

**In the Matter of the Commissions of Inquiry Act 1888 & 2005  
and**

**In the Matter of an Inquiry into the retirement of the former Commissioner of Police convened by a Commission issued by  
HM Government of Gibraltar on the 4th February 2022 in Legal Notice No 34 of 2022 (“the Inquiry”)**

Gibraltar Garrison Library  
2 Library Ramp  
Gibraltar

Wednesday 19 July 2023

Before

**SIR CHARLES PETER LAWFORD OPENSHAW, DL  
Commissioner of the Inquiry**

**Maurice Turnock: Secretary to the Inquiry**

**Julian Santos: Counsel to the Inquiry, 5RB Chambers  
Hope Williams: Junior Counsel to the Inquiry, 5RB Chambers  
Charles Simpson: Solicitor to the Inquiry, Triay Lawyers, Gibraltar  
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**Lawyers representing The Hon. Fabian Picardo KC MP, Chief Minister,  
Nicholas Pyle OBE, Deputy Governor of Gibraltar, and  
Michael Llamas CMG KC, Attorney General for Gibraltar:**

**Sir Peter Caruana KC, Peter Caruana & Co, Gibraltar  
Chris Allan, Peter Caruana & Co, Gibraltar  
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**Lawyers representing John Perez, Thomas Cornelio, and Caine Sanchez:**

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Ellis Sareen, Foundry Court Chambers  
Callum Smith, Phillips, Gibraltar**

**Lawyers representing Paul Richardson, Former Superintendent of Gibraltar Police:**

**Paul Grant, Signature Litigation LLP**

#### **PROCEEDINGS- DAY 4**

Transcript of Epiq Europe Limited  
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(Official Shorthand Writers to the Court)

<p>1 2 (Wednesday, 19 July 2023) 3 (10.13 a.m.) 4 THE COMMISSIONER: Good morning, 5 everyone. I am very sorry for getting you 6 here early and then having a late start but 7 things have developed. As you know, this is 8 the fourth preliminary hearing of the inquiry. 9 On behalf of everyone, I am very grateful to 10 the curator and staff for making the Garrison 11 Library available to us, even in this heat. If 12 anybody wants to take their jackets off, I am 13 very willing for them to do so. Let me start 14 with referring to items 8 and 9 on the agenda. 15 Item 8 deals with the admissibility of the 19 16 witness statements and item 9 addresses 17 further information and documents to be 18 obtained regarding those 19 witness 19 statements. I have already decided that those 20 items on the agenda should have been 21 discussed in private but I can say now that in 22 my opinion, they should not, and cannot, be 23 heard today in any event. Soe explanation 24 has been given to the parties, but I cannot say 25 any more than that and I cannot now sensibly</p> <p style="text-align: center;">Page 1</p>	<p>1 drew attention to some concerns or 2 drawbacks, as I then saw them, including the 3 potential costs to the taxpayer, but as a result 4 of constructive representations that I have 5 received, particularly from the GBC, I am 6 persuaded that those concerns can be met by 7 a detailed protocol. I propose, therefore, to 8 allow live broadcasting, subject to conditions 9 to be set out in the protocol, which I will 10 circulate for comments and then issue as a 11 document on which we can proceed. So now 12 I will hand over to Mr Santos, counsel to the 13 inquiry, who will go through the rest of the 14 agenda. Yes, Mr Santos. 15 MR SANTOS: Good morning, sir, and first 16 of all can I also, on behalf of the inquiry 17 team, thank the Garrison Library for 18 facilitating the early arrival today and 19 especially for organising air conditioning for 20 today. Thank you to everybody for arriving 21 early. I am sorry that we have not kicked off 22 on time but that was a matter which arose 23 recently, which caused that. I am optimistic, 24 obviously now, that we should be able to get 25 through all items on the agenda today and</p> <p style="text-align: center;">Page 3</p>
<p>1 or properly give any reasons for that but 2 there is no reason not to proceed with the rest 3 of the open agenda, on the basis that the 4 inquiry will proceed in September but, as I 5 make clear, the timetable and its detailed 6 provisions will always be subject to revision 7 in the light of any developments and any 8 material change of circumstances. I will not 9 make any alteration to the timetable without 10 giving the parties the opportunity of making 11 representations. It is perhaps convenient to 12 start with item 6 on the agenda, which is 13 broadcasting and the proposal by the 14 Gibraltar Broadcasting Corporation to 15 broadcast the inquiry proceedings about 16 which the parties have made representations 17 and which I can, I think, deal with at the 18 start. I recognise, as many have submitted 19 including the GBC, that there is a high public 20 interest in the inquiry, that the principles of 21 open justice strongly favour the broadcasting 22 of inquiry hearings. If members of the public 23 can see and hear what is being done and said, 24 then public confidence in the inquiry and its 25 findings is increased. In an earlier ruling, I</p> <p style="text-align: center;">Page 2</p>	<p>1 possibly even this morning. Speaking of the 2 agenda, the items that we will be dealing 3 with today are as follows. We have just dealt 4 with 1 and 6, but number 2 is a short update 5 on the data breach relating to the inquiry 6 documents in October/November of 2022. 7 Third, I will give an update on progress 8 towards the main inquiry hearing in 9 September of this year. Fourth, we will have 10 submissions on procedure at the main inquiry 11 hearing, including responsibility for 12 examination of witnesses and the witness list. 13 Fifth is finalisation of the inquiry list of 14 issues and consideration of agreed facts. 15 Sixth was the GBC proposal, which you have 16 already dealt with, sir. The only thing that I 17 would add on 6, and I may as well do it now, 18 is to thank Mr Niche of GBC for his very 19 helpful submissions on this point and for 20 providing us with a copy of the Manchester 21 Arena Inquiry live streaming notes, which we 22 believe will be a useful starting point in 23 preparing a protocol for this inquiry. It will 24 need to go further, in some respects, 25 including for example procedures for</p> <p style="text-align: center;">Page 4</p>

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<p>1 applications in advance that matters not be 2 broadcasted where circumstances call for 3 that. We hope to circulate a draft protocol in 4 the next 14 days and will afford core 5 participants and GBC the opportunity to 6 provide input before it is finalised. Seventh, 7 we have restriction orders, although there 8 may not be a huge amount to say on that, 9 given recent submissions by the parties and 10 particularly the government parties, and then 11 there -- as you have said already, sir, items 8 12 and 9 will not be dealt with today. So 13 moving on immediately to item 2 on the 14 agenda, which is an update on the data 15 breach. That was a breach relating to 16 documents held by the then solicitors to the 17 inquiry, Attias &amp; Levy. This update is 18 largely based on an investigation which has 19 been conducted by Senior Investigating 20 Officer John McVey. Then inquiry is very 21 grateful to him and his team for the work 22 they have carried out on this important issue. 23 The criminal investigation remains live, with 24 some suspects believed to be currently out of 25 the jurisdiction. The initial concern that</p> <p style="text-align: center;">Page 5</p>	<p>1 the established mutual aid arrangements 2 managed by the UK National Police 3 Coordination Centre. The Police Service of 4 Northern Ireland agreed to support the 5 investigation through these mutual aid 6 arrangements. As part of the incident 7 response, Attias &amp; Levy and the inquiry 8 commissioned Hedgehog, a private cyber 9 security company based in Gibraltar, to 10 examine Attias &amp; Levy's systems. It is 11 common established practice for law 12 enforcement to work collaboratively with 13 private incident response teams such as 14 Hedgehog. An image copy of the computers 15 seized with consent from Attias &amp; Levy was 16 supplied to Hedgehog by PSNI officers to 17 assist their work. In February 2023 an 18 investigative decision was taken for digital 19 forensic officers from the PSNI Cyber Crime 20 Centre to attend Gibraltar and examine the 21 computer systems within Attias &amp; Levy. 22 They received full cooperation from 23 Hedgehog and also were granted full, 24 unfettered access to the servers and computer 25 towers in Attias &amp; Levy. Mr McVey reports</p> <p style="text-align: center;">Page 7</p>
<p>1 there had been a suspected data breach was 2 raised by Mr McGrail and his local lawyer, 3 Mr Charles Gomez, with the inquiry. In 4 essence, it was suspected that individuals had 5 accessed, and were in position of, 600 6 screenshots of inquiry documents. The 7 specifics of Mr McGrail's and Mr Gomez's 8 observations and concerns were outlined to 9 the inquiry, which the inquiry then shared 10 with the police. A report of a data breach 11 was made to the RGP by the inquiry on 15th 12 November 2022 and a criminal investigation 13 commenced. Three suspects were identified 14 at the outset and an arrest and search 15 operation was conducted at 6:30 in the 16 morning on 16th November 2022. A range 17 of digital devices were seized during the 18 searches. In addition, the computer tower 19 used by a suspect within the offices of Attias 20 &amp; Levy was seized by the RGP with the 21 consent of the firm. Two suspects were 22 interviewed and released on police bail. 23 Owing to the fact that the RGP themselves 24 were core participants to the inquiry they 25 requested assistance from UK policing via</p> <p style="text-align: center;">Page 6</p>	<p>1 that the consensual access and support from 2 Attias &amp; Levy was exceptional and all 3 requests for information were granted. A 4 forensic report has been produced by the 5 PSNI Cyber Centre in relation to the 6 examination of Attias &amp; Levy's systems. As 7 there are still suspects believed to be outside 8 the jurisdiction, it is not appropriate to share 9 that forensic report with participants or the 10 public but Senior Investigation Officer 11 McVey has kindly permitted the inquiry to 12 indicate the apparent scale and nature of the 13 breach, such as it can be forensically proven 14 to date. The investigation has thus far 15 established that two unauthorised third 16 parties were in possession of inquiry 17 documents as a result of the activities of a 18 suspect working within Attias &amp; Levy, who 19 was not part of the staff working on public 20 inquiry matters. In terms of documents 21 recovered, two photographs were recovered 22 from a suspects phone, which were of two 23 inquiry documents, one of which was a 24 request for evidence from a witness and 25 another which was an administrative email</p> <p style="text-align: center;">Page 8</p>

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<p>1 between the inquiry team. They are 2 photographs of printed documents and not 3 photographs of a computer screen. The third 4 document is a letter addressed to a core 5 participant, relating to disclosure matters, 6 which was also recovered, and finally there 7 was an email chain containing the general 8 call for evidence which has also been 9 recovered. The forensic examiner has 10 stressed that when a breach of this nature 11 occurs by an employee within a firm, known 12 as insider threat, it is very difficult to prevent 13 the occurrence, or subsequently ascertain 14 with certainty the full extent of the activity. 15 The forensic examiner in the report states as 16 follows: "Throughout my investigation of 17 these devices, I have not located any 18 evidence to show significant data exfiltration, 19 although an event such as copying a large 20 quantity of documents can occur without 21 leaving a trace. Only four public inquiry 22 documents of concern are known for certain 23 to have been breached by the suspect within 24 Attias &amp; Levy. This should, at this point, be 25 reasonably concluded to be the extent of the</p> <p style="text-align: center;">Page 9</p>	<p>1 gratitude to the team of solicitors at Triay, 2 led by solicitor to the inquiry, Charles 3 Simpson, who came on board in February in 4 quite difficult circumstances and have since 5 been instrumental in ensuring the ongoing 6 progress of the inquiry. The inquiry has no 7 received sworn statements, in some cases 8 more than one statement, from 69 9 individuals. We have then reviewed those 10 statements for relevance to the issues being 11 investigated. Of the 69, the inquiry deemed 12 43 of the statements received to be relevant 13 to the matters in the provisional list of issues. 14 Since drafting written submissions last week, 15 the statements of Nicholas Pyle and Darren 16 Grech have been circulated to the core 17 participants and, therefore, all 43 relevant 18 statements have now been disclosed to core 19 participants. There is one further statement 20 submitted to the inquiry by a non-core 21 participant, which the inquiry is still 22 considering including as to relevance. That 23 person is not one of the 43 listed in our 24 written submissions but due to the complex 25 questions that it raises, I don't propose to say</p> <p style="text-align: center;">Page 11</p>
<p>1 data breach as far as it can be forensically 2 proven. No evidence has been obtained to 3 support the suggestion that 600 documents 4 have been obtained or breached. It is, 5 however, impossible to forensically prove 6 that a breach of this scale did not occur for 7 the reasons I have already given. After 8 investigation of the data breach, the Senior 9 Investigating Officer currently sees no barrier 10 to the public inquiry progressing." That is 11 what I propose to say on the data breach. If 12 anyone wishes to say anything further, I will 13 pause to permit them to do so and if not, I 14 will move on to item 3. 15 THE COMMISSIONER: Yes, does anyone 16 want to say anything about that? Well, it 17 looks as if that matter has been thoroughly 18 investigated. Yes, okay. 19 MR SANTOS: Number 3 is an update on 20 progress towards the main inquiry hearing. 21 First an update on our works into PH3, which 22 took place in February of this year. Since 23 February the inquiry team has made 24 significance progress on evidence gathering 25 and disclosure. I must repeat my sincere</p> <p style="text-align: center;">Page 10</p>	<p>1 more about that statement at this juncture. 2 Obviously, we will keep core participants 3 updated. We have also reviewed the 4 statements for personal data, made redactions 5 to protect that data. In addition, we have 6 considered redaction requests by providers of 7 documents or PODs to use the shorthand. 8 We have also had to consider, on a statement 9 by statement basis, whether they should be 10 disclosed to the single issue core participants, 11 namely the GPF, Mr Cornelio, or Mr Perez 12 and Mr Sanchez. Recently we have started to 13 receive responsive witness from core 14 participants, although a number remain 15 outstanding. We have granted reasonable 16 extensions where sought and are grateful to 17 the core participants for engaging in that 18 process. Needless to say, those will go 19 through the same procedure in terms of 20 relevance and redaction reviews. As well as 21 witness statements, we received a large 22 quantity of additional documents provided by 23 core participants and other witnesses. Again, 24 those have all had to be reviewed for 25 relevance and redactions and have been</p> <p style="text-align: center;">Page 12</p>

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<p>1 disclosed to the core participants where 2 appropriate. The only disclosure which 3 remains outstanding beyond that relates to 4 the RGP. As per the RGP disclosure process, 5 we have set out a full timeline in paragraph 6 10 of our witness submissions, so I will only 7 provide a quick summary. On 23rd February 8 2023 the inquiry received a witness statement 9 from an RGP officer, raising concerns 10 relating to the RGP disclosure process which 11 was being conducted in an office in 12 Secretary's Lane. We quickly referred the 13 matter to the RGP and an independent 14 investigation was launched by Senior 15 Investigating Officer John McVey into the 16 issue. On 17th March 2023 two further 17 witness statements were received by the 18 inquiry and, following a request by the 19 inquiry, 10 days later they too were provided 20 to the RGP. Following the investigation, on 21 15th May 2023 the inquiry received a copy 22 of a report by Officer McVey into the issue. 23 We received an updated version of that report 24 for disclosure to core participants on 29th 25 June 2023 and have passed that on. For the</p> <p style="text-align: center;">Page 13</p>	<p>1 will be disclosed to the core participants first, 2 subject to any necessary redactions, and as a 3 result of a request from the RGP and/or the 4 inquiry's own exercise with reference to the 5 redaction of personal data. It is impossible to 6 give an exact date for completion of the 7 exercise at present, until we have completed 8 the initial technology assisted review of 9 documents. The solicitors to the inquiry are 10 aiming to provide a realistic time estimate in 11 the early part of next week but they are very 12 much alive to the long stop date for further 13 responsive statements, which is 28th August, 14 and recognise that disclosure therefore needs 15 to be facilitated well in advance of that 16 deadline. Turning to the Operation Delhi 17 defendants' disclosure. When they provided 18 disclosure to the inquiry, they provided a list 19 of documents which they called Category C 20 and D documents, which they were unable to 21 provide to the inquiry as they had received 22 them solely through the criminal 23 proceedings. Mr Cooper K.C. for the 24 Operation Delhi defendants' requests at 25 paragraph 9 of his written submission that the</p> <p style="text-align: center;">Page 15</p>
<p>1 public's benefit, the conclusion of the report 2 is as follows. "I can see no integrity issues 3 with the disclosure exercise being conducted 4 by the RGP and my preliminary assessment 5 that the threshold to reasonably suspect that a 6 crime or disciplinary offence has been 7 committed has not been reached and remains 8 the case. There is no reason to doubt the 9 integrity of the RGP disclosure exercise." 10 On the basis of those conclusions, the inquiry 11 team does not consider that any further action 12 is required. We are grateful to Officer 13 McVey for his investigation into the matter. 14 In any event, as matters have transpired, the 15 inquiry is now undertaking its own relevance 16 review of RGP documents, although I should 17 make clear that this is not for reasons relating 18 to the Secretary's Lane issue. We have 19 completed our review of physical documents 20 held by the RGP at Secretary's Lane and are 21 currently organising the electronic disclosure 22 review. We will then provide disclosure to 23 the core participants as soon as practicable. 24 It is most likely that the relevant documents 25 which were the subject of physical review</p> <p style="text-align: center;">Page 14</p>	<p>1 inquiry inform them as to any of those 2 documents which the inquiry does not have 3 from other parties, so that they can make an 4 application to the Supreme Court for 5 permission to disclose them to the inquiry. 6 We are grateful for that indication and for the 7 indication that they would be willing to make 8 such an application. It has been the inquiry 9 team's intention, cone the RGP disclosure 10 review is complete, to ascertain whether any 11 of the Category C and D documents remain 12 outstanding and, if so, the inquiry will at that 13 stage decide whether to seek those 14 documents directly from the RGP or via the 15 procedure proposed by Mr Cooper K.C. 16 Another process that we have been 17 overseeing in parallel is the organisation of 18 access by retired polices, namely Mr McGrail 19 and Mr Richardson, to documents held by the 20 RGP which they required to refresh their 21 memories and produce witness statements. 22 That process was also delayed by the 23 Secretary's Lane issue but on 21st June 2023 24 the Commissioner made orders facilitating 25 the process and imposing definitive</p> <p style="text-align: center;">Page 16</p>

