

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**

**THIRD WITNESS STATEMENT OF
SUPERINTENDENT MARK WYAN**

1. My name is Mark Wyan and I am a Superintendent of the Royal Gibraltar Police (“the RGP”).
2. I write this statement in answer to the questions posed by Triay in their letter of the 28th July 2023 (erroneously dated the 14th June 2023) entitled “*RE: Inquiry into the Retirement of the Former Commissioner of Police – Further Matters to be Addressed in Responsive Statements.*”
 1. *On the decision to make James Levy KC (“JL”) a suspect:*
 - a. *When was JL formally made a suspect in the investigation?*
3. On the 25th February 2020 former Superintendent Richardson (“Mr Richardson”) sent the NDM assessment document to Mr. McGrail (*Exhibit MW23* refers). The document establishes that by the aforementioned date the RGP considered Mr. Levy to be a suspect. Paragraph 24 of the document stated:
 - c) *We therefore that have reasonable grounds to suspect that an offence of conspiracy to defraud has been committed.*
 - d) *In the absence of anything to the contrary the evidence suggests that JL took part in this conspiracy together with JP, TC and CS [...]*

4. Mr. Levy KC was formally made a suspect in the Operation Delhi investigation on the 8th April 2020. This followed advice provided by the Director of Public Prosecutions (“DPP”) during a video conference on that date.
5. The advice by the DPP was provided following an email sent by former Superintendent Richardson (“Mr. Richardson”) to the DPP on the 1st April 2020 (*Exhibit MW78* refers). Attached to the email was the “*NDM assessment regarding the involvement of Haim Judah Levy with 36 North Ltd*” (*Exhibit MW55* refers) and “*Charging Advice – Operation Delhi*” report (in particular paragraphs 123 to 137) (*Exhibit MW78* refers). Paragraph 338 of the charging advice report requested that:

“In addition to the proposed charges, advice is also sought as to whether, based on the above evidence, there are reasonable grounds to suspect that Levy has committed: a. The offence of conspiracy to defraud; and / or b. Any other criminal offences.”

b. Where is this decision recorded?

My notes of the conference state, “*Mr Levy was considered. DPP stated that there were still questions that he needed to answer. Interview under caution was appropriate*” and “*He agreed that Mr Levy should be treated as a suspect as there were questions which needed to be answered. He should be interviewed.*” (*Exhibit MW12* refers).

Why was this decision taken?

6. It is my understanding that the advice by the DPP to formally treat Mr. Levy KC as suspect was made following his consideration of the evidence / documentation provided to him in advance of the conference call (*Exhibit MW55* and *MW78* refers).

2. On application for the search warrant dated 6 May 2020 (‘the Application’):

a. Was the application (made by DC Clarke) first seen and approved by Mr Wyan?

7. My emails confirm that a draft of the Schedule 1 warrants and the associated information were provided to Inspector Goldwin by DS (formerly DC) Clarke on the 4th May 2020. I was copied in to the email but do not appear to have been

- consulted. The warrant applications were approved by Inspector Goldwin (*Exhibit MW77* refers). I tender the email and attachments as **Exhibit MW87**.
8. Whilst I did not approve the final version, I believe that I was involved in the early stages of drafting the application.
- b. Why did Mr Wyan, as Officer in Charge, not attend the hearing on 6 May 2020?*
9. The period in question was subject to Covid-19 lockdown restrictions. An email by DS Clarke on the 5th May 2020 indicates that I was self-isolating due to having symptoms of Covid-19 and awaiting test results. I tender this email as **Exhibit MW88**.
- c. Was a draft of the Application sent to the CPS for advice?*
10. I have no record of the application having been sent to the OCPL for advice.
11. It is of note that the information supplied in support of the application for the Schedule 1 warrants was predominantly taken directly from the charging advice report provided to the DPP on the 1st April 2020 (*Exhibit MW87* refers).
12. Moreover, the NDM document attached to the same email set out the intent of the RGP to execute a warrant in respect of Mr Levy KC (Paragraphs 31, 34, 35 and 38 of *Exhibit MW55* refers).
- d. What was the basis for the conclusion/assertion at [322] of the Application that “the material sought does not include any Legal Privilege material”?*
13. This statement forms part of a template provided to officers making applications for a search warrant pursuant to Schedule 1. I created the said templates for the RGP based upon templates utilised by officers in England and Wales. There is no provision in law for police officers to intentionally seize material subject to legal privilege. The statement simply reinforces that there was no intent by police to seize such material.
14. The preceding paragraph before the relevant statement is instructive:
- “E.g. the material sought consists of communications between the subjects of this application. This would not be classified as legally privileged material. [...] The

material sought is not, and does not contain any Legal Privilege Material however it is understood legally privileged material may be present on digital devices which will be seized. All digital devices will be reviewed by an appointed independent legal representative prior to the OIC being given access to any material.”

