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

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**SUBMISSIONS ON BEHALF OF IAN MCGRAIL**

**In advance of Third Preliminary Hearing, 8th February 2023, The Garrison Library**

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**2nd February 2023**

## A. INTRODUCTION

1. These submissions are made on behalf of Mr Ian McGrail, the former Commissioner of the Royal Gibraltar Police ("**RGP**"), in advance of the Third Preliminary Hearing in the Inquiry into the Retirement of the Former Commissioner of Police ("**the Inquiry**"), listed for 8th February 2023.

2. The Inquiry has suffered a number of setbacks in the past number of months, particularly the data breach, the knock-on impact of this upon the Inquiry's substantive work, and, this week, the dismissal , and proposed replacement, of the Solicitor to the Inquiry ('**STI'**). At time of drafting, on Thursday 2nd February 2023 – with only three working days before the scheduled hearing – it is regrettably the case that (a) there is no known Solicitor to the Inquiry in place; (b) there is no substantive update regarding the data breach investigation, nor any clear timeline as to when participants in the Inquiry will receive such an update; and (c) the deadlines and timetable set at the second Preliminary Hearing are no longer relevant, the set dates having long passed without the anticipated progress having been made.

3. We are extremely concerned by what has occurred in recent months and, regrettably, consider there to be shortcomings in the Inquiry's approach and, in particular, the Inquiry's timings. As we summarise below, we are particularly concerned at the Inquiry's delay in grappling with serious issues concerning the STI. We are also extremely concerned that the difficulties which have arisen since the data leak became known were predictable, and, indeed, predicted by Mr McGrail's legal team from the outset of these proceedings. We submit that it is now imperative that the Inquiry takes robust and decisive action.

4. In these submissions, we make a number of constructive proposals which will enable the Inquiry to get back on track. We wish to emphasise that our criticisms and proposals are made in the spirit of cooperation and, fundamentally, our determination that this Inquiry succeeds in its important task. In this regard, and to emphasise the importance of the Inquiry's work, we reiterate some of the points we made in our submissions for the First Preliminary Hearing.

5. We address below:

   a. The importance of the Inquiry;

   b. Composition of the Inquiry team (additional agenda item);

   c. Issues arising from the data breach and provision of IT services by HMGOG (Agenda items 2 and 4);

   d. The Draft Inquiry Timetable (Agenda item 3(d), including the Inquiry's approach to preliminary hearings;

   e. Conclusion.

## B. THE IMPORTANCE OF THE INQUIRY

4. The Council of Europe ("**CoE**") considers *"the fight against corruption"* to be a priority area.[1] They state: *"Ever since antiquity, corruption has been one of the most widespread and insidious of social evils. When it involves public officials and elected representatives, it is inimical to the administration of public affairs."*

5. In 1999 the Group of States against Corruption ("**GRECO**") was established by the CoE to monitor States' compliance with the organisation's anti-corruption standards. GRECO monitors the United Kingdom, including Gibraltar, for compliance with CoE standards. These standards include the CoE's *Criminal Law Convention on Corruption* ("**the CoE Corruption Convention**") of 27th January 1999 and the Recommendation on Codes of Conduct for Public Officials, Rec. No. R (2000) 10.

6. The CoE Corruption Convention states in its preamble that, "*corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society"*.[2]

7. The need for effective protection of whistleblowers and whistleblowing-type activity is also recognised in international and regional instruments, including in particular the CoE's *Committee of Ministers' Recommendation on the protection of whistleblowers,* Recommendation CM/Rec (2014) 7, adopted on 30th April 2014. The definition of *"whisteblower"* is set out at page 6 of the Recommendation: it *"means any person who*

[1] See further https://www.coe.int/en/web/greco/about-greco/priority-for-the-coe.
[2] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5.

*reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector".* It relevantly states in the preamble that "*freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy"* and it refers to *"recognising that individuals who report or disclose information on threats or harm to the public interest (whistleblowers) can contribute to strengthening transparency and democratic accountability".*

8. Paragraph 21 of the Recommendation states: "*Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment."* Protection from retaliation is clearly a matter of fundamental importance in the present Inquiry, particularly when, we submit, the victim was the principal law enforcement officer of the Crown in Gibraltar.

