

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

OPEN SUBMISSIONS BY COUNSEL TO THE INQUIRY **FOR THE FOURTH PRELIMINARY HEARING ON 19 JULY 2023**

Introduction

1. These are submissions by Counsel to the Inquiry ('**CTI**') in advance of the Fourth Preliminary Hearing ('**PH4**') on 19 July 2023. The Main Inquiry Hearing is listed to commence on 26 September 2023, with a time estimate of four weeks ending on 20 October 2023, and a further reserve week (if required).
2. The Third Preliminary Hearing ('**PH3**') occurred on 8 February 2023. It was largely focused on two significant issues that had affected the Inquiry's progress: the data breach affecting the Inquiry's documents, and the decision to terminate the engagement of the former Solicitor to the Inquiry.
3. Since PH3, the Inquiry team has made significant progress in relation to evidence gathering and disclosure. CTI are very grateful to the team of solicitors at Triay who have facilitated the disclosure process. Notably:
 - a. The Inquiry has received sworn statements from 69 individuals.
 - b. The Inquiry team has reviewed these statements for relevance and personal data, and where necessary considered redaction requests by the provider of document ('**POD**').
 - c. The Inquiry team also considered on a statement-by-statement basis whether each statement should be disclosed to single-issue CPs (the GPF, Mr Cornelio, Mr Perez and Mr Sanchez).
 - d. The Inquiry has deemed 43 of the statements received to be relevant to the matters in the Provisional List of Issues. The vast majority of these statements have now been disclosed to CPs. The exceptions are two instances where redactions are being finalised (Mr Nicholas Pyle and Mr Darren Grech) and a non-CP witness statement (disclosure of which raises a number of complex issues).

- e. In addition, the Inquiry team has very recently received responsive witness statements, which it has already commenced the process of reviewing. More responsive statements are expected in the coming weeks.
 - f. The Inquiry team has also undertaken a review of a large quantity of additional documents provided by CPs and other witnesses. Except for documents provided by the RGP, Mr Pyle and Mr Grech, relevant documents have also been disclosed to CPs. The position in relation to RGP disclosure is set out in Part B below. As some disclosure is still outstanding, the Inquiry has proposed a longstop date of 28 August 2023 (one month prior to the Main Inquiry Hearing) for any further witness statements by CPs, so as to permit a fair opportunity to respond. However, responses will only be permitted in respect of evidence or documents received, or matters arising, since the deadline for exchange of responsive witness statements.
4. The following items fall to be addressed at PH4:
- a. The data breach relating to Inquiry documents in October/November 2022 (**‘the Data Breach’**);
 - b. RGP disclosure, including the Secretary’s Lane investigation and access to documents by retired officers;
 - c. Procedure at the Main Inquiry Hearing, including responsibility for examination of witnesses and the witness list/schedule;
 - d. Finalisation of the List of Issues and timetable for agreeing facts;
 - e. The proposal by GBC to broadcast the Main Inquiry Hearing;
 - f. Outstanding applications for restriction orders;
 - g. The admissibility of 19 witness statements received by the Inquiry; and
 - h. Further information and documents to be obtained regarding the 19 witness statements.
5. In recognition of the sizeable agenda, PH4 has been listed to commence at 9.30am. The Commissioner is also content to sit late if required. It is unfortunately unviable to accommodate a second day on 20 July 2023.

A. The Data Breach

- 6. As explained by CTI at PH3, very shortly after being notified of the Data Breach, the Inquiry reported the matter to the RGP and the Gibraltar Regulatory Authority, and also

commissioned an independent forensic investigation. The Inquiry had received several reports from the forensic expert by the time of PH3. However, as CTI recognised at PH3, it was clear that a lot more work was required in terms of investigation before a meaningful update could be provided to CPs. In addition, there was (and remains) a live criminal investigation into the Data Breach, and therefore the Inquiry is limited in terms of the information which it can disclose to CPs and the public.

