

**INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF
POLICE**

**SUBMISSIONS ON BEHALF OF
HM GOVERNMENT OF GIBRALTAR,
THE CHIEF MINISTER, THE HON FABIAN PICARDO KC,
HM ATTORNEY GENERAL FOR GIBRALTAR, MICHAEL LLAMAS KC
AND
(THEN) INTERIM GOVERNOR, MR NICHOLAS PYLE**

(collectively referred to as “the Government Parties”)

for the Third Preliminary Hearing on 8 February 2023

A. INTRODUCTION

1. The Core Participants were invited to make written submissions (if so advised) on the matters on the agenda for the Third Preliminary Hearing (“**3PH**”), as issued by the Inquiry and supplemented by additional matters added to it by Core Participants in response to an invitation to do so by the Inquiry. Mr McGrail proposed an additional matter for the agenda, namely “The Composition of the Inquiry Team.” Given the nature of the issues on the Inquiry’s agenda, the Government Parties intended not to make written submissions, and did not do so.
2. On Friday 3 February 2023 (albeit that they are dated 2 February) Mr McGrail’s legal team filed and served written submissions on his behalf (“**McGrail Written 3PH**”). But for the need to deal with the matters to which Part B below relates, the Government Parties would have responded to McGrail Written 3PH orally at the hearing of 3PH.

B. THE IMPORTANCE OF THE INQUIRY

3. In paragraphs 4-14 of McGrail Written 3PH, Mr McGrail once again sets out the allegedly relevant international law material about corruption and, in paragraph 12 and 13, sets out specific and serious allegations and his untested and unadjudicated case theory. He does so, allegedly and supposedly “*to emphasise the importance of the Inquiry’s work*” (para 4 McGrail Written 3PH). It is submitted in this respect on behalf of the Government Parties as follows:

3.1 It is inconceivable that Mr McGrail or his legal team believe that the Commissioner, a hugely experienced High Court judge, needs to be reminded of the importance of the Inquiry’s work or to have it emphasized.

3.2 The stated reason for the inclusion of paragraphs 4-14 is plainly a pretext for yet another attempt to give renewed and inappropriate publicity to Mr McGrail’s allegations and case theory.

3.3 Furthermore, the inclusion of paragraphs 4-14 disregards the existing rulings of the Commissioner in this regard (as to which see paragraph 4 below).

3.4 Furthermore still, such submissions do not address or relate to any of the matters on the agenda for the hearing. They are therefore, under the guise of a pretext, wholly gratuitous, unnecessary and inappropriate for a hearing of this nature.

3.5 Nor, contrary to what is implied by his legal team, can paras 12-13 be justified on the basis that it has been said before.

(i) First, what is said on behalf of Mr McGrail in paras 12-13 of McGrail Written PH3 is not (contrary to what is now said) a reiteration of “some of the points we made in our submissions for the First Preliminary Hearing”.

(ii) Second, apart from being different, much of what was said in McGrail Written 1PH was, and remains, redacted on the Inquiry’s website (as to which see para 4.1 below).

4. The position in relation to inclusion of allegations and case theories in publishable written submissions for Preliminary Hearings is as follows:

4.1 During the First Preliminary Hearing, the commissioner expressed the view that “...*it is better to wait to have proper opening statements at the commencement of the full hearing.*” (Page 47, lines 22-25). Following some discussion a compromise was agreed whereby each side published a brief factual position. What was publicly stated on behalf of Mr McGrail at 1PH (see transcript of 1PH at page 115) is:

"At the heart of this inquiry is a man whose version of events is that he was placed under improper pressure at the highest levels of government in conducting his job. His core allegations are that he was (a) put under inappropriate pressure in respect of the conduct of a criminal investigation, and (b) subsequently put under pressure by the same individuals to request early retirement against his will, pressure to which he ultimately succumbed." This is very different to what is now sought to be said.

4.2 Following argument, the Commissioner decided (see para 28 of Amended Judgment dated 25 August 2022 following 1PH) that, for the purposes of the Second Preliminary Hearing (“**2PH**”), Mr McGrail’s counsel “*should now be permitted at least briefly to set out the factual background of Mr McGrail’s claims at the Second Preliminary Hearing, to the extent that it is relevant to the issues before me at that hearing*” (our emphasis).

4.3 Pursuant to the ruling referred to in para 4.2 above, item 3 of the agenda for 2PH was for counsel for the core participants to give short statements of their factual allegations (our emphasis). Mr McGrail’s statement of factual position dated 20 September 2022 for 2PH made no such allegations as are now contained in paragraphs 12 and 13 of McGrail Written 3PH.