9. The preamble to the Council of Europe *Code of Police Ethics*[3] states that "*the criminal justice system plays a key role in safeguarding the rule of law and that the police have an essential role within that system".* Paragraph 15 provides: "*The police shall enjoy sufficient operational independence from other state bodies in carrying out its given police tasks, for which it should be fully accountable".* Paragraph 34 states "*Public authorities shall support police personnel who are subject to ill-founded accusations concerning their duties".*

10. The European Court of Human Rights ("**ECtHR**"), the judgments of which apply to Gibraltar, has repeatedly emphasised that corruption threatens the rule of law, and the importance of whistleblower protection, citing the standards referred to above. There have been a number of cases where sanctions imposed on whistleblowers have been found to breach Article 10 ECHR – in cases involving the dismissal of public servants this has sometimes been articulated as an attack on reputation protected by Article 8 ECHR.

[3] Adopted 19th September 2001: https://rm.coe.int/16805e297e.

11. In *Guja v. Moldova (No. 1)* [2011] 53 EHRR 16, for example, the Grand Chamber held unanimously that there had been a violation of Article 10 (freedom of expression). The applicant was Head of the Press Department of the Moldovan Prosecutor General's Office. The case concerned his dismissal for giving a newspaper two letters received by the Prosecutor General's Office which disclosed interference by a high-ranking politician in pending criminal proceedings. The Court balanced the conflicting factors under Article 10 and concluded there had been a breach: *"[72] ... The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large."*

12. [redacted]

13. [redacted]

14. We briefly reiterate these issues in order to re-emphasise the importance of this Inquiry to the rule of law in Gibraltar, and to ensure that the submissions we make below are seen in their proper context – an attempt to assist the Inquiry, which retains our full support and confidence, in its important task.

## C. COMPOSITION OF THE INQUIRY TEAM

15. We have raised the issue of the composition of the Inquiry team a number of times. Our concerns remain, and indeed have been compounded by the serious data breach and increasing complexity of the Inquiry, in terms of the issues being considered, the number and range of the core participants and the overall challenging environment caused by the contentious subject matter and the nature of Gibraltar as a jurisdiction.

16. We have expressed reservations from the outset regarding the expertise of the Inquiry team, and particularly that none of team appears to have had any experience of acting in, let alone running, public inquiries. We do not raise this matter lightly but we are extremely troubled by what has unfolded.

17. We raised concerns at an early stage as it appeared to us that Counsel to the Inquiry ("**CTI**") had been selected by and appointed by the Government, which raised immediate concerns regarding independence and the appearance of independence. We also raised a specific conflict of interest issue which, whilst ultimately resolved, was not in our submission treated with the expected level of sensitivity or urgency given the subject matter of the Inquiry, which we consider was a reflection of lack of experience and may have contributed to the major issue which ultimately arose in relation to Attias & Levy.

18. But more fundamentally, at an early stage we raised serious concerns regarding rudimentary matters, including that disclosure was being requested prior to there being basic policies in place, such as a document management policy and a process for addressing redactions and anonymity. We were surprised that such policies were not in place at an early stage, and indeed that they appeared to be novel suggestions when we raised them with STI and CTI. We then provided assistance and pointers to STI and CTI in this regard, including directing them to examples of such policies in other Inquiries.

19. It was clear to us that this was going to be a very steep learning curve for both the solicitors and counsel team given the lack of prior experience or expertise in conducting public inquiries. If they then had in place systems or practices which [redacted] reinforces the concerns we have had from the outset. Regrettably, whilst what has occurred may be a surprise and a shock to the Inquiry team, it comes against the backdrop of us raising security and document management issues from the very outset.

20. More recently, we raised a serious conflict of issue involving Attias & Levy on 19th December 2022. We received no update on the matter until almost six weeks later, a delay which we do not consider reasonable given the circumstances. During that period of delay, Attias & Levy continued to take certain steps as STI, including sending correspondence, directing Mr McGrail and his legal team on certain matters, and reviewing Mr McGrail's legal team's fee notes. It was and remains our view that Attias & Levy could not continue because of the conflict of interest, and the fact that it was not declared until it came to public light in December. We are not aware of any material change of circumstances between us notifying the Inquiry of our concern on 19th December and the reaction to that letter almost six weeks later. However, we are concerned that the Inquiry has not, as at the date of these submissions, appointed a replacement solicitor, and has rejected our request to be informed of potential candidates in advance, in case there are concerns which we or other core participants may wish to raise. Overall, this supports our impression that the Inquiry has not taken seriously enough the issues we have raised in relation to conflicts of interest, information security and the management of preliminary hearings. We remain of the view that the lack of experience on the Inquiry team is at the heart of these problems.