7. Senior Investigating Officer John McVea (former Chief Superintendent of the Police Service of Northern Ireland) was appointed by the RGP as an independent investigating officer in relation to the Data Breach. Since PH3, the Inquiry has closely cooperated with Mr McVea on this issue. The Inquiry has also continued to cooperate with the GRA on its investigation into the Data Breach.
8. Shortly after Mr McVea's appointment, the Inquiry and Mr McVea agreed that Mr McVea would be permitted to conduct his investigation and share his findings with the Inquiry, rather than the Inquiry also commissioning an additional expert. This was considered an appropriate and proportionate cause of action given: (a) the expertise of Mr McVea and his team; (b) the significant resources at Mr McVea's disposal; (c) Mr McVea's independence; (d) the limited information that had been discovered through the forensic investigation to date; and (e) the undesirability of duplicative and costly parallel investigations.
9. Mr McVea had indicated he would provide the Inquiry with a report which could be provided to CPs during the week commencing 12 June 2023, as STI indicated to CPs in the Inquiry's letter dated 6 June 2023. Subject to receipt of the same, the Inquiry therefore intended to provide this report to CPs in advance of PH4. Mr McVea has indicated subsequently that he no longer intends to provide a full copy of the report given the ongoing criminal process but rather an executive summary which can be disclosed to CPs. Mr McVea has indicated that he intends to provide the Inquiry with this executive summary by close of business on 12 July and the Inquiry's intention is to disclose this to CPs in advance of PH4 subject to and following receipt of the same. Any disclosure of the executive summary to CPs is subject to the confidentiality ring which is in place.

B. RGP Disclosure

(a) RGP disclosure process and investigation

10. A timeline of relevant events is set out below:

- a. On 23 February 2023, the Inquiry received a witness statement from an RGP officer (via Mr Charles Bonfante of Hassans) which outlined concerns relating to the processes adopted within the RGP's public inquiry disclosure exercise being conducted at an office in Secretary's Lane. The Inquiry quickly formed the view that it was necessary to refer this matter to the RGP for its own investigation (including a criminal investigation if necessary).
- b. STI sought Mr Bonfante's client's consent to the disclosure of the witness statement to the Commissioner of Police. On 8 March 2023 Mr Bonfante confirmed the statement could be disclosed to the Commissioner of Police.
- c. The Inquiry also sought Mr Bonfante's consent to disclose the witness statement to CruzLaw, who represent the RGP in the Inquiry, in light of concerns about the impact on the Inquiry's evidence gathering process. While Mr McVea was investigating the allegations, the RGP halted its process of reviewing and disclosing documents to the Inquiry.
- d. On 16 March 2023, the Inquiry disclosed the witness statement to the Commissioner of Police and CruzLaw.
- e. The next day, 17 March 2023, the Inquiry received two further witness statements from RGP officers (via Mr Bonfante) raising concerns about the RGP disclosure process. Although those two witnesses initially objected to the statements being disclosed by the Inquiry to the Commissioner of Police and CruzLaw, it is understood the witness statements were subsequently provided by Mr Bonfante to Mr McVea on or before 27 March 2023.
- f. Following Mr McVea's investigation into the issue, on 15 May 2023 the Inquiry received a copy of Mr McVea's report (**'the Secretary's Lane Report'**). There was further correspondence with CruzLaw about the disclosure of the Secretary's Lane Report to CPs.
- g. On 27 June 2023 the Inquiry received an updated version of the Secretary's Lane Report for the purpose of the disclosure to CPs, which anonymised the names of the complainants. This version was sent to CPs on 29 June 2023 in advance of PH4.

11. The Secretary's Lane Report concludes that: *"I can see no integrity issues with the disclosure exercise being conducted by the RGP"* and *"My preliminary assessment*

that the threshold to reasonably suspect that a crime or disciplinary offence has been committed has not been reached remains the case. There is no basis to doubt the integrity of the RGP disclosure exercise.” In light of these conclusions, the Inquiry team does not consider that any further action is required. The Inquiry is grateful to Mr McVea for his investigation into his matter.

12. In any event, as explained in correspondence with CPs, the Inquiry is now undertaking its own relevance review of RGP documents (although not for reasons relating to Secretary’s Lane issue). The Inquiry has completed its review of physical documents held by the RGP at the Secretary’s Lane premises, and is currently in the process of organising an electronic disclosure review exercise. The Inquiry will provide disclosure to CPs as soon as practicable after completion of this disclosure exercise.

(b) Access by retired officers

13. The Secretary’s Lane investigation also delayed Mr McGrail and Mr Richardson’s access to documents held by the RGP, which they required to refresh their memories and produce witness statements to the Inquiry. On 21 June 2023, the Commissioner made orders facilitating this process and imposing definitive deadlines. It is the Inquiry’s understanding that this process is now underway, although additional time can be afforded to these witnesses to prepare any statements arising from this disclosure.