4.4 What is currently available on the Inquiry’s website is the extent of what the Inquiry has hitherto permitted to be placed in the public domain by way of factual allegations.

4.5 In contrast to what has hitherto been permitted to be said orally and published on the Inquiry’s website, at this stage of the Inquiry and for the purposes of procedural

preliminary hearings, the content of paragraphs 12-13 of McGrail Written 3PH are not a statement of factual position, but highly inflammatory, untested and underdetermined allegation of specific and serious wrong-doing by both the Chief Minister and the then Interim Governor.

5. **Submission**: In light of, and consistently with the matters set out above, it is submitted on behalf of the Government Parties that the Commissioner should not allow counsel for Mr McGrail to refer orally at the second Preliminary hearing to any of paragraphs 4-14 of McGrail Written 3PH, and that the Inquiry should redact those paragraphs before placing McGrail Written 3PH on its website or otherwise publishing that document.
6. **Defamatory**. We are instructed that those allegations are considered to be outrageous and wholly untrue and considered also to be highly defamatory. We are further instructed by the Chief Minister to say that he fully reserves his rights against all relevant persons in this respect.

Defensive response by Government Parties

7. As stated above, the Government Parties submit that it is unnecessary and wrong for Written Submissions for 3PH to include serious allegations and case theories, and that counsel for Mr McGrail should not be allowed to do so at the hearing of 3PH, and they should not be published. The same applies to paragraph 8 below of this Written Submission.
8. However, in case the Commissioner should take a different view, the following is the Government Parties' response to Mr McGrail's allegations:
 - 8.1 Mr McGrail's allegation that Mr McGrail "was forced out of his post because he had executed a search warrant against a friend of the Chief Minister, in a brazen act of corruption designed to protect the personal and political interests of the Chief Minister and other powerful figures" is wholly untrue, and will not be sustained by the evidence.
 - 8.2 Mr McGrail's allegation that the Chief Minister and (then) Interim Governor, Nicholas Pyle, "have attempted to muddy the waters by raising unrelated issues

before this Inquiry which are nothing but fig leaves to cover up their conduct” is wholly untrue and will not be sustained by the evidence.

8.3 In the context of the remainder of this paragraph 8, it should be borne in mind, as the evidence will show, that the Interim Governor, Nicholas Pyle, kept both officials and Ministers at the Foreign Commonwealth and Development Office in London informed on a timely basis.

8.4 Mr McGrail ceased to be Commissioner of Police because he (properly and inevitably) sought early retirement consequent on (i) learning that he had lost the confidence of the Governor and the Chief Minister and (ii) that, had he not sought early retirement, he (correctly) believed there was a very real risk that the Governor (not the Chief Minister, who had no power to do so) would call publicly for his resignation, as he had the power to do under section 13(1)(f) of the Police Act, with London’s full knowledge.

8.5 Only His Excellency the Governor (and not the Chief Minister, Mr Picardo, still less the Attorney General, Michael Llamas) had, at that time, power to call for Mr McGrail’s resignation, and it is therefore self-evident from his own statement that he chose to retire to avoid the anticipated actions of the Governor, who had lost confidence in him, and had told him so.

8.6 Accordingly, the reasons why the Chief Minister and the Attorney General had also lost confidence in Mr McGrail were not, in the event, relevant to the reasons and circumstances leading to his choosing to retire. That was clearly triggered by the actions and position of the Governor. The Governor had not lost confidence in Mr McGrail, and did not intend to call for his resignation, for any reason to do with the criminal investigation in which Mr McGrail alleges (which is denied and roundly rejected) that the Chief Minister and the Attorney General interfered.

8.7 The Governor’s loss of confidence in Mr McGrail’s probity and integrity, and his leadership of the RGP had been progressive over an extended period of time and by reason of a number of incidents and matters, namely, the Governor’s view about –

(i) His mishandling of an incident at the airfield in February 2017 involving an

RAF airplane and some of the most senior military officers in Gibraltar, and its aftermath, which unnecessarily brought the relationship between Gibraltar and the Ministry of Defence to near crisis point;

- (ii) The RGP's handling of an investigation into an incident in March 2017 in which an RAF pilot was severely assaulted during a stop-over in Gibraltar, and which resulted in no-one being prosecuted;
- (iii) The fractured and almost hostile relationship between Mr McGrail and the Gibraltar Police Federation, which was resulting in very low morale in the RGP, which resulted in tensions which culminated in a formal complaint by the Federation to the Gibraltar Police Authority about Mr McGrail;
- (iv) Mr McGrail's failure to address or effectively tackle the serious issues raised in the 2016 report on the RGP conducted by Her Majesty's Inspectorate of Constabularies. The 2020 report by HMIC also reported some finding which tended to vindicate the issue in (iii) above; and
- (v) The fact that the Governor considered that he had been misled by Mr McGrail, through intentional omission to provide the Governor with the best information or intelligence available to Mr McGrail (which he was providing to others) in relation to a matter arising from the incident at sea on 8 March 2020 in which two Spanish Nationals died following a collision with an RGP launch, and which touched very specifically upon HMG's and the Governor's responsibilities for external affairs, namely information relating to the location of the incident.