<p>1 deadlines. We understand that access is                  2 currently taking place and obviously                  3 additional time will be afforded, as is                  4 reasonably necessary for witnesses going                  5 through that process, to provide statements.                  6 In the light of this outstanding disclosure, the                  7 inquiry has proposed a long stop date of 28th                  8 2023, on month prior to the main inquiry                  9 hearing, for any further witness statements by                  10 core participants so as to permit a fair                  11 opportunity to review any new material and                  12 file any evidence addressing it. Obviously,                  13 that additional opportunity relates only to                  14 evidence addressing documents received                  15 since the original deadline for exchange of                  16 responsive witness statements and is not an                  17 opportunity to simply give further evidence                  18 on all issues. Now that we are nearing the                  19 end of the preparation of evidence, work can                  20 be completed on the electronic bundle. We                  21 continue to use Epiq's TMX bundle and have                  22 already uploaded all admissible statements                  23 and documents received so far to that bundle.                  24 The next step, which is commencing now, is                  25 preparation of a chronological disclosure</p> <p style="text-align: center;">Page 17</p>	<p>1 THE COMMISSIONER: Yes, does anyone                  2 want to say anything about the disclosure                  3 process or the mechanism of it?                  4 MR GRANT: I have some submissions to                  5 make on behalf of Mr Richardson in relation                  6 to the long stop dated on 28th August.                  7 THE COMMISSIONER: Yes. With the                  8 fans in the background, you do need to speak                  9 -- it is not very convenient, I know, but --                  10 MR GRANT: Thank you, sir. Sir, as the                  11 inquiry is aware, since retiring Mr                  12 Richardson has had no access to                  13 contemporaneous documents and has                  14 required to rely upon his own memory of                  15 events. His objective, of course, is to assist                  16 this inquiry to the best of his ability and he is                  17 grateful to the Commission and to counsel                  18 for the inquiry for recognising the challenges                  19 which he has faced in this regard in relation                  20 to providing evidence and for their patience                  21 and understanding in taking the relevant                  22 steps to allow him to access documents. As                  23 Mr Santos has said, his evidence will reflect                  24 the remaining part of the contemporaneous                  25 material of his which the RGP will have let</p> <p style="text-align: center;">Page 19</p>
<p>1 bundle which will place all individual                  2 documents from within the exhibits and                  3 disclosure into chronological order. The                  4 intention is to provide this to core                  5 participants well in advance of the deadline                  6 for written opening statements, so that a                  7 singular referencing system can be used.                  8 Sorry, I should correct one thing which I                  9 said, which is that the only outstanding                  10 disclosure relates to the RGP. There are two                  11 residual items -- sorry, three residual items                  12 that also remain to be disclosed and are                  13 currently going through the redaction                  14 process, a process which is almost complete,                  15 and that is the disclosure we have received                  16 from the FCDO, the exhibit to the witness                  17 statement of Nicholas Pyle, and the exhibit to                  18 the affidavit of Darren Grech, and so those I                  19 think should be very close to being disclosed.                  20 That is all I propose to say in relation to                  21 progress since the previous hearing. I will                  22 deal with procedure at the main inquiry                  23 hearing next, but if anyone wants to say                  24 anything on what I have just said, I will                  25 permit them to do so at this stage.</p> <p style="text-align: center;">Page 18</p>	<p>1 him revisit in its totality by then. Mr                  2 Richardson does expect to provide a further                  3 witness statement in good time before the                  4 28th August long stop date identified by the                  5 inquiry. There is just another point, sir, in                  6 relation to his review of the documents and                  7 the request in the order of 21st June 2023 for                  8 him to notify solicitors to the inquiry, and the                  9 RGP, if he intends to rely on or use any                  10 additional documents or footage described in                  11 that order. Sir, Mr Richardson has spent                  12 various days looking through this document                  13 and despite his best endeavours and                  14 sensitivity as to the importance of this task, it                  15 has not been possible to provide STI with a                  16 list of documents before today. In part, this                  17 is due to some delays in Mr Richardson                  18 receiving copies of documents which have so                  19 far been requested, the process of receiving                  20 copies has been slower than anticipated and,                  21 although we appreciate that some hurdles                  22 have necessarily needed to be overcome, it is                  23 hoped that progress may now be swifter                  24 going forward. My understanding from Mr                  25 Richardson is that the documents which he</p> <p style="text-align: center;">Page 20</p>

<p>1 has so far reviewed are not dated or 2 categorised and this has made the task more 3 arduous. The upshot is that the process, from 4 his perspective, has been more cumbersome 5 than envisaged and he is, at the moment, 6 unable to confidently provide a reliable list of 7 the documents he proposes to rely upon. 8 Nevertheless, he will be greatly assisted once 9 copies of those documents requested are 10 indeed provided. I can advise the inquiry, in 11 the meantime, that a very discrete list of 12 documents has been identified and we will be 13 writing to STI in short order on that. 14 THE COMMISSIONER: Is the difficulty 15 getting copies? 16 MR GRANT: Precisely, sir, yes. That is 17 exactly the issue. 18 THE COMMISSIONER: Is that an 19 administrative problem? 20 MR GRANT: We understand that it is being 21 addressed and we hope that copies will be 22 provide -- a list would be provided to STI 23 within seven days of today, sir, if that is 24 agreeable to the Commission, and for copies 25 of those documents to be provided say within</p> <p style="text-align: center;">Page 21</p>	<p>1 to rely upon this footage in its totality in the 2 proceedings. 3 THE COMMISSIONER: Sorry, the what? 4 MR GRANT: The body worn footage. 5 THE COMMISSIONER: Oh, at the time of 6 the execution of the warrant. 7 MR GRANT: Precisely, yes. 8 THE COMMISSIONER: Yes. 9 MR GRANT: And sir, to the extent that -- 10 THE COMMISSIONER: Sorry, it was not 11 actually execute. The attempt to execute the 12 warrant, the visit to execute the warrant? 13 MR GRANT: Yes, we are referring to the 14 same event and date, sir, yes. Sir, to the 15 extent that the visual quality of any of the 16 body worn footage may, in any way, be 17 impaired, Mr Richardson is nevertheless of 18 the view that audio of those electronic files 19 will, nevertheless, be of relevance and will 20 also assist the inquiry. 21 THE COMMISSIONER: Thank you. Does 22 anybody else want to make a contribution? 23 Sorry. 24 MR COOPER: I am obliged. On behalf of 25 Mr Cornelio, Mr Caine and Mr Sanchez, I</p> <p style="text-align: center;">Page 23</p>
<p>1 seven days thereafter if that is workable. 2 THE COMMISSIONER: There is someone 3 in charge of the RGP end of this process, is 4 there? 5 MR SANTOS: Yes, sorry, I do not know 6 whether Mr Cruz can assist on this, but from 7 our perspective, the timelines that are 8 proposed are acceptable. 9 MR CRUZ: Sir, it is clear that it took a little 10 time to get the orders, given the investigation 11 that was discussed, and of course that has 12 delayed everything. The access has been 13 given, as I understand, and we are now just 14 waiting for a list and as soon as the list is 15 ready, we will provide them, so I do not think 16 there are any issues at all. 17 THE COMMISSIONER: Okay, that is all I 18 wanted to know. 19 MR GRANT: So sir, I will propose a list to 20 provide that list within seven days of today. 21 THE COMMISSIONER: Excellent, thank 22 you. 23 MR GRANT: Understood. Sir, in addition, 24 Mr Richardson has reviewed the body worn 25 footage show to him by the RGP and intends</p> <p style="text-align: center;">Page 22</p>	<p>1 appear. It is simply with respect to agenda 2 item 3(e)(i). At present, the inquiry will be 3 aware that we requested items set out in the 4 annex to the affidavit served in January, 5 namely schedule, section C and D, materials 6 readily within the possession of the RGP. I 7 am grateful for the indication as to some 8 progress being made with regards to this 9 disclosure request but I simply flag that, at 10 present, it remains outstanding and there is a 11 real risk that we will be in difficulty 12 complying with the 28th August deadline for 13 the core participants to file further witness 14 statements addressing that further disclosure 15 as we had anticipated receiving it before 16 now. So it is really a question of whether a 17 clearer indication can be provided as to when 18 that material will be provided to us and it 19 may be that I can make progress by 20 discussing this -- 21 THE COMMISSIONER: Yes, informally. 22 MR COOPER: Informally. 23 THE COMMISSIONER: Yes, I agree. 24 MR COOPER: And I simply put it on record 25 that we may need to make an application in</p> <p style="text-align: center;">Page 24</p>

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<p>1 due course, subject to when that material is 2 received. 3 THE COMMISSIONER: Perhaps I might 4 just indicate that I do not at the moment 5 anticipate that much of the evidence 6 submitted is going to be admissible, because 7 I do not think that it bears directly on the 8 points at issue as identified. 9 MR COOPER: Perhaps we can come back 10 to you having had our informal discussions 11 and indicate if any formal applications need 12 to be made. 13 THE COMMISSIONER: Correct. 14 MR COOPER: I am grateful. 15 THE COMMISSIONER: Yes, sorry? 16 MR CRUZ: Sir, insofar as the RGP is 17 concerned, we received copies of witness 18 statements, other peoples' witness statements 19 in late April and May, the 60-odd statements. 20 So we have gone through them. We have 21 gone through the exhibits. We received, as 22 you may know, sir, the more recent 23 statements I think last night or the day 24 before, Mr Breck and Mr Pyle, and so we 25 have not had a chance to digest all that. But</p> <p style="text-align: center;">Page 25</p>	<p>1 would then restrict the need for the RGP to 2 give specific witness statements. 3 THE COMMISSIONER: You are very fond 4 of the word "granular". I am not quite sure 5 what it means. 6 MR CRUZ: Yes, I do like it. I suppose item 7 by item, document by document, 8 investigation by which I mean -- 9 THE COMMISSIONER: Okay. 10 MR CRUZ: If the issue is, if I can put it in 11 this context, whether certain information was 12 given by Mr McGrail to the Attorney General 13 or the Chief Minister or the Interim 14 Governor, that may or may not require some 15 degree of investigation. But the details of the 16 investigation for the last three years, the sort 17 of information that in essence was the subject 18 of the NOLI(?), we would suggest is 19 absolutely irrelevant to that. Now, if the 20 view by certain -- 21 THE COMMISSIONER: I think you are 22 pushing at an open door there, but I will 23 define that later on. 24 MR CRUZ: Indeed, sir. And all I am saying 25 is, insofar as we are talking about 28 August</p> <p style="text-align: center;">Page 27</p>
<p>1 the position with RGP, insofar as the officers 2 are concerned, all save two out of the six 3 officers that are giving evidence, have now 4 filed their second statements and they do not 5 intend to file any more. Two should be filing 6 them during the course of this week, or the 7 next seven days or so. What is important to 8 us is that the RGP will be filing its own 9 responsive statement in relation to matters 10 that it has now read about, but of course the 11 extent to which it needs to and how far it 12 goes, is somewhat dependent on your 13 comment a moment ago and on one of the 14 other agenda items. So, to the extent that it 15 obviously needs to understand what issues 16 are going to be ventilated, clearly the RGP at 17 the right time, which is only when it knows -- 18 THE COMMISSIONER: I am not going to 19 have a wide-ranging investigation of 20 Operation Delhi if that is on your mind. 21 MR CRUZ: Precisely. So, for example, that 22 is an item, there might be other items in 23 which you indicate in due course that 24 actually the matter is not going to be dealt 25 with in a granular basis. That of course</p> <p style="text-align: center;">Page 26</p>	<p>1 deadlines, insofar as the RGP is required 2 because the decision is that certain 3 information needs to be detailed (not to use 4 the word granular again) in that case the RGP 5 will file evidence that addresses that issue. If 6 it is not necessary, we do not want to. We 7 have done enough. 8 THE COMMISSIONER: I entirely -- 9 MR CRUZ: But we need to reserve our 10 position and flag it. We have already 11 indicated that two Counsel to the Inquiry and 12 solicitors have been carrying out for some 13 weeks -- 14 THE COMMISSIONER: I have the point 15 very much in mind. 16 MR CRUZ: Thank you, sir. 17 THE COMMISSIONER: Yes? 18 MR SANTOS: Just very quickly in response 19 to those three contributions, taking Mr Cruz 20 first of all, I think that I will have things to 21 say in relation to issues and in relation to 22 other items on the agenda which may inform 23 what he has just said. But we are very alive 24 to the points that he is making. In terms of 25 Mr Grant, those timelines do sound</p> <p style="text-align: center;">Page 28</p>

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<p>1 acceptable. I would ask Mr Grant and Mr 2 Cruz to please keep the Inquiry informed as 3 to progress, because we cannot have open 4 ended delay. We need to be informed and if 5 we are required to step in, as we have done in 6 the past, we are only happy to do so. 7 In terms of Mr Cooper, yes, happy to discuss 8 informally, but also just to repeat what I said, 9 hopefully once the technology assisted 10 review takes place, which I am told should be 11 taking place in the next couple of days, early 12 next week we should have a much clearer 13 picture as to timeline on the RGP disclosure, 14 because we will know exactly how many 15 documents we are dealing with. 16 Turning then to item 4 on the agenda, which 17 is procedure at the Main Inquiry hearing, 18 there are three items to be considered under 19 this hearing. Firstly, the timetable up to the 20 Main Inquiry hearing, then the procedure for 21 witness examination and then finally the 22 witness list. 23 Taking the timetable first of all, that appears 24 to be agreed by all parties, but just to recap, 25 28 August is the deadline for further witness</p> <p style="text-align: center;">Page 29</p>	<p>1 Turning to witness examination -- I am 2 happy to give way. 3 THE COMMISSIONER: Yes? 4 SIR PETER CARUANA: Mr Chairman, the 5 Government parties agree the schedule of 6 dates, the timetable in the context of a 7 hearing scheduled for the current hearing 8 dates. Now, we have heard this morning 9 passing reference to certain matters that 10 might disturb that or might not disturb that in 11 the future and that is a matter entirely for 12 you, sir. But I have instructions from one of 13 my clients, the Chief Minister, to flag that the 14 Government is going to be making 15 representations to you, Mr Chairman, at a 16 later date, about the appropriateness of the 17 Committee of the Inquiry sitting during the 18 period of the forthcoming General Election 19 Campaign which necessarily and by law 20 needs to take place before December, if it 21 transpires that that will come to pass, which 22 is now looking increasingly likely that it will 23 straddle the election campaign with the 24 sittings in whole or in part, and the 25 Government wishes to make representations</p> <p style="text-align: center;">Page 31</p>
<p>1 statements addressing any further disclosed 2 material; 15 September is the deadline for 3 core participants to file written opening 4 statements; 21 September I will file a written 5 opening statement; and on 21 and 22 6 September we will have designated reading 7 days. On 26 September, that is the first day 8 when the Main Inquiry hearing commences. 9 THE COMMISSIONER: Because we have 10 agreed not to sit on Monday, 25th? 11 MR SANTOS: Correct. As all core 12 participants will have experienced thus far, 13 the Inquiry team has been as understanding 14 and as flexible as possible in granting 15 extensions of time for provision of 16 documents and witness statements, and I 17 believe we are yet to refuse an extension of 18 time, but I should give advance warning that 19 as we get closer to the hearing, that approach 20 may change, because we will not have the 21 same room for manoeuvre. Now, I recognise 22 that obviously that means that we need to 23 provide the remaining items of disclosure as 24 quickly as we can and, as I say, we will do 25 so.</p> <p style="text-align: center;">Page 30</p>	<p>1 for your consideration for the event that it 2 does come to pass, given in particular the 3 nature of this Inquiry and the parties involved 4 in it. Just to flag up, therefore, to reserve the 5 right to submit these representations to you 6 and that my having allowed the moment to 7 pass does not prejudiced that. 8 THE COMMISSIONER: You have flagged 9 it up very clearly. 10 MR SANTOS: I am grateful for him having 11 flagged that up. The only thing I would say 12 is that if that transpires and if they take the 13 view that they need to do so, then I would 14 invite them to do so as soon as possible. But 15 that is all I propose to say. 16 THE COMMISSIONER: That is obviously 17 sensible. 18 MR SANTOS: Turning to the witness 19 examination procedure, this is a matter which 20 was addressed first of all at the first 21 preliminary hearing and addressed further in 22 our written submissions for today, and we 23 have benefitted from input by a number of 24 core participants in their written submissions. 25 THE COMMISSIONER: And from me.</p> <p style="text-align: center;">Page 32</p>

