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MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND
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1921, ON 17 FEBRUARY 2017

SOLE MEMBER: MR. JUSTICE PETER CHARLETON, JUDGE OF THE
SUPREME COURT

HELD IN DUBLIN CASTLE
ON WEDNESDAY, 31ST JANUARY 2018 - DAY 52

52

Gwen Malone Stenography
Services certify the
following to be a
verbatim transcript of
their stenographic notes
in the above-named
action.

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1 THE HEARING RESUMED ON WEDNESDAY, 31ST JANUARY 2018,
2 AS FOLLOWS:

3
4 MS. LEADER: The first witness this morning, sir, is
5 Mr. Martin Power. 10:02

6
7 MR. MARTIN POWER, HAVING BEEN SWORN, WAS DIRECTLY
8 EXAMINED BY MS. LEADER:

9 MS. LEADER: Mr. Power's letters to the Tribunal can be
10 found from pages 3499 of the materials, sir, in Volume 10:03
11 6.

12 1 Q. Now, Mr. Power, you are attached to the Department of
13 Justice, is that correct?

14 A. That's correct, yes.

15 2 Q. And your position that you hold there is what? 10:03

16 A. I am a principal officer.

17 3 Q. Principal officer. And do you have particular
18 responsibility for any area within the Department?

19 A. Yes, my main areas of responsibility are to Garda
20 accountability and governance. 10:03

21 4 Q. Okay. And in 2015, what part of the Department were
22 you attached to?

23 A. At the start of the year I was attached to the
24 Department's security division and in mid-February that
25 year I moved to the policing division, governance and 10:04
26 accountability.

27 5 Q. And that is where you remain?

28 A. That is where I am now, yes.

29 6 Q. And I think in terms of who you reported to, it was,

1 Mr. Flahive was your direct superior, am I correct in
2 saying that?

3 A. At that time, yes.

4 7 Q. At that time. You obviously were familiar with Garda
5 matters at that time and were you familiar with 10:04
6 Sergeant McCabe and the O'Higgins Commission and the
7 Independent Review Mechanism, I don't know if you could
8 help the Tribunal with regard to that?

9 A. Do you mean in May --

10 8 Q. In May, yes, in 2015? 10:04

11 A. Well, I was becoming familiar with the IRM process
12 because it was part of my area of responsibility, I
13 would have been aware of Sergeant McCabe's complaints,
14 and allegations, I would have been aware that
15 Mr. Guerin had reported, and I was certainly aware that 10:04
16 the O'Higgins Commission was underway because part of
17 my responsibility at that stage was actually logistics
18 in relation to accommodation and resources for that
19 Commission.

20 9 Q. Did you have any other role vis-à-vis the O'Higgins 10:05
21 Commission?

22 A. No. It was mainly as liaison between the Commission
23 and the Department and, as I say, the provision of
24 resources, including accommodation, IT, so on.

25 10 Q. And in terms of liaison, we know the Department had a 10:05
26 role in the O'Higgins Commission later on in 2015. Did
27 you have any role in liaising between the Department
28 and the Commission vis-à-vis evidence to be given or
29 anything of that nature?

1 A. Yes. I had some role in relation to the engagement of
2 counsel the Department officials through the Attorney
3 General's office and an assistant principal who
4 reported to me acted as main liaison in distributing
5 documents that were being sent out by the Commission 10:05
6 for those witnesses.

7 11 Q. Did you yourself attend at the Commission?
8 A. No.

9 12 Q. All right. If we could go to May of 2015. You were
10 one of the recipients of an email sent by Mr. Flahive, 10:06
11 is that correct?
12 A. That's correct.

13 13 Q. If we could just look at that email at page 745 of the
14 materials, Mr. Power.
15 A. Can I ask which volume? 10:06
16 14 Q. Volume 2, I think. It's 1B, sorry. It will come up on
17 the screen in front of you, it might be more
18 convenient.
19 A. Yes, I can see, yes.

20 15 Q. Yes. So Mr. Flahive was your direct superior, am I 10:06
21 correct --
22 A. That's correct.

23 16 Q. -- at that time? And we won't go through the email,
24 the Tribunal is very familiar with it at this stage,
25 but he sent an email on 15th May 2015 to 10:06
26 Mr. Quattrociocchi, first of all, and it's cc'ed to
27 you, you will see your name there, Secretary General's
28 office, Mr. O'Leary, Justice and Martin M Power?
29 A. Yes.

1 17 Q. First of all, if you could explain to the Tribunal why
2 you think you got that email?

3 A. I believe I got it because I was the principal officer
4 in charge of the particular area of the Department
5 dealing with O'Higgins matters -- 10:07

6 18 Q. Yes.

7 A. -- in terms of logistics and support, and the
8 Independent Review Mechanism was under my remit at that
9 stage. And I would have been reporting directly to
10 Michael Flahive at that point and I believe that is why 10:07
11 I am cc'ed on this email.

12 19 Q. Right. So you understand one of the reasons was
13 because of your connection with the O'Higgins
14 Commission which was ongoing at that time?

15 A. That's correct. 10:07

16 20 Q. All right. Now, in relation to the email itself, it's
17 addressed to Mr. Quattrociochi, and it asks him to
18 pass on the email to the Minister for information,
19 please. You are familiar with the email?

20 A. Yes, yes. 10:07

21 21 Q. You don't require me to go through it?

22 A. No, I have read it.

23 22 Q. Yes. So, do you remember getting that email?

24 A. On the 15th May, no, I do not, I'm sorry.

25 23 Q. Okay. And looking back on it now, what do you think 10:07
26 your reaction would have been when you got that email?

27 A. Well, first of all, let me say, I have no doubt I read
28 the email in or around that time. I can't say for
29 definite that I read it on that day because it came

1 late in the evening. As it happened, I wasn't in the
2 office on that day. But I have no doubt I read it
3 because that was my habit and still is my habit, to
4 read all my emails. I think I took it that I was being
5 informed because it was a matter that had come up at 10:08
6 the O'Higgins Commission, for which I had
7 responsibility as liaison in part and also because of
8 the reference to the Independent Review Mechanism case.
9 If I read it fully at that time, I am sure I would have
10 taken the view that is at the end -- 10:08
11 24 Q. You can scroll down to the end, it might --
12 A. That it was for the Minister's information primarily,
13 and that's the important point, was for information,
14 and that no further action was required by her. In the
15 Civil Service, in Justice at least, when you are cc'ed 10:08
16 on an email it's really for your information and it
17 doesn't normally require you to take any action.
18 25 Q. All right. Do you think you would have had cause to
19 discuss it with Mr. Flahive at any time, considering he
20 was your direct boss and he was sending you an email in 10:09
21 relation to two areas of responsibility that you had at
22 that time?
23 A. No, I don't believe I had a conversation with him about
24 the email.
25 26 Q. All right. Now, Mr. Flahive, I think we will agree, is 10:09
26 sending it up the line to the Minister, and he is also
27 sending it to down the line to you?
28 A. Correct.
29 27 Q. Isn't that correct? So do you think you printed it off

1 or anything like that?

2 A. No. I don't think I printed it off, no.

3 28 Q. All right. So did you maintain a file with regard to
4 the IRM and the O'Higgins Commission in the Department?

5 A. We certainly had files in relation to the O'Higgins 10:09
6 Commission in terms of the logistics we were providing.

7 29 Q. Yes.

8 A. And we certainly had IRM files --

9 30 Q. Yes.

10 A. -- in relation to all the IRM cases. 10:09

11 31 Q. Yes. And did you have a general IRM file as well?

12 A. I can't recall at this moment whether we had a general
13 one. I think we may have had but I can't say for
14 definite.

15 32 Q. All right. 10:10

16 A. I would remind the Tribunal that in May 2015 I was
17 two-and-a-half months into this particular job, yeah.

18 33 Q. Yes, yes. So I suppose what I'm asking you really is:
19 why wasn't it put on either an IRM file or an O'Higgins
20 Commission file, or even a Sergeant McCabe file; it 10:10
21 could have homes in either of those three areas?

22 A. I think it wouldn't have gotten on to an IRM file
23 immediately because I am going to suggest that at that
24 point I wasn't so familiar with the case that I
25 recognised which particular IRM case this referred to. 10:10
26 It certainly refers to Sergeant McCabe. But I
27 wouldn't -- I think I may not have had enough
28 information at that stage to recognise immediately
29 which case this was referring to. And it's an email of

1 a conversation to the Minister advising that the
2 Minister has no role in this matter. It's not normal
3 to print every email that comes in and place it on a
4 file because the volume of emails is just so great that
5 it would overwhelm the filing system and it would 10:11
6 require -- you know, it's not a paperless office in
7 that context, if you are going to be taking everything
8 from your screen and putting it in manual files,
9 because you are only increasing the workload. So I
10 don't believe it would have been practical to think of 10:11
11 all the emails that we would get would have to go on a
12 manual -- or paper file and I think this is probably in
13 that category.

14 34 Q. All right. So did you understand at that time that the
15 IRM file was the Ms. D file? 10:11

16 A. No, I don't think I did at that stage.

17 35 Q. All right. Because coincidentally, in or around that
18 time, GSOC were reporting the outcome of their
19 investigation in relation to Ms. D's complaints in May
20 2015. 10:11

21 A. They may have been. I can't recall if that's when the
22 notification from GSOC came in, that they had completed
23 their investigation.

24 36 Q. But was there any link made between the two of them at
25 that time? They would have been reporting to you 10:11
26 presumably to go up the line to the Minister?

27 A. Correct. I can't say that I made that connection at
28 that point. I could surmise for you and I don't know
29 how valuable that might be to the Tribunal, but if I

1 made any inquiry in relation to this email I would have
2 inquired from one of my colleagues did he recognised
3 which IRM case this referred to and could I see it.
4 But I can't say I did that, I don't recall doing it
5 exactly.

10:12

6 CHAIRMAN: Ms. Leader, I think the report by GSOC to
7 Garda Headquarters was the 19th May, so that would have
8 been the Tuesday, I would say.

9 MS. LEADER: Yes, I think so. And I think a document
10 was circulated this morning, or will be shortly,
11 suggesting it was reported to the Minister on the 21st
12 May 2015. It was part of the documents for the Tusla
13 module.

10:12

14 37 Q. And that would appear to be going to you, Mr. Power?

15 A. And it may well have, because I would have been in the
16 position where reports from GSOC of the outcome of
17 investigations where the Minister had to be informed
18 would have come through me. But this wouldn't have
19 been the only GSOC case coming through the office at
20 that time. Again, I can't remember exactly receiving
21 that but I think I did receive it because if I remember
22 I actually have disclosed to the Tribunal a copy of
23 this --

10:12

10:13

24 38 Q. Yes, you have.

25 A. -- GSOC report.

10:13

26 39 Q. Yes. Mr. Power, it's something I have to put to you:
27 was any decision made not to print off the email or not
28 to refer to it thereafter --

29 A. No.

1 40 Q. -- until -- All right.

2 A. No. There was no positive decision made that somehow
3 or other this email should not be -- or should be
4 hidden if that is what you are asking.

5 41 Q. Or discussed perhaps? 10:13

6 A. No, not that I am aware of.

7 42 Q. It was circulated to a number of Department of Justice
8 officials, isn't that correct, Mr. Quattrociochi --

9 A. Yes --

10 43 Q. -- Mr. O'Leary, you. There was no discussion? 10:13

11 A. No. And you can see it's sent to a limited number of
12 people.

13 44 Q. Yes.

14 A. I am sure there are other emails that you have seen
15 coming out where it's sent to quite a larger number of 10:13
16 people. So this was, I suppose, deemed to be something
17 that required just tight circulation, I suppose.

18 45 Q. Okay. I think it was to eleven people in all.

19 A. This particular email, from Michael Flahive, only went
20 to -- 10:14

21 46 Q. I think it does come to eleven people, when you count
22 everybody, yes.

23 A. Well, I will take your word for that.

24 47 Q. Yes.

25 A. Yes. 10:14

26 48 Q. In relation to how this email came to light, I think
27 you sent it to the Tribunal in November of this year?

28 A. That's correct.

29 49 Q. And if you could explain how that came about, please?

1 A. Well, in November 2017.

2 50 Q. Yes, of '17, I beg your pardon.

3 A. What happened was that there were, as you are probably
4 aware, a series of parliament questions which appeared
5 to indicate that the Department was present at or knew 10:14
6 of or was somehow or other represented at a meeting
7 that took place in or around May, 15th May 2015. The
8 parliamentary questions were somewhat opaque, but there
9 were honing in on information that the deputy thought
10 the Department had about or of a meeting or part of a 10:15
11 meeting on that day. I understand that what happened
12 when one of those series of questions came in is that
13 the private secretary to the Secretary General decided
14 that because the date seemed to be fairly specific he
15 would examine the diary and email traffic for that day, 10:15
16 and I understand as a result of that he turned up this
17 particular email.

18 51 Q. Yes. And did he bring it to your attention?

19 A. No, he didn't bring it to my attention. I believe he
20 obviously brought it to the Secretary General's 10:15
21 attention.

22 52 Q. Yes. And it eventually came to you to forward to us,
23 to forward to the Disclosures Tribunal?

24 A. Well, when the thread was then followed through.

25 53 Q. Yes. 10:15

26 A. I have a recollection of writing to the Attorney
27 General's office asking for some advice about whether
28 this should be disclosed, and I think that advice
29 obviously was in the positive.

1 54 Q. Yes.

2 A. And so, as the main liaison with the Tribunal here, I

3 wrote the letter and sent the email thread to the

4 Tribunal. That I think was on 21st November last.

5 55 Q. Yes. That's correct. Now, I think you may be able to 10:16

6 help the Tribunal with regard to email addresses in the

7 Department of Justice. There is a suggestion from your

8 counsel yesterday that you may be --

9 A. Yes, I may be able to help here, yes.

10 56 Q. So in relation to email addresses in the Department of 10:16

11 Justice, as I understand it, if we take you as an

12 example, it's martinxpower --

13 A. No, it's martinm.

14 57 Q. -- mpower@justice?

15 A. Correct. 10:16

16 58 Q. And it continues likes that. And in relation to

17 Mr. Waters, who was the Acting Secretary General at the

18 relevant time, his email address is noelawaters, is

19 that correct?

20 A. No. My understanding is his email address is nwaters. 10:16

21 59 Q. nwaters?

22 A. nwaters@justice, yes. That is my understanding.

23 Although his middle initial is A it's not part of his

24 email address. That is my understanding. Am I allowed

25 to refer to a document which I brought with me? 10:17

26 60 Q. Yes, certainly, certainly.

27 A. And I think the email you talked about was an email

28 from an address at the Oireachtas.

29 61 Q. Yes, it's former Minister Fitzgerald's, and I think I

1 can assist you with bringing documents up on screen.

2 A. No, I think I have the documents here.

3 62 Q. If we just could have 4221 on the screen.

4 A. Yes.

5 63 Q. You will see that is an email from 10:17
6 frances.fitzgerald@oireachtas - I take it - ie, to
7 nawaters@justice?

8 A. Correct. Yes, I see that.

9 64 Q. And I don't know if you are able to assist the Tribunal
10 as to who nawaters@justice.ie is? 10:18

11 A. Okay. Well, there is no -- when this email chain
12 arrived and I checked with our ICT division, so if you
13 forgive me --

14 65 Q. ICT is?

15 A. ICT is information and communications technology 10:18
16 division, our computer division.

17 66 Q. Yes.

18 A. So I am going to give a layman's expression of what
19 they told me. What happened with that email, and there
20 was a second email as well on that occasion, was: It 10:18
21 came in to what is called the Department's email
22 domain, that is the outer stretch, where an email first
23 arrives. As you know, emails are based on the end
24 part, ie, which means it's somewhere in Ireland --

25 67 Q. Yes, 10:18

26 A. -- and then the rest of it leads you to the individual.

27 68 Q. Yes.

28 A. So the server checks the outside, the next section and
29 eventually tries to find the person nwaters. And what

1 A. And this appears to indicate that the emails in
2 question did not get beyond the outer limit of the
3 Department's email server. That is how it works the
4 Department. It doesn't go into a kind of a bin
5 somewhere that says I will it checked later on or 10:20
6 inform somebody we got this and we don't know where it
7 should go; it goes back to the sender, informing them
8 that it couldn't be delivered because there was some
9 error in the address.

10 72 Q. So it puts the onus on the sender, am I correct, in 10:20
11 saying the system puts the onus on the sender to
12 resend --

13 A. That is my understanding of it, yes.

14 73 Q. So as somebody will be alerted to the fact that the
15 email didn't get to its destination? 10:20

16 A. Well, that is certainly how the Department of Justice
17 system works. If I send an email to the wrong address
18 it will come back to me or to my screen saying we
19 couldn't deliver that because there is a problem with
20 the address. If the Oireachtas one works the same, 10:20
21 someone at the sender's end should have received some
22 notification similar to that.

23 74 Q. And I think what you are saying to us is, your
24 inquiries with your IT Department would suggest that
25 Justice sent it back to Oireachtas? 10:21

26 A. Yes.

27 75 Q. The person who sent it?

28 A. That's correct.

29 76 Q. And that's your inquiries made in the Justice IT

1 system?

2 A. Correct.

3 77 Q. I don't know, the document you are referring to in your
4 evidence there, is what?

5 A. It's a log from our IT division of activity in relation 10:21
6 to emails coming in at this time.

7 78 Q. At that time.

8 A. I can certainly make it available to the Tribunal.

9 79 Q. Yes. Thank you.

10 A. There won't be a problem with that, I think. 10:21

11 80 Q. Yes.

12 A. If I could just make a quick check that there isn't an
13 issue about giving out email addresses, I can certainly
14 make this available to the Tribunal.

15 81 Q. Or a suitably redacted -- 10:21

16 A. If appropriate, I will check that, yes.

17 82 Q. Now, I think in 2016, it would appear from the
18 documentation that you had some involvement in the
19 controversy following on the publication of the
20 O'Higgins Report, am I correct in saying that? 10:22

21 A. No, I don't believe I had.

22 83 Q. I think you may have been copied into an email along
23 the way. If we could -- 4305 of the materials. It's
24 just halfway down the page. You see Mr. O'Leary is
25 forwarding an email to the Garda Commissioner here, and 10:22
26 it appears to be an email --

27 A. Sorry, yes, I do see that, yes.

28 84 Q. And you were copied into it, it would appear?

29 A. Sorry, on the screen I can't see the entire email.

1 85 Q. If Mr. Kavanagh can scroll down. So, it appears that
2 this is an email sent to the Tánaiste by Mr. O'Leary
3 suggesting ways for the Tánaiste to deal with the
4 emerging story at that time?

5 A. Yes. 10:23

6 86 Q. You see that. Do you remember that email?

7 A. No, I don't, I'm afraid.

8 87 Q. And maybe if you could just explain why you think you
9 were copied into it?

10 A. Again, I think I was copied in because the information 10:23
11 is in relation to Sergeant McCabe and allegations he
12 may have -- or he made.

13 88 Q. Yes.

14 A. And part of my responsibilities were dealing with
15 complaints made by members of the Garda Síochána about 10:23
16 either mismanagement or wrongdoing or other failings
17 within An Garda Síochána, which would have also been
18 part of the IRM process. But that is probably why I
19 was cc'ed on this one.

20 89 Q. Well, do you think you would have been cc'ed into it 10:23
21 because you had some involvement in the O'Higgins
22 Commission?

23 A. It's possible, but I think it more likely that on this
24 occasion that it's because of my involvement with the
25 Independent Review Mechanism. My involvement with the 10:24
26 O'Higgins Commission by this stage, I think -- is it
27 possible I could see this in hard copy because I can't
28 see the entire page?

29 90 Q. Yes. It's volume 8 of the materials, page 4305.

1 A. 4345?

2 91 Q. -- 05.

3 A. I beg your pardon, I'm sorry. Yes, it may be possible
4 that because of my involvement with the O'Higgins
5 Commission that I was cc'ed on this, but I venture to 10:24
6 say that at that stage my involvement with O'Higgins
7 Commission would have been negligible because the main
8 involvement was getting it up and running and getting
9 it started. My involvement at this point might well
10 have been concerned with, let's say, making certain 10:25
11 payments that were being requested by the Commission or
12 other matters. But my intensive period of involvement
13 with it would have been around February, March, April,
14 up to May of 2015. By this stage the Commission was
15 well and truly up and running and my involvement would 10:25
16 have been minimal at this point. But it's certainly
17 possible that I was included partly for that reason
18 also.

19 92 Q. All right. Now we know the Minister had a meeting with
20 the Commissioner -- two meetings with the Commissioner 10:25
21 in May 2016 in the aftermath of the O'Higgins Report,
22 and it would appear that, from the documentation --
23 it's in volume 9, 4801 might be of assistance to you.

24 A. Yes.

25 93 Q. If we go to page 4803, a briefing document was prepared 10:26
26 for the Minister's meeting of 16th May 2016 with the
27 Commissioner.

28 A. Yes.

29 94 Q. Are you familiar with that?

1 A. I know I saw it at the time.

2 95 Q. Yes.

3 A. Yes.

4 96 Q. And we will just -- it's a fairly comprehensive
5 briefing, it would appear. It includes the terms of 10:26
6 reference, the establishment of the Commission, the
7 statement by the Minister and the publication of the
8 report, questions and answers, Mr. Clifford's press
9 articles and implementation of the report. And it
10 would appear from page 4801 that you had took some role 10:27
11 in preparing the briefing document. You will see an
12 email going from you to Ms. Connolly earlier on in the
13 day of the 16/5, asking Ms. Connolly to assemble a word
14 document:

15 10:27

16 "-- all the material we used in the last week,
17 including supplementary questions for the priority
18 parliamentary questions."

19 A. Yes.

20 97 Q. And I suppose, what I am asking you really, Mr. Power, 10:27
21 is: There is no mention in that, that the Department
22 were notified or told, I suppose, to put a less loaded
23 word, by the Commissioner of what was going on in the
24 Commission on the 15th May 2015?

25 A. Yes, that would be correct. 10:28

26 98 Q. Yes.

27 A. Yes.

28 99 Q. I wonder is there any reason for that, Mr. Power?