8.8 All of these factors arose and occurred well before the alleged (and denied) interference by the Chief Minister and the Attorney General in the criminal investigation known as Operation Delhi. The Governor's deep concern with Mr McGrail's leadership qualities had absolutely nothing to do with that RGP investigation. Indeed, the Governor had no prior knowledge about the criminal investigation, until the Chief Minister brought it to his attention in their meeting on the 15th May 2020.

8.9 The consideration of whether to invoke the procedure in section 13 of the Police Act

to call for Mr McGrail's resignation was entirely the Governor's, with the knowledge of HMG in the UK. At no time was he put under any pressure by any person, including the Chief Minister, to decide to do so.

8.10 It is frankly fantastic to believe, as would need to be the case for Mr McGrail's case theory to be correct, that, however much Mr McGrail may be willing to attribute improper conduct and motives to the Chief Minister and the Attorney General, the Governor would state that he had lost confidence in the Commissioner of Police and consider calling for his resignation, based on those improper motives and conduct, in full view of UK Foreign Office ministers, senior officials and legal advisers, whom the Governor kept briefed in timely manner.

Attack on this jurisdiction

9. HM Government of Gibraltar is concerned that, taken holistically, the effect of McGrail Written 3PH is to systematically undermine the good name and reputation of Gibraltar, on the basis of Mr McGrail's untested, unadjudicated and self-serving allegations, and indeed the public credibility of Inquiry itself, by unfounded criticism (all of which, having been put in the public domain by Mr McGrail's legal team, will no doubt find its way into the pages of the Guardian newspaper), as appears by the following:

- (i) **Undermining the Inquiry.** The apparent systematic undermining of the Inquiry (while professing to do so "in the spirit of cooperation") by means of the following:
 - (a) The (as contrasted with the version of facts and events expounded in his written submissions for 3PH by CTI), selective recitation and description of the handling of the data breach suffered by Attias & Levy while they were Solicitors to the Inquiry ("STI").
 - (b) The criticism of the time taken and manner of handling of the replacement of STI.
 - (c) The unjustified criticism of the Inquiry for allegedly failing to carry out an allegedly promised inquiry into data security.
 - (d) Generalised allegations of "shortcomings" in the Inquiry's approach to Mr McGrail's serious concerns.

- (e) The statement (see para 12) that the Inquiry is allowing itself to become “distracted” by fact-finding on issues which have no real relevance to the Interim Governor’s and Chief Minister’s “decision making at the time”. As an aside, it is quite extraordinary, but noteworthy that Mr McGrail, and his legal team, consider anything that is not consistent with his allegations or case theory to be a “distraction” not worthy of investigation by the Inquiry, for example, the matter of the explanations given by the Interim Governor for the decisions that he made.
 - (f) His bald allegation, for which he provides no evidence whatsoever, and which is denied, and the publicly available evidence will show to be untrue, that the “the Chief Minister has repeatedly attempted to besmirch Mr McGrail’s good reputation in Parliament and in public interviews, further compounding the victimisation he has suffered as a result of his attempting to stand up for the rule of law.”
 - (g) The attacks on the experience, competence and performance of the Gibraltar lawyers constituting the Inquiry’s legal team, and the manner in which this is done.
 - (h) The obvious conflation of the unrelated matters of the data breach and the fact that the provision of IT services to the Inquiry by the Government’s Information Technology Department. The data breach did not occur from the Government’s information technology department.
 - (i) The apparently unjustified allegation that the Inquiry has breached its obligations under applicable data protection legislation.
- (ii) **The Civil Service.** The wholesale disqualification of Gibraltar’s professional civil service by brazenly stating that even with a written undertaking a professional civil servant cannot be trusted to hold the Inquiry’s data without improperly making it available to others.
 - (iii) **The Jurisdiction in general.** The unparticularised, but plainly intended to be unflattering, reference (in paragraph 15) to “*the nature of Gibraltar as a jurisdiction*”.
 - (iv) The implication that not even private sector providers of IT services in Gibraltar can be trusted, implicit in the suggestion that the Inquiry should set up a server

“which is not based in Gibraltar” (para 27).