<p>1 MR SANTOS: Yes. I think it is fair to say 2 that there is broad agreement on the general 3 model that we have proposed, which is that 4 for seven witnesses, who we refer to as 5 unrestricted witnesses, we are to adopt the 6 so-called traditional model, allowing 7 questioning by representatives other than 8 Counsel to the Inquiry. Those witnesses are 9 identified in paragraph 20 of our written 10 submissions, and just for the benefit of the 11 public, they are Mr McGrail, the Chief 12 Minister, the Governor at the time, Nicholas 13 Pyle, the Attorney General, the DPP, the 14 Chairman of the Gibraltar Police 15 Association, Dr Britto, and former 16 Superintendent Paul Richardson. In our 17 written submissions we had proposed that the 18 opportunity to cross-examine our unrestricted 19 witnesses would be afford to counsel for all 20 core participants. However, at least two core 21 participants have submitted that the right to 22 cross-examine our unrestricted witnesses 23 should be limited to counsel for other 24 unrestricted witnesses only. There does have 25 to be a balance here and, while we do not</p> <p style="text-align: center;">Page 33</p>	<p>1 to give evidence according to the schedule. 2 We will then indicate either (1) that we 3 intend to pursue the topic, issue or question 4 with the witness; (2) that counsel for the CP 5 should pursue the topic, issue or question 6 with the witness; or (3) that the topic, issue 7 or question cannot be pursued. If the CP 8 disagrees with our indication, it will be open 9 to them to apply in writing to the 10 Commissioner for permission to question the 11 witness as proposed. Generally, cross- 12 examination as we see it in courts does not 13 take place in an inquiry context, but if there 14 is good reason for a CP's representative to 15 ask a question or a series of questions of a 16 particular witness, they may apply to the 17 Commissioner in writing by no later than 18 seven days before the witness is due to give 19 evidence. Any permitted questioning may be 20 subject to time limits by the Commissioner. 21 We consider that this hybrid model is the 22 appropriate approach given the need to 23 balance careful management of the Inquiry in 24 light of the window for the Main Inquiry 25 hearing, balancing that with proper</p> <p style="text-align: center;">Page 35</p>
<p>1 consider that other core participants should 2 be deprived altogether of the important 3 participatory right of asking questions, we 4 would submit that where other CPs wish to 5 question unrestricted witnesses, then they 6 should go through the procedure of running 7 their topics, issues or questions by Counsel to 8 the Inquiry first of all rather than those other 9 CPs having carte blanche to ask any 10 questions of the unrestricted witnesses. 11 The Inquiry team would consider any 12 requests to ask questions in the context of 13 that CP's role in the Inquiry, bearing in mind 14 for example, the basis on which CP status 15 was granted to that individual or body. 16 In respect of the other witnesses giving live 17 evidence, what is proposed is a hybrid model 18 along the following lines. Firstly questioning 19 of a witness should be conducted principally 20 by Counsel to the Inquiry. If any core 21 participant would like to have any topics, 22 issues or questions put to a witness, those 23 questions should be put forward in writing to 24 me or preferably my excellent junior, Ms 25 Williams, 14 days before the witness is due</p> <p style="text-align: center;">Page 34</p>	<p>1 participation by CPs. We also need to ensure 2 that questioning remains targeted to the list 3 of issues. 4 Now, just picking up on a few points which 5 have been raised by CPs in submissions, as to 6 the order of examination of each witness, the 7 proposed procedure is that firstly written 8 evidence will stand as evidence in chief. 9 Then, Counsel to the Inquiry will question 10 the witness to highlight -- 11 THE COMMISSIONER: Insofar as it is 12 relevant? 13 MR SANTOS: Insofar as it is relevant, yes. 14 I will come on to relevance shortly. Then 15 Counsel to the Inquiry will question the 16 witness to highlight or challenge such points 17 as we may deem appropriate. Thirdly, the 18 witness will be cross-examined by counsel 19 most appropriate to do so, and it will usually 20 be unnecessary for cross-examination to be 21 done by all CPs. The witness will then be re- 22 examined by their own counsel or counsel 23 most closely representing their interests, and 24 finally, Counsel to the Inquiry may ask any 25 additional questions if necessary.</p> <p style="text-align: center;">Page 36</p>

<p>1 A number of CPs have raised concerns as to 2 the timing for applications and particularly 3 the need to make applications to question a 4 witness seven days in advance of their 5 evidence and to go through the procedure 6 with Counsel to the Inquiry 14 days before 7 that evidence. We recognise that 8 circumstances may arise where such note is 9 not possible, for example, where oral 10 evidence given, either by that witness or a 11 different witness gives rise to the need to 12 question on a particular issue. Of course, 13 there has to be sufficient flexibility to allow 14 for ad hoc applications of that nature. But 15 those must be the exception rather than the 16 norm. What we cannot and will not accept is 17 receiving ten pages of questions the day 18 before a witness is due to give evidence 19 because that will make our role completely 20 unworkable. There has to be general 21 compliance with the deadlines set and the 22 parties must organise themselves so that they 23 are in a position to give notice within the 24 time period set, subject to anything arising 25 thereafter.</p> <p style="text-align: center;">Page 37</p>	<p>1 am not sure how workable that can be as it 2 would involve, it seems to me, giving 3 advance notice of questions to witnesses 4 which parties may understandably not wish 5 to give in all circumstances, but I am open to 6 hearing suggestions as to how that can be 7 accommodated. 8 I think it is probably worth going through the 9 witness list and then inviting submissions on 10 the examination procedure and the witness 11 list together, because there is a slight 12 crossover in relevance. 13 In our open submissions we have also set out 14 a list of the 43 witnesses whose evidence has 15 been deemed relevant by the Inquiry to date. 16 Due to time constraints, it will not be 17 possible for all of these witnesses to give oral 18 evidence, nor is it desirable for them to do so 19 for time and resource reasons. We need to 20 concentrate on the unrestricted witnesses 21 whose evidence is central to the matters 22 under inquiry. The evidence of other less 23 central witnesses can be assessed by the 24 Commissioner on the basis of written 25 evidence and contemporaneous documents</p> <p style="text-align: center;">Page 39</p>
<p>1 Another point raised by the Government 2 parties is that where witnesses give oral 3 evidence that impugns the evidence of a CP, 4 there should be a right to allow that CP's 5 counsel to cross-examine the witness. While 6 I recognise the force of that submission, I 7 would submit that to enshrine a right to 8 question in such circumstances would be to 9 go too far. What I would submit is that 10 where there is a factual dispute or a 11 credibility issue, that would be a strong 12 starting point for an application to question a 13 given witness, limited of course to that 14 dispute or issue, but that should be done 15 within the procedure I have already 16 summarised. 17 Finally, we recognise that time and resource 18 management cannot displace the overarching 19 priority of fairness to parties who may be 20 criticised, who must be afforded the 21 opportunity to participate fully in the process. 22 A further point is made which is that whether 23 there should be transparency to all CPs about 24 the questions of which notice is given by any 25 other CP. I understand the reasoning but I</p> <p style="text-align: center;">Page 38</p>	<p>1 and the mere fact that they will not be 2 questioned does not mean that the Inquiry 3 will accept them as entirely relevant and 4 entirely truthful. 5 We have therefore categorised witnesses into 6 three main groups. Category 1, witnesses 7 who we recommend should give oral 8 evidence; category 2, witnesses who we 9 recognise may need to give oral evidence but 10 we currently recommend will not need to do 11 so; and category 3, witnesses who we 12 recommend will not give oral evidence. The 13 Inquiry will shortly be writing to all 14 witnesses in categories 1 and 2 to inform 15 them of the likelihood or possibility that they 16 will be required to give evidence at the Main 17 Inquiry hearing. In our submission, this list 18 should now be the basis upon which the 19 Inquiry proceeds. However, if, following 20 responsive statements and provision of 21 pending disclosure, any core participant 22 considers that a given witness should be 23 bumped into a different category, then it 24 would be open to them to make written 25 submissions to that effect as early as possible</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 and in any event within seven days of 2 exchange of responsive statements, so we 3 would say by 4 September 2023 at the latest. 4 Again, picking up some of the points made 5 by the core participants in written 6 submissions, a number of additional 7 witnesses have been identified by the core 8 participants as potential candidates for 9 category 1 or even for unrestricted witnesses. 10 Addressing each of them in turn, first we 11 have Lloyd DeVincenzi. Two parties have 12 highlighted Mr DeVincenzi as a potential 13 category 1 witness. Mr McGrail in 14 paragraph 8 of his written submissions 15 proposes that Mr DeVincenzi be considered 16 for category 1 because he has given 17 potentially important evidence on the Chief 18 Minister's motivations in losing confidence 19 in Mr McGrail and also in relation to a 20 meeting on 7 April 2020. Mr Richardson 21 also refers to that meeting. 22 While we recognise the basis for these 23 submissions, our proposal in the first instance 24 would be to clarify the position through a 25 request for further evidence from Mr</p> <p style="text-align: center;">Page 41</p>	<p>1 given that his witness statement relates 2 primarily to the background to the Operation 3 Delhi prosecution and does not directly 4 address the specific matters identified in the 5 subparagraphs of issue five. I would 6 respectfully remind you, sir, of your ruling 7 granting core participant status to the 8 Operation Delhi defendants where you ruled 9 as follows at paragraph 14: 10 "Issue five does not require or indeed permit 11 me to conduct something equivalent to a 12 criminal trial of a conspiracy investigation or 13 even an assessment of the merits of the 14 charging decision in respect of that 15 investigation and I would warn against the 16 applicants from seeking to use the Inquiry for 17 either of those purposes." 18 Finally, we have other members of the 19 Gibraltar Police Authority. At paragraph 20 5.23 of the Government parties' written 21 submissions, they make the point that if Mr 22 Pyle's failure to seek their attendance to give 23 oral evidence is going to be treated as an 24 acceptance by him of their evidence and will 25 prevent him from contradicting it in evidence</p> <p style="text-align: center;">Page 43</p>
<p>1 DeVincenzi and on the back of that a final 2 decision can be made as to whether it is 3 appropriate for him to give oral evidence. 4 But he is currently within category 2, so he 5 falls within the group of witnesses who will 6 be notified at present. 7 The second is Mr Darren Grech. Mr 8 Richardson's team submits that Mr Grech 9 should be further considered for oral 10 evidence. In fairness to Mr Richardson, Mr 11 Grech's statement was only circulated to Mr 12 Richardson and other CPs yesterday. 13 However, subject to anything that Mr Grant 14 may wish to say, our position is that his 15 evidence does not go to matters which are 16 heavily contested or otherwise call for oral 17 evidence, so we would submit that he be left 18 in his current position at present. 19 Then we have James Gaggero. The 20 Operation Delhi defendants proposes that Mr 21 Gaggero be moved into category 1 and thus 22 called to give oral evidence. Subject to 23 anything that they might wish to say today, 24 our position is that we do not see any good 25 reason for calling him to give oral evidence,</p> <p style="text-align: center;">Page 42</p>	<p>1 or submissions, then he will seek their 2 attendance to give live evidence. Our 3 position in the regard is that the GPA's 4 position can be covered sufficiently by the 5 GPA witnesses who are already identified 6 within category one, namely Dr Britto and 7 Mr Gonzales and it is not therefore necessary 8 for those other witnesses to attend, but for the 9 avoidance of doubt, we will not seek to 10 prevent Mr Pyle from making submissions or 11 giving evidence which contradicts their 12 evidence on the basis that they have not been 13 called to give live evidence. 14 Mr Cruz on behalf of the RGP makes a 15 number of points as to relevance of witness 16 evidence. In paragraphs 5 and 14 of his 17 written submissions, he says that a number of 18 witnesses give detailed evidence on 19 irrelevant matters (I have used the word 20 "detailed" and not "granular" purposefully) 21 and raised the concern that such irrelevant 22 matters will remain uncontradicted and 23 unchallenged and then be published on the 24 Inquiry website. That is a valid concern 25 which we would propose to address by</p> <p style="text-align: center;">Page 44</p>

<p>1 ensuring that irrelevant parts of witness 2 statements are redacted prior to publication 3 on the Inquiry website. We propose to 4 provide CPs with redacted versions of 5 witness statements removing irrelevant 6 material prior to the hearing in order that any 7 further submissions as to allegedly irrelevant 8 material may be made before statements are 9 uploaded to the Inquiry website, which 10 would take place at the end of the Main 11 Inquiry hearing. Our intention is also that at 12 the conclusion of the main hearing, the 13 Commissioner would make a general 14 restriction order preventing publication or 15 collateral use of any of the redacted material. 16 Hopefully, those steps would address the 17 concerns raised by Mr Cruz, although I 18 should say that on the other hand, core 19 participants do have to accept the reality that 20 this is a public inquiry and it is an inevitable 21 consequence of the process that some 22 statements which are relevant and which are 23 not challenged by questioning or contradicted 24 in evidence or submissions, will ultimately 25 be uploaded onto the Inquiry website as a</p> <p style="text-align: center;">Page 45</p>	<p>1 been proposed will hopefully address our 2 concerns. They have been flagged and I 3 think the spirit there is to address them, so I 4 think we just reserve our position to see the 5 consequence. 6 THE COMMISSIONER: We cannot now 7 sort out the detail. 8 MR CRUZ: No, we cannot. 9 THE COMMISSIONER: But the principle is 10 very clear and I have taken it on board. 11 MR CRUZ: Thank you, sir. 12 THE COMMISSIONER: Yes? 13 SIR PETER CARUANA: As briefly as I 14 can, sir, the Government parties do submit, 15 as my learned friend the CTI has indicated, 16 that there is a case for the Chair to consider 17 about whether, even in relation to the hybrid 18 principle, given the sort of witnesses that that 19 might entail, there is a case to be made for 20 permitting at least the unrestricted witnesses 21 whose evidence, or for that matter other core 22 participants, is impugned in a way that Mr 23 Chair considers to be sufficiently serious, the 24 opportunity to cross-examine. You will 25 always, sir, be the judge, of whether there has</p> <p style="text-align: center;">Page 47</p>
<p>1 consequence of the open justice principle. 2 That does not mean that the Inquiry is 3 accepting them or putting them forward as 4 true or definitive statements and, of course, 5 your report sir, will make evaluative 6 judgments as to the relevant issues. 7 That is what I propose to say in respect of 8 item 4. I suspect that there will be core 9 participants who want to say something 10 about everything that I have said, so I give 11 way to anyone who wishes to do so. 12 THE COMMISSIONER: Well, Mr Cruz 13 makes the valid point, if I may say so, about 14 the part of the statements which is not 15 relevant and not admissible and therefore that 16 will not go into the public domain. I make 17 that very clear. So in principle, I entirely 18 agree with that point. 19 MR CRUZ: Yes sir. It is all about -- I avoid 20 that word -- the detail. So of course, when 21 we see the redactions, we can then either -- 22 THE COMMISSIONER: There is not going 23 to be very much left of some of these 24 statements. 25 MR CRUZ: Indeed. So I think that what has</p> <p style="text-align: center;">Page 46</p>	<p>1 been that seriousness of impugning, if I can 2 put it that way, but the idea that, given the 3 issues and the seriousness of the allegations 4 in this case, the "defence" (very much in 5 inverted commas) of any party should be 6 dependent on what my learned friend puts to 7 them and chooses to test further when they 8 are given, seems when they address a 9 sufficiently important issue, to be insufficient 10 protection to those who might be seriously 11 criticised -- 12 THE COMMISSIONER: I understand the 13 principle. You want to have a go at the 14 witnesses whose evidence you dispute, even 15 though it might have been challenged by Mr 16 Santos, and in principle I am not going to 17 stop that, but there are limits. 18 SIR PETER CARUANA: Of course, sir. 19 THE COMMISSIONER: And it is difficult 20 to define them, but it is rather easier to 21 recognise them. 22 SIR PETER CARUANA: Absolutely sir, 23 and we would be content with the indication 24 that you have just given and to place 25 ourselves in the hands of your discretion at</p> <p style="text-align: center;">Page 48</p>

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<p>1 the time as to the --  2 THE COMMISSIONER: Well, I used to  3 cross-examine people myself a very long  4 time ago. I am entirely familiar with the  5 problems.  6 SIR PETER CARUANA: With respect to  7 my learned friend, the complaint or the  8 contrary submissions to his about the  9 impracticality of a seven day notice rule, is  10 not a question of the parties organising  11 themselves, rather it is a matter of evidence  12 that he might elicit in oral examination of  13 which it will not have been possible to give  14 seven days' notice in advance.  15 THE COMMISSIONER: I completely  16 agree.  17 SIR PETER CARUANA: Excellent. The  18 Government parties also believe that cross-  19 examination should be permitted of any  20 witnesses, or rather re-examination should be  21 permitted of any witnesses that have been  22 cross-examined, and on this question of  23 transparency, I do acknowledge the point that  24 Mr Santos has made this morning, that there  25 is an issue to be addressed, even if, sir, you</p> <p style="text-align: center;">Page 49</p>	<p>1 highlight parts of the evidence in the witness  2 statement.  3 SIR PETER CARUANA: But what he  4 extracts orally cannot be the only evidence  5 that you have, sir. The witness statements  6 are themselves evidence available to you --  7 THE COMMISSIONER: Correct.  8 SIR PETER CARUANA: -- when you are  9 considering your report.  10 THE COMMISSIONER: That is entirely  11 correct.  12 SIR PETER CARUANA: Thank you.  13 Finally, I am grateful to my learned friend for  14 indicating his own view on it, and it will be  15 sufficient if you, sir, would ratify that view, it  16 is obviously not for the parties, it is entirely  17 for you, to decide who you call to give oral  18 evidence and who you do not. So all I want  19 to be sure is that in accordance with the usual  20 rule, we would not be prejudiced in putting  21 contrary submissions or even commenting  22 adversely about the evidence of a witness  23 whom we have not asked should be called to  24 give oral evidence.  25 THE COMMISSIONER: That arises in the</p> <p style="text-align: center;">Page 51</p>
<p>1 were minded to agree with our submission  2 that if all the parties that give notice to CTI  3 about questions that they would like him to  4 put to witnesses should be shared with others  5 so that there is transparency of what is being  6 fed in to CTI, there is an issue to be dealt  7 with and that is that it might not be  8 appropriate, or would not be appropriate to  9 give notice of questions to witnesses.  10 THE COMMISSIONER: Again, I  11 completely agree.  12 SIR PETER CARUANA: So, perhaps we  13 could work together, all of us, on that to see  14 if that could be left.  15 The other point that I would just like to say,  16 two more points briefly. The first is that we  17 entirely agree, and we have so submitted in  18 writing, that the witness statements of the  19 witnesses should stand as evidence in chief in  20 accordance with the usual rule, rather than  21 the only evidence that you, sir, will have to  22 go on and we will have to defend ourselves  23 on, all the core participants, is the evidence  24 that is able to be elicited orally.  25 THE COMMISSIONER: Mr Santos may</p> <p style="text-align: center;">Page 50</p>	<p>1 context of members of the Gibraltar Police  2 Authority, and possibly others.  3 SIR PETER CARUANA: Yes.  4 THE COMMISSIONER: But I have the  5 point and I completely agree.  6 SIR PETER CARUANA: Yes. In which  7 case we do not have to make submissions  8 about wanting to call certain people for fear  9 of prejudice of being lumbered with their  10 evidence.  11 THE COMMISSIONER: I agree.  12 SIR PETER CARUANA: Thank you, sir;  13 that is all I have to say.  14 MR CRUZ: If I may, you specifically asked  15 me to address a specific issue but I had not  16 had a chance to address the other issues  17 about who should ask questions and when,  18 and suffice to say that in our submission  19 what we said is that we needed to have some  20 flexibility for a lot of the reasons that Sir  21 Peter has brought to your attention. We  22 received what you are suggesting in good  23 spirit, by which we mean we think it is  24 perfectly sensible the approach that is being  25 adopted but with one very clear point, which</p> <p style="text-align: center;">Page 52</p>