21. We had hoped that these issues could be dealt with swiftly whilst the new STI was being appointed, and for this reason and also to ensure that the next preliminary hearing is effective we had proposed a short adjournment to the hearing listed on the 8th February 2023. However, as the hearing is proceeding, and given the circumstances, regrettably raising these matters in these submissions is now unavoidable.

22. We recognise, of course, that the composition of the Inquiry team is a matter for the Commissioner. (This is in part why we were so concerned that the Government had

directly appointed CTI at the outset.) We respectfully request that he consider appointing solicitors and leading counsel with substantial experience of running a public inquiry. For the avoidance of doubt, we see this as being a supplement to, not replacement of, the current CTI team.

## D. ISSUES ARISING FROM THE DATA BREACH AND GOVERNMENT PROVISION OF IT SERVICES

23. The Inquiry's Document Policy states, at paragraphs 40-42 that: "[t]*he security of information that the Inquiry gathers, holds and has access to is fundamental to its integrity. It will also assist in delivering the success of the Inquiry. Therefore, information must be protected and kept secure."*

24. It appears that information has neither been protected or kept secure and, as is correctly identified in the Documents Policy, this potentially impacts on the integrity of the Inquiry. We are concerned, for the reasons set out below, that despite the data breach coming to light in November 2022, the Inquiry has not taken sufficient steps to investigate and provide information to Core Participants on its impact.

25. First, as at the date of these submissions no information has been forthcoming from the Inquiry about the data which is likely to have been leaked or the steps it has taken to secure the data which it retains, save that it has commissioned a report from an IT security company. Whilst we understand that investigations are ongoing, it is of concern that we have not been given a more detailed update on how the Inquiry's systems have been secured particularly given that the Inquiry has indicated it will now resume its substantive work including requesting disclosure and witness statements.

26. Second, and relatedly, we have raised a number of IT security vulnerabilities previously. We are concerned that despite the data breach these warnings are still not being heeded. For example, we raised a concern that most of the Inquiry team continue to use professional email addresses rather than setting up a dedicated Inquiry email addresses which link to a separate server. We were reassured that this was unnecessary because non-Inquiry email addresses are secure. At the Second Preliminary Hearing, Mr Santos said "*[w]e have said to the parties that we are willing to consider alternatives, but without any real information as to a threat to the integrity of our documents, we certainly*

*do not think that we should be embarking on looking into alternative IT solutions*" (Transcript page 102). The Commissioner then confirmed that the Inquiry would "*undertake to make a detailed inquiry of the position and the risks, and we will let you know precisely what we find, and if there are concerns we will let you know and we will address them "* (*ibid* page 103). We have not been informed of the result of any such inquiry or whether risks were identified. We are concerned that despite the clear and obvious threat to the integrity of the Inquiry documents which has emerged (and, resultantly, the integrity of the Inquiry) no changes appear to have been made to the Inquiry data systems. The fact that a data breach [redacted] demonstrates why these basic security measures are urgently necessary.

27. Similarly, we objected to HM Government of Gibraltar ('**HMGOG'**), a Core Participant in the Inquiry, providing Information Technology services to the Inquiry, which includes an employee of HMGOG having access to Inquiry systems. This is listed for discussion at Item 4 in the agenda. The Inquiry has answered our concern by proposing that the individual in question signs an undertaking that they will not share any information or documents. This does not provide sufficient reassurance. Given the serious security breach which has now occurred, the Inquiry should not be taking any such obvious risks and, particularly, no core participant should have access to internal Inquiry systems, regardless of undertakings. We do not consider it would be overly complex or costly to set up an Inquiry server which is not based in Gibraltar, or if based in Gibraltar one which does not involve maintenance by an employee of a core participant.

*28.* Third, we are concerned that the Inquiry has not complied with its duties under Article 33-34 the Gibraltar General Data Protection Regulation. Article 34 requires that following a personal data breach a data controller must *inter alia "describe in clear and plain language the nature of the personal data breach and contain at least the information and measures referred to in points (b), (c) and (d) of Article 33(3)."* Article 33(3) include that the data controller must: "*describe the likely consequences of the personal data breach"* (c) and "*describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects"* (d).

29. We have received a number of communications from the Inquiry, through Attias & Levy, in relation to the data breach (in particular, emails on 16th November, 5th December and 19th December 2022). At no point have we been provided with information on the "*likely consequences of the personal data breach*" i.e. any information as to what data has been leaked and relating to whom. Whilst we understand that investigations are ongoing, we are concerned that the Inquiry is now proceeding apace in obtaining disclosure and witness statements without any information having been provided to the Core Participants as to how its integrity will be maintained when there is a strong likelihood that private documents have been leaked 'into the wild'.