C. Procedure at the Main Inquiry hearing

14. Three items fall to be considered under this heading: (a) the Inquiry agenda moving forward; (b) the procedure for witness examination; and (c) the witness list/schedule.

(a) Inquiry timetable

15. CTI proposes the following timetable for the future progress of the Inquiry in the agenda for PH4:
 - a. **28 August 2023**: Deadline for CPs to file further witness statements addressing any further disclosed evidence (if so advised).
 - b. **15 September 2023**: Core Participants to file written opening statements for Main Inquiry Hearing.
 - c. **21 September 2023**: CTI to file written opening statement for Main Inquiry Hearing.

- d. **21 – 22 September 2023**: Designated (remote) reading days.
- e. **26 September – 20 October 2023**: Main Inquiry Hearing.

16. CTI welcome submissions on these dates from CPs at PH4.

(b) Witness examination procedure

17. This matter was addressed, but not finally decided, at the First Preliminary Hearing ('PH1'). As explained by Professor Beer in *Public Inquiries* (OUP 2011) ('*Beer*') at [5.177], there are three models by which questioning of witnesses may take place:
- a. The "traditional model", which is essentially adversarial and akin to the procedure adopted in court proceedings, whereby all representatives of other parties may question all witnesses.
 - b. The "restricted model", whereby CTI asks all or nearly all questions of witnesses, and counsel to participants submit questions and issues to CTI in advance of the date on which a witness gives evidence.
 - c. The "hybrid model", a fusion of the models set out above, within which questioning could exist on a spectrum between "traditional" and "restricted".
18. CTI's proposed model in relation to most witnesses (subject to the carve-out for specific witnesses referred to below) is a hybrid model along the following lines:
- a. Questioning of a witness should be conducted solely by CTI.
 - b. If any CP would like to have any questions put to a witness, those questions should be put forward in writing to the CTI **14 days** before the witness is due to give evidence according to the schedule. CTI will then indicate: (1) whether he will pursue to the topic/issue question with the witness; (2) that counsel for the CP should pursue the topic/issue/question with the witness; or (3) that the topic/issue/question cannot be pursued, subject to applying to the Commissioner to do so.
 - c. Although generally 'cross-examination' does not take place in an Inquiry context, if there is good reason for a CP's representative to ask a question or series of questions of a particular witness, they may apply to the Commissioner in writing by no later than **7 days** before the witness is due to give evidence. Any permitted questioning may be subject to time limits by the Commissioner.

19. In CTI's view, this version of the hybrid model is the appropriate approach in present proceedings given:

- a. The need to balance (i) careful case management in light of the listing window and the substantial witness list, with (ii) proper participation by CPs; and
- b. The need to ensure that questioning remains targeted to the list of issues, particularly given (i) any criminal investigations running in parallel to the Inquiry, and (ii) complex questions which may arise surrounding the relevance of specific witness statements.

20. At PH1 [**PH1 Transcript 97.8**], counsel for Mr McGrail submitted that the Commissioner should decide what model would be appropriate on a "witness by witness" basis. Whilst CTI consider that the hybrid approach outlined above should apply as a default, they agree that the traditional model might be more appropriate in relation to some witnesses. The Inquiry invites submissions as to which (if any) witnesses should be subject to this model. CTI's preliminary view is that this is only likely to be appropriate in situations where either the witness's credibility is in issue, there are significant factual disputes, or the evidence is central to the Inquiry. At this juncture, CTI consider that those witnesses (who can be referred to as "**Unrestricted Witnesses**" as shorthand) are:

- a. Former Commissioner Ian McGrail;
- b. The Hon Fabian Picardo KC MP, Chief Minister;
- c. Nicholas Pyle OBE, former Deputy Governor and Interim Governor;
- d. Michael Llamas CMG KC, Attorney General;
- e. Dr Joseph Britto;
- f. Former Superintendent Paul Richardson;
- g. Christian Rocca KC.

(c) Witness list

21. Below, CTI have set out a list of the 43 witnesses whose evidence has been deemed relevant by the Inquiry to date. Due to time constraints, it will simply not be possible for all 50 of these witnesses to give oral evidence at the Main Inquiry Hearing. Nor is it desirable for them to do so, for the following reasons:

- a. Time and resources at the Main Inquiry Hearing must be concentrated on the unrestricted witnesses whose evidence is central to the matters under Inquiry; and

- b. In any event, the evidence of several witnesses is not in dispute and/or can adequately be assessed by the Commissioner on the basis of written evidence and documentation.