<p>1 is if, for example, the police witnesses are the 2 subject of criticisms, I want to be able to get 3 up on my feet and have a chance to address 4 that issue. I do not think there is any 5 suggestion that that should not be the case. 6 The reason I raise that is because at some 7 point there is a suggestion by two core 8 participants, McGrail and the Government 9 parties, that there should be a restriction on 10 the ability to ask questions to those who 11 represent those unrestricted witnesses, and 12 insofar as the police is concerned, given our 13 extraordinary kind of overlap with all of 14 these events, what we would say is that that 15 restriction should not apply to us, in other 16 words we should be in the same position as a 17 core participant with so much interest in this 18 to ask whatever questions, subject to 19 relevance, that are deemed appropriate for us, 20 particularly when one of our key personnel or 21 actions are being put into question and we 22 should have an ability to stand and make 23 representations. We absolutely understand 24 that it is a matter for you on the day. 25 THE COMMISSIONER: Fairness so</p> <p style="text-align: center;">Page 53</p>	<p>1 examination of unrestricted witnesses, and on 2 that point I would share the position taken by 3 my learned friend Mr Caruana that 4 unrestricted witnesses should be cross- 5 examined by counsel for other unrestricted 6 witnesses, otherwise it might become open 7 season for all and sundry. 8 The third point is the point made about the 9 giving of oral evidence by all the members of 10 the police authority. On that, I agree with the 11 position advocated by Mr Santos. In any 12 event, if a decision were to be taken at a later 13 stage I would also support the position taken 14 by Mr Wagner on the point, which is that it is 15 premature at this stage whether or not to call 16 any of those witnesses. For example, one the 17 points of this court has been addressed by Dr 18 Joe Britto in his second witness statement in 19 relation to discrepancies between the 20 Commissioner of Police and the Gibraltar 21 Police Federation, so it may well be that the 22 parties think there is no issue which requires 23 the giving of oral evidence. Until all the 24 evidence is gathered and until the list of 25 agreed facts is taken, then I would submit it</p> <p style="text-align: center;">Page 55</p>
<p>1 requires. 2 MR CRUZ: Thank you, sir. 3 MR NEISH: May I address you? 4 THE COMMISSIONER: Of course, but you 5 have to speak into the microphone. 6 MR NEISH: I am doing that. I just have 7 three very brief points to make. I have made 8 a brief written submission whereby I agree 9 with the approach advocated by counsel to 10 the inquiry. 11 I would just like to make three points. The 12 first point which I made in the submission is 13 that the procedures and processes should not 14 be cast in stone and you, sir, have already 15 given an indication -- 16 THE COMMISSIONER: It is all - 17 MR NEISH: -- that it is all fair. 18 THE COMMISSIONER: It is all flexible. 19 MR NEISH: Exactly, because this is an 20 inquiry which is leading to all sorts of 21 surprises along the way and where we are 22 working to very tight timescales, so that is 23 very reassuring that you, sir, have taken that 24 approach. 25 The second point is the question of the</p> <p style="text-align: center;">Page 54</p>	<p>1 is premature to -- 2 THE COMMISSIONER: All these 3 assessments and categorisations are 4 provisional and can change. They are not set 5 in stone. 6 MR NEISH: That is all I have to say, sir. 7 Thank you very much. 8 THE COMMISSIONER: I agree. Yes? 9 MR GRANT: Sir, if I may very briefly just 10 touch upon the point made by -- 11 THE COMMISSIONER: I am sorry you 12 have to stoop over like that. 13 MR GRANT: I am trying to speak into the 14 microphone as much as I can. 15 THE COMMISSIONER: If we put 16 something bulky underneath that stand, that 17 would make it more convenient for you, 18 because you are going to get backache at this 19 rate. 20 MR GRANT: Thank you, Sir Peter, for his 21 pragmatism in pushing the microphone 22 towards me. 23 In relation to the cross-examination of 24 unrestricted witnesses by counsel for other 25 unrestricted witnesses, we are not asking for</p> <p style="text-align: center;">Page 56</p>

<p>1 a particular special status for Mr Richardson 2 at all. We just want to ensure that the 3 questioning is fair and balanced. There is a 4 sliver of individuals who are core 5 participants but not unrestricted witnesses, 6 and I echo Mr Neish KC's submissions in 7 relation to avoiding a situation akin to open 8 season, so just to reiterate that point. 9 THE COMMISSIONER: I have the point. 10 MR GRANT: Understood. Sir Peter has 11 proposed at paragraph 5A of his submissions 12 the ability to cross-examine witnesses who 13 have impugned other witnesses. In our view, 14 Mr Richardson's view, this would serve to 15 only increase the temperature and upset the 16 balance and character of the questioning, and 17 for that reason we do not agree with Mr 18 Caruana's position on that point. 19 THE COMMISSIONER: I will keep the 20 temperature low. 21 MR GRANT: Thank you, sir. Just one final 22 point, if I may, in relation to paragraph 4D of 23 the Government parties' open submissions 24 that there be transparency about the 25 questions, our view is that this process is</p> <p style="text-align: center;">Page 57</p>	<p>1 MR WAGNER: Yes, and one point that may 2 be useful from the inquiry rules, Rule 10, is 3 that when making an application to question 4 witnesses by a CP, the representative must 5 state the issues in respect of which they wish 6 to question the witness and whether the 7 question raises new issues and, if not, why 8 the questioning should be permitted. That 9 does seem to be, particularly in respect of the 10 dynamic applications during the hearing, that 11 it would constrain or at least require the 12 parties to address their minds to why, if 13 something is not a new area, they effectively 14 want to regurgitate or put what the CTI has 15 already put in a different way, they would 16 have to justify that and that would be a 17 matter for you, sir, as to whether you allow 18 that. 19 THE COMMISSIONER: It is easy to state 20 these rules. 21 MR WAGNER: It is. 22 THE COMMISSIONER: But it is more to 23 being able to apply them, but in general 24 terms I am not going to allow people to go 25 over ground already covered by the CTI.</p> <p style="text-align: center;">Page 59</p>
<p>1 simply too convoluted and will only 2 encourage a back and forth between the 3 parties on meta issues which will only 4 increase time and costs going forward. 5 THE COMMISSIONER: Okay. 6 MR WAGNER: Good morning, sir. I act for 7 Mr McGrail, along with Charles Gomez, 8 Nicholas Gomez and Daniel Benyunes. Just 9 in relation to the witness questioning, it 10 seems to us that the risk to the inquiry overall 11 is that the hearing dates will not be effective 12 because there is too much questioning. 13 THE COMMISSIONER: Do not worry, I 14 will sort that out. 15 MR WAGNER: That is the risk we are 16 concerned with, and it seems that under the 17 inquiry rules under the 2005 Act in the UK, 18 the way that that is dealt with is obviously a 19 very constrained potentially system whereby 20 CTI is the main and sometimes the 21 questioner, but we are doing that with certain 22 unrestricted witnesses here anyway. 23 THE COMMISSIONER: I have 24 contemplated that the questions should be 25 principally by the CTI.</p> <p style="text-align: center;">Page 58</p>	<p>1 MR WAGNER: I am grateful for that 2 indication. I will take the other points briefly 3 because they have been, in the most part, 4 dealt with. 5 In relation to the point by the Government 6 parties that where witnesses give oral 7 evidence that impugns the evidence, or 8 seriously impugns, Mr Caruana now says, of 9 a core participant, that should open the door 10 to cross-examination, we submit that that is 11 an approach which lends itself more to an 12 adversarial rather than an inquisitorial 13 setting. 14 THE COMMISSIONER: You cannot really 15 make rulings on this until you have heard the 16 tone of the proceedings. 17 MR WAGNER: Yes. 18 THE COMMISSIONER: I am not going to 19 make rules in advance. We will just have to 20 play it by ear. But one thing that I will keep 21 very much under consideration is the 22 timetable. 23 MR WAGNER: Exactly, and I think that 24 really the only difference between CTI and 25 the Government parties is whether it should</p> <p style="text-align: center;">Page 60</p>



<p>1 be a right or a right to apply.  2 THE COMMISSIONER: Well, it is a right  3 to apply.  4 MR WAGNER: And it would be a right to  5 apply, and we agree with that proposal. We  6 do not agree with the Government's  7 submission that CTI should give notice of  8 questions requested for the same reasons as  9 Mr Neish said, that it would lead to collateral  10 battles over topics and questions and that  11 seems an unnecessary use of time.  12 In relation to witness statements standing as  13 evidence in-chief, we agree with CTI's  14 proposal - we think this is what CTI's  15 proposal is - that there will be some eliciting  16 of what might be considered to be  17 examination in-chief.  18 THE COMMISSIONER: Highlighting, as I  19 call it.  20 MR WAGNER: Highlighting, exactly, and  21 we say that that is important in a public  22 inquiry context because the public will not  23 have the witness statements.  24 THE COMMISSIONER: And it is  25 extremely difficult to know whether a</p> <p style="text-align: center;">Page 61</p>	<p>1 redactions and we do not want to spend half  2 the day arguing about redactions.  3 MR SANTOS: Just to clarify, what I meant  4 was witnesses who have not been called to  5 give live evidence. Witnesses who give live  6 evidence, at the end of the day or within  7 24/48 hours, the intention is to --  8 THE COMMISSIONER: And their  9 evidence, of course, will be on the website in  10 any event.  11 MR SANTOS: The evidence will go up on  12 the website once they have completed their  13 evidence.  14 THE COMMISSIONER: And the witness  15 statement which is part of their evidence,  16 again, we will sort that out very shortly.  17 MR SANTOS: Yes. We want to engage in  18 that irrelevance(?sic) process before the  19 inquiry starts because, as you rightly  20 anticipate, we cannot have debates over  21 redactions while the evidence is being heard.  22 We want to engage on that before.  23 THE COMMISSIONER: So does this  24 answer your question?  25 MR SANTOS: Yes, because this issue arose</p> <p style="text-align: center;">Page 63</p>
<p>1 witness is reliable unless you have actually  2 heard him tell the tale.  3 MR WAGNER: Yes, and the witness  4 statements are --  5 THE COMMISSIONER: Or bits of it.  6 MR WAGNER: Exactly, and witness  7 statements tend to be quite lawyerised. They  8 are different to oral evidence.  9 THE COMMISSIONER: I am aware of that.  10 MR WAGNER: And just on the most basic  11 level, from a public perspective, just being  12 able to hear the basic story the witness is  13 telling from them is very important, we say.  14 THE COMMISSIONER: I have the point  15 and I agree.  16 MR WAGNER: One question that I wanted  17 clarification on, and I may have  18 misunderstood, was Mr Santos saying the  19 statements would be published at the end, but  20 I did not know whether he meant the end of  21 the inquiry or the end of the day.  22 THE COMMISSIONER: I think he meant  23 the end of the inquiry. At the end of the day  24 is going to be difficult because it is going to  25 give rise to extended problems about</p> <p style="text-align: center;">Page 62</p>	<p>1 back last year when we were talking about  2 open justice, and we had originally proposed  3 that the statements were published at the  4 beginning of the day, and the position we  5 reached was they would be published as soon  6 as practicable after the end of the day, so that  7 is still the position and that is not of any  8 concern.  9 In relation to the witness list, we are grateful  10 for the indication relation to Lloyd  11 DeVincenzi, and we agree with that approach  12 from CTI.  13 THE COMMISSIONER: We will ask him to  14 elaborate on his statement and then take a  15 decision in the light of what he says.  16 MR SANTOS: Yes, and that seems entirely  17 practical and we agree with CTI's  18 submissions on the other proposed witnesses  19 for the reasons that he has stated.  20 MR SANTOS: The only other point I  21 wanted to raise, sir, very briefly and with no  22 detail, just because I did not stand up at the  23 beginning, was to say in relation to the issues  24 that are not being heard today, we had  25 proposed in our open submissions that it may</p> <p style="text-align: center;">Page 64</p>

16 (Pages 61 to 64)

<p>1 be necessary to hold a further preliminary 2 hearing perhaps online. We now say that that 3 is necessary. 4 THE COMMISSIONER: I think that is 5 increasingly likely. I agree. 6 MR SANTOS: And we would ask that 7 maybe after this hearing, since we may have 8 a bit more time -- 9 THE COMMISSIONER: I have already 10 asked about the practicalities of that, which it 11 is not very convenient to discuss it in open, 12 but we will sort that out. 13 MR SANTOS: I am very grateful. 14 THE COMMISSIONER: Okay. Thank you 15 very much. I am sorry, I have rather lost the 16 thread of where we had got to. 17 MR SANTOS: I just wonder whether 18 anybody else wants to address item 4; if not, 19 I will pick up very, very small points. I am 20 grateful for Mr Neish KC's contribution. 21 What I should emphasise, just in case anyone 22 was confused by what was said, is that we 23 have not disclosed the responsive statement 24 of Dr Britto because that will be disclosed 25 when we have responsive witness statements</p> <p style="text-align: center;">Page 65</p>	<p>1 inquiry's list of issues and consideration of 2 agreed facts. I will take each of them in turn 3 because I think there may be plenty to say 4 from others on each of these items. 5 The provisional list of issues which was 6 settled at the second preliminary hearing is 7 expressly stated to be provisional and subject 8 to change as matters develop. For this reason 9 the inquiry team considered going into this 10 hearing -- Before this hearing was heard the 11 inquiry team considered whether any matters 12 could or should be removed. In our written 13 submissions we queried two items in 14 particular, namely issue 2, the RGP's 15 investigation into an assault on a helicopter 16 pilot and crew member in Gibraltar in March 17 2017; and issue 7, the RGP's involvement in 18 and/or handling of the Alcaidesa claims. We 19 expressly asked the Government parties to 20 clarify in their submissions whether those 21 incidents would be relied on. The 22 Government has addressed this at paragraph 23 67 of their written submissions, stating that 24 both of these matters are reasons why the 25 Governor/and or Chief Minister lost</p> <p style="text-align: center;">Page 67</p>
<p>1 from everybody. We do not want to be 2 disclosing responsive statements to 3 participants who have not yet served their 4 own responsive statements. What was 5 referred to by Mr Neish is something that is 6 addressed in that statement. 7 The only other point that I wanted to 8 emphasise for the benefit of Mr Caruana KC 9 is just to give him the comfort that, of course, 10 it is not really for core participants to call 11 witnesses in any event. It is a decision for 12 the inquiry. Therefore, there cannot be 13 procedural consequences on a particular core 14 participant. As a result, we will listen to 15 decisions and then it is a decision for you, sir, 16 as Commissioner, as to whether a witness 17 will come, and therefore a decision not to call 18 a witness cannot give rise to consequences 19 for core participants. Nobody is going to 20 stop Mr Caruana KC from making any points 21 in terms of evidence of witnesses who are not 22 attending. 23 THE COMMISSIONER: No, I agree. Okay, 24 we move on. 25 MR SANTOS: Item 5 is finalisation of the</p> <p style="text-align: center;">Page 66</p>	<p>1 confidence in Mr McGrail. We do not 2 consider that it would be appropriate to 3 remove those items from the list of issues at 4 this stage. In saying that, we hope that the 5 CPs are reassured by the fact that although 6 we purposely cast the net wide at the time of 7 seeking witness statements and documents, 8 the inquiry's focus is becoming narrower as 9 investigation progresses. This is 10 demonstrated, for example, by the inquiry's 11 provisional list of category one witnesses. 12 We do not consider it would be appropriate 13 to remove altogether any matters from the 14 provisional list, as this would prevent the 15 inquiry from being able to look into them or 16 addressing them in the report. However, we 17 can assure the CPs that all issues will not be 18 given equal or even close to equal emphasis 19 at the main hearing. 20 The RGP has also made written submissions 21 on the provisional list of issues and Mr Cruz 22 will have an opportunity to address you, sir, 23 in due course, but in summary his submission 24 is that the list as drafted is too wide and goes 25 beyond the inquiry's terms of reference. We</p> <p style="text-align: center;">Page 68</p>

17 (Pages 65 to 68)