15. Whilst I did not draft this paragraph myself, DS Clarke has specified that the material sought consisted of communication between Mr. Levy KC and the other named subjects / suspects.
16. The evidence obtained during the investigation suggested that, in the context of 36 North Limited, Mr. Levy was communicating with the subjects / suspects as a businessman / partner and not in the capacity of a legal advisor for the purpose of giving legal advice. The communication sought was thereby not subject to legal privilege.
17. It is noteworthy that, even if (contrary to the evidence obtained) Mr. Levy KC was acting as legal advisor to one or more of the subjects / suspects, pursuant to section 14(2) of the Criminal Procedure and Evidence Act 2011, legal privilege is otiose where a client has sought the assistance of a lawyer to further criminal or fraudulent conduct.

3. On Mr McGrail’s involvement in Operation Delhi:

a. Did Mr Wyan share any information regarding the contents of the Application with Mr McGrail?

18. To the best of my knowledge and belief, I did not share any information regarding the content of the application with Mr. McGrail.

b. Was Mr McGrail’s view sought on whether a warrant or production order should be issued?

19. To the best of my knowledge and belief, Mr. McGrail’s view was not sought on whether a warrant or production order should be issued. He was informed of the intention to execute a search warrant in the NDM document sent to him by Mr. Richardson on the 25th February 2020. In his response on the 1st March 2020 he supported, in principle, the intended action, subject to consultation with the DPP (*Exhibit MW23* refers).

c. What was Mr McGrail's involvement in operational decisions generally? Wyan states at [51] that "to the best of my knowledge and belief he did not make any decisions in respect of Operation Delhi, including the decision to issue the warrants."

20. I can confirm that paragraph 51 of my first witness statement accurately reflects my understanding of Mr. McGrail's involvement in decisions regarding Operation Delhi.

4. On the decision to seek a search warrant rather than a production order:

a. What was basis for the conclusion/assertion that "it is feared if notice was given to the subject to provide this material to the OIC, the subject would destroy, alter, deface or conceal the material sought" (Application [324]); and that "it is highly likely that they would destroy, alter, deface or conceal the material sought because it is evidence sought by the OIC which may prove their involvement in the offence" (Application [326])? See also [17] of Mr Richardson's Witness Statement.

21. DS Clarke appears to have drafted these statements based upon the template I provided to officers making applications for search warrants pursuant to Schedule 1 (see paragraph 13 above). The original text of the template states, "*The / A key suspect in this case is the person I would serve a Production Order for the material sought. In the circumstances it is highly likely that they would destroy, alter, deface or conceal the material sought because it is evidence of their own wrongdoing.*"

22. Whilst DS Clarke appears to have amended the statement, the rationale remains clear. The basis for applying for a search warrant rather than a production order was because Mr. Levy KC was a suspect, and as such, would be highly likely to destroy, alter, deface or conceal relevant material rather than provide evidence of his own wrongdoing to police.

b. Was this conclusion reached generally due to JL's status as a suspect, or was it the result of particular facts/events pertaining to JL?

23. Mr. Levy KC was regarded as a suspect based upon the facts (as set out in the charging advice report (*Exhibit MW78* refers)). By virtue of his status as a suspect, and as set out above, it was extremely unlikely that he would provide evidence of his own wrongdoing to police.

c. Were counterarguments considered regarding: (a) JL's position in the legal profession/community; (b) the fact JL knew of the investigation for many months?

24. To the best of my knowledge and belief there were no counterarguments that a production order rather than a search warrant should be used on the basis that Mr. Levy KC's position in the legal profession / community.
25. Whilst the question posits that the status of Mr Levy KC could constitute a counterargument for obtaining a search warrant this is not necessarily the case. It is equally arguable that, given his status and position, he had considerably more to lose than others if he were to be found guilty of a criminal offence. Such an argument may favour obtaining a search warrant over a production order.
26. Notwithstanding the above, the position of Mr. Levy KC in the legal profession / community was considered in respect of the manner the search warrant was to be carried out. This is reflected in the NDM document written by Mr. Richardson (*Exhibit MW55* refers). At paragraphs 37 and 38 of the document he wrote:
- "37. Given the political sensitivities of the persons involved the least disruptive and most diplomatic means of police intervention will be deployed.*
- 38. JL will be approached at his place of work and as far as possible in private. The warrant will be executed and a notice of pre-interview disclosure served. A date will then be agreed for voluntary attendance interview. I have chosen this method as I believe that it is the most likely to generate a response to the allegation as opposed to a no comment interview."*
27. This approach to the execution of the search warrant is exemplified by the manner in which both Mr. Richardson and I conducted ourselves on the 12th May 2020 (*Exhibit MW56* and *MW57* refer). Indeed, this is alluded to in the email from Lewis Baglietto KC to the Attorney General on the 12th May 2020 where he writes, "[Although] Mr Levy has asked me to confirm that the officers in attendance were personally courteous to him at all times, [...]" (*Exhibit MW30* refers).
28. I do not recall whether there were any counterarguments regarding the fact that Mr. Levy KC may have known about the investigation for many months. However, whilst Mr. Levy KC may have known that there was an investigation regarding the

