

Your Ref.

Our Ref.

17th January 2025

CAG/DB/NG/MM11338

Triay Lawyers
28 Irish Town
Gibraltar

F.A.O. C. Simpson Esq / S. Triay Esq,

Dear Sirs,

Re: Inquiry into the Retirement of the Former Commissioner of Police Ian McGrail

We write in response to the application contained in the letters of 25th November 2024 ('the Application') and the letter dated 10th January 2025 ('Follow Up Letter') from Peter Caruana & Co. on behalf of the Government Parties and written submissions relating to various WhatsApp disclosures received following the conclusion of the oral hearings to be made orally at a reconvened, live-broadcast oral hearing of the Inquiry.

Our position is that the Application should be refused, for the reasons set out below.

Principles

1. The procedure and conduct of the Inquiry are such as the Chairman of the Inquiry may direct: Inquiries Act 2024, s.17(1)
2. We submit that in deciding this Application the Chairman must:
 - a. act with fairness (Inquiries Act 2024, s.17(3));
 - b. act with regard to the need to avoid any unnecessary costs (Inquiries Act 2024, s.17(3));
 - c. act proportionately, i.e. only require a further oral hearing if it is necessary to resolve the issues in the Inquiry and strike a fair balance with the cost and any other potential negative impacts;
 - d. take into account the need for the Inquiry to conclude expeditiously and not be subject to further delays;
 - e. take into account the importance of finality;

- f. take into account the emotional and (if relevant) psychological impact of requiring further oral evidence and prolonging the Inquiry process, pursuant to the protection of family and private life (s.7 of the Gibraltar Constitution/Article 8 ECHR)

What has already taken place

3. The following has already taken place:
 - a. the Inquiry held oral hearings for six weeks, in combination with five preliminary hearings which lasted for between one and two days each, and an oral hearing for final submissions which lasted for two days;
 - b. all of the Core Participants have had ample opportunity to make submissions on all of the issues in the Issues List, which itself was the subject of repeated submissions and amendments;
 - c. the Government Parties and Mr McGrail were given three hours each for both opening and closing submissions, and submitted opening and closing submissions with a combined total of hundreds of pages;
 - d. each of the main protagonists in the issues under investigation has given extensive oral evidence. Mr McGrail himself gave evidence for two and half days, and Commissioner Ullger also gave evidence;
 - e. unusually for a public inquiry (where, generally, CTI asks all or almost all of the questions), the CPs were given unrestricted permission to cross examine key witnesses. Mr McGrail himself was cross examined for around one and a half hours by Sir Peter Caruana KC on behalf of the Government Parties, following cross examination by CTI which lasted over a day;
 - f. all of the oral evidence was broadcast live on GBC and was the subject of extensive and robust public commentary;
 - g. having been commissioned in February 2022, the Inquiry has already been subject to significant delays, most notably caused by the data breach at Attias & Levy and the witness inducement investigation;
 - h. in total, the Inquiry process has taken almost three years to date, the Commission having been issued on 4th February 2022. On the current indicative timetable, assuming a report in “Late Spring” (which must now be in doubt because of the delay caused by this Application, even if it is refused), the Inquiry will report no earlier than five years after the index events took place.
4. The process has no doubt taken a toll on all involved. It has taken a particularly serious toll on Mr McGrail. As he has outlined in previous witness statements, his psychological well-being has deteriorated significantly, and he is undertaking regular treatment. As the Chairman will have noted from his clear emotion in the witness box, giving oral evidence was a highly emotional and stressful experience for Mr McGrail. This has been compounded by the regular, scurrilous attacks on his conduct and character which have been published by Mr Picardo’s/Hassans’ newspaper, *The New People*, and even in HMGoG press releases. *The New People* has even gone as far to suggest that Mr. McGrail should be deprived of his pension after nearly 36 years of service to the RGP. To be

required to give further evidence – and effectively be singled out to do so – and be subjected to further cross examination, can reasonably be expected to lead to a serious further deterioration of his mental health.

5. Any further hearing would undoubtedly delay the Inquiry’s report for many further months, and lead to significant extra cost.
6. All of the issues in the issues list have been extensively ventilated by way of oral evidence and written and oral submissions. All of the CPs have had the opportunity to put their ‘case’ in great detail. In light of this, as well as the significant cost, delay and risk of deleterious impact on Mr McGrail’s mental health, there would have to be a very good reason indeed for reinstating the oral hearings, such as new evidence which had the potential to significantly alter the core findings in the Report and must as a matter of fairness be put to witnesses in oral evidence. It is plain that this is not the case.

