

**INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE CONVENED BY A COMMISSION ISSUED BY HM GOVERNMENT OF GIBRALTAR ON THE 4<sup>TH</sup> FEBRUARY 2022 IN LEGAL NOTICE NO. 34 OF 2022 (“THE INQUIRY”)**

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**WRITTEN CLOSING SUBMISSIONS**

**ON BEHALF OF:**

- (1) HM Government of Gibraltar**
  - (2) The Hon Fabian Picardo KC MP, Chief Minister**
  - (3) Mr Nicholas Pyle OBE (at all material times, Governor)**
  - (4) Michael Llamas CMG KC, HM Attorney General for Gibraltar**
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## A. EXECUTIVE SUMMARY

1. The following is an executive summary of these submissions:

1.1. The evidence clearly shows that Mr McGrail did not retire because improper pressure had been put upon him to alter the course of the live Operation Delhi criminal investigation, as he claims.

1.2. In any event, there was no improper (still less corruptly motivated) interference by anyone in the conduct by the RGP of the Operation Delhi investigation.

1.3. Mr McGrail's bald allegations to this effect are entirely unwarranted and simply constitute a self-serving but manufactured narrative to justify his decision to seek early retirement without acknowledging the real reason for it.

1.4. The real reason for Mr McGrail's retirement was that:

(i) He knew that he had lost the Governor's and the Chief Minister's confidence because-

(a) in the case of the Governor, principally because the seriousness of the incident at sea in March 2020 in which two people died in a collision with a police launch and also because the then Governor considered he had been misleadingly evasive with him in the provision of information relating to the incident; and

(b) in the case of the Chief Minister, principally because he considers that Mr McGrail lied to him.

(ii) He knew that his position had therefore become untenable and he could not remain in post.

(iii) He knew that the Gibraltar Police Authority thought that his position was untenable and that he should stand down.

(iv) He believed and feared that the Governor was about to call publicly for his resignation, and (wrongly) believing that, if he did, his pension may be in jeopardy, he chose to retire instead.

- 1.5. Even though it is not the real reason for his retirement, and there was in fact no improper interference in the Operation Delhi Police investigation, Mr McGrail has nevertheless mounted a public case narrative in which he has alleged the most serious of improper conduct on all of the then Governor, the Chief Minister and the Attorney General on the basis just of his own bald assertions and of speculative innuendo. All such allegations of improper behaviour are roundly rejected and denied.

## **B. INTRODUCTION**

2. These Closing Written Submissions are made on behalf of HM Government of Gibraltar, the Chief Minister, the Hon. Fabian Picardo KC MP, HM Attorney General for Gibraltar Michael Llamas CMG KC and Nicholas Pyle OBE, at the material time the interim Governor of Gibraltar ("**the Government Parties**").

3. These submissions are arranged as follows:

Part A: Executive Summary [Para 1]

Part B: Introduction [Paras 2-4]

Part C: Some General Principles [Paras 5-9]

Part D: Mr McGrail's Retirement [Paras 10-72]

Part E: The Loss of Confidence Issues

E.1 – Op Delhi (Issue 5) [Paras 73-151]

E.2 – Incident at Sea (Issue 3) [Paras 152-198]

E.3 – HMIC Report (Issue 4) [Paras 199-210]

E.4 – GPF/Bullying (Issue 6) [Paras 211-217]

E.5 – Airport Incident (Issue 1) [Paras 218-226]

E.6 – Helicopter Incident (Issue 7) [Paras 227-232]

Schedule 1: Section 34 - Default

Schedule 2: Mr Pyle's powers as Governor

Annexes 1-3: Extracts from transcripts of 13, 15 and 20 May meetings.

4. **The Inquiries Act 2024 and the Government's Restriction Notice.**

- 4.1. As foreseen and stated by the Government at the time that it did so, the enactment of the new Inquiries Act and the making by the Government of a Restriction Notice under it, has enabled the Government to protect the vital, unrelated to this Inquiry

public interest of Gibraltar without any material practical adverse implications for the conduct of the Inquiry. The Government is grateful to the Chairman for the manner in which he has done so.

- 4.2. As the Chairman has himself envisaged and stated, there has been no curtailment of the Inquiry's ability to investigate anything it has wanted to investigate. The domestically and internationally damaging comment and criticism levelled against these measures have therefore proved to be entirely unwarranted and unjustified, as also foreseen and said by the Government at the time.

### **C. SOME GENERAL PRINCIPLES**

#### **5. Nature of these submissions.**

It will not be helpful to the Inquiry to have multiple comprehensive reviews of all the evidence. It is to be supposed that Counsel to the Inquiry will do so. These submissions review the evidence only to the extent necessary to illustrate submissions made on behalf of the Government Parties in relation to the key relevant issues.

#### **6. What this Inquiry is (and is not) about.**

- 6.1. As the Chairman has acknowledged many times, this Inquiry is limited in scope by and to its terms of reference, which are to inquire into and report to the Government on the reasons and circumstances leading to Mr McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement ("**the Inquiry's Scope**").
- 6.2. For this purpose, the Chairman has identified a number of issues ("**the Issues**") that he wishes to investigate. But he has rightly (and again often) acknowledged that his interest in these Issues is necessarily limited to the extent (if at all) that they constitute a reason or circumstance leading to Mr McGrail's retirement ("**Relevance**" or "**Relevant**"). This could be either because they led to a loss of confidence in Mr McGrail or for some other reason.
- 6.3. This Inquiry is therefore not about or concerned with general considerations of the appropriateness or inappropriateness of any person's conduct or behaviour,

personal style, nature or manner of expression, levels of emotion or passion, or approach to the conduct of their functions and responsibilities, unless it is Relevant.

- 6.4. Nor is this Inquiry about baldly and speculatively alleged, supposed corruption in Gibraltar, Gibraltar's system of governance and/or the extent to which things are done or operate differently here to the UK, supposed conflicts of interests or any other matter, again, unless Relevant.

**7. Reasons and circumstances leading to.**

- 7.1. The Government Parties broadly agree with CTI's submissions about the meaning and effect of "reasons", "circumstances" and "leading to" in the Inquiry's terms of reference. A 'reason' is a cause of or motive for an action or event. A circumstance is a fact or condition that accompanies or influences an event or action.

- 7.2. As CTI says (para 8 of his written opening submissions) the words 'leading to' reinforce the need for a link between the reasons and the circumstances and IM ceasing to be Commissioner of Police. It is submitted that this introduces the requirement for a 'causal link' between (i) the circumstances and reasons, on the one hand and (ii) the relevant event or action.

- 7.3. In this case, the relevant "event or action" is Mr McGrail's retirement or ceasing to be COP, not the loss of confidence or the reasons for the loss of confidence in him. None of the 'loss of confidence' Issues were the direct cause of or reason for Mr McGrail's retirement. The reasons for a loss of confidence may therefore be circumstances for the relevant "event", namely, Mr McGrail's decision to seek early retirement.

**8. Loss of Confidence – Factors to consider.**

In the Government Parties' submission, a number of factors should be taken into consideration in approaching the matter of loss of confidence, namely:

8.1. Loss of confidence is subjective.

- (i) Loss of confidence is subjective. Different people may form different judgments about the same conduct. Loss of confidence by a person is about the effect of something on that person, regardless of whether the judgment is right or wrong, justified or unjustified. Accordingly, in the context of loss of confidence, the issue is not the sufficiency or adequacy of the reasons why Mr Pyle and/or Mr Picardo lost confidence in IM. That would be an objective test, and it is submitted that that would not be right.
- (ii) We therefore agree with CTI's submission that it matters not whether the facts underpinning the reasons for a loss of confidence are well-founded or not. What matters is whether the loser of confidence genuinely believed them to be true and well-founded. Accordingly, a particular contributing reason for loss of confidence does NOT have to be objectively well founded or correct.

8.2. Loss of confidence may be incremental.

- (i) Issues will have contributed to the view that the Governor and the Chief Minister had of Mr McGrail in May 2020 in an "incremental" or "accumulating" way over a period of time. A person's decision at a given moment that, in his mind, the threshold for taking an action has been met may be influenced by the cumulative effect on that person's mind of relevant influencing factors that have occurred in the past, even though those same issues, individually, did not produce that effect. In short, a proverbial glass that is filling or a camel's back that is being laden over time.
- (ii) Therefore, for example, the fact that an issue precedes Mr McGrail's appointment as COP does not dispose of it in terms of its relevance to loss of confidence in Mr McGrail in May 2020, if and to the extent that he played a role in the matter that influences a person's view of him in the "accumulating, incremental" sense.
- (iii) In the end, in May 2020, the issues that caused the proverbial glass to overflow, or the camel's back to break, and caused the Governor and the Chief Minister to decide that they had lost confidence in Mr McGrail as the

person able to or that should continue to lead the RGP was, in the case of the Governor, the incident at sea, and in the case of the Chief Minister, his belief that he had been lied to by Mr McGrail in their meeting on 12 May 2020. These were the catalysts for their decision.

- (iv) The other ‘loss of confidence’ issues were effectively “concerns”, some very historical, that contributed (in different measure, if at all, in the case of each of the Governor and the Chief Minister) to the final, joint assessment of Mr McGrail in the context of their May 2020 individual decisions that they had lost confidence in him, and their joint decision to seek his removal. As Mr Pyle said in oral evidence: “*There is a big difference and a big step between concerns and loss of confidence*” [Transcript Day 18, p.168 line 3].

### 8.3. Issues not previously raised.

- (i) It has been a theme of Mr McGrail’s approach to the Inquiry to assert that the Governor and/or the Chief Minister did not previously or contemporaneously raise, bring to his attention or complain about a matter upon which they (separately and to different degrees, if at all) later rely or refer to in relation to their loss of confidence decisions in May 2020.
- (ii) It is submitted that this does not speak to the merits of the issue, especially in the context of subjective, cumulative effect of past events on a person’s later decision that a loss of confidence threshold has been reached or passed. Nor does the genuineness of a person’s loss of confidence in another for specified reasons depend on whether that person has previously articulated, still less litigated, his views about those reasons with the person concerned.

## 9. **Leadership: taking responsibility for failings of the organisation.**

9.1. People in leadership positions have to take overall responsibility for what happens in the organisation which they lead particularly for matters and events that have serious consequences to others (“falling on your sword”).

9.2. In the case of the RGP, under the Police Act the Commissioner has “full command, superintendence, direction and control of the Force, and shall be

responsible for the efficient administration and government of the Force". The Commissioner of Police must therefore take responsibility for serious failures in the RGP. In this context, the issue is not the Commissioner's personal responsibility or blame for, or direct, personal involvement in or causation of events or occurrences.

9.3. The difference of approach in this respect by Mr McGrail and his successor, Mr Ullger, is starkly noteworthy. While Mr McGrail prevaricated and refused to acknowledge this, the current Commissioner Mr Ullger immediately and unconditionally acknowledged and accepted it:

(i) Mr McGrail:

[Transcript Day 6, p.99 lines 18-25]:

*Q. ....Would you agree or disagree that the leader of an organisation is ultimately responsible for the conduct of that organisation?*

***A. Depends what conduct you are referring to. If it is in general, yes. If it is in departmental silos, it all depends the conduct and the concern relating to that conduct, where is it pitched?..***

[Transcript Day 6, p.69 line 23 to p.70 line 15]:

*Q. And, more generally, do you accept ultimate responsibility as head of the organisation for the collision at sea?*

***A. Regrettably, again, no. I don't accept responsibility for that. ... It's tragic, shocking for everybody, shocking for them, shocking for us, shocking for their families, it is a tragic situation. At the same time, individual officers have to be accountable for their actions in the same way as any firearms' officer or other officer engaged in any operational duties. I was asleep at four o'clock in the morning when I was informed of this. I was at home asleep.***

(ii) Mr Ullger:

[Day 13, p.186, lines 1-24]:

*Q. There is just one more thing and then I am done. Commissioner Ullger, you very candidly, if I may say so, said this morning that you acknowledged your role as commissioner when it came to taking responsibilities and the question was put to you in the context of the*



*HMIC report, effectively you used more elegant language, "but the buck stops with me" was effectively your evidence, do you agree?*

**A. Yes, sir.**

*Q. Would you take the same view about two deaths at sea in relation to the incident at sea?*

**A. Yes, sir.**

#### **D. MR MCGRAIL'S RETIREMENT**

10. So, why did Mr McGrail cease to be Commissioner of Police in June 2020? The short answer is that he chose to apply for early retirement. But plainly, his decision to seek early retirement did not reflect any spontaneous desire on his part in June 2020 to no longer wish to be Commissioner of Police for reasons unrelated to anyone else. So why did he seek early retirement? What was his reason for doing so?

***The Governor and the Chief Minister had lost confidence in Mr McGrail and wanted him gone***

11. On 15 May 2020 the Governor and the Chief Minister met, agreed that they had both lost confidence in Mr McGrail (albeit for different reasons) as the person to lead the RGP, wanted him removed from office for that reason and sought to bring that about. Their varied reasons for this (to the extent that the Inquiry may consider them Relevant) are dealt with later in these submissions.
12. The Governor and the Chief Minister were entitled to lose confidence in the Commissioner of Police, even though neither of them had the power to remove him from office at that time (and the Chief Minister never did have it). The right to lose confidence in someone is distinct from and does not depend on having the legal power to remove the person in consequence. But they did have the right to act as they did, namely, to bring their loss of confidence to the GPA's attention.

***The Gibraltar Police Authority invited Mr McGrail to retire following an entirely independent decision***

13. They did this at a meeting on 18 May 2020 with Gibraltar Police Authority's Chairman, Mr Joey Britto, at which they set out to him their reasons for losing confidence in Mr McGrail and invited the Gibraltar Police Authority to consider whether there were

grounds to exercise its statutory power to call upon Mr McGrail to retire in exercise of its power under section 34 of the Police Act, and whether it wished to do so.

14. The meeting was followed up, at Dr Britto's request, with a Note of what had been said at the meeting, which the Chief Minister himself prepared, and submitted to Dr Britto after it had been approved by the Governor **[B1448]**. The Note, reflecting what had been said at the meeting (confirmed by Dr Britto's own evidence to this Inquiry), made it clear that it was for the GPA to consider the matter and make its own decision:

- 14.1. *"The GPA are therefore being invited by the Governor and the Chief Minister together to consider whether they believe that all OR any (note it is a disjunctive, not a conjunctive list) of the following 5 have been impacted."* **[B1449]**

- 14.2. *"It is now a matter for the GPA to decide how to act and to decide that they want to engage the S.34(1) power."* **[B1452]**

15. Contrary to Mr McGrail's self-serving allegations (at para 172 and 173 of McGrail 5 – **[A177]**), there was therefore no "guidance" or "instructions" by either the Governor or the Chief Minister about what the GPA should decide as to whether or not to invite Mr McGrail to retire. This is made clear by Mr Britto at paras 13-15 of Britto 1**[A322]**:

- 15.1. *"The interim Governor and the Chief Minister stated that it was a matter for the GPA, having been appraised of these concerns, whether in its discretion, it wanted to invoke the powers vested in it pursuant to Section 34 of the Police Act 2006".* (Para 13)

- 15.2. *"The Interim Governor stated that should the GPA be minded to call upon MR McGrail to retire, both should be deemed to have been consulted and agreed."* (Para 14)

- 15.3. *The interim Governor and the Chief Minister pointed out that if the GPA were to consider inviting Mr McGrail to retire, the first step would be to allow Mr McGrail to make representations, if he wished to do so."* (Para 15)

16. The GPA held an emergency meeting on 21 May 2020 to consider this matter. It read the Memo of the Chairman's meeting with Governor and CM at the Convent, heard orally from its chairman and itself decided, without further intervention of the Governor or the

Chief Minister to invite Mr McGrail to retire. It did so for two stated reasons (see Minutes at [B1973]) primarily because as Mr McGrail had lost the confidence of BOTH the Governor and the Chief Minister, he would find it very difficult to continue to work with the Government and the Governor. It also considered the seriousness of the Incident at Sea on 8 March.

17. The GPA did not consider the reasons why the Governor and the Chief Minister had lost confidence in Mr McGrail, or the merits of those reasons. They simply decided that having lost the confidence of them both, his position as COP had become untenable. Though, as just stated, the GPA did decide that the incident at sea was serious.
18. While it is not for the Government Parties to justify or defend the decision of the GPA to call for Mr McGrail's retirement (which obliged him to retire and thus amounted to removal of him by the GPA), the Government Parties agree with the GPA's view that losing the confidence of both the Governor and the Chief Minister makes it well-nigh impossible for a Commissioner of Police to function in a way that ensures the effectiveness and efficiency of policing in Gibraltar (a view that Mr McGrail himself shares).
19. The GPA's decision was communicated in person to Mr McGrail on 22 May by Dr Britto at a meeting in IM's office at New Mole House Police Station and by the two letters dated 22 May 2020. The Chief Minister had, at Dr Britto's request, contributed to the drafting of these two letters (see WhatsApp exchanges between CM and JB on 21-22 May 2020 at FP3/20 [B1436]). But the members of the GPA had already made their decision (which was reflected in the letters) to invite Mr McGrail to retire. So, the Chief Minister's involvement in their drafting did not in any way affect or influence the GPA's decision. It did not in any way undermine the independence of the GPA's decision. Respectfully, it is a 'red herring'.

***The GPA's decision-making making process turned out to be flawed – and placed it in default***

20. As the Inquiry has heard, the GPA's decision to call upon Mr McGrail to retire in exercise of its power under section 34 of the Police Act, turned out to be fatally flawed for technical, procedural reasons. This was because the GPA had failed to allow Mr McGrail the opportunity to make representations BEFORE exercising its power under section 34

to invite him to retire, as that section requires. Also, the meeting at which it made that decision was inquorate.

21. Accordingly, and acting on sound legal advice, the GPA therefore decided that it had no other option but to withdraw the invitation to retire and to abandon the process and further stated that, as then constituted, it would be unable to pursue the matter. It is submitted that, for the reasons set out in Schedule 1 to these submissions, this constituted a 'default' by the GPA i.e., the GPA had failed to discharge or perform a responsibility imposed on the Authority.
22. The GPA's default engaged Section 13(1)(f) of the Police Act, under the provisions of which the Governor may "*where the Authority has failed to discharge or perform a responsibility imposed on the Authority under this Act*", among other things, suspend from duty, or call for the resignation of the Commissioner.

***Consequent on the GPA's default, the Governor acted***

23. Mr Pyle took legal advice.

- 23.1. Mr Pyle took legal advice from the Attorney General, who advised him that as the GPA had placed itself in a position where it could not discharge or perform a responsibility imposed on it under the Police Act, it was in default, and the powers of the Governor under section 13(1)(f) of the Act had thereby been engaged<sup>1</sup>.

- 23.2. The FCDO legal adviser in London took the same view: see email to the Governor dated 7 June [B1828] ("*Although you have justifiable grounds on which to exercise your section 13(f) power...*").

24. The Government Parties therefore reject the view that a default had not occurred and that therefore the section 13(1)(f) power of the Governor had not been engaged. Furthermore, and in any event, the question whether a default had occurred such as to engage the Governor's powers under section 13(1)(f) is a matter of law the determination of which is thus outside the scope of the Inquiry's terms of reference.

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<sup>1</sup> The AG also advised the Governor that reconstituting the GPA was not a practical option because, under the Police Act, its new or additional members required to be appointed as to one member by each of Mr Pyle and the Chief Minister, and the other seven members by Mr Pyle, acting on the advice of the Public Service Commission from a list of persons that shall have been approved by the Governor and the Chief Minister, and that this role of the Governor and the Chief Minister would render the new appointments equally tainted by bias [C4796].

25. Only the Governor had power to act.

At this stage, only the Governor had the legal power to bring about Mr McGrail's removal by calling for his resignation. **The Chief Minister**, Mr Picardo, did not have the power to remove Mr McGrail from office or call for his resignation, and he did not do so, though he was in full agreement with the Governor that he should exercise his power to do so, if necessary.

26. The Governor prepared to act under section 13(1)(f), but Mr McGrail asked to retire before he began that process.

26.1. For the purpose of initiating the process of consideration by him of using his section 13(1)(f) powers to suspend Mr McGrail or to remove him by calling for his resignation, the Governor, Mr Pyle, called Mr McGrail to a meeting with him on 5 June 2020. The purpose of that meeting was to inform IM that the Governor had received his lawyer's letter dated 29 May 2020, the Chief Minister's and Attorney General's response to that letter and also the letter from the GPA in relation to the procedural flaws in their decision-making, and that he would study them over the weekend and reflect **[C4808]**.

26.2. At that very meeting, Mr McGrail handed Mr Pyle an email that his lawyers **had already sent to the GPA's lawyers** stating that Mr McGrail "*feels that he must apply for early retirement from the Royal Gibraltar Police*". That was therefore before Mr Pyle formally even initiated the process to consider using his section 13(1)(f) powers.

26.3. The Governor did not look at this email until the next day, Saturday 6<sup>th</sup>, on which day he wrote to Mr McGrail by email. In that letter **[C4815]** Mr Pyle referred to Mr McGrail's stated feeling that "*he must apply for early retirement*" and asked for Mr McGrail's confirmation by midday on the next day, Sunday, that he "*will be tendering your letter of resignation on Monday with immediate effect.*"

26.4. The reference to "resignation" was an error, since the issue was retirement, not resignation. Mr Gomez (Mr McGrail's lawyer) replied by email dated 7 June **[C4820]** making it clear that Mr McGrail would not be resigning, but confirming his intention to retire, subject to agreement of terms and saying that he would be

writing to the new Governor “*next week with what he believes will be reasonable terms for his retirement*”.

- 26.5. At a meeting later on 7 June attended also by Mr Llamas, the AG, who was legally advising Mr Pyle, Mr Pyle and the Chief Minister, agreed **[C4845]** that “*on balance, we needed to protect Sir David and felt should CoP still be in the office after the swearing in, he would more likely than not retract his request to retire and appeal to Sir David, thus taking us back to square one*”. They agreed that this needed to be prevented and that the only way of doing so was “*to conclude proceedings before Sir David’s swearing in on Thursday*”. That discussion, decision and the reasons for it were reported by Mr Pyle to the FCDO in London.
- 26.6. At that same meeting it was agreed that should Mr Pyle have to invoke his powers he would suspend Mr McGrail with immediate effect (not call for his resignation) so as to allow Mr McGrail “to lobby” the new Governor “*but not take us back to square one*” i.e. to lobby the new Governor on retirement terms as requested by Charles Gomez and Co on Mr McGrail’s behalf. This is also the course that had been mooted by Mr Pyle with the FCDO in London and preferred by both of them: see email thread starting at **[C4841]**.
- 26.7. To that end, Mr Pyle met with Mr McGrail in the morning of Monday 8 June, at which meeting Mr Pyle handed Mr McGrail the letters referred to above and asked him to return later that afternoon “to discuss matters” **[C4856]**. During the afternoon meeting Mr Pyle and Mr McGrail discussed Mr McGrail’s intention to retire and Mr Pyle “*agreed that this was the best course of action*” and it should happen by 6pm on 9 June. Mr McGrail agreed to retire “*subject to financial terms being agreed*” (letter 8 June Governor to Mr McGrail at **[C4866]**) which terms Mr McGrail discussed with the Chief Secretary **[C4868]**.
- 26.8. There followed a negotiation on the financial terms of Mr McGrail’s retirement **[C4870 – 4878]** which concluded successfully on the terms of an email from the Chief Secretary to Mr McGrail at 21:16 and the latter’s acceptance reply at 21:27 (both at **[C4884]**).
- 26.9. Following this agreement of terms, the Governor sent Mr McGrail the letter dated 8 June referred to above **[C4868]**, which Mr McGrail acknowledged saying that

he would submit his retirement letter “first thing in the morning” [C4887] which he duly did at 08:14 on 9<sup>th</sup> June [C4888].