<p>1 have three points to make in relation to this.  2 First, in fairness to Mr Cruz, for procedural  3 reasons he did not have Mr Pyle's affidavit  4 until Monday of this week and after  5 submissions were made, and therefore the  6 relevance of some of the issues in the  7 provisional list may not have been as obvious  8 to him before reading that affidavit.  9 Second, whether a matter should be on the  10 list of issues is a different question to  11 whether in due course the inquiry will  12 conclude that the matter was a reason or  13 circumstance leading to Mr McGrail ceasing  14 to be Commissioner of Police. The time for  15 substantive submissions as to the latter  16 question will be the main inquiry hearing. At  17 present, and from the outset, the inquiry has  18 proceeded on the basis of the reasons and  19 circumstances identified by the statutory  20 participants, and we do not believe it is  21 appropriate to rule out any of those yet.  22 Finally, and perhaps most importantly, each  23 issue on the list must be read in conjunction  24 with the introductory wording, and I think it  25 is worth reading that introductory wording</p> <p style="text-align: center;">Page 69</p>	<p>1 investigation into the events leading up to the  2 airport incident or the incident at sea, a  3 criminal trial of the assault investigation or a  4 forensic examination of complaints made by  5 the GPF, to take a few examples. The focus  6 of the inquiry as demonstrated by the witness  7 list is the impact of these events on Mr  8 McGrail ceasing to be Commissioner of  9 Police, including the extent to which the key  10 parties had these matters in mind during  11 April and May 2020.  12 That is what I propose to say on the issues,  13 and I would invite submissions on that before  14 turning to agreement of facts.  15 THE COMMISSIONER: Yes. Of course, I  16 have read your skeleton argument, but you  17 want no doubt to give some outline of the  18 points you make so that everyone  19 understands them.  20 MR CRUZ: Yes, sir. I think obviously we  21 start from a premise that it is only in April  22 and May we see witness statements, and I  23 think that is important because we are only  24 able to make the assessment about the  25 provisional list of issues in the context of</p> <p style="text-align: center;">Page 71</p>
<p>1 out in full. "(a) What were the relevant facts  2 which the Commissioner will seek to  3 ascertain only to the extent that he considers  4 it necessary and appropriate to address the  5 matter under inquiry; (b) to what extent, if at  6 all, did the issue constitute a reason or  7 circumstance leading to Mr Ian McGrail  8 ceasing to be Commissioner of Police in June  9 2020 by taking an early retirement, either  10 because they led to a loss of confidence in  11 him, or for some other reason." This  12 language in my submission makes clear that  13 the inquiry's investigation will only go as far  14 as is necessary to answer the central question  15 under inquiry. For example, by reference to  16 issue five, as I said previously, the  17 Commissioner has already recognised in a  18 ruling that issue five does not require or  19 indeed permit something equivalent to a  20 criminal trial or conspiracy investigation or  21 even an assessment of the merits of the  22 charging decision in respect of that  23 investigation; and a similar approach will be  24 taken to other issues. The main inquiry  25 hearing will not involve a blow-by-blow</p> <p style="text-align: center;">Page 70</p>	<p>1 seeing what people are saying. It is evident  2 to us - we were not a core participant; I do  3 not mean any criticism by this - that  4 obviously there has been some discussion at  5 an early stage about what were issues, some  6 agreement, some disagreement. I have read  7 just with my copy late in the evening my  8 learned friend's updated submissions and we  9 had chapter and verse about similar points he  10 made about the width of submissions earlier  11 on. But we were not in the game, so to  12 speak, at that time, and I just think that is  13 important because we do not come in this  14 late, we come in this as quickly as we can,  15 which is after we have seen witness  16 statements.  17 Now, we also recognise that Mr Pyle's  18 statement is something that we did not have  19 until yesterday or the day before yesterday.  20 Notwithstanding that, I think our position is  21 this. The RGP - and we have made it clear  22 in our submissions; I do not want to  23 grandstand on this point - has some pretty  24 wide obligations that are current and ongoing  25 that is different to other participants - not all</p> <p style="text-align: center;">Page 72</p>

<p>1 of them but different to some; obviously the                  2 Government parties might have a different                  3 position, but it is important to retain public                  4 confidence in that context and so what we                  5 absolutely are adamant about is this should                  6 not become an inquiry into the policing of                  7 Gibraltar since 2010, the first incident.                  8 THE COMMISSIONER: I agree.                  9 MR CRUZ: Well, sir, I am very pleased                  10 about that and I have been instructed to make                  11 that point. That being said, it is in our view -                  12 obviously clearly not the view ours - a pretty                  13 unanswerable submission that what you did                  14 before you became Commissioner of Police                  15 might be relevant to your appointment but it                  16 absolutely cannot be relevant to your                  17 removal or the threat of removal which                  18 makes you leave, and so to the extent that                  19 matters had been touched upon that really                  20 talk about pre-1st May 1918(sic) we say that                  21 actually in law they are simply not capable of                  22 being matters that are relevant.                  23 THE COMMISSIONER: It is said to be                  24 relevant to the confidence in which he was                  25 held by Mr Pyle and the Chief Minister.</p> <p style="text-align: center;">Page 73</p>	<p>1 alone. Now, obviously Mr McGrail's                  2 position is different. Mr McGrail's position                  3 is it actually has nothing to do with that, it is                  4 all to do with Operation Delhi. Fine, that is                  5 Mr McGrail's position so we understand the                  6 relevance, although even in that respect we                  7 think it should be constrained, and I think I                  8 have read the updated submission of Mr                  9 Wagner that there is some agreement that                  10 perhaps that first opening paragraph that says                  11 "the handling of the matter by the RGP is not                  12 the width that this should be given." But                  13 those are the issues, and we point to the                  14 Police Act because ultimately removals of                  15 policemen can only be done in accordance                  16 with the law, and the Police Act just gives us                  17 a very clear steer of what that was, and both                  18 the Government parties at the time and the                  19 submissions on behalf of those who were                  20 acting for Mr McGrail make it very clear that                  21 those sections, the interplay of sections 34                  22 and 13, is the only basis upon which a person                  23 can be removed. Therefore we say that for                  24 this inquiry to now go into the reasons -                  25 good, bad, ugly, whatever they are - as to</p> <p style="text-align: center;">Page 75</p>
<p>1 MR CRUZ: Mr Pyle we would say, with all                  2 due respect to Mr Pyle, is perfectly entitled to                  3 get on the stand and say: "Look, I never liked                  4 this guy, I have always thought he was                  5 useless and he should never have been                  6 appointed." That is a matter for him to say.                  7 He can say that. It does not mean that we                  8 have to go into the reasons back to 2010 that                  9 he has formed that view.                  10 THE COMMISSIONER: That is quite a                  11 robust summary of his evidence, but in                  12 essence that is exactly what he is saying.                  13 MR CRUZ: But my point is that that does                  14 not, in our submission, give licence under the                  15 current mandate to then start exploring                  16 reasons why he, back in the day that Mr                  17 McGrail was a constable, did not like the                  18 way he looked at him. That is a matter for                  19 them. So our position is that the real issue                  20 here is when he was Commissioner, what is                  21 it, and we have the answer in Mr Pyle's own                  22 witness evidence. I saw it only two days ago,                  23 but Mr Pyle specifically - specifically -                  24 points to a letter that he sent Mr Britto in                  25 which he identifies two issues and two issues</p> <p style="text-align: center;">Page 74</p>	<p>1 why Mr Pyle had confidence in Mr McGrail                  2 is entirely irrelevant - entirely irrelevant -                  3 and should not be considered. That would                  4 actually limit the inquiry to the issues that                  5 really I think everybody wants to know, or                  6 those who called this inquiry, want to know                  7 the answer and the public are entitled to,                  8 which are about the issues that were raised                  9 and the reasons that were given for removing                  10 or threatening to remove Mr McGrail, and                  11 those are articulated by both sides. There is                  12 no difference. Just because Mr Pyle a year                  13 later or two years later writes a witness                  14 statement and goes: "By the way, I did not                  15 like all of this stuff about him", he can still                  16 say that, absolutely he can say that, but it is                  17 not a matter for us to go into because it                  18 cannot have influenced him because he                  19 specifically said what influenced him, and                  20 the Chief Minister, the other person,                  21 specifically said that those things did not                  22 influence him. So it is our submission that                  23 this is a powerful submission, that one has to                  24 look at the law --                  25 THE COMMISSIONER: Do not these</p> <p style="text-align: center;">Page 76</p>

<p>1 points go to the weight of what they are 2 saying? 3 MR CRUZ: No. We say the parameters of 4 the inquiry, sir - and this is the point - the 5 inquiry cannot come to a conclusion, we say, 6 that issues not raised by the people at the 7 time were the reasons beyond the exploration 8 of those that have been suggested at the 9 material time, which is the Delhi issue, and 10 so on, and we do not believe that one can 11 actually go and almost backfill in order to 12 somehow find some other reason that was not 13 used or utilised by any of the parties at the 14 time, and those issues are three, four and 15 five. So everything else, while it may be 16 relevant to explaining why Mr Pyle or 17 anybody else had confidence or did not have 18 confidence, it may be relevant in that context 19 but the investigation - I am going to risk the 20 word again - granular investigation of those 21 issues has no bearing whatsoever. 22 Mr Wagner in his submissions, although he 23 does not quite - he is not on all fours with 24 my analysis of the 13 and 34 sections of the 25 Police Act.</p> <p style="text-align: center;">Page 77</p>	<p>1 that the Commissioner was not even 2 Commissioner. Well, if we have to go into 3 that, we will go into that. 4 THE COMMISSIONER: Hang on. A clean 5 bill of health from whom? 6 MR CRUZ: Adam &amp; Ratkin. 7 THE COMMISSIONER: No, that is not 8 right. He conceded that there was no right of 9 arrest. 10 MR CRUZ: And apologised to the entire 11 police force, and this was under the time of 12 Mr Yome as Commissioner, not Mr McGrail. 13 THE COMMISSIONER: You can argue that 14 is a clean bill of health but he is not referring 15 to the other activities that took place at the 16 airport. 17 MR CRUZ: I am talking about the airport 18 incident. 19 THE COMMISSIONER: Or the arrest of the 20 senior officers. 21 MR CRUZ: Well, with all due respect, I 22 think that is precisely the risk that we are 23 already seeing. If we start to engage in this 24 process what we are going to do is go back to 25 pre-Mr McGrail being Commissioner and ask</p> <p style="text-align: center;">Page 79</p>
<p>1 THE COMMISSIONER: His principal 2 concern is that I am going to get distracted 3 from issue five by investigating other issues. 4 MR CRUZ: And we would say that that is a 5 reasonable position to get to but, more 6 importantly, Mr Wagner has suggested - and 7 I say this by way of sort of compromise to 8 the extent that it - Mr Wagner has suggested 9 some language in his naughty late 10 submission last night in which he says: Well, 11 actually, whilst we have kind of agreed with 12 the RGP's position, not entirely in section 13 13 and 34, there is language that could be used 14 that allows the parties to have their cake and 15 eat it by capturing that as background 16 information, while actually making a very 17 clear direction today that we should not start 18 going into that because to go into that will 19 require the RGP to make its submission, a 20 substantial submission, subject to the 21 redaction point that you said earlier, but 22 require us to address those issues because if 23 we are going to start having people 24 questioning the airport incident where we got 25 an absolute clean bill of health and at a time</p> <p style="text-align: center;">Page 78</p>	<p>1 ourselves those questions. 2 THE COMMISSIONER: But he arrested the 3 officers, and Mr Pyle is going to say that that 4 was misconceived and it adversely affected 5 his belief in his competence and abilities. 6 MR CRUZ: Well, he should have spoken 7 stronger when he was going to be appointed, 8 but my point is that actually the minute that 9 we start going into this field, with all due 10 respect, sir, I think you have highlighted the 11 danger, because we take the view, RGP takes 12 the view, that that matter was absolutely 13 vindicated so far as the Gibraltar Police and 14 the Gibraltar Government was concerned, 15 and it is clear to get an apology from 16 someone who is now the head of the Military 17 Command in the UK, that says "Sorry, we 18 did it wrong", and the other apologies, is not 19 anything but a clean bill of health. You 20 cannot get much more. So therefore we say 21 what can that have as a bearing on whether 22 Mr McGrail, who was not even 23 Commissioner at that time, and why do we 24 have to look into this and produce evidence 25 and address this? Therefore we say that Mr</p> <p style="text-align: center;">Page 80</p>

20 (Pages 77 to 80)

<p>1 Wagner's suggestion, and I would ask that we 2 have some regard to it, at least in your 3 deliberations where you take this away with 4 you because I think it is an important point 5 and it influences the production of evidence 6 by us and all the rest, Mr Wagner's 7 suggestion which we saw last night seems to 8 address potential concerns that might be had 9 by others about this sort of background noise 10 to the lack of confidence but at the same time 11 strongly encouraged people to avoid going 12 into those issues in a detailed, not to say 13 granular, fashion. So that is the main point. 14 THE COMMISSIONER: Is not the answer 15 to this to cover it by agreed facts? Most of 16 which are agreed. 17 MR CRUZ: They may or may not, but even, 18 sir, in your questioning about the clean bill of 19 health it just demonstrates - I know you were 20 just testing that but I know it might 21 demonstrate that there is nothing to be agreed 22 on this position. So the question -- 23 THE COMMISSIONER: We can agree what 24 has happened and we can agree what 25 submissions were made about it.</p> <p style="text-align: center;">Page 81</p>	<p>1 raised by Mr Pyle in his witness statement - I 2 have got it in front of me, he makes specific 3 reference to his 3 June letter, so he does not 4 say it - so therefore it is frankly irrelevant. 5 Irrelevant in the context of being an issue. It 6 might be relevant to -- 7 THE COMMISSIONER: Both he and the 8 Chief Minister said it at the time. 9 MR CRUZ: But they did not give it as a 10 reason, sir, to encourage the GPA to invite 11 him to step down or to make representations, 12 a 34 process, nor did they give it as a reason - 13 when Mr Pyle in his evidence says: "I met 14 with Mr McGrail and I said to him: 'If you 15 want to know the reasons why I have got this 16 problem, these are these, let me give you the 17 3 June letter'." In that 3 June letter you do 18 not find them. That is the position. 19 Now, the fact that he said: "Look, I have 20 other issues with this gentleman," and he 21 wants to explore, with all due respect, and I 22 say this in a general sense, if we are going to 23 adopt the sort of Lewis idea of funnel, it is 24 our view that that needs to be adopted, and it 25 is our suggestion that the government parties</p> <p style="text-align: center;">Page 83</p>
<p>1 MR CRUZ: But we may not agree whether 2 or not there was fault and whether or not that 3 should somehow ... 4 THE COMMISSIONER: Not suggesting for 5 one moment that you should or would admit 6 that there was fault. 7 MR CRUZ: Precisely, or vindication. The 8 point that I am making, sir, is that these 9 matters are simply irrelevant to what this 10 inquiry has to decide. Therefore it is the 11 first, for us, and the best opportunity to take a 12 deep breath and look at all of this and say: 13 actually can we find a modus vivendi which 14 allows those government parties to make 15 their points in relation to confidence in Mr 16 Pyle and so on but at the same time constrain 17 this inquiry to what we say the mandate was 18 all about. We have not addressed issue 6 yet, 19 which we intend to, but I am addressing 20 really the others. 21 THE COMMISSIONER: Yes. 22 MR CRUZ: Yes, the issue 6 point is not 23 dissimilar. What we say on that is it is not an 24 issue that is raised by the GPA in their 25 section 34 letter, it is not an issue that is</p> <p style="text-align: center;">Page 82</p>	<p>1 want to turn the funnel exactly the other way 2 round, and that is an examination of the 3 RGP's performance over a period of time in 4 matters that are not relevant. So we strongly 5 encourage the removal of all the issues that 6 we have suggested and leaving just 3, 4 and 7 5, and 5 with a slight constraint on it in the 8 manner that seems to Mr McGrail's 9 representative also to be sensible. Those are 10 our submissions, sir, and of course they 11 would influence the need for evidence and 12 more evidence substantially within this 13 timescale. Thank you, sir. 14 THE COMMISSIONER: Yes. 15 MR WAGNER: Sir, I think it probably 16 makes sense for me to go next ... 17 THE COMMISSIONER: Yes, I agree. 18 MR WAGNER: ... because my submissions 19 have been referenced. I do agree, as we said 20 in the submissions, with a significant, pretty 21 much all of what Mr Cruz says. I am slightly 22 worried by his late night coffee drinking 23 habits, but other than that I am -- 24 THE COMMISSIONER: I think that was the 25 reaction to your late night submission.</p> <p style="text-align: center;">Page 84</p>