NSCIS platform and 36 North Limited, as set out at paragraph 3, he was not formally considered a suspect until the 8th April 2020.

29. It is also of note that modern police digital forensics are capable of recovering deleted messages / emails.

d. Were the Attorney General and/or DPP's concerns about seeking a search warrant (rather than a production order) known at the time of the application? If so, were they brought to the attention of the Magistrate?

30. I was not made aware of any concerns raised either directly or indirectly by the Attorney General prior to the application for the search warrant.

31. I recall, but am not certain, that prior to the application for the search warrant the DPP expressed the view that whilst he would have applied for a production order rather than a search warrant, this was an operational matter for the RGP. He further stated that if the use of a production order were to be challenged by judicial review, he would defend the RGP's position and that in his view, we would be successful.

32. During the meeting with the Attorney General and the DPP on the 15th May 2020, the DPP restated his view about the use of the search warrant. My notes from that meeting (*Exhibit MW7* refers) state:

"DPP disagreed with the decision to use a warrant. But stated that this was an operational matter. He did say that he believed we would be successful in JR. He would defend us."

33. I was not involved in making the warrant application to the Stipendiary Magistrate and am therefore unable to comment on what matters, otherwise than those set out in the application itself, were brought to his attention.

5. On the motivation for seeking electronic devices from JL:

a. Please elaborate on the WhatsApp exchange below between Mr Richardson and Mr Wyan:

"[07/05/2020, 12:39:17] Paul Richardson: Why did we not include documents on the warrant application.

[07/05/2020, 13:00:17] Mark Wyan: Primary because we were looking for texts / emails. I didn't want to over complicate things further especially because docs at

Hassans may be legally privileged. Just wanted enough to show we had followed the line of enquiry.”

34. In this text Mr. Richardson was asking why the search warrant was restricted principally to digital material and did not also include hard copy material.
35. I believed that if we were to read through hard copy documents at Hassans it was likely that we would have encountered legally privileged material. To avoid reading this material would have necessitated seizure of all relevant physical paperwork, including paperwork subject to legal privilege, for later review by independent counsel. By focusing on digital material such as texts and emails it was possible to subsequently refine searches through the use of keywords, and thereby limit or eliminate material that may be legally privileged. The reduced volume of material could then be reviewed by an independent lawyer in order to ensure that the remaining results were not subject to legal privilege.
36. I was also cognisant of the fact that, in respect of Mr. Levy KC, we were investigating the offence of conspiracy to defraud. By its very nature, the evidence of such a conspiracy was more likely to be evidenced by communication such as texts and email exchanges between the subjects / suspects.

6. What was discussed at the meeting on 8 May 2019 between Mr Richardson, Mr Wyan, Mr Gaggero, Mr Zammitt, Mr Clarke, Mr Finlayson, and Mr McGrail [Delhi Day Book p72]. It is noted that the Delhi Day Book refers to “trigger notes” for what Richardson planned to say: does this reflect what he did say at the meeting? Further, what was intended by the annotation in the Day Book “Explore IP issue w JL email”?

37. I do not have a note dated the 8th May 2019. However, my note of the 7th May 2019 appears to record this meeting. I tender the note as **Exhibit MW89**. It states:
- “Meeting with James Gaggero, Insp Zammitt, Supt Richardson and CI Finlayson. Mr Gaggero provided an overview of the allegations. Necessary to better understand the nature of the allegations.”*
38. My only recollection of this meeting was that Mr. Gaggero provided detail and context to the criminal allegations he was making to police.
39. With regards to the “trigger notes” made by Mr. Richardson, I am unable to recall what he said during the course of the meeting.

40. I am unable to answer what Mr. Richardson intended when he wrote, “*Explore IP issue w JL email.*” In the context of Operation Delhi “IP” is likely to refer either to Internet Protocol address or Intellectual Property.

7. What occurred at the meeting between Mr Wyan, Mr Richardson, the DPP on 3 March 2020 “for legal advice regarding the involvement of Mr Levy KC” (Wyan [22])?

a. Why has Mr Richardson not mentioned this meeting in his WS, or referred to it in the Day Book?