26.10. So, although (i) an unsuccessful attempt to remove him was made by the Gibraltar Police Authority, (ii) the Governor had previously indicated an intention to consider using his section 13(1)(f) powers if the GPA did not remove Mr McGrail and (iii) the Governor called Mr McGrail to a meeting to initiate that process, Mr McGrail was, in fact, not removed from office by the Governor or anyone else. Mr Pyle was not required to invoke his powers under section 13 of the Police Act, nor indeed to even commence the process of doing so.

26.11. Since the email from Mr McGrail’s lawyers to the GPA’s lawyer on 5 June expressing an intention to retire, the process had been exclusively about terms for retirement, rather than any attempt by Mr McGrail to remain in post.

***Why did Mr McGrail make the decision to seek early retirement and why did he agree to do so on 9<sup>th</sup> June 2020?***

Mr McGrail did not retire for the reasons that he stated to the GPA

27. In his lawyer’s email dated 5 June 2020 to the Gibraltar Police Authority asking to retire, Mr McGrail gave two reasons for doing so, namely:

- (i) that he had been unfairly treated by the GPA in the flawed section 34 process; and
- (ii) that improper pressure had been put upon him to alter the course of a live criminal investigation (a reference to Operation Delhi, the RGP investigation into alleged fraud in relation to the contract for the maintenance of the NSCIS national security platform).

28. It is submitted on behalf of the Government Parties that neither of those reasons were plausible or true, because-

28.1. As to the interference in live criminal investigation reason (and without prejudice to the primary contention of the Chief Minister and the Attorney General that there was no such interference):

- (i) According to Chief Superintendent Yeats, on the afternoon of 22 May (the day that Mr Britto had come to NMH to give him the letter in which the GPA invited him to retire), Mr McGrail had convened the entire RGP Senior Management Team in his office and told them that “*he was engaging with the GPA to resist him having to retire*”. (Yeats 1 para 43 [A640])
  
- (ii) Also on 22 May, Mr McGrail had a telephone conversation with the Attorney General, Mr Llamas (the transcript of Mr McGrail’s part of which conversation is at [C6952]). Nothing in that conversation suggests any sense of principled need to retire as Commissioner of Police. If anything, the contrary is the case.
  
- (iii) On 29 May 2020, Mr McGrail’s own lawyers had written to the Gibraltar Police Authority [C4477] saying that:
  - (a) the exercise of the section 34 power by the GPA “would be wholly unjustified” (page 1) and “a travesty” (page 2),
  - (b) the GPA, taking an independent decision should conclude that “Mr McGrail should not be removed from office” (page 2);
  - (c) the GPA should protect the COP from “retaliation” under international principles to protect whistle blowers (para 24 page 10);
  - (d) if the GPA exercised its powers under section 34 to call for IM’s retirement “in the full knowledge that background involves the Chief Minister and AG seeking to interfere with a live criminal investigation, this would indeed be an affront to the rule of law and a breach of your duties under the Constitution.” (para 42 page 16);
  - (e) “The only rational decision for the GPA to reach is to dismiss the request of the Governor and the Chief Minister and the “just result” would be for them to allow him “*to remain in post*” i.e., that he should be allowed to continue as Commissioner of Police (para 77 page 28).
  
- (iv) Absolutely nothing relevant to the alleged interference had happened in the Operation Delhi investigation between the 29 May and 5 June (the date on which he asked to retire). So, on 22 May and 29 May:



- (a) All the alleged (though denied by the Government Parties) “wrongful interference with a live criminal investigation” had already by then occurred; and
- (b) Mr McGrail plainly did **not** think that the alleged interference in the investigation was an obstacle to his ability or desire to carry on as COP. On the contrary, he urged the GPA to allow him to continue to do so.

28.2. Furthermore, if Mr McGrail had genuinely thought that the required statutory independence of his office and of the RGP as crime investigators was being improperly interfered with, his duty, as the holder of such an office, would have been to stay and defend the RGP’s independence by resisting any unjustified pressure or unlawful attempts to remove him.

28.3. Similarly, the proper reaction of a Commissioner of Police to a supposed improper attempt to interfere in the administration of justice is not to seek early retirement, but rather to enforce laws that exist precisely in relation to such unlawful conduct.

28.4. As to the unfair treatment reason:

- (i) The GPA had withdrawn the flawed section 34 procedure and stated that it could not be proceeded with for technical, procedural reasons.
- (ii) This is a wholly implausible reason for a Commissioner of Police to seek early retirement.
- (iii) All the “unfair treatment” had occurred before the above-cited expressions by Mr McGrail of desire to continue as CoP.

29. He plainly **did** wish to carry on as Commissioner despite:

- (i) the supposed interference in a live criminal investigation, and
- (ii) his unfair procedural treatment at the hands of the GPA.

30. Accordingly, it is respectfully submitted on behalf of the Government Parties that the reasons given by Mr McGrail for his decision to seek early retirement are not plausible or credible and should be rejected by the Inquiry.

### The real reasons for Mr McGrail's retirement

31. It is submitted on behalf of the Government Parties that the real reason why Mr McGrail sought early retirement was that:
- 31.1. he knew (having been told by Mr Britto, the Chairman of the Gibraltar Police Authority at their meeting on 18<sup>th</sup> May) that he had lost the confidence of both the Governor and the Chief Minister and that the Governor would consider using the powers available to him under Section 13(1)(f) of the Police Act to call for his resignation if the GPA did not call for his retirement;
  - 31.2. he knew that his position had, for that reason become untenable. Indeed, the GPA itself had decided to call for his retirement for that very reason;
  - 31.3. he believed that, had he not sought early retirement, there was a very real risk that the Governor would call publicly for his resignation, under section 13(1)(f) of the Police Act; and
  - 31.4. he was (wrongly) concerned that if the Governor sacked him (as opposed to him retiring) he may lose his pension or it might be otherwise adversely affected.
32. This is evident from Mr McGrail's own repeatedly stated case that "*He was also concerned that if he was forced to resign (as opposed to retire) this would put his pension rights at risk*". (See para 13 of Mr McGrail's written submissions dated 20 June 2022 for PH1; para 27 of Mr McGrail's written submissions dated 20 July 2022 after PH1; para 25 of his written submissions dated 9 September 2022 for PH2 and para 17 Statement of Factual Position for PH2 on 20 September 2022). See also:
- 32.1. Para 23 of Mr McGrail's Written Opening: "*IM reluctantly agreed to retire early, rather than being forced to resign and therefore – in addition to the huge reputational damage he would suffer – potentially putting his pension at risk.*"
  - 32.2. McGrail 1:
    - (i) Para 100 [A42]: "*either I remained in post and was potentially suspended or called to resign (which according to the letter was what was on offer), and*

*lose all my pension rights and years of service, or apply for early retirement which may safeguard some of my interests.”*

(ii) Para 108 [A44]: *“I had completed 36 years of service and did not want to put in jeopardy my pension entitlements”.*

33. But Mr McGrail did not ask anyone whether that would be the case. In fact, this was not correct. Instead, he opted to retire before even speaking with the Governor, and then focused on negotiating his retirement terms.

***Mr McGrail could not, in any event, continue in post – the efficiency and effectiveness of policing is engaged***

34. In any case, and regardless of the nature and extent of the statutory removal procedures, it was not realistically possible for a Commissioner of Police to properly and effectively discharge his or her functions, and therefore to continue in office, without the confidence of both the Governor and the Chief Minister. This is true in Gibraltar as much as it is in London, where two very recent Metropolitan Police Commissioners, Ian Blair and Cressida Dick, have both retired early (outside of the statutory removal procedure) after losing the confidence of the incumbent Mayor of London.

35. Mr McGrail’s legal team have sought to draw support from the criticism levelled at the Mayor of London by the Chairman of the Inquiry into Cressida Dick’s resignation. But that was a case in which the Mayor of London had proceeded outside the statutory removal process. That is not the case in relation to Mr McGrail. Both the GPA and, in consequence of their default, the Governor invoked (or in the case of the latter intended to invoke) the statutory removal process. In any event, the criticism misses the point being made on behalf of the Government Parties which is limited to the fact that the practical reality is that Commissioners of Police cannot remain in office after losing the confidence of the political authorities with whom they must work.

36. This reality was recognised by the Gibraltar Police Authority who, in consequence of the loss of confidence in Mr McGrail by the Governor and the Chief Minister, itself decided to call for Mr McGrail’s retirement, considering his position to have become untenable by virtue merely of the Governor’s and the Chief Minister’s loss of confidence in him.

37. Indeed, Mr McGrail himself had already come to the very same conclusion:

McGrail 1, para 101 [A42]: “.....*The other part of me was saying that my time was up as it was going to be impossible to work with these officials ever again – in my view, my position was untenable but not for the reasons they claimed. I suppose by that point the loss of confidence was a mutual issue between them and I.*”

38. In doing so, Mr McGrail himself (rightly) acknowledged the inextricable link between such loss of confidence and the efficiency and effectiveness of policing under his leadership. Accordingly, all of the Government Parties, the GPA and Mr McGrail consider that such loss of confidence engages the efficiency and effectiveness of policing.

39. It is further submitted that, following the very serious allegations made by Mr McGrail against all of the Governor, the Chief Minister and the Attorney General in his lawyers’ letter dated 29 May 2020 to the GPA, his inability to continue as Commissioner became still more obvious, and his ceasing to be Commissioner became still more inevitable and unavoidable. It was inconceivable that he should or could continue in office thereafter.

#### ***Procedure and natural justice***

40. The Section 34 process.

40.1. The procedure to be followed by the GPA in the exercise of its powers under section 34 of the Police Act are set out in that section and are thus statutory. Section 34 is a GPA process, which is a matter for the GPA. It not for the Governor or the Chief Minister to supervise the manner of its exercise.

40.2. Neither the GPA’s decision, nor the procedural flaws in the manner in which it was made, are the acts or responsibility of the Governor or the Chief Minister (save that they invited the GPA to consider whether there were grounds for and wished to exercise its powers to do so).

40.3. As ‘complainants’, it is not incumbent on the Governor and the Chief Minister to comply with any procedural requirements in the manner in which they articulate their ‘complaint’ or position to the GPA. The note of their meeting of 18 May 2020 with the GPA chairman is not part of the GPA section 34 process or of any other

process that engages the principles of natural justice in Article 6 ECHR or section 8 of the Gibraltar Constitution.

40.4. It was up to the GPA to decide what further information it may require for the purposes of the proper conduct of its section 34 process and to have requested it from the Governor and the Chief Minister.

40.5. Accordingly, the criticism of the Governor and the Chief Minister for the alleged inadequacy or incompleteness of the contents of that note (in so far as fairness to Mr McGrail is concerned) is thus misconceived. The reasons for the Chief Minister's loss of confidence (his belief that he had been lied to) were alluded to in the Note (as well as having been stated to Dr Britto in the meeting).

41. The Section 13 process.

41.1. Section 13 creates a power in favour of the Governor. The Act itself provides for no procedural requirement for its exercise. It is therefore legally moot whether a court of law would take the view that its exercise requires "a fair process" in application of constitutional or common law principles, which the courts may imply into the statute, and if so, what process. That is a matter of law and, respectfully, outside the Scope of this Inquiry.

41.2. In any event, interesting as that legal question is, it is academic in the context of this Inquiry because, although recourse to section 13 was threatened (and feared by Mr McGrail), and so may be a "circumstance" leading to his retirement, recourse was not in fact had to that power, no process or procedure was invoked and it is not known what, if any, process or procedure would have been deployed if the power had been invoked. It may be that the Chairman will wish to consider making a recommendation in this respect.

***Allegations of corruption***

42. These are the inescapable realities, much as Mr McGrail may try to conjure the smokescreen that this Inquiry is about "corruption" or "corrupt conspiracies" or about the alleged fraud relating to the national security platform contract, or that he retired because of alleged improper interference in a live police investigation motivated by such alleged corrupt conspiracies.

43. Those allegations, which characterised the narrative of Mr McGrail's case until the start of the oral hearings, gave way during the oral hearings to less intemperate (but still denied) assertions of "inappropriate conduct".
44. Considerable damage has been done to the reputation of Gibraltar by these allegations of corruption. Since Mr McGrail retired under pressure from proposed action by the Governor, who is not accused or suspected by Mr McGrail of 'corruption', the allegations (which are in any event roundly rejected and denied) were entirely misplaced in the context of this Inquiry.

### ***Mr Pyle's role***

#### 45. Mr Pyle's status: as Governor and professionally

- 45.1. At all material times (February to 9 June 2020), Mr Pyle was the ("*interim*") Governor of Gibraltar pursuant to the provisions of section 22 of the Constitution.
- 45.2. For the reasons set out in Part 1 of Schedule 2 to these submissions, in his capacity as *interim* Governor (and unlike the quite different position of someone who is merely the holder of the position of *acting* Governor under section 23) Mr Pyle was endowed with the full functions, responsibilities and powers of the Governor.
- 45.3. For the reasons set out in Part 2 of Schedule 2 to these submissions, the contention to the contrary effect advanced on behalf of Mr McGrail that, because of the imminence of the arrival of the new Governor, Sir David Steel, Mr Pyle was not endowed with the full powers of the Governor are incorrect.
- 45.4. Mr Pyle OBE was (at the material time) an experienced UK diplomat of ambassadorial rank. He had been British High Commissioner to Botswana. He had considerable experience of dealing with "deeply challenging and complex issues" (for example, in Somalia).
- 45.5. As interim Governor he represented the Crown in Gibraltar. As Deputy Governor (his substantive position before and after his interim governorship) he represented the Foreign Commonwealth and Development Office in Gibraltar.

Mr Pyle therefore had no stake or interest in any issues of a “local” nature such as those that comprise Mr McGrail’s narrative of “inappropriate behaviour” or motives.

45.6. There is no evidence that Mr Pyle acted improperly (still less corruptly) and it is implausible to posit (as Mr McGrail narrative effectively requires) that he did. Not only is it implausible, but it is incompatible with elements of Mr McGrail’s own case and, indeed, the overwhelming evidence (including, but not limited to Mr Pyle’s own candid and credible oral evidence).

***Mr Pyle’s: it is not said that he is lying but that he has been manipulated by the Chief Minister***

46. It is Mr McGrail’s own case that Mr Pyle is not lying: “*We do not say that NP is lying, but we do say that NP was manipulated, and allowed himself to be manipulated, by FP.*” (Para 30, McGrail Written Opening Submissions).

47. This is the insuperable, fatal contradiction that lies at the heart of Mr McGrail’s narrative in this Inquiry. The contradiction is the means by which he seeks to overcome the obvious obstacle in the path of his case theory: how to reconcile -

47.1. his stated case that he retired because of improper (indeed corrupt) interference in a live police investigation (Op Delhi) by the Chief Minister, the Attorney General and the DPP, with

47.2. the inescapable reality (also part of his stated case) that he retired because he feared for his pension because of the threatened decision and acts of the Governor (that he would call for his resignation), when the Governor was not involved in or motivated by anything to do about Op Delhi (about which he had only recently learned)?

48. Mr Pyle’s reaction to the suggestion that the CM may have manipulated him was understandably indignant: “*...with what I’ve done in my career and what I’ve achieved, and in some of the deeply challenging and complex issues I’ve been involved with (and I have to say this carefully: my work on Somalia springs to mind), that I could be*

*manipulated and manoeuvred is quite insulting*". [Transcript of oral hearing Day 18, p.164-165]

49. Mr Pyle is either lying or telling the truth, and it is respectfully submitted that he is telling the truth, because this is the corollary of the fact that Mr Pyle is not lying (as even Mr McGrail concedes). The truth of Mr Pyle's evidence cannot be obfuscated by the use of such words as "manipulated", which are not consistent with truth.

50. That must include Mr Pyle's evidence [Transcript Day 18 page 164 lines 9-18]:

*"...the lack of confidence was from both of us, for ultimately different reasons.....the coincidence of timing of these matters of importance to both of us coming together at the same time may be coincidental, but that's all they were: there was no conspiracy or collusion in that."*

51. And, in any event, there is no evidence to the contrary.

#### ***Manipulation? - Mr Pyle's evidence***

52. In any event, in addition to the fact that Mr McGrail does not say that Mr Pyle is lying, Mr McGrail's self-serving case theory narrative that Mr Pyle was manipulated is not sustained by the evidence of what Mr Pyle said and did, which is not compatible with his having been manipulated.

53. Mr Pyle's evidence is as follows:

53.1. His *"loss of confidence in Mr McGrail's probity and integrity, and his leadership of the RGP had been progressive over a period of time and by reason of a number of incidents and matters"* which he sets out in paras 20-25 of his First Witness Statement: Pyle 1, para 13.2 [A240]. They had begun early on after his arrival in Gibraltar: Pyle 1, para 20 [A245].

53.2. During his WhatsApp exchanges with the Chief Minister on 14 and 15 May [B1440] Mr Pyle said (among other things) the following:

(i) When he received the Chief Minister's message on 14 May at 09:49 stating that he was *"starting to lose confidence here"* Mr Pyle responded *"Agree. As*



*we thought at the time, wrong appointment*", and it was Mr Pyle who suggested that they should meet the next day.

- (ii) On 15 May at 20:30 Mr Pyle said to the Chief Minister: *"I don't see any option re CoP given the evidence. I'll speak to Joey carefully sometime next week"*.

53.3. At the meeting on 18 May 2020 with GPA chairman Mr Pyle himself told Dr Britto that (Pyle 1, para 14.2-14.3 **[A241]**):

- (i) He endorsed the Chief Minister's explanation (at Mr Pyle's request) of their joint position.
- (ii) There had to be accountability for the failings and that the common thread through all the issues appeared to be a lack of adequate management and leadership and that therefore in his opinion, it is the Commissioner who has to be held accountable.
- (iii) Should the GPA determine that a call to retire was not appropriate, he would consider using the powers available to him under Section 13(1)(f) of the Police Act which allowed him to call for the resignation of the Commissioner that, as things stood, he would need strong and persuasive arguments not to do so and that the GPA should be in no doubt as to the strength of his feelings.

53.4. When the Chief Minister telephoned him on 14 May 2020 saying he wished to discuss an important issue surrounding the RGP with him, Mr Pyle's response was that "this was a remarkable coincidence as I wanted to discuss my deep concerns about its leadership with him) and they agreed to meet the next day. (Pyle 1, para 26.1 **[A255]**)

53.5. At the 15 May 2020 meeting between them, Mr Pyle (see Pyle 1, para 26 **[A255]**):

- (i) "Went first" and he told the Chief Minister that he had had for some while concerns about the RGP and its leadership which the incident at sea has turned into a firm belief that change in how the RGP works is needed. He briefly ran through the concerns as outlined in Pyle 1.

- (ii) Told the Chief Minister that the incident at sea further demonstrated a lack of control by RGP leadership and that there was a culture at the RGP that was unhealthy, and it stemmed from its leadership.
- (iii) Explained to the Chief Minister that he (NP) believed that he had “at best” been misled by Mr McGrail over issues that were the Governor’s direct responsibility, namely, where the incident had taken place an issue that he had posed to Mr McGrail numerous times during the first few days of the incident. It took until Wednesday 11 March before he told Mr Pyle it was highly likely the incident took place outside BGTW. He felt that Mr McGrail had been evasive on that issue and that his behaviours and mannerism mirrored those that he had displayed during and after the airfield incident.
- (iv) “Concluded”, together with the Chief Minister, after a long discussion between them, that both of them (a) had lost confidence in Mr McGrail and (b) thought that as head of the organisation believed he should be held accountable for the RGP’s failings.

53.6. In a WhatsApp message on 22 May 2020 at 22:07 [B1443], Mr Pyle said:

*“This is the first issue for many a year that has conflicted me and troubled my nights and weekends – I’m very good at switching off. But I am absolutely sure that we are doing the right thing in the right way. My conscience is clear. This is the right thing for the RGP and the Gibraltar, painful though it is.”*

53.7. In a WhatsApp message on 27 May 2020 at 19:22 [B1444], Mr Pyle said:

*“As well as breach of trust and loss of confidence, CoP has demonstrated significant lacking in leadership competences which I think can be summed up in abject decision- making capabilities.”*

53.8. The decision to invoke the procedure relating to the exercise of his power under section 13 of the Police Act to call for the resignation of Mr McGrail as Commissioner of Police was entirely his own. At no time was he put under any pressure by any person but in particular by the Chief Minister, to decide on that course of action. (Pyle 1, para 26.1 [A257])

53.9. He had no prior knowledge about the criminal investigation referred to in Mr Gomez's letter of 29 May until the Chief Minister briefed him "in headline fashion" about it at their meeting on 15 May. He was not aware of any of the detail of the case save that the Deputy Chief Minister's former Private Secretary was implicated in it. He did not know that the investigation was known as Operation Delhi until March of 2022. He had expressed his deep concerns about the RGP leadership to the Chief Minister before he raised the issue of the criminal investigation. (Pyle 1, para 27.1 [A257])

54. As to whether Mr Pyle was manipulated by the Chief Minister:

54.1. None of the above sworn evidence is compatible with or suggests "*manipulation*". Mr Pyle was plainly acting out of his own conviction and decisions.

54.2. Mr Pyle's above evidence cannot be explained by the suggestion that Mr Pyle was being "*manipulated*". They are statement of positions, acts and decisions by him, and they are either true or not. In this context, Mr McGrail says that it is not suggested that Mr Pyle is lying.

54.3. In any event, it is not plausible that a UK diplomat of Mr Pyle's standing and experience would allow himself to be manipulated as alleged.

***Manipulation? - In full view of London***

55. It is submitted that the extent of Mr Pyle's routine reporting to the FCDO and its knowledge of (including up to ministerial level) and involvement in the issue of Mr McGrail's proposed removal from office and the reasons for it, and latterly, retirement ahead, most desirably and if possible, of the new Governor's then imminent arrival in Gibraltar, is by itself sufficient to dispose of Mr McGrail's self-serving narrative that it was the result of:

55.1. Mr Pyle "allowing himself to be manipulated by the Chief Minister"; or

55.2. An improper, still less corrupt, conspiracy between them; or

55.3. An attempt by them to "rush it through" before the new Governor's arrival, for any improper or surreptitious reason.

56. Especially noteworthy to dispel the suggestion that Mr McGrail's replacement as Commissioner was unjustified and the result of improperly motivated manipulation of Mr Pyle by the Chief Minister, is the FCDO's Overseas Territories' Police Adviser's assessment in email dated 9 June to Mr Pyle: "*A challenging situation but without doubt the right course of action.*" [B1838]

***Rushed through?***

57. It was indeed the common view of the Governor, the Chief Minister and the FCDO in London that it would be preferable if the matter could be resolved before the new Governor's arrival so that his new tenure would not commence with such a complex, controversial extant issue.
58. It is submitted that that is an entirely proper objective, which was achieved despite Mr Pyle's decision not to call for the resignation of, but only to suspend Mr McGrail if he had to have recourse to section 13.
59. Indeed, the new Governor, who is implicitly said to have been deprived of the opportunity "to bring a new perspective" to the issue was aware of the matter and fully supportive of Mr Pyle's efforts to resolve it before his arrival, if he could. In an email dated 5 June 2020 [B1813] Sir David Steel (the then imminently arriving new Governor) said as follows to Mr Pyle in response to an email from My Pyle to him about the McGrail issue [B1811]:

*"Thank you. This matter has been the reason that I too have not been troubling you, as I know that you have had much on your plate at the moment. I discussed the whole issue with [name redacted] this morning, as well as with PUS. Both think you are doing a cracking job in difficult circumstances. I just hope that the actions you are taking will address the issue."*

***The Chief Minister, Mr Picardo's role***

60. Mr Picardo and Mr Pyle had discussed the matter at length and were agreed that Mr McGrail should be replaced as Commissioner. Mr Picardo was thus a full participant in the loss of confidence decision and in the decision to invite the GPA to consider the use of section 34. Mr Picardo was also in full agreement with the Governor using his power to call for Mr McGrail's resignation, if it became necessary to do so.