The Government Parties’ stated reasons

7. The Government Parties’ stated reasons for their application are:
 - (a) to allow Mr McGrail and Commissioner Ullger to be cross examined by CTI and other CPs on “*their failure, in the case of the RGP to disclose them sooner and, in the case of Mr McGrail, to disclose them at all, as Mr McGrail has had the opportunity to do and has done of Mr Picardo and others*”; and
 - (b) to allow them to be cross examined on the substantive content of their WhatsApp messages which are “*very relevant*” and “*sustain important parts of the Government Parties’ case*”, and “*completely undermine, indeed contradict, the case advanced by Mr McGrail and the RGP*”.

Attempting to subject Mr McGrail to public embarrassment is not a valid reason to re-open the hearing

8. In relation to (a), we share the Government Parties’ regret that the WhatsApp messages were not disclosed prior to the oral hearing by the RGP or Mr McGrail. However, the non-disclosure was inadvertent. Mr McGrail has explained why he did not disclose the messages prior to his phone being seized by the RGP in March 2023 in his 9th Statement dated 2nd December 2024. That explanation is reasonable. At the time before Mr McGrail lost access to his phone in March 2023, which was over a year before the oral hearings commenced, he did not consider that the messages between him and (then) Assistant Commissioner Ullger or Assistant Commissioner Yeats would be relevant. The RGP has also provided a detailed explanation about why it did not disclose the messages it held until recently.
9. The Chairman may accept those explanations, or he may not, and it is of course open to him to criticise a witness in his report for non or late disclosure, and for the Government

Parties to critique the explanations, however an oral hearing will not assist in concluding whether the explanations are reasonable or not.

10. The Government Parties' submissions heavily focus on criticising Mr McGrail for the late disclosure, and plainly they wish to be given the opportunity to make those criticisms in public in order to expose a "*double standard*" whereby other witnesses (notably the Government Parties and Hassans witnesses) were similarly criticised. However, it is a misrepresentation to say that Mr McGrail has attempted to "*exploit to his advantage*" (Application §5.2(iv)) the non-disclosure by other parties of WhatsApp messages. The Government Parties and Hassans witnesses did not disclose relevant WhatsApp messages in time or at all. There are still no messages before the Inquiry between Mr Picardo and Mr Levy relating to any of the events being investigated. It was fair for other CPs and CTI to ask questions about this in oral evidence, which they did. It would be reasonable for the Chairman to comment on this in his Report, if he sees fit, and he may also choose to comment on other witnesses' disclosure, including Mr McGrail.
11. Equally, it would have been reasonable for the Government Parties to ask Mr McGrail about messages which were not, at the time of the oral hearings, in evidence (e.g. between him and Commissioner Ullger and Assistant Commissioner Yeats). He would have explained that he did not have access to them, which is why the RGP have eventually disclosed them. The Government Parties had this opportunity and did not take it. They could have asked any question they wanted of Mr McGrail about which messages had been disclosed, and why certain messages had not been, and made any submission they wanted at the outset and at the end of the hearing. The fact that they missed this opportunity which was open to them cannot be a reason in itself to re-open an oral hearing, at great expense and inconvenience to the Inquiry and other parties.
12. What the Government parties appear to be seeking, in reality (and despite also calling for other RGP officers to give evidence), is to use a further Inquiry hearing to publicly embarrass Mr McGrail because, through his counsel, he legitimately raised the issue of missing WhatsApp messages at the oral hearings, not just relating to Mr Picardo, but also with the Hassans witnesses.
13. On this, it is notable that the Application appears to be at least in part a stalking horse for the Hassans witnesses: see e.g. §4.2 "*as Mr McGrail has had the opportunity to do and has done of Mr Picardo and others*"; §5.2 "*his intense criticism of others*"; "*This criticism was persistently and publicly levelled with the obvious intention of casting suspicion and aspersions on and inviting the opprobrium of the Chief Minister (and others for that matter)*"; §5.8 "*Mr McGrail's persistent and intense criticism of Mr Picardo (and others)*" (emphases added).
14. The public embarrassment of a witness cannot be a valid reason for reconvening a hearing at a public inquiry, especially when the opportunity could easily have been taken at the previous hearing. We would be deeply concerned if the Inquiry allowed its oral hearings to be used in this way.