<p>1 MR WAGNER: Then if I have caused that, I 2 do apologise. 3 THE COMMISSIONER: We want to try and 4 have a hearing where we do not get 5 submissions - it is not quite as bad as last 6 time when I think one was sent at eleven 7 o'clock, although possibly not by you. 8 MR WAGNER: It is difficult, and it has 9 occurred in every preliminary hearing from 10 one party or the other, because things arise 11 very late, and it has happened every time. 12 We had, I think, one working day to digest 13 and respond to the very detailed submissions, 14 not just open but closed. 15 THE COMMISSIONER: Anyway you just 16 summarise your point, Mr Wagner. 17 MR WAGNER: Exactly, sir. So if I have 18 caused difficulty or coffee, I am sorry. The 19 point about Lewis, in Lewis the inquest 20 process, which is analogous in some ways, 21 described a funnel, wider at its opening but 22 narrowing as the evidence passes down it so 23 to exclude non-causative factors from the 24 eventual verdict. 25 In a way I agree with both approaches,</p> <p style="text-align: center;">Page 85</p>	<p>1 always what was proposed at the beginning, 2 or at least it was proposed as an option, and 3 Mr Neish will now have seen the 4 submissions which we made, which 5 essentially reflect almost exactly the 6 submissions RGP make now about what we 7 consider to be the extraneous issues, which 8 are issues 1, 2, 6 and 7. To put it another 9 way round, we say that the core issues are the 10 incident at (c), the HMIC FRS report and Op 11 Delhi, and those are the core issues because 12 they are the ones which had prominence at 13 the time. 14 THE COMMISSIONER: I think I might 15 even have used the expression core issues 16 originally. 17 MR WAGNER: Yes. 18 THE COMMISSIONER: But I entirely 19 agree. But it seems to me to be very 20 difficult for me to exclude the other issues on 21 which the Chief Minister and Mr Pyle relied 22 variously at the time. They did not set the 23 whole list out every time they referred to it. 24 MR WAGNER: I think with the exception 25 of the airport incident, which never appeared</p> <p style="text-align: center;">Page 87</p>
<p>1 because on the one hand you can have a 2 limiting of the issues list and grab the bull by 3 the horns at this stage and say: "We are now 4 limiting and reducing down the issues list 5 because ... otherwise we will have 6 arguments later about: this was part of the 7 issues list and you have not allowed the 8 evidence, which is not fair." That is one way 9 of doing it. 10 The other way of doing it, which I think 11 counsel to the inquiry is proposing and seems 12 to be your, Commissioner's, proposal, sir, is 13 that it really goes to weight. We can see that 14 by first of all the way in which the oral 15 evidence has been listed, so the choice of the 16 witnesses is obviously illustrative of the 17 prominence with which the inquiry is treating 18 certain issues over other issues, and that is 19 very helpful. There are other points made in 20 the closed submissions which I will not 21 discuss, which also demonstrate that there is 22 an approach being taken to weight. 23 On balance, our submission is that the better 24 approach is to grab the bull by the horns now 25 and to reduce down the issues list. That was</p> <p style="text-align: center;">Page 86</p>	<p>1 in the contemporaneous correspondence - I 2 may be misremembering but I do not think 3 that incident appeared in anything except for 4 Mr Pyle's statement. 5 THE COMMISSIONER: Yes, I think he 6 raised it in an email to the Chief Minister at 7 the time. 8 MR WAGNER: If that is right then I stand 9 corrected, but the point is we do not argue for 10 those issues being just erased at all. We 11 propose that what is done is effectively is 12 being done anyway through the choice of 13 oral witnesses, through the limiting and 14 restriction on admissible evidence. 15 THE COMMISSIONER: I am going to 16 focus on what you call the core issues ... 17 MR WAGNER: Yes. 18 THE COMMISSIONER: ... but I cannot 19 exclude the others, it seems to me. 20 MR WAGNER: The language that we use, 21 which is at paragraph 28 of the updated 22 submissions, is: to what extent, if any, did 23 any other factors constitute a reasonable 24 circumstance leading to Mr Ian McGrail 25 ceasing to be Commissioner of Police in June</p> <p style="text-align: center;">Page 88</p>

<p>1 2020 by taking an early retirement, either 2 because they led to a loss of confidence in 3 Mr McGrail or for some other reason, 4 including the airport incident, the assault 5 investigation, the Federation complaints and 6 the Alcaidesa claims. 7 THE COMMISSIONER: That, incidentally, 8 is the weakest one, number 7. 9 MR WAGNER: The Alc ... 10 THE COMMISSIONER: Yes. 11 MR WAGNER: The assault investigation as 12 well seemed to - they just do not really - they 13 are so incidental that they do not feature in 14 the evidence in anything more than a 15 throwaway line. It may be -- 16 THE COMMISSIONER: That is not quite 17 right. One of the senior officers had a 18 discussion with Mr McGrail about the assault 19 on the helicopter pilot. 20 MR WAGNER: Yes, but in terms of the - 21 put it this way: there are really three ways of 22 investigating in my respectful submission the 23 reasons and circumstances that were stated 24 by the Chief Minister and Mr Pyle, and Mr 25 Britto for that matter. The first is a purely</p> <p style="text-align: center;">Page 89</p>	<p>1 given. 2 MR WAGNER: Yes, and the second 3 category would be, given what they knew at 4 the time and what they must have known at 5 the time and what they reasonably knew at 6 the time, were those reasons reasonable, to 7 put it in a non-elegant way? Was it 8 appropriate for those reasons -- 9 THE COMMISSIONER: Yes, I think we 10 can -- 11 MR WAGNER: ... to be used? 12 THE COMMISSIONER: I entirely agree. 13 MR WAGNER: Then the third category, 14 which I submit is the really risky category 15 and in fact is not one which the inquiry 16 should be determining is: purely objectively, 17 were they reasonable? What I mean by that 18 is -- 19 THE COMMISSIONER: Ah, no, you are 20 straying here, I think, possibly into items that 21 were on agenda 8. 22 MR WAGNER: No, I do not intend to and I 23 will not mention those points at all. 24 THE COMMISSIONER: No. 25 MR WAGNER: It is purely, for example --</p> <p style="text-align: center;">Page 91</p>
<p>1 subjective approach, which is to say on a 2 factual basis what were the reasons in the 3 minds of those individuals, and that will be a 4 matter of witness evidence, of documentary 5 evidence, or oral evidence. That seems 6 indisputably something the inquiry has to 7 decide. 8 THE COMMISSIONER: Yes. 9 MR WAGNER: The second category would 10 be part subjective, part objective, which 11 would be: what were the reasons in the minds 12 of the Chief Minister and Mr Pyle, for 13 example, and were they reasonable reasons, 14 if that makes sense. 15 THE COMMISSIONER: And more 16 importantly, were they the true reasons? 17 MR WAGNER: The true reasons in what 18 sense, sir, because were they really the 19 reasons? 20 THE COMMISSIONER: Yes, correct. 21 MR WAGNER: That would be decided in 22 the first category, as in what were the actual 23 reasons in the minds of those witnesses. 24 THE COMMISSIONER: You mean what 25 were the reasons as opposed to the reasons</p> <p style="text-align: center;">Page 90</p>	<p>1 THE COMMISSIONER: But they raise that 2 point in critical form. 3 MR WAGNER: If Mr Pyle says: "I was 4 concerned about rumours about bad practice 5 at the RGP," now, he has had an opportunity 6 in his witness statement to say what those 7 rumours are and he has not said. That does 8 not open the door in my submission for all 9 bad practice or any rumours ... 10 THE COMMISSIONER: This does arise in 11 agenda 8 and I take your point. 12 MR WAGNER: Yes. That in my 13 submission is the risk and that is where, I 14 think, Mr Cruz and I agree ... 15 THE COMMISSIONER: Well -- 16 MR WAGNER: ... is once we are stepping 17 into that -- 18 THE COMMISSIONER: I am alive to the 19 risk that you have identified. 20 MR WAGNER: Yes. In my submission that 21 really should be forbidden territory in one 22 sense, because it is not causative. That is 23 ultimately what the question is: what was 24 causative of the -- 25 THE COMMISSIONER: You cannot be</p> <p style="text-align: center;">Page 92</p>



<p>1 caused to lose confidence by something of  2 which you were unaware at the time.  3 MR WAGNER: Precisely, and that is the far  4 more elegant way of expressing what I was  5 going to express.  6 THE COMMISSIONER: I have had time to  7 think about it, Mr Wagner.  8 MR WAGNER: I am grateful. I have set out  9 the quotation from Beer, which I will not  10 read, about the importance of the issues list.  11 In my submission it is important for two  12 reasons. It is important as an internal  13 document for the inquiry because it is in  14 effect - it describes the funnel.  15 THE COMMISSIONER: Otherwise we lose  16 our way.  17 MR WAGNER: Because otherwise you lose  18 your way, exactly, and all the decisions about  19 what oral evidence to hear, what to restrict,  20 what questions to ask, all of that all comes  21 through that funnel of the issues list. That is  22 the point of the issues list, particularly where  23 the terms of reference of this inquiry are very  24 vague, as in they do not - if you look at the  25 Covid inquiry terms of reference there is a</p> <p style="text-align: center;">Page 93</p>	<p>1 have the background, we have requested it  2 and we know what they mean when they say  3 the airport incident, we know what they  4 mean when they say, to an extent, the  5 helicopter assault pilot incident, but we no  6 longer are going to look at the facts of those  7 incidents at all, except in so far as were  8 known to and were considered by the key  9 players at the time." In my submission that  10 would be a helpful approach internally, it  11 would be a helpful approach externally and  12 the benefit would be that it avoids arguments  13 later, which no doubt will occur, for example  14 in relation to the airport incident, about  15 restriction of evidence, because you could  16 say: "We have restricted the issue list, that is  17 covered by that and we are not going to allow  18 this evidence," which in my submission is on  19 balance a more logical approach than  20 retaining the issue list as it is and the equal  21 prominence of each issue, and then making  22 decisions about that.  23 The only other point I make about the GPF,  24 the Gibraltar Police Federation, evidence is:  25 that issue is actually very carefully</p> <p style="text-align: center;">Page 95</p>
<p>1 three page list of all sorts of very clear issues  2 that are - some quite detailed, granular, or  3 however you want to put it - and then there  4 are separate issues lists as well, whereas here  5 there is effectively a line just saying: "Go  6 investigate what happened." So the issues  7 list is a fundamentally important document,  8 for internal reasons, but then for external  9 reasons for the individuals giving evidence to  10 the inquiry, the CPS and the public it also  11 describes the limits and in effect the duties of  12 the inquiry to investigate. I respect the point  13 that my learned friend made about the  14 reservation which is in, I think it is in 1(b) of  15 the issues list, that says proportionate to the  16 importance of the issue as the Commissioner  17 decides.  18 THE COMMISSIONER: Yes.  19 MR WAGNER: I think that was added, it  20 may have been added after we raised out  21 concerns at the outset. But in my submission  22 and to conclude, now it would be a  23 reasonable time to revisit the issues list,  24 which should not be set in stone, and to say,  25 at least in respect of some issues: "We now</p> <p style="text-align: center;">Page 94</p>	<p>1 circumscribed in the issue list itself, and it is  2 only about complaints made to the GPF.  3 THE COMMISSIONER: That is correct.  4 MR WAGNER: All I say on that is - it is  5 difficult because some of the points that I  6 would like to make are based on - I do not  7 think any particularly contentious or private  8 points of principle are made by CTI in the  9 closed submissions, so I will not raise them,  10 except to say in the generality that we are  11 concerned that the approach that the inquiry  12 is currently taking is in effect to square the  13 circle, to say: "Yes, this issue is very  14 carefully circumscribed in the issue list but  15 because it is useful background we will allow  16 certain of the contentious evidence to be  17 admitted."  18 THE COMMISSIONER: I have the point  19 but I think this is not the time to discuss that,  20 because I think this really is issue 8  21 primarily.  22 MR WAGNER: Yes. Sorry, I did not hear  23 that.  24 THE COMMISSIONER: I think the  25 submissions you have just made are really</p> <p style="text-align: center;">Page 96</p>

<p>1 primarily directed to issue 8 in the agenda.  2 MR WAGNER: To an extent but there is a  3 GPF witness, Mr Morello, who is nothing to  4 do with item 8 and who raises very similar  5 issues. I do not think there is any restriction  6 on that. I will not say what he says ...  7 THE COMMISSIONER: No, correct.  8 MR WAGNER: ... but it raises exactly the  9 same issues, that there is absolutely  10 enormous amount of evidence that Mr  11 Morello has given, including documentary  12 evidence --  13 THE COMMISSIONER: Very little of it is  14 relevant.  15 MR WAGNER: It is very important - all I  16 would conclude in saying is it is very  17 important now in my submission to make  18 absolutely clear what approach is being taken  19 to the GPF evidence because it will dictate  20 the extent to which Mr Cruz, I on behalf of  21 Mr McGrail, Mr Gomez, will need to go  22 through that line by line and respond.  23 THE COMMISSIONER: We will seek to  24 identify what parts of that statement is  25 relevant.</p> <p style="text-align: center;">Page 97</p>	<p>1 THE COMMISSIONER: Is that not in the  2 last point?  3 MR WAGNER: Exactly, and it was included  4 in the issue list.  5 THE COMMISSIONER: It went in as item  6 9 in the issue list.  7 MR WAGNER: Exactly. Mr Pyle's stated  8 intention as to his powers under section 13  9 and consideration of whether it mattered that  10 Sir David Steel was arriving soon. That is  11 not the only consideration in terms of  12 lawfulness, there is also the GPA process as  13 well, but the simple point is: just because a  14 reason should not have been taken into  15 account does not mean that it was not taken  16 into account and certainly does not mean the  17 inquiry could not reach a conclusion on that,  18 or should.  19 THE COMMISSIONER: I agree.  20 MR WAGNER: I am grateful.  21 THE COMMISSIONER: Sir Peter Caruana,  22 I have sort of made the points that you have  23 made in your skeleton because there is no  24 point in my just sitting here listening, giving  25 everyone the impression that I am agreeing</p> <p style="text-align: center;">Page 99</p>
<p>1 MR WAGNER: Yes, and we will be very  2 happy to make submissions on that.  3 THE COMMISSIONER: Yes.  4 MR WAGNER: But you can probably guess  5 what they would be.  6 THE COMMISSIONER: Yes. Okay.  7 MR WAGNER: Yes, and just the point of  8 disagreement I have with Mr Cruz, which he  9 touched upon, is the idea that the statutory  10 scheme in some way circumscribes the ambit  11 of this investigation, and in my submission  12 that would only be correct if you assume that  13 any decision making has to be on a lawful  14 basis for it to be investigated by the inquiry.  15 But in my submission the inquiry remit is  16 wider than that and in fact it may have to  17 grapple with the question of whether the  18 decision making process sits within the  19 statutory scheme in part, in full or not at all.  20 We made a submission in fact I think in  21 relation to the original issue list that there  22 should be consideration - Mr Cruz will not, I  23 do not think, know this - of the extent to  24 which Mr Pyle was entitled, as the interim  25 governor - I may have got that wrong.</p> <p style="text-align: center;">Page 98</p>	<p>1 with them, it is much better if I test what they  2 are saying and I have tested what they are  3 saying with what I understand to be your  4 arguments. But add anything else you think I  5 have missed.  6 SIR PETER CARUANA: I can be very, very  7 brief, sir, I can be very brief. First of all I  8 think I just need to clear, for the record, that  9 the premise of Mr Cruz's submission appears  10 to be mistaken, and that is that he thinks that  11 the government parties want to conduct a  12 thorough review or investigation into all of  13 these issues. I would just point out for the  14 record that the government party submissions  15 are to the contrary, that this inquiry is not  16 about the issues, it is not into or about the  17 issues. That is our inquiry.  18 But to the extent, and indeed we have not  19 identified the issues and it is not for the  20 government parties to decide what the  21 inquiry wants to investigate, but to the extent  22 - and this is my main point and the only one I  23 need to make, I think - to the extent that the  24 inquiry is interested in investigating the  25 reasons and circumstances which led to the</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 loss of confidence, I just do not see how the                  2 inquiry can accede to the request to eliminate                  3 those reasons given from its agenda. It can                  4 restrict them, I agree entirely with what CTI                  5 has said that all these issues are subject to the                  6 chapeau that it is only to the extent that they                  7 are relevant. It is not reasons only, sir, and I                  8 think Mr Cruz's submissions overlooked this,                  9 it is reasons and circumstances. I just do not                  10 see that - you can narrow the issues, as I                  11 think you have already and will when you                  12 consider the evidence, to what is relevant to                  13 the issue under inquiry, but I do not think                  14 you can eliminate the issue altogether to the                  15 extent that they are reasonable, unless, sir,                  16 you take the view that you do not feel that                  17 you need to interest yourself in what Mr Pyle                  18 says he is the man who pulled the trigger that                  19 caused Mr McGrail to opt to retire.                  20 THE COMMISSIONER: Those were the                  21 reasons that were given and I think those are                  22 the reasons that I should investigate. Sorry, I                  23 may have given the impression that I was                  24 about to cut you out. Perhaps you did not                  25 want to say anything? Okay. Yes.</p> <p style="text-align: center;">Page 101</p>	<p>1 careful about drawing the boundaries of this                  2 inquiry on the basis of things which were or                  3 were not said at the time. We have to allow                  4 for the possibility that things were not said at                  5 the time but played a role, things were said at                  6 the time but did not play an important role                  7 and, as Mr Wagner rightly says, just because                  8 the proper way to do things is set out in                  9 statute that does not mean that we can                  10 exclude the possibility that things were not                  11 done as the statute foresees them to be done.                  12 So for all those reasons one cannot simply                  13 look at the statute and just set the boundaries                  14 of the inquiry on the basis of that, nor can                  15 one look at what was said at the time and set                  16 the boundaries based on what was said there.                  17 Issue 6 is dealt with, for example, in                  18 paragraphs 20 and 23 of Mr Pyle's evidence                  19 and there he says that his loss of confidence                  20 was progressive over a period of time and by                  21 reason of a number of incidents and matters,                  22 which he then goes on to explain, and he says                  23 in terms that they began early on after his                  24 arrival in Gibraltar. When he gets to                  25 paragraph 23 he has a heading, and one of</p> <p style="text-align: center;">Page 103</p>
<p>1 MR SANTOS: Yes, just to respond briefly                  2 to some of the points that are made. With                  3 respect to Mr Cruz, I do think he is straying                  4 into substantive submissions. Without                  5 wishing to pre-empt judgment on relevance,                  6 for example, there are ways that historic                  7 evidence can be relevant. If it transpires, for                  8 example, that Mr Pyle opposed the                  9 appointment or that matters happened in the                  10 past that had a cumulative impact on his                  11 thinking in the present, that is not something                  12 that we can simply close off.                  13 THE COMMISSIONER: That is what he                  14 says, is it not?                  15 MR SANTOS: Yes. The exchange in my                  16 submission between Mr Cruz and Mr                  17 Wagner demonstrates that difficulty that                  18 narrowing the issues at this stage presents.                  19 Some participants, it is clear, are going to say                  20 that the issues not raised at the time - sorry,                  21 some participants are going to say that the                  22 issues raised at the time cannot be the real                  23 reason, and some participants are going to                  24 say that issues not raised at the time were the                  25 real reason, which is why we need to be very</p> <p style="text-align: center;">Page 102</p>	<p>1 the matters he refers to is the fractured                  2 relationship with the Gibraltar Police                  3 Federation. He refers specifically to                  4 complaints made to the GPA but he does                  5 make wider statements as to Mr McGrail's                  6 management style and the hostile relationship                  7 between him and the Gibraltar Police                  8 Federation.                  9 In my submission, although the inquiry is                  10 entitled to give more importance and more                  11 attention to matters which appear to have                  12 featured more prominently in the decision                  13 making process, what we cannot do is simply                  14 foreclose consideration of matters which                  15 have been raised by the statutory participants,                  16 and that is what we have done.                  17 THE COMMISSIONER: All Mr Cruz's                  18 points go to weight.                  19 MR SANTOS: Precisely, precisely, and the                  20 weight of each issue is under active                  21 consideration. That is why we raised issues 2                  22 and I believe 7, because, for example, the                  23 Alcaidesa claims, the only reason they found                  24 their way into the issues was because of one                  25 reference in one WhatsApp message, and if</p> <p style="text-align: center;">Page 104</p>