30. In this connection, we are concerned the Inquiry has indicated that submissions on its findings on the data breach may be in writing only (Inquiry's 31st January 2023 letter, page 2, penultimate paragraph). This indicates that the Inquiry has not fully grasped the seriousness of the breach and also risks conflicting with the Commissioner's ruling of 25th August 2022 that the Inquiry is subject to the principles of open justice, which we submit must include that the Inquiry will act openly and transparently, including when an issue relates to its own processes.

31. We note the Inquiry's statement that "*[t]here is no reason to doubt the integrity and security of the Inquiry's systems moving forward"*, however our concern is that at present the Inquiry has provided no information at all on the data which was leaked in or around November 2022. Mr McGrail has disclosed highly sensitive documents and information through his affidavits to the Inquiry, on the basis of clear and unambiguous assurances from the Inquiry in the Documents Policy. We appreciate that Attias & Levy are no longer acting for the Inquiry, however this alone does not provide any reassurances about impact of the data breach. For example, if documents were leaked we do not know who has received them. It is possible that Core Participants or potential witnesses to the Inquiry have access to those documents. As far as we are aware, the Inquiry has not asked that Core Participants confirm by affidavit whether this is the case. This seems an obvious and prudent step which should have been taken immediately when the Inquiry learned of the data breach, and which would reflect the practice of other public inquiries which have suffered similar breaches (for example, IICSA). The technical report which has been commissioned will no doubt assist in understanding more about what data has been

leaked, but there are other measures which could have been taken, but have not, to secure the integrity and security of the Inquiry's systems and also reassure Core Participants of the same.

32. In summary, we submit that the following measures should be taken in addition to those proposed by the Inquiry:

(i) A further preliminary hearing is listed within eight weeks to consider, *inter alia,* the implications of the data breach;

(ii) The Inquiry seeks assurances by affidavit that none of the Core Participants has had access to leaked documents or has had any involvement in the data breach including any relevant knowledge prior to the Inquiry communicating about it to the Core Participants;

(iii) The Inquiry communicates to the Core Participants the outcome of the security review which was promised by the Commissioner at the June hearing;

(iv) If no security review has been completed as yet, one should be undertaken urgently and the results communicated to the Core Participants;

(v) The Inquiry should take immediate steps to ensure the security of its data storage systems, and in particular ensure that all Inquiry emails are stored in a dedicated server, and no Core Participant including HMGOG has access to Inquiry servers;

(vi) The Inquiry should provide an update to individual Core Participants on the likely consequences of the data breach to them.

## E. THE DRAFT TIMETABLE

33. We are grateful to the Inquiry for providing a draft timetable in Ms. Williams letter of 31st January 2023 ('the Draft Timetable'). However, we do not agree with a number of the proposals made, and we propose an alternative timetable below.

34. First, the Draft Timetable does not provide sufficient time for the Core Participants to provide responsive witness statements following disclosure. The timetable only provides three weeks between final disclosure of redacted documents on 16th June 2023 and 7th July 2023 when responsive witness statements are due. This leaves insufficient time to review what is likely to be extensive further disclosure from a range of Core Participants – a number of whom have provided no disclosure to date, or at least none has been

provided the other CPs, for example the Royal Gibraltar Police. It is important background that the Inquiry has included a number of issues in the Provisional List of Issues which were not anticipated to be relevant when initial disclosure and affidavits were provided, particularly Issue 1 (the Aircraft Incident), Issue 2 (the Assault Investigation), and Issue 6 (the Federation Complaints). Each issue is likely to involve extensive disclosure and require additional affidavits, much of which may be subject to redaction requests. It is unrealistic to expect Mr McGrail and his legal team to review this disclosure and draft a responsive witness statement in just three weeks.

35. Second, the "longstop" date of 10th March 2023 for provision of witness statements and disclosure could reasonably be brought forward. Those statements and disclosure were requested around six months ago (i.e. around the time of the Second Preliminary Hearing on 15th September 2022). The Inquiry has sent correspondence on 24th January 2023 putting Mr McGrail's representatives on notice that they should be prepared to submit outstanding disclosure *"within 48 hours of a renewed request by the Inquiry"* of the Inquiry's request. It is unclear why Core Participants should be given a further month following the preliminary hearing to provide disclosure and statements. The Inquiry has powers of compulsion should individuals unreasonably refuse to provide disclosure – given the time which has elapsed since the relevant events, we submit that a shorter timetable should be set and if it not complied with, the Inquiry use its powers of compulsion to ensure that disclosure is provided in a timely manner.