61. As already stated, Mr Picardo had no statutory or other power in relation to Mr McGrail's removal from office and did not purport to exercise any.
62. This does not mean that the Chief Minister did not want Mr McGrail to be removed from office. He most certainly did, having lost confidence in him primarily and most immediately because he considered that Mr McGrail had lied to him.
63. Accordingly, since Mr McGrail feared the consequences of the Governor's actions, Mr Picardo's loss of confidence in Mr McGrail could not have been a reason for Mr McGrail's retirement, though it may, to some extent, have been a circumstance leading to it. Put in more legalistic terms, Mr Picardo's loss of confidence could not have been the actual cause of the retirement, though it could have been a contributory cause of its timing in the 'but for'.
64. Mr McGrail holds up the Chief Minister as the "trigger" for his ceasing to be Commissioner of Police. This is most succinctly articulated on his behalf in para 78 of his Written Opening Submissions:
- "The key events which are the subject of this Inquiry were triggered by the attempt on 12 May 2020 to execute a search warrant against JL [James Levy]. But for this event, IM would have still been in post until his scheduled retirement in 2022."*
65. Leaving to one side the inaccurate reference to "attempt" to execute a search warrant (as if the RGP had been prevented from doing so, which is not the case), this is a speculative statement for which there is no evidence and is sustained only by the narrative of Mr McGrail's case theory, because Mr Pyle's evidence was as follows:

Day 19, page 252:

- 1 Q. And even if the Chief Minister had been  
2 the trigger in the but for sense, I do not  
3 know, presumably you would not have done  
4 it on that day if the Chief Minister had not  
5 rung up. Perhaps you would like to answer  
6 that question. Would you have done it on  
7 that day? I think this was the thrust of one of  
8 my learned friends' questions. Would you  
9 have done it on that day if the Chief Minister  
10 had not reached out to you on the 14th with  
11 his email?  
12 **A. Probably not, given what was in my**

13 **in-tray at the time. But it wouldn't have**  
14 **taken long.**

15 Q. So even if the Chief Minister was the  
16 trigger in the sort of but for sense, does that  
17 alter anything about your position, about  
18 your loss of confidence and about your desire  
19 to see Mr McGrail replaced for whatever  
20 reasons you have explained to the Inquiry?

21 **A. Not at all.**

66. On the evidence, Mr McGrail would not have survived much longer in post (and certainly not until the end of his tenure in 2022 as posited in his written opening submissions), however much his ceasing would likely not have occurred precisely on 9 June 2020 (as it did), without the events of 12 May 2020.
67. But, even for Mr McGrail's point under consideration, the relevant event is not the execution of a warrant against Mr Levy, but rather what Mr McGrail told the Chief Minister during the 12 May meeting, and specifically the fact that the Chief Minister believes that Mr McGrail intentionally lied to him. That is the "trigger cause" of his demise at that precise time. In other words, the execution of the warrant against Mr Levy would not have triggered Mr McGrail's ceasing to be COP at that precise moment in time, if Mr McGrail had not lied to the Chief Minister.

***James Levy's visit to Mr Picardo's home and the email exchanges between the Governor and the Chief Minister on the eve of their meeting with Dr Britto on 18<sup>th</sup> May.***

68. The fact that CM met JL at home on 17 May, and later that day exchanged emails with NP about meeting with JB the next day see [C3947] is not forensic of anything relevant because—
- 68.1. That exchange was initiated by Mr Pyle. It was therefore not the Chief Minister initiating anything that may have been "hatched" at the meeting with Mr Levy.
- 68.2. It was Mr Pyle telling Mr Picardo what he (Mr Pyle) proposed to tell Dr Britto the next day.
- 68.3. None of Mr Picardo's comments in response to Mr Pyle reflected anything that might have reflected input from Mr Levy or anyone else at the meeting at home.
- 68.4. The loss of confidence and agreement to request the GPA on consider exercising its section 34 powers had been agreed already at their meeting on 15 May.

69. It was put to Mr Picardo by CTI that he did not refer to this meeting in para 11 of Picardo 3 [A234]. Whilst it is true that there is no reference to this meeting in the narrative of the witness statement itself, the existence of that meeting was disclosed by Mr Picardo in that affidavit in that he exhibited to it the WhatsApp messages that alluded to the meeting, which is how the Inquiry has discovered that the meeting took place [B1422].

### ***AG's role***

70. The Attorney General, Mr Llamas was not a participant in the “loss of confidence” decision by the Governor and the Chief Minister, nor in their decision to invite the GPA to consider exercising their section 34 powers.

71. The AG participated only at the end, at Mr Pyle’s request and as his legal adviser to provide him with legal advice in relation to the GPA ‘default/engagement of section 13’ issue, and in relation to such issues as whether Mr Pyle should (if he needed to have recourse to section 13) call for Mr McGrail’s resignation or just suspend him (meeting with Governor and CM on Sunday 7 June) and Mr McGrail’s retirement terms.

72. There is no justification, still less evidence, to justify Mr McGrail’s case theory narrative that the Attorney General is somehow party to a ‘corrupt conspiracy’ in respect of the role that he played in the ‘loss of confidence’ decision by the Governor and the CM and their decision to invite the GPA to consider calling on Mr McGrail to retire. That allegation is reckless and irresponsible, and is to be deprecated.

## **E. LOSS OF CONFIDENCE ISSUES**

### **E.1 OPERATION DELHI – THE CONSPIRACY INVESTIGATION/ SEARCH WARRANT ISSUE (MAY 2020) – ISSUE 5**

#### **The Governor**

73. Mr Pyle’s evidence is clear: he did not lose confidence in Mr McGrail for any reason connected to the Operation Delhi investigation (see e.g. Transcript Day 19 page 234. He played no role in relation to this matter.

## **The Chief Minister**

74. Mr McGrail and his legal team have persistently made very serious allegations of corruption that Mr McGrail “*was forced out of his post because he had executed a search warrant against a friend of the Chief Minister, in a brazen act of corruption designed to protect the personal and political interests of the Chief Minister and other powerful figures*”. IM PH3 Written Submissions dated 2 February 2023 para 12.
75. This is untrue. It is a wild and irresponsible allegation unsupported by evidence, and is based only on innuendo, speculation, hyperbole and his own self-serving case theory narrative.
76. Contrary to Mr McGrail’s case theory, Mr Picardo did not lose confidence in Mr McGrail because:
- 76.1. he obtained and proceeded to execute a search warrant instead of a Production Order against Mr James Levy KC;
- 76.2. nor because the RGP was investigating the nature and extent of Mr Levy’s involvement in the matters being investigated by them, as a suspect or otherwise or any desire to protect him from that;
- 76.3. nor to protect a supposed financial interest of his own in the NSCIS platform management contract.
77. The allegation that he may have been motivated by his and his friends and partners’ interest in 36 North Limited is roundly contradicted and disavowed by the fact that his behaviour and that of his Government was in fact to the very opposite effect:
- 77.1. When Bland’s concerns about the attempt to divert its NCSIS contract to 36 North Limited were brought to Mr Picardo’s attention, he intervened to ensure that the contract remained with Bland (October 2018).
- 77.2. The Financial Secretary Mr Mena (another partner of Hassans with an indirect interest in 36 North Limited through that partnership) intervened to overrule Mr Caine Sanchez and ensure that arrears of payments that were being withheld



from Bland Limited by Mr Sanchez were paid to Bland Limited. (Mena 1, paras 33-39 [A1321]).

- 77.3. According to PR's note of a telephone call from Mr Gaggero on 2 May 2019 [B5599], Mr Gaggero expressed the view that, in his judgement, the CM had "*acted correctly throughout*". This even in the knowledge (as appears by the same note) that the CM had been discussing the platform with JL and that, in Mr Gaggero's view, JL was leaning on the CM.
- 77.4. These are not the actions of people seeking to protect their financial interest as shareholders in 36 North Limited in the NCSIS management contract.
- 77.5. In any event, by the time of Mr Picardo's supposed "interference" on 12 May 2020, any possible financial interest in the NSCIS management contract had ceased to be the case more than 18 months earlier (see sub-para 1 of this para above).
- 77.6. Mr Picardo did not intervene or interfere in the police investigation (see para 92 *et seq* below).
78. Nor did the Chief Minister, or anyone else, do or say anything that protected Mr Levy from whatever the RGP may have wished to do with him in relation to their investigation.

**The Chief Minister: The Lie Issue - the reason for *Mr Picardo's loss of confidence***

79. The primary reason for Mr Picardo's loss of confidence in Mr McGrail (though there were others, including the incident at sea and the HMIC report issues) is that Mr Picardo believed (as he still does) that Mr McGrail had lied to him when stating to Mr Picardo during their 12 May meeting that, in relation to the execution of the warrant, he was acting on the advice of the Director of Public Prosecutions, which was not the case, as the DPP has himself later confirmed.
80. Mr Picardo's evidence as to the lie:
- 80.1. Mr Picardo told the Gibraltar Police Authority 6 days later in his (and Mr Pyle's) meeting on 18 May with the Chairman, namely that "*the Commissioner had*

*expressly misled him and which left him unable to believe the Commissioner.”*  
See (c) in note of 18 May meeting **[B1451]**

80.2. *“Mr McGrail then specifically told me that the advice of the DPP was that they should proceed by way of search warrant.”* Picardo 1 para 49 **[A193]**.

80.3. Picardo 2 para 15 **[A227]**:

*“At para 147 (iii) e) (of McGrail 1), Mr McGrail says that he did not tell me that the Op Delhi investigation team had executed the search warrant on the advice of the DPP and that what he “was referring to was the status of suspect for JL had been the subject of consultation and agreement with the DPP who had advised the team generally on the investigation throughout.” Also, in para 33 of Mr McGrail’s First Affidavit, he reduces the statement made by him to me in relation to the DPP’s advice on the James Levy search warrant to “all the grounds to deal with JL had been consulted with the DPP “. In other words, he is denying that he said to me in terms, or that he had ever said to Michael Llamas, the Attorney General, that the DPP had advised that a search warrant should be used against James. This is simply untrue. He most certainly told us both that the DPP had advised him that a search warrant could and should be used against Mr Levy. In fact, this was central to my loss of confidence in Mr McGrail. I consider that Mr McGrail is now seeking to wriggle off the hook of his lie by suggesting it was a ‘misunderstanding’. There is no room for misunderstanding as Mr McGrail clearly told me in the presence of Mr Llamas that the search warrant for Mr Levy had been issued on the advice of the DPP. He is changing his version only now that he has seen that the DPP does not make out the lie he told me.”*

81. It is noteworthy that the CM’s immediate (within one minute) and spontaneous response when told by Mr Llamas that the DPP had “strongly advised against the search warrant”, was to say (in Spanish) “well then he lied to both of us” (see WhatsApp exchanges at **[B1417]**). The fact that Mr Llamas had mis-conveyed and misdescribed the precise message from the DPP is wholly irrelevant to this point. The point is the references to search warrant and lie. (And, in any event, it is not accepted that Mr Llamas’ misdescription of the DPP’s position made things appear worse than they were. The RGP, like anyone else, is at liberty not to follow legal advice that they have sought. The point is that, having not taken advice from the DPP (or even if the RGP had and had

gone against it), Mr McGrail cannot then claim to have been acting on advice of the DPP.)

82. Furthermore, Mr McGrail's case theory and evidence that during the meeting his statements had referred to Mr Levy's status as a suspect and that his use of the word 'intervention' is a reference to that and not to the search warrant is wholly implausible, unsustainable as a matter of semantics (a status is not an intervention) and unsupported by the evidence of Mr McGrail's own practice and evidence:

82.1. At para 12 of McGrail 2 [A49]: "*With all that had happened since the intervention of JL, I wanted to discuss these crucial findings with them.*" When asked whether he was using the word 'intervention' here to describe the execution of the warrant, Mr McGrail agreed [Day 7, p.144. lines 12-21]

82.2. In his email to self at [B75], Mr McGrail stated: "*The date of execution was arranged for 12<sup>th</sup> May though I was not aware of the time. I advised the team that out of courtesy (not obligation) I would be informing the CM, MoJ and AG of this action given the delicate nature of the intervention.*" When asked whether he was using the word 'intervention' here to describe the execution of the warrant, Mr McGrail agreed [Day 7, p.145].

82.3. Also in his email to self at [B76], Mr McGrail stated: "*My hypothesis is that the AG himself is under some form of pressure to ensure that the investigation is terminated and the intervention of JL has shown him up for not having achieved the stopping of the investigation,*" When asked whether he was using the word 'intervention' here to describe the execution of the warrant, Mr McGrail agreed, adding that it is a common term that he uses [Day 7, p.146].

82.4. In answer to CTI asking why he had sent the WhatsApp informing the CM that the search warrant was being executed, Mr McGrail responded "*It was a sensitive intervention and I didn't want him to hear it from anybody else first other than myself*" [Day 6, p.189, lines 1-6].

82.5. Mr McGrail's oral evidence: "*...in the wake of the intervention on 12 May when, to quote Miss Gallagher's opening address, "all hell broke loose"...*" and "*It was all to do of the intervention on 12 May in relation to Operation Delh*" [Day 6, p.84].

- 82.6. Mr McGrail's oral evidence: "*because the other three had already been arrested, had been processed and interviewed, but this was in relation to an intervention at Hassans for JL, Mr Levy*," [Day 6, p.189].
- 82.7. Mr McGrail's oral evidence: "*so I think it was the right call of me to advise [the CM] as close to the point of intervention as possible*" [Day 6, p.191, lines 7-9]
83. Note that, when the AG put the lie to Mr McGrail at the end of the 13 May meeting, Mr McGrail's immediate response was that he couldn't remember the words that he had used: **[B161]** This completely undermines his challenge to the Chief Minister's and AG's explicit evidence as to what he said.

ML: "*No, no (inaudible) what you told me and him yesterday, you told us yesterday that the [IM interjects "No the..."] ... the decision to do search warrant was on advice of the DPP.*"

IM: "*I.... prrfff, I can't remember the words Michael, what I remember saying is that and I've said it in this, I don't need to shrug responsibilities, but this matter had been dealt with in consultation with the DPP . That is what I've said, and I'm referring to an investigation and a....a relationship that has been back and forth on a number of... of times. That is what I'm referring*"

ML: "*But what you can't categorically say, I think, is that you , you or Paul or any other member of the team [IM interjects "Hmm.. it...it...it was with..."]... asked the DPP, do you agree that a search warrant is the appropriate way of doing this and then the DPP replied saying yes*"

IM: "*Paul me ha dicho.... Paul me ha dicho, de que... [Paul has told me, Paul has told me that] there was conversations about the search warrant. Emm... and... and... err before what's happened...*"

84. So, on the day following the exchange with the CM on 12 May, Mr McGrail could not remember the words that he had used but said that Mr Richardson had told him that there had been conversations about the search warrant with the DPP. So, it is not clear on what basis IM now says that he was not referring to the search warrant (which he believed PR had indeed discussed with DPP) during the 12 May meeting with the CM.
85. Within minutes of telling the AG that he could not remember the words he had used in the 12 May meeting, Mr McGrail told Mr Richardson (in what he thought was the privacy of his own car), that he had the advice of the DPP "*on the question of having to do these interventions*" (See transcript of 13 May car journey at **[C6929]**). In the context of his

frequent use of the word 'intervention' in reference to the search warrant, it is simply not plausible to suggest that he was not using the word 'intervention' in reference to the search warrant in this statement to Mr Richardson, and therefore also in the 12 May meeting with the CM.

86. Furthermore, even on IM's (denied) case as to the words that he used, it is plain that he intended to and did give to CM and AG at least the obvious impression that DPP had advised the search warrant. In the context of a discussion of a disagreement about whether the correct thing was a search warrant or a production order, to say that "it had been consulted with DPP" (whatever the speaker had in mind) is to plainly imply that the DPP had advised the search warrant.
87. Mr Levy's evidence is that he was told by Supt Richardson, in his office on 12 May, that the RGP had taken advice at the highest level [Day 8, p.143-144]. While Mr Richardson denies saying this to Mr Levy, he did recall a conversation with Mr Chincotta in the lift at Hassans where he told Mr Chincotta "*we have taken advice from the highest level in relation to the intervention.*" [Day 8, p.133, lines 22-25]. It is noteworthy that Mr Richardson claims to have used the word 'intervention' in the same implausible way as Mr McGrail claims to have. Given all that has been stated about this and the unusualness of the meaning attributed to this word, it is submitted that the fact that both Mr Richardson and Mr McGrail alight on this argument suggests a coordination of positions.

### **The interference issue – Chief Minister and Attorney General**

88. Mr McGrail alleges that both the Chief Minister and the Attorney General improperly interfered in the Operation Delhi criminal investigation into alleged fraud relating to the NSCIS national security platform and that they did so corruptly to "change the course of the investigation".
89. There was no improper (still less corruptly motivated) interference by any Government Party in the conduct by the RGP of the Operation Delhi investigation. Mr McGrail's bald and unsubstantiated allegations to this effect are entirely unwarranted and simply constitute a self-serving but manufactured narrative to justify his decision to seek early retirement without acknowledging the real reason, namely that he knew that he had lost the Governor's (and the Chief Minister's) confidence, and that the Governor may have

been about to call for his resignation. He was (unjustifiably and unnecessarily) driven by a personal concern to save his pension.

90. As already stated above, Mr McGrail did not retire because of any such interference and, in fact, no such interference took place. Nothing that amounts to interference was done by either of them. Neither the Chief Minister nor the Attorney General interfered with the Op Delhi criminal investigation or tried “to change the course of a police investigation, still less “to halt it”. The contrary is true. After Mr McGrail’s retirement, the investigation was continued by the same senior officers, and charges were brought against the same three individuals against whom they were envisaged at the time of Mr McGrail’s retirement. And the RGP were free to deal with Mr Levy as they chose.
91. “Interference” means “enter into something intending to hinder or obstruct” it or “intervene so as to affect an action”. Mr McGrail does not appear to distinguish between (i) interference and (ii) criticism of his actions. He wrongly equates them. He appears to have a misplaced sense of immunity from criticism for and comment about his decisions and actions. Criticism and comment are not interference. Nor is comment or advice that the receiver is free to accept or reject.

#### ***Alleged interference by Chief Minister***

92. Mr McGrail says that the Chief Minister “interfered” in the Operation Delhi investigation in three ways:
- 92.1. By expressing a negative opinion about the RGP’s actions;
  - 92.2. By berating Mr McGrail angrily on 12 May 2020 in relation to the warrant against James Levy;
  - 92.3. By communicating with James Levy and his lawyer, Lewis Baglietto on and after the 12<sup>th</sup> May 2020.
93. None of these things would constitute interference in the RGP’s investigation.

#### ***Chief Minister: Interference by expressing negative opinion***

94. By simply commenting (in response to IM’s WhatsApp informing the CM that the warrants were being executed) that it was “*a bad decision*”, which according to Mr McGrail “*expressed a clear negative opinion about the RGP’s actions*”. Para 91.1.1 page

31 IM Updated Written Opening Submissions). It is wholly fanciful to suggest that this amounts to interference in the investigation.

***Chief Minister: Interference by “berating”***

95. The Chief Minister and the Attorney General do not accept Mr McGrail’s description of the 12 May meeting as a “berating” of Mr McGrail. The Chief Minister was certainly angry, but neither he nor the Attorney General felt that Mr McGrail was intimidated, but rather stood his ground. The Chief Minister was strongly of the view that the RGP’s decision to seek a search warrant rather than a production order against Mr James Levy CBE KC, a leading lawyer, the senior partner of Gibraltar’s largest law firm and the leader of the Jewish Community, was wrong.

95.1. Whether as Chief Minister or not, and regardless of the manner in which he did so, and regardless also of the merits of the views that he expressed, Mr Picardo has the same right as anybody else to criticise the actions and decisions of the RGP and its Commissioner in respect of this matter.

95.2. Picardo 3 para 10 [A234]: *“I was, and remain, very concerned that the Police should fail to give proper consideration to the test for obtaining a Search Warrant as opposed to a Production Order in respect of any individual. That concern is magnified in respect of Mr Levy (as it would be in respect of anyone in his position), not because of my long standing, continuing and much-valued personal, political and professional relationship with him, but because of his standing in the community and the effect on Gibraltar’s international reputation as a finance centre of the ill-considered taking of such decisions in respect of a leading professional in our finance centre and Gibraltar’s foremost law firm.”*

95.3. If criticism of the police in the context of a criminal investigation is to be thought to constitute interference in it, the police simply become an unaccountable law unto themselves.

The Chief Minister’s criticism and concerns appear to have been justified

96. It is submitted that, whether the exchange between the Chief Minister and Mr McGrail was interference or not does not depend on the views expressed by the Chief Minister being right. It does not matter whether he was right or wrong. But it would appear that

there was a considerable degree of merit in the concerns and views expressed by the Chief Minister, as appears from the following matters relating to the search warrant:

- 96.1. The views (his preference) expressed about it by the DPP.
- 96.2. No explanation has been forthcoming as to why an application that, for the very reason of the sensitivity was decided should be decided by the Supreme Court, was in fact submitted to the Stipendiary Magistrate.
- 96.3. The application was prepared by the most junior officer on the team Sgt Clarke using a template with which he was not familiar, without previous experience and without the benefit of legal advice. It was approved by an Inspector (Goldwin) who appears to have had no involvement or knowledge of the investigation.
- 96.4. The application took the form of a mere reading of the document prepared in support by the RGP. The Magistrate conducted no interrogation of the application and issued a perfunctory ruling. Mr Richardson, the SIO, seems to have just “sat there” [B174] during the application.

Nothing was done or said to try to stop the search warrant against Mr Levy from being executed.

97. The CM said and did nothing to stop the execution of the search warrant from happening. It was in the process of happening as the exchange of 12 May was taking place. i.e. after the RGP had already obtained and “was executing” (according to IM’s WhatsApp) the search warrant.
  - 97.1. But in oral evidence, Mr McGrail asserted that, by his “interpretation” the CM and AG did attempt on 12 May to stop the execution of the search warrants [Day 7, p.160 line 14 to p.161 line 10]

*Q...Now, did the Chief Minister or the Attorney General make any attempt whatsoever on 12 May to stop the RGP doing as it pleased in relation to the execution of the search warrant?*

***A. They did, in my interpretation, by applying the pressure that they did, with the threat included. I took it to mean that I should call back the officers from the offices of Hassans, that I should stop the activity against***

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97.2. This evidence is implausible because –

- (i) It represents only his own interpretation.
- (ii) It assumes that the critical comments made by the Chief Minister constitutes “pressure”.
- (iii) There was no “threat” to Mr McGrail by the Chief Minister, whose words plainly meant that there would be consequences for the RGP (and the Government as its funders) from a damages claim.
- (iv) Nothing attributed to the Chief Minister or the AG could logically be assumed and interpreted to mean “call off the execution of the search warrant”. If that had been meant it could have been said.
- (v) Indeed, Mr McGrail and the other RGP officers say that Mr McGrail himself made and would make no operational decisions in relation to the investigation. They were all made by the investigation team led by Mr Richardson. It is not therefore clear why Mr McGrail himself would have interpreted the criticism as pressure on him to discontinue the warrant. He would not have thought that, and if he had, he would have told the Chief Minister that it would not be his decision to call back the officers. He did not do that.
- (vi) Supt Richardson, the SIO actually executing the warrant, was called out of Hassans by Mr McGrail to be briefed about “the berating”. He has given no evidence that the “berating” was interpreted as now claimed by Mr McGrail who would surely have shared such a view with him. Indeed, Mr Richardson’s oral evidence is to the contrary effect. When testifying to the fact that IM recalled him to New Mole so that he could brief him on the CM’s dressing down, Mr Richardson said “**I wouldn’t say that that was an interference though in the investigation**” [Day 5, p.15, lines 7-11]
- (vii) Mr McGrail has filed seven witness statements. It was not until his Fifth Affidavit in August 2023 that he alludes to this, having in his previous witness statements dealt at length with what he describes as the “berating”

and his interpretation of it and its effects (he had previously said it was interference, a threat to his job etc, but no suggestion that he should call back the officers).