<p>1 that is the totality of the evidence we have 2 thus far, even leaving that issue within 3 consideration -- 4 THE COMMISSIONER: Not going to take 5 very long. 6 MR SANTOS: It is not - precisely, 7 precisely, that does not mean that it is going 8 to take a huge amount of attention. What I 9 should add is that perhaps I was at fault by 10 not dealing with the agreement of facts 11 together with this, because I think that the 12 agreement of facts has a very important role 13 to play in this proceeding. 14 THE COMMISSIONER: I am hoping that 15 many of the facts ... 16 MR SANTOS: Precisely. 17 THE COMMISSIONER: ... of these historic 18 incidents can be agreed. What inferences we 19 draw obviously will not be agreed, and I am 20 certainly not expecting anyone to agree that 21 there was fault. 22 MR SANTOS: No. 23 THE COMMISSIONER: But the facts 24 probably can be agreed. 25 MR SANTOS: Correct, correct. We are</p> <p style="text-align: center;">Page 105</p>	<p>1 been unusual circumstances, but as a general 2 practice it is not a good idea. 3 MR SANTOS: On the airport incident, I 4 think it is right to say that the Chief Minister 5 did refer to the airport incident at the time in 6 a WhatsApp message as well, so there is a 7 basis for at least inquiring into whether that 8 played a role. 9 THE COMMISSIONER: Subject to all the 10 points ... 11 MR SANTOS: Of course. 12 THE COMMISSIONER: ... that Mr Cruz 13 makes about the merits of it. 14 MR SANTOS: Of course. 15 THE COMMISSIONER: Like sitting on the 16 Appointments Commission. I have got the 17 point. 18 MR SANTOS: Sir, that is what I propose to 19 say in response and if I may turn to 20 agreements of fact. We have canvassed in 21 our submissions the benefits of the core 22 participants working collaboratively to seek 23 to agree as many facts as possible in advance 24 of the inquiry hearing, and it seems to the 25 inquiry team, on the basis of the evidence</p> <p style="text-align: center;">Page 107</p>
<p>1 willing to listen to any suggestions for 2 refinements to the list of issues. That is not 3 to say we are not - and if any party wishes to 4 make further submissions, we are prepared to 5 take that into account. Yes, I am going to 6 address the agreement of facts separately. 7 THE COMMISSIONER: Yes. 8 MR SANTOS: But just two other very small 9 points. On the skeleton received last night 10 Mr Wagner, without seeking to criticise and 11 it may have been with good intentions - if 12 everybody takes the approach of filing 13 updated submissions the night before a 14 hearing we would be inundated with 15 submissions and I would seek to politely 16 discourage that practice in future. 17 THE COMMISSIONER: The Court of 18 Appeal, in which I once sat, does not read 19 such (inaudible). 20 MR SANTOS: I appreciate they were done 21 in the right spirit ... 22 THE COMMISSIONER: Yes, so do I. 23 MR SANTOS: ... but I would discourage 24 that in the future. 25 THE COMMISSIONER: There may have</p> <p style="text-align: center;">Page 106</p>	<p>1 that we have seen so far, that many of the 2 underlying facts, in fact most of the 3 underlying facts under inquiry are in fact 4 uncontroversial, and so significant time and 5 cost could be saved if these could be agreed 6 in advance of the hearing. Most importantly, 7 this will free up time at the main inquiry 8 hearing so that questioning can focus on 9 genuine factual disputes. 10 No core participants object in principle, I 11 believe, to this process but some have raised 12 concerns about the timing and mechanics of 13 this process. In our submissions we propose 14 that participants should engage in this 15 process by correspondence but we are 16 sympathetic to submissions that this could 17 lead to unwieldy, multilateral correspondence 18 between all of the core participants. 19 However, we strongly believe that the 20 process of core participants will be a 21 productive one and allow issues to be 22 narrowed down, so while we are willing to 23 participate and guide the process along, we 24 believe that it should be a process led in the 25 first instance by the core participants.</p> <p style="text-align: center;">Page 108</p>

27 (Pages 105 to 108)

<p>1 So, having thought about it since we received 2 submissions, we would propose the 3 following procedure - and I do not suggest 4 that this be set out in stone immediately, but I 5 would ask for everyone to consider it during 6 the course of today so that we can start it off 7 as quickly as possible - and by way of 8 indication, what we would suggest is 9 something along the following lines: by the 10 3rd of August, for each issue, a designated 11 core participant will produce a first draft of 12 agreed facts for that issue and circulate this 13 to other core participants, copying in the 14 inquiry. 14 days later, so by the 17th of 15 August, each core participant should produce 16 a marked up version of that document, 17 proposing any amendments and this should 18 be sent to the inquiry team. The inquiry team 19 will then review these marked up versions 20 and seek to produce an agreed document and, 21 by the 31st of August, the inquiry team will 22 circulate a final draft, so that the core 23 participants can submit any final comments 24 on that final draft. As to who should prepare 25 the first draft list of facts, we are content for</p> <p style="text-align: center;">Page 109</p>	<p>1 mean, this exercise is not going to succeed 2 unless we start off with a draft, and if you 3 can start off with a draft that would be 4 extremely helpful. 5 MR SANTOS: I agree, and the procedure 6 that I have suggested allows everybody to 7 have a say. 8 THE COMMISSIONER: Yes. 9 MR SANTOS: And it does not foreclose 10 anyone from saying anything, but I really 11 think that a lot of these facts can be agreed. 12 THE COMMISSIONER: I think at some 13 stage in one of your skeleton arguments - not, 14 I think, the 50 page one, or was it 40 pages? - 15 you did encourage me to say something to 16 encourage people to agree facts. 17 MR SANTOS: Yes. 18 THE COMMISSIONER: It seems to me 19 that, on a proper analysis, the actual area of 20 disputed facts is quite small, and there is a 21 great deal here that can be agreed and no 22 party will lose out by coming to an 23 agreement. 24 MR WAGNER: I agree, and also I saw Mr 25 Caruana raise an eyebrow when I made that</p> <p style="text-align: center;">Page 111</p>
<p>1 one CP to prepare all first drafts in this 2 process if a CP is willing to take on that role, 3 or alternatively we are content for CPs to 4 divide the issues among themselves. For 5 example, the CPs taking two issues each. 6 Failing agreement on those, by, say, 10 a.m. 7 tomorrow, we are willing to divide the issues 8 among the CPs, but we do feel strongly that 9 this is something that the core participants 10 should engage in, and that we are willing to 11 help with. 12 MR WAGNER: I was just rising to say that 13 we would be happy to provide a first draft on 14 all the issues. 15 THE COMMISSIONER: On all the issues? 16 MR WAGNER: If that is helpful. We were 17 intending to do it before this hearing anyway 18 but time prevented us doing it. 19 THE COMMISSIONER: Well, no-one is 20 going to refuse. That is extremely kind. 21 MR WAGNER: Yes. 22 MR SANTOS: I am grateful for that 23 indication. I certainly have absolutely no 24 issue with that. 25 THE COMMISSIONER: Yes, because, I</p> <p style="text-align: center;">Page 110</p>	<p>1 suggestion - he may have been raising an 2 eyebrow about something else - but I can 3 confirm that the first draft will not be a 4 hammer and tongs, "This is McGrail's case 5 ..." 6 THE COMMISSIONER: No. 7 MR WAGNER: We will try to do it in a way 8 which is not going to lead to ... 9 THE COMMISSIONER: It should be done 10 in neutral terms. 11 MR WAGNER: No, we will aim to do it in 12 neutral terms, we really will. 13 THE COMMISSIONER: I am not disputing 14 that for a moment. 15 SIR PETER CARUANA: The eyebrow, 16 since he has observed, is that, of course, we 17 have had a version of their attempted agreed 18 list of issues, I think back in November last 19 year, in the form of a letter ... 20 THE COMMISSIONER: Yes, agreed facts 21 is not a suitable vehicle for argument. 22 SIR PETER CARUANA: Exactly. 23 THE COMMISSIONER: And Mr Wagner 24 knows that perfectly well and I am sure he ... 25 SIR PETER CARUANA: Exactly, and the</p> <p style="text-align: center;">Page 112</p>

<p>1 only other sort of thing that I would say is 2 that, of course, there cannot be any 3 draughtsman's licence; in other words, the 4 onus is not on the recipients of the list to 5 make a case for inclusion of exclusion: 6 everyone has the same status in the creation 7 of the list. 8 THE COMMISSIONER: Correct, but you 9 have to start off with something or else ... 10 SIR PETER CARUANA: Indeed, sir, yes. 11 MR NEISH: Sir, may I suggest ... 12 THE COMMISSIONER: Again, sensibly, 13 you are speaking to me rather than the 14 microphone, which I do the whole time - 15 sorry, come again? 16 MR NEISH: I would suggest that at the end 17 of the process of trying to agree facts, if there 18 are facts which are incapable of being 19 agreed, that we also draw up a list of those 20 facts which are not agreed, and that, I think, 21 will help the inquiry focus on the factual 22 issues. 23 THE COMMISSIONER: I agree. I think 24 what might be possible to draw up is a 25 chronology in respect of which some points</p> <p style="text-align: center;">Page 113</p>	<p>1 that they have agreed to recast the 2 application, to focus the application, and we 3 are content with the timeline proposed. 4 THE COMMISSIONER: Then this is 5 probably a dangerous and unwise question, 6 but does anyone have anything to say about 7 anything else? 8 MR CRUZ: Sir, I have something to say 9 about that. I think the proposal in counsel's 10 submission is that, once all the disclosure is 11 complete, that is when the applications will 12 be made. It seems that Sir Peter's live 13 outside of that because it has been there 14 before. Now, from the RGP's perspective, 15 we look at the protocol and we look at 16 section 25, and it is certainly the case that it 17 is likely that we will be making quite a lot of 18 applications, depending on how the issues, 19 the agreed list and all of that, is constrained, 20 the evidence we need to file. So, what I 21 would just put in as a reservation is that, as 22 we understand the submissions that have 23 been made, it is expected that, after the 28th 24 of August deadline, there will be written 25 applications for restricted orders in relation</p> <p style="text-align: center;">Page 115</p>
<p>1 are agreed and some are not. 2 MR SANTOS: Yes, and I should add that it 3 would be extremely helpful to have that 4 because then the inquiry can also give an 5 indication as to the disagreed facts that it 6 proposed to look into and the ones that we 7 certainly do not propose to look into, because 8 there are going to be many which we will not 9 propose looking into. That is why, I think, 10 that I was at fault in not proposing this 11 process before allowing everyone to have a 12 say in relation to what we discussed earlier, 13 because I think that this will inform the 14 approach to those issues very substantially. 15 THE COMMISSIONER: And then we can 16 move on to ... 17 MR SANTOS: Unless anyone has anything 18 else to say, then, yes, there is the application 19 for restriction orders ... 20 THE COMMISSIONER: Yes, but that is 21 more or less sorted out, is it not, because you 22 are going to give a more detailed 23 submission? 24 MR SANTOS: Yes, I do not propose to say 25 anything further. In that case, we are pleased</p> <p style="text-align: center;">Page 114</p>	<p>1 to those things which are considered by core 2 participants to be important. Now, it may 3 well be that Mr Caruana, on behalf of the 4 Government of Gibraltar, captures the issues 5 that concern the RGP, but they are not 6 exactly the same, so issues, for example, 7 under the policy that touch on ... 8 THE COMMISSIONER: They are certainly 9 not the same. 10 MR CRUZ: They are not the same. So, it 11 may be that he captures some but others are 12 not captured. 13 THE COMMISSIONER: Yes. 14 MR CRUZ: But there is no point in us, we 15 suggest, which is why we go to the original 16 timescale suggested by counsel, which is 17 immediately after the end of the evidence 18 process, the 28th of August, there is no point 19 in us making applications about numerous 20 documents and operations on the incident at 21 sea and numerous other applications if at the 22 end of the day the view is that, actually, a lot 23 of the detailed information is actually not 24 even going to feature. Because, if we start 25 having to make these applications, they are</p> <p style="text-align: center;">Page 116</p>

<p>1 going to be substantial and weighty 2 applications. 3 THE COMMISSIONER: You are 4 suggesting that the process should be 5 inclusive in the first place rather than 6 exclusive? 7 MR CRUZ: And, indeed, I am just flagging 8 the timing. Counsel for the inquiry in his 9 open submissions said that this will happen at 10 the end of the disclosure process, on the 28th 11 of August. We are working to that. As far as 12 we are concerned, we are not making an 13 application before then. To the extent that 14 Sir Peter makes his application, if that is 15 ventilated or we know about it and it captures 16 some things, great, but we will also know 17 what evidence is going to be admitted. So, 18 our application will shrink substantially if 19 the, dare I say, issues and the detail behind 20 those issues also shrinks. 21 THE COMMISSIONER: Yes, exactly. I 22 think the second point has more foundation. 23 MR CRUZ: Yes. So, sir, I am just flagging 24 it just so that we do not find ourselves 25 surprised, because I am working on that</p> <p style="text-align: center;">Page 117</p>	<p>1 website, and you have other grounds of 2 objections on police methodology, and that 3 kind of objection. 4 MR CRUZ: Indeed, sir, and, yes, it is not 5 just limited to relevant evidence; if there is 6 relevant evidence that were to touch on areas 7 that are considered sensitive ... 8 THE COMMISSIONER: Yes, I understand 9 that. 10 MR CRUZ: ... we would be making an 11 application and so on. 12 THE COMMISSIONER: Yes, you have two 13 points; one is relevance and admissibility, 14 and the other is some other area of sensitivity 15 or confidentiality. 16 MR CRUZ: Yes, and all I am flagging is that 17 I have read my learned friend's submissions 18 on the timing of that, to be one that needs to 19 be decided on written submissions after the 20 28th of August. That is how I read his ... 21 MR SANTOS: That is not my submissions. 22 I would clarify that immediately. Anything 23 that we are being provided with - what I 24 would suggest is that we start working on 25 these applications the moment the disclosure</p> <p style="text-align: center;">Page 119</p>
<p>1 timescale of after the 28th of August to make 2 our applications, which is when we will 3 know exactly what is going in. 4 MR SANTOS: I am a bit concerned by that 5 because I fear that that is going to lead to an 6 application being dealt with, you know, at the 7 beginning of the hearing, which is what we 8 are seeking to avoid. I think the proposal 9 that we had made was that any further 10 application - the Government's proposal was 11 that any application should be made by the 12 11th of August. I think that, if we - I mean, 13 one thing is agreeing facts and another thing 14 is admissibility of evidence, and just because 15 you agree a fact does not mean the evidence 16 that goes to that fact becomes inadmissible or 17 will not go up on the inquiry website. So, I 18 think that it is probably best for us to engage 19 to make sure that we are not left dealing with 20 a very sizeable application in mid- 21 September, because I think that is exactly 22 what we want to avoid. 23 THE COMMISSIONER: But the principle 24 that you are seeking for is clear, that only 25 admissible evidence should go up on the</p> <p style="text-align: center;">Page 118</p>	<p>1 is given, because otherwise we are going to 2 be really up against it on this, and I 3 sympathise with the RGP because it is the 4 one that is going to have, this issue is 5 probably going to arise most for and in 6 respect of most documents, but I think that 7 we should start that process immediately. 8 THE COMMISSIONER: But there are other 9 - for example, the statements of the three 10 defendants ... 11 MR SANTOS: Those have already been 12 circulated. 13 THE COMMISSIONER: I know, yes, but 14 we need to focus on what parts of those are 15 admissible. 16 MR SANTOS: Yes. 17 THE COMMISSIONER: Relevant and 18 admissible. 19 MR SANTOS: No, that is a different 20 question, but my point is as to any 21 applications for redactions on the basis of, 22 for example, public interest and operational 23 matters, etc., etc., which I recognised from 24 the outset may require redactions to be done 25 before matters are put on the inquiry website.</p> <p style="text-align: center;">Page 120</p>