41. My notes for this meeting (*Exhibit MW11* refers) state:

“Meeting with the DPP regarding JL. Advice requested on whether his involvement amounts to a criminal offence. Full report drafted by Supt Richardson.”

42. The meeting followed an email exchange between Mr. Richardson and Mr. McGrail between the 25th February 2020 and 1st March 2020 (*Exhibit MW23* refers). In his email to Mr. McGrail on the 25th February, Mr. Richardson attached the NDM assessment (*Exhibit MW55* refers). In his response on the 1st March 2020 Mr. McGrail asked that Mr. Richardson consult with the DPP. Mr. Richardson replied, “*All noted. Will raise with DPP this week.*”

43. In light of the email exchange (*Exhibit MW23* refers) and my notes of the 3rd March 2020 (*Exhibit MW11* refers), I believe that the report I refer to in my notes is the NDM assessment (*Exhibit MW55* refers).

44. I recall that it was at this meeting that the DPP disagreed with our position that Mr. Levy KC was suspected of having committed a criminal offence. The DPP regarded his actions as “*sharp business practice.*” It was agreed that we would go away and prepare a full report setting out the evidence in support of our assertions.

45. It is noteworthy that in his email to the DPP on the 1st April 2020 (*Exhibit MW78* refers) Mr. Richardson explains why the charging advice report was created (*Exhibit MW78* refers) when he wrote:

“We last met to discuss this matter on the 3rd March 2020 with DI Wyan and considered the need to interview James Levy in order to complete our investigation. During the meeting we expressed differing views about some of the criminality identified particularly with regard to the conspiracy to defraud offences. Given our

different viewpoints we agreed that it was important for you to have sight of the key evidence in order to make an informed decision.”

46. I am unable to say why Mr. Richardson did not mention this meeting in his witness statement or refer to it in his Day Book.

8. The Daybook note for the 8 April 2020 meeting between Mr Richardson, Mr Wyan, the DPP [Delhi Daybook p139] states: “Re: JL - Reasonable grounds to question. Would be a lingering doubt otherwise. Obligation to interview under caution”. To whom or what did this lingering doubt apply?

47. Whilst I did not make this note myself, it seems to relate to Mr. Levy KC. It appears to reflect a concern that if Mr. Levy KC were not interviewed under caution, there would remain a doubt as to his involvement in the suspected conspiracy.

9. What was discussed at the meeting between Mr Wyan, Mr Finlayson, Mr Clarke, the DPP on 4 September 2019?

48. My notes of the 4th September 2019, which I tender as **Exhibit MW90**, state:

“Meeting with CI Finlayson and DPP regarding legal matters including:

- Asquez statement*
- Webber status*
- Security related information*
- Official Secrets Act*
- Conspiracy to Defraud*

Itinerary created for the meeting.”

“Consideration of legal issues and advice to be sought from DPP. In particular:

- 1) Asquez statement – Consideration of whether there would be a conflict for Mr Fischel to act on behalf of Cornelio / Perez and represent Asquez in providing a full account?*
- 2) Webber – Keyword search has recovered correspondence with David Webber who appears to be involved in setting up the 36N business. Consideration of whether this is legally privileged or simply business actions. Note that he is working for Levy / Hassans and is arguably not a lawyer / client relationship. If it is, how do we proceed moving forward?*

- 3) *The platform is related to national security. See for example the evidence of Insp Chipolina. What level of detail is required for the purpose of section 366A? If detail is required, can any special measures be introduced to protect this public interest?*
- 4) *Consideration of Official Secrets act offence (section 2 of 1911). Is it defence to disclose the information to a person if you honestly believed the person was authorised to receive it (even if they were not)? Is misdemeanour offence tried in Supreme?*
- 5) *Conspiracy to defraud – Does the agreement to take the NSCIS contract from Bland amount to a conspiracy to defraud? Consideration to the term ‘by dishonesty.’ Or is it simply a commercial dispute, and civil action is appropriate? Relevance – Legal advice sought in respect of the ongoing investigation.”*

b. Why did Mr Richardson not attend this meeting?

49. I cannot recall, nor have any notes as to why Mr. Richardson did not attend this meeting.

c. What advice did the DPP provide?

50. I do not appear to have notes of the advice provided by the DPP at this meeting. However, DS Clarke made notes of the meeting which may account for the reason why I did not (*Exhibit PC9* refers).

STATEMENT OF TRUTH

I believe the contents of this witness statement to be true.

**Personal
Data**

✓ NAME: Mark WYAN

DATE: 4th August 2023