- (v) **The legal profession in Gibraltar.** The criticism of the capacity for competence and independence of the legal profession in Gibraltar for the conduct of a public inquiry implicit in the suggestion that addressing the concerns that they (often wrongly) express requires the appointment of “solicitors and leading counsel with substantial experience of running a public inquiry”, which is plainly intended to mean UK solicitors and leading counsel.
- (vi) **Affidavit of innocence ref Data Breach.** The obvious implication that HM Government of Gibraltar, the Chief Minister, the Royal Gibraltar Police and/or the previous Interim Governor may have been involved in bringing about the data breach by the outrageous submission that the Inquiry should seek their assurance by affidavit that they have had “no involvement in the data breach” i.e. that they have not been the perpetrators of or party to the theft of documents from the IT systems of Attias & Levy, the Inquiry Solicitors.

The suggested affidavit of innocence

- 10. As just stated, it is submitted that seeking the assurance by affidavit of any person that they have had “no involvement in the data breach” (a criminal offence) is an outrageous and inappropriate submission.
- 11. Notwithstanding this, and without derogating from that view, the Chief Minister would not wish anyone to think, or worse still abuse for the purposes of this Inquiry or politically, that he is reluctant to confirm his total and complete, direct or indirect non-involvement in or knowledge of the data breach, and that this may be understood to suggest that he was. I am instructed to state publicly that, inappropriate as Mr McGrail’s submission may be, if the Commissioner does not consider it inappropriate for him to do so, the Chief Minister is ready and willing at any time to swear an affidavit to the effect described in this paragraph.
- 12. Similarly, the suggestion that the Government Parties should swear affidavits that they have not had access to documents derived from the data breach, similarly implies involvement in criminal wrongdoing since it implies that they may have incurred in

knowing receipt of stolen property, as well as other inappropriate conduct. Nevertheless, and similarly, the Chief Minister adopts the same position as in para 11 above.

The suggestion that UK Solicitors should be appointed

13. HMGOG, respectfully agrees with the position adopted by the Commissioner in his letter dated 3 February 2023 to Core Participants, namely, that he is “firmly of the view that in a public inquiry involving matters of public and political significance to Gibraltar citizens, it is preferable (and indeed may be required from a regulatory perspective) to instruct a local firm.”
14. The Government Parties do not consider it necessary to express a view about the Commissioner’s choice of new STI, namely Charles Simpson of Triays, supported by two lawyers from that firm. This raises no issue for the Government Parties.
15. As stated above, HMGOG considers the suggestion that UK solicitors should be appointed to be an insufferable and unjustified slur on and undermining of the legal profession in Gibraltar, and by that means of our legal system and of this jurisdiction. Furthermore, it is the view of HMGoG that in light of the provisions of the Legal Services Act, UK lawyers cannot lawfully provide the services of Solicitors to the Inquiry. I am instructed that, for both these reasons HMGoG would feel unable to approve the provision of funding to the Inquiry under section 13 of the Commissions of Inquiry Act in respect of expenditure on the engagement of UK solicitors as STI.

Interim Governor – nomenclature

16. The Government Parties note that, despite the distinction and its legal significance having been pointed out previously during earlier Preliminary Hearings, Mr McGrail and his legal team persist in referring to Mr Pyle as “the Acting Governor”. This is incorrect and is not simply a matter of semantics.
17. The powers and status of Acting Governor and Interim Governor are very different under the Constitution, and Mr McGrail himself has sought to put in issue the extent of Mr Pyle’s powers at the time that he made the decision in a way that puts at the heart of that aspect of the Inquiry, the distinction between the legal powers of the Acting Governor

and the Interim Governor.

18. Mr Pyle and other Government Parties are concerned that the purpose of Mr McGrail's apparent insistence on referring to Mr Pyle as "the Acting Governor" may be to transmit the view to public opinion that Mr Pyle lacked the necessary powers and authority by virtue of being only the Acting Governor. In fact, contrary to the position of the Acting Governor, the Interim Governor (which is what Mr Pyle was) is the substantive Governor with all the powers of that office, and without any requirement to seek any substantive Governor's consent to the exercise of gubernatorial powers and functions.
19. The Government Parties accordingly request that the Inquiry itself refers to Mr Pyle, and invites Mr McGrail and his legal team to do the same, as "(then) Interim Governor".

Draft new timetable

20. The Government Parties will make oral submissions at the hearing in respect of CTI's draft timetable.
21. The Government Parties have no particular view, and therefore are not opposed, to an additional Preliminary Hearing, tentatively in March 2023, as proposed by Mr McGrail, if the Inquiry considers it helpful and appropriate.

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7th February 2023