<p>1 I think that should start in earnest now, I do 2 not think that we can leave that until the end 3 of August. 4 MR CRUZ: With all due respect to my 5 learned friend, I mean, at paragraph 45 of his 6 open submission, we understood this to 7 mean: no such applications, making 8 reference to applications to withhold 9 documents, for example, and in respect of 10 disclosure, circulated thus far - that the 11 disclosure process remains open and 12 ongoing, and the deadline for final 13 responsive witness statements is the 28th of 14 August. "These arguments should take place 15 after that date, although any application in 16 respect of disclosure which has already been 17 provided by the inquiry should be made well 18 in advance of that date." I understand what 19 he now means by that, but, clearly, the point 20 that we make is that, as the issues narrow, if 21 they narrow, or as the matters that we have 22 been discussing today suddenly, you know, 23 allow us to focus, we will know the extent of, 24 for example, Operation Delhi, and all the 25 details are going to be put into the inquiry. If</p> <p style="text-align: center;">Page 121</p>	<p>1 many documents that give rise to that kind of 2 objection, are there? I may be wrong. 3 MR CRUZ: I think, sir, it all depends a little 4 bit on the constraints that are put. In other 5 words, if, for example - and I think you have 6 indicated that it is not the case - but if, for 7 example, you know, on issue 5, the first 8 paragraph of that, which had the handling by 9 the RGP of Operation Delhi, if that brings 10 about detailed consideration of the search 11 warrant, the application for the search 12 warrant, the evidence behind the search 13 warrant and all of the rest, which we say 14 should not be part of this, but if that requires 15 that, our evidence ... 16 THE COMMISSIONER: The application for 17 the search warrant was plainly relevant. 18 MR CRUZ: Well, it then means that 19 everything that goes behind it is a lot of 20 documents, and all of that is very likely to be 21 subject to an application by us. 22 THE COMMISSIONER: I think what is 23 likely to be relevant not so much is what was 24 known, but what was disclosed. 25 MR CRUZ: Well, the interaction - and I do</p> <p style="text-align: center;">Page 123</p>
<p>1 at the end of the day out of, just to use an 2 example, a hundred documents, we have got 3 three, we might make an application in 4 relation to those three. We do not know 5 where that sits at the moment and, therefore, 6 we cannot make that application. If we make 7 an application, it is going to be a machine 8 gun approach to almost everything if we 9 make it now. I do not think that the process 10 of agreeing lists of facts is going to result in 11 exclusion of reams of evidence. I do not 12 think that we should be proceeding on that 13 understanding. That is what I am saying, and 14 also I think that most of the RGP's concerns - 15 I am obviously not seeking to speak for them 16 - is going to be in relation to documents that 17 they are providing to the inquiry, and if they 18 have concerns about operational matters and 19 public interest matters, that I well understand 20 may arise from those documents, I would 21 suggest that those be flagged right from the 22 outset and not - and there is no need for 23 anybody to wait until the 28th of August to 24 commence that process. 25 THE COMMISSIONER: There are not</p> <p style="text-align: center;">Page 122</p>	<p>1 not think I say anything I should not at this 2 stage - the interaction between the then 3 Commissioner and the relevant core 4 participants is the relevant issue. The 5 underlying investigation is not, but if we are 6 going into the detail of that underlying 7 investigation, then there will be, by its 8 nature, an application by the RGP, and we 9 would have thought the Government parties 10 because - and, therefore, unless 11 circumstances have changed, we expect that 12 issue of both policing and public interest and 13 national security remain extant. That is an 14 example. On the operation at sea, there may 15 be a different issue, but my point was, if we 16 understood what is going to be considered 17 and if the message is all of that is going to be 18 considered, then, of course, we can start 19 making the application now. It will be a very 20 wide application. If, actually, the issue is 21 really whether or not the Commissioner had a 22 type of conversation and which conversation, 23 in a meeting, and therefore what underpins 24 that conversation, the details of Operation 25 Delhi are not going to be considered, then, of</p> <p style="text-align: center;">Page 124</p>



<p>1 course, we do not need to make these 2 applications because the evidence is simply 3 not going to be there. So, that is the point 4 that I am flagging now. 5 THE COMMISSIONER: Obviously, if there 6 were a conversation or conversations 7 involving the Commissioner of Police, those 8 are highly relevant to the application for the 9 search warrant. If there were such 10 conversations - none were actually 11 mentioned in the application, and that is, 12 plainly, quite an important point. 13 MR CRUZ: Yes, I understand. I am just, I 14 guess, trying to - the reason I stood up is 15 because I understood the timescale to be one 16 which suited us, you know, because we 17 would then see what really was going to be 18 considered. 19 THE COMMISSIONER: I think the answer 20 is that I will leave you to sort this out 21 between you, and I think it can be sorted. 22 MR CRUZ: We will, and in light of the sort 23 of developments, it is then incumbent on us 24 to make an application perhaps earlier. 25 THE COMMISSIONER: If you cannot</p> <p style="text-align: center;">Page 125</p>	<p>1 me, what are you referring to now? 2 SIR PETER CARUANA: To this whole - 3 paragraph 11 of my written submissions. 4 THE COMMISSIONER: Paragraph 11.1? 5 SIR PETER CARUANA: 11.1. 6 THE COMMISSIONER: Yes. 7 SIR PETER CARUANA: And the reason 8 why we subjected that to a very short 9 timetable is in recognition that we have really 10 been tardy; we were invited by the inquiry to 11 do this some time last year. So, I think the 12 onus is on us to do this quickly. But I think it 13 is also right, sir, to say that the Government 14 was there very much - the large share of that, 15 the largest part of that application relates to 16 things that the Government, points that the 17 Government took in a broader brief of the 18 public interest, at a time that the RGP was 19 not a party and was not a core participant, 20 and, actually, many of the issues, the bulk of 21 the issues in my application relate to RGP 22 type security issues. In fact, now that they 23 are parties, they are much better judges than 24 we about the extent to which they are 25 worried, for example - the largest redaction</p> <p style="text-align: center;">Page 127</p>
<p>1 come to an agreement, then I will have to 2 resolve it, but I expect you can. 3 MR CRUZ: Thank you, sir. 4 SIR PETER CARUANA: Sir, on the basis of 5 what you have just said, presumably you do 6 not want to hear contributions from anybody 7 else about this? 8 THE COMMISSIONER: Yes, sure. 9 SIR PETER CARUANA: Well, it just seems 10 to me, sir, at paragraph 11 of my written 11 submissions, you will see our proposal to try 12 and narrow the concerns expressed by CTI 13 and by Mr Cruz. As to a timetable for this, 14 first of all, I think it is right to say that my 15 learned friend, Mr Santos, is plainly right 16 when he says that redaction is not about 17 issues, it is about documents, and nothing in 18 the procedure suggests that documents are 19 going to fall out of the reckoning before the 20 start of the oral hearing. So, I think the 21 moment that Mr Cruz seeks is not actually 22 ever going to happen. So, in paragraph 1, I 23 offered to comply with my modified 24 application by next Friday ... 25 THE COMMISSIONER: Sorry, just forgive</p> <p style="text-align: center;">Page 126</p>	<p>1 that we sought was one of the appendices to 2 the previous Commissioner McGrail's section 3 15 of the Police Act report to the Chief 4 Minister, which discloses all manner of 5 names and ranks of police officers, of police 6 training methods, the training that policemen 7 have ... 8 THE COMMISSIONER: Yes, and 9 operational procedures. 10 SIR PETER CARUANA: Operational 11 procedures. Now, there are two ways of 12 doing this. Either, now that the RGP is a 13 party, I reduce my own application to things 14 that the RGP, who are now able to do it, 15 cannot do because they are not RGP issues, 16 or we defer mine for a few more days and I 17 try to agree a joint application with the RGP. 18 The Government has no wider or narrower 19 security concerns than the RGP. They are 20 primarily responsible for security in the first 21 instance, and the Government are not in the 22 first instance. So, that might be a way to 23 proceed. The other thing that we suggested 24 was that, in respect - and I think this is really 25 what the CTI's concern is - is that, in relation</p> <p style="text-align: center;">Page 128</p>

<p>1 to disclosures that we have already all 2 received, we should make any redaction 3 applications by the 11th of August, and (iii) 4 there, sir, is my suggestion in respect of 5 disclosures not yet received. In other words, 6 when the STI circulates them, they indicate a 7 reasonable period, by reference to the volume 8 of the disclosure, a reasonable period after 9 disclosure for the making of redaction 10 submissions. That means that there will not 11 be a sort of train crash at the end of 12 accumulated submissions that might easily 13 have been made sooner. 14 THE COMMISSIONER: Yes, that is a good 15 idea. 16 MR WAGNER: I just rise to raise one issue 17 about Op Delhi, and I just want to clarify 18 what Mr McGrail's position is on that, and 19 the relevance, and I am not going to go into 20 chapter and verse at all, but just in relation to 21 the issues list: so, we agreed in our 22 submission that the RGP's handling overall 23 of Op Delhi is outside of the issues because it 24 has never been suggested by Mr McGrail, 25 and it was never suggested by the Chief</p> <p style="text-align: center;">Page 129</p>	<p>1 in my submission, and it has to be dealt with: 2 if there was any inappropriate pressure, then 3 why was there inappropriate pressure? What 4 were the motivations? And the way that Mr 5 McGrail has always expressed it is that there 6 are reasons why - I will not go into the 7 reasons - why pressure was being applied by 8 the people it was being applied by, and 9 particularly the Chief Minister, because of 10 various elements of the Op Delhi 11 investigation and the involvement of him 12 particularly. 13 THE COMMISSIONER: The discussions, if 14 there were any discussions, between Mr 15 McGrail and the Attorney and the DPP are 16 obviously relevant. 17 MR WAGNER: The discussions are but the 18 background to the Op Delhi investigation has 19 to be considered, otherwise those discussions 20 will be in a vacuum, effectively. So, in my 21 submission, with all respect to Mr Cruz, it is 22 likely that there will have to be consideration 23 of certain documents from within Op Delhi, 24 but also it is the point that we raised - I think 25 Mr Caruana raised it in the first preliminary</p> <p style="text-align: center;">Page 131</p>
<p>1 Minister or Mr Pyle, that there was a 2 criticism overall of the handling of Op Delhi 3 that led to his leaving his post. So, we say 4 that chapter and verse analysis of the whole 5 Operation is well outside of what is required. 6 However, the way Mr Cruz has described it, 7 you know, on his feet, that it really is about 8 the conversations, does not reflect what Mr 9 McGrail's position has been, and in fact it 10 does not reflect the issues list because there 11 is also 5.3: "Did the Attorney General and/or 12 the Chief Minister place any or any 13 inappropriate pressure on Mr McGrail 14 regarding the investigation or otherwise 15 interfere with the investigation and, in 16 particular, the decision to execute the search 17 warrants?" Now, that issue, in my 18 submission, does require some analysis or 19 some consideration of the investigation as it 20 went, and particularly - and you will know 21 the points, Commissioner - the issues raised 22 by Mr McGrail in his statement about the 23 final few months while he was in post and 24 conversations he had with the Attorney 25 General. And it also raises, by implication,</p> <p style="text-align: center;">Page 130</p>	<p>1 hearing: the decision to discontinue, because 2 the reasons for the decision to discontinue 3 may be relevant to those reasons. 4 THE COMMISSIONER: That is a separate 5 issue, but I will come to that. 6 MR WAGNER: It is a separate issue, but I 7 am just pointing out that, if there are going to 8 be applications for redaction, they are going 9 to have to be quite extensive, in my 10 submission, because those documents will 11 need to be considered, otherwise the 12 background will seem - it will seem as if 13 conversations, and if there was pressure, then 14 pressure, arose from, you know, from 15 nowhere. 16 THE COMMISSIONER: Well, the 17 conversations obviously did not arise in the 18 abstract and they have to be seen in the 19 context. 20 MR WAGNER: Exactly, and that will 21 require some consideration of the 22 documentation, in my submission. 23 THE COMMISSIONER: Limited, I think - 24 sorry ... 25 MR CRUZ: I feed off my learned friends</p> <p style="text-align: center;">Page 132</p>

<p>1 and hope we can work together on this. I 2 certainly cannot meet the timescale that Mr 3 Caruana has identified. I have not had this 4 matter on my table since September or 5 whenever it was last year. So, we have only 6 seen the evidence in the last sort of three 7 weeks, and the last of it only a day or so ago. 8 So, it is going to take us time to really go 9 through the evidence and produce the 10 application that we need to produce. It is not 11 going to be by that date in July. You know, 12 if we are ambitious and we can do it by the 13 middle of August, that will be realistic. So, 14 what I would say is, you know, I am very 15 happy with Mr Caruana, I am very happy to 16 see where certain things overlap, I can see 17 that there are certain matters that would 18 overlap; you know, the Attorney General's 19 interest in some respects, the police interest 20 in some respects. So, there might be areas 21 that overlap, and I am certainly happy to 22 work with the counsel to the inquiry in 23 relation to that. So, your message, "Leave it 24 to you guys to work out", I think is 25 something which I sort of very much take on</p> <p style="text-align: center;">Page 133</p>	<p>1 that are non-RGP? 2 MR SANTOS: I think that is a sensible 3 suggestion. In terms of the final deadline, I 4 think that the suggestion made by Mr 5 Caruana, KC is a very sensible one. What I 6 would say is that the starting point is the 7 documents policy, which says that 14 days 8 from disclosure is when applications should 9 be made. So, the default position would be 10 14 days, but, obviously, if it is only a small 11 amount, then maybe we might try and 12 shorten that. If it is a very large amount, we 13 might increase that, but I would just point 14 that out. I do not propose to say anything 15 beyond that, and that is the last item on the 16 agenda to be dealt with today. 17 MR CRUZ: Whilst my learned friend, Mr 18 Caruana, said, "Look, the restriction of issues 19 does not restrict documents", I perhaps do 20 not accept that. If, sir, after due 21 consideration of submissions made today you 22 go, "Look, I think this issue is out", then, of 23 course, documents related to that issue 24 simply go away. So, an early indication, and 25 it might be - I hope it is not going to be as</p> <p style="text-align: center;">Page 135</p>
<p>1 board and will work hard to that. 2 THE COMMISSIONER: If not in those 3 terms. 4 MR CRUZ: You put it in far more eloquent 5 terms. I am just not so eloquent. 6 THE COMMISSIONER: I have got the 7 point. 8 MR CRUZ: I endorse what he said and I 9 think that we should agree timelines that are 10 workable for all concerned. Obviously, you 11 know, if we can agree on a deadline that is 12 workable, but we want to avoid the train 13 crash in a place that does not have any trains. 14 What I would add is that there may be logic 15 to a joint application because the Governor 16 ultimately does have residual overall 17 responsibility for similar issues, but, I mean, 18 that is a matter for the parties to consider. 19 SIR PETER CARUANA: I wonder if a 20 compromise way forward would be to release 21 me from my agreement for next Friday and 22 push this to the 14th of August, by which 23 time I might have been able to drop out of 24 much of my application in favour of the RGP 25 and limit my own application just to issues</p> <p style="text-align: center;">Page 134</p>	<p>1 quick as in a moment's time - but an early 2 indication of your views on our submissions 3 with regards to those issues might also 4 constrain it, because they might be matters 5 that we immediately can go, "Well, there's no 6 application on redaction of that matter 7 because that matter is no longer in the game." 8 So, that would be helpful. 9 THE COMMISSIONER: I can give my 10 decision now and I will give reasons later. I 11 am not going to amend the issues at this 12 stage. 13 MR CRUZ: Understood. That leaves it 14 wide. Thank you, sir. 15 THE COMMISSIONER: But there is, I 16 think, another issue that we ought to raise. 17 Mr Wagner and Mr Cruz politely danced 18 around it, and that is the issue of the nolle. I 19 am obviously going to have to make a ruling 20 on this at some stage. What I would suggest 21 is that we formulate a question that needs to 22 be argued, and then I will make a ruling, 23 which can be questioned or challenged 24 elsewhere if the need arises. 25 MR SANTOS: I think the best thing to do,</p> <p style="text-align: center;">Page 136</p>

<p>1 and what we were discussing this morning 2 was perhaps that write to the parties in the 3 next 24 hours or 48 hours, setting out a 4 procedure where we think it would fairly ... 5 THE COMMISSIONER: I will cause a 6 possible formulation of the questions to be 7 circulated and, when we have agreed what 8 the questions are, I will invite arguments on 9 it and the matter will require a ruling. 10 Because, essentially, and put very crudely, 11 Mr McGrail and perhaps others want to know 12 why the nolle was issued and, no doubt for 13 sound reasons, the Government are going to 14 resist answering the question, and, indeed, 15 you are probably going to say that there is no 16 right to ask the question, but that needs to be 17 sorted out. 18 SIR PETER CARUANA: Sir, the position of 19 the Attorney General is that he will not, 20 unless ordered by a court of final recourse to 21 do so, he will not disclose publicly the 22 reasons why he entered the nolle - for 23 reasons that he has explained publicly 24 already, and that is that it would defeat the 25 reasons for entering into the nolle. And my</p> <p style="text-align: center;">Page 137</p>	<p>1 no, that is correct. 2 MR SANTOS: And the submissions will not 3 require going into those reasons. It is more 4 points of principle. 5 THE COMMISSIONER: No, correct. I 6 know this is a concern to you. You can have 7 your say on the draft. Is there anything else 8 we can do? 9 MR SANTOS: Not on my list. 10 THE COMMISSIONER: Since I have said 11 that really - well, I have withdrawn items 8 12 and 9 from the agenda, that really is the end 13 of it. 14 MR SANTOS: Core participants will hear 15 from us on items 8 and 9. They're not 16 disappearing. 17 THE COMMISSIONER: Correct. I invite 18 people to stay around, hang about, as Mr 19 Cruz would probably say, as I will, and any 20 informal progress that can be made I would 21 encourage. Thank you very much. 22 (12.43) 23 (The hearing adjourned) 24 25</p> <p style="text-align: center;">Page 139</p>
<p>1 concern, therefore, is that, if there is an 2 argument to be had, as the Chair has just 3 suggested, that argument cannot itself require 4 me to touch on the reasons. 5 THE COMMISSIONER: Of course not. I 6 entirely - I mean, I apprehend that the 7 Attorney General may well say that he is 8 entitled, and possibly required by law, not to 9 address the question. 10 SIR PETER CARUANA: Thank you, sir. 11 Subject to that clarification, whatever you 12 direct. 13 THE COMMISSIONER: And I am going to 14 have to decide whether that is a tenable 15 position or not. But I have attempted to 16 formulate what seemed to me to be the 17 relevant questions on which we can change - 18 it is no good if we do not agree what we are 19 arguing about. 20 MR SANTOS: But I am happy to clarify that 21 one of those questions will not be, "What 22 were the reasons?", and submissions will not 23 require ... 24 THE COMMISSIONER: One of those 25 questions is not, "What were the reasons?" -</p> <p style="text-align: center;">Page 138</p>	

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