36. Third, the Fourth Preliminary Hearing (26th-27th July 2023) is likely to be too close to the final hearing date to be of practical use, particularly given that many lawyers are likely to be taking annual leave during August. We submit an additional preliminary hearing should be listed – at least on a provisional basis – in March as in the proposed timetable below, and a Fifth Preliminary be held in June rather than July. This is so that Core Participants can raise any issues relating to disclosure, evidence etc. sufficiently advance of the final hearing, and also in order to review the position and make submissions in relation to the data breach.

37. Fourth, it is unclear why skeleton arguments are required for the Main Inquiry Hearing. The requirement should be for written opening statements by the Core Participants (see Core Participants Policy, paragraph 3).

38. Fifth, we reiterate our previous request that the Inquiry follow the usual practice in many recent public inquiries in the UK in respect of preliminary hearings, namely for CTI to circulate proposals to Core Participants in writing in advance, and Core Participants then respond to CTI in writing in advance. We set this out in our submissions in advance of the First Preliminary Hearing, at paragraph 44, suggesting that this course of action would be sensible and efficient. We have since reiterated this, including this week, with an impending deadline for filing submissions yet being entirely in the dark regarding basic issues. Whilst that request was then followed by the letter from CTI on Tuesday of this week, this of course came after the deadline of last week for providing new agenda items, and was, we suggest, 'too little and too late'. It remains the case that we are likely to learn key issues only at the hearing itself, without adequate time to consider them or take instructions. We ask that the Commissioner direct that CTI provide proposals in writing in advance of future , in good time, allowing the issues to be crystallised and narrowed, and, importantly, advice given and instructions taken prior to an oral hearing.

39. We appreciate that the Inquiry has been dealing with urgent and serious issues in recent weeks relating to the data breach and replacement of the Inquiry Solicitor. However, we are concerned that no opportunity has been given for the Core Participants to comment on substantive submissions by CTI prior to the Third Preliminary Hearing. This is particularly of concern, because the only other oral hearing currently listed prior to the Final Hearing is in five months' time, and very shortly before the hearing. For this reason, and as expanded upon below, we request that the Inquiry list a further preliminary hearing in March, and also request that the Core Participants are given an opportunity to consider and respond to substantive representations by CTI well in advance of that hearing.

40. In light of the above factors, we propose the following amended timetable:

**By 4pm 22nd February 2023**: Longstop date for provision of witness statements and disclosure (that has already been requested) to the Inquiry.

**By 4pm on 9th March 2023:** Counsel to Inquiry to provide written submissions to Core Participants in advance of the Fourth Preliminary Hearing

**By 4pm on 16st March 2023:** Submissions by Core Participants to be filed for Fourth Preliminary Hearing

**23rd/ 24th March 2023**: Fourth Preliminary Hearing (we suggest one day would suffice for this)

**By 4pm on 13th April 2023**: Inquiry to notify providers of documents which documents the Inquiry intends to disclose to the Core Participants – para 22, Documents Policy.

**By 4pm on 27th April 2023**: Providers of documents to indicate which part or parts (if any) of the documents it seeks to have redacted – para 22, Documents Policy.

**By 4pm on 4th May 2023**:

(1) Core Participants to provide any objections to proposed redactions – para 23, Documents Policy.
(2) Inquiry to disclose all relevant witness statements and disclosure (except those the subject of redaction requests) to Core Participants.
(3) Inquiry to make any requests for further disclosure to providers of documents.

**By 4pm on 18th May**: Inquiry to disclose any documents subject to redaction requests to Core Participants.

**By 4pm on 22nd June 2023:**

(1) Core Participants (or any other witness invited to make a responsive statement) to provide responsive witness statements to the Inquiry.
(2) Counsel to Inquiry to provide written submissions to Core Participants in advance of the Fifth Preliminary Hearing

**By 4pm on 29th June 2023**: Core Participants to file any skeleton arguments (if so advised) for Fifth Preliminary Hearing.

**11th-12th July 2023:** Fifth Preliminary Hearing

**15th September 2023**: Core Participants to file Written Opening Statements for Main Inquiry Hearing.

**21st – 22nd September 2023**: Designated (remote) reading days.

**25th September – 20th October 2023**: Main Inquiry Hearing.

## F. CONCLUSION

41. We hope that these submissions are of assistance. We remain fully committed to the success of the Inquiry and to assisting with its important work.

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2nd February 2023