15. The principle of open justice can be achieved without a further hearing. Mr McGrail has no issue with the relevant messages being published on the Inquiry website, along with the Government Parties' correspondence, and any submissions they wish to make on the new disclosure.

Not sufficiently probative to justify a further hearing

16. The Government Parties' other reason for suggesting there should be a further hearing ((b) above), that the messages are probative of factual issues in the inquiry, is in principle a better one. However, is not supported by an explanation as to why these messages are sufficiently probative that they justify the huge expense and inconvenience, and likely serious psychological impact to Mr McGrail, of a further hearing. Mr McGrail cannot respond to the written submissions which the Government Parties have refused to disclose. Insofar as there is any explanation, §5.7 refers to five issues which have been extensively ventilated at the oral hearings and in previous written evidence. Mr McGrail gave evidence for over two days and was asked in great detail about those issues.
17. The messages do not reach the threshold for re-opening the oral hearings, which surely must be that they raise new issues. The messages relate to issues already heavily explored at the oral hearings, and do not cast them in a new light (the Government Parties do not claim they do so). In relation to the five issues mentioned in §5.7 of the Application, and following the same sub-paragraph numbering:
- (i) The meetings of 13th, 15th and 20th May: The messages are not relevant to this issue and in any event, those meetings were recorded and transcripts are available, which is conclusive evidence of what happened at the meetings.
 - (ii) Why and how Mr McGrail retired: this issue was extensively ventilated in Mr McGrail's oral evidence. The government's 'case theory' has remained the same since the preliminary hearings, that Mr McGrail retired because he knew he had lost the confidence of key individuals. There were already numerous messages, emails and other documents in evidence at the oral hearings which go to Mr McGrail's decision-making process in the 28 days from 12th May 2020 to when he communicated his intention to retire on 8th June 2020. The chronology is addressed at length in the Government Parties' written closing submissions from §§28-39, which refer to documents which indicate that Mr McGrail was already considering retiring as early as 22nd May 2020 (c.g. the transcript of Mr McGrail's part of a conversation with the Attorney General referred to at §28.1 / Bundle [C6952]). The fact that he was considering leaving his post due to the extreme pressure he was being put under is not disputed. The messages do not show that he had 'resolved' to retire any more than the extensive correspondence and messages which have already been disclosed. They show that he was agonising over what decision to take because he saw how difficult his position was becoming. The precise reasons for his ultimate decision to retire, and whether there was unfairness and/or misconduct behind those reasons, will be a key matter for the Chairman to determine based on the evidence,

and there is already ample evidence including oral evidence upon which His Lordship may reach that conclusion.

It is also important context that Sir Peter Caruana did not in any substantial way put questions to Mr McGrail about his motivations for retiring in his cross examination. To permit a further hearing would essentially allow the Government Parties a second bite of that cherry.

- (iii) Alleged protection of James Levy: There is almost no reference to this issue in the messages, but even if there was it is difficult to understand how messages between the police officers could be probative of this issue in any case.
 - (iv) HMIC Report: Mr McGrail was undoubtedly conscious that he was being criticised for the HMIC report. This is already extensively in evidence.
18. The Follow Up Letter raises other issues which the Government Parties submit are referred to in the messages: the incident at sea and the Gibraltar Police Federation. These references are again unparticularised. There are messages in the disclosure related to these issues, but the same points apply as above: the messages refer to issues which have been extensively and comprehensively ventilated already, and do not cast them in any new light. At most, the messages could be subject to written submissions explaining why they support a CP's (already expressed) case theory, however a further oral hearing would simply lead to repetition of the previous hearings, to no clear benefit.
19. A further factor which we ask that the Chairman bears in mind is that a resumption of the oral hearings, and a significant further prolongation of the Inquiry process, risks causing a deterioration to Mr McGrail's mental health, which has already been seriously impacted by the material events which have now been ongoing for almost five years, the stress of the Inquiry hearings, the extensive retributive actions against him (particularly inducement of witnesses against him, the hostile government press releases focussing on his conduct and the numerous scurrilous and defamatory articles in Mr Picardo's and Hassans' newspaper, *The New People*).
20. In conclusion, fairness does not require the oral hearings are reopened. The issues which the new evidence touch upon have already been extensively ventilated. The serious delay and cost resulting from a further hearing, as well as the likely damage to Mr McGrail's mental health, would be disproportionate to the very limited benefit, if any, which could be obtained from such a hearing.
- Unfairness
21. If the Government Parties' logic is followed, and there were to be a further oral hearing, a range of other witnesses could be called. Our view is that a further hearing would be an unnecessary and disproportionate exercise, which is why we have not applied for other witnesses to be recalled such as:

- a. Mr Rocca KC and Mr Baglietto KC to account for the important documents which were disclosed on 3rd May 2024, after their evidence, relating to the meeting which took place on 27th May 2020 and which raise issues relating to the DPP's apparent advocacy on behalf of Mr Levy. This goes directly to the DPP's own apparent motivations to protect Mr Levy from police intervention.
- b. Mr Levy to account for the WhatsApp messages between him and Mr Picardo which were disclosed by Mr Picardo on 4th May 2024, i.e. after Mr Levy's evidence had concluded. These messages go to the issue of Mr Levy's close relationship with Mr Picardo vis-à-vis 36 North;
- c. Mr Llamas to account for:
 - (i) the WhatsApp exchanges between him and Mr Devincenzi, disclosed by Mr Devincenzi on 5th May 2024, after Mr Llamas's oral evidence. These go to the issue of why Mr Llamas failed to act on clear warnings of his and Mr Picardo's conflict of interest and inappropriate actions;
 - (ii) the timeline of events which he provided to his lawyers and which Mr Devincenzi commented on (within the document), disclosed on 5th May 2024, which cast significant doubt on Mr Llamas' claim that the alleged agreement he reached with Mr McGrail at the meeting on 8th April 2020 was "*clear beyond peradventure*";
 - (iii) the message which he disclosed on 5th May 2024, which is relevant to the meeting which may or may not have taken place on 14th May 2020.
- d. Mr Picardo:
 - (i) to account for the fact that he has not disclosed, to our knowledge, any messages from a phone that he used at the relevant time with the number (+350) 58960000;
 - (ii) to account for the fact that we understand (though ask to be confirmed or denied) that at the relevant time he was receiving a substantial monthly payment from Hassans in addition to his salary as Chief Minister, which if true would provide a significant and as yet undisclosed further motivation for protecting the Hassans senior partner from criminal investigation;
 - (iii) to account for his involvement in the *New People* articles which have regularly defamed Mr McGrail and others including Mr. Devincenzi, Mr. Ullger, Mr. Richardson, Mr. Yeats, Mr. Wyan and Mr. Gaggero relating to their participation in the Inquiry;
 - (iv) to account for his ongoing failure to disclose relevant messages between him and Mr Levy, and any of the contents of his personal email account which is referred to in other disclosure.
- e. Mr Levy KC relating to:

- (i) his late, heavily redacted disclosure of WhatsApp messages with the Attorney General. We have asked whether the Inquiry has investigated the reasons for these redactions but have received no response;
- (ii) the mystery as to why his messages with the Attorney General have been extracted but not relevant messages between him and the Chief Minister.
- (iii) his alleged involvement in the Attias & Levy data breach, and his alleged receipt of illegally obtained documents from Mr Bolaños. If there is any truth in this allegation, which arises from the ongoing criminal prosecution of Mr Bolaños, and Mr Levy actively procured the documents, this would be a potential contempt of the Inquiry.

f. Samantha Sacramento, the former Justice Minister:

- (i) to account for the conversations which she had with Commissioner Ullger who appears to have attempted to resolve the conflict between Mr Picardo and Mr McGrail through conversations with her;
- (ii) to disclose any relevant messages/emails including with Mr Picardo;
- (iii) to ask about the allegation made by Mr Picardo in his 5th June letter to the GPA that Mr McGrail's actions caused a breakdown of his relationship with "*the Government (myself and all other members of my cabinet)*" [B2031]. This appears to be belied by Ms Sacramento's comments to Commissioner Ullger, as he reports them.

22. To be clear, it is not our submission that a further oral hearing would be necessary or proportionate. However, the above list demonstrates how such a hearing could not straightforwardly be limited to only witnesses the Government Parties consider might be helpful to their 'case theory'.

Yours faithfully,



Charles Gomez & Co