22. CTI have therefore categorised witnesses into three groups, subject to submissions from CPs at the PH4:

- a. Category 1: Witnesses who CTI recommend will give oral evidence;
- b. Category 2: Witnesses who CTI recognises may need to give oral evidence, but currently recommend will not need to do so;
- c. Category 3: Witnesses who CTI recommend will not give oral evidence.

23. These categorisations are preliminary only, and submissions are invited on all three categories – particularly as to Category 2. A small number of witnesses may be re-categorised following receipt of responsive evidence and/or agreement of facts between the parties (see Part D below).

Category 1 – Witnesses who will give oral evidence		
1.	Ian McGrail	Category 1 + Unrestricted witness
2.	Fabian Picardo KC MP	Category 1 + Unrestricted witness
3.	Nicholas Pyle OBE	Category 1 + Unrestricted witness
4.	Michael Llamas CMG KC	Category 1 + Unrestricted witness
5.	Christian Rocca KC	Category 1 + Unrestricted witness
6.	Dr Joseph Britto	Category 1 + Unrestricted witness
7.	John Goncalves MBE	Category 1
8.	Commissioner of Police Richard Ullger	Category 1
9.	Assistant Commissioner of Police Cathal Yeats	Category 1
10.	Detective Superintendent John Field	Category 1
11.	Superintendent Mark Wyan	Category 1

12.	Detective Sergeant Paul Clarke	Category 1
13.	Paul Richardson	Category 1 + Unrestricted witness
14.	James Levy CBE KC	Category 1
15.	Sergeant Maurice Morello	Category 1

Category 2 - Witnesses who may give oral evidence (but currently not)

16.	Lloyd De Vincenzi	Category 2
17.	Darren Grech	Category 2
18.	Albert Mena	Category 2
19.	Peter Canessa	Category 2
20.	Francis Carreras	Category 2
21.	A/Detective Superintendent Gary Smith	Category 2
22.	Edward Yome	Category 2
23.	James Gaggero	Category 2
24.	Christopher Collins	Category 2

Category 3 - Witnesses who will not give oral evidence

25.	Julio James Alcantara	Category 3
26.	Nadine Collado	Category 3
27.	Albert Danino	Category 3
28.	Aurelius Falero	Category 3
29.	Rebecca Figueras	Category 3
30.	Ernest Gomez	Category 3
31.	Naomi Hassan-Weisfogel	Category 3
32.	Edgar Lavarello	Category 3
33.	Vikram Nagrani	Category 3
34.	Fidelio Patron	Category 3
35.	Claire Pizzarello	Category 3
36.	Stephen Reyes	Category 3
37.	Richard Mifsud	Category 3
38.	John Perez MBE	Category 3
39.	Thomas Cornelio	Category 3
40.	Caine Sanchez	Category 3

41.	Edward Asquez MBE	Category 3
42.	Michael Walliker	Category 3
43.	Lt. Gen. (Ret.) Edward Grant Martin Davis CB CBE	Category 3

D. Finalisation of the list of issues and consideration of agreed facts

24. As the Inquiry’s investigations have progressed, CTI have considered whether any items on the Provisional List of Issues can be removed. CTI have concluded that it would be premature at this juncture, as the disclosure process is still ongoing. However, it would assist the Inquiry in the meantime if the Government parties could clarify in their submissions the extent to which (if at all) the following incidents will be relied upon as reasons for Mr McGrail ceasing to be Commissioner of Police:

- a. Issue 2: the Assault Investigation. This is raised in only limited detail in para 22 of Mr Pyle’s first Affidavit.
- b. Issue 7: the Alcaidesa Claims. This has not been cited as a reason by any of the Government parties, but was mentioned in a WhatsApp from Mr Picardo to Mr Pyle on 14 May 2020, extracted in para 67 of Mr Picardo’s first Affidavit.

25. Separately, Mr McGrail’s legal team requested that “Agreement of facts prior to the Main Inquiry Hearing” be included as an item on the agenda. CTI consider that there are clear benefits in the CPs identifying a list of agreed facts for each issue in advance of the Inquiry hearing. It appears that many of the facts are not in dispute, and agreeing them in advance will allow more time to be devoted at the Inquiry hearing to facts and issues that are genuinely in dispute.

26. The process of agreeing facts is likely to be a lengthy and detail-oriented process, during which CPs will need to work closely with their legal teams. Accordingly, CTI do not consider that it can take place at PH4. CTI therefore propose that:

- a. CPs should exchange correspondence on proposed lists of agreed facts for each issue.
- b. By **4 September 2023**, CPs should provide the final lists of agreed facts and any areas of dispute to the Inquiry.

E. GBC Broadcasting Application

27. This matter was also aired at PH1. It is convenient to summarise the position by quoting the letter sent to CPs on this topic on 29 June 2023:

“CPs will recall that the issue of livestreaming was considered at the First Preliminary Hearing. In the Commissioner’s Ruling on Open Justice dated 25 August 2022,¹ the Commissioner declined to permit live streaming at paragraphs [32]-[44]. The judgment held that the usual procedure in the UK is now that Inquiries are livestreamed, but that the position in Gibraltar could be distinguished. The Commissioner also raised the following “drawbacks” of livestreaming, namely: (a) strain on witnesses; (b) “since it is unlikely that any broadcaster will want to show the whole of the proceedings, there is a risk that only unrepresentative tit-bits of the Inquiry’s hearings would be broadcast on television”; and (c) cost and control of the camera.

Since publishing that ruling, the Inquiry has received a request from the Gibraltar Broadcasting Corporation (GBC) to broadcast the Inquiry proceedings. STI has engaged in a productive meeting with James Neish (CEO) and Christine Vasquez (News Editor) about this proposal. The Inquiry’s preliminary view is that GBC’s proposal has been able to address many of the Commissioner’s “drawbacks” addressed in the judgment, namely:

- (a) GBC will adhere to any restrictions in relation to vulnerable witnesses and would be happy to take guidance from the Inquiry. At this stage, the Inquiry has not received any applications under the vulnerable witnesses protocol.
- (b) The entire Inquiry will be broadcast live (save for any private hearings), although “edited highlights could be used in an evening round-up for news and other programmes”.
- (c) There will be no cost to the Inquiry.
- (d) The system would be run by a single person on a small desk, which if required could be in a separate room. Cameras will be operated robotically.”

28. CTI support the proposal by GBC to broadcast the Inquiry: the proposal is practical, cost-effective, and will further the principles of open justice (which the Commissioner held to apply to this Inquiry in his ruling dated 25 August 2022²). The public has demonstrated significant interest in the Inquiry to date, including through high attendance at preliminary hearings. Public confidence in the Inquiry will be bolstered by ensuring Inquiry proceedings are as transparent as possible.

¹ <https://coircomp.gi/wp-content/uploads/2022/09/Amended-Ruling-on-Open-Justice-and-Recommendations-25-August-2022.pdf>.

² <https://coircomp.gi/wp-content/uploads/2022/09/Amended-Ruling-on-Open-Justice-and-Recommendations-25-August-2022.pdf>.

29. However, if livestreaming is permitted, CTI consider that the Inquiry should adopt a further protocol on the topic to ensure that that the technology is utilised responsibly and does not interfere negatively with Inquiry proceedings. CTI consider that as a minimum, these should include the matters set out in the letter to CPs as follows:

- “1. Provisions made for vulnerable witnesses;
2. Procedures to permit sections of the proceedings not to be livestreamed. The Inquiry considers that this could be threefold:
 - a. Provisions permitting the Commissioner to rule in advance, either of his own motion or on application by a CP/witness, that a section of the proceedings should not be livestreamed. As a starting point, the Inquiry envisages that the criteria that may apply are those set out in CPR 39.2(3), as to when hearings should be held in public.
 - b. Provisions permitting the Commissioner to rule, either of his own motion or on application by a CP/witness, that a section of the proceedings which has already taken place should not be livestreamed. This would be facilitated by a short time lapse in transmission (5 minutes) to prevent livestreaming of material that the Commissioner deems inappropriate for broadcast. The Inquiry understands that this is common practice, for example in the COVID Inquiry where a three-minute delay is adopted.³
 - c. A general provision for the Commissioner to mute or suspend the stream at any time at his absolute discretion, including (a) when the Commission has exercised its power to exclude the public from a hearing; (b) where a non-publication order is in place; or (c) for the welfare of witnesses or other people.
3. Guidelines governing the onward use of the livestream by third parties including:
 - a. A prohibition on recording or transmission of the livestream by third parties, other than by the media for the purpose of public reporting of the Inquiry proceedings;
 - b. Provisions on the broadcasting of extracts on news bulletins (for example provision that any extracts must be fair and not distort, misrepresent the proceedings or take extracts out of context);
4. Guidelines on technical matters, including that:
 - a. The Commissioner is unlikely to adjourn in case of technical malfunction, and
 - b. Guidance to prevent livestreaming becoming a distraction to witnesses, legal teams and the Commissioner.”

³

<https://covid19.public-inquiry.uk/frequently-asked-questions/>.

30. The Commissioner is empowered to issue a protocol addressing these topics through his broad procedural discretion in s6 of the Commission of Inquiries Act 1888. CTI invite the Commissioner to exercise his discretion accordingly.

F. Restriction Orders

31. During the process of disclosing evidence to CPs, the Inquiry received several requests for redactions by providers of documents ('PODs') in accordance with paras 19 – 28 of the Documents Policy. The Inquiry team considered these requests and applied redactions where appropriate, including where the redactions were to personal data contained in the evidence.

32. However, a separate issue arises as to whether: (1) further redactions are required to these documents before they are disclosed to the public on the Inquiry's website; or (2) certain documents should not be published at all on the Inquiry's website. The following relevant events have occurred to date:

- a. On 7 September 2022, the Inquiry received an application from Caruana & Co ('**the Government Application**') that certain documents in Mr Picardo and Mr Llamas' evidence be withheld from public dissemination.
- b. On 11 October 2022, Ms Gallagher KC and Mr Wagner made written submissions to the Inquiry on the Government Application. In summary, they argued that:
 - i. The application was insufficiently particularised and should be rejected in its entirety, as "*the CM and AG have failed to set out precisely which parts of the relevant documents should be redacted; rather, they appear to be asserting that entire documents should be withheld from publication.*" (para 13)
 - ii. Should the CM and AG maintain the application, they should be asked to "*(a) specify which parts of each document should be redacted, for example by submitting copies of the documents with the relevant parts highlighted, and (b) state any justifications in the margin beside/ above the relevant text, and (c) insofar as national security matters are raised, these should be supported by witness evidence from the Governor or an explanation given as to why no such evidence has been provided.*" (para 23)

Without prejudice to those arguments, the submissions also responded to each of the documents that were sought to be withheld.

- c. On 26 October 2022, the Inquiry wrote to Caruana & Co enclosing Mr McGrail's submissions, affording an opportunity to make a revised application (if so advised), and imposing a deadline of 4 November 2022.
- d. At PH3, Sir Peter Caruana KC stated in oral submissions that "*I have an outstanding request to further flesh out an application for a restriction, that is in hand.*" [Transcript p103.1]

33. While in principle CTI recognise that the Government Application relates to documents containing sensitive information, CTI do not consider that blanket redaction or non-publication, as the Government Application appears to seek, is justified. CTI's preliminary position is that several documents in the Government's application could be redacted in a more limited way – for example to remove specific operational information, matters relevant to national security/international relations or sensitivities surrounding deceased persons – rather than withholding them altogether. CTI therefore propose that the Government Application should either: (a) narrow its focus to the specific parts of the documents which require protection (which should be identified in the Government parties' written submissions), or alternatively (b) provide greater justification (including evidence if so advised) for the blanket approach which the Inquiry is urged to adopt.

34. This position is consistent with the following:

- a. The Commissioner's earlier decision in the Amended Judgment following PH1⁴ at [10]-[11] that:

"It is well established under the English common law that inquiries should apply the general principles of open justice, although the extent to which a public inquiry should be conducted in public has been held to depend on context. As Lord Mance explained in *Kennedy v Charity Commission* [2014] UKSC 20 at [48]: "At one end of the spectrum are inquiries aimed at establishing the truth and maintaining or restoring public confidence on matters of great public importance, factors militating in favour of a public inquiry. But many inquiries lie elsewhere on the spectrum."

⁴ <https://coircomp.qi/wp-content/uploads/2022/09/Amended-Ruling-on-Open-Justice-and-Recommendations-25-August-2022.pdf>.

The facts of the present Inquiry fall squarely within the “end of the spectrum” identified by Lord Mance: the former Commissioner of Police complains that he was required to resign following improper and undue pressure put upon him by the Chief Minister and by the Attorney General. I must balance the public interest in the Inquiry being open to public scrutiny against any countervailing factors. **It is, in my judgment, plainly in the public interest that the evidence is disclosed, heard, and challenged, in public. However, there may be some exceptions to this general principle, which the Inquiry has sought to identify in the protocols which it shall shortly publish, and which I will deal with if and when they arise.**” (Emphasis added)

- b. Para 24 of the Documents Policy, published after PH2, which emphasises the need for a “*measured approach*” where redactions are sought:

“It is the Commissioner’s intention that members of the public have access to a record of evidence produced at the Inquiry, and will publish documents as soon as is practicable at or following the relevant hearing. **The Inquiry expects PODs to adopt a measured approach when seeking redactions and will only redact information where the case for this is properly made out,** recognising the need for the Commissioner to ensure as far as possible that members of the public are able to view a record of evidence and documents provided to the Inquiry.” (Emphasis added)

35. As to the determination of the Government Application, CTI endorse the summary of principles in Mr McGrail’s submissions dated 11 October 2022 at [9]-[10]. See also the leading statement by the House of Lords in ***R v H*** [2004] UKHL 3 at [36], made in the context of criminal proceedings:

“When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate

protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced? It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.”

36. On the application of these principles to an Inquiry context, see **Beer** at [5.82]:

“A claim for public interest immunity should be made by the person whose duty it is to protect the information (which need not necessarily be the Crown), supported by evidence (usually in the form of a witness statement or ministerial certificate) that disclosure would cause real damage or harm to the public interest. It is then the responsibility of the Inquiry panel, having viewed the documents or information, to balance the public interest in disclosure against the public interest in maintaining confidentiality. Having carried out that ‘balancing exercise’ the inquiry must decide whether to uphold the claim for immunity and, if so, on what terms. The inquiry panel may decide that the information may be withheld, or that it be disclosed in whole or in part (after ‘redaction’). ...”

37. CTI recommend that to the extent that arguments about public interest immunity at PH4 address the justification for withholding specific documents, as opposed to legal principles, this will need to take place in private. Pursuant to para 25 of the Documents Police, the Inquiry may hear evidence in private in “*exceptional circumstances*”. CTI considers that airing details about or the basis for the application in public would defeat the purpose of the application.

Further applications to withhold documents

38. Finally, CTI recognise that CPs may wish to make applications for redactions and/or to withhold documents from public dissemination, including in respect of documents submitted to the Inquiry by other parties. This reflects a submission made by Sir Peter Caruana KC at PH3 [**Transcript p101**]:

“So the question is: is there scope for reflecting the agenda, that when we get other people’s witness statements there may be material that others think should be redacted from public consumption. Obviously not kept from the other core participants.”

39. CTI accepts this submission, as public interest immunity can attach irrespective of where a document originates from or in whose custody it reposes, provided it has properly either emanated from or come into possession of some servant or agent of the Crown: **Beer** [5.82].

40. No such applications have been received in respect of disclosure circulated thus far. As the disclosure process remains ongoing, and the deadline for final responsive witness statements is 28 August 2023, CTI considers that these arguments should take place after that date (although any applications in respect of disclosure which has already been provided by the Inquiry should be made well in advance of that date). Due to the limited time between the final deadline for responsive witness statements and the start of the Main Inquiry Hearing, the best course would be for CPs to address any applications in respect of those final statements in written submissions (copied to all other CPs), and for the matter to be decided on the papers.

G and H. The 19 witness statements

41. CPs have been alerted to the background of this matter by letter from the STI dated 29 June 2023. In essence, it involves whether certain witness statements disclosed to the Inquiry should be admitted as relevant evidence. A number of the matters referred

to in that evidence may affect ongoing criminal investigations. In the circumstances, the RGP has requested that these two items be considered in private, and CTI agrees that this is the only safe way in which to proceed at this stage. Accordingly, CTI's submissions on these points are contained in separate closed submissions.

42. Mr McGrail has requested that a related item be added to the agenda for PH4, namely "Further information and documents to be obtained regarding the 19 witness statements". Whilst this is potentially a highly important matter, CTI do not consider that it can be resolved until the anterior question of the admissibility of the 19 witness statements is determined. Accordingly, while CTI are content for Mr McGrail to make written submissions on this topic, CTI consider it unlikely that it can be substantively considered and resolved at PH4. In any event, CTI request that those submissions should be made on a closed basis at this stage, given the issues raised by the RGP, but that this can be revisited by the Commissioner once the question of admissibility has been determined.

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