- (viii) Indeed in his email to self [B75] purportedly prepared on 12 May 2020 in which he recites in detail what the CM said and his interpretation of it, he says in this regard: “*I felt the CM was questioning an operational decision on a live criminal matter and that this was not appropriate.*” There is no mention whatsoever in the email to self of the suggestion that he interpreted the words to mean an attempt to persuade him to call back the officers and abandon the execution of the warrant.

There was no interference in fact

98. Nothing obliged Mr McGrail to pay heed to the Chief Minister’s opinion, and indeed, Mr McGrail boasted that he did not do so:

- (i) “unsuccessfully we might add” – 29<sup>th</sup> May 2020 Gomez Letter para 35 [B21]
- (ii) “I was clearly not relenting to that pressure....” – Para 119 IM 5 [A167]

99. There was in fact no interference with the execution of the search warrant. It was being executed, and continued to be executed (or not) exactly as planned by the RGP:

99.1. Paul Richardson:

- (i) PR confirmed that “*The execution of the search warrant or non-execution of the search warrant as it happened, **did go as we had planned***” [Day 5, p.11, lines 15-17].
- (ii) While PR claimed (during his oral evidence and for the first time) that the only deviation from the plan was that PR left Hassans earlier than he would have, because IM recalled him to New Mole so that he could brief him on the CM’s dressing down, PR added “***I wouldn’t say that that was an interference though in the investigation***” [Day 5, p.15, lines 7-11]

(iii) While at Hassans, PR told JL: “*I can assure you, with my hand on my heart, **that nobody has interfered at all, with the, with my conduct in this investigation. At all.**” [B3475] (transcript of body-worn camera footage).*

(iv) When para 5 of PR’s draft email to COP in Oct 2020 [B3446]<sup>2</sup> was put to PR, he agreed that, if anybody did any persuading of the RGP on 12 May 2020, it was Mr Levy and not any nefarious external interference. [Day 5, p.17, lines 16-21]. (Note that PR subsequently refused to accept that para 25 of that email [B3447]<sup>3</sup> was therefore a partial and manifestly incomplete characterisation of what happened in relation to the search warrant.)

99.2. Richard Ullger :

[ Day 13, p.180 lines 5-17]:

*Q. In fact are you aware that the search warrant execution changed as a result of the dressing down?*

***A. I think one of the biggest failings in our investigation was not executing that warrant, sir, and it has been a matter that we have discussed on a few occasions in our debriefs***

*Q. But do you acknowledge that whatever happened or did not happen in the attempted execution of a warrant was an RGP decision in accordance with the options plan that Mr Wyan had created?*

***A. Exactly, it was.***

99.3. IM himself said in oral evidence that the decision to allow JL 9-10 hours to hand over the phone was a decision for which each officer had to be accountable, and was not the result of interference [Day 7, p.161, line 11 to p.162 line 6].

*Q. Mr Richardson has said that the execution of the warrant on the day went entirely according to the RGP’s plan. Do you agree with that?*

***A. No.***

*Q. You disagree with both of them.*

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<sup>2</sup> [B3446]: “5. **Levy persuaded us not to execute the warrant** declaring (after consulting with leading UK silk) that he would hand over the material we required voluntarily. **At his request** I personally conducted a rudimentary and cursory search of his work and home office only. Levy declined to sign the relevant section of the warrant form until later arguing that the warrant was not executed as he had consented to the search. BWC footage of this exchange was taken”

<sup>3</sup> [B3447] “25. This should not be seen as a vindication of Levy’s innocence throughout the investigation which may have resulted in a different outcome had the warrant been executed and Levy interviewed under caution.”

**A. Each officer is accountable for his actions and his decision making, and to allow Mr Levy nine or ten hours to voluntarily hand over the phones, I perhaps would have dealt with it differently.**

Q. But who is responsible for that? Are you blaming the Chief Minister and the Attorney General for the fact that Mr Richardson decided to let him give it voluntarily and wait until his technicians had copied it before doing so?

**A. No.**

Q. Is that interference by the Attorney General and the Chief Minister?

**A. No**

100. The problems that flowed in relation to James Levy stemmed from the RGP's own decision (which was not the result of any interference) on 12 May not to execute the warrant that they claimed to have properly obtained:

100.1. DPP's evidence:

- (i) Day 10, p.187-188: *"I think what we were discussing was the difficulties that had now arisen with the search warrant **because of the manner in which that had been exercised or not exercised** and the judicial review, and that was the trigger for the 13th meeting to my knowledge, and then those meetings developed..."*
- (ii) Day 10, p.190: *"A. **My view is that if you've got a warrant you execute it. You then don't turn up and negotiate that warrant. If you've got a warrant because you believe someone is going to dispose of evidence, you execute that warrant on the premises, however difficult that might be. And that in part was one of the difficulties.** Now, I recognise that Mr Richardson was aware of the critical sensitivities of who it was, but, with respect, that should not have played part of the process because **that's caused half the problem**, because then you're in the grounds of in terrorem consent, non-consent, does the warrant lapse after a month, does it not lapse after a month, and that is I think what starts kicking everything off, with respect, because it's that letter that comes from Lewis Baglietto complaining about the warrant to the Attorney General that leads to the meetings, hence the discussions at the meetings. How do we deal with this?"*
- (iii) Day 10, p.191-192 (when it was suggested to him by Mr Cruz that his support for the RGP was not as robust as the RGP expected): *"A. My support*

*was the appropriate one, given on the information I had, and I felt I gave them all the support they needed. I told them that even though I disagreed with their decision to go for a search warrant I could understand why they had done so. I wouldn't have done so but I could understand it. I thought it would be defensible on JR grounds. I hadn't seen the documents themselves that was based purely on the decision at that stage. I think that was pretty much supported, if you ask me. **I didn't say: "Oh, chaps, you really messed this one up. Why did we then not execute for nine hours and why did we let them hand them over voluntarily."***

100.2. Mr McGrail's own evidence at the time was that the RGP had been played or taken for a ride by JL: See transcript of 13 May meeting:

- (i) **[B115]**: IM refers to the fact that JL was allowed to keep his "phone for nine hours", which could "turn back on us...And that is something that he [Paul Richardson] would have to live with as C as SIO"
- (ii) **[B152]**: IM says that he can only "knock" the investigation team "for being taken for a ride" (clearly by JL).
- (iii) **[B162]**: IM says "La torreao a Paul alli..." (poorly translated to "eluded" at **[B226]** – but really means to "play" someone; to entertain their hopes by deceiving them; run rings around them)

101. The allegation of improper (or any) interference by Mr Picardo is simply fanciful and without possible foundation. It simply did not happen, even on Mr McGrail's version of the facts that occurred.

102. Expression of views by Chief Minister.

102.1. CTI asked the CM whether it had occurred to him that a Chief Minister "should not be expressing strong views on a live criminal investigation", to which the CM responded "Well, I'm surprised that that point is being taken, given that when I had strong views about the airfield incident the RGP were very happy to receive my strong views." [Day 16, p.174]

102.2. Mr McGrail has been eager to highlight the CM's statements around the time of the Airport incident about 'going for the jugular' and supporting 'another turn of the screw', but there has been no evidence that any member of the RGP SMT characterised the CM's views as "interference", still less that they felt obliged to retire early as a result. The bottom line is that, as per the CM's answer, the RGP (or IM) appears to be happy to receive strong views from the CM provided that those views are supportive of the RGP, but will cry interference when the strong views are not aligned with the RGP's position.

***Chief Minister: Interference by communicating with Mr Levy and Mr Baglietto on and after the 12<sup>th</sup> May 2020***

103. It has been alleged by Mr McGrail that by communicating with Mr James Levy, a suspect in Op Delhi investigation, and his lawyer (and partner of both Mr Levy and Mr Picardo) Mr Baglietto of Hassans, the Chief Minister was interfering in a live criminal investigation.

104. The Chief Minister roundly rejects this view. Notwithstanding that he is the Chief Minister, he is entitled to speak to whomever he pleases about whatever he pleases, subject only to legal constraints and considerations of official confidentiality (as to which see para 111 below).

105. The Chief Minister is of the view that he was therefore free and entitled to communicate as he pleased with Mr Baglietto and Mr Levy, and he did so frequently. Picardo 4 paras 8-18 [A1447- 1448]

106. Picardo 3, para 17 [A235]:

*"Finally, I wish to say that I do not share Mr McGrail's exaggerated and self-serving view and descriptions of my having spoken and expressed my views to Mr Levy KC on the day the Search Warrant had been executed in his home. I do not consider that it was 'inappropriate behaviour' to do so. To the contrary, I believed and continue to believe that it was entirely proper, natural and appropriate, not least given my very close friendship and relationship with him. The high office that I held (and continue to hold) does not disqualify me from doing so, still less does it require me to engage in an unnatural omission to do so to avoid the speculative and reckless suspicions of Mr McGrail or anyone else."*

107. It is submitted on the Chief Minister's behalf that he is equally free to adopt a supportive and sympathetic position towards a suspect. People are innocent until proven guilty, and the fact that someone is merely a suspect under investigation does not require him to be "put in Coventry" even by the Chief Minister.
108. The legal and operational independence of the police is precisely the reason why it is open to anyone, including the Chief Minister, to criticise the police and discuss and comment on police investigations, even with suspects, without that constituting an interference in a police investigation.
109. Whatever view may be taken of these communications, the relevant point to this Inquiry is that they did not constitute interference in the investigation itself because the communications related to possible legal challenges by Mr Levy to the RGP's actions, though the position would be the same even if they had been about the investigation itself. This is not interference in the investigation.
110. At para 10.3 of FP2 [A224] Mr Picardo says: "*What I did think was right was for Mr Levy to challenge the issue of the warrant, even though it had been granted, and the procedure which had been followed in that respect as, from what I could see, such a warrant should never have been issued in respect of Mr Levy or any such similar individual from whom information should have been sought by way of Production Order rather than search warrant.*"

Confidential information

111. The Chief Minister has not conveyed any confidential information about the investigation to Mr Levy or to anyone else.
112. He conveyed to Mr Levy that the DPP had advised against the recourse to a warrant. The DPP had given no such advice and therefore the Chief Minister did not convey the advice that the DPP had given. Nor was that information "confidential". Mr Richardson's evidence is that he recalls a conversation with Mr Chincotta (managing partner of Hassans) in the lift at Hassans on the 12 May where he told Mr Chincotta "we have taken advice from the highest level in relation to the intervention." [Day 8, p.133, lines 22-25]. So, the RGP itself was taking the same view of this not being confidential. And if it was, the RGP itself removed the confidentiality of it.

113. The Chief Minister's position is that he was free to convey to Mr Levy and to whomever else he chose, that Mr McGrail had misled him by wrongly telling him that the DPP had advised the use of a search warrant, when he had not done so. That is not confidential information about the investigation.

***Alleged interference by the Attorney General***

114. In keeping with the style of his self-serving case theory narrative, Mr McGrail has no qualms about making the most serious of allegations against the Attorney General based on no evidence whatsoever and contrary to the available evidence. In this vein, according to Mr McGrail, the Attorney General is the Chief Minister's "wingman" in the corrupt conspiracy of which he recklessly accuses them both. As stated, that is to be deprecated.

115. The reality of the matter is that:

115.1. As already stated, Mr Llamas did not participate in the making of the decision by the Governor and the Chief Minister that they had lost confidence in Mr McGrail or in their consequent decision to seek Mr McGrail's removal from office. Mr McGrail's attempt to construct a conspiracy in this respect involving Mr Llamas is therefore reckless, irresponsible and untrue.

115.2. Indeed, the few occasions on which Mr Llamas has actively engaged in relation to the Operation Delhi investigation were principally at the request of Mr McGrail himself or the Director of Public Prosecutions, Mr Rocca, or on the basis of information or concerns brought to him by the DPP. This is plain from the transcripts of the secret tape-recording by Mr McGrail of meetings between himself, the Attorney General and the Director of Public Prosecutions.

116. Mr Llamas strongly denies Mr McGrail's allegation that he had for "many months" sought to obtain briefings or interfere in the investigation. It is noteworthy that Mr McGrail has been unable to provide a single date, a single record, a single note or a single WhatsApp exchange to sustain this allegation. In addition, his evidence is also severely undermined by the oral evidence given by Mr Richardson [Day 4, pp.53-56] and the DPP [Day 10, pp.35 and 43 lines 19-24]. Contrary to Mr McGrail's allegation, Mr Llamas had no involvement whatsoever with the investigation until April 2020, nearly a year after Mr McGrail first briefed officials in May 2019. This 2019 meeting is the meeting about which



there is confusion and doubt as to whether the Attorney attended in person, by telephone or not at all and was subsequently briefed sometime later, in all likelihood by the DPP.

***The Agreement or understanding between the AG and Mr McGrail***

117. Mr Llamas' position remains as set out in para 32 of his First Witness Statement **[A278]**. After a long and amicable discussion with Mr McGrail in the 7<sup>th</sup> April 2020 meeting, "we reached what, for me, was a very clear understanding between us, namely, that the RGP would not take any further action until they had (i) clarified the question of ownership of the NSCIS platform (ii) rationalised the charges (which the DPP had told me was extremely possible to do), and (iii) whereupon Mr McGrail would meet with me and the DPP before taking any further steps. It was clear beyond peradventure that nothing, other than what we had agreed to, would happen until we met again."
118. Mr Llamas repeated this position to Mr McGrail and all other attendees of the 13<sup>th</sup> May 2020 meeting: see **[B109]** (bottom of the page).
119. Also, at the end of that meeting the AG and Mr McGrail had a "private" (subject to Mr McGrail's covert recording of it) conversation. The transcript **[B228]/[B164]** does not accurately transcribe the audio recording. The corrected transcript is set out below, and the Inquiry is invited to listen to the audio tape [IM Exhibit 5] to verify the accuracy of the below corrected translated transcript (which has previously been provided to the Inquiry):

*"Mr Llamas: Emm.. vale, pero [right but]... yo no puedo remediar, y por eso no te queria ver por ahora [I can't remedy this and that's why I haven't wanted to see you for the time being]. We've had to y mira, me alegro de [and look, I'm glad]...that we've met. Pero para mi estaba muy claro what we agreed in this meeting [But what we agreed in this meeting was very clear to me]. Tu no sabes lo que a mi me entro por cuerpo, cuando vi tu WhatsApp ayer [you don't know what I felt when I saw your What's App yesterday]. Forget Attorney General, Commissioner of Police. At a personal level, Ian McGrail a [to] Michael Llamas*

*[IM interjects: Hmm...hmm...]*

*Mr Llamas: Eso es lo que te quiero decir, mas que nada, nunca me ha pasado Ian [what I mean to say, more than anything Ian, is that this has never happened to me]. Yo [I]*

*eventually voy a aceptar, que [will accept that] there was a misunderstanding between us, because esa soy...esa es la clase de persona que soy [that is, that is the type of person I am].”*

Contrary to submissions made on Mr McGrail’s behalf, this exchange, far from being an admission by Mr Llamas that there had been a misunderstanding, is a clear statement by him that there had been a breach of the agreement but that being the sort of person that he was he would eventually put the matter behind them.

120. Mr Llamas was and remains clear that for him there was a clear understanding (“*for me, was a very clear understanding*”). This is borne out by the immediacy (1 minute and 27 seconds) and spontaneity of his reaction to Mr McGrail’s WhatsApp informing him that the execution of the search warrant was in progress **[C6925]**:

*[12/05/2020, 12:26:52] Ian McGrail: Michael - before you hear it from anyone else I want to inform you that detectives are executing a search warrant at Hassans for (JL) in relation to the case against Perez, Cornelio & Sanchez. Its been done in the most discreet of ways and we’re hoping there is co-operation. I have also advised CM.*

***[12/05/2020, 12:28:15] Michael: Ian, we had agreed that you would come to me with a rationalisation of the charges before doing anything?***

*[12/05/2020, 12:29:43] Ian McGrail: We agreed we’d do that when all the loose ends were tied up and this included the enquiries with JL.*

***[12/05/2020, 12:30:24] Michael: No. that was not what we agreed.***

121. While Mr Llamas accepted in oral evidence that it was an implication rather than an explicit agreement, he nevertheless maintained that, for him, it was clear beyond peradventure [Day 12, p.125-127]. In this respect, we would point out that, contrary to Mr Wagner’s apparent insinuation during his cross-examination of Mr Llamas that the words “clear beyond peradventure” were his lawyer’s words, these words were Mr Llamas’ words as appears by the recently disclosed timeline.
122. In the context of Mr McGrail’s narrative theme that the AG (and others) were improperly motivated by a desire to protect James Levy, it is worthy of note that the question of ownership (to which the rationalisation of charges was limited) was relevant only to the computer hacking charges, of which Mr Levy was not a suspect.

123. In any event, this issue is of very limited (if any) real relevance to the Inquiry. Mr Llamas was not a participant in the decision by the Governor and the Chief Minister that they had lost confidence in Mr McGrail. That is the loss of confidence that is relevant. The Attorney General's loss of confidence in him by virtue of his breaching their agreement did not contribute either as a reason or circumstance to Mr McGrail's retirement, however much it may have been alluded to by them.

7<sup>th</sup> April 2020 meeting

124. In April 2020 the Attorney General was briefed by the DPP, Mr Rocca in relation to some concerns that Mr Rocca had about the very large number of proposed charges, the ownership issue and other issues. That briefing, which was the first time that the Attorney General received a proper account of the investigation [DPP, Day 10, p.239 lines 8-11], was not solicited by him but came as a result of an email that Counsel for the Op Delhi defendants (Mr Fischel) had sent to the RGP, copied to the AG and the DPP, and which generated the email exchanges between the AG and DPP of 6 April 2020 at **[C3312-3316]**. Mr Llamas subsequently met (on 7 April 2020) with Mr McGrail and Mr Richardson, on the back of a meeting that was already rescheduled between them for that day on Op Kram, to discuss the issues of concern that had been raised by the DPP.

125. Some criticism has been expressed of the AG in relation to his convening of this meeting on the basis that the subject-matter was appropriate for the DPP but not for him the AG. See e.g., McGrail 5 para 125 **[A168]**; PR oral [Day 4, p.59-60]. This criticism is misconceived since it appears to be based on the erroneous view that there are issues that are appropriate for the DPP and inappropriate for the AG. That view misunderstands the nature of the office of DPP as established in the Director of Public Prosecutions Act 2018, the relationship that it establishes between the DPP and the AG and the effect that the establishment of the office of DPP and its statutory functions has on the AG's own constitutional responsibilities for those same functions-

125.1. Under the DPP Act (s.3), the DPP is responsible to the AG for the discharge of his duties and functions under the Act.

125.2. Under s.5 of the DPP Act, the DPP's functions and powers are only those that may be bestowed upon him under general or special instructions issued by the AG pursuant to s.59(3) of the Gibraltar Constitution.

125.3. The position in law is therefore as follows:

- (i) All the functions of the DPP under the Act are the AG's constitutional functions, delegated by him to the DPP under the Constitution and the Act.
- (ii) Under the Act, the DPP shall not exercise any of the powers bestowed on him where the AG exercises those powers himself.
- (iii) The AG's functions, powers and duties under the Constitution remain entirely unaffected by the Act and any delegation to the DPP, and therefore vested in the AG.
- (iv) The Supreme Court has stated in *R v Lishman* 2017/CRIM/043 (ruling dated 11 August 2020) that it is "*a basic premise of public law that delegation of powers does not equate to an abrogation of those powers and that, notwithstanding the delegation, the Attorney General continues to be seized of those powers.*"

125.4. Accordingly, the view that any form of intervention, advice, or involvement is permissible and proper on the part of the DPP but not the AG, is entirely misconceived as a matter of law.

125.5. Furthermore, as the DPP confirmed [Day 10, p.234-235], for these very reasons, he cannot lawfully withhold information from the AG, and therefore any criticism of the DPP for not doing so, or of the AG for requesting it, is similarly and equally misconceived.

125.6. The purpose of the meeting was not for the Attorney General to give legal advice which he was not giving [Richardson, Day 4, p.64, lines 3-5] but to advise Mr McGrail to act prudently and with tremendous care, because of the political and reputational sensitivities of the investigation (as acknowledged by the RGP itself **[B3272], [B3610], [B3452]**) and for all the reasons stated by the Attorney in his oral evidence [Llamas, Day 12, p.117, line 18 to p.123, line 18).

126. In any event, it is Mr McGrail's and Mr Richardson's evidence that nothing that transpired at the 7 April 2020 meeting constituted interference by the AG in the Op Delhi investigation. PR: [Day 5, p.3, lines 1-5]; IM: [Day 7, p.164, line 23 to p.165 line 6]

127. Furthermore, any suggestion that the 7 April meeting was convened by the AG to halt or interfere in the investigation is also belied by the evidence of the 8 April video conference between Mr Richardson, Mr Wyan and the DPP. Indeed, as recorded by Mr Richardson in his note of this video conference, the AG was in “full agreement” that the investigation should proceed and that if Mr Levy had to be “pulled in” then “so be it” [B5507]. As further explained by the DPP in his oral evidence:

*“My view was, with which the Attorney General agreed, that the public interest in this matter was so serious it needed to proceed at all costs, and the AG was in full agreement with that. Knowing who was involved, I might add. Names may come out at a later stage, fine”.* [Day 10, p. 62 line 11 to p.63 line 11].

128. 12<sup>th</sup> May – the “berating” meeting

128.1. There was no further engagement between Mr McGrail and Mr Llamas in relation to the Delhi investigation until the 12 May 2020 when Mr Llamas was told by Mr McGrail by WhatsApp, as it was happening, that search warrants were in the process of being executed against Mr Levy.

128.2. The AG was also present later at the meeting between the CM and Mr McGrail, when the CM expressed his views to Mr McGrail about that matter.

128.3. Nothing that Mr Llamas said at that meeting, or the manner in which he said it, could possibly be thought to constitute interference, proper or improper, or to justify Mr McGrail’s attempt to make the AG a co-party to his description and interpretation of what transpired between him and the CM.

128.4. Indeed, this would appear to be confirmed by Mr McGrail himself in his email to self purportedly prepared on 12 May 2020 [B76] where he says, speaking of this meeting, as follows: *“I have discussed the above with my command team senior officers who are also concerned and worried about the level of interference by the CM and demeanour of the AG.”* Plainly, Mr McGrail himself is drawing a distinction between what he considers to have been the ‘interference by the CM’, which he does not attribute to the AG, and the ‘demeanour of the AG’, by whom he does not allege there was any interference.

128.5. The AG was largely a bystander at that meeting, and his intervention was limited to (i) denying Mr McGrail's false statement that he the AG had advised on the search warrant, (ii) expressing the view that it was difficult to believe that he could have received such advice from the DPP and (iii) informing him that there had been a breach of trust by Mr McGrail in relation to the understanding between them at the 7 April meeting.

128.6. Nothing said by Mr Llamas was reasonably open to the interpretation by Mr McGrail that the AG was in any way saying or even insinuating that Mr McGrail should call back the officers from Hassans and abandon the execution of the search warrant.

128.7. It is, with respect, unrealistic to expect the Attorney General to interrupt and rein in the Chief Minister in his own office when he is engaged in a very intense, rapid two-way exchange with another very senior official and no obvious impropriety is being perpetrated. It is not for an Attorney General to impose upon a Chief Minister or the Commissioner of Police on matters of personal style and demeanour in dealing with others. The Attorney General is entirely satisfied that the Chief Minister did not cross any line of legal propriety or that may have been relevant to the Attorney General's legal duties as guardian of Gibraltar's laws.