29 A. May 2015?

1 100 Q. Yes. This is a year later --
2 A. Yes.
3 101 Q. -- we are talking about.
4 A. Yes. I presume the reason was. I mean, I understand
5 Mr. O'Leary and Mr. Flahive explained the contacts that 10:28
6 were ongoing or whatever at the time in relation to
7 anything going on in the Commission.
8 102 Q. Yes.
9 A. We weren't aware of anything going on at that point,
10 other than what is in the email and what Mr. O'Leary 10:28
11 said about the telephone conversation. So I had no
12 knowledge of those at this point in time.
13 103 Q. Well, I suppose you had been told about it in the email
14 you received from Mr. Flahive?
15 A. Yes, certainly. I mean, yes, I would have seen that 10:28
16 email. But a year later that wasn't in my mind.
17 104 Q. Yes. Was it simply forgetting about it or not
18 remembering it?
19 A. Just simply not remembering it, I imagine.
20 105 Q. Now, I think you have had extensive involvement in 10:28
21 organising the Department's disclosure of documentation
22 to this Tribunal?
23 A. That's correct.
24 106 Q. Now, in relation to the process which was engaged by
25 the Department in gathering up documentation for this 10:29
26 Tribunal, I think the first thing that was handed over
27 was the transcripts of the O'Higgins Commission?
28 A. I think that's correct, yes.
29 107 Q. Yes. And that was in February of 2017?

1 A. That's right, yes.

2 108 Q. And that was on foot of an express request/order from
3 this Tribunal?

4 A. That's correct.

5 109 Q. Now, I think the Chairman then made an opening 10:29
6 statement, and asked people to submit relevant
7 documentation or information, if they knew anything
8 about the terms of reference, isn't that correct?

9 A. Yes.

10 110 Q. And I think that was dealt with, it would appear, in 10:29
11 the Department by correspondence being entered into
12 identifying potentially relevant materials by the
13 Department, is that correct?

14 A. Yes.

15 111 Q. And I think what was identified by the Department at 10:30
16 that time was the IRM material as it related to Ms. D
17 and potentially another related person, isn't that
18 correct?

19 A. That's correct.

20 112 Q. The O'Higgins material insofar as it related to the 10:30
21 GSOC inquiry which had been -- the GSOC complaint which
22 had been sent by the Minister to GSOC?

23 A. Yes.

24 113 Q. And also, certain litigation files in relation to
25 Sergeant McCabe, is that correct? 10:30

26 A. Yes, I think there was also a representation made to
27 the Minister.

28 114 Q. In relation to the questions put to the Minister?

29 A. Correct, yes -- well, I beg your pardon, a

1 representation to the Minister which referenced, I
2 believe, Sergeant McCabe. And I can't recall did it
3 reference the allegation that was made against the
4 sergeant or not but it was thought that it might be
5 relevant and we were prepared to give it to the 10:31
6 Tribunal and let the Tribunal make its own decision.

7 115 Q. All right. So that is April 2017, and I think you
8 yourself swore a fairly comprehensive affidavit of
9 discovery identifying the various documentations which
10 in very general terms fall into the categories that I 10:31
11 have just identified?

12 A. Yes, I think I informed the Tribunal in early -- or
13 mid-March that we were looking at this and had
14 identified certain things but we required to examine
15 them and get advice. And then I wrote in April to, as 10:31
16 you have just outlined, what the files were.

17 116 Q. Yes, yes. So, the sequence of events is, the
18 transcripts were forwarded to the Tribunal on foot of
19 an order of discovery, and that was necessary --

20 A. Yes. 10:31

21 117 Q. -- because there was a confidentiality concern with
22 regard to the Commission of Inquiries Act?

23 A. Correct.

24 118 Q. Then there was material identified within the
25 Department by the departmental officials following the 10:32
26 Chairman's opening statement?

27 A. Yes.

28 119 Q. And that falls into the categories that we have just
29 described there?

1 A. That's right.

2 120 Q. And following on that and the Department getting legal
3 advice, you swore an affidavit of discovery in relation
4 to all of that material that has been identified by the
5 Department? 10:32

6 A. Yes.

7 121 Q. I think matters thereafter related to Garda Harrison
8 matters, which were discovered to the Tribunal, is that
9 correct?

10 A. Yes. 10:32

11 122 Q. And then we come to the email of November, which was
12 handed over to the Tribunal in November 2017, and
13 that's the email of May 2015?

14 A. Yes.

15 123 Q. And you have already explained to the Tribunal how it 10:32
16 came about that that email was identified and forwarded
17 to the Tribunal?

18 A. Yes.

19 124 Q. Now, there is a second email which was forwarded to the
20 Tribunal -- or chain of emails, and that is the July 10:32
21 email?

22 A. Yes.

23 125 Q. July 2015, which had its origins in a press query to
24 the Garda Commissioner being notified to Mr. O'Leary?

25 A. That's correct. 10:33

26 126 Q. And if you would explain to the Tribunal how that email
27 was identified and forwarded to the Tribunal?

28 A. Yes. Well, the first email chain was, as you say, the
29 one from the 15th May.

1 127 Q. Yes.

2 A. And we were anxious to ensure that we got material to
3 the Tribunal as quickly as possible, so we sent on that
4 email chain. But we had caused a search to be made in
5 the, primarily, Secretary General's office to ascertain 10:33
6 whether there were further emails of a similar nature
7 that might also be relevant, and a couple of days I
8 believe after we made the first disclosure these emails
9 were brought to my attention. And we, once we
10 ascertained that we had the full chain we then 10:33
11 disclosed those on 28th November.

12 128 Q. All right. And that --

13 A. If I may say so, it was all part of the search which
14 commenced with the email of the 15th November.

15 129 Q. It was a continuum? 10:33

16 A. Yes, yes.

17 130 Q. Yes. And that is your letter to the Tribunal of the
18 27th November 2017, which appears at page 3499 of the
19 materials.

20 A. I am prepared to take that on screen if it's available, 10:34
21 sorry. 27th of November, yes.

22 131 Q. Yes. And at that time, Mr. O'Leary had informed the
23 Department of his phone call with the Commissioner on
24 the 15th May?

25 A. Yes, I believe he had, and that is referenced in the 10:34
26 letter.

27 132 Q. Yes. What you say in your letter is, it's at page 3500
28 of the materials:
29

1 "I wish to bring to your attention also that a now
2 retired senior official has informed the Department
3 that he received a telephone call --"
4
5 And that official is Mr. O'Leary who has given evidence 10:34
6 to the Tribunal.
7 A. Yes.
8 133 Q. It's in Volume 6, I think.
9 A. Yes, I have that, yes. That was brought to my
10 attention by the Secretary General's office, I believe, 10:35
11 because the communication with Mr. O'Leary was at that
12 level.
13 134 Q. Yes. Yes. So, following:
14
15 "-- and the Department understands that the call 10:35
16 concerned this matter but no written record has been
17 located in the Department of that conversation."
18 A. That's correct.
19 135 Q. And that remains the case?
20 A. Yes. 10:35
21 136 Q. Is that correct? And then it refers to term of
22 reference (p)?
23 A. Yes.
24 137 Q. Now, I think following on that disclosure to the 10:35
25 Disclosures Tribunal, there was a very comprehensive
26 trawl of emails and material done in the Department
27 over Christmas and the new year of this year, is that
28 correct?
29 A. That's correct.

1 138 Q. And I wonder if you would tell the Tribunal about that,
2 please.

3 A. Okay. Well, the Department as you know wrote to the
4 Tribunal seeking some guidance on a number of matters
5 which had -- some of which had arisen following the 10:36
6 Acting Secretary General's appearance before an
7 Oireachtas Committee. The primary purpose -- the
8 primary thing coming out of that was the committee
9 wanted to know whether the discovery orders and the
10 Department's replies to the Tribunal could be made 10:36
11 available, made public. So we wanted to seek some
12 guidance from the Tribunal on that, but we also took
13 the opportunity to ask for guidance in relation to what
14 kind of searches the Tribunal thought the Department
15 might or should undertake to ensure that we had a 10:36
16 comprehensive disclosure or discovery to the Tribunal.

17 139 Q. Yes.

18 A. The response from the Tribunal indicated that other
19 places, other parties had undertaken disclosure, or
20 searches, extensive searches, and that the Department 10:36
21 might think about doing that, and the Tribunal gave us
22 guidance in terms of time-lines, whether we might
23 consider. So this arrived literally just before
24 Christmas but was considered immediately on the first
25 day back at work after Christmas, the 28th, I 10:36
26 believe -- 27th, I think, of December. I was part of a
27 conference call that day with officials in the
28 Department, in which they set out how they were going
29 to start doing this extensive electronic trawl for any

1 other relevant documents. So we agreed on a
2 methodology criteria and the ICT division, the computer
3 division, had identified an external provider of
4 services who would actually conduct the search on the
5 Department's behalf. So that external provider I 10:37
6 believe was closed over that period and wouldn't have
7 been available until the following Tuesday, at which
8 stage the search commenced, the electronic search
9 commenced based on the criteria we had outlined. And I
10 believe in the report to the Tribunal we have set out 10:37
11 what those criteria were at the second stage, which I
12 might explain in a moment. But we used terminology
13 which we thought would identify anything of relevance
14 to the Tribunal. So we used names of individuals who
15 were kind of part of the Tribunal's terms of reference 10:37
16 and other criteria. And that search commenced, and was
17 completed and it identified -- I can't remember at this
18 remove but it identified quite a sizable number of
19 documents or emails that might be relevant. However,
20 on examination of it, actually I noticed that it had 10:38
21 not identified any files from the Independent Review
22 Mechanism. But we knew we had disclosed material and
23 that there might be something there. So we thought
24 there might be a flaw in our search criteria, so we
25 revised the search criteria to expand it. 10:38

26 140 Q. Yes.

27 A. And we included different search criteria, which are
28 the criteria we have actually told the Tribunal about.
29 Resulting from that then we got a significant number of

1 hits, I think documentary counsel who examined them for
2 us identified 35 and a half thousand emails and other
3 documents from our document libraries, or -- yes, our
4 document libraries, which met the criteria. And that
5 search carried out actually trawled through I think 30 10:38
6 million emails in the period in question and out of
7 that 30 million it identified about 35,000 which met
8 the criteria. Documentary counsel examined all of
9 those 35,000 emails and from that, they identified 88,
10 one of which was an email string of about 40 emails 10:39
11 which might be relevant, and they identified another
12 document -- two documents from a paper file. And other
13 paper files they examined they did not identify any
14 other documents. So we were left with 90 documents, 88
15 of which were from the electronic trawl. When the 10:39
16 Department then set about compiling the schedule of
17 documents to give to the Tribunal, we discovered that
18 about eleven of them were already part of the email
19 string identified and sent last November. One of them
20 was a letter relating to one of the legal action files 10:39
21 which we had previously informed the Tribunal about and
22 which was subject to legal privilege. So we took it
23 that that was also covered by legal privilege and we
24 told the Tribunal we had it but we were claiming
25 privilege. And the second document was identified 10:40
26 which was actually a document from the Chief State's
27 Office to the solicitor to the O'Higgins Tribunal.
28 Now, that came up in the trawl because the Department
29 service hosted the emails and so on from the O'Higgins

1 Tribunal, but we told the Tribunal about this but we
2 also said we didn't think it was within our power to
3 disclose it, so we didn't. So of the 88 documents
4 identified by documentary counsel, 86 were kind of
5 suitable for disclosure, plus the other two, the manual 10:40
6 ones that we found, and we set out those in schedules
7 and they were disclosed to the Tribunal.

8 141 Q. Yes. I think that happened last week or the week
9 before, possibly, the 19th January?

10 A. 19th January, yes, yes, the search was concluded on 10:41
11 15th. The documentary counsel worked from the previous
12 Wednesday, the 10th, over the weekend and finished its
13 search on Monday the 15th. We got a report from
14 documentary counsel the following day about the search
15 and in the following few days we were collating and 10:41
16 scheduling the documents and so we disclosed them to
17 the Tribunal on the 19th, Friday.

18 142 Q. And I think following on that some of those emails were
19 circulated beginning at page 4781 of our materials.
20 Just for completeness. 10:41

21 A. Okay.

22 143 Q. One thing I did forget to ask you, Mr. Power: The
23 Department also forwarded to the Tribunal the core
24 booklets and such like material from O'Higgins in the
25 run-up -- in December of this year, isn't that correct? 10:41

26 A. Yes.

27 144 Q. And they were disclosed both electronically and in hard
28 copy, on foot of orders from this Tribunal --

29 A. Correct.

1 145 Q. -- to the Department of Justice?
2 A. Yes, that's correct.
3 146 Q. Yes. If we just look at page 4917 of the materials.
4 This is the notification from GSOC, it was circulated
5 this morning, so Ms. Mullen might be able to give you a 10:42
6 hard copy of it. Maybe, Mr. Power, it might be
7 actually more efficient if maybe you were given a
8 minute or two to read it, I think you have just seen
9 this document?
10 A. Yes, please. [SAME HANDED] It's quite a lengthy 10:42
11 document, do you want me to read all of it?
12 147 Q. No, I just want to ask you about the first page of it.
13 You will see there at:
14
15 "Dear Mr. Power 10:43
16 On 19th May 2015 GSOC delivered a report to Garda
17 Headquarters in accordance with Section 97 of Garda
18 Síochána Act, as amended. Ms. D has also been informed
19 of the conclusions reached by GSOC during the
20 investigation. GSOC understands that Mr. Paul 10:44
21 Williams, journalist, is aware of the allegations made
22 by Ms. D against Sergeant McCabe. Given the specifics
23 of the case, GSOC feels that the Minister should be
24 informed of the progress of the investigation and you
25 may wish to bring this correspondence to her 10:44
26 attention."
27
28 You see that there?
29 A. Yes.

1 148 Q. Do you remember bringing that correspondence to the
2 Minister's attention?

3 A. I can't say I do, but I have no doubt at this stage
4 that it would have been brought to her attention by way
5 of some form of a submission to inform her of what GSOC 10:44
6 were telling us.

7 149 Q. And I suppose just given the proximity of that to the
8 email of the 15th May, which also mentioned Sergeant
9 McCabe and the Commission of Investigation, was any
10 link made between the two at that time? 10:44

11 A. I can't say at this moment because this -- if a
12 submission was done it would be in the Department, and
13 I can't recall the submission or what might have been
14 in it at the time. So I am just going on this letter
15 here and I can't say at the moment what the submission 10:45
16 might or might not have contained, unless I go and see
17 it again.

18 150 Q. Okay. But you would be able to maybe go back to the
19 Department and check?

20 A. I can certainly check, yes. 10:45

21 151 Q. Yes, yes, at some stage. And in relation to the email
22 of the 15th May, do you think you might have discussed
23 it with the Minister considering this was so close in
24 time?

25 A. I don't recall that I personally had any discussions 10:45
26 with the Minister at this time.

27 152 Q. Okay. In relation --

28 A. In relation to the O'Higgins Commission, in relation to
29 Sergeant McCabe, or in relation to the IRM case. At

1 this point, I can't remember that I did, but if I see a
2 submission, it might jog my memory.

3 153 Q. It might jog your memory?

4 A. Yeah.

5 154 Q. Just this morning, Ms. Mannion has made notes available 10:45
6 to the Tribunal in relation to a meeting with the
7 Minister, so it may be that you might be asked some
8 questions about those in due course.

9 CHAIRMAN: Ms. Leader, can I just ask you, this letter,
10 the contents of it are familiar to me. 10:46

11 MS. LEADER: Yes.

12 CHAIRMAN: So I believe I have read it before.

13 MS. LEADER: It was circulated for the Tusla --

14 MR. MCDOWELL: Page 152 in Tusla papers.

15 CHAIRMAN: Okay. That makes sense. But the point of 10:46
16 it was, the Garda Ombudsman Commission had this
17 complaint from Ms. D: My complaint was never properly
18 investigated. They looked at it, they regarded the
19 file as being competent, the investigation as being
20 competent. The only thing that they said was, it can 10:46
21 be very difficult for an officer to investigate someone
22 who the officer knows and I suppose even more so on
23 both sides. And that was basically it, they didn't
24 find any fault of any kind whatsoever in the D
25 investigation. 10:46

26 MS. LEADER: The opposite, I think, sir.

27 CHAIRMAN: They said it was, in fact, a highly
28 competent investigation.

29 MS. LEADER: Yes. I think there was also an

1 observation made with regard to putting matters on
2 pulse.

3 CHAIRMAN: Yes. And that indeed had come up, and I
4 think I have taken a view that sometimes maybe it's not
5 a good idea but obviously there are the regulations 10:47
6 there. They would override my view.

7 MS. LEADER: In fairness to Mr. Power, this document
8 was circulated as part of this module's work this
9 morning, so --

10 CHAIRMAN: No, no, I appreciate that, and it is a good 10:47
11 while ago.

12 MS. LEADER: Yes. If would you answer any questions.
13

14 THE WITNESS WAS CROSS-EXAMINED BY MR. MCDOWELL:

15 155 Q. MR. MCDOWELL: Good morning, Mr. Power. 10:47
16 A. Morning.

17 156 Q. Could I ask you just, without being too curious, you
18 said you took up duty in relation to the position you
19 held in May of 2015, earlier that year, is that right?
20 A. That's correct. 10:47

21 157 Q. And had you been involved in this kind of territory
22 beforehand or had you shifted from something very
23 different?
24 A. Something quite different, yeah.

25 158 Q. I see. I don't want to know what you were up to 10:48
26 otherwise --
27 A. I think you know.

28 159 Q. Yes, indeed. Just, in other words, you were --
29 A. I was in the crime directorate area.

1 160 Q. You were coming to this fresh, is that right?
2 A. Correct.

3 161 Q. I just wanted to be clear about that. Now, in relation
4 to the Independent Review Mechanism, by the time you
5 became the person in the Department with responsibility 10:48
6 for dealing with it, it was well into its work, it had
7 been established the previous year, isn't that right?
8 A. That's correct.

9 162 Q. And it was established, as we have heard in evidence,
10 partly in response to the Guerin Report, isn't that 10:48
11 right?
12 A. That's correct, yeah.

13 163 Q. Yes. And the letter that you received on the 21st May
14 2015 from the Ombudsman Commission, could I ask you
15 whether this was the first you heard about the fact 10:49
16 that they had been investigating Ms. D's allegation
17 that her complaints against Sergeant McCabe had not
18 been properly investigated?
19 A. I believe this would have been the first occasion, yes.

20 164 Q. Yes. So, in other words, what I really want to ask you 10:49
21 politely is: This wasn't a final copy of a letter,
22 drafts of which had been sent to you or anything like
23 that?
24 A. No, I suspect that this was the first I knew of this.

25 165 Q. Yes. 10:49
26 CHAIRMAN: Just to correct the transcript, it's 2016 we
27 are talking about.
28 MR. McDOWELL: 2016. Sorry, did I say 2015 -- it's
29 2015, judge.

1 A. The GSOC.

2 CHAIRMAN: What happened, sorry, Mr. McDowell, I just
3 want to make sure --

4 MR. MCDOWELL: If you look at the first page of it,
5 Judge, you will see that it refers to a complaint made 10:50
6 by Ms. D on the 29th April of 2014.

7 CHAIRMAN: That's correct, yes.

8 MR. MCDOWELL: And now we are in May 2015, and this
9 letter is sent after they had completed their
10 investigation and made their report. 10:50

11 CHAIRMAN: No, that is correct. And I am sorry,
12 Mr. McDowell, you are right.

13 MR. MCDOWELL: Sorry, I thought I was misleading you, I
14 am sorry, Judge.

15 166 Q. So here we are in 2015, on the 21st May, with you being 10:50
16 told for the first time that GSOC had been
17 investigating a complaint made by Ms. D, isn't that
18 right?

19 A. Yes, that's correct.

20 167 Q. But we do know, or maybe you don't know, but it was a 10:51
21 matter of public publicity in the newspapers that she
22 intended to make this application or complaint to GSOC
23 the previous year?

24 A. That is as may be, but GSOC would normally tell the
25 Department when it had concluded or arrived at a 10:51
26 particular point in an investigation.

27 168 Q. Yes. But I am just trying to work out whether it came
28 as a surprise to the Department that GSOC were, so to
29 speak, on the case?

1 A. I'm not sure that I could say it came as a surprise.
2 If I might say so, the letter is in its own way routine
3 in the sense that GSOC are writing to inform the
4 Department of something which they think the Department
5 should be made aware of. 10:51

6 169 Q. Yes.

7 A. My role would be to receive this kind of communication
8 and to act on it in terms of, normally it would be to
9 bring the matter to the Minister's attention if it
10 seemed to warrant attention by the Minister. 10:51

11 170 Q. Yes.

12 A. And I think I would have taken the view here that, it's
13 quite a long letter, as you can see, that GSOC
14 obviously thought this quite important and I suspect
15 that I would have thought the same and it would have 10:52
16 resulted in action, maybe, by the Minister.

17 171 Q. Well, I mean, if we go to the third paragraph of it,
18 and this is -- I'm operating on the Tusla numeration,
19 but it's circulated today, 4917 --

20 CHAIRMAN: You are referring to Mr. Williams, yes? 10:52

21 MR. McDOWELL: No, the third paragraph, Judge. It
22 says:
23
24 "Given the specifics of the case, GSOC feels that the
25 Minister should be informed of the progress of the 10:52
26 investigation and you may wish to bring this
27 correspondence to her attention."
28
29 So it would have been strange indeed if you had

1 thought, I won't inform the Minister of this letter,
2 wouldn't it?

3 A. Probably, yes.

4 172 Q. I mean, the Minister would have been somewhat surprised
5 to find out later that GSOC wanted her to know 10:53
6 something and that you had decided, well, I don't
7 really think it's anything the Minister should know
8 about?

9 A. Yes, I think you are right.

10 173 Q. So this was, I mean, on its face a direct request by 10:53
11 GSOC to -- that this should be brought to the attention
12 of the Minister, isn't that right?

13 A. That is what it says, yes.

14 174 Q. The contents of the letter?

15 A. That is what it says, yes. 10:53

16 175 Q. And I know you have hadn't had much of a chance to
17 refresh your memory of this letter, but I take it that
18 since you read your emails you would have read this
19 letter thoroughly when it was sent to you?

20 A. I am sure I would have read it when it arrived, yes. 10:53

21 176 Q. Yes. And I am not saying anything critical about you,
22 by the way, in relation to this, I am not asking --
23 there is no need to be defensive with me at all. The
24 content of the letter set out in great detail the
25 background to the D case, isn't that right? 10:54

26 A. Well, as I said, I don't recall receiving it and I
27 haven't had a chance to read it thoroughly this morning
28 but it seems to set out fairly extensively material
29 relating to the GSOC complaint by Ms. D.

1 177 Q. Yes. And it sets out the original complaint made by
2 Ms. D?
3 A. Yes.
4 178 Q. Which is under the heading "The Complaint".
5 A. Mm-hmm. 10:54
6 179 Q. And moving to the next page, it sets out the
7 circumstances in which the allegation was first made
8 about Sergeant McCabe of a criminal sexual assault,
9 isn't that right?
10 A. Yes, I see that, yes. 10:54
11 180 Q. Yes. And it then sets out, at the third paragraph on
12 the second page there, that she firmly -- or they were
13 recording that Ms. D firmly believed that the complaint
14 she had made to the Gardaí was never properly
15 investigated and that her alleged assailant was never 10:55
16 arrested or properly questioned because the Garda
17 authorities in Cavan-Monaghan were trying to protect
18 him. That was the gist of what was being -- her
19 complaint, isn't that right?
20 A. Yes, yes, that is what it says. 10:55
21 181 Q. And all of this was brought, I suggest to you, to the
22 Minister's attention presumably within days of you
23 receiving this?
24 A. As I said, I can't say at this remove when exactly it
25 was brought to the Minister's attention. 10:55
26 182 Q. Well, I know you have to prepare your evidence and I am
27 not criticising you, but can we assume that within days
28 of you receiving this you brought it to the Minister's
29 attention as you had been asked to do?

1 A. Well, I can't say whether it was within days or when it
2 was. I mean, the 21st of May, working from the email
3 of 15th being a Friday, was a Thursday, I can't say at
4 this stage whether it was brought to the Minister's
5 attention that day, the following day, the following 10:56
6 Monday. I will certainly check and see what it was.
7 But if I had been asked in advance about this document,
8 Chairman, I might have been able to check, but --

9 183 Q. I am not criticising you at all.

10 A. No, no, I appreciate that, but I am just saying I can't 10:56
11 say when the matter would have been brought to the
12 Minister's attention.

13 184 Q. That is why I am using the formula within days, you
14 know, I am just -- I take it that it's not -- that it's
15 not going to be suggested that this was shelved in the 10:56
16 Department?

17 A. Well, I am not going to suggest that.

18 185 Q. No. And what I am driving at is, that anybody who read
19 this, including yourself, and who read the email which
20 was circulated on the 15th to the 18th to various 10:57
21 departmental officials from the Attorney General's
22 office, that anybody who read both would immediately
23 associate the contents of both communications, I have
24 got to suggest to you that you would have to say, well,
25 this must be what the Attorney General's office were 10:57
26 talking about the previous Friday.

27 A. I can't say at this moment that on the 21st May when I
28 received this or -- I can't see a date on it, it would
29 normally be date-stamped the Department received it,

1 which could well have been the following day. I can't
2 say that when I saw this that I immediately associated
3 it with the email of the previous Friday.

4 186 Q. well now, in retrospect would you see a connection
5 between the two? 10:58

6 A. well, I don't know. I received a letter from GSOC
7 informing me of the current position of an
8 investigation, asking that the Minister be informed and
9 I think that is what would have been on my mind.

10 187 Q. well, I amn't trying to be critical of you, but I am 10:58
11 asking you to, even now, is it not apparent to you that
12 there must have been a connection between the two, the
13 subject matter of the two communications to the
14 Department?

15 A. well, as I said earlier on in relation to the email, 10:58
16 I'm not sure that I was so familiar with the IRM cases
17 that I recognised the case being referred to in the
18 email. I might well not have and I might not have made
19 any inquiry it at that point. So this letter coming in
20 might not have struck me that this was related to 10:59
21 exactly the same matter that was referred to in the
22 email. But at this remove I cannot say that I made the
23 link or didn't make the link.

24 188 Q. You see, Mr. Flahive told us that he made a reference
25 to the IRM consideration, effectively as a means of 10:59
26 alerting people to the particular issue without leaving
27 a trace on an email which might be improperly
28 circulated at a later stage, referring to the actual
29 nature of the sexual assault case against Sergeant

1 McCabe, isn't that right?

2 A. Yes, if that is what he said, yes.

3 189 Q. Well, you are aware he said that?

4 A. Yes, sorry, I am, I beg your pardon, yes.

5 190 Q. And you were one of the people he expected to draw -- 10:59
6 make this connection?

7 A. I am not sure that is exactly the case, that I was one
8 of the persons expected to make the connection. I
9 could certainly have made inquiries to see what case he
10 might be referring to, because, as I mentioned earlier, 11:00
11 at that stage I may not have been so familiar with the
12 IRM that I would have recognised the case to which he
13 was referring. But he would certainly have -- I would
14 certainly have had the wherewithal to find out if I had
15 sought information. 11:00

16 191 Q. You see, the point, Mr. Power, is: He was being
17 careful to use the IRM reference --

18 A. Mm-hmm.

19 192 Q. -- so as not to be overly explicit.

20 A. Mm-hmm. 11:00

21 193 Q. And he was sending this email, inter alia -- inter
22 alios to you, I am just asking: Did you not see the
23 connection fairly quickly when you received this
24 document?

25 A. At this remove I can't say I did. Mr. Flahive's 11:00
26 reference to the IRM case was to alert people who would
27 have been familiar enough with it to recognise what he
28 was mentioning. I am not so sure on that Friday when
29 that email came along -- and I am not sure I read it on

1 the Friday perhaps. I am not sure that I was in a
2 position immediately to recognise the case to which he
3 was referring, because I was new to the job.

4 194 Q. Well allowing for that, you wouldn't have understood
5 what he was driving at all in his email? 11:01

6 A. Well, I think I would have understood that there was an
7 IRM case in being, in which there was relevant
8 information that he felt was part of the dispute that
9 had arisen at the Tribunal that -- at the Commission
10 that day. 11:01

11 195 Q. In relation to Sergeant McCabe?

12 A. In relation to Sergeant McCabe.

13 196 Q. So he was referring to an IRM case in relation to
14 Sergeant McCabe?

15 A. Yes. 11:01

16 197 Q. And you are saying you wouldn't have known at that
17 stage or you may not have known, I don't want to be
18 unfair to you, what case this was at all?

19 A. Yes, I'm saying that at that point in time I may not
20 have been so familiar with them that I would have 11:02
21 recognised the case immediately.

22 198 Q. I see. But when you read this document which arrived
23 on your desk on 21st May or maybe the following day,
24 you must have seen immediately the connection between
25 the two, surely? 11:02

26 A. Well, I have tried to answer your question,
27 Mr. McDowell. I'm not sure that I did see the
28 connection and I can't say at this remove recall
29 whether I did or not make that connection.

1 MS. LEADER: I don't wish to interrupt Mr. McDowell but
2 I took the opportunity to check Mr. Power's affidavit
3 of discovery which he made to the Tribunal, which I
4 think was May of 2017, and he did send to the Tribunal
5 a submission to the Minister in relation to this 11:02
6 matter, and the Minister's private secretary would
7 appear to have been notified in relation to the matter
8 on the 21st May 2015. But it was Mr. McDermott who
9 actually wrote the submission.

10 A. That would seem correct. 11:03

11 MR. MCDOWELL: Well, Chairman --

12 MS. LEADER: Maybe --

13 MR. MCDOWELL: -- I am very grateful to Ms. Leader for
14 telling me that. Could I ask you to give me ten
15 minutes to consider this, because I don't want to ask 11:03
16 unfair questions.

17 CHAIRMAN: Yes, no, I think that is a reasonable
18 request, Mr. McDowell, because I'm kind of puzzled as
19 to what people should be actually taking out of this.
20 I mean, at this moment, the puzzlement is very deep. 11:03
21 So, if I rise for ten minutes.

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23
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1 THE HEARING ADJOURNED BRIEFLY AND THEN RESUMED
2 AS FOLLOWS:

3
4 MR. McDOWELL: I understand Ms. Leader wants to ask
5 some questions first. 12:02

6 MS. LEADER: We circulated the documentation which was
7 created following the GSOC notification to the
8 Department.

9
10 THE WITNESS WAS FURTHER EXAMINED BY MS. LEADER AS
11 FOLLOWS: 12:02

12 199 Q. MS. LEADER: Mr. Power, I think you have had an
13 opportunity to look at the documentation and refresh
14 your memory?

15 A. Yes. 12:02

16 200 Q. Now, I think first of all, if we just put this in
17 context, you swore an affidavit of discovery on behalf
18 of the Department on 19th May 2017 for the purposes of
19 this Tribunal?

20 A. Yes. 12:02

21 201 Q. And I think a large amount of documentation was
22 discovered to the Tribunal at that time and copies of
23 it forwarded to the Tribunal in its entirety?

24 A. Yes.

25 202 Q. And that documentation fell into the broad categories
26 that I was referring to earlier on here this morning
27 when you were giving evidence? 12:03

28 A. That's correct.

29 203 Q. Now, one of the categories of documentation which was

1 discovered relates to "complaint against An Garda
2 Síochána, Ms. D", is that correct?

3 A. Yes.

4 204 Q. And that appears now in the material which has just
5 been circulated by the Tribunal at page 4935 of the 12:03
6 materials, which is in front of you, I think.

7 A. Yes, yes.

8 205 Q. Now, I think the first thing that appears in that
9 schedule is a copy of the file cover, that's right?

10 A. Mm-hmm. 12:03

11 206 Q. And the next thing that appears is "Copies of
12 correspondence handed to the Minister by Deputy Martin
13 at a meeting with him on 2nd July 2014", and that
14 correspondence was a letter from Mr. Martin to the
15 Taoiseach with attached letter dated 30th April 2014, 12:04
16 an email dated 19th April 2014?

17 A. Yes.

18 207 Q. And that refers to the Ms. D meeting with Micheál
19 Martin?

20 A. It certainly refers to the complaint by Ms. D, yes, 12:04
21 yes.

22 208 Q. Yes. Now, the next thing that was in that bundle of
23 documentation was a document dated 21st May 2015, and
24 that's: "Report from An Garda Síochána Ombudsman
25 Commission to the Minister for Justice and Equality 12:04
26 regarding the complaint from Ms. D"?

27 A. Yes.

28 209 Q. And that's the nine-page document which was referred to
29 earlier on this morning, notifying you of the outcome

1 of the GSOC complaint made by Ms. D?
2 A. That's right.
3 210 Q. Okay. Now, the next thing that appears in that -- and
4 it was suggested by GSOC that that be brought to the
5 Minister's attention and you will remember earlier on 12:05
6 this morning that paragraph was opened to you?
7 A. Yes.
8 211 Q. Yes. Now, the next thing that appears in that bundle
9 of documentation is an email which is dated 21st May
10 2015, is an email to the Minister's private secretary 12:05
11 notifying the Minister that GSOC has been received and
12 that a submission will follow.
13 A. Correct.
14 212 Q. And if we just turn to that email, it's at page 4936 of
15 the materials. It relates to a report from GSOC on 12:05
16 conclusion of their investigation of the complaint by
17 Ms. D of an alleged cover-up by Gardaí of sexual
18 assault allegations made against Sergeant McCabe.
19 A. Yes.
20 213 Q. And that is a document created by Mr. Frank McDermott 12:05
21 of the Garda division. And I don't know if you would
22 explain to the Tribunal who Mr. McDermott is and what
23 role he occupied at that time?
24 A. Yes. Well, Frank McDermott is assistant principal in
25 the, it's now the policing division, who works directly 12:06
26 to me on matters relating to Garda governance and
27 accountability, and that is the role that he fulfilled
28 at that time also.
29 214 Q. So do you think that you asked him to create this

1 document following on the letter received from GSOC to
2 you?

3 A. Yes. I believe that what most likely happened in this
4 instance is we agreed it was something that should be
5 at least mentioned to the Minister immediately and 12:06
6 inform her that a submission would follow in due
7 course.

8 215 Q. Okay.

9 A. And it's dated the same day as the letter from GSOC.

10 216 Q. Yes, yes. So that is Mr. McDermott sending an email to 12:06
11 Mr. Quattrociochi, who is the --

12 A. Private secretary to the Minister.

13 217 Q. -- private secretary to the Minister, who we heard from
14 yesterday. And it's cc'ed to Mr. Waters, who is the
15 Acting Secretary General -- 12:07

16 A. Secretary General, acting, yeah.

17 218 Q. -- Mr. O'Leary who is the Deputy Secretary General,
18 Mr. Flahive who is your boss at that particular time --

19 A. Correct.

20 219 Q. -- and to you. 12:07

21 A. Yes.

22 220 Q. And it's also sent to Mark Dugdale and Mr. English?

23 A. Yes.

24 221 Q. They are?

25 A. They work in the same area with Frank and myself. They 12:07
26 were both at that stage higher executive officers.

27 222 Q. Okay. So in that email, Mr. McDermott sets out, it's:
28
29 "Re: Report from GSOC on conclusion of their

1 investigation of the complaint by Ms. D of an alleged
2 cover-up by Gardaí of sexual assault allegations made
3 against Sergeant McCabe."

4 A. Yes.

5 223 Q. Then at number 1 it's explained that the Ms. D case was 12:07
6 amongst those under consideration under the Independent
7 Review Mechanism and Deputy Micheál Martin made
8 representations in relation to the case?

9 A. Correct.

10 224 Q. And that is probably why the Micheál Martin material 12:07
11 was included with this matter?

12 A. Yes.

13 225 Q. And then it sets out the substance of Ms. D's
14 complaint, which was in essence that the matter should
15 have been investigated by somebody not known to the 12:08
16 parties and that the complaint wasn't recorded on
17 Pulse?

18 A. Yes, that it wasn't properly investigated, I think was
19 the substance of it.

20 226 Q. Yes, was the substance of the complaint. Now it 12:08
21 continues on down at number 3:
22
23 "Counsel have made their recommendation in the case to
24 the Department and have recommended that the Minister
25 take no further action. The case will be submitted for 12:08
26 consideration of the recommendation and notification
27 letter will issue to Ms. D in due course."
28
29 And I think that is a reference to the consideration

1 made by the Independent Review Mechanism --

2 A. Yes.

3 227 Q. -- in relation to the matter?

4 A. Yes.

5 228 Q. And you were setting out what the position was there. 12:08

6 Then we come to number 4:

7

8 "Ms. D made a complaint to GSOC. They concluded in

9 their investigation and have notified Garda

10 Headquarters, Ms. D and Sergeant McCabe of the outcome. 12:09

11 Given the specifics of the case, GSOC felt it was

12 appropriate that the Minister be informed of the

13 progress of the investigation. Their report to the

14 Minister was received today."

15 A. Yes. 12:09

16 229 Q. And that is a reference to the long letter from GSOC?

17 A. That's right.

18 230 Q. Yes. And then at number 5:

19

20 "GSOC made no recommendations that disciplinary action 12:09

21 should be commenced against any Garda member. They

22 found no issue with the investigation that was carried

23 out. The only issue that they raised was with regard

24 to the non-recording of the incident on Pulse. They

25 found no evidence, however, of any ulterior motive for 12:09

26 not recording the incident."

27 A. Yes.

28 231 Q. And that sets it out. And then Mr. McDermott says:

29

1 "We will arrange for GSOC's report to be submitted
2 shortly for the Minister's information. In the
3 meantime, you may wish to make the Minister aware of
4 the report's conclusions."

5 A. Yes.

12:09

6 232 Q. Yes. And finally:

7
8 "In their report GSOC referred to the fact that
9 Mr. Williams, journalist, is aware of the case so it is
10 possible that some press queries may arise."

12:10

11 A. Yes.

12 233 Q. Are you now familiar with the document having seen it
13 again just shortly --

14 A. Well, I mean, I can't recall the time when I read this
15 first, but yes, it's certainly something I would have
16 read, yes.

12:10

17 234 Q. Yes. Now, the next document, if you just go back to
18 the schedule to the file that was disclosed, it's
19 number 5, dated 27th May 2015:

20 12:10

21 "Submission from policing division to the Minister with
22 GSOC report tabbed."

23 A. Yes.

24 235 Q. So the 21st May email to the Minister was a
25 forewarning, if I can put it this way, in relation to
26 this report of the 27th May, is that correct?

12:10

27 A. Yes. I suspect the view was taken that it was a
28 significant report from GSOC and that at the minimum
29 the Minister should be aware of the broad conclusions

1 of it and that a further detailed submission would
2 follow.

3 236 Q. All right. So if we look at the submission to the
4 Minister, it contains eleven pages, presumably nine of
5 those pages are the actual letter from GSOC of the 21st 12:11
6 May?

7 A. Yes.

8 237 Q. And that appears, just the first page of it appears for
9 our purposes, at 4940, it's tabbed at tab 1?

10 A. Yes. 12:11

11 238 Q. And then the submission to the Minister is made by
12 Mr. English, Garda Division, dated 27th May 2015, at
13 page 4939 of the materials.

14 A. Yes.

15 239 Q. If you could explain who Mr. English is? 12:11

16 A. Mr. English was a higher executive officer who worked
17 in the governance and accountability section of the
18 Department and he would have been involved in matters
19 relating to submissions, reading reports from GSOC and
20 deciding what submissions should go to the Minister. 12:12

21 240 Q. So, did he work to you, so to speak?

22 A. Yes, yes.

23 241 Q. Now, if we look at the first page of the submission to
24 the Minister, it's at page 4938 of the materials.

25 A. Yes. 12:12

26 242 Q. You will see the people named at the top, Martin Power,
27 principal officer, that is you?

28 A. Yes.

29 243 Q. And Mr. Flahive, assistant secretary, and it would

1 appear that Mr. Flahive has initialled it on the 2nd
2 June 2015.

3 A. Yes.

4 244 Q. And rúnaí aire is at that time?

5 A. Rúnaí aire was Chris Quattrociocchi at that time. 12:12

6 245 Q. Yes. So the submission, it's:
7
8 "Re: Complaint by Ms. D, alleged cover-up by Gardaí of
9 assault allegation against Sergeant Maurice McCabe."
10 12:12

11 And then it goes through the complaint, Ms. D's
12 complaint, in the first paragraph. It refers to the
13 full report at tab 1, in relation -- at the very end of
14 that paragraph.

15 A. Yes. 12:13

16 246 Q. And then it refers to the GSOC investigation, and sets
17 out that:
18
19 "GSOC considered the allegations serious enough to
20 warrant investigation in the public interest, and 12:13
21 decided that there was good reason to extend time."
22

23 And I think that that relates to, there was a six-month
24 time limit --

25 A. For making a complaint. 12:13

26 247 Q. -- for making complaints to GSOC. But time could be
27 extended in appropriate cases which was at the
28 discretion of GSOC, is that correct?

29 A. Yes.

1 248 Q. And then we see:

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"GSOC obtained relevant documentation from An Garda Síochána and interviewed Ms. D and a number of other individuals. A report was prepared for the GSOC commissioners in accordance with section 101 of the Act who decided not to send a file to the Director of Public Prosecutions. The -"

12:13

CHAIRMAN: In this instance the time was extended I think for seven years, April '07 to April 2014.

12:14

MS. LEADER: A considerable time. Yes, yes.

CHAIRMAN: Yes.

249 Q. MS. LEADER: And we see:

"The commissioners then considered section 101(6) of the Act and accordingly directed that the complaint should be further investigated pursuant to section 95 of the Act. Statements were recorded from Ms. D's parents, including a statement from Ms. D concerning the relationship between the D and McCabe family.

12:14

Statements were recorded from other witnesses that Ms. D had spoken to about the allegations and a further statement was recorded from Sergeant McCabe's wife, who it was felt was a potential witness to the incident.

12:14

Sergeant McCabe was interviewed by Inspector Cunningham, who was assisted by another sergeant. The content of Ms. D's statement was read to Sergeant McCabe, who claimed to have no memory of the incident and denied the allegations. In summary, there was no

12:14

1 physical or witness evidence to support Ms. D's
2 allegation. A file was prepared for the DPP, who
3 directed no prosecution. GSOC were satisfied that
4 Inspector Cunningham carried out appropriate inquiries
5 and GSOC was satisfied that there was no evidence of 12:15
6 criminality in how the Garda investigation was
7 conducted."

8
9 And then it refers to two potential breaches of
10 discipline, which was the failure to record the 12:15
11 allegations made on Pulse and the suitability of the
12 appointment of Inspector Cunningham to investigate the
13 matter, given that he knew both the D family and
14 Sergeant McCabe. And then it refers to Superintendent
15 Cunningham bringing it to the attention of the chief 12:15
16 superintendent that he knew both members and was
17 directed to continue with the investigation.

18
19 "It is Garda policy to appoint investigating officers
20 from within the division. The investigation revealed 12:15
21 no evidence that the investigation carried out by
22 Superintendent Cunningham was compromised in any way by
23 the fact that he knew the parties involved.
24 Superintendent Cunningham was found to have carried out
25 reasonable inquiries and it was found that it would 12:16
26 have been negligent not to have explored Ms. D's
27 credibility. The decision not to arrest Sergeant
28 McCabe but to hold a voluntary interview after caution
29 was also reasonable. With regards to Pulse, Sergeant

1 Fraher explained that he did not record the matter on
2 Pulse as both members were serving in the same division
3 at the time. There is no evidence to suggest that
4 there was any ulterior motive for not recording the
5 incident on Pulse. The non-recording of the incident 12:16
6 did not affect the investigation in any way. It would
7 be unreasonable and excess if in GSOC's opinion to
8 subject Sergeant Fraher to a disciplinary procedure
9 eight years later. Furthermore, it was felt that it
10 would be disproportionate to make any findings against 12:16
11 Superintendent Cunningham who investigated the matter
12 and obtained other incidents reported by Ms. D."

13
14 And then there is the:

15
16 "Observations re operational matters. 12:17
17 GSOC wrote to the Garda Commissioner on the 19th May
18 and made two recommendations. GSOC asked the Garda
19 Commissioner to consider issuing further guidance to
20 district and divisional officers where allegations of 12:17
21 serious crime are made against a member by another
22 member, that consideration be given to having the
23 matter investigated by a member who has no prior
24 professional knowledge or relationship with the person
25 involved. 12:17

26
27 2. GSOC asked that the Gardaí should be reminded of
28 the importance of properly recording matters on Pulse,
29 as a failure to do so can lead to loss of confidence of

1 the public and give credence to allegations of bias or
2 appearance of bias.
3
4 Finally, GSOC made no recommendations that disciplinary
5 action should be commenced against any Garda member but 12:17
6 note that the Garda Commissioner may take some action.
7 Any decision taken by the Gardaí will be communicated
8 at a later date."
9 A. Yes.
10 250 Q. And you would have seen that submission obviously 12:17
11 before it went to the Minister?
12 A. Yes.
13 251 Q. Now, you yourself prepared an update for the -- I think
14 it's referred to as a covering submission, so at page
15 4935 we have 27/5/2015, "Covering Submission to 12:18
16 Assistant Secretary"?
17 A. That's correct.
18 252 Q. And the assistant secretary would have been?
19 A. Michael Flahive.
20 253 Q. Michael Flahive at that time. And if we just turn to 12:18
21 that at page 4941 of the materials, you see
22 Mr. Flahive, assistant secretary, and in handwriting
23 next to it, there are two notations, I think, the first
24 one: "Noted --" I don't know -- 4941, I beg your
25 pardon 12:18
26 A. Yes. That looks like "noted MF" and the date and his
27 note then to the Minister for her information.
28 254 Q. Yes. "Minister for your information." That would
29 appear to be the 2nd June 2015.

1 A. That's correct.

2 255 Q. And sorry, we see there, Mr. Flahive, assistant
3 secretary, and we have two ticks, have they any
4 particular significance?

5 A. The first tick through the name "assistant secretary" 12:19
6 indicates I have read this and here is my notation,
7 which is noted.

8 256 Q. Yes.

9 A. So in Civil Service, you will notice on the earlier
10 submission, it's also ticked by Mr. Flahive and by the 12:19
11 rúnaí aire. It indicates I have received it and
12 whatever. The second tick on the left, I can't account
13 for that, that wouldn't be Michael saying he has noted
14 this. His tick was the one through the word "assistant
15 secretary". 12:19

16 257 Q. Okay.

17

18 "Re: Update from Minister on GSOC investigation into
19 complaint of inadequate Garda investigation of alleged
20 sexual assault against Sergeant McCabe." 12:19

21

22 And I think you created this document.

23 A. That's correct.

24 258 Q. Do you have a memory of it now having refreshed your
25 memory this morning? 12:20

26 A. Well, I can't say I remember it sitting down, but it's
27 certainly my document, yes.

28 259 Q. If we just go through it, Mr. Power. It says:
29

1 "Please see submission below which sets out the
2 principal elements of a letter from GSOC informing the
3 Minister of the progress of its investigation into a
4 complaint by Ms. D that the Gardaí did not carry out a
5 proper investigation into an alleged sexual assault by 12:20
6 her by Sergeant Maurice McCabe."
7

8 Then you say:
9

10 "I think the alleged sexual assault was referred to in 12:20
11 a particular context during the recent initial hearings
12 of the O'Higgins Commission of Investigation."
13

14 A. Yes.

15 260 Q. What do you think that is a reference to?

16 A. I think certainly it's a reference to the email of the 12:20
17 15th May, wherein the initial reference was made to the
18 issue that had arisen at the O'Higgins Commission that
19 day, and I suspect that either on foot of that then at
20 that time or when this report came in I inquired as to 12:21
21 whether there was a link, and clearly -- well, I say I
22 think it refers to that. Michael would certainly have
23 been in a position to confirm if that was also his
24 understanding, that this was the same case. That's the
25 reason why I say I think it's the same case.

26 261 Q. Okay. So when you say I think the alleged sexual 12:21
27 assault was referred to in a particular context, do you
28 think you checked back on the email or anything like
29 that?

A. I think, I am not sure if I checked back on the email

1 but I think I sought to link the content of the email
2 with this case, and from what I could ascertain, maybe
3 the facts seem to meet somewhere and I surmised that I
4 think this was the case referred to in the email.

5 262 Q. That's a logical enough conclusion I think Mr. Power, 12:21
6 yes.

7 A. Yes. Because if I may say so, I think my only
8 knowledge of what might have occurred on 15th May would
9 have been that email.

10 263 Q. All right. Do you think, looking back on it now, you 12:21
11 discussed it with anybody when the matter came up
12 again, so to speak, and in particular, maybe, with
13 Mr. Flahive?

14 A. No, I'm not certain that I would have discussed it with
15 Mr. Flahive. I think I may have asked Mr. McDermott 12:22
16 whether he could associate this with any one of the IRM
17 -- with an IRM case, and his familiarity may well have
18 brought that to my attention at that point. But again,
19 because of the manner in which the email of the 15th
20 May was constructed I think I was still being a bit 12:22
21 cautious lest there was something else I wasn't aware
22 of. But I am not sure, and I don't think I did discuss
23 it as such. I think my reference here in this covering
24 submission was to indicate that I think that's what the
25 case was about and that Michael would know better 12:22
26 whether it was in fact the case.

27 264 Q. And I suppose you may have been trying to be helpful
28 with regard to the information which was being conveyed
29 here and letting people know that the matter had come

1 up recently?

2 A. Yes, I think I probably would. And I think I may -- I
3 can't say for definite but the outcome of the GSOC
4 investigation seemed definite enough in terms of any
5 further action that they were going to pursue. 12:23

6 265 Q. Yes.

7 A. And that was, at this stage, it would appear, not to do
8 any further action. So I think I was making the link
9 in order that the Minister would be more fully aware.
10 As you will notice, the earlier e-submission is merely 12:23
11 relating to the GSOC report that has come in.

12 266 Q. Yes.

13 A. I think my effort here is to make the link, if it's an
14 appropriate link. If it wasn't an appropriate link
15 Michael certainly would have recognised that. 12:23

16 267 Q. Yes. So I suppose what you were trying to do then was
17 to make sure the Minister was fully briefed in relation
18 to the matter?

19 A. Yes, yes.

20 268 Q. And you would have known from your receipt of the email 12:23
21 that the email had been brought to the Minister's
22 attention at that stage because Mr. Quattrociochi had
23 emailed everybody back?

24 A. Yes, I presume I would have known that the Minister had
25 seen the email, yes. 12:23

26 269 Q. That it had been noted by everybody?

27 A. Yes, yes.

28 270 Q. And then we go into the following paragraphs, you just
29 briefly refer to the alleged incident dating back to

1 December 1998, the complaint being made to GSOC in
2 April 2014, the complaint that the matters were not
3 properly investigated by the Gardaí when it was
4 reported to them in 2006. And then you say:

5
6 "The GSOC report was delivered to the Garda
7 Commissioner on 15th May 2015. Ms. D has been informed
8 of the GSOC conclusions."
9

10 And then you summarise the main points covered in the
11 letter to the Minister, that is the GSOC letter to the
12 Minister of the 21st.

13 A. Yes, correct.

14 271 Q. Is that correct, in relation to the outcome of the GSOC
15 investigation? And we don't have to go through those
16 again, I have referred to them in the actual submission
17 to the Minister. And:

18
19 "GSOC will report further when the Garda Commissioner
20 has responded to the report issued to her."
21

22 Is that correct?

23 A. Yes.

24 272 Q. And you sign off in relation to that, and that's sent
25 to Mr. Flahive by you on 27th May?

26 A. That's right.

27 273 Q. And just in relation to any feedback you get in
28 relation to that, would it be made -- would you be made
29 aware of whether or not the Minister was made --

1 whether the GSOC report and the submission and your
2 outline covering submission, would you have been made
3 aware that it was brought to the Minister's attention?
4 A. I think it would normally be communicated back that the
5 report had been brought to the Minister's attention, 12:25
6 but I note amongst these documents there isn't that
7 notification.

8 274 Q. That notification. And in relation to when these
9 documents were given to the Tribunal in May of this
10 year, did you go through them all or did you trust 12:25
11 somebody else to do it on your behalf?

12 A. By and large I trusted somebody, but I did check the
13 schedules to make sure that the documents that we were
14 discovering were appropriate documents and if it was
15 brought to my attention that there might be redactions 12:26
16 necessary I would have looked at those. I suspect I
17 looked at these documents and thought, yes, they are
18 appropriate and the Tribunal should have them.

19 275 Q. The Tribunal should have them. If you would answer any
20 questions Mr. McDowell might have. 12:26
21

22 THE WITNESS CONTINUED TO BE CROSS-EXAMINED BY
23 MR. MCDOWELL AS FOLLOWS:

24 276 Q. MR. MCDOWELL: well Mr. Power, dealing with page 4941
25 the last paragraph, the last sentence, where you say: 12:26
26

27 "I think the alleged sexual assault was referred to in
28 a particular context during the recent initial hearings
29 of the O'Higgins Commission of Investigation."

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was it forgetfulness an hour ago that you could not see any link between the two?

A. I simply didn't recall this submission at that time. But I am happy to say that it's clear that at the time I sought to make the link, if it was appropriate to make the link and bring it to Michael's attention who would have certainly been able to make the link if it was an accurate link. 12:26

277 Q. Mr. Power, I asked you whether you saw a link at the time or even now whether you saw a link and you wouldn't agree to either proposition. 12:27

A. I didn't record it at the time. I am happy now to say that clearly I did have a link, or did make a link, or seek to make a link. 12:27

278 Q. With respect to you, Mr. Power, and I am not here to judge witnesses, I am here to ask questions. How can you possibly have given me the answers that you gave me an hour ago when you actually did draw this linkage yourself at the time, wrote to Mr. Flahive about it and when I ask you about it, you refused to see a linkage even now, let alone then? 12:27

A. Well, as I said, I didn't recall it at the time. You know. There are lots of things ongoing in writing submissions and so on, I can't recall every single submission I sat down and wrote, here today I can't remember every single one of them. Obviously I am happy to say that now clearly I did make a link two weeks later. 12:28

1 279 Q. You see, the point I was making was that anybody who
2 saw the GSOC investigation report and the email within
3 a few days of each other or a week or two of each other
4 would have inevitably drawn the linkage between the
5 two? 12:28

6 A. Well, I have, as you can see, drawn the link between
7 the two and the purpose I suspect in putting it in here
8 was to make that link so that others, Michael Flahive
9 and the Minister, might know then that the email of the
10 15th May was in fact about the same case. 12:28

11 280 Q. Mr. Power --

12 A. I am saying I think it was the alleged case. I
13 obviously wasn't 100 percent certain at that stage.

14 281 Q. Mr. Power, let's take this bit-by-bit. You now know
15 there was a linkage in your mind? 12:28

16 A. Yes.

17 282 Q. When I asked you whether there was such a linkage in
18 your mind, you wouldn't even assist me at all on that
19 matter?

20 A. I wasn't trying to be unhelpful. I simply did not 12:29
21 recall at that point.

22 283 Q. And when I asked you whether even now looking back on
23 this situation you could see a linkage, you wouldn't
24 assist me?

25 A. Well, clearly the email -- or the submission is seeking 12:29
26 to make such a link, and the email is now here, so we
27 can see that.

28 284 Q. Yes. Now, this was an update for the Minister, and you
29 were writing it on the 27th May to Mr. Flahive so that

1 he would presumably convey it on to the Minister, isn't
2 that right?

3 A. Correct.

4 MR. MCCANN: Just, Mr. Chairman, just looking at the
5 transcript, just I mean, I just wondering was that 12:29
6 perfectly fair -- what the account -- the earlier
7 conversation -- so Mr. Power says --

8 CHAIRMAN: Well, I have Mr. Power noted as saying I did
9 not make a connection with the Ms. D case or any
10 complaint in GSOC. 12:30

11 MR. MCCANN: But at this remove -- I will just read it
12 out, Chairman. This is page 39:

13

14 "But at this remove I cannot say that I made the link
15 or didn't make the link." 12:30

16

17 was his evidence.

18 CHAIRMAN: I know. And --

19 MR. MCCANN: It was put to him on a different basis,
20 that is all. 12:30

21 CHAIRMAN: Well, all of this documentation was familiar
22 to me prior to coming in here, but I tend to wonder
23 where we are going. Because we have to be very careful
24 about this and not to make allegations against people
25 that are unfounded. I appreciate that in this there is 12:30
26 a reference to a sexual assault, but there is no
27 reference to it in the original email, and at the
28 O'Higgins Commission there was no reference to the
29 sexual assault at all. I mean, that is what it's

1 coming back to.

2 MR. MCDOWELL: I asked --

3 CHAIRMAN: Again, I am required to investigate by the
4 Oireachtas whether any unjustified grounds were relied
5 upon by the Garda Commissioner to discredit Sergeant 12:31
6 Maurice McCabe. That is what I am investigating, not
7 the inner workings of the Civil Service. If it's
8 relevant of course, but it has to be relevant.

9 MR. MCDOWELL: Judge, I have, on a number of occasions,
10 made the point that it really doesn't help for me to 12:31
11 make submissions on relevance to you while I am
12 cross-examining witnesses. It doesn't really help me,
13 because I would say, Judge, that the relevance of this
14 is fairly obvious; that the people in the Department of
15 Justice who received the GSOC report must have 12:31
16 connected it with the email as soon as they saw it. If
17 that is not -- I will deal later with why that is
18 relevant, but --

19 CHAIRMAN: If that is the case, that's fine. But
20 what -- how does that -- 12:31

21 MR. MCDOWELL: When I asked the witness could he see
22 anything --

23 CHAIRMAN: No, I know that, Mr. McDowell. It's very
24 often -- no, no, Mr. McDowell, look, it's been a long
25 morning, longer for you than for me, but it's a very 12:32
26 commonplace thing for a judge to ask counsel what is
27 the relevance of a particular question. It may not
28 help you, but I'd say you are well used to making those
29 submissions, Mr. McDowell, and I mean no disrespect by

1 asking.

2 MR. MCDOWELL: Judge, I am used to dealing with
3 matters, but I really think that the relevance is
4 fairly obvious, Judge.

5 CHAIRMAN: Well, I am not -- forgive me for being dim. 12:32

6 MR. MCDOWELL: No. I am saying that the issue, Judge,
7 and I am not accusing anybody of being dim, the issue
8 is, whether those people in the Department of Justice
9 who received this email realised its significance and
10 realised -- had a good reason to understand what was 12:32
11 happening at the O'Higgins Commission. And this
12 document shows that they did appreciate the linkage
13 between what was happening at the O'Higgins Commission
14 and the assault on -- the alleged assault allegation.
15 They saw that. 12:33

16 CHAIRMAN: But, Mr. McDowell, you know, I have read or
17 other people have read parts of -- I have read all the
18 relevant bits of the O'Higgins Commission transcript
19 and the Ms. D sexual assault allegation was never put
20 to Sergeant McCabe as 'didn't you assault a child' or 12:33
21 anything like that.

22 MR. MCDOWELL: Judge --

23 CHAIRMAN: Sorry, Mr. McDowell, I really need to
24 finish. The most that was ever put was 'in consequence
25 of that, when you were exonerated by the DPP, were you 12:33
26 not upset when that could not be circulated to you and
27 to the D family?' That is the height of it.

28 MR. MCDOWELL: With respect, Judge, that -- again I
29 don't want to have an argument in front of this witness

1 on that issue, and I will make extensive submissions
2 when I am given the opportunity to do it. But you
3 asked me -- first of all, let's be clear about this,
4 nobody in this Tribunal is making the allegation that
5 Sergeant McCabe was accused of assaulting Ms. D at the 12:34
6 O'Higgins Commission. Nobody is. So it's a straw man
7 put up there which is not true. And what did happen
8 was that a sustained effort was made to suggest to him
9 that he only made his allegations and was motivated in
10 making his allegations by reason of the fact that he 12:34
11 was dissatisfied with the failure of the Garda
12 authorities to communicate the DPP's directions to the
13 D family.

14 CHAIRMAN: That case was certainly made, but very much
15 controlled by the judge. 12:34

16 MR. McDOWELL: I think the Tribunal will find that that
17 was certainly done to him, at a tribunal, at a
18 tribunal -- sorry, at a commission where there were
19 upwards of 40 to 60 people in the room from time to
20 time, that was put to him. And it was put in writing 12:35
21 to him as well on an entirely false basis, as we know
22 as well.

23 CHAIRMAN: Yes.

24 MR. McDOWELL: Now, that goes to the heart of the
25 second issue. the first issue as to whether he was 12:35
26 ever accused at the O'Higgins Commission of assaulting
27 Ms. D is a non-issue because nobody, nobody who read
28 any of the papers could believe that.

29 CHAIRMAN: well, people obviously did and that includes

1 the Oireachtas who actually put it -- sorry, it
2 includes the Oireachtas which is the question they
3 asked me and apparently it's not correct at all. So I
4 don't know where they got the impression, but --
5 MR. MCDOWELL: Judge, nobody who has any passing 12:35
6 acquaintance with what happened there could possibly
7 believe that.
8 CHAIRMAN: Mr. McDowell, you need more than a passing
9 acquaintance. You need to read the whole thing from
10 beginning to end. 12:36
11 MR. MCDOWELL: Exactly. But --
12 CHAIRMAN: To be sure of that.
13 MR. MCDOWELL: Nobody could believe for one minute that
14 this is an issue now before this Commission -- before
15 this Tribunal. 12:36
16 CHAIRMAN: All right. Mr. McDowell, let's kind of draw
17 this to a close if you don't mind. I have no problem
18 with you cross-examining Mr. Power. I have no problem
19 with you asking questions. But it has to be
20 appreciated as well that I have to look at things on 12:36
21 the basis of what I am asked, what my jurisdiction is
22 and how relevance --
23 MR. MCDOWELL: I accept that, Judge.
24 CHAIRMAN: -- informs matters. And I think it can be
25 appreciated as well from any judge who sat in a 12:36
26 criminal case, in particular, that anything can be made
27 relevant to anything.
28 MR. MCDOWELL: Judge, I hope you are not suggesting
29 that I am attempting to make anything relevant to just

1 anything.

2 CHAIRMAN: No. No, I am not, Mr. McDowell. I am
3 saying that is the danger.

4 MR. McDOWELL: Sorry, I am not anywhere near that
5 danger zone and I really do believe, Judge, that it 12:36
6 shouldn't be put to me as a proposition that I am in
7 danger of doing that.

8 CHAIRMAN: Mr. McDowell, look, that question -- that
9 comment is not directed at you. It's directed -- no, I
10 feel I need to say this. It's directed towards the 12:37
11 general proposition, which may be summarised as law
12 world. We have here nearly 5,000 pages, and what needs
13 to be focused on is the issue which the Oireachtas has
14 put to me. That is what I am saying.

15 MR. McDOWELL: Yes. 12:37

16 CHAIRMAN: I say it to myself every single day and I
17 say it to myself in the context where, for instance,
18 indeed, in rape or sexual assault cases, people can
19 make things relevant apparently which are not relevant,
20 I can give you some very, very choice examples. But 12:37
21 what I don't want to happen and what we have been
22 trying to ensure doesn't happen, is that we simply
23 enter into a world of looking at documents and failing
24 to remember that the Oireachtas has asked us a specific
25 question. And that is all. Now, now that I have 12:38
26 clarified that is a general comment and not a comment
27 for you, it is a comment indeed for myself, I can't say
28 that it's kind of like my morning prayer, but it's
29 certainly something that I remind myself of every day.

1 I think maybe we should have a break for lunch and then
2 we will come back in an hour.

3 MR. MCDOWELL: Thank you, Judge. Can I say, Judge, I
4 hope I am not sounding tetchy, Judge. I know I am,
5 really, to be honest with you. But, Judge, what I am 12:38
6 saying is, I think I did explain to you what our case
7 was when you asked me weeks ago what it was, and --

8 CHAIRMAN: Well, no, you did, and you did clarify the
9 sexual assault bit, but I need to focus on what it
10 actually is, and maybe I do need a bit of reminding 12:38
11 from time to time, and, as the years go by, maybe more
12 will be required.

13 MR. MCDOWELL: Maybe I need reminding too, Judge.

14 CHAIRMAN: So we will break for an hour.

15 12:39

16 THE HEARING ADJOURNED FOR LUNCH

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1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

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3 285 Q. MR. MCDOWELL: Now, Mr. Power, this report from GSOC
4 was received I think on the 21st May in your
5 Department, is that right?

13:41

6 A. That's correct, yeah.

7 286 Q. And Frank McDermott of the Garda division prepared a
8 memorandum for Mr. Quattrociochi, is that right?

9 A. That's correct.

10 287 Q. And the report itself was not submitted to the
11 Minister?

13:41

12 A. It does not appear to have been submitted with that
13 email.

14 288 Q. No. And then looking at the documents that you have
15 before you here, when was it, in fact, first sent to
16 the Minister, do you think?

13:41

17 A. I think it was sent to the Minister with the submission
18 of the 27th May.

19 289 Q. I see. And if Mr. Flahive signs it as the 2nd June
20 2015, is that -- this is on page 4938, at the top.

13:42

21 A. I assume that's the day he forwarded it to the
22 Minister's office.

23 290 Q. I see. So -- and you think that the Minister didn't
24 see it until 2nd June, is that right?

25 A. She may not have seen the full report until 2nd June.

13:42

26 291 Q. And I just want to understand how is it that you say
27 that it was attached to that report?

28 A. Because I think in the schedule it indicates that the
29 submission of the 25th -- 27th May is a submission from

1 the division to the Minister with GSOC report tabbed,
2 eleven pages, and the GSOC report, I think, was nine
3 pages, eight or nine pages. So the record number 5:
4

5 "Submission from Policing Division to Minister with 13:43
6 GSOC report tabbed."

7 292 Q. I see. And can you just explain to me the difference
8 between submission from Policing Division to Minister
9 and covering submission to assistant secretary?

10 A. The covering submission was my attempt to hone in on 13:43
11 what I thought were the more salient points of the
12 submission made by Mr. John English, which summarised
13 the report more generally. My covering submission was
14 an attempt to allow that summary to be read, if it
15 needed to be, or the full report, but to try to hone in 13:44
16 on the two or three or four critical points from that
17 report.

18 293 Q. I see. So we're to take it then that Mr. English
19 prepared his document on the 27th May and that you then
20 decided to condense it further for Mr. Flahive and the 13:44
21 Minister, is that right?

22 A. Yes.

23 294 Q. Could I just ask you to go back to page 4936, the
24 document which is dated 21st May from Mr. McDermott.

25 A. Yes. 13:45

26 295 Q. It recites at paragraph 1 that:

27

28 "Ms. D's case is amongst those under consideration
29 under the IRM. Deputy Martin made representations in

1 relation to the case."

2

3

And at paragraph 3 it's stated:

4

5

"Counsel have made their recommendations in the case to 13:45
the Department. They have recommended the Minister
take no further action. The case will be submitted for
consideration of the recommendation and a notification
letter will issue to Ms. D in due course."

10

13:45

11

Are we to take it from that that -- who was it to be
submitted for recommendation?

12

13

A. To the Minister.

14

296

Q. So the Minister was yet to make a final decision in
respect of the IRM?

15

13:45

16

A. Correct.

17

297

Q. Out of the 21st May, is that right?

18

A. Yes.

19

298

Q. Sorry, I had got a different picture completely from
Mr. Flahive. But, in fact, it was -- it hadn't been
disposed of by the Minister at all, at this stage?

20

13:46

21

A. I don't believe at this stage it had been, no.

22

299

Q. Is that is what you are saying?

23

A. No. I think, if I may, amongst the other disclosed
documents is the file relating to this case, which I
think should show the date of the submission to the
Minister.

24

13:46

25

26

27

28

300

Q. Yes. Sorry, I lost you there. What did you just tell
me there? You wanted to what?

29

1 A. I beg your pardon, sorry. The IRM file in this case
2 was actually disclosed to the Tribunal.

3 301 Q. Yes.

4 A. So I think that will clearly show the date on which the
5 submission in that particular case was made to the 13:46
6 Minister. So it's with the Tribunal somewhere.

7 302 Q. I see. And just as a matter of interest, would the
8 Minister sign off on that submission?

9 A. Yes. The Minister would have signed off on all the
10 submissions in all 320 cases, in terms of approving the 13:46
11 approach to be taken in each case.

12 303 Q. I see. So am I right in thinking that the discovered
13 documentation at item 5, which is "Submission from
14 Policing Division to Minister with report tabbed",
15 there should be a signed-off copy by the Minister 13:47
16 acknowledging that she'd read it, or whatever?

17 A. Em, I would normally expect to receive or see something
18 back from the Minister's private secretary to say she
19 had seen and noted it.

20 304 Q. And did that happen on this occasion? 13:47

21 A. I can't say at this point because I don't see any
22 particular reference amongst these documents.

23 305 Q. I mean, I think it is fairly safe to assume, is it not,
24 that Mr. Flahive wouldn't have failed to give a
25 document headed "Update for the Minister" signed by 13:47
26 you, and I think written on top of it is "Minister, for
27 your information", so presumably it was sent to her?

28 A. That's the conclusion I would draw.

29 306 Q. On the left, is that "noted FF"?

1 A. Yes, I believe that's the word "noted" and Michael's
2 initials.

3 307 Q. Yes. Do you think that's the Minister's note on it?
4 A. I'm afraid, I'm sorry, the copy I have is not very
5 clear. We're looking at page 4941? 13:48

6 308 Q. Yes.
7 A. It hasn't photocopied very well.

8 309 Q. No.
9 A. But it could well be "FF", yes.

10 310 Q. Because if it was "Minister, for your information" it'd 13:48
11 be quite normal for the Minister then to say "noted",
12 or whatever, isn't that right?
13 A. In general terms, yes.

14 MR. MCCANN: It's the Minister's initials, if that is
15 any help, Chairman. 13:49

16 MR. MCDOWELL: That is what I gathered myself, but I
17 didn't want to draw some --

18 A. I'm sorry, it just doesn't look clear to me on the
19 papers. But looking at it on the screen, it looks to
20 be "noted FF", which -- 13:49

21 311 Q. So it's "noted" and the Minister's initials, Mr. McCann
22 helpfully tells me.
23 A. That's what that seems to be, yes.

24 312 Q. It says:
25
26 "I think the alleged sexual assault was referred to in
27 a particular context during the recent initial hearings
28 of the O'Higgins Commission of Investigation."
29 A. Yes. 13:49

1 313 Q. And that document seems to have been noted by the
2 Minister, is that right?

3 A. Yes.

4 314 Q. Going back to page 4936, paragraph 2:

5

13:49

6 "The substance of Ms. D's complaint is as follows."

7 A. Yes.

8 315 Q. And it states:

9

10 "Ms. D has made allegations of sexual assault against a
11 member of An Garda Síochána, Sergeant Maurice McCabe. 13:50

12 The assault took place in 1998 when she was six years
13 old and the offender was a friend of her father's, also
14 a serving member of the force. She only divulged the
15 information to her parents when she was 14. The 13:50

16 incident was reported to the Gardaí in the
17 Cavan-Monaghan division in 2006 and the incident was
18 investigated by a Garda inspector who personally knew
19 her father and her assailant. She was aggrieved that
20 an independent officer had not been assigned to her 13:50

21 case. She claims that the event had a devastating
22 effect on her life and the lives of her parents. She
23 believes that her assailant was never arrested or
24 questioned in relation to the incident and that AGS
25 were protecting him. As such, she claims that the 13:51

26 matter was never properly investigated. Her case was
27 referred to the DPP who directed no prosecution due to
28 a lack of evidence. Ms. D alleges that although a
29 formal and written complaint was made to Gardaí, no

1 record of the incident was ever recorded on Pulse."

2
3 where did that come from, that paragraph?

4 A. Em, as you know, I didn't read fully the copy this
5 morning of the letter from GSOC. It may well have come 13:51
6 from the GSOC letter. But it's also possible that it
7 came from the IRM complaint, which is, in substance,
8 the same complaint.

9 316 Q. Yes. And, you see, what is strange about all of these
10 memoranda is that none of them recite the fact that the 13:51
11 matter had been investigated by the DPP and -- as
12 stated in the GSOC report, which the Minister hadn't
13 yet received, that the DPP had found that there was no
14 offence and that what was described didn't even amount
15 to an offence, if true. That was never put to the 13:52
16 Minister in any of these documents?

17 A. Well, in the submission from Mr. English it says:

18
19 "A file was prepared for the DPP, who directed no
20 prosecution." 13:52

21 317 Q. Yes.

22 A. So it is clear there that the Director had been
23 involved and had made a decision.

24 318 Q. Yes. But I'm just, I'm querying why it is that the
25 GSOC report, which was so clear in stating what the DPP 13:52
26 had found, what Ms. Hurley in the DPP's office had
27 found about -- or find in relation to the matter, was
28 not reduced to writing for the Minister to consider?

29 CHAIRMAN: It was Ms. Howlin, by the way.

1 MR. MCDOWELL: Ms. Howlin was the DPP's office --
2 CHAIRMAN: Yes.
3 A. The directions were issued -- or the directions went
4 back to the Gardaí, not to the Department.
5 319 Q. MR. MCDOWELL: Yes. No, but if you had read the GSOC 13:53
6 report in full, it would have been clear that GSOC set
7 out exactly what happened in relation to the DPP's
8 direction. And if you go to the sixth page of the
9 letter.
10 A. I'm sorry, I don't have the letter in front of me at 13:53
11 the moment.
12 MS. LEADER: It's in volume 9, if it is of assistance.
13 Page 4917.
14 MR. MCDOWELL: Page 4917 is the first page of the
15 letter, is it? 13:54
16 MS. LEADER: Yes.
17 MR. MCDOWELL: Yes.
18 A. Yes, I have that. And, sorry, the page reference was?
19 320 Q. 4922 I think on my poor arithmetic should bring you
20 to -- page 4922, yes. 13:54
21
22 "The investigation report and evidence in the case was
23 sent to the State solicitor for Cavan acting for the
24 DPP on the 19th February 2007. On the 5th April 2007,
25 Liz Howlin, of the office of the Director of Public 13:54
26 Prosecutions, directed no prosecution. The direction
27 indicated that the incident described did not amount to
28 an offence."
29 A. Mm-hmm.

1 321 Q. I'm just wondering why none of that was drawn to the
2 Minister's attention in the résumés that were given?
3 A. Well, I think the résumés have to take account of the
4 salient issues in the report, and the salient issue
5 there was the DPP directed no prosecution. 13:55

6 322 Q. Yes.
7 A. In addition to which, as you know, the report itself
8 was included with the submission.

9 323 Q. Yes.
10 A. But the résumé was an attempt to -- it's nine pages -- 13:55
11 was an attempt to draw the Minister's attention to what
12 were deemed to be the most important points of the GSOC
13 letter, and, if the Minister or anybody else wished to
14 read in full, the letter was there itself.

15 324 Q. Well, now, I mean, we've had an hour or two to reflect 13:55
16 on all the documents. I take it you do agree that
17 there was a clear linkage between this and the email?
18 A. Yes, I think it's certainly clear now that there was a
19 link, yes.

20 325 Q. Yes. 13:56
21 A. Well, we are talking about the same case, obviously.

22 326 Q. Yes. But are you still sticking to the position that
23 when you saw the email, you didn't know what incident
24 Mr. Flahive was referring to?
25 A. Yes, I mean, I've -- that was my position on 15th May 13:56
26 2015. I've no reason to change it today to say that
27 now I remember something which I couldn't remember at
28 the time.

29 327 Q. So his code, as he put it himself, was sufficiently

1 A. Yes.

2 336 Q. Do you remember that?

3 A. Well, I can't say I can recall that. But, yeah, I
4 remember the report generally, and they commented on
5 processes in the Department. 14:00

6 337 Q. Is that a fair description of the IRM process, that,
7 depending on the gravity and complexity of the issues
8 raised, they were regularly overseen at senior
9 management level, up to and inclusive of the Secretary
10 General of the Department and the Minister, himself or 14:00
11 herself?

12 A. Well, I wonder is that referring more generally to how
13 complaints are dealt with within the Department --

14 338 Q. Yes.

15 A. -- as opposed to these IRM cases? 14:00

16 339 Q. No, I think it is the IRM cases.

17 A. Well, certainly --

18 MR. MCCANN: Chairman, I just wonder how fair it is for
19 the witness not to have the entire document.

20 MR. McDOWELL: Well, the entire document is vast. 14:00

21 MR. MCCANN: Or even the relevant pages.

22 CHAIRMAN: Yes. I mean, that's a point that needs to
23 be made. Once these were produced this morning, I was
24 already familiar with them and I think they had been
25 distributed in the previous module. I just want to 14:00
26 have a look at IRM file, which is a thing perhaps I'm
27 not familiar with at this point because it didn't seem
28 to me to be relevant. But there's no harm in any of
29 the questions you're asking, Mr. McDowell.

1 MR. MCDOWELL: I don't want to take the witness short
2 at all.

3 CHAIRMAN: So I might take the chance to look at it.

4 MR. MCDOWELL: I was just seeking from him confirmation
5 that the modus operandi within the Department of 14:01
6 Justice and Equality was "that there was a patently
7 careful internal review conducted within the Department
8 of Justice and Equality, frequently one that went
9 through many hands and, depending upon the gravity and
10 complexity of the issues raised, regularly overseen at 14:01
11 senior management level, up to and inclusive of a
12 Secretary General of the Department and of the
13 Minister, himself or herself."

14 A. Could I have a page reference? I have a copy of the
15 report. 14:01

16 340 Q. You have?

17 A. Yes. If you have a page reference, I can see it.

18 341 Q. Sorry, it's page 14 I'm quoting from there.

19 CHAIRMAN: He has it.

20 MR. MCCANN: That will obviously address my concern, 14:01
21 thank you, Chairman.

22 A. Yes. But I think if you -- the context of this is,
23 this is counsel giving us a report explaining how some
24 of the files that were delivered to them for part of
25 the IRM were generated. 14:02

26 342 Q. MR. MCDOWELL: Yes.

27 A. And if you look at the previous pages, it says:
28
29 "The generation of files from within the Department".

1 343 Q. Yes.

2 A. And so, therefore, it's not describing the IRM process;
3 it's describing departmental processes in relation to
4 complaints or whatever other files are in place for
5 dealing with such complaints. And it says clearly then 14:02
6 depending on complexity, any of those files, which may
7 or may not have been part of the IRM, would have been
8 looked at in a certain way. And I think that is what
9 that paragraph is saying.

10 344 Q. I see. Yes. 14:02

11 A. It's not referring to the IRM process.

12 345 Q. I understand you now. I fully understand you, yes.
13 Now, could I ask you, you mentioned a letter earlier
14 from the Chief State Solicitor's Office to the
15 Commission of Investigation in respect of which there 14:02
16 was some query as to whether privilege should be
17 pleaded.

18 A. Yes, I remember that, yes.

19 346 Q. Can you remember what date that letter bore?

20 A. I can't, at the moment, but I suspect the schedule 14:03
21 probably puts a date on it, the schedule that we
22 delivered with that.

23 347 Q. Of your affidavit?

24 A. No, it wasn't -- I don't think I did an affidavit for
25 that discovery. We delivered a schedule with a report 14:03
26 following the searches for documents. This was part of
27 what -- part 3 of that schedule, which set out two
28 documents; one is the privileged document and the other
29 is this document. It may say what date it is. I can't

1 recall at this point.

2 348 Q. I am just asking you, can you recollect what that
3 document was? What was this Chief State Solicitor's
4 Office writing to the Commission of Investigation
5 about? 14:03

6 A. I don't recall. It was from Annmarie Ryan to
7 Mr. O'Hagan. But I don't recall the contents.

8 MR. McDOWELL: I wonder could my colleagues assist me
9 on this?

10 MS. LEADER: It's just not immediately to hand, sir. 14:04
11 But Ms. Mullan will get it.

12 CHAIRMAN: Okay.

13 349 Q. MR. McDOWELL: Well, I suppose I should be just
14 straightforward: Was it the letter of the 18th May?

15 A. I can't recall. 14:04

16 350 Q. Well, can you recollect how it came to be in the hands
17 of the Department?

18 A. I tried to explain earlier; what happened when we were
19 doing the electronic trawl for any evidence that might
20 be, or any information or documents that might be 14:04
21 relevant to the Tribunal --

22 351 Q. Yes.

23 A. -- the search criteria searched through all the email
24 accounts that the Department hosted on its servers.

25 352 Q. Yes. 14:04

26 A. One of the email accounts that it hosted was the email
27 account of the Commission, the O'Higgins Commission
28 itself.

29 353 Q. Oh, I see.

1 A. And from that database, or that --

2 354 Q. well, then --

3 A. -- it threw up this particular email.

4 355 Q. I follow you. So I don't want to start chasing a
5 completely irrelevant question. You're saying that 14:05
6 these documents came from the Commission to the
7 Department?

8 A. No, no, I'm not saying that. What I am saying is,
9 these were documents in this particular case, this
10 particular document was from the Chief State 14:05
11 Solicitor's Office to the solicitor to the Commission.

12 356 Q. Yes.

13 A. The Commission's email account was hosted on the
14 Department of Justice's servers. The search for
15 electronic records that took place after Christmas went 14:05
16 through all of the email servers hosted by the
17 Department and out of the server for the Commission it
18 found this document that met the criteria. So counsel
19 examined all those 35,000 documents. This was one that
20 they identified as possibly relevant. When we were 14:05
21 scheduling the records that documentary counsel found,
22 two of them came out which looked unusual; one was the
23 privileged one which I mentioned earlier, and this one,
24 which we believed the Department didn't own in the
25 sense of have ownership of or have a right to decide 14:06
26 what to do with it. So we informed the Tribunal that
27 we had it but that we couldn't deliver it to them
28 because it wasn't ours to deliver, but we did say to
29 the Tribunal if they wanted to see it or make their own

1 decision, we would certainly make it available, and
2 that is where it was left at the time. It's recorded
3 in part 3 of the schedule to the disclosure or
4 discovery at the beginning of this year, of 19th
5 January. 14:06

6 357 Q. Judge, I don't want to delay things, but, I mean, if it
7 was the letter of the 18th May 2015, are you saying
8 that the only way, the own sense in which it was in the
9 Department's possession was that it was part of the
10 Commission's file? 14:06

11 A. It was an email on the Commission's email server, which
12 was hosted by the Department.

13 358 Q. To be very clear: Are you saying that it was not a
14 copy document which the Department had of itself?

15 A. Correct. 14:07

16 359 Q. I just want to be a hundred percent clear on that.

17 A. Yes, that's correct.

18 360 Q. Yes. Could I ask you to go to page 4801.

19 A. Yes, I have that.

20 361 Q. And do you see you're sending Kathleen Connolly an
21 email headed "Meeting with Commissioner". It's at the
22 bottom of that page. 14:07

23 A. Yes.

24 362 Q. And you say:
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26 "Could you assemble in a word document all the material
27 we used in the last week, including supplementary
28 questions for the priority PQs, please."
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A. Yes.

363 Q. Do you know was such a word document proposed?

A. I believe that the email further up would seem to answer -- it's sent to Mr. O'Callaghan. It says:

14:08

"You might let me know if the hard copy is required also."

I believe that Kathleen would have assembled the necessary records and would have forwarded them on.

14:08

364 Q. You see, what's further up, it says that -- Kathleen Connolly is writing to John O'Callaghan, saying:

"In connection with this evening's meeting with the Commissioner, Martin has approved the submission of the attached briefing note for your consideration."

14:08

But, I mean, the briefing note appears to have been based on a collection of documents which were in a word document, and I'm wondering are they available or what became of them?

14:09

A. I believe that the document attached at 4803 is the briefing report that was prepared as a result of this.

365 Q. But it could hardly be the same -- you could hardly say "Assemble in a word document all the material we used in the last week, including supplementary questions for the priority", where's the material as distinct from the document that you prepared?

14:09

1 A. Well, when I asked to assemble in a word document, I
2 think what I was doing here was indicating that some of
3 the material that would have been prepared within that
4 period might not have been in word form; it might have
5 been an email, for example. And I was asking her to 14:09
6 put it into word format so that it could be put into a
7 briefing document.

8 366 Q. And did you discover all of those emails on that
9 material?

10 A. No, I don't think so. This is a year after the May 14:10
11 2015 email. And it says clearly "used in the last
12 week".

13 MR. McDOWELL: I see. Thank you, Mr. Power.

14 MR. DIGNAM: No questions, Chairman.

15 MS. LEADER: I don't know if Mr. McCann has questions. 14:10

16 MR. MCCANN: Oh, sorry, I thought Mr. Dignam had
17 questions.

18 MR. DIGNAM: I've no questions, Chairman. I don't
19 think I pressed the button. No questions.

20 14:10

21 MR. MARTIN POWER WAS CROSS-EXAMINED BY MR. MCCANN:

22

23 367 Q. MR. MCCANN: Mr. Power, a small number of questions.
24 The Chairman, as we know, made a statement on the 28th
25 February 2017 outlining what his terms of reference 14:10
26 were and seeking cooperation. Do you remember that?

27 A. Yes, indeed.

28 368 Q. Is that a proper way of describing what the Chairman
29 did?

1 A. Yes.

2 369 Q. And could you explain to the Tribunal what steps were
3 taken on foot of that by the Department, please?

4 A. Well, the Chairman will well remember that at that time
5 we were still trying to establish his IT systems, and 14:11
6 so on, because it was still very early, so I had
7 gotten -- received a copy of the Chairman's opening
8 statement with a view to having it put on the
9 Tribunal's website, and, when I received it, I
10 forwarded it to our ICT division, information 14:11
11 technology division, with a view to having it put on
12 the website, and I also cc'd that copy to the Secretary
13 General's office, Deputy Secretary and I think Michael
14 Flahive at the time, so that they would be aware of
15 what the Tribunal was saying. 14:11

16 370 Q. Right.

17 A. We commenced the next day, within my division, we began
18 to feel that we would have some material that might be
19 relevant to the terms of reference, and, in view of the
20 Chairman's call for cooperation, we were certainly 14:12
21 looking at things like our IRM file. We knew we had
22 the records of the O'Higgins Commission, although they
23 were sealed. And we may have had other matters that
24 might be relevant, given the nature of the work we do
25 in my section. On the 1st March, I recall I emailed a 14:12
26 colleague in another division, a crime division, as we
27 call it in the Department, which may also have had
28 relevant documents. I subsequently got a reply there
29 saying they didn't. So that was the nature of the

1 beginning of the work. And I then -- as you know, we
2 wrote to the Tribunal early in March to say we were
3 doing this and we might have certain materials, and
4 then again we wrote in February -- or in April, saying
5 we've located some material, we're getting advice and 14:12
6 we may have to ask you to make an order, which was what
7 subsequently happened.

8 371 Q. would you just, please, address for the Tribunal the
9 issue of whether or not, as was raised with witnesses,
10 whether or not the Department asked witnesses for 14:12
11 witness statements or not, why that was done or why it
12 wasn't done?

13 A. No, not at that stage. I think a view was taken that
14 the likelihood that relevant documents would be within
15 the Department were likely to be within one or two 14:13
16 sections, mine included - mine primarily, I should say.
17 The statement was sent to others in the Department. If
18 they thought they had evidence or whatever, they were,
19 I presume, entitled to come forward with that
20 themselves. The Chairman clearly asked for people who 14:13
21 were witnesses. And perhaps a view was taken that that
22 meant people who had firsthand knowledge of certain
23 things. And it also asked for anybody who may have
24 documents. And I think that's probably the category to
25 which officials in the Department probably thought we 14:13
26 were likely to be and that's why we were doing our
27 search.

28 372 Q. Yes. And then can you just explain to the Tribunal
29 that you didn't carry out a generalised email search at

1 that stage?

2 A. No, we didn't. I think we took what was not
3 unreasonable at the time, the view that material was
4 likely to be within my section and we would have been
5 able to check our own emails there as well as our 14:14
6 electronic files and our paper files.

7 373 Q. If we just turn to 4941 for a moment, please,
8 Mr. Power.

9 A. 4941?

10 374 Q. 4941, sorry. It's the document we've been discussing. 14:14

11 A. Oh, I beg your pardon. Sorry, yes. Yes, yes.

12 375 Q. And the note for the pack for the Minister, am I right
13 in understanding, I think you've explained this already
14 to the Chairman, that among the pack that was sent to
15 the Minister was the entire letter from GSOC, isn't 14:14
16 that right?

17 A. That's correct, yes.

18 376 Q. So any suggestion that the fact that the allegation
19 against Sergeant McCabe could never have amounted to a
20 criminal offence, that was in the pack sent to the 14:15
21 Minister?

22 A. That's correct.

23 377 Q. And if we just look at 4941 then, it's identified as
24 for information only, isn't that correct?

25 A. Yes, that's right. 14:15

26 CHAIRMAN: Where is that?

27 MR. MCCANN: Sorry, Chairman. So 4941 is the last
28 document in the book, and you will see handwriting in
29 the right-hand corner, top right-hand corner, Judge:

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"Minister, for your information. Michael Flahive."

CHAIRMAN: Yes.

MR. MCCANN: 2/6/2015.

CHAIRMAN: I get you.

14:15

MR. MCCANN: Yes.

CHAIRMAN: And what bit are you referring to in that?

MR. MCCANN: well, I'm just noting that the document, insofar as the Minister saw it, was for her information only. It wasn't a submission, to use the term of art --

14:15

CHAIRMAN: But you say also in the pack was a statement to the effect that what was alleged was ruled by the DPP not to amount to a sexual assault or an assault at all.

14:15

MR. MCCANN: Yes, yes.

CHAIRMAN: And that is where I was wondering. I know it's there somewhere --

MR. MCCANN: Oh, yes, sorry. Sorry, it's in --

Mr. Meehan is going to get it for me now. It's in the GSOC letter.

14:15

CHAIRMAN: Oh, yes, it is. All right. That is fine. As long as I know what you are talking about. Thank you.

MR. MCCANN: And the GSOC letter was in the pack sent to the Minister.

14:16

378 Q. Just as regards your comment there about the alleged sexual assault against Sergeant McCabe, of its nature prefaced by the words "I think", it's a tentative

1 comment on your remark?

2 A. I think that's accurate, yes.

3 379 Q. It's not making any adverse comment about the O'Higgins
4 Commission.

5 A. Certainly not, no. 14:16

6 380 Q. It's a passing remark?

7 A. Yes.

8 381 Q. Yes. And this letter, this briefing note for the
9 Minister, among others, was concerning the GSOC report.
10 It wasn't concerning the O'Higgins Commission? 14:16

11 A. That's correct.

12 MR. MCCANN: Thank you very much, Mr. Power.

13 CHAIRMAN: Was there anything else, Ms. Leader?

14 MS. LEADER: No, sir.

15 CHAIRMAN: No. Just arising out of a few things that 14:16
16 have -- I asked Ms. Ní Ghabhann to get me a copy of the
17 relevant IRM file, and I have gone through it, while
18 obviously keeping a very open ear on all of the
19 evidence and watching the transcript. And it seems to
20 me what -- in terms of the relevant dates, is that the 14:17
21 Minister, through her private secretary, wrote to Ms. D
22 on the 2nd November 2015 saying the process has been
23 gone through and there's no reason to carry it further,
24 that was the IRM, and also saying that the Minister
25 proposed there was going to be a general report, but 14:17
26 that looks to me like a letter that would be sent to a
27 whole load of people, like 500 people. I think there
28 was 350, or something, in that respect. Now going to
29 the general issue as to whether the whole IRM process

1 was alive after Christmas, as Mr. Power believes it may
2 have been, or whether it had finished more or less
3 before Christmas, which Mr. Flahive believes it was, as
4 I see it, on the 29th October 2014 the entire
5 investigation file was forwarded from the Gardaí in 14:18
6 Cavan-Monaghan division to the Department of Justice
7 and then, I presume, shortly after to counsel. Counsel
8 wrote a report, which is the IRM report, and I imagine
9 they did it shortly after, but the report isn't dated.
10 But there doesn't seem to be any further pressure 14:18
11 beyond the pressure that had come up to the point where
12 the file was forwarded to counsel. Now, all I'm saying
13 in relation to that is, I suppose, two things:
14 Firstly, the documents that were referred to today are
15 not a stranger to the Tribunal. I realised I had read 14:18
16 them in various files. Many of them were in the last
17 module. But if, for instance, Mr. McDowell, you want
18 to look at the IRM -- no, but if you do, I'd invite
19 you, or whoever you nominate, in to look at it, but I
20 don't want to distribute it because it refers to names 14:19
21 all over the place and it's not -- it's not relevant.
22 That's the only thing that is alive, and it seems to me
23 it ended in or around Christmas 2014, the whole
24 process, IRM process, though people seem to have been
25 written to about a year later, and then if there was a 14:19
26 general report, it seemed to have been published about
27 a year later.
28 MR. McDOWELL: I fully appreciate what you are saying
29 to me, Chairman. No, I had actually understood from

1 Mr. Flahive's evidence that counsel were sent to the
2 Garda Headquarters to have access to the file rather
3 than the file coming to the Department of Justice.
4 That is the only new information that I have gleaned
5 from what --

14:19

6 CHAIRMAN: Well, it could be they sent it up to Garda
7 Headquarters, I don't know. If it becomes important
8 later on, we can look at it. But for the moment, that
9 seems to me to solve the mystery.

10 MR. MCDOWELL: Yes. So it appears that until at least
11 November there were two parallel processes in play --
12 of 2015: One, the GSOC process which had started on
13 29th April; and, two, an IRM process in respect of
14 Ms. D which had started at some other point in that
15 year.

14:19

14:20

16 CHAIRMAN: Yes. No, I'm not sure that is correct
17 because I think, in fact, the correct interpretation
18 is: once the file had gone from Cavan to Dublin,
19 whether it was in Justice or in Headquarters, I don't
20 know, but it certainly came to Department of Justice
21 first, that was on the 29th October 2014, counsel had
22 asked for the investigation file.

14:20

23 MR. MCDOWELL: Yes.

24 CHAIRMAN: It wouldn't take you long to read it - about
25 an hour, I would suspect.

14:20

26 MR. MCDOWELL: Yes.

27 CHAIRMAN: And I would imagine they then signed off.
28 But in terms of the overall process, what I see from
29 the file is that the Minister was writing to Ms. D on

1 the 2nd November 2015, but that could be in the
2 context, and the letter looks like a standard letter,
3 sent to 300 people, and promising, look, there's going
4 to be an overall report as well. So the administrative
5 aspect of it could have been held up, but the IRM thing 14:20
6 could have been well finished a year previous.

7 MR. MCDOWELL: In other words, the Minister's final
8 sign-off was a more or less forgone conclusion.

9 CHAIRMAN: Yes, I think so. And it looks as if, once
10 it had been decided not to send it to the O'Higgins 14:21
11 Commission, that was it, it didn't rear its head again.
12 That's what it looks like, Mr. McDowell. Now, you're
13 welcome to check that --

14 MR. MCDOWELL: I don't want to complicate matters.

15 CHAIRMAN: -- if you want. No, but if it becomes 14:21
16 important, it is. It's just I don't want anyone to
17 feel that we're not aware of stuff.

18 MR. MCDOWELL: Maybe my solicitor could look at it at
19 some stage.

20 CHAIRMAN: The file is there. Certainly, yes. 14:21
21 Obviously under the ordinary conditions attached to
22 secrecy, etcetera.

23 MR. MCDOWELL: Yes.

24 CHAIRMAN: Thank you, Mr. Power.

25
26 THE WITNESS THEN WITHDREW
27

28 MR. MCGUINNESS: The next witness, Chairman, is
29 Ms. Frances Fitzgerald, please.

1
2 MS. FRANCES FITZGERALD, HAVING BEEN SWORN, WAS DIRECTLY
3 EXAMINED BY MR. MCGUINNESS:
4

5 382 Q. MR. MCGUINNESS: Ms. Fitzgerald --

14:22

6 A. Yes.

7 383 Q. -- during the course of the afternoon I will be asking
8 you to refer to different documents and you have a
9 choice as to whether you'd like to see them on screen
10 or take them from one of the several volumes at your
11 left-hand side. Please feel free to do either at any
12 stage.

14:22

13 A. Thank you.

14 384 Q. Just for the information of parties, Ms. Fitzgerald's
15 statement is to be found in volume 6 at page 3362 and
16 thereafter. I think you started your career as a
17 social worker and family therapist, is that correct?

14:22

18 A. Yes, I did a social science degree in UCD and I worked
19 in Dublin as a social worker for a number of years and
20 then I did a masters in social administration and
21 social work in the London School of Economics, so I
22 worked as a social worker on and off, not when my
23 children were young but later on for about 20 years.

14:23

24 385 Q. Yes. I think you obviously went into politics, but
25 prior to that you served as the Chair of the National
26 Women's Council of Ireland between 1988 and 1992?

14:23

27 A. Yes, I was Chairwoman there. It's a voluntary
28 position. I was Chair of that organisation.

29 386 Q. And I think you had been vice-president of the European

1 Women's Lobby also?

2 A. Yes.

3 387 Q. And you also refer to being vice-chair of the EUROPA
4 DONNA European breast cancer campaign?

5 A. Yes, a number of voluntary organisations. 14:24

6 388 Q. And between the years of 2007 you served as leader of
7 the Opposition in the Irish Seanad?

8 A. Yes.

9 389 Q. But prior to that you had been a TD in Dublin for the
10 previous ten years, I think, is that right? 14:24

11 A. Yes, I was a TD for ten years and I was in Opposition
12 for ten years and I served in six different portfolios
13 during that period on the front bench of Fine Gael.

14 390 Q. Yes. And I think you covered matters such as arts,
15 culture and the Gaeltacht, spokesperson on defence, 14:24
16 social, community and family affairs, equality and
17 family affairs, and social welfare, and spokesperson as
18 health and children while in the Seanad?

19 A. Yes. And I was also on a number of committees: the
20 Committee on the Constitution, the Economic and Social 14:24
21 Forum and the Justice Committee, the Equality
22 Committee, and a number of other committees during that
23 period, State-sponsored bodies as well.

24 391 Q. All right. And I think did you regain your seat in the
25 election after -- 14:24

26 A. Yes, yes, I was Opposition spokesperson -- I was
27 Opposition leader in the Seanad for about
28 three-and-a-half years and then I ran in 2011 in Dublin
29 Midwest and I was elected to the Dáil in that election.

1 392 Q. Yes. And does that cover the Lucan area?
2 A. It does, yes.

3 393 Q. And I think you were appointed to Government as a
4 minister and served as Minister for Children and Youth
5 Affairs from March 2011 until May 2014? 14:25
6 A. Yes. It was a new department. The Department of
7 Children, I established the department, brought the
8 various parts of it together from a legal framework
9 point of view and I was the first Minister for
10 Children, and during the course of that ministry I was 14:25
11 in charge of the children's referendum and reforming
12 the child protection system and doing a number of the
13 groundwork for a number of important pieces of
14 legislation, including the Adoption (Amendment) Act and
15 the vetting legislation and a number of other 14:25
16 initiatives in relation to reform of the child
17 protection system.

18 394 Q. Yes. And we'll hear more about them perhaps later.
19 But I think when you became Minister at that time you
20 took on a couple of special advisers that we have heard 14:26
21 reference to: Mr. Lavelle --
22 A. Yes.

23 395 Q. -- and Ms. Mannion, is that correct?
24 A. That's right, yes.

25 396 Q. And I think initially Mr. Lavelle was, he told us, as 14:26
26 it were, part-time special adviser?
27 A. Yes.

28 397 Q. And then he became a full-time special adviser?
29 A. Yes, that's right.

1 398 Q. I think he's also a councillor in the Dublin area --
2 A. Yes.

3 399 Q. -- I think, in the Fine Gael interest?
4 A. And I also had had another adviser who did the other
5 half of that job, Niamh Connolly. And at a later point 14:26
6 when I was Tánaiste, Matthew Lynch -- Matt Lynch worked
7 with me, and Stephen O'Shea.

8 400 Q. Yes. And we have heard reference obviously to
9 Ms. Marion Mannion, whom I've mentioned there, and was
10 she taken on as a special adviser at that time as well? 14:26
11 A. She came in in 2011.

12 401 Q. And she became a full-time adviser as well?
13 A. She was full-time, yes. And it was a shared position,
14 there were two advisers.

15 402 Q. And I think when you became Minister for Justice and 14:27
16 Equality, did you bring them with you --
17 A. Yes.

18 403 Q. -- to the Department of Justice?
19 A. Yes, I did.

20 404 Q. And would it be fair to say that you found them of 14:27
21 great value and relied upon them?
22 A. Well, yes, they had important positions.

23 405 Q. Yes. I think you served as Minister for Justice and
24 Equality from May 2014 until the 6th May 2016, and you
25 became Tánaiste I think on that date? 14:27
26 A. Yes.

27 406 Q. In May 2016?
28 A. Yes. I served as Minister for Justice from '14 to '17,
29 and in that position I had responsibility for a wide

1 range of legislation, obviously, and a programme of
2 reform, particularly following the Séan Guerin Report,
3 and obviously establishing the O'Higgins Commission was
4 part of my work and setting up a number of regulatory
5 bodies, including the Charities Regulatory Authority 14:28
6 and the Legal Services Regulatory Authority, and so on.
7 And there was a very wide range of legislation. As I
8 say, I think in 2015, I say in my submission, it was
9 the largest number of bills that had been done. So it
10 was a very extensive portfolio. 14:28

11 407 Q. Yes. And just to bring matters up to date, as it were,
12 I think you were reappointed Tánaiste and you had a
13 switch of ministerial responsibility; in 2016 you
14 became the Minister for Business, Enterprise and
15 Innovation -- 14:28

16 A. '17.

17 408 Q. Sorry, June '17.

18 A. Yes. The third ministry I had was Business, Enterprise
19 and Innovation, from June of '17.

20 409 Q. Yes. And I think you remained in that position until 14:28
21 just before the end of the year in 2017?

22 A. Yes. I resigned to avoid a general election, because
23 of the circumstances at that time.

24 410 Q. All right. We're not concerned with those --

25 A. I understand. 14:29

26 411 Q. -- political events, you understand that. But in terms
27 of your responsibility for the Department of Justice
28 and Equality over the period, would you like to just
29 give a brief description of what's involved in that?

1 A. Yes. Well, it's a very large department with a lot of
2 agencies under its remit. One of the things I did
3 during the period that I was Minister was to try and
4 ensure that there was proper governance arrangements
5 with the various agencies under the remit of the 14:29
6 Department. Primarily I had responsibility, obviously,
7 for all Justice issues, for the security of the State
8 and the safety of our citizens, overseeing a very wide
9 range of legislation, as I have said. Probably, I
10 think, the Minister for Justice does the greatest 14:29
11 amount of legislation in the Dáil. And I would have
12 done that. It would have ranged from the Child and
13 Family Relationship Bill, insolvency, bankruptcy, the
14 marriage equality referendum and a whole range of other
15 areas that I had responsibility for. I would also 14:30
16 obviously have received a very large number of
17 submissions on a very wide range of areas in any one
18 year - 560 submissions in 2015, for example - and they
19 would cover all of the different areas that the
20 Department had responsibility for. So many of them, 14:30
21 for example, particularly at weekends, might be
22 prisoner release, there would be a submission on each
23 and every appropriate, you know, prisoner release that
24 had -- where a decision had to be taken by the
25 Minister. They would cover the subject matters that 14:30
26 were being dealt with in the Department at a particular
27 time - Magdalene Laundries, for example. The various
28 reports that were being received by the Department, I
29 would have responsibility to bring those to Government

1 and prepare memos. So there would be a very large
2 number of memos as well, which would -- yeah, I think
3 about -- well, over 150 that particular year. So they
4 would cover legislation. The submissions would also,
5 for example, they would cover departmental officials 14:31
6 who were recommending changes in legislation, so they
7 would normally do a submission for discussion with me
8 about the kind of amendments that would be brought to
9 the Dáil and to the Cabinet in the first instance
10 usually. And just to say the reform, obviously, would 14:31
11 have been an important part of what I was doing as
12 well, establishing the Police Authority. A good deal
13 of time was taken up in 2015 doing consultations on the
14 establishment of the Policing Authority, and I would
15 have appointed Ms. Josephine Feehily to chair that. 14:31
16 And also, for example, the reform of GSOC when I
17 appointed Judge Mary Ellen Ring to chair the GSOC body.
18 412 Q. Yes.
19 A. And the Toland Report, I -- after the Séan Guerin
20 Report, I initiated a review of the Department and I 14:31
21 asked Kevin Toland, who was an independent businessman,
22 and a number of other senior figures, to do a report on
23 the Department and the kind of changes that were
24 needed, and the implementation of that had begun.
25 413 Q. You've drawn attention to a number of important pieces 14:32
26 of legislation that were going through your office in
27 2015. I don't intend to ask you anything about them.
28 A. Yes.
29 414 Q. You also had some international responsibilities --

1 A. Yes.

2 415 Q. -- in EU, obviously, as a Minister for Justice, of some
3 significance?

4 A. Yes. I mean, during that period in 2015 there was a
5 very -- it was an extremely busy period and there would 14:32
6 have been a lot of international meetings. I think
7 there were eight in 2015, for example, probably a
8 similar amount the next year, maybe slightly less.
9 Those meetings would have been looking at the
10 particular -- the two issues which were on the table at 14:32
11 a European level at that point, and they were terrorism
12 and migration. And obviously security would be a very
13 important part of the work for the Minister for Justice
14 and all that goes with that. The discussions on
15 migration meant that we had to take a decision in 14:33
16 relation to Ireland, how Ireland would respond to the
17 refugee crisis, and that would have been a very
18 important part of the work during 2015, doing the
19 submissions on that, and dealing with also the reform
20 of the International Protection Bill, the asylum 14:33
21 changes that we needed to make, and also we had set up,
22 I can't quite remember whether it was '15 or '16, I had
23 asked Judge McMahon, Brian McMahon, to do a report on
24 direct provision and the kind of changes that we needed
25 to make on that. So that would have been another area 14:33
26 of importance at that time.

27 416 Q. Yes.

28 A. As well as everything to do with policing, of course,
29 which I haven't yet mentioned.

1 417 Q. Yes. Yes, that is what I was going to ask you about
2 next. You obviously, in your experience as a Minister
3 and as a legislator, you would have had experience of
4 how other ministers for justice approached matters,
5 discussed matters, brought matters to Cabinet, 14:34
6 etcetera, but this was your first time in the
7 Department of Justice. You hadn't obviously been there
8 as a junior minister at any stage?

9 A. That's right. No, I had been on a Justice Committee,
10 but it was my first -- it was my first appointment to 14:34
11 Justice, yes.

12 418 Q. Can you just describe to the Chairman how the Policing
13 Division in your Department worked under you?

14 A. Yes. Well, there was a separate Policing Division. In
15 my statement, I have gone into detail of how that 14:34
16 worked.

17 419 Q. Yes.

18 A. There was an assistant secretary in charge of it. At
19 that time it was Michael Flahive and subsequently John
20 O'Callaghan. And they had responsibility, it's laid 14:34
21 out in the annual report of the Department, but they
22 had responsibility for a very, very wide range of areas
23 in relation to policing. So, for example, one very
24 obvious one, although the accounting officer was the
25 Commissioner, obviously in terms of getting a budget 14:34
26 every year and having the resources to do the job, that
27 would clearly come to me and be part of my
28 responsibilities; the various HR issues; and really
29 everything that was relevant for the Department would

1 be dealt with by the Policing Department. Engagement
2 with the Commissioner would normally be at a senior
3 level.

4 420 Q. Yes.

5 A. It would normally be at secretary general or assistant 14:35
6 director or ministerial level.

7 421 Q. Yes. And you do mention obviously intensive engagement
8 between the Department and An Garda Síochána. You
9 don't specifically mention the Commissioner there, but
10 would it be the practice to have been -- for the 14:35
11 Commissioner to have been in regular contact with you
12 directly herself?

13 A. Primarily, her contact would be through the Secretary
14 General and the -- or the assistant director. That
15 would be the most normal. There would be some direct 14:36
16 contact. Often, when there might have been a gangland
17 murder or there might have been a terrorist offence or,
18 you know, something, and, you know, I would perhaps
19 have a direct conversation to ask what exactly the
20 policing initiatives were that were being taken. But 14:36
21 more normally through the -- you know, through the
22 formal procedures.

23 422 Q. Yes. It would seem that the Commissioner was active in
24 keeping you personally involved in relation to gangland
25 issues as they arose at the time? 14:36

26 A. Yes.

27 423 Q. There would be nothing unusual about that?

28 A. No.

29 424 Q. You would expect to be informed of any developments, I

1 take it?

2 A. Yes. I mean, I would often, obviously, particularly on
3 a Thursday, or indeed that first week we were
4 discussing in May, I was doing the order of business
5 while the Taoiseach was away, I think it was the 17th, 14:36
6 18th, 19th May '16, but normally I'd be doing it, since
7 I had become Tánaiste a year previously, on a Thursday.
8 So if there had been, for example, a gangland murder or
9 that, I might ask the Department to get me an up to
10 date on -- because it would probably be raised on the 14:37
11 order of business.

12 425 Q. Yes. Now, at the time we are first concerned with,
13 after you became Minister, obviously the former
14 Commissioner had resigned; the Deputy Commissioner, who
15 was Nóirín O'Sullivan, was Acting Commissioner at that 14:37
16 time, I think, isn't that right?

17 A. Yes.

18 426 Q. And was Mr. Purcell still in position as Secretary
19 General in the Department when you came in?

20 A. Yes, for a short period. 14:37

21 427 Q. For a short period. And then Mr. Waters took over as
22 Acting Secretary General?

23 A. That's right.

24 428 Q. So you were, I suppose, meeting people in a different
25 context, obviously, with different responsibilities. 14:37
26 Can you recollect when you first met the Deputy
27 Commissioner after you became Minister?

28 A. I think it was a meeting in the Department, I think
29 that was the first time that I met her.

1 429 Q. And obviously the circumstances of the departure of the
2 former minister, you were all too familiar, I suppose,
3 with the circumstances which led to that, good, bad or
4 indifferent, and I'm not asking for any comment on it,
5 but Mr. Guerin's report had come out on, I think was it 14:38
6 the 6th May, or thereabouts, and Mr. Shatter resigned
7 in circumstances and you then became Minister. And can
8 I ask you this: what was your understanding of what
9 the Government might do or would do at that stage in
10 relation to the Guerin Report? 14:38

11 A. Well, I think there had been -- before Minister Alan
12 Shatter at that time had resigned, I think there had
13 been a -- I think there had been maybe a memo to
14 Government in relation to some of the issues. But
15 basically I was asked, when the Séan Guerin Report came 14:38
16 out, I was asked to work on it, really, to decide what
17 actions we'd take as a Government, so I began to do
18 that, and we had to decide what was the most
19 appropriate response to it. So I would have obviously
20 had meetings in the Department, would have considered 14:39
21 and read it myself. Tried -- you know, obviously get a
22 very good understanding of the report and its
23 implications and what we needed to do. And when I
24 arrived at that point, I went to Government with a
25 series, a whole series of initiatives at that point, 14:39
26 because there were a number of different implications
27 to that report --

28 430 Q. Yes.

29 A. -- in terms of what needed to be done. So there were

1 about six or seven areas that I identified that needed
2 action, and they would have included what were we going
3 to do on foot of the recommendations of Mr. Guerin, and
4 he had recommended a Commission of Investigation, we
5 needed to make a decision about that. And there were a 14:39
6 number of other cases around where there had been
7 complaints about Gardaí investigations, and a file had
8 been handed to, I think, the Taoiseach Enda Kenny at
9 that point, which had been referred to me as well. So
10 at that point, following discussions with -- both 14:40
11 within the Department, with the Attorney and
12 considering how we would deal with all of these cases,
13 we set up -- I made a recommendation at that time that
14 we would have what we went on to call the Independent
15 Review Mechanism -- 14:40
16 431 Q. Yes.
17 A. -- to which over 300 cases went.
18 432 Q. Yes.
19 A. That memo would also have covered the Toland Report,
20 that that was my idea to do that, and that we should 14:40
21 examine what was happening, to strengthen GSOC, to set
22 up an independent policing authority and also to refer
23 the issues that had arisen in the Guerin Report around
24 investigation to the Garda Inspectorate to ask their
25 view of the Guerin Report. So there was a range of 14:40
26 initiatives that needed to be taken forward, having
27 received the Séan Guerin Report, and that's what I did.
28 433 Q. Well, just to place Sergeant McCabe in this. Obviously
29 you knew well, I take it, of the controversy that had

1 been generated, inter alia, by former Commissioner
2 Callinan at the PAC committee and you knew, presumably,
3 of the fixed charge penalty points issue?
4 A. Yes.
5 434 Q. And what was your understanding of Mr. Guerin and 14:41
6 Sergeant McCabe, as to whether he [sic] had looked at
7 that issue? You say you read the report obviously very
8 carefully?
9 A. Yes -- which issue? The penalty points?
10 435 Q. No, the Guerin Report. 14:41
11 A. Yes.
12 436 Q. You read that?
13 A. Yes.
14 437 Q. Presumably you were aware that hadn't been considered
15 within the Guerin Report, the issue of Sergeant McCabe 14:41
16 or any issues relating to him?
17 A. Well, it was all about the complaints that he had made,
18 obviously.
19 438 Q. Yes.
20 A. The investigations which he felt there were 14:41
21 shortcomings in.
22 439 Q. Yes. And perhaps I am being a bit ambiguous.
23 A. Yes.
24 440 Q. Had you been aware that there had been an allegation
25 made against Sergeant McCabe of an assault? 14:42
26 A. I don't believe I was at that point. The point where I
27 became aware of that was, it was around that -- it was
28 when the IRM, when the cases were handed to the
29 Taoiseach. I think that was April.

1 441 Q. Yes.

2 A. That was around April '14. And then I became Minister
3 in May '14.

4 442 Q. All right. Well, there had been a number of articles
5 written in the paper by a Mr. Williams, which, although 14:42
6 it didn't name Sergeant McCabe, appears to have led a
7 number of people to believe that he could be identified
8 from it. Were you conscious of those articles?

9 A. No. The point when I became more aware of that, I
10 think, was in the June, when, at that time, Deputy Alan 14:42
11 Shatter did a speech in the Dáil. I think at that
12 point I was aware of it. But at that point I would
13 also have had the files; they would have come to me
14 from the Taoiseach.

15 443 Q. Yes. Well, I don't know whether you followed the 14:42
16 evidence closely at the time it was given, but during
17 our July sittings Mr. Williams, I think, gave evidence
18 of having spoken to Ms. D and had an interview and
19 published a couple of articles, and then he brought her
20 to meet or arranged for her to meet Mr. Shatter, and I 14:43
21 think also Micheál Martin as well. But did you see
22 Mr. Shatter's contribution in the Dáil in June as an
23 attempt to get her allegation included in the terms of
24 reference?

25 A. Well, I read what he said -- 14:43

26 444 Q. Yes.

27 A. -- you know, I heard -- I think I might have been
28 there. I heard it, what he said. So, I mean, he was
29 making a point about a particular case, that, you know,

1 might be included in the -- yes.

2 445 Q. And obviously, there may have been obviously
3 sensitivities in the sense that you were now occupying
4 the position that he had formerly occupied, but did he
5 speak to you about that issue? 14:43

6 A. No.

7 446 Q. Okay. I think you met Micheál Martin in July --

8 A. Yes.

9 447 Q. -- in connection with the Ms. D call for an
10 investigation, isn't that correct? 14:44

11 A. Yes, he asked to see me.

12 448 Q. And I think that resulted in the dossier, was it, going
13 to An Taoiseach?

14 A. It had already gone to the Taoiseach.

15 449 Q. It had already gone? 14:44

16 A. Yes. It went to the Taoiseach first. The Taoiseach
17 sent it to me. I think I wrote back to the Taoiseach
18 about June '14 and said I was examining how best to
19 progress these cases, and then subsequently Micheál
20 Martin asked to see me, just to see express, you know, 14:44
21 concern about whether the Ms. D investigation had been
22 adequate or not.

23 450 Q. Yes. And did you have any view on that or were you
24 both able to form any view on that at the time?

25 A. No, not at that time, I didn't have -- I didn't have 14:44
26 the information. But a decision was then made --

27 451 Q. Yes.

28 A. -- that it would be part of the IRM.

29 452 Q. Okay. And can you say when that decision was made,

1 that it would form part of that, roughly?

2 A. well, we set up the IRM.

3 453 Q. Yes.

4 A. And decided that we would have the senior and junior
5 counsel. We were expecting that the IRM, which was 14:45
6 unrealistic, as it turned out, would be completed in
7 six to eight weeks. That was the sense around it. It
8 obviously grew much, much bigger than that, and went on
9 for much longer. We had over 300 cases. The cases
10 were arriving on an almost-daily basis. They were 14:45
11 cases that had been on people's desks that they weren't
12 quite sure what to do with, other TDs sent across
13 cases. There was a group, as well, that some TDs had
14 been working with, I think it was called Justice4All,
15 they had quite a number of cases as well, so -- and the 14:45
16 Department of Justice would have had historical cases
17 where -- you know, that were -- there had been
18 complaints and they'd reached a certain point, but they
19 were also -- it was decided to put all of these into
20 the IRM. So that was the decision that was made, that 14:46
21 these cases would go into an IRM mechanism, to review
22 the paperwork on the cases and to see if there was any
23 further action that could be taken. And in about, I
24 think it was about -- between 10% and 12% of cases,
25 which I understand is the international norm when 14:46
26 you're reviewing this type of situation, it was
27 suggested that there should be -- it was recommended, I
28 should say, that there should be further action. We
29 also appointed a judge to look at the final

1 recommendations. In terms of the letters that we sent
2 out, we asked a judge to do the summary of the findings
3 from the IRM, to kind of keep it distant from everybody
4 else.

5 454 Q. Yes. 14:46

6 A. And then those summaries came to me and I sent those to
7 the people who had made the original complaint.

8 455 Q. All right. Well, in any event, I suppose there's a
9 number of important points perhaps to be considered in
10 that. Firstly, the Department wasn't making any 14:46
11 decision about the quality of any Garda investigation,
12 is that right?

13 A. That's right. It was being sent to the group that had
14 been set up, senior and junior counsel, that had been
15 selected by the Attorney. 14:47

16 456 Q. And secondly, the Gardaí weren't similarly making a
17 decision about it themselves?

18 A. No, no.

19 457 Q. And that was, I suppose, a very important part of it.
20 And thirdly, the group who were making it were selected 14:47
21 because of an expertise in evaluating perhaps a Garda
22 investigation from a criminal point of view?

23 A. Yes. They were barristers, senior and junior counsel,
24 and they were appointed by the Attorney General.

25 458 Q. But can I ask you this: where did the terms of 14:47
26 reference that might emerge from the acceptance of the
27 Guerin recommendations stand now in relation to the IRM
28 mechanism?

29 A. Sorry, could you repeat that?

1 459 Q. where did the possible terms of reference stand with
2 regard to the IRM mechanism? were you open to
3 including IRM cases in the --
4 A. Terms of reference.
5 460 Q. Terms of reference? 14:47
6 A. Of the O'Higgins Commission?
7 461 Q. Yes.
8 A. Well, what happened in relation to that is that when
9 the Government decided to set up the O'Higgins
10 Commission, at the same time, clearly, we had all of 14:48
11 these cases, and there was a possibility that some of
12 them might end up needing a commission. So the
13 thinking in the early days was that if some of these
14 cases needed to be investigated by a commission of
15 investigation, they would be referred to the O'Higgins 14:48
16 Commission. That was the early thinking. Now, there
17 was a new -- one of the recommendations I had also made
18 was that there would be a justice subcommittee, in fact
19 the Taoiseach suggested that at the time, and so there
20 was a new justice committee being set up at that time 14:48
21 as well. So in the early days before the O'Higgins
22 Commission was formally established, it was expected
23 that there might be cases and, as I say, the timeframe
24 we thought might be six to eight weeks, but that became
25 much longer. 14:48
26 462 Q. Yes.
27 A. And as the time went by and following discussions, it
28 was felt that, and I think the senior counsel advised
29 that the only cases that should go into an O'Higgins

1 Commission of Investigation, Judge O'Higgins'
2 Commission of Investigation, would be cases that had
3 something to do with the geographic area or the terms
4 of reference of the O'Higgins Commission. And then, as
5 time progressed and we -- I think we delayed slightly 14:49
6 the O'Higgins Commission, but there was work going on
7 all of the time, but it was delayed to see what the
8 outcome would be of the IRM. And then it got to the
9 point, I think late November, before I went back to
10 Government in the December, it got to the point where 14:49
11 there were, I think, two cases that were being
12 considered for inclusion, and then further work was
13 done. One of those was the Ms. D case and the other
14 was a different case. But it was felt that the
15 O'Higgins Commission had to move ahead and there was a 14:49
16 decision finally made by the independent counsel,
17 having looked at the Garda investigation, that it was
18 not suitable for the O'Higgins Commission, or it didn't
19 need any commission, in fact, and also, there had been
20 discussion from counsel that, in fact, it would not be 14:50
21 appropriate anyway; that even if it had been
22 recommended, it wouldn't be appropriate that it should
23 be in the O'Higgins Commission, for obvious reasons, I
24 think.

25 463 Q. You weren't here, I think, for Mr. Flahive's evidence, 14:50
26 but he refers to that process, and on day 51 at
27 question 598 he refers to counsel recommending no
28 further action.

29 A. Yes.

1 464 Q. And he says that that was accepted, and he said that he
2 informed the Minister of that development.

3 A. Yes.

4 465 Q. Is that right?

5 A. That's correct, yes. I think the decision was made 14:50
6 that that case was effectively dealt with towards the
7 end of '14. But I think you said earlier that, and I
8 think it's true, that there was a gap between the
9 final, you know, decisions in cases and people actually
10 being informed, and I think there was a discussion at 14:51
11 the time, I'm sure there was a discussion at the time
12 that there would be groups of cases dealt with. The
13 question was whether we'd wait until the end of the
14 process to write to everybody or whether we would do it
15 sort of incrementally. 14:51

16 466 Q. Yes.

17 A. And --

18 467 Q. I suppose there are two separate streams, but this was
19 a decision that they should not meet, in the sense that
20 there was no requirement to put any IRM case into the 14:51
21 terms of reference stream, would that be a fair way of
22 putting it?

23 A. Well, I mean, they were just different -- I mean, they
24 were just different issues, really. One was the
25 establishment of the O'Higgins Commission and all of 14:51
26 the work that was being done on that and the terms of
27 reference and the setting up of it. And a point I
28 haven't made so far is that all of the recommendations
29 made, I think without one or two technical changes by

1 Séan Guerin, it was agreed that we would be totally
2 true to what he had said in terms of the terms of
3 reference. So there was an almost direct translation
4 from Mr. Guerin's report to the O'Higgins -- Judge
5 O'Higgins' terms of reference. 14:52

6 468 Q. Yes.

7 A. But they were separate processes, you know.

8 469 Q. The Chairman has referred to the IRM file.

9 A. Yes.

10 470 Q. And it appears from the IRM file that, in fact, counsel 14:52
11 who had made the final recommendation on it, made it on
12 the 10th November, and Mr. Flahive then said that you
13 were then in a position to send a letter to the
14 minister, which is -- I mean the other minister, under
15 the Commissions of Investigation Act, you had to seek 14:52
16 his consent --

17 A. Yes.

18 471 Q. -- to your proposal to establish a commission of
19 investigation?

20 A. Yes. That was Mr. Howlin, I think, at the time, yes. 14:52

21 472 Q. Yes. And Mr. Flahive said that he thinks that letter
22 went off on the 17th November --

23 A. '14.

24 473 Q. -- 2014. Is that right?

25 A. Yes. 14:52

26 474 Q. Okay. It would appear that obviously the minister gave
27 his approval for the establishment of the Commission,
28 and the Government decided to establish it, I think, on
29 the 17th, and then they laid the terms of reference

1 before the Houses, with the statement of the reasons
2 for it on the 19th December, I think?

3 A. Yes.

4 475 Q. You refer to that date in your own statement.

5 A. And it began work in February. 14:53

6 476 Q. Just one issue before I go back a little. Section 4 of
7 the Act, of the Commissions of Investigation Act,
8 allows consultations with any persons in respect of the
9 establishment of or terms of reference of a commission.
10 Did you consult, apart from perhaps the Judge over 14:53
11 technical changes, did you consult with the
12 Commissioner over the terms of reference?

13 A. No.

14 477 Q. Did you have any consultation or did your Department,
15 to your knowledge, have any consultation with An Garda 14:54
16 Síochána --

17 A. No.

18 478 Q. -- over the terms of reference?

19 A. Not to the best of my knowledge. It was very much
20 within the Department and with the Attorney General and 14:54
21 a lot of back and forth with the Attorney General about
22 the terms of reference. And all dealings with the
23 Judge were done by the Attorney, not by me as Minister.
24 It was the Attorney that dealt with the request to the
25 Judge to do the investigation and to carry it out, yes. 14:54

26 479 Q. So the Attorney did it on behalf of the Government?

27 A. Of the Department.

28 480 Q. Or on your behalf, was it?

29 A. Yes.

1 481 Q. I take it you'd agree then that there was a very
2 decisive step taken, and confirmed, when the Government
3 made the order of the 3rd February, that the Ms. D
4 complaint, or any complaint relating to Sergeant
5 McCabe, wasn't within, and shouldn't be considered 14:54
6 within, the Commission of Inquiry?
7 A. Well, the terms of reference were what Mr. Guerin had
8 recommended, so they were based on the Guerin Report.
9 And the IRM was a separate process.

10 482 Q. Yes. 14:55
11 A. And it had been decided that no cases would be included
12 in the Commission.

13 483 Q. Yes. But were you clear in your own mind - it would
14 seem perhaps an obvious question - that Ms. D's
15 complaints and/or Sergeant McCabe's alleged behaviour 14:55
16 in relation to them were not within the terms of
17 reference?
18 A. They weren't within the terms of reference because it
19 had been -- no, they weren't, because it wasn't dealt
20 with by Séan Guerin, so -- and the terms of reference 14:55
21 were based on what Séan Guerin had recommended.

22 484 Q. Okay. I think some time prior to this you had been
23 presumably involved in the Protected Disclosures Act of
24 2014 which had been going through the Dáil, isn't that
25 correct? 14:56
26 A. Yes, well, Minister Howlin had responsibility for that,
27 but I was aware of it, obviously.

28 485 Q. It obviously had significant implications for An Garda
29 Síochána --

1 A. Yes.

2 486 Q. -- amongst others, isn't that right?

3 A. Yes.

4 487 Q. And the former system under the Garda Síochána Act had
5 involved regulations relating to the Confidential 14:56
6 Recipient, isn't that right, who would report to you as
7 Minister, isn't that right?

8 A. Yes, that was changed.

9 488 Q. And that was all changing. And you've drawn attention
10 in your statement, at appendix 3, to your policy that 14:56
11 was adopted in relation to this issue of protected
12 disclosures and people who made protected disclosures,
13 isn't that correct?

14 A. Yes.

15 489 Q. And perhaps we'd just look at that at page 3393. 14:56

16 A. That was the internal protected disclosure policy.

17 490 Q. Yes. Now, this had been in preparation for, but was
18 finally adopted then, is that right?

19 A. Yes.

20 491 Q. At the Management Approval Committee on 31st March 14:57
21 2015. But it had been in progress, as it were, in
22 preparation for the coming into force of the Act, isn't
23 that right?

24 A. Yes.

25 492 Q. Now, just relating to the general concerns about people 14:57
26 who made protected disclosures or who had made earlier
27 disclosures, you had some direct dealings with Sergeant
28 McCabe, isn't that right --

29 A. Yes.

1 493 Q. -- in 2014?
2 A. Yes.
3 494 Q. And could you just detail the first of those?
4 A. Yes. I was appointed Minister in May, and a couple of
5 months later I had got a letter from Sergeant McCabe 14:58
6 asking to meet me, and I think that was October '14,
7 and I responded in a couple of days and I said that I
8 would meet him. I thought it was important to hear
9 firsthand. There were a number of court cases
10 outstanding, but, notwithstanding those, I decided that 14:58
11 I would meet Sergeant McCabe to hear firsthand what his
12 experience had been, because obviously this had been a
13 very serious issue that had emerged in the previous
14 months in relation to the various complaints that he
15 had made and how they had been dealt with. So I met 14:58
16 him and his wife Lorraine --
17 495 Q. Yes.
18 A. -- in the Department with the Secretary General.
19 496 Q. Is this in October now?
20 A. Yes, October. 14:58
21 497 Q. Yes.
22 A. October '14.
23 498 Q. Yes.
24 A. And I spent about an hour-and-a-half with him, and we
25 had a very broad discussion in relation to the penalty 14:59
26 points situation in particular, his experiences in An
27 Garda Síochána, the impact it had had on his family and
28 his wife Lorraine, and what he felt needed to happen to
29 change things. And we had quite -- as I say, about an

1 hour-and-a-half's discussion about these issues, and he
2 thanked me for meeting him. Subsequently, he wrote to
3 me and --

4 499 Q. May I just interrupt you there --

5 A. Sorry, yes. 14:59

6 500 Q. -- just so that we look at some of the documentation
7 there.

8 A. Yes.

9 501 Q. At page 3447, I think this is the email, you should be
10 able to see it on screen there in a moment at the 14:59
11 bottom of the page, at the bottom of that page, it's an
12 email, comes into info@justice, and that came to your
13 desk, is that right?

14 A. Yes, it did.

15 502 Q. And if we go on to the next page, 3348, he's also 15:00
16 enclosing an email forwarded, which was one he'd sent
17 to the Commissioner on the same day, complaining about
18 a number of matters and referencing a meeting that he
19 had had with -- that the Commissioner --

20 A. Yes. 15:00

21 503 Q. -- had had with his solicitor, Mr. Costello. Did you
22 seek a report on that meeting from the Commissioner,
23 for instance?

24 A. Not on that particular meeting.

25 504 Q. Okay. 15:00

26 A. I think what happened after I met Sergeant McCabe is
27 that I had a number of other emails from him saying
28 that work was still pretty impossible. And then I
29 asked -- brought it up, obviously, with my Department,

1 asked them to ask for a report to find out precisely
2 what was happening, and then I got a very long letter
3 on the 20th March --

4 505 Q. Yes.
5 A. -- from the Commissioner outlining the various steps 15:01
6 that were being taken.

7 506 Q. Okay. Perhaps we'll come to that --
8 A. Okay.

9 507 Q. -- in due course. But at the top of page 3447 then,
10 Sergeant McCabe's email comes in. 15:01
11 A. Yes.

12 508 Q. At the top of 3447. And it's sent to a number of
13 people.
14 A. Yes.

15 509 Q. And would you expect that email to go to those people 15:01
16 at that time, or is that something that you concerned
17 yourself with?
18 A. Not particularly. I mean, it came in, it would have --
19 it appears as if it went to my own private secretary,
20 who then forwarded it to a number of other people, 15:01
21 primarily I think in the Secretary General's
22 department.

23 510 Q. Yes.
24 A. And to their private secretaries.

25 511 Q. All right. In any event, you, I think, wrote back to 15:02
26 him on the 6th October. And could we look at page
27 3346, preceding that.
28 A. Yes.

29 512 Q. And that's the text of the letter sent back?

1 A. Yes.

2 513 Q. And it's suggesting a meeting there, and there's
3 reference to the civil proceedings then, that it would
4 have to be without prejudice to those, if we just go
5 down to the bottom paragraph of that. 15:02

6 A. Yes.

7 514 Q. You also say you're conscious --
8
9 "I'm also conscious of your engagement with Garda
10 management and the Acting Garda Commissioner in 15:02
11 relation to your concerns."
12
13 what did you know at that point in time about his
14 engagement with Garda management, in a general way?

15 A. I think in a general way, I'm trying to think of that 15:02
16 precise time, what I would have known, in a general
17 way, that there were ongoing issues. The
18 preoccupation, if you like, at that time, or the main
19 focus at that time, I understand, was -- it had centred
20 around the penalty points, and when I met Sergeant 15:03
21 McCabe he had a lot to say about that that I was very
22 interested in, and I followed up and he followed up,
23 and, in fact, went into the Professional Standards
24 Unit, as far as I remember, to do some work to ensure
25 that the outstanding issues which he felt were still on 15:03
26 the table in relation to penalty points, all of which
27 proved to be accurate, were being dealt with, needed to
28 be dealt with, and that came out of -- that was one of
29 the issues that came out of my meeting with him, that

1 519 Q. And I think on foot of that, did you write letters to
2 the Commissioner?

3 A. Yes, I was quite concerned about these letters that I
4 got from Sergeant McCabe, because I had hoped, having
5 met him, and, you know, various Gardaí would have been 15:05
6 aware that I had met him obviously, I was hopeful that,
7 you know, that the issues would be dealt with that were
8 on the table at that time, and then I got these letters
9 from Sergeant McCabe saying that, you know, things
10 hadn't improved and he was still very concerned about 15:06
11 the penalty points issue, and so on. And I asked the
12 Department officials, and I think I brought it up
13 directly myself with the Commissioner as well, I wanted
14 a report on what was happening and to see why he was
15 still writing letters like this and was still concerned 15:06
16 about various issues in Mullingar in particular.

17 520 Q. Obviously, you'd met him once in October?

18 A. Yes.

19 521 Q. You knew of the controversy that he had generated,
20 either directly or indirectly, without passing judgment 15:06
21 on it, but, having met him, had you formed a view as to
22 his bona fides or motivation for doing what he was
23 doing?

24 A. Well, at that point I had the Guerin Report, I had
25 Mr. Guerin's assessment of Sergeant McCabe and I met 15:07
26 him myself and I had no reason to doubt --

27 522 Q. Yes.

28 A. -- you know, to doubt the description that had been
29 given of Sergeant Maurice McCabe and his concerns.

1 523 Q. It's always perhaps undesirable to draw inferences from
2 how quickly somebody deals with correspondence, but you
3 dealt with this correspondence on the very same day,
4 isn't that right? You wrote a letter, if we could turn
5 to page 3025, you wrote to the Commissioner, and this 15:07
6 is in volume 5 of our books.

7 A. Yes.

8 524 Q. And I don't know whether that is a facsimile signature
9 attached or your own one on the page, at the bottom?

10 A. Yes, yes, I recognise that letter. 15:08

11 525 Q. Yes. And I think you received a reply from the
12 Commissioner and you wrote to the Commissioner thanking
13 her for the reply, at page 3026. Now, what did you
14 understand the Commissioner was doing at that stage?

15 A. Well, what I wanted to know was what was being done. 15:08

16 526 Q. Yes.

17 A. And what the engagement had been with Sergeant McCabe
18 and why he was still raising concerns about his
19 workplace situation. And so, having met him and
20 having, as I say, hoped that -- not simply because of 15:09
21 the meeting with me, but just hoped that, you know,
22 given the approach to the penalty points issue, which
23 he was very concerned about at the time, I had hoped
24 that, you know, these issues would be dealt with,
25 whatever the issues that were on the table, I was 15:09
26 hoping that they would be dealt with. And then when I
27 got these letters, I was -- I felt that I had
28 absolutely needed a report on what was being done to
29 help Sergeant McCabe and why were these issues still

1 ongoing, and that's why I wrote that letter and spoke
2 to the senior officials in the Department to find out
3 why this was happening.

4 527 Q. Yes.

5 A. It's not the first time I would have done it in 15:09
6 relation to whistleblowers, because subsequently if
7 issues were brought in the Dáil which didn't seem to me
8 to be congruent, you know, efforts being made to help
9 or to deal with the issues which whistleblowers had
10 brought up, I would have asked the Department to take 15:10
11 it up with An Garda Síochána and find out, you know, if
12 certain allegations that were being made in the Dáil,
13 if they were true.

14 528 Q. But obviously you hastily wrote to the Commissioner and
15 she wrote back, and her reply is at 3435, which is in 15:10
16 book 6. 3435. But just before we look at that, were
17 you concerned that you would accord either special
18 treatment to Sergeant McCabe or routine treatment, or
19 were you simply passing it back to the Commissioner to
20 deal with as his employee/employer? 15:10

21 A. Was I concerned, did you say?

22 529 Q. Yes.

23 A. Yes.

24 530 Q. What was your purpose in dealing with it at that time?

25 A. I wanted to ensure that appropriate measures were in 15:10
26 place to deal with anybody who was bringing up
27 whistleblowing complaints --

28 531 Q. Okay.

29 A. -- in An Garda Síochána. And as it happened, the one

1 that was on my desk and the letters I had got were
2 about Sergeant McCabe at that point in time.

3 532 Q. But were you concerned that he would be protected from
4 any consequences arising from his confidential
5 reporting? 15:11

6 A. Of course.

7 533 Q. Or protected disclosures?

8 A. Yes.

9 534 Q. And presumably you were expecting the Commissioner to
10 do likewise? 15:11

11 A. Yes.

12 535 Q. All right. And you received this letter. And perhaps
13 we'd look at the text of the letter, if we go down the
14 page. Have you got that, Ms. Fitzgerald?

15 A. What volume is that? 15:11

16 536 Q. This is in volume 6.

17 A. Volume 6, yes. Page?

18 537 Q. It's the one you have open there. Sorry.

19 A. Yes. Page?

20 538 Q. It's at page 3435. 15:11

21 A. Yes.

22 539 Q. And the Commissioner says:

23

24 "Dear Minister,

25 15:11

26 I refer to your letter of this date in relation to
27 email correspondence from Sergeant Maurice McCabe
28 addressed to you and I. I am very concerned about the
29 various allegations being made by Sergeant McCabe and

1 have taken immediate action to address his concern.

2
3 As you will be aware, Sergeant McCabe also sent
4 correspondence to both offices on Sunday 23rd February
5 2015 where he complained of an incident on Saturday the 15:12
6 22nd which caused him to leave work early. I directed
7 our Executive Director of Human Resources and People
8 Development, Mr. John Barrett, to meet with Sergeant
9 McCabe to discuss these matters and to address any
10 issues arising. During their initial telephone 15:12
11 contact, Sergeant McCabe has indicated that the issue
12 on Saturday related to comments attributed to a third
13 party. Mr. Barrett is currently meeting with Sergeant
14 McCabe at Garda Headquarters with a view to addressing
15 his concerns. The meeting is ongoing at this time. 15:12

16
17 In relation to the correspondence from Sergeant McCabe
18 dated 25th February 2015, as Commissioner, I have at
19 all times ensured that my duties as an employer under
20 the Protected Disclosures Act 2014 had been fully 15:12
21 complied with.

22
23 In the context of the issue raised regarding
24 publications and in the light of the memorandum of
25 understanding between the Minister for Justice and the 15:13
26 AGSI and the GRA and the legal framework within which
27 the Garda representative associations operate, I am
28 seeking the urgent advices of the Attorney General's
29 office as to whether there are any legal issues arising

1 that would necessitate further steps to be taken on my
2 part. Once these advices have been received and on
3 receipt of Mr. Barrett's report, I will revert with
4 further detail."

15:13

5
6 And presumably you were happy to get that and get those
7 assurances from the Commissioner?

8 A. Yes. One of the points that I think Sergeant McCabe
9 wrote up was, I think it was an editorial in the 'Garda
10 Review' and both he and I had been criticised. I had 15:13
11 been criticised for a speech that I gave in Templemore,
12 where I encouraged the recruits, if they saw
13 wrongdoing, to speak out, and I was accused by the GRA
14 of causing indiscipline in the force. And clearly, in
15 that speech, what I was intending to say was that, you 15:14
16 know, if people saw wrongdoing, they should speak out
17 about it. And Sergeant McCabe felt that that original
18 letter you quoted, he was concerned about what had been
19 said about him there. He felt it was part of a
20 campaign and he wanted the Garda Commissioner to look 15:14
21 into it.

22 540 Q. Yes. I'm not passing any judgment at all about the
23 nature of Sergeant McCabe's complaints, but they
24 obviously emanate from things that are said or done to
25 him which he considers not to have been correct. Did 15:14
26 you have any discussion at this point as to how the
27 Commissioner was going to approach dealing with
28 Sergeant McCabe in the context of the investigation of
29 his complaints?

1 A. The complaints, you mean within the internal -- within
2 An Garda Síochána, as opposed to the ones that the
3 O'Higgins Commission were investigating, the HR ones?
4 541 Q. The ones that had been assigned to the O'Higgins
5 Commission and would be investigated by the O'Higgins 15:15
6 Commission within its terms of reference?
7 A. Did I have any conversation with the Commissioner?
8 542 Q. Yes --
9 A. No.
10 543 Q. -- did you have any conversation with the Commissioner 15:15
11 about what approach she might take?
12 A. No, no. I didn't, no. At the O'Higgins Commission?
13 544 Q. In relation to how, in particular, she would be
14 approaching Sergeant McCabe?
15 A. No, I didn't. 15:15
16 545 Q. All right. Did it cross your mind as to whether you
17 should do that or whether it might be appropriate in
18 the light of all of the controversial events?
19 A. No, because what I was focusing on very much was how
20 his day-to-day work, how he was experiencing his 15:15
21 day-to-day work, the issues that were still emerging
22 for him there, and I was asking what could be done in
23 relation to that. So it was quite separate from the
24 Judge Kevin O'Higgins Commission.
25 546 Q. All right. Just go back to the letter there, the 15:16
26 Commissioner mentioned Mr. Barrett, and obviously she
27 described what Mr. Barrett was doing that day. But did
28 you understand that he had been, as it were,
29 specifically assigned very recently to concern himself

1 with Sergeant McCabe's HR issues and well-being, et
2 cetera?

3 A. Well, I think this letter and the letter of the -- go a
4 bit further, the letter of the 20th March from the
5 Commissioner, would have been the first time that I 15:16
6 would have detailed information on how Sergeant McCabe
7 was being dealt with --

8 547 Q. All right.

9 A. -- internally, because it would be very much an
10 operational matter as opposed to a matter for me. So I 15:16
11 was raising it really at a -- well, obviously because
12 of the impact it was having on him at that time, but I
13 was raising it very much in terms of the policy
14 approach and, you know, how these issues were being
15 dealt with, and I was seeking reassurance in relation 15:17
16 to that. But I wouldn't have been aware of the, you
17 know, the operational, if you like, the ins and outs of
18 how he was being dealt with from a HR perspective --

19 548 Q. All right.

20 A. -- within An Garda Síochána. 15:17

21 549 Q. And you wouldn't perhaps expect to be?

22 A. No, not at all.

23 550 Q. But in any event, obviously the terms of reference that
24 progressed through the Dáil and the Seanad, the
25 Government had made its order of the 3rd February? 15:17

26 A. Yes.

27 551 Q. The Commission was certainly in name established and
28 this issue of Sergeant McCabe and how he was being
29 treated and how the Commissioner was dealing with him

1 was on your desk then at this stage in the sense of you
2 being alive to his concerns and concerned to ensure
3 he'd be treated properly?

4 A. Yes.

5 552 Q. And did you consider at all as to whether the 15:18
6 Commissioner might, as alleged, take a different view
7 in private than she was taking in public?

8 A. Did I -- what way did you put that?

9 553 Q. Did you consider at all whether the Commissioner was 15:18
10 dealing with him in this way and might be dealing with
11 him differently in private?

12 A. No, I didn't. No, I was just getting a report on, you
13 know, the actions that were being taken and needed to
14 be taken in order to deal with the issues that he had
15 raised. 15:18

16 554 Q. Okay. I think Sergeant McCabe emailed you subsequently
17 in March, and perhaps we'd look at that email on page
18 3407.

19 A. Yes.

20 555 Q. This refers to an email of yours from the previous 15:19
21 date, which we should perhaps look at first.

22 A. Yes.

23 556 Q. It's at the bottom of page 3407, going onto page 3408
24 there. It says:
25
26 "Email from Minister Fitzgerald."
27
28 And then on 3408 --

29 A. Yes.

1 557 Q. -- that appears to be the second page of it, but it's
2 mispaginated there.

3 A. Yes.

4 558 Q. But if we go to page 3412, we should see the start of
5 that. And this appears to be a reply giving him a lot
6 of detail: 15:19

7

8 "Dear Sergeant McCabe,

9

10 I promised to respond to your recent email 15:20
11 correspondence raising workplace concerns relating to
12 protected disclosures which you made under the
13 Protected Disclosures Act 2014. As you know, I asked
14 the Garda Commissioner, as your employer, for the
15 purpose of the Act, for her response to your concerns. 15:20
16 The Garda Commissioner informs me that she has written
17 to you direct."

18

19 And then we should go to the top of page 3410 as the
20 continuation of that. 15:20

21 A. Yes.

22 559 Q. "Advising you that --"

23

24 3410.

25 15:20

26 "Advising you that in addition to the measures which
27 she has already taken, she has asked an independent
28 workplace relations expert, Kieran Mulvey, to examine
29 your concerns and make recommendations on how they

1 might be addressed.

2
3 I am very pleased that Mr. Mulvey has accepted this
4 invitation and that a person whose stature and
5 expertise will now see how best your concerns might be 15:21
6 resolved.

7
8 I very much hope this intervention will lead to
9 resolution of outstanding difficulties and enable you
10 to continue to effectively do the vital work of the 15:21
11 Garda Síochána.

12
13 Very best wishes to you and your family."

14
15 And Sergeant McCabe replied to that. If we go to 3409. 15:21
16 And that's your private secretary I think sending on
17 the return of -- the return email of Sergeant McCabe
18 there. It says:

19
20 "Dear Minister Fitzgerald, 15:21

21
22 Thank you for your email yesterday. I have been kept
23 updated by the Garda Commissioner with the work and
24 developments as outlined by you.

25 15:22
26 I am happy to say that things are going very well at
27 work due to the positive leadership and the new
28 management at Mullingar. The roll-out of the seminars
29 has started a change of attitudes for the better. It's

1 great being able to say for the first time in years
2 that I'm happy going to work. I wish to acknowledge
3 your personal input into sorting out my work
4 environment. Thank you very much for all of your help.
5 It's very much appreciated by myself and Lorraine." 15:22

6
7 And I think am I right in saying that you were able to
8 write that letter because of the Commissioner's letter
9 of the 20th March that you've referred to already, is
10 that right? 15:22

11 A. Well, yes, because I had been informed of the various
12 initiatives that were underway and maybe even being
13 accelerated a little bit, perhaps.

14 560 Q. Yes.

15 A. And also because I had been told about those, that long 15:22
16 letter, telling me the various things that were being
17 done and intended to, that the guards intended to
18 continue doing, and the various initiatives they'd
19 taken to work with Sergeant Maurice McCabe and the
20 various issues which he had raised. There were also 15:23
21 changes in the penalty points, just to mention that in
22 passing. At some point we reorganised -- you know, the
23 Gardaí reorganised, and at policy level I was very
24 pleased to see what was happening in relation to that.
25 They were all centralised in Athlone, and less people 15:23
26 were taking decisions about them and we appointed a
27 judge to oversee that. So that was happening as well.
28 And when he references the seminars there, I think it's
29 the seminars in relation to the handling of the penalty

1 points, but, you know, he acknowledged my personal
2 input into sorting out his work environment and thanked
3 me for his help. And then when I was informed that
4 Kieran Mulvey was also being appointed, I thought that
5 was very good, given his expertise in dealing with HR 15:24
6 issues and that that really should make a difference.
7

8 I should say I think that in August '16 and March '17,
9 Sergeant Maurice McCabe also made comments about my
10 approach, but we perhaps will reach that at a later 15:24
11 stage.

12 561 Q. Yes. I think I have made reference, as you have, to
13 the letter of the Commissioner of the 20th March --

14 A. Yes.

15 562 Q. -- which you had received prior to this. That's to be 15:24
16 found at page 3419 onwards. And that's a 14-page
17 letter. It's being written to you under the Garda
18 Síochána Act of 2005, and obviously it's addressed to
19 the Secretary General, but I take it you saw it --

20 A. Yes. 15:24

21 563 Q. -- immediately it came in?

22 A. Yes.

23 564 Q. And did matters like this relating to Sergeant McCabe,
24 did they have a degree of priority in your Department
25 in terms of being brought to your attention as soon as 15:25
26 possible?

27 A. Well, you know, as I said, it was an extremely, you
28 know, busy department with a lot of priority areas --

29 565 Q. Yes.

1 A. -- I would have to say that, and a lot of, you know,
2 red flag issues effectively that were brought to my
3 attention on a daily/weekly basis. But clearly, this
4 would be brought to my attention quickly as well.

5 566 Q. Yes. Obviously a Section 41 report is, I don't know 15:25
6 whether the Commissioner may have interpreted or been
7 advised to interpret your request in terms of a more
8 formal statutory sort of response, but did you draw
9 anything from the fact that it was provided under
10 section 41, or not? 15:25

11 A. Well, I think it -- I suppose it was showing the
12 seriousness with which she was responding to the
13 questions that had been raised about how Sergeant
14 Maurice McCabe was being dealt with.

15 567 Q. Yes. 15:26

16 A. So I would take that from it, that it was --

17 568 Q. Yes.

18 A. -- it was a very serious reply outlining what had
19 actually happened in terms of responding to the
20 different issues which had emerged. 15:26

21 569 Q. Yes. And the Tribunal has had it opened to it before,
22 you obviously have received it, you've referred to it
23 in your own exhibits, I don't intend to read the letter
24 in its entirety at all, but you'd have to describe it
25 as a most comprehensive report of the approach that the 15:26
26 Commissioner was taking to Sergeant McCabe at that
27 point?

28 A. Yes.

29 570 Q. Okay. From your point of view, you couldn't consider

1 it as anything but a genuine approach, from the content
2 and the way that the Commissioner was dealing with
3 Sergeant McCabe, presumably?

4 A. Absolutely, yes. I saw it as an outline of the various
5 actions that were being taken in response to a very
6 serious request from myself and the Department to
7 outline --

15:27

8 571 Q. Yes.

9 A. -- a response to what Sergeant McCabe had in his
10 letters.

15:27

11 572 Q. Yes. Perhaps if we just turn to the summary of the
12 Commissioner's expressed position at that point in
13 time, at page 3429. The bottom half of that page is an
14 attempt, obviously, at a summary of the letter. It
15 says:

15:27

16
17 "In summary and exclusive of meetings and calls
18 relating to the FCPS examination and protected
19 disclosure matters, the contacts to date comprise:

20
21 Contact with Commissioner's private secretary, personal
22 telephone with Commissioner, discussed welfare support
23 and nomination of an individual he trusted, offer of a
24 meeting and the opportunity to nominate an individual
25 in whom he had confidence and with whom he was
26 comfortable, to set out the issues/concerns he has and
27 give an undertaking that these matters would be fully
28 and thoroughly addressed, the offer of an external
29 expert or panel of expert with different skills and

15:27

15:27

1 qualifications in employment and/or human resource
2 management and workplace issues, to assist in resolving
3 outstanding issues for an agreed mediation process was
4 again made and attempted to address all matters,
5 meeting with Commissioner and senior staff, again 15:28
6 offered and accepted opportunity to nominate officer to
7 deal with his concerns, meeting with local chief
8 superintendent, Acting Deputy Commissioner met with
9 solicitor and client, further meeting with
10 Commissioner, telephone call executive director of 15:28
11 human resources and people development, meeting with
12 executive director of human resources people
13 development, and Chief Superintendent O'Brien,
14 inspector appointed locally as point of contact, chief
15 superintendent appointed at human resources and people 15:28
16 development to act as point of contact at HR, ten
17 directions to regional assistant commissioner directing
18 action on complaints received and to ensure that
19 Sergeant McCabe is fully supported in the workplace,
20 meeting at Sergeant McCabe's home with Chief 15:29
21 Superintendents O'Brien and McLoughlin at which
22 Sergeant McCabe expressed satisfaction with the
23 appointment of Mr. Mulvey to carry out mediation. The
24 aforementioned contacts are additional to past and
25 ongoing local management contacts." 15:29

26
27 It then continues:

28
29 "As outlined, I and my senior Garda management team

1 have made significant efforts to progress the
2 resolution to the issues raised by Sergeant McCabe and
3 remain committed to doing so. In that context, and
4 giving the complexities of the issues raised to date, I
5 have now retained the services of an independent 15:29
6 workplace mediator to review and examine all of the
7 issues and concerns raised by Sergeant McCabe with a
8 view to addressing, progressing and/or resolving his
9 issues and to issue any advice or recommendations that
10 he sees fit as to what further actions can be taken, to 15:29
11 ensure a safe and harmonious place of work.

12
13 In addition, An Garda Síochána has engaged an
14 independent workplace relations expert, Dr. Gerry
15 McMahon, to conduct a series of seminars to brief all 15:29
16 personnel on policies in An Garda Síochána on dignity
17 at work. This was also welcomed by Sergeant McCabe.

18
19 Sergeant McCabe has been assured that his welfare and
20 well-being are paramount in all actions that I have and 15:30
21 will continue to take regarding his position.

22
23 I will keep you informed of developments.

24
25 Yours sincerely,
26 Nóirín O'Sullivan.
27 20th March 2015."
28

29 Now, I suppose you took her, the Commissioner, at her

1 word, obviously, having regard to the content of the
2 letter?

3 A. Yes.

4 573 Q. And can I take it that you did expect to be informed of
5 developments? 15:30

6 A. Not necessarily. I mean, I saw this very much as an
7 issue for the guards to take forward, and these
8 supports were all apparently put in place and I
9 expected that they would continue.

10 574 Q. All right. 15:31

11 A. Unless I, you know, was informed otherwise.

12 575 Q. Could I ask you look at this email of the 15th May
13 2015, page 743 of our documents. That's volume 2.
14 It's one of -- I'm sorry, there's another tranche of
15 emails. Perhaps 3482. Now, this was apparently sent 15:31
16 at three minutes to five on the 15th May, which was a
17 Friday, and you've helpfully made your diary available.
18 Can I just ask you where you were then, actually, if
19 you can recollect, more or less at that time on a
20 Friday? 15:32

21 A. 15th May --

22 576 Q. Yes.

23 A. -- '15? Yes, I was in my constituency that day. I was
24 in a number of schools in Saggart, Rathcoole and
25 Newcastle, and I was in my office, my constituency 15:32
26 office. At about, I think, five o'clock I left to go
27 to the launch of a book in the Central Bank by -- 'The
28 Law of Intoxication'. I was launching that book that
29 evening with a member of the judiciