

## **Commissions of Inquiry Act**

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

**Convened by a Commission issued by His Majesty's Government of Gibraltar on 4th February 2022 in Legal Notice No.34 of 2022**

("the Inquiry")

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**SUBMISSION ON BEHALF OF THE ROYAL GIBRALTAR POLICE  
("RGP") for 5 Preliminary Hearing ("5PH") 25-26 October 2023**

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#### **Introduction**

1. This submission is made in respect of two simple matters namely Categorization of Witnesses and the Nolle Prosequi questions to Core Participant His Majesty's Attorney General for Gibraltar Mr Michael Llamas KC. ("AG") as requested by the Solicitors to the Inquiry ("STI") in their letter of the STI letter to all CP's ("3 August Letter") and or 7 September 2023 ("7 September Letter").

#### **Witness Categorization**

2. Counsel for the Inquiry Julian Santos ("CTI") in his submissions to the Inquiry 4PH ("CTI 4PH Submissions") at paragraph (c ) headed Witness List paragraphs 21 to 23 set out the CTI suggested Categorization of Witnesses (Cat 1, 2 and 3) with CAT 1 Witnesses being witnesses who the CTI recommend will give oral evidence; CAT 2 Witnesses who CTI recognises may need to give oral evidence, but currently recommend will not need to do so, and CAT 3 Witnesses who CTI recommend will not give oral evidence.
3. At 16 on the list Mr Lloyd De Vincenzi ("Mr De Vincenzi") was identified in CAT 2 suggesting that Mr De Vincenzi whilst may need to give oral evidence, the CTI currently recommend will not need to do so.
4. With all due respect to the CTI (and recognizing that these categorizations were

intended to be preliminary and subject to submissions) Mr De Vincenzi who was the Solicitor General at the material time on Issue 5 (“Operation Delhi” also known as “the Conspiracy Investigation”) and engaged arguably in a material way in meetings related to various matters which were central to Issue 5. Additionally, it is evident from perusal of Mr De Vincenzi evidence as per his Affidavit dated the 24 August 2022 (“Mr De Vincenzi Affidavit”) that the Solicitor General had a role in the question of the subsequent Nolle Prosequi (at least in the embryonic discussions thereon) and the agreement that was reached on or about the 8 June 2020 between the CP AG and the CP Mr Picardo KC and quite possibly CP Mr Pyle. It would appear that Mr De Vincenzi evidence would also touch on issue 10 (“the GPA Process”). Indeed, Mr De Vincenzi evidence may well go to the question central to the Inquiry namely:

*“To what extent, if at all, did the issue [namely all the individual Issues] constitute a reason or circumstance leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking an early retirement (either because they led to a loss of confidence in Mr McGrail or for some other reason)?”*

(“Central Issue”)

5. It is the RGP submission that Mr De Vincenzi Affidavit shine a very bright and much needed light on the inner workings of the process (in respect of Issues 5, possibly 10 and the Central Issue and wider questions including the Nolle Prosequi) by way of first hand evidence in the form of meetings attended to and discussions had including with several CP’s such as Mr McGrail, the RGP (including some of their witnesses), former RGP Offices (Mr McGrail and Mr Richardson) and crucially the AG.
6. Counsel for RGP will address (if required the specifics at the 5PH in oral evidence) but by way of illustration paragraphs 11, 12, 14, 16, 17, 18, 19, 20, 21,22,23,24 and 24 of Mr De Vincenzi Affidavit need to be explored in oral evidence by way of cross examination to assist the Inquiry getting to the truth in this matter.
7. Of particular relevance to the RGP’s witnesses’ evidence is the attendance of Mr De Vincenzi to various meetings with the RGP suggested by Mr De Vincenzi Affidavit, including Mr McGrail and Mr Richardson were present and at which Superintendent Mark Wyan was also present. These he suggests, may have included meetings on the

25 September 2019, 7 April 2020, 30 April 2020, 13 May 2020. Some of these meetings are confirmed by Mr De Vincenzi Affidavit. That meetings took place at which the RGP were present is not in doubt. Indeed, some of the meetings are confirmed by Superintendent Mark Wyan Witness Statement of the 21 November 2022 and his subsequent second witness statement dated 27 July 2023 (“Wyan Witness Statements”). However, Wyan Witness Statements make it clear that he was only present at two meetings with the AG, namely on the 15 and 20 May 2020 and two meetings with Mr De Vincenzi namely the 25 September 2019 and 30 April 2020 (both of which took place in the presence of the Chief Secretary Darren Grech but in which the AG was not present) . It would appear Mr De Vincenzi Affidavit is in some respects unclear and or possibly mistaken on attendees and this will require clarification.

8. In conclusion the RGP submits that Mr De Vincenzi it is of great importance to the Inquiry to properly understand the evidence of Mr De Vincenzi and that can only be explored if Mr De Vincenzi gives evidence at the Inquiry Hearing in due course. In these circumstances Mr De Vincenzi should be recategorized as a CAT 1 witness, being witnesses who the CTI recommend will give oral evidence.
9. The RGP does not have any further issue or concerns with the categorization of other witnesses save that it will reserve the right to respond to any submissions made by other CP’s or on behalf of witnesses should they attempt to change this preliminary Categorization.

### **Nolle Prosequi Issue**

10. In the 3 August Letter and the 7 September Letter CP’s were invited to express their views on the following questions that relate to the decision of the AG to enter a Nolle Prosequi in relation to the Conspiracy Investigation (Operation Delhi issue 5).
11. On pages 2 and 3 of the 7 September Letter (amending the 3 August Letter questions) the STI identified that the Commissioner had identified the questions as follows:

*“The extent to which, if at all, the Attorney General can and should be asked about the discontinuance of the prosecution of the three Defendants as per paragraph 1(f) of the Commissioner’s Ruling dated 26 July. In that respect, proposed questions were*

*circulated to CPs on 19 July 2023 in accordance with the direction made by the Commissioner that day. Comments were then received from CPs by the deadline of 21 July 2023. The Commissioner has considered those comments and directs that the questions to be answered as are follows:*

*1.. Questions for the Attorney General and Messrs Perez, Cornelio and Sanchez: What was the legal basis on which the prosecution was discontinued: (a) section 59 of the Gibraltar Constitution; (b) section 223 of the Criminal Procedure and Evidence Act; (c) both; or (d) some other basis?*

*Questions for all Core Participants (with the exception of the GPF):*

*2. In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?*

*3. If so, is it within the Terms of Reference of the Commission to ask the question?*

*4. If so, can the Attorney General properly be asked why he discontinued the prosecution?*

*5. If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above.*

*6. Is the Inquiry entitled to draw any inference(s) from a failure by the Attorney General to answer the question in (2) above?*

*7. In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?”*

12. The starting point for the RGP is the recognition that this matter involved a criminal investigation that in the opinion of the Senior Investigating Officer had crucially passed the evidential threshold, involving three CP's Mr. Perez, Cornelio and Sanchez (Operation Delhi CP's) with additional suspects, one of which Mr. James Levy KC was reclassified as a witness. Moreover, the RGP did believe that an indictable offence had been committed and it is self-evident from the grant of the search warrant that the Stipendiary Magistrate agreed, as was required by Schedule 1 of the Criminal Procedure

and Evidence Act 2011 (“CPEA2011”). It is also important to note that Operation Delhi CP’s were subsequently charged with an indictable offence, namely, conspiracy to defraud misconduct in public office and computer misuse offences. The AG and the Director of Public Prosecution, Mr. Roca expressed the opinion that the evidential threshold had been met. Subsequently the AG, on public interest grounds 21<sup>st</sup> January 2022 exercised his discretion to enter into a Nolle Prosequi. This was and is a matter for him, and the RGP respect the respective constitutional roles of all relevant parties. In October 2021 the AG did discuss the broad reasons the AG had for considering this decision with the COP Mr Ullger.

*1. Questions for the Attorney General and Messrs Perez, Cornelio and Sanchez: What was the legal basis on which the prosecution was discontinued: (a) section 59 of the Gibraltar Constitution; (b) section 223 of the Criminal Procedure and Evidence Act; (c) both; or (d) some other basis?*

13. The Position of the RGP is that this is a legitimate question for the AG but not the Operation Delhi CP’s who benefited by the decision, The RGP were not in any way involved in the decision-making process which was a decision for the AG alone.
14. It is a legitimate question because it goes specifically to Issue 5 Operation Delhi and the Central Issue.
15. However, the RGP expresses no view as to whether this legitimate question should be answered by the AG, and whether the circumstances remain that should result in the position by the AG being maintained.
16. To the extent that the Nolle Prosequi was entered in the exercise of the AG’s powers under section 223 of the CPEA 2011 the RGP submission that it expects is non contentious is they can only be exercised in the public interest as determined by him but without regard to the views of other CP’s specifically the executive. Moreover, the RGP believe that detailed exploration of this issue in a public forum must have in mind the detailed provisions of section 223 of the CPEA 2011 which provide:

***“Power of Attorney-General to enter nolle prosequi.***

- 223.(1) *In any criminal case, at any stage before the verdict or judgment, as the case may be, the Attorney General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings are not to continue.*
- (2) *If the Attorney-General enters a nolle prosequi-*
- (a) *the defendant must be at once discharged in respect of the charge for which the nolle prosequi is entered;*
- (b) *if the defendant has been committed to prison he must be released, or if on bail, his recognizances must be discharged;*
- (c) ***the discharge of the defendant does not operate as a bar to any subsequent proceedings against him on account of the same facts.***
- (3) *If the defendant is not before the court when a nolle prosequi is entered, the registrar or clerk of the court must forthwith cause notice in writing of the entry of the nolle prosequi to be given–*
- (a) *if the defendant is in prison - to the Superintendent;*
- (b) *if the defendant has been committed for trial - to the Supreme Court;*
- (c) *if the trial is a summary one - to the Magistrates' Court.*
- (4) *Upon the entry of a nolle prosequi the court must forthwith cause a notice of it to be given in writing to any witnesses bound over to prosecute and give evidence and to their sureties, if any, and also to the defendant and his sureties if he has been admitted to bail.*
- (5) *Any document purporting to be the fiat, order, sanction, consent or nolle prosequi of the Attorney-General and to be signed by the Attorney-General is admissible as prima facie evidence without further proof.” [Emphasis added].*

17. This is important to the RGP and has been addressed in its application/submissions for restriction orders dated the 6 October 2023 (“Restriction Application”) in detail.
18. It is the RGP submission that the landscape that gave rise to the grounds for the entering of the Nolle Prosequi could change and the AG (or any subsequent person holding that post) may form a different opinion at a different time and the prosecution of the Operation Delhi CP’s or others could proceed on the same facts. The RGP recognizes that in Gibraltar where, with few exceptions, criminal prosecutions are heard before a Jury, the fundamental right to a fair trial, could be subject to a real risk of abuse, if all crucial information in relation to Operation Delhi Issue 5 were to be subject to exploration in a public forum at the Inquiry Hearing, and then form part of the Inquiry Record, therefore subject to Online Publication. Therefore also even in the context of exploration of this issue now in the 5PH the Commissioner should exercise caution and if the CP’s, and or the CTI wishes that this matter be explored in a detailed granular fashion, the Commissioner should consider whether this should be in private with

restrictions on any publication online or otherwise.

*2. In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?*

19. As explained above it is a legitimate question because it goes specifically to Issue 5 Operation Delhi and the Central Issue. This could be supportive of Mr McGrail suggestion that certain CP's were motivated by matters other than issue 3 and 4 but the RGP expresses no view as to whether this legitimate question should be answered by the AG, as for the reasons explained above it is not in a position to make a comprehensive and properly informed assessment on the existence of the grounds for the Nolle Prosequi, nor was it involved in the decision making process.

20. The RGP does not wish this answer to be treated as inferring that the RGP has or is questioning the AG's motivation or his jurisdiction.