129. 12<sup>th</sup> May 2020 – IM's Email to Self

129.1. At B74, there is an email dated 12th May from Mr McGrail to himself. That email purports to have been created (i.e. content written) and sent by Mr McGrail to himself on 12th May. The Attorney General and Chief Minister are sceptically concerned about that being the case because the email contains information about matters that had not yet (on 12th May) occurred and alludes to things that occurred subsequently, including in the days immediately after 12 May.

129.2. The matters referred to in the previous paragraph are as follows

(i) In the second para [B74] Mr McGrail says:

*"For quite some time, I have been meeting with HMAG Mr Llamas, at his request, to discuss matters relating to this investigation.....At most of*

*these meetings with the AG, particularly the latter ones, I have been accompanied by Supt Richardson.”*

- (ii) In the final para on page [B74], Mr McGrail says:

*“At a meeting in the office of the AG, with the DPP present, the AG was suggesting that I stopped the investigation from progressing on the basis that the ownership of the platform had not been established”.*

129.3. A number of points arise from these paragraphs:

- (i) Mr McGrail says in this email: “At most of these meetings with the AG, particularly the latter ones, I have been accompanied by Supt Richardson.” But Mr Richardson’s evidence is that he had not attended a meeting with Mr McGrail and the AG until the 7 April Meeting. [Transcript Day 4 page 53 line 14 – page 54 line 1] and [Transcript Day 4 page 55 line 22 – page 56 line 3]
- (ii) In oral evidence, Mr McGrail said that his briefings to the AG could have been “on the back of” other subject-matter briefings. The Attorney General denies that this may be so. The cited words from the email support the AG’s and not IM’s version. If it was on the back of meetings on other non-Delhi matters, they could not be described (as the email does) as meetings “at his request, to discuss matters relating to this investigation”.
- (iii) Mr Llamas’ version is borne out by Mr Richardson, who said that he had not attended any non-Delhi meetings with the COP and the AG at which Delhi matters may have been discussed. He would remember that if he had done so. [Transcript Day 4 page 192 line 5 to page 193 line11]
- (iv) At the bottom of the first page [B74] Mr McGrail’s email refers to “a meeting in the office of the AG, with the DPP present” in which he (IM) said that AG “asked both me and DPP whether he could enter a nolle prosequi.” Similarly, at the bottom of page 2 [B76] IM says in reference to the decision not to run a prosecution and referring to both the AG and DPP: “Neither have indicated that they are willing to do so.”

- (v) Mr Llamas' evidence is that he had not on any occasion discussed with Mr McGrail the ownership issue prior to the 7 April 2020 and anything about nolle or discontinuance until meetings in May after the 12<sup>th</sup>, when it was brought up by Mr McGrail himself.
- (vi) The DPP's evidence was that that he had no recollection of any discussion about the ownership issue in any meeting with AG and IM prior to 13 May meeting, and that "*nolle prosequi would not have been discussed anywhere near that time*" [Transcript Day 10 page 239 line 12 to page 240 line 11]
- (vii) It seems wholly implausible that Mr McGrail (who says that he was not involved in the conduct of the investigation) would have discussed matters that would have gone to the heart of it without informing the SIO Mr Richardson, whose evidence was that he knew nothing about it.
- (viii) These issues were mentioned and, to some extent discussed at the meetings on 13, 15 and/or 20 May and it would appear that these are references to those meetings. This is also Mr Richardson's view: "*I am assuming that they are the meetings of 13, 15 and 20 May*". [Transcript Day 4 page 55 lines 15-21]
- (ix) Of course, Mr McGrail could not have written about those meetings on 12<sup>th</sup> May.

129.4. Mr McGrail said in oral evidence that he had typed the notes reflected in the email on an RGP desktop computer or laptop during the afternoon of 12 May. Neither the notes nor the desktop/laptop itself have been disclosed and Mr McGrail cannot say what became of them.

129.5. On page 3 of the email at **[B76]** Mr McGrail says that he briefed the Chair of the GPA in person in his office. Dr Britto's evidence is that his recollection is that that meeting took place on 15 May. [Transcript Day 15, p.66, line 6]

129.6. It has been established on behalf of the Government Parties that it is technically possible to:



- (i) Alter the date of an email (such that an email sent on a later date can be made to appear as though it was sent on an earlier date); and
- (ii) Alter the content of an email after it has been sent (so as to, for example, add content to it that was not contained within the original email when transmitted).

129.7. The Government is taking steps through its IT department (ITLD), the system host and administrator, to try to establish whether the process described in the preceding paragraph has occurred or not in relation to the email to self. The Government will inform the Inquiry of the outcome of ITLD's investigation and, with the Chairman's permission, would file further evidence and make further submissions in this respect if it were necessary.

#### 130. Meetings of 13, 15 and 20 May

130.1. Mr Llamas had three further meetings with Mr McGrail and other RGP officers. They were all principally in relation to advice on the handling by the RGP of the legal dispute with Mr Levy and his lawyers about the execution of the search warrant against him and the retention by the RGP of Mr Levy's devices, and further accusations that were being made by Mr Levy's lawyers against the RGP and Mr Richardson in particular.

130.2. At these meetings:

- (i) both the Attorney General, Mr Llamas and the DPP, Mr Rocca acknowledged that the decision to obtain a search warrant rather than a Production order against Mr Levy had been an operational matter entirely for the RGP. They nevertheless both expressed the view that they thought it had been the wrong decision. They were entitled to think that and to express it. It does not constitute improper interference or interference at all.
- (ii) No attempt was made to discourage the RGP from interviewing Mr Levy. On the contrary, it was acknowledged that it was necessary and desirable to do so. Advice was given to Mr McGrail about the pros and cons of interviewing Mr Levy (i) under caution or (ii) voluntarily in the first instance. That advice was accepted by the RGP who proceeded accordingly. In any event, giving

advice, which Mr McGrail was free to accept or reject cannot properly be said to constitute interference, improper or otherwise.

- (iii) No pressure of any kind was put on Mr McGrail or the RGP by Mr Llamas, and there was no improper involvement by him in his engagement and discussions with Mr McGrail about this criminal investigation.

130.3. These meetings were entirely collaborative discussions between senior police men and law officers jointly discussing and seeking proper actions to:

- (i) Deal with the legal challenges from Hassans in relation to the search warrant and devices; and
- (ii) To advance and secure the prosecution case against those defendants in respect of whom the DPP thought there was sufficient evidence;
- (iii) Enabling the RGP to obtain evidence from Mr Levy in support of the prosecution
- (iv) While leaving the RGP free to pursue its investigation of Mr Levy by whatever means they may operationally decide should that be what they wish to do including arrest and interview should that be what the RGP decided was what it wanted to do

130.4. At no time was the RGP under any compulsion to agree to do or not to do whatever they wished.

130.5. In answer to questions from Mr Cruz about the nature of the meetings, the DPP's evidence was as follows:

- (i) Day 10, p.187-188: when asked whether he agreed with Mr Wyan's description of the meetings as a negotiation or facilitation, the DPP stated:

*"No. I think **what we were discussing was the difficulties that had now arisen with the search warrant because of the manner in which that had been exercised or not exercised**, and the judicial review, and that was the trigger for the 13th meeting to my knowledge, and then those meetings developed. I think on the meeting of the 15th we actually got a letter delivered during the course of the meeting which*

*we actually went through and tried to draft a response, from memory. And so it was an ever-evolving process, **but there was no agenda to push this one way or the other.** It was stimulated by the warrant on the 13th. That's what stimulates the meetings and **the desire to resolve an issue as easily as possible because we didn't want to be embroiled in six months of JR stalling the investigation and impacting potentially on everything.**"*

(ii) Day 10, p.189: "No, it was a **full and frank exchange of views of how best to deal with this matter going forward.** That's all it was, in my view."

(iii) Day 10, p.193-194: when it was suggested that the AG and DPP presenting what they think "might be a way out of this" in effect creates pressure and interference, the DPP responded:

*"Mr Cruz, I suggest you re-read the transcripts because **a lot of the suggestions are posed by the Commissioner himself and by Superintendent Richardson.** The one that does not participate in the conversation much is Mr DeVincenzi or Mr Wyan. **The four of us - senior officer, Commissioner of Police, superintendent, Attorney General and DPP - were having a full and frank discussion on the options.** This one, that won't work because we can't use it in this way. This one might work. And that's the way the meetings were conducted. The four of us batting openly, as far as we were concerned, in relation to that, trying to cure a problem that had been created. That's what those meetings were."*

130.6. Mr McGrail had unethically and unprofessionally covertly recorded these three meetings without the knowledge of the AG, the DPP or any other participant (except Mr Richardson in respect of the 15<sup>th</sup> and 20<sup>th</sup> meetings). While, in the view of the Government Parties this constitutes reprehensible conduct, the availability of those recordings and their transcripts will be helpful to the Inquiry.

130.7. In the Government Parties' submission, it is essential that the Chairman reads the transcripts of each of these three meetings and listens to the audio recordings of them. They are central to Mr McGrail's self-serving case theory narrative, and the Government Parties submit that the transcripts serve two useful purposes:

(i) They show that the Attorney General and the DPP did not improperly interfere in the RGP's investigation, nor "cajole or pressure" the RGP into

not seeking the evidence that they were after, as submitted on behalf of Mr Richardson by Mr Gibbs; and

- (ii) A comparison of the transcripts with McGrail 1 and McGrail's written opening submissions will serve to illustrate the extent to which the narrative of Mr McGrail's case is untrue.

131. 13 May Meeting.

131.1. Attached to these submissions as Annex 1 are extracts from the transcript of this meeting (shown side-lined in red) that demonstrate that there was no pressure on or cajoling of or improper interference with the RGP by the Attorney General or the DPP in relation to the Op Delhi investigation.

131.2. In his oral evidence, Mr Richardson:

- (i) agreed that it was the DPP who suggested that the way to deal with a particular paragraph in Hassans letter about challenging the legality of the seizure of the device was to offer a 7-day standstill on their examination to allow Hassans time to bring a legal challenge and thus "*call their bluff*" [Day 5, p.34, lines 5-10].
- (ii) confirmed that the decision to give JL a week (from the search warrant intervention) to prepare his position before interview was not the result of any pressure from the AG [Day 5, p.35, lines 2-13]
- (iii) agreed that his statement during the 13 May meeting (at **[B143]**) that "*It doesn't mean to say that we couldn't delay the examination of that phone for enough time until everything else is resolved*" was not made under pressure from the AG. [Day 5, p.35 line 14 to p.36 line 5]

131.3. During PR and IM's car journey after the 13 May meeting (which PR did not know was being recorded and the content of which is not included in the version of the transcript produced and disclosed by Mr McGrail), the following exchange took place **[C6929-C6930]**:

*"IM: ... Well do you think it's gone it could have gone worse no Paul?"*

*PR: Oh I think it has been, I think, I think **all credit to Michael** when you go into these things logically and rationally (IM interjects “ye”) and he sees the strength of the argument he doesn’t **he doesn’t bully** into saying this is not right he sees the argument and tries ways around it but then accepts it.”*

131.4. PR agreed that the above is the most contemporaneous, instinctive and therefore most likely to be true, assessment by PR of the AG, and that there is no suggestion of pressuring, bullying, being forced or interference or anything of the kind [Day 5, p.39-40].

131.5. In re-examination by Mr Gibbs [Day 5, p.89, line 16 to p.90 line 2]:

*Q. Was the Attorney supporting the police plan, the plan to interview under caution, the plan to examine the devices?*

*A. At the beginning, yes.*

*Q. And at the end?*

*A. No.*

*Q. What could the police do without his and the Director's support?*

*A. I'm not sure what I mean by that, Mr Gibbs. **We were operationally independent and so we could have taken whatever action that we considered was appropriate,** but had we taken that action and gone to the stage where we would charge somebody, the DPP would still have to consider whether there was sufficient evidence to properly - I am trying to think of the phrase for this now - to see whether there were reasonable grounds to convict and whether it was in the public interest to proceed. **So whilst we were free to do those things,** in the absence of the other two devices we wouldn't have taken the case forward.*

131.6. IM told DPP “thanks for today” after 13 May meeting: see WhatsApp at 19:49 **[B749]**. That is hardly consistent with Mr McGrail’s pretence now that he was pressured, cajoled and improperly interfered with at that meeting.

131.7. The AG did seek the removal of the direct reference to the Chief Minister in point 9 of the Voluntary Attendance at Interview to James Levy (“communications with Chief Minister”). This became, by agreement “communications with any person”, which would capture communications with the Chief Minister. The RGP was thereby denied access to nothing to which the document related, but had protected the Chief Minister from premature and perhaps unwarranted embarrassment, while having zero negative impact on the investigation.

132. 15 May meeting:

132.1. Attached to these submissions as Annex 2 are extracts from the transcript of this meeting (shown side-lined in red) that demonstrate that there was no pressure on or cajoling of or improper interference with the RGP by the Attorney General or the DPP in relation to the Op Delhi investigation.

132.2. Tellingly, Mr McGrail said the following an hour into this 1.5 hour meeting [B256]:

***"I welcome the fact that you are consulting it with us, because in other days, in other years by, the AG, before the DPP existed, would have said he would have been the one who calls the shots on whatever actions I suppose after charge. But I am really, really grateful that you are consulting this and getting our views. We want to come out good of this too"***

132.3. In his oral evidence, Mr Richardson:

(i) [B239]: the idea of getting JL to submit his version of events (i.e., a voluntary statement ahead of a possible interview under caution) was PR's own idea (*"Sorry sir to interrupt you, I've had a thought..."*)

(ii) After further extracts of the meeting (at [B242] and [B258]) were put to PR, he agreed that the tenor of the meeting was collaboratively exploring ways out of the legal challenge, whilst leaving the RGP free to conduct the investigation thereafter as it chose:

*"...Do you agree with me that that is exactly the sort of exchange between men, collaboratively trying to find a way forward out of the legal challenge, the fact that you were agreeing to give him time to launch a legal challenge before looking at his device, whilst leaving the RGP's freedom to conduct the investigation thereafter as it chose. Do you accept that that is the tenor of what was being discussed and agree? **A. I do.**"*

133. 20 May Meeting

133.1. Attached to these submissions as Annex 3 are extracts from the transcript of this meeting (shown side-lined in red) that demonstrate that there was no pressure on or cajoling of or improper interference with the RGP by the Attorney General or the DPP in relation to the Op Delhi investigation.

133.2. Mr Richardson:

- (i) It was put to PR that the AG and DPP immediately agreed the response to Hassans would have to robustly reject the suggestion that JL was no longer a suspect. PR accepted that the general tone of that proposition was correct. [Day 5, p.52, lines 9 to 17]

133.3. Supt Wyan

- (i) *“Q. This 20 May meeting, did you feel pressured to act in any particular way at the 20 May meeting? A. My recollection of the 20 May meeting was largely about a letter which had been received from Hassans. There was some confirmation of what I believe had already been agreed in the previous meeting, **but I would not describe it as any pressure**, although I would have to read the full transcript just to double-check.”* [Day 5, p.207, lines 1-11]
- (ii) MW confirmed that there was support from the AG: *“There was support. **The meeting of the 20<sup>th</sup> was the Attorney General offering his support** and there were subsequent supports from the DPP...”* [Day 5, p.224].

134. Post- 20 May 2020.

134.1. Mr Richardson:

- (i) PR did not have any further dealings with the AG after the 20 May meeting [Day 5, p.53, lines 3-10].
- (ii) While PR would expect that the DPP would have been briefing the AG, as far as PR aware, the AG played no role in decisions made after 20 May [Day 5, p.53, line 11 to p.54, line 1]
- (iii) As to the RGP’s decision (contained in the Oct 2020 Levy Report - **[B3443]**) that JL was no longer a suspect and that his devices should be returned, PR agreed that:

- (a) (as far as he was aware) neither the AG nor the CM played any role in obliging the RGP to come to this decision: [Day 5, p.56 line 12 to p.57 line 13];
- (b) this decision was not influenced by any 'chilling effect' on other police officers of knowing that IM had been berated: [Day 5, p.57, line 22 to p.58 line 6].
- (c) had the evidence from the US indicated that JL had further involvement than the RGP suspected, it would have given them grounds to seek a further order to open the devices. Therefore, any concern that others involved in the investigation might be removed as IM had, was just "*in the back of [PR's] mind*" and not a factor in the decision. [Day 5, p.61, lines 1-15].

134.2. Sgt Clarke

- (i) PC did not have any concerns or worries about interference with his work or damage to his career as a result of IM's early retirement. [Day 9, p.43, lines 11-25].
- (ii) PC and the investigation team absolutely remained confident that they could fulfil their functions without fear or favour, or risk to their careers. They continued the investigation regardless of IM's early retirement. [Day 9, p.44, lines 1-11].
- (iii) After IM's retirement, Op Delhi continued unabated and as planned, and there was no interference in the investigation whatsoever: [Day 9, p.45, lines 3-16].
- (iv) As far as PC is aware, neither the Governor, the CM nor the AG provided any direct or indirect input to the ongoing investigation: [Day 9, p.46, lines 5-9].

134.3. Commissioner Ullger

- (i) Day 13, p.185 line 8 to p.186 line 8:



Q. After Mr McGrail retired, did the Operation Delhi investigation continue its normal course?

A. **It did, sir.**

Q. By "normal" I hope we both agree that it means without inappropriate external interference?

A. **The investigation continued as any other investigation would continue.**

Q. And eventually the RGP decided that Mr Levy should no longer be treated as a suspect and a report was addressed --- only the (inaudible) ever actually saw it but we know about it.

A. **Yes, sir, it got to me, yes, sir.**

Q. And did you approve or disapprove of it or perhaps your approval or disapproval were not required?

A. **This was a device from the --- the advice from the senior investigating officer and on his advice, Mr Levy was no longer deemed to be a suspect.**

Q. Are you satisfied that that that was a properly made decision uninfluenced by improper pressures from outside?

A. **Yes, sir.**

134.4. The DPP's emails to the RGP in early June 2020 are entirely inconsistent with any continued interference to protect JL:

(i) **[B3355]**: DPP to RGP on 2 June 2020:

*"Frankly, I do not see why you need to engage any further with Mr Bonfante in this manner. It is not appropriate, in the circumstances of this case, to litigate by letter with a potential D's lawyer in this manner or for the RGP to justify its conduct or findings.*

*They have what they have from you and that is all you are happy to give over at this stage. They should provide what they are able to provide based on your pre-interview disclosure and the redacted court document and if that is insufficient then if course you will need to decide on next steps as you seem operationally appropriate"*

(ii) **[B3361]**: DPP to RGP on 4 June 2020:

*"First and foremost you might want to point out to mr Bonfante his views on the lawfulness of the conduct are pretty irrelevant at this juncture and you are not going to enter a debate on that point ...*

*In all honesty you would be perfectly justified in directing him back to what you have disclosed. He offered to give a voluntary account so let him go ahead and give it."*

134.5. The decision not to examine JL's devices was ultimately taken by the RGP. See DPP's 2 September 2020 email: **[D7381]** "As explained at our meeting, we agree

*with your tentative view that there isn't sufficient evidence to charge this individual at this stage. We are aware that you continue to hold various electronic devices owned by Mr Levy. As explained at our meeting, the next step for the RGP in relation to these devices are matters for you as these are operational decisions." [emphasis added]*

134.6. DPP oral Day 10, p.79: *"When they returned the phone to Mr Levy that was an operational matter for the police, a tactical matter for the police. We weren't asked for our views on whether it should be returned or not, for example"*

135. Furthermore, nothing that Mr Llamas has said or done can possibly be asserted or relied on by Mr McGrail as a reason for or circumstance of his retirement. Mr McGrail did not retire for any reason connected with Mr Llamas, unless he felt that he should retire because, apart from losing the confidence of the Governor and the Chief Minister, he had also lost the confidence of the Attorney General.

#### ***Communications with Lewis Baglietto of Hassans***

136. It is submitted on behalf of the Attorney General that there is nothing objectionable in his having professional contact, conversations and meetings with lawyers representing suspects in a police investigation, particularly not when they relate to a civil law claim/complaint aspect of a criminal investigation (as was the case). This position does not change because the lawyers may be partners or linked in other way with the suspect.

137. Accordingly, the Attorney General considers his limited contact with Mr Baglietto to have been entirely apposite and proper, and well within the scope of his powers, functions, responsibilities and rights as Attorney General.

138. The Attorney General does not consider it necessary that such his communications have to be transparent to the DPP, the RGP or anyone else. That fails to have due regard to the status and nature of his Office. He is not accountable to the DPP or the RGP for his conversations with others.

139. But in any event, there was no lack of transparency about his contacts with Mr Baglietto. It was transparently his role in the context of the matters to which the meetings of 13<sup>th</sup>, 15<sup>th</sup> and 20<sup>th</sup> May related (including the letters addressed to him by Hassans), and known, understood and agreed by all other participants, including Mr McGrail and Mr

Richardson, that the Attorney General would be the contact person with Hassans in respect thereof. See e.g. Transcripts of 15<sup>th</sup> and 20<sup>th</sup> meetings at B264, B265 and B312 and oral evidence of DPP on Day 10 pages 220-221.

***Communication with James Levy***

140. Mr McGrail has been critical of the AG for the following exchange of WhatsApp messages with Mr Levy on 12 May 2020 **[C6901]**:

*[13/05/2020, 20:57:22] James Levy: On the other matter I feel I've been hung out to dry.*

*[13/05/2020, 20:57:32] James Levy: Certainly not by you*

*[13/05/2020, 20:58:17] Michael: Don't worry*

141. The AG's oral evidence on this exchange is at [Day 11, p.260-261] and [Day 12, p.94-95]. In summary:

141.1. when he received Mr Levy's message at 20:57, the AG was still working in his office on a number of important and pressing matters;

141.2. he had had a long and tense day, which was not yet over (indeed, he sent his last email from the office at 23:49 and left the office after midnight), and the last thing he was going to do was engage in a conversation with Mr Levy;

141.3. while he would not ignore a message from someone of Mr Levy's seniority, he sought to nip any exchange in the bud and therefore, a mere 45 seconds later, replied with "Don't worry".

141.4. his immediate spontaneous response had the desired effect as the conversation did not continue;

141.5. the AG was not giving Mr Levy an assurance that he would be protected. On the contrary, earlier that day it had been agreed with Mr McGrail and Mr Richardson that the Hassans letters would be rebuffed and the investigation would continue.

142. Accordingly, there is no evidential or logical basis for Mr Wagner's suggestion to the AG that, by sending the 'don't worry' message, the AG could have been undermining the investigation entirely.

143. Notably, when Supt Wyan was asked for his thoughts on this exchange, he candidly replied “*I don’t have thoughts about it to the extent that I am not sure in what context...*” and “*It’s difficult to draw much of a conclusion from there because of the responses. Simply “don’t worry”* [Day 5, p.202 lines 12-16 and p.203, lines 9-11]

***Nolle Prosequi / Protecting the Chief Minister and/or others***

144. The Attorney General does not consider it necessary to justify his emotional language or expressiveness, however much, in hindsight he may regret it and consider that it would have been best avoided.
145. What is important to the Attorney General is the unfounded suggestion that properly interpreted, his words mean that he would or would even contemplate the possibility of interfering in the administration of justice or use any of his powers to protect Mr Picardo, or any Chief Minister from the consequences of legal wrongdoing. That is absolutely denied and rejected by the Attorney General. It is not the proper meaning of his words, nor his position, however much it may now suit Mr McGrail to assert that for his own self-serving reasons.
146. We say ‘now’ because of course at no stage did Mr McGrail or anyone else who witnessed the Attorney General’s statements, express the surprise or commentary that would surely be expected in the case of a thoroughly improper statement of intention by the Attorney General, such as is now alleged.
147. It is respectfully submitted on the Attorney General’s behalf that, however infelicitously expressed, his words, taken in the round and in the full context and explanation, clearly mean protecting the holder of the Office of Chief Minister and the Office itself from attack or embarrassment on “flimsy” or other unjustified grounds. This was made abundantly clear by the AG to Mr McGrail when they had a private discussion at the end of the 13 May meeting.
148. In any event, the Chief Minister has never been a suspect in relation to the matters to which the investigations related. The RGP have never suspected him of wrong-doing, so he has never been in need of the Attorney General’s or anyone else’s protection.

149. It is a theme of Mr McGrail's case narrative and allegations against the Attorney General that Mr Llamas appeared keen to enter a *nolle* in order to protect the Chief Minister and/or James Levy. The Attorney General has never raised with Mr McGrail the possibility of entering a *nolle* to protect any of the parties being investigated or charged or otherwise adversely affected by Op Delhi. This is false and unwarranted.

150. On each occasion that the *nolle* has been mentioned (all of which were during the meeting of 13 May), it has been raised by Mr McGrail or the DPP, and not by the Attorney General:

150.1. **[B118]:** "I cannot pull it, you can"

- (i) As the transcript of 13 May meeting shows, it is Mr McGrail who raised the issue of the *nolle* for the time when he, spontaneously and without it being an obviously apposite response to anything that the AG was saying (indeed, at that moment in the meeting, the exchanges were primarily between Mr McGrail and Mr Rocca), says at [B118] *"I get the whole periphery, I get it all. I cannot pull it, you can. You can, Michael."*
- (ii) Contrary to the suggestion made by Mr Wagner when questioning the DPP, Mr McGrail did offer that statement *"out of the blue"* and **not** as a reaction to the Attorney saying that he would defend the Chief Minister to the death [Day 10, p.225 lines 13-25 and p. 226 lines 1-19]. A simple perusal of the preceding exchanges in the transcript shows this.
- (iii) Nothing therefore that the AG has said justifies the attribution of any such sentiment to him by Mr McGrail.
- (iv) Yet notwithstanding the AG's rejection of the idea, Mr McGrail again raises the issue of discontinuance at the top of [B119] a few seconds later. Mr McGrail says *"Now, now, if, if we cannot and I, I would understand and...and I've said it, I've said it before, I would not raise any objections if this is pulled, but I will not pull it, Ian, the RGP cannot pull it. And if there are legal routes to pull it, those, I am asking why not?"* A statement that was ignored by the AG and the DPP.

150.2. **[B126]: “magic wand”**

- (i) The transcript [B126] does not accurately transcribe the audio recording. The corrected transcript is set out below, and the Inquiry is invited to listen to the audio tape [IM Exhibit 5] to verify the accuracy of the below:

<b>Mr Llamas</b>	I am still and its the only reason why I am involved in this when I'd rather not be, es que [ <i>is because</i> ] this is highly sensitive, as point 9 here-
<b>I McGrail</b>	I agree.
<b>Mr Llamas</b>	demonstrates.
<b>I McGrail</b>	I agree.
<b>Mr Llamas</b>	In my view, its just a view, completely unjus—unjustifiably, that this man should be, err, even appearing on a formal document. Emm.. and I will not, if it's not legitimate, I want that to disappear immediately. My concern here is the reputation of this jurisdiction and that passes by the reputation of our Chief Minister -Especially in this moment in time. And for that I shall fight until I die.
<b>I McGrail</b>	Es que [ <i>the thing is</i> ] you have the magic wand here. You have it.
<b>Mr Llamas</b>	I am sure, and if it's the case, I would ask you to get it out of this as soon as possible.

- (ii) It is clear from the transcript that what was being discussed, when Mr McGrail himself raised the “magic wand”, was not anything to do with a nolle prosequi, but the Attorney General’s request that, if the reference to the Chief Minister in point 9 of the Voluntary Attendance for Police Interview Document given to Mr Levy was not legitimate, that reference should be removed.
- (iii) Mr McGrail then interjected by saying “The thing is that you have the magic wand here”. Mr Llamas continued what he had been saying without regard to the interjection, that if it is the case that the mentioning of the Chief Minister was not legitimate, he would ask Mr McGrail to get the CM’s name out of this document as soon as possible. (See also in this respect para 131.7).

- (iv) Not only did this exchange have nothing to do with *nolle* (which refers to discontinuing a prosecution) but the “*magic wand*” was raised by Mr McGrail, not by the Attorney General. Furthermore, since Mr Llamas was asking Mr McGrail to do it, it cannot have been a reference to entering a *nolle*, which is not something that Mr McGrail could do.
- (v) For these same reasons, the allegation in para 108.3.1(b) of IM Written Opening that “ML also appeared to agree that if FP was implicated, he would get out what was described in the meeting as his ‘magic wand’. i.e. use his power to discontinue the investigation,” is a wholly false characterisation of what transpired. In addition, to the fact that “what was described at the meeting” was by Mr McGrail himself, a *nolle prosequi* is not available to discontinue a police investigation.

150.3. **[B157-8]: “Michael can’t enter a *nolle*”**

- (i) On this occasion, the issue of *nolle* was raised by the DPP following Mr McGrail’s suggestion of how the matter could be brought to an end for him.
- (ii) Mr Llamas made it clear that entering a *nolle* is something that he would rather not do, that if he had been approached several times since he was appointed AG to enter a *nolle*, in some very sensitive cases, but he believes the threshold for a *nolle* is “*extremely, extremely high*”. But that if he felt that a prosecution exposed the CM on grounds which are “*flimsy*” he would stop it.

150.4. In Mr McGrail’s email to self dated 12 May, he says (at the bottom of page 1 **[B74]** that the “AG asked both me and DPP whether he could enter a *nolle prosequi*.” As both the AG and the DPP have stated in their oral evidence, *nolle* had not been mentioned or discussed before the 13 May meeting (where it was raised not by the AG).

150.5. If the Attorney General had been minded, as alleged by Mr McGrail, to discontinue the prosecution at the time and for the improper reasons speculatively alleged by Mr McGrail, he had plenty of opportunity to do so. In addition to Mr McGrail’s own repeated suggestions to that effect (including that

that would be ok with him), defence counsel made repeated representations for the entering of a nolle, (see Transcript Day 12 page 262 line 22 to page 263 line 7) all of which invitations and suggestions were rejected by Mr Llamas.

151. The nolle entered in January 2022.

151.1. It has been alleged on behalf of Mr McGrail that the entry by the AG of a nolle prosequi to discontinue the prosecutions against Messrs Perez, Sanchez and Cornelio in January 2022 showed that the events of May-June 2020 were about limiting Op Delhi and further that he may have been influenced by the Chief Minister to discontinue the prosecution and that such discontinuance may have been for improper purposes.

151.2. All of these speculative bald allegations, unsupported by evidence of any kind, are wholly untrue, and amount to an allegation that the Attorney General has lied publicly and on oath [Day 12, p. 24 lines 5-9] about his reasons for entering the *nolle*-

(i) At the time the *nolle* was entered, neither James Levy nor the Chief Minister were suspects or persons of interest to the RGP investigation. As such, they were not in any jeopardy which the Nolle would protect them from.

(ii) At no time did the Chief Minister play any role in or influence or seek to influence the AG in the latter's decision to enter the *nolle*. There is no evidence that he did, and he did not do so.

(iii) The reasons for the nolle have been shared confidentially by the Attorney General with a number of third parties including:

- (a) the complainant in relation to the investigation (Mr Gaggero);
- (b) the Leader of the Opposition Mr Azzopardi; and
- (c) the then leader of the political party Together Gibraltar (and MP), Ms Marlene Hassan Nahon,
- (d) and he has offered to share his reasons confidentially with the Inquiry. While the Inquiry is entitled to take the view that it is not willing to receive this information on a confidential basis, it is



nevertheless telling that the Attorney General has offered to provide his reasons and remains willing to do so.

- (iv) The public interest reasons for entering the *nolle* have nothing whatsoever to do with the subject matter of this Inquiry or with anybody involved in or affected by this Inquiry. As the DPP has confirmed in his oral evidence, these reasons were brought to the attention of the Attorney General by his office [Day 10, p.255]. As the AG further explained in his oral evidence, his decision to enter the *nolle* was based on matters brought to his attention in an email he received from the DPP on 7 May 2021 [Day 12, p. 24].

## **E.2 THE INCIDENT AT SEA (8 MARCH 2020) - ISSUE 3**

### **MR PYLE**

#### ***Seriousness of the incident***

152. The gravity and seriousness of the incident at sea on 8 March 2020 together with its local and international consequences, cannot be overstated. The incident resulted in the deaths of two individuals, serious injuries to two others, and significant damage to both the Royal Gibraltar Police Marine Boat (PMB) and another suspect vessel. This followed a collision between the PMB and vessel during a chase.
153. NP describes these matters as “*without a doubt, the most serious incident that was the tipping point from my “growing concerns” changing to recognising that things could not go on as they were, and that change was needed, arose in relation to this incident, which set in motion a chain of events that led to lose confidence in the abilities of the Commissioner to effectively lead his police force and indeed lead me to lose confidence in his probity*”: Pyle 1, para 25.1 [A251]. In his oral evidence, he confirmed that his loss of confidence in Mr McGrail “*would possibly not have happened without the incident at sea*” and that it was “*unequivocally*” this incident that spurred him on to act as he did in May 2020. [Transcript Day 18 Page 11].
154. During his oral evidence, Mr McGrail acknowledged that “*it was evident that this was a serious matter, that there was reputational risk for Gibraltar and serious consequences for those involved*”. [Transcript Day 6, page 65]. He also described the incident as

“serious and critical” [Transcript Day 7 page 196] and “tragic”. Aside from the regrettable loss of life, Mr McGrail

154.1. feared public disorder in the neighbouring, Spanish town of La Linea;

154.2. feared the possibility of retribution against RGP officers and their families;

154.3. accepted that “serious diplomatic and international risk” arose from the Incident [Transcript Day 7 page 197];

154.4. could not recall any other case during his 36 years career where RGP conduct had resulted in deaths of individuals [Transcript Day 7 page 196].

155. To make matters worse, the whole of the incident (the chase and the collision) took place outside of British Gibraltar Territorial Waters and well within Spanish Waters.

156. As well as the seriousness of the incident itself, Mr Pyle considers that Mr McGrail intentionally misled him (by evasiveness and lack of candour) in an important matter. This was the intentional omission to provide the Governor with the best information or intelligence available to Mr McGrail (which he was providing to others) in relation to a matter which touched very specifically upon HMG’s and the Governor’s responsibilities for external affairs, namely information relating to the location of the incident, and for which Mr McGrail was directly accountable to the Governor.

### ***Taking responsibility***

157. The draft Solis Report **[B1738]** found that:

157.1. Paragraph 3.15.1 – There was no training in carrying out pursuits of suspect vessels who would be taking evasive action to avoid being apprehended. While numerous pursuits have been carried out, the coxswains experience in pursuits was earned on the job, watching more experienced coxswains as they trained. Pursuits methods are therefore developed and understood by the coxswain but without RGP Marine Section management standard or proper established oversight in place.

157.2. Paragraph 5.10 – *“There was no proper training in pursuits of suspect vessels for the coxswain who would be required to take evasive action”*

157.3. Paragraph 5.11 – *“From evidence reviewed to date, it appears that Marine Section Managers did not have effective oversight of how their patrols were being*

*carried out.*” This was reflected in the final Solis Report at para 3.17.7 that “it appears that Marine Section Managers did not apply effective oversight into how the patrols were being carried out.

- 157.4. Paragraph 5.13 – “The Instructions and guidance provided to the Response Teams, oversight of operations (patrols and high-speed pursuits) and the management's review processes should be better understood.
158. Mr McGrail accepted in his oral evidence he had overall responsibility for: (i) ensuring that officers receive proper training in the execution of their duties; (ii) that there is effective oversight and supervision of officers; (iii) overall command and superintendents; (iv) overall responsibility for ensuring that systems exist and are being properly applied to ensure policies and procedures are adhered to in practice.
159. We refer to paragraph 9 of these Submissions as to Mr McGrail's apparent failure (in contrast to Commissioner Ullger) to understand and accept the implications and consequences of “taking responsibility for serious events of this kind in the organisation of which he was the leader at the time.
160. This was an important point for Mr Pyle, who stated in oral evidence that the evasiveness and lack of full disclosure of best available information to him (as to which, see below) is “*secondary to my point of losing confidence, in that, as I said yesterday, this discussion around accountability for the loss of life at sea*” [Transcript Day 19 p.122, lines 17-22].

***The failure to provide Mr Pyle with the best available information***

161. Under Section 47(1) of the Constitution, the Governor has special responsibility for Gibraltar's external affairs. It is for this reason that Mr Pyle's “primary concern was to establish the location of the incident, and whether it occurred in Spanish territorial waters and to at least be able to report the best available information back to the foreign office in London given the possibility of diplomatic and political situation with Spain about this incident” (Pyle 1, para 25.3 [A251]).
162. Mr Pyle confirmed in his oral evidence that it was standard practice for the Governor to be updated by the RGP when there are major incidents which fall within the Governor's responsibilities under section 47 of the Constitution [Transcript Day 18, p.65-66]. Notably, Mr Pyle was identified as one of those individuals who needed to be advised of the incident during the Gold Command meeting at 0500hrs on 8 March 2023 [B1680].

163. Mr Pyle has said that he had “*at best been misled over issues that were of the Governor’s direct responsibility. This was about where the incident had taken place.*” In short, Mr McGrail had intentionally failed to provide to Mr Pyle the best information available to him (Mr McGrail) (Pyle 1, para 25 [A251] and Pyle 2, para 19 [A264]). This is clear from all of the following.

8th March 2020 – the availability of information

164. Gold Command convened: [B1680]

164.1. It is common ground that around 0500 on 8 March 2020, a Gold Command meeting was convened by Mr McGrail in response to the Incident at Sea.

164.2. Mr Richardson and Mr Field were in attendance.

164.3. Mr Richardson was the senior officer on call when the incident happened and was appointed Deputy Gold Commander (to Mr McGrail).

164.4. In his oral evidence, Mr Richardson said he took notes and summarised what had happened to Mr McGrail.

164.5. Mr Field was a Chief Inspector at the time and was appointed as the Senior Investigating Officer. He was the Gold Commander on call over the that particular weekend and he was tasked with the role of determining the coordinates of the Incident at Sea.

165. At 06:05, Mr McGrail sent a WhatsApp to FP and to NP [B1343] informing them that

*“...We’re dealing with a critical incident - one of our boats has been involved in a collision with a smuggling RHIB with 4 on board. 2 on the smuggling RHIB are fatalities. Our crew are uninjured but clearly shaken & shocked.*

*I am invoking Post Incident Procedures and planning for consequence management. Once I have further updates I will let you know. ...”*

166. In this first WhatsApp message from Mr McGrail he is reporting the incident to both the Governor and the Chief Minister at the same time and in the same terms. Importantly, he is also telling them that he will let them *both* know once he has further updates [about the Incident]. This is important because this is precisely what he then did not do.

167. The Witness Information:

167.1. In his oral evidence, Mr Field said that Sean Perera (an RGP officer) had said that the suspect/crew-member had told O'Flattery (another RGP officer) that the incident had happened by Alcaidesa. [Transcript Day 13 page 12]. ("***the Witness Information***") This is reflected in a note [C6953] in Mr Field's Day book at 0700 that reads:

*"SP Suspect -> O'Flattery – Nordin  
This happened by the Alcaidesa – hurry up to help his friend – the police officers came slowly5 knots without lights – blue lights"*

167.2. Notwithstanding that (i) the Witness Information was not contained in the Mr Richardson's sit-rep email at 10:11 on 8 March [B1680] and (ii) Mr Field gave oral evidence that he did not think he would have passed this information to Mr McGrail, it is submitted that, in all likelihood, Mr McGrail would have been aware of it because:

- (i) Mr Richardson's email records the need to establish the location of the incident with accuracy and therefore it is submitted it can be safely assumed that all the information known at the time regarding location was discussed; and
- (ii) Mr Field confirmed in his oral evidence that he probably would have told it to Mr Richardson who would, in turn, have conveyed it to Mr McGrail, given his role as Deputy Gold.

168. The Port Authority Information.

168.1. Mr Underlay (sic: Undery) of the Gibraltar Port Authority had received a report at 04:00 from "Tarifa Traffic" where he was informed that they had received a call from an unknown person reporting that there had been a serious incident at sea just off the port of Atunara [B1310] row 36 ("***the Port Authority Information***").

168.2. It is apparent from an email from Paul Richardson [B1680] that Gold Command was aware of this information by 07:50. Although it was not known whether this

related to the same incident, it is not reasonable to suppose that there would have been more than one serious incident in the same location at the same time.

168.3. The email stated as follows: *"Ian Underlay – Gib Port – reports that he was advised of an incident in Alcaidesa by Tarifa Control uncertain whether this is the same incident"*.

168.4. Given that the Port Authority information formed part of the Gold Command update, Mr McGrail must have been aware of it by 07:50.

169. The Guardia Civil Coordinates.

169.1. At 09:40, DCI Field received a report from Inspector Paul Chipolina that the coordinates of the collision were 36'09 N 5'12 W. **[B1319]**. See Field 1 at Para 36 **[A801]**: *"At 09:40, I received a report from Insp Paul Chipolina who had obtained the co-ordinates through his contact in the Spanish Guardia Civil. There were 36'09 N5' 12 W, approximately 6.54 miles east of Playa Santa Barbara."*

169.2. Mr Field then plotted the co-ordinates on a map and subsequently made his way to the COP suite". It would have been obvious to anyone with local knowledge that that is well inside Spanish waters. See **[B1319]** Row 125 and 126.

169.3. Mr McGrail was immediately told about the coordinates received from the Guardia Civil. At McGrail 3, para 60 **[A72]** he says: *"At 0940 I received information from DCI Field who in turn relayed information provided by the Guardia Civil suggesting the collision had occurred in Spanish territorial waters though this required confirmation by them"*. This is also evident from Mr Richardson's contemporaneous notes **[B1680]**.

169.4. In his oral evidence, Mr Field described the Guardia Civil Coordinates as the *"crucial"* update, even though he also said that *"they had to confirm it and the technical officers had to extract it from their database, and once they have done that, they would be able to confirm the coordinates as of where the collision took place."* [Transcript Day 13 page 29].

169.5. Mr Field also said of the Guardia Civil Coordinates:

- (i) From his experience, that , “*there would have been a strong likelihood that it would have been the exact coordinates*”. [Transcript Day 13 page 30].
- (ii) “*From receiving information from the Guardia Civil. Whenever they say something, it's usually right. The other thing is trying to confirm that or getting them to put anything on paper, that is another hurdle in itself.*” [Transcript Day 13 page 30].
- (iii) As it happened, the Guardia Civil Coordinates were “*almost spot on*” with the final coordinates contained in the Solis Report.

169.6. It is clear from Mr Richardson’s evidence that, in his mind, once he was given the Guardia Civil Coordinates, there was no longer any doubt in his mind that the collision had happened outside BGTW, leaving him only unclear as to whether any part of the chase had happened inside BGTW: [Transcript Day 4 page 237-8]

169.7. Accordingly, and however much the RGP might still have been investigating whether any part of the chase had taken place in BGTW, it is submitted that, in light of the reliability attributed to the Guardia Civil Coordinates by Mr Field and Mr Richardson, there was a very high probability that the collision had happened (1) outside BGTW and (2) inside Spanish territorial waters. And that was the best information available to Mr McGrail at that time.

170. The sharing of information:

170.1. Consistently with this analysis as to the reliability of the information, at 09:49, Mr McGrail updated the Chief Minister as follows:

*“CM - the information suggests that the collision took place outside BGTW – approx. 6NM east off (sic.) the runway/Santa Barbara Beach.” [B1345]*

170.2. Despite having told the Governor and the Chief Minister in his WhatsApps to them at 06:05 [B1343] that once he had further updates he would let them (both) know, Mr McGrail did not share this update with the Governor. It is important in

this regard that Mr Field himself described the Guardia Civil Coordinates as a “crucial” update.

170.3. When asked why he had not sent a similar message to Mr Pyle, Mr McGrail he said *“I was engaged in a form of conversation with the Chief Minister and I was responding to questions from him in the same way as I was responding to questions from the Interim Governor, from Mr Pyle.”* [Transcript Day 6 page 19].

170.4. Mr McGrail’s attempt to explain and justify his plainly discriminatory failure to provide this information to the Governor by stating that he was engaged in a “conversation” with the Chief Minister, does not avail Mr McGrail’s intended purpose because:

(i) In fact, it was with the Governor and not with the Chief Minister that Mr McGrail was involved in a then current conversation.

(ii) Mr Pyle had sent Mr McGrail a WhatsApp offering support at 09:29, and Mr McGrail thanked him by WhatsApp at 09:41.

(iii) Mr McGrail had therefore sent a WhatsApp to Mr Pyle just one minute after the time that he says in his affidavit he was told about the Guardia Civil Coordinates i.e. 09:40.

(iv) Therefore, at the time of sending the 09:41 WhatsApp to Mr Pyle, the information about the Guardia Civil Coordinates could not have been more fresh (one minute) in Mr McGrail’s mind and therefore, despite being in this “conversation” with Mr Pyle, Mr McGrail failed then or at any time thereafter to share this information with him.

(v) In contrast, Mr McGrail’s most recent communication with the Chief Minister had been at 0814hrs **[B1344]** some 1 hours and 35 minutes prior to the Guardia Civil Information being provided to him. He was not therefore then in a conversation with Mr Picardo any more than he was then in a conversation with Mr Pyle.

(vi) In his oral evidence, Mr McGrail, said that *“there is absolutely no doubt whatsoever that this information would have been shared with Mr Pyle at the*



*next point of communication with him.*” [Transcript Day 6, p.19]. As is evident from the above, that is precisely what he did not do.

170.5. Mr McGrail was asked by CTI whether, whilst the Guardia Civil information may not have been confirmed information, he accepted that the Governor was entitled to the best available information. Mr McGrail answered: “*That's right, and he was. He was provided with the best information.*” [Transcript Day 6, page 22]. But, whilst Mr McGrail concedes that the Governor was entitled to receive the best available information, it is evident from the above that he failed to provide to the Governor the information that he had provided to the Chief Minister.

170.6. Furthermore, and regardless of what information he provided to the Chief Minister, Mr McGrail also did not provide to the Governor any of the (i) Port Authority Information (ii) the Witness Information and (iii) the Guardia Civil Coordinates (or even the fact that they had been provided).

170.7. Best available information means precisely the best information that is available, regardless of whether it is confirmed, requires confirmation, and any other qualification to its complete certainty and reliability.

#### Meeting between IM and the AG at 10:25 on 8 March

171. At around 10:25 on 8 March 2020 the Attorney General met with Mr McGrail accompanied by Supt Richardson. They were joined at 11:05 by DCI Field. As to this briefing:

171.1. In his oral evidence Mr McGrail confirmed that he had told the AG that it was highly likely that the collision had happened in Spanish waters [Transcript Day 6, p.24-25]:

*Q. ... Do you agree that you said that it seemed highly likely that the collision had occurred in Spanish waters to the Attorney General?*

*A. ...it was mentioned that it was highly likely that it was going to happen – would have happened – in Spanish waters.*

*Chairman: when you say “it was mentioned”, you mean you thought that it was highly likely that it occurred in Spanish waters, and said so.*

A. Yes, yes, with the proviso that *part of the chase or under I mean, these were working theories to complement the information that we had, the coordinates and the information that we had, that it would seem that it had happened, but we were working on the hypothesis that part of the chase had either commenced or had involved British Gibraltar territorial waters.*"

171.2. Mr Field provided the meeting with a map on which the Guardia Civil Coordinates had been plotted and from which, Mr Field said, it was obvious that the coordinates of the collision were in Spanish Waters. When asked was the Attorney General informed that these co-ordinates were in Spanish Waters his response was "Yes, it is at plain sight if you see the map".

171.3. During the course of this meeting, at 11:40, the Attorney General purported to send a WhatsApp to FP but inadvertently sent to Mr McGrail. The WhatsApp stated **[B1345]**

*"Been in New Mole for the last hour or so. ... PR [Press Release] will not say where incident occurred but it is virtually certain it was outside BGTW eastern side opposite runway. It also seems that part of the chase was within BGTW."*

171.4. Evidently, sufficient and detailed information was provided to the Attorney General to enable him to say in this WhatsApp that it was "virtually certain" that the incident was outside BGTW.

171.5. It is noteworthy that in his oral evidence the Attorney General said he thinks he drafted this message with Mr McGrail [Transcript Day 11 page 111]. Indeed, Mr McGrail himself confirmed in oral evidence that the Attorney General got the information that enabled him to say that it was "virtually certain" from his briefing at this meeting, and further confirmed that he did not consider this choice of words to be inappropriate [Transcript Day 6, p.26]

171.6. This evidence confirms two important things in respect of this point in time:

- (i) That Mr McGrail was himself of the view that it was "virtually certain" that the collision took place outside BGTW;

- (ii) That he provided this information to the AG, believed that the AG had provided it to the CM, but did not himself make any attempt to provide it to the Governor in discharge of his accepted obligation to keep them both informed of updates.

Meeting between Mr Pyle and Mr McGrail at 12:15 on 8 March

172. It is common ground that Mr Pyle arrived at New Mole House police station at around 12:15, either after the AG departed, or as he was departing. He went to New Mole House unscheduled and of his own initiative. Mr Pyle's primary concern was "*to establish the location of the incident and whether it had occurred in Spanish territorial waters*" Pyle 1, para 25.3 **[A251]**. As he said in oral evidence, "*the only thing at the time, outside of concern for the welfare of those involved in the incident, was where it happened. I didn't really need to know anything else at that moment.*" [Transcript Day 18, p.69].
173. In his Third Affidavit, Mr McGrail says that he had "*practically provided NP and the AG with the same briefing*" **[A74]**. In his oral evidence, Mr McGrail said that all he could recall was that "*other than say that the matter - that the collision was highly probable that it happened in Spain with part of the chase happening in Gibraltar waters.*" [Transcript Day 6, page 28]. Mr McGrail repeated this assertion in his oral evidence where he stated that I believe would have "*briefed him to the same level that I briefed the Attorney General*". [Transcript Day 6, page 28]. This is implausible and not supported by the other evidence for the following reasons:
- 173.1. Had the Guardia Civil Information been provided to Mr Pyle he would have recollected such an important piece of information. Indeed in his oral evidence Mr Pyle said "*because without a doubt, in my mind it would have firmly told me, unequivocally, that the incident, the accident, the death at sea was firmly inside Spanish waters*" [Transcript Day 18, page 70]. In other words, it would have had precisely the same effect on him as it had on everybody else that knew the information.
- 173.2. Furthermore, Mr Pyle said that he "absolutely" would have reported [the coordinates] to the FCDO [Transcript Day 18 page 71]. It is not possible to conclude that Mr Pyle was told of the co-ordinates and that he failed to notify the FCDO and continued to provide them with less information than he knew.

173.3. Mr Pyle was not shown a map with plotted coordinates which would have made it obvious (as it did for everyone else) that the collision took place in Spanish Waters. Again, it is inconceivable that Mr Pyle would have been shown such a map and (i) he himself not recollect that he had been shown it; (ii) no one else has recollected that he was shown it; (iii) and that he did not report it to the FCDO.

173.4. In his email to the FCDO at 14:09 (i.e. shortly after the meeting with Mr McGrail on 9 May) [C3253] Mr Pyle reports to the FCDO on a basis which makes it clear that he had not been given the same briefing that had been given to the AG:

*“I’ve just met with the Commissioner of Police who kindly gave me a briefing on the incident. The facts have yet to be determined and the investigation is ongoing, but initial headlines are as follows: The incident happened @ 04:00 hours though it is not yet known whether it took place in BGTW or just outside...”*

173.5. This message does not reflect the “virtually certain” message nor the Guardia Civil Coordinates or the map, which Mr McGrail claims he shared with Mr Pyle before he issued this statement. For Mr McGrail’s evidence to be correct, Mr Pyle would have to be misleading the FCDO.

173.6. In the WhatsApp Exchange between Mr Pyle and Mr McGrail after the meeting [B1346] as follows:

*“Line will be. Investigation ongoing. Spanish nationals from Cueta (sic.) (did you say one person was Portuguese). Not sure in whose waters **incident** took place. RGP seeking assistance from UK police authorities. No assistance needed from FCO at this stage.”*

At 13:46, Mr McGrail replied “Yes all correct.”

At 13:47, Mr McGrail sent a further Whatsapp “Trying to clarify exact position of the collision”.

If Mr McGrail had indeed informed Mr Pyle that the incident took place in Spanish waters or had provided the coordinates to Mr Pyle it is submitted (1) Mr Pyle would not have framed his draft report in this manner and (2) Mr McGrail’s would not

have responded that it was “all correct”. What Mr McGrail confirms as being correct reflects exactly the state of knowledge that Mr Pyle had been conveyed to him up to that point by Mr McGrail.

174. During his oral evidence, Mr McGrail relied on the fact that Mr Pyle had emailed the FCDO at 07:57 on 9 March 2020 informing them that: *“There may be complications around yesterday’s incident in that it might have happened as much as six miles inside Spanish waters. If true, it’s hard to fathom quite what the RGP were doing chasing a vessel so deep into Spanish waters and one can only hope that it was at the invitation of the Spanish. But this may be why GoG have kept details very close and have asked for no social media speculation.”* [C3257] Mr McGrail suggested during his oral evidence that that information could only have come from the debriefing he had provided Mr Pyle. That proposition is not sustainable because:

174.1. Mr Pyle’s “debrief” to the FCDO of his 8 March meeting with Mr McGrail was Mr Pyle’s email on 8 March 16:09 [C3253]. In it, Mr Pyle specifically refers to the meeting he has just had with the Commission of Police.

174.2. According to Mr McGrail’s own evidence, the information provided by Mr Pyle in his 07:57 email dated 9 March 2020 is not the information that Mr McGrail had and which he claims to have Mr Pyle). In his oral evidence, Mr McGrail said in relation to the wording of the email that it said *“that the incident happened at six nautical miles into Spanish waters, which is actually not correct.”* Mr McGrail is absolutely correct because the information that he then had was 6.54 NM east of Santa Barbara Beach and not 6 miles north of BGTW.

174.3. Accordingly, the source of Mr Pyle’s email of 9 March at 07:57, could not have been the briefing he had received from Mr McGrail, and Mr Pyle’s evidence is that it was not.

#### Meeting on 9 March

175. It is submitted that the evidence demonstrates that Mr McGrail continued to mislead and/or not provide Mr Pyle with the best available information at the 9 March 2020 meeting:

- 175.1. Despite the matter of the Guardia Civil Coordinates being fresh in his mind because he had spoken that very morning to the Guardia Civil (who had informed him that the collision had indeed occurred in Spanish waters but that they still needed confirmation by their technicians) [A74], Mr McGrail cannot recall whether the Guardia Civil Coordinates were provided to Mr Pyle (or discussed) in the 9 March meeting [Transcript Day 6 Page 41].
- 175.2. If provisional coordinates were discussed or the map shown, Mr Pyle would have reported that to the FCDO. Instead, in his email dated 9 March 2020 timed at 16:42 [C3278] Mr Pyle states *“The GC confirmed they had opened up an investigation which they would pursue regardless of where the collision took place. This infers even they are not sure where it happened. ... CoP confirmed that the exact location has still to be determined as were details of the chase which lasted 10 minutes”*. It is submitted that the Mr Pyle’s report is completely accurate (and consistent with Mr Richardson’s note) in that Mr Pyle was only told that the exact coordinates were still being determined.
- 175.3. During their oral evidence both Mr Richardson and Mr McGrail suggested that because *“exact co-ordinates not being determined”* was noted that it implies that provisional coordinates were mentioned. It is submitted that this is not correct because that requires (i) all of the attendees to have forgotten that they were discussed; (ii) requires Mr Richardson’s note not to have recorded it; and (iii) requires Mr Pyles email note to London to not have recorded it. Nor is it plausible for the very same reasons for Mr McGrail to suggest as he did in his oral evidence to have confirmed in the meeting that it was “highly probable” that the collision had taken place in Spanish Waters.
- 175.4. By email dated 11 March 2020 [B1351] Mr Pyle asks Mr McGrail *“Are we any clearer as to where the collision took place? London are keen to know whether it was inside or outside BGTW and if the latter, approximately by how far.”*
- 175.5. This email is plainly inconsistent with Mr McGrail having provided Mr Pyle with best available information on 8 and or 9 March 2020, for the following reasons:
- (i) Mr Pyle does not ask Mr McGrail whether the provisional coordinates have now been confirmed or ask whether the Guardia Civil have now confirmed the information they provided.

(ii) Mr Pyle's question still posits the possibility that the collision may have taken place inside BGTW.

(iii) As Mr Pyle says in his Second Affidavit NP2 paragraph 17 **[A263]**:

(a) *"Why would I have been asking if as Mr McGrail is now saying, I already knew that; and*

(b) *Why would IM say that to me if he thought that I already knew it and that the position at the time was that all Gibraltar parties were merely awaiting confirmation by the Guardia Civil of the coordinates"*

175.6. By email dated 11 March 2020 **[B1351]** and timed at 18:58, Mr McGrail responded *"we are getting there on establishing exact co-ordinates of where collision took place. We are tying up some loose ends and probing further from WHSS and should be able to confirm soon. **It is, high (sic.) probable it did occur out BGTW.** We are getting plotted which will provide a better understanding in terms of distance from BGTW"*

175.7. This email invites a number of observations:

(i) Why did Mr McGrail not respond to Mr Pyle by saying that he was still only working on the provisional coordinates which had still not been confirmed?

(ii) Why, given that the Guardia Civil had apparently still not confirmed their coordinates and they were still probing further with Windmill Hill Signal Station, was Mr McGrail then able to say that it was "highly probable" that it did occur outside BGTW?

(iii) Why would Mr McGrail think that he was conveying news to Mr Pyle by saying "highly probable it did occur outside BGTW" if his position is that this is effectively what he conveyed to him on 8 March ("virtually certain") and again on 9 March?

(iv) Why was Mr McGrail using the "highly probable" mantra when:

- (a) he was aware that from the morning of the 8 March, the Attorney General was reporting to the CM (with Mr McGrail's concurrence) that it was "virtually certain"; and
- (b) he had received further information from Mr Field on 10 March about the coordinates appearing on the suspect vessel's GPS chart plotter/radar device, which more or less tallied with the Guardia Civil coordinates [Day 13, p.34-35].

175.8. Furthermore, it is evident from the WhatsApp exchange Mr McGrail and the Attorney General on 11 March starting at 1909hrs (which was initiated by Mr McGrail only eleven minutes after Mr Pyle's email) [B1351] that Mr Pyle could not possibly have been told in the 9 March meeting that it was highly probable that the incident had taken place outside BGTW and/or in Spanish Waters. The Whatsaap Exchange [B1351] is as follows:

*"Cop to AG @ 1909: "He (Nick) is asking for confirmation of where collision took place as London are keen to know I have informed him along the same lines that you advised CM ie that it is highly probable that it happened outside BGTW".*

*AG to CoP @ 1915: "Ian that seems fine to me. Factual whilst being amenable to further precision once you obtain further details."*

175.9. This shows that CoP was aware that he had not told NP previously because he is suggesting that informing Mr Pyle that it is "highly probable that it happened outside BGTW" represents new information, thereby admitting that he has not conveyed such information before.

176. Accordingly, even by 9 March 2020, Mr McGrail had not provided to the Governor any of the (i) Port Authority Information (ii) the Witness Information and (iii) the Guardia Civil Coordinates.

177. Finally, by asserting that he assumed that because the AG was NP's legal advisor the AG would have been passing on information to NP, Mr McGrail is effectively admitting that he did not do so himself. It is noteworthy in this respect that the AG is also the legal advisor of the Chief Minister, which did not lead to Mr McGrail not himself briefing the



CM on the same assumption that he made in the case of the Governor, that the AG would be briefing him.

178. In any event, the AG is not the solicitor for the Governor in the sense that information communicated to him is deemed communicated to his client. It is not the AG's responsibility to act as a conduit for information that another office-holder requires to convey to the Governor, not least when that office-holder has whatever access he requires to the Governor directly. And furthermore, the Commissioner of Police was not entitled to assume that the Attorney General would pass all or any of the information to the Governor, not least when Mr McGrail did not specifically request the AG to do so (which would be the very minimum that he would have to have done to even begin to be entitled to rely on this conduit argument).
179. The point is not, as IM now argues, that Mr Pyle already knew from some other source (which he did not). The point relevant to Mr Pyle's sense that he was being misled by Mr McGrail is that he, Mr McGrail, intentionally omitted to tell him so himself. So it would not be an answer to Mr Pyle's misleading complaint even if Mr Pyle had known the best available information from a source other than Mr McGrail and the RGP, because that would still mean that Mr McGrail had abrogated his constitutional responsibility to account to the Governor.

***As to IM's argument that by 'incident' he meant both collision and pursuit, and thus NP's case of evasiveness is built on a misunderstanding:***

180. In cross-examination of Mr Pyle, Mr Wagner (on behalf of Mr McGrail) put it to Mr Pyle that the RGP were investigating both the chase and the collision and that Mr McGrail therefore understood the word 'incident' to apply to both [Transcript Day 19 page 83 line 14 to page 84 line 8].
181. Mr Pyle's evidence was that by 'incident' he understood and meant 'collision'. [Day 19 page 113 lines 4-6].
182. Mr Wagner then put to Mr Pyle the proposition that that as Mr McGrail understood the word 'incident' to refer to both the chase and the collision, there was no evasiveness by Mr McGrail in not providing information about the collision in answer to a question about 'the incident' which did not mention the word 'collision'. [see Day 19 page 116 to 120].

183. With respect, this is disingenuous. The case being advanced on his behalf, is that Mr McGrail did not understand that Mr Pyle was inquiring about the location of the 'collision'. It must have been obvious to Mr McGrail that what was relevant here was not where the chase took place but where the collision took place, and that this is what he was asking. It was the collision that caused the deaths, not the chase. Had there been no collision and deaths, there would have been no 'incident' of this nature or consequences.

184. Furthermore, it is clear that at the time Mr McGrail understood the word 'incident' to primarily mean 'collision'. The words 'collision' and 'incident' are used by him interchangeably. For example:

184.1. See IM's initial WhatsApp to various officials on 8 March, including the CM and NP at 06:05 **[B1343]**, describing the incident as the collision: "*Nick - We're dealing with a critical incident - one of our boats has been involved in a collision with a smuggling RHIB with 4 on board. 2 on the smuggling RHIB are fatalities...*" (emphasis added). Here, plainly the critical incident is being identified and described as the collision resulting in fatalities.

184.2. 8 Mar 13:12hrs - COP to MOJ **[B1346]**: "*Our officers are ok. We are constantly keeping tabs of their welfare. We are expecting them to come today at some point to provide a detailed account of what occurred. This is in accordance with our force policy on post incident procedure.*" Again, the 'incident' requiring the invocation of post-incident procedures and the keeping of tabs on officers' welfare was not the pursuit, but the collision.

184.3. 8 Mar 13:33hrs – NP to COP **[B1346]**: "*Thanks for the briefing. I'll do a quick note for London for when it hits the press. Line will be. Investigation ongoing. Spanish nationals from Ceuta (did you say one person was Portuguese). Not sure in whose waters incident took place. RGP seeking assistance from UK police authorities. No assistance needed from FCO at this stage.*"

13:46hrs – COP to NP: "*Yes all correct. Indeed one was Portuguese.*"

13:47 – COP to NP: "*Trying to clarify exact position of the collision.*"

These exchanges related to a draft message to FCDO in London that Mr Pyle was running past Mr McGrail for accuracy. It refers to the nationalities of the

deceased and injured and the request for assistance from UK police authorities and therefore to the collision. Neither would apply to a mere chase that may have strayed into Spanish waters. Indeed, nor would it be necessary or normal practice to engage with the Governor and the Chief Minister in this manner in the event of a mere chase.

184.4. 9 Mar 14:33, COP to GPA Chair **[B1346]**: “Joey - been working through the weekend on this collision case. I am going to email you, (or if you want Elka), to formally notify you of the incident”. So, the incident is “this collision case”.

184.5. 11 Mar 18:02, COP to AG **[B1349]**: “Michael - we have still not provided any official account to GC of the incident at sea and they have asked for a brief from us...” and then the draft starts “Ref: Initial Incident Report - Collision at Sea with fatalities”.

184.6. 15 Mar 13:26 COP to AG **[B1351]**: “Michael - Can I come round to see you tomorrow for a quick discussion regarding issues with potential political connotations ref the collision at sea incident?” Again, the incident is the collision.

185. In any case, this supposed distinction in the use of the word ‘incident’ was never explained by IM to NP at the time, nor was he given any reason to think that Mr McGrail may be drawing any such pedantic distinction: Transcript Day 19, p.243, lines 5-8; p.244, lines 4-9.

186. Hence, despite NP recognising the possibility of a misunderstanding (a mark of his candour), there is no forensic merit or value to the Inquiry in Mr McGrail’s argument for the Inquiry and the Inquiry should disregard it.

187. In any event (and to underscore the lack of genuine forensic merit or value of the point), Mr Pyle maintained his view as to evasiveness:

187.1. When asked whether he regretted making an allegation of evasiveness and dishonesty and using it to found the removal of the Commissioner of Police, when there was an alternative valid explanation which was nothing to do with dishonesty, Mr Pyle responded that he did not [Day 19, page 122, lines 12-17].

- 187.2. When pressed on whether he regretted making the allegation, Mr Pyle said: *“No, at the time I still --- and to this day I still believe there were elements of evasiveness on the Sunday in what Mr McGrail told me.”* [Day 19, page 123, lines 4-7]
- 187.3. When asked whether he accepted that a particular paragraph in his 3 June letter to the GPA [C4680] was insufficient to be the foundation of an allegation of dishonesty on its own, Mr Pyle responded: *“No, I still think that there were elements – and I think we’re going to just go back and forth on this a little bit, there were elements of evasiveness and a link of evasiveness, dishonesty at the time. You asked me to, you know, comment now today on this paragraph. I wrote the paragraph at the time and I would still write it if I was re-writing it. I suspect I would still write it very much in the same terms.”* [Day 19, page 123, lines 15-22].
- 187.4. In re-examination, Mr Pyle reaffirmed the point that he believed that Mr McGrail was being evasive to him from Sunday morning until the WhatsApp of 12 March: *“The point that I hope I got across is that I believed Mr McGrail was evasive to me from the Sunday morning up until he confirmed, which is the information I wanted to hear from the Commissioner of Police, until I got this WhatsApp response from him.”* [Day 19, page 248, lines 8-13]
- 187.5. In re-examination, Mr Pyle also restated his position that he considered that Mr McGrail had been evasive with him in terms of providing the best information, subject to confirmation, that was available to him [Day 19, page 250, line 25 to page 251, line 4].
188. Mr Wagner [Day 19, page 124] put it to Mr Pyle by reference to [B1351] (WhatsApp on 11 March 2020 at 18:58) that, because that message, for the first time, asked specifically about the collision, Mr McGrail provided the answer “it is high[ly] probable that it did occur outside BGTW” 9 minutes later. It is not plausible that:
- 188.1. Mr Pyle would ask for information that he had already been given on 9 March (if he had been given it);
- 188.2. Mr McGrail would have provided it to him on 11 March in the terms contained in the message at [B1351] if he had already provided it to Mr Pyle on 9 March

188.3. If Mr McGrail had indeed told Mr Pyle on 9 March that it was highly probable that the collision had taken place outside BGTW, why would Mr McGrail send a WhatsApp message to the AG on 11 March at 19:09 [B1351] informing the AG that the Governor *“is asking for confirmation of where collision took place as London are keen to know. I have informed him along the same lines that you advised CM i.e. that it is highly probable that it happened outside BGTW.”* That is precisely the information that Mr McGrail now claims that he himself had told Mr Pyle on 9 March, in the AG’s presence. It makes a complete nonsense of Mr McGrail’s WhatsApp to the AG.

189. Furthermore, arising from Mr McGrail’s WhatsApp to the AG on 11 March 2020 at 19:09, it is noteworthy that Mr McGrail is telling the Governor that it happened “outside BGTW” i.e. Mr McGrail is still not himself informing the Governor about that which the RGP was by then as good as certain of, namely, that not only had the collision occurred outside of BGTW, but well inside Spanish territorial waters

***The inescapable facts***

190. The inescapable facts are, as restated by Mr Pyle in re-examination, that IM did not communicate to Mr Pyle the best information available to him, despite having communicated it to both the Chief Minister and the Attorney General, namely. during 8<sup>th</sup> and 9<sup>th</sup> of March, Mr Pyle was not told by Mr McGrail that:

190.1. It was virtually certain or highly probably that the collision had taken place in Spanish waters;

190.2. The Guardia Civil had provided to coordinates from the radar tracking system;

190.3. The collision was thought to have occurred 6NM off Santa Barbara beach;

190.4. Nor was he shown the map plotting the coordinates provided by the Guardia Civil.

[Day 19, page 241-244]

191. Finally, Mr McGrail has levelled criticism at Mr Pyle that he did nothing to act on his concerns about IM in relation to the incident at sea for a period of 8-9 weeks (mid-March to mid-May 2020). It is submitted that this criticism is not well-founded in the sense of

invalidating his decision to nevertheless have recourse to that reason in a determination that Mr McGrail should be replaced as COP on the basis of loss of confidence-

191.1. It is something of an irony that when Mr Pyle makes decisions quickly he is accused of making them hastily, and when he makes them too slowly, the genuineness of them is called into question by reason of delay. This is not an appropriate basis on which to examine the genuineness of Mr Pyle's loss of confidence in Mr McGrail.

191.2. Mr Pyle's evidence was that he was drawing together the threads in his mind: "I was still getting them together in my mind... Collecting in my mind how I would approach an issue I could see, I will use the word storm brewing". [Day 19, p.192] Mr Pyle also gave evidence that various factors had focused his mind on the matter, including the Met Police visits, the claims in Spain and the HMIC Report [Day 19, p.290-291].

191.3. Sight should also not be lost of the fact that this 8-9 week period coincided with the unprecedented Covid-19 pandemic lockdown.

### **Chief Minister**

192. In the case of Chief Minister, his issue primarily centred around the lack of the provision in a timely fashion of information concerning the Spanish and Gibraltar Claims against the RGP arising from this incident.

193. As the Chief Minister expressed in his email to the Attorney General dated 20 May 2020 [C4105] the issues of the claims raised:

*"fundamental human rights, the right to life, potential payment of huge amounts of the extradition and liberty of serving police officers being at stake, the issue of Standard Procedures which may be in place and the management thereof. All of that is in addition to the huge potential political exposure that arises for Gibraltar as a result thereof and the concomitant (and dangerous) issues of sovereignty and the United Nations Convention on the Law of the Sea."*

194. Given the seriousness of the matter and the Chief Minister’s role (including qua Minister for Finance), the issue of the claims should have been the “*subject of detailed submission by Mr McGrail*” to the Chief Minister.
195. By 14 May 2022 Mr McGrail received a letter from Verralls Law Firm which confirmed that they were instructed by one survivors of the Incident at Sea “*to pursue on his behalf a claim for damages consequent upon injuries sustained in the collision in Spanish territorial waters...*” [C3762]. This so happened to be the same day that the Chief Minister became aware of potential claims being commenced in Spain and Gibraltar from a newspaper article in El Faro.
196. By his own admission, in his oral evidence Mr McGrail did not consider referring the 14 May letter directly to the Chief Minister because he was “*under the comfortable belief that it was not a firm letter of claim and that’s the information that was being imparted to me by the DPP and the AG.*” [Transcript Day 6 Page 77]. It is submitted that whether or not the formal letter of claim had been issued is not a valid reason for his failure to have informed the Chief Minister directly of these matters.
197. The evidence clearly shows that Mr McGrail failed to provide the Chief Minister with information about the claims at any time. The matter was only raised, coincidentally with the Chief Minister, when the RGP sought additional funding on 20 May 2020.
198. Regardless of who else may have been aware of the Verralls letter, the relevant point for this Inquiry in the context of the loss of confidence issue is what the Chief Minister knew.

### **E.3 - HMIC REPORT**

#### ***Not a standalone reason for losing confidence***

199. The HMIC Report issue was a contributor to accumulating loss of confidence for both The Governor and the Chief Minister, but both have made clear that, by itself, it would not have resulted in a loss of confidence in Mr McGrail such as to seek his removal from office.
200. See Picardo 1, para 107 [A216]: “*I want to be clear also in stating that the report did not make me lose confidence in the integrity or probity of Mr McGrail as Commissioner*

*of Police. I was, however, clearly of the view that, once I reviewed the conclusions, I was persuaded that they did reflect on Mr McGrail's ability to maintain the efficiency and effectiveness of the RGP, which are also key aspects of the criteria of the power of the Authority in section 34(1) of the Police Act. I was, thereafter, also not confident that Mr McGrail could be the person to address the HMIC recommendations, given he had demonstrably failed to act since 2018 and matters had obviously deteriorated and not improved on his watch. He had, for instance, as far as I am aware, not established the working group he had suggested in his job application was 'imperative'."*

201. Nick Pyle's oral evidence [Day 18, p.132, line 15-18]: *"I will say, as I have said on the other issues, that the HMIC report on its own wouldn't have caused a loss of confidence..."*

202. While both the CM and NP gave evidence that, initially, they were of the view that IM could continue to lead the RGP and address the HMIC issues:

202.1. the CM explained that, although when looking at the HMIC issue individually at the time (and bearing in mind the many other preoccupations on his mind) he was in agreement with NP's proposal about dealing with the HMIC report, *"all of these then came together like the strands of circumstantial evidence and became a cord that for me was the straw that broke the camel's back after my huge loss of confidence in Mr McGrail on 12 May 2020"* [Day 8, p.78-79]

202.2. in similar vein, NP said *"I don't think I had started to draw the threads together of this can't go on...The stage I started to get in my mind or believe that a change of leadership was needed, um, was growing, but I didn't have enough weight to even talk through it with the Chief Minister, let alone Dr Britto."*

### ***IM's commitment when he applied for the post of CoP***

203. In his application for the post of COP, IM had included the following **[B1098] [B1097] [B1095]**: *"(x) HMIC recommendations - The inspection of the RGP by HMIC in 2015 revealed various areas for improvement. Whilst some of these recommendations have already been addressed there still remains some requiring further action. It is imperative that a working group is created to see this project through. In my view the most pressing area for improvement, as highlighted in one of the recommendations, is that of the creation of manual of guidance which should represent Force policy in crime*



*investigation standards. This will inherently make officers better at conducting investigations and is positive for their all-round personal development.”*

204. The working group, which IM had said was ‘imperative’, was never set up. It appears that there was never even a discussion about setting it up: Ullger oral evidence, Day 13, p.99, lines 10-14: “Q. *Was there ever a discussion about setting up a working group to address the recommendations prior to the inspection taking place? A. No.*”

***Not enough done to implement 2016 Report***

205. The RGP Senior Management Team had been opposed to inviting the inspection precisely because they all felt that not enough had been done to implement the recommendations of the 2016 Report:

205.1. Ullger: Day 13, p.95, lines 2-7: “*We felt that we were not ready for another inspection by His Majesty’s Inspectorate of Constabulary and Fire Rescue Services simply because we had not done enough work to achieve the recommendations of the 2016 report*”

205.2. Yeats 1, para 31 [A638]: *The entire command team at the time, which comprised of AC Ullger, Supt Richardson, Supt Lopez, Supt Tunbridge and I were uncomfortable with the suggestion. This was principally because whilst we felt that it would help to address the bullying issue, the consensus was that not enough progress had been made to address the recommendations of the 2016 HMICFRS report following the inspection of September 2015. We felt that this would expose the organisation to renewed criticism. Our view was that HMICFRS should be invited to return once progress had been made*

206. IM gave evidence that he wishes, with hindsight, that he had taken their counsel not to proceed with the HMIC report: Day 7, p.221-222.

***IM neither accepts responsibility nor agrees with the Inspectors (unlike COP Ullger)***

207. Not only does IM refuse to accept responsibility, he was not even willing to agree with HMIC’s conclusions, nor even that they were entirely fair:

207.1. "Q... *Do you consider the conclusions of the HMIC report were fair? A. Not entirely...*" [Day 6, p.98, lines 10-12]

207.2. "...*I don't necessarily agree of their understanding that we were not alive to corruption, I don't agree with, but I didn't even speak to HMIC in that regard*" [Day 6, p.100, lines 6-9]

207.3. "*the findings did not resonate with what I knew of the RGP*" [Day 6, p.100, lines 23-24]

207.4. (referring to IM's force-wide bulletin on bullying) "*That was not regarded by HMIC as a bullying statement, although when I did it, I felt that it did meet that criteria*". [Day 6, p.105, lines 5-8]

207.5. "Q...*Did you agree that the RGP did not fully understand its exposure to the risk of corruption? A. I did not fully agree...I understand where they are coming from, but I don't necessarily wholeheartedly agree*" [Day 6, p.107 lines 13-16 and p.108, lines 1-3]

208. IM's position in this respect is also in contrast to Commissioner Ullger who candidly stated that he did not disagree with any of the areas for improvement identified by HMIC: [Day 13, p.106, lines 15-19, 25 to p.107 lines 1-2]:

*Q...I asked you whether there were any areas for improvement that you disagreed with and you highlighted that.*

**A. And I didn't disagree.**

...

*Q. Did you disagree with any other areas for improvement that were identified by the inspectorate?*

**A. No, not at all, sorry.**

### **Lack of resources not an excuse**

209. IM effectively blames his failure to implement the 2016 HMIC recommendations on a lack of resources:

209.1. Day 7, p.219, lines 7-14 and p.220 lines 2-3:

Q...On HMIC are you blaming lack of resources on your inability to implement your job application commitment to expeditiously implement the 2009/16 [sic: 2016] report recommendations?

**A. As part one of the ingredients to my inability to dedicate time to that, yes.**

Q. You could have delegated it, could you not? If you were very busy you could have delegated it.

**A. No, it's not a question of --**

Q. To a competent --

**A. This is not a question of delegation. This is a question of setting up a working group and if I haven't got the resources available then I can't do that, and it was—**

Q. Was your job application commitment conditional?

**A. I could have implemented the working group and compromised front line policing.**

Q. So you are blaming lack of resources

**A. It has a bearing, of course it does.**

209.2. Also to CTI on Day 6, p.88, lines 10-13: "*if I had the resources that would have not been an issue but considering that I did not have the resources I had to juggle with priorities...*"

210. The supposed lack of resources is not a credible excuse:

210.1. COP Ullger was able to implement the recommendations in a similar period of time (20 months as opposed to 18 months) and without any additional resources: Day 13, p.158, line 23 to p.159 line 18:

Q. So, you took over... When Mr McGrail retires, you took over on an acting basis, I suppose in June.

**A. For a month, sir, yes.**

Q. Immediately?

**A. Correct.**

Q. By April of - that is June 2020 then, and by April 2022, you were inspected again by HMIC.

**A. That is correct, sir.**

Q. They found that you had complied with all the outstanding 2016 inspection report.

**A. Bar three, that still were partially implemented, all had been implemented. Yes, sir.**

Q. Yes. So, you were able to do it in one year and ten months?

**A. Yes, we did.**

Q. Did you get additional resources to do that?

**A. No, we did not.**

210.2. Mr Ullger also confirmed that the 2022 HMIC inspection was comparable in methodology and depth to the 2019 inspection, and was led by the same individuals (lead inspector Paul Holewell supported HMI Matt Parr): [Day 13, p.112 line 20 to p.113 line 1]

210.3. In a GBC TV 'Viewpoint' interview on 14 May 2020 [B1216] Mr McGrail said as follows:

- (i) [B1216]: (When asked whether he was going to use the Report to try to lobby the Government for more financial resources):

*"The government has been very supportive towards us. And in fact, at the time when the inspectors were here in October, we were already in the middle of that uplift that the business case that we submitted to government had produced. So we are we've already assumed the first tranche of that uplift and there's another two, it was going to be rolled out over a three year phased out period. And we are now in the second year. But obviously understanding that we live in the real world and that COVI D has slowed everything down. So we are looking at ways of means to readjusting our intent of boosting those resources in accordance with the agreed principles of the business case that government agreed to."*

- (ii) [B1217]: *"But look, at this moment in time, the RGP is well-funded. The government has always, both this one and in previous administrations has always supported the RGP in the funding of, even when we go over and above our budget for exigencies..."*

#### **E.4 - LOW STAFF MORALE AND THE RELATIONSHIP WITH THE GIBRALTAR POLICE FEDERATION - ISSUE 6**

211. In Pyle 1, para 23 [A248] NP identifies this issue as *"a concern of a lesser order of gravity, which nevertheless fitted into the pattern of behaviours by Mr McGrail which was already causing him concern and causing him to begin to lose confidence in him."* The GPF/bullying allegations did not play a primary role in NP's loss of confidence [Day 18, p.137].

212. Regardless of whether there had been any "***formal***" complaints about this to the GPA, there can be little doubt from the evidence set out by CTI in paras 118- 127, that this issue was real. It existed, whatever may have been the "ins and outs" of it.

213. Mr McGrail himself agreed that there was general background music, fairly or unfairly, about bullying in the RGP: “*It was on the media and it came out in the surveys. I agree, yes, that’s the reasons why I called in AAP consultants to contextualise the surveys*” [IM Oral, Day 7, p.226-227].
214. Whether or not there were “formal complaints”, or whether these issues featured as formal agenda items in GPA meetings, or whether they are reflected in GPA minutes is not the point. The fact is that, as Mr Pyle maintained in his evidence, the GPF/bullying issues were discussed by the GPA, however informally and un-minuted those discussions might have been. It is implausible that the GPA was not discussing these issues that were in the public domain (and would have been failing in its duty if it were not discussing them). [Day 18, p.45, Day 19, p.22; p.224].
215. It was accordingly a genuinely held belief by Mr Pyle.
216. Mr Pyle also says (para 24.3 [A249]) that

*“In similar vein, I often heard numerous anecdotal stories of bad practice and behaviours by the RGP that, given the volume of such stories, were hard to ignore, including numerous stories from different sources of the RGP turning a blind eye with crimes committed by people they know. **These were rumours and anecdotal, and therefore, despite some of the sources being credible, were not things on which I felt it was possible to act. They nevertheless contributed to my growing sense of unease.**”*

## CHIEF MINISTER

217. For his part, the Chief Minister did not lose confidence in Mr McGrail on account of this issue, even though he thought that it was “a demonstration of Mr McGrail’s very fractious and difficult approach to relationships”. This supports the view held by Mr Pyle in this respect.

## E.5 - THE AIRPORT INCIDENT - ISSUE 1

### **Mr Pyle**

218. Mr Pyle's concerns over the behaviour and judgment of Mr Grail in a leadership role in the RGP started with the Airfield Incident (on 8 February 2017) and, in particular, to Mr McGrail's role in the aftermath of it, at a time that Mr McGrail was Head of Crimes Division, and Mr Yome was the COP. (It is acknowledged that, in respect of the events at the airfield on 8 February, the decisions were made by COP Yome and not by IM).
219. Mr Pyle's concern related in particular to the manner of the conduct of the arrests of the three very senior MoD personnel. Those arrested were: the Chief of Staff, British Forces Gibraltar, Colonel Frank Green; Station Commander Wing Commander Liz Hutchison; and Squadron Leader Provost Marshall Chris Collins in connection with this incident.
220. Mr McGrail led the RGP's criminal investigation into the conduct of the three senior MOD officials and prepared the operational plan for their arrest (Operation Apache). Although COP Yome sanctioned the search warrants, he says that Mr McGrail prepared the operational plan for and conducted the execution of the search warrants, in which COP Yome says he was not involved". [YOME 1 Para 29 A1346].
221. It appears that Mr McGrail give little thought to the proportionality of his intended action:
- 221.1. He justified his "simultaneous strike" approach as being "*a standard approach where you fear that the persons that you are dealing with may confer, dispose of evidence or abscond*", which clearly does not take into account fact that he was dealing with senior officers in the armed forces, and not gangsters [Day 7, p.60].
- 221.2. When asked whether he had considered the option of inviting the officers to attend the station voluntarily in lieu of arrest (something which CBF Walliker says, on oath, that he confirmed to Mr McGrail the officers were happy to do: Walliker 1, para 8 [A1387]), Mr McGrail responded: "**I don't think I considered that. I can't recall what the considerations were around that...**" [Day 7, p.59]
222. Some of the actions and behaviours were described to Mr Pyle by senior MoD people as a cross between the Sweeney and Life on Mars, and extremely and unnecessarily

discourteous. (For those too young to remember, the Sweeney was a 1970s British TV series about an unethical police officer who used unorthodox methods to pursue criminals). (NP1 para 21.7 A247). This would appear to be borne out by Exhibit CY19 – A731 – Report Mr McGrail to Police Complaints Board describing the arrest operation planning and implementation.

223. In relation to this Incident:

223.1. Commodore Walliker personally witnessed the RGP officers giving each other “high-fives” outside the Tower as his Chief of Staff was being placed under arrest: Walliker 1, para 8 [A1387].

223.2. The Provost Marshal, Chris Collins was arrested in the baggage collection area of Gibraltar Airport having disembarked from a civilian flight from the UK [Walliker 1 Para 8 A1387]. Colonel Green, the Chief of Staff was arrested in front of his superior, the Commander of British Forces Gibraltar, Commodore Mike Walliker. And RAF Station Commander Hutchison was arrested in front of her team at RAF Gibraltar Station Headquarters: Pyle 1, para 21.5 [A246].

223.3. This despite the fact that, according to Commodore Walliker, the Commander of the British Forces Gibraltar, he had previously spoken personally to both CoP Yome and (then) Supt McGrail in the days leading up to the arrests and confirmed that all three were happy to report to the New Mole House given that it was an open secret that the RGP were conducting these investigations and planning these arrests: Walliker 1, para 8 [A1387].

## **Chief Minister**

224. For his part, the CM states (Picardo 1, para 21 [A186] that:

*“It became apparent to me that the manner in which Mr McGrail had led that investigation was unnecessarily institutionally confrontational in respect of the MOD. While I believed that the policing objectives were meritorious ... and I gave the RGP my fulsome public support in that respect, that objective could and should have been more quickly, effectively and easily achieved via a more collaborative and conventional route.*

*I was clear in my view that, while the MOD had not handled the matter well either, Mr McGrail had led the RGP into a dangerous, difficult and damaging situation for Gibraltar in terms of its relationship with the MOD, which would, and subsequently did, require a lot of my time and effort to mitigate.”*

225. While the Chief Minister had given fulsome praise and support to the RGP, including not allowing people to get away with misleading and obstructing the RGP, he also said the investigation he had also said that “we must not exacerbate matters”

*“We must not exacerbate matters, but we cannot allow people to get away with having misled the RGP or having obstructed you.”* (The CM’s email to CoP and SMT copied to MoJ dated 8 February 2017 (20:57) (day of incident) **[C142]**).

226. The handling of the aftermath by Mr McGrail exacerbated the relationship between Gibraltar and the Ministry of Defence to near crisis point.

## **E.6 - THE HELICOPTER PILOT INCIDENT - ISSUE 2**

227. Mr Pyle has alluded to this incident as one of several by virtue of which his loss of confidence in Mr McGrail had been progressive over a period of time.

228. *“In March 2017, during a stop-over in Gibraltar, a helicopter pilot and another member of the crew were assaulted in a bar in Gibraltar, the pilot so severely that his cheek or jawbone was fractured which prevented him from flying. Despite witnesses and I believe CCTV, charges were never pressed. It took the RGP several weeks to state that the forensic evidence they had collected was not conclusive. The widely held belief in MOD circles is that the RGP did not investigate the crime correctly to protect those involved in the attack.”* Pyle 1, para 22 **[A248]**

229. That was Mr Pyle’s genuinely held belief based on the fact that it was *“the widely held belief in MOD circles”*.

230. Mr Walliker deposes to the fact that Mr McGrail said to him that the pilot was drunk and abusive and got what he deserved **[A1388]**. But the fact that CBF Walliker contemporaneously reported it up his chain of command in the MOD, which must necessarily mean in London, since there is nobody further up the chain of command than him in Gibraltar (the Governor, despite being Commander-in-Chief is actually not



in the military chain of command of the MOD in Gibraltar) suggests that he believed it to be true.

231. If the Inquiry concludes that the RGP did indeed properly investigate this incident and properly decided not to bring charges, then this is an example of what I referred to earlier, namely: a subjectively and genuinely held, albeit erroneous belief.
232. Mr Pyle was not aware of any of the information and documents that the RGP has subsequently disclosed, and therefore the genuineness of his view cannot be impugned by reference to this material.

## SCHEDULE 1

### Section 34 Police Act

#### DEFAULT

1. By letter dated 5 June 2020 to the Governor (at [B1487]), the GPA Chairman informed the Governor as follows:

*“We have taken independent legal advice and have been advised that the process that we have adopted under section 34 of the Police Act is fundamentally flawed and should be withdrawn. However, we are advised that the complaints by you and the Chief Minister remain live and have to be determined. We have also been advised that the Authority as presently constituted is vulnerable to challenge on the grounds of bias. The Authority considers that as presently constituted it is unable to process the complaints without being vulnerable to legal challenge and it is not therefore prepared to do so.”*

2. The GPA's flawed procedure to call for the retirement of Mr McGrail as Commissioner of Police resulted in a situation whereby:
  - a. the GPA had decided that Mr McGrail's position had become untenable because he had lost the confidence of both the Governor and the Chief Minister; and
  - b. should be invited to retire for that reason but could not and would not be able to act to do so, for reasons of those same technical flaws, namely, as constituted, the GPA could not act because of actual or perceived bias.
  - c. And it could not be reconstituted (without being exposed to the same problem) because of the role that the Governor and the Chief Minister would have to play in its reconstitution. In any event, it is submitted that the test of default has to be applied to the GPA as then constituted. A default by an entity does not cease to be a default just because the entity can be reconstituted to overcome the reasons why it is in default.
3. That plainly constituted a default i.e., the GPA failed to discharge or perform a responsibility imposed on the Authority under this Act because –

- a. Under section 5 of the Police Act the GPA has the responsibility to secure the maintenance of an efficient and effective police force for Gibraltar.
  - b. As correctly contended by the GPA itself, the loss of confidence in the COP by both the Governor and the Chief Minister, with both of whom the COP has to work, directly engages issues of efficiency and effectiveness of policing in Gibraltar.
  - c. Through its pursuit of a flawed procedure the GPA placed itself in a position where it would not and could not take an action which it itself had decided was necessary and desirable in the discharge of a statutory responsibility placed upon in under the Act.
4. This engages the Governor's powers under section 13 of the Police Act under the provisions of which the Governor may "*where the Authority has failed to discharge or perform a responsibility imposed on the Authority under this Act*", among other things, suspend from duty, or call for the resignation of the Commissioner.

## SCHEDULE 2

### MR PYLE'S POWERS AS GOVERNOR

#### Part 1: The powers of the Interim Governor

1. In his capacity as *interim* Governor Mr Pyle was endowed with the full functions, responsibilities and powers of the Governor.
2. Section 23 of the Gibraltar Constitution ("the Constitution") creates a regime for a person to deputise for the Governor during a period of temporary absence from Gibraltar or inability. Although the proper constitutional term is "Deputy to the Governor" (as opposed to Deputy Governor, which is a different, substantive and permanent post that exists) the position is commonly referred to as "acting-Governor". Although this was Mr Pyle's substantive post in Gibraltar, the Inquiry is not concerned with this section because at all material times Mr Pyle was Governor under section 22 of the Constitution.
3. Section 22 of the Constitution creates the different regime applicable to the person who holds the post of Governor while there is a vacancy in that post. Although the Constitution does not call it that, this position is commonly referred to as "interim Governor". This is the position that Mr Pyle held during the times that are most material to this Inquiry.
4. Under Section 22 during a vacancy in the office of Governor, "the functions of his office shall, during His Majesty's pleasure, be assumed and discharged by such person as His Majesty may have designated in that behalf by instruction given through a Secretary of State."
5. Accordingly, while Mr Pyle was the person designated under section 22, he held all the functions and powers of the office of Governor under the Constitution.

## **Part 2: imminent arrival of new Governor irrelevant**

1. The (then) imminent arrival of the new Governor, Sir David Steel on 12<sup>th</sup> June 2020 did not detract from the fact that Mr Pyle was endowed with the full powers of the office of Governor.
2. Under section 19 of the Constitution, “there shall be a Governor”. It is therefore not constitutionally possible for there not, at all times, to be a Governor, be it a substantive Governor, and interim Governor or an acting Governor.
3. Under Section 21 of the Constitution, every person appointed to the office of Governor shall, before entering upon that office, take and subscribe oaths of allegiance and for the due execution of the office in the forms set out in the Schedule to this Constitution.” (emphasis added). The point is that “appointment” (in the chosen, soon to arrive sense) does not constitute the appointee “the Governor for the purposes of section 19. Such appointee must swear the oaths “before entering upon the office”. The oaths are taken in Parliament (administered by the Chief Justice) at a ceremony immediately upon the arrival in Gibraltar).
4. Section 22(3) provides that any person designated under section 23(1) “shall not continue to perform the functions of the office of Governor after the Governor or some other person having a prior right to perform the functions of that office has notified him that he is about to assume or resume those functions.”
5. On a proper interpretation of section 22(3) read together with the effect of sections 19 and 21, it does not mean that section 22(3) is invoked simply because there is a new appointee, who is arriving imminently but has not yet “entered into the office” and thus cannot discharge the functions of the office.
6. Accordingly, the person designated under section 22 continues to discharge the functions of the office of Governor until the new appointee Governor is “sworn in” upon his arrival in Gibraltar. So, the issue is not imminence of arrival of a new appointee. That is not the law, and it has never been the practice.

7. In any event, even if the above were not a correct statement of the legal position), section 23(3) would not have been invoked in this case because the new “Governor” had not “notified” Mr Pyle that “he is about to assume” the functions of the office. First he could not lawfully assume those functions and second, this sub-section requires the issue of a notice. That is not satisfied simply because the date of arrival in Gibraltar is known or is imminent.
8. Indeed, very far from notifying him under section 22(3) so that he would have to cease discharging the functions of the office of Governor, Sir David Steel emailed Mr Pyle on 5 June 2020 {B1811} encouraging him to continue: “*I just hope that the actions you are taking will address the issue.*”
9. With respect, the submissions to the contrary effect by Mr McGrail legal team are legally misconceived.

**Sir Peter Caruana KCMG KC  
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**7<sup>th</sup> June 2024**