp-content/uploads/2022/05/Commissioner-of-Police-Inquiry-Funding-Protocol.pdf>. See paragraphs 10 - 22 for a detailed discussion of the legal position.

- b. Ellis Wolfe Sareen (2008), Foundry Court Chambers (London).
6. For the reasons explained below, I have concluded and recommend to His Majesty's Government of Gibraltar ('**the Government**') that:
 - a. The Government should fund the Applicants' two legal counsel, on the condition that time spent is divided between leading/junior counsel on a 20/80 per cent basis. The Applicants' legal counsel team as set out in paragraph 5 above will need to be approved admitted and enrolled as a barrister or solicitor under the provisions of the Supreme Court Act 1960, as required pursuant to paragraph 7 of the Funding Protocol.
 - b. The Applicants' legal team should include a lawyer already approved, admitted and enrolled as a barrister or solicitor in Gibraltar, and practicing from a permanent place of business in Gibraltar. The purpose for this is to ensure that the Applicants' legal team have a presence in Gibraltar for *inter alia* the service of documents; the purposes of liaising with the Inquiry; and to instruct and / or advise legal counsel on matters of Gibraltar law.
 - c. Funding should be limited to that which is necessary for items (a)-(c) in paragraph 4 above, including the provision of documents to the Inquiry. At this juncture, funding should not include funding for representation during oral evidence or travel expenses.
 - d. Funding should also include reimbursement of the Supreme Court fees for the admission and enrolment of Mr Cooper KC and Mr Sareen as a barristers for the purposes of the Inquiry under section 28(2) of the Supreme Court Act, as required by paragraph 7 of the Funding Protocol.
 - e. The hourly rates for counsel shall be subject to the maximum hourly rates listed in paragraph 12(e) of the Funding Protocol.
7. I have determined this application for legal funding in accordance with the Funding Protocol, as required by paragraph 1(b) of the Funding Protocol. In particular, I have had regard to the overarching requirements to "*act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or witnesses or others)*" (paragraph 1(a)) and to take into account "*whether making a Legal Expenses Funding award is in the public interest*" (paragraph 3).

8. However, as I explained in my earlier determination on Mr McGrail's application for a Funding Award, the 1888 Act does not contain a power by which the Chairman of the Inquiry can definitively order that expenses incurred by a witness be charged to the Consolidated Fund. Section 13 provides that:

“The commissioners shall have the power to include in the expenses of giving effect to the provisions of this Act any reasonable sum, which they may think fit to recommend by certificate under their hand, to be paid to any witness for his expenses and loss of time, and which may be approved by the Government.”

9. Accordingly, this recommendation will be submitted to the Government for approval in accordance with section 13 of the 1888 Act.

Decision as to funding

10. As set out in paragraph 6 above, I have recommended that the Government should fund the Applicants' proposed legal team for the purpose of responding to the Inquiry's request for evidence from the Applicants. This recommendation raises three separate issues, which I address in turn below.

11. First, I am satisfied that the Applicants should receive a Funding Award by reference to the considerations in paragraph 4 of the Funding Protocol. Namely:

- a. The Applicants are intimately implicated and concerned in a matter under Inquiry, namely the Conspiracy Investigation in Issue 5. The Applicants submit that they have *“first hand knowledge of the matters ... which will greatly assist the Inquiry”* and with regard to certain matters *“are in fact the only people who can provide relevant information and documents to assist the Inquiry”*. I am satisfied that: (i) it is in the public interest that the Applicants give evidence to the Inquiry; (ii) the Inquiry will benefit from the Applicants' evidence, and (iii) the Inquiry would be assisted by counsel playing a role in presenting and structuring that evidence in a suitable manner (for example, including relevant details, excluding relevant details and producing relevant documents).
- b. Given the Applicants' implication in the Conspiracy Investigation, they may (without any prejudice) be subject to significant criticism in the course of the Inquiry's proceedings, particularly by other witnesses.
- c. The Applicants have indicated that if a Funding Award was not granted, they would be unable to fund legal representation. The Applicants have provided

detailed information about their financial resources and expenses, which is not necessary to ventilate in this public judgment. It suffices to note that the Applicants have relatively limited financial resources and substantial outgoings and dependents.

- d. It is fair, necessary, reasonable and proportionate to make a Funding Award to the Applicants, and I consider that such an award is an appropriate use of public funds. In particular, I consider that it would be fair for the Applicants to have access to legal advice on issues of legal professional privilege and privilege against self-incrimination, and how those privileges operate in the context of the Inquiry, when preparing their witness statements. As the Applicants are not core participants, the modest amount of any Funding Award would be proportionate to the benefits that will accrue to the Inquiry if the Applicants give evidence.

12. Second, I consider that the Funding Award should presently be limited to the cost of preparing witness statements, as requested by the Inquiry's Solicitors. I note the following:

- a. The Applicants have not applied for Core Participant ('CP') status in the Inquiry, so do not enjoy the participatory rights set out in paragraph 3 of the Core Participants Policy,⁴ which include the ability to make opening and closing statements, suggest lines of questioning, and apply to ask questions of witnesses. If the Applicants want to participate in the Inquiry in this manner, and seeking funding in respect of that participation, they will first need to apply for CP status.
- b. The Inquiry has not yet determined which witnesses will need to give oral evidence at the main Inquiry hearing. Accordingly, the capacity in which the Applicants are currently assisting the Inquiry is limited to the provision of sworn written evidence.
- c. It does not appear that it will be necessary for the Applicants' legal counsel to be physically present in Gibraltar in order to assist them in preparing sworn statements and disclosing relevant documents to the Inquiry, which can occur remotely through correspondence and meetings on Zoom or Microsoft Teams. Accordingly, I make no determination on the Applicants' request for

⁴ Available here: <https://coircomp.gi/wp-content/uploads/2022/09/Core-Participants-Policy-22.09.22.pdf>.

disbursements relating to travel expenses at this stage. This matter can be considered by the Inquiry's Solicitors on a case-by-case basis, should it arise.

13. Third, I must consider the composition of the Applicants' legal team. Pursuant to paragraph 11 of the Funding Protocol, where the Chairman determines to make a Legal Expenses Funding award, this will normally be limited to the expenses of a (singular) recognised legal representative. However, for the following reasons, I am satisfied that the Applicants should receive the benefit of advice from their two existing legal counsel, who are both based in the United Kingdom:

- a. As the Applicants submit, Mr Cooper KC and Mr Sareen represented the Applicants during the Conspiracy Investigation proceedings, and will need to spend less time than external counsel familiarising themselves with the facts and issues – thereby minimising expense. There are also other benefits in continuity, including that the Applicants' counsel are likely to be in the best possible position to assist the Inquiry, and to advise the Applicants on their evidence to the Inquiry, due to their wholistic involvement.
- b. The Applicants also submit that by jointly instructing senior and junior counsel, this will minimise expense and avoid unnecessary cost. That is correct in theory, as the involvement of junior counsel often operates to limit the amount of hours that senior counsel (with their higher hourly rate) spends on a matter. However, to ensure that benefit is effected in practice, I recommend that the Government should fund the Applicants' legal team on the basis of a 20/80 split in work between senior and junior counsel. I caution that any work undertaken by Mr Cooper KC beyond a 20 percent share will need to be specifically authorised by the Solicitors to the Inquiry, pursuant to the procedure for assessment of budgets and bills set out in paragraphs 18 to 28 of the Funding Protocol.
- c. I am satisfied, in accordance with paragraph 9 of the Funding Protocol, that it would be appropriate for Mr Cooper KC and Mr Sareen to jointly represent the Applicants. The Applicants have similar interests in the Inquiry; are likely to rely on similar facts in the course of the Inquiry; and it is fair and proper for them to be jointly represented. Of course, should any conflict of interest emerge, the appropriate course would be a matter for Mr Cooper KC and Mr Sareen's professional judgment.

14. I draw the attention of the Applicants and their legal team to paragraphs 18 to 28 of the Funding Protocol, by which the assessment of budgets and bills will be managed.
15. I am willing to consider any further application under paragraph 14 of the Funding Protocol, on the matter of the limits of the Funding Award.

Sir Peter Openshaw

28 October 2022