*3. If so, is it within the Terms of Reference of the Commission to ask the question?*

21. The RGP believe that this question is within the Terms of Reference of the Inquiry because although the Nolle Prosequi decision of the 21 January 2021 followed the departure of Mr McGrail in June 2020, for reasons explained above, it considers it could inform the questions set by the Inquiry specifically to Issue 5 Operation Delhi and the Central Issue.

*4. If so, can the Attorney General properly be asked why he discontinued the prosecution?*

22. The AG can be properly asked, but for the same reasons he entered the Nolle Prosequi, if he determines the landscape and circumstances for that still remain unchanged, then he can choose not to answer, otherwise it would defeat the objective of the Nolle Prosequi. It may be however in his gift to answer this question in a private forum given all CP's are bound by undertaking of confidentiality. Moreover, all parties and the Commissioner and specifically the AG should be alert to CPEA 2011 223(2) c) and the repercussions identified above.

*5.If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above?.*

23. The RGP submits that the AG can decline to answer the question if he believes the reasons for his decision to enter the Nolle Prosequi remain extant at the time of the Inquiry Hearing. This is an important distinction, to the time the decision was taken, or at any time since then.

*6. Is the Inquiry entitled to draw any inference(s) from a failure by the Attorney General to answer the question in (2) above?*

24. The RGP submits that absent some adverse finding that is suggestive of a breach of duty by the AG in that he has acted not in the public interest, but for ulterior motives, or at the direction or control directly or indirectly of another, then no adverse inference should be drawn for the reasons explained above, namely that to do so (if the reasons for his decision to enter the Nolle Prosequi remain extant now or at the time of the Inquiry Hearing) would be defeated by answering this question (at least in a public forum).

*7. In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment? ”*

25. The RGP submits that the Commissioner must afford persuasive weight to the Judgment of the Honourable Chief Justice, Dudley CJ, in the Supreme Court case of Thomas Cornelio and Ors v Rex (2023/GSC/029) (“the Judgment”) and paragraphs [21] to [23] of the Judgment clearly support the RGP’s submissions above (and below) and at 24 herein.

26. In so far that the decision to enter the Nolle Prosequi was taken under the powers vested in him by section 59 of our Constitutional Order (as in the case of the CPEA 2011) clearly it is implicit that they can only be exercised in the public interest, as determined by him, but without regard to the views of other CP’s, specifically the executive, namely the Government or specifically CP’s Mr Picardo and or Mr Pyle. Section 59 states:

### ***Attorney-General***

59.-(1) *There shall be an Attorney-General for Gibraltar whose office shall be a public office.*

(2) *The Attorney-General shall have power in any case in which he considers it desirable so to do*

(a) *to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);*

(b) *to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and*

(c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*

(3) *The powers of the Attorney-General under subsection (2) may be exercised by him in person or through other persons acting in accordance with his general or special instructions.*

(4) *The powers conferred upon the Attorney-General by subsection (2)(b) and (c) shall be vested in him to the exclusion of any other person or authority:*

*Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.*

(5) *In the exercise of the powers conferred upon him by this section the Attorney-General shall not be subject to the direction or control of any other person or authority.*

(6) *For the purposes of this section, any appeal from any determination in any criminal proceedings before any court of law, or any case stated or question of law reserved for the purposes of any such proceedings to any other court of law, shall be deemed to be part of those proceedings.*

27. The RGP is reinforced in its submission about its view: that whilst the AG has the right to decline to answer, it can only be on a public interest basis, and without regard to others influence. Subsection 5) of section 59 clearly indicates that the exercise of the

power: “...*shall not be subject to the direction or control of any other person or authority.*”

28. The words “*direction*” or “*control*” in this context must be treated as meaning express, or implied, direct or indirect.
29. In these circumstances there may be questions that are considered relevant which explore, not the underlying public interest (which the AG should be able to decline to answer) but reassurance that it was a decision that was solely his, and not influenced directly or indirectly with or by CP’s Mr Picardo, Mr Pyle or any other person, CP or otherwise.
30. For the avoidance of any doubt, the RGP does not suggest that the AG acted improperly, or was influenced in his decision-making process, and nothing should be inferred by the suggestion of this possible line of questioning.

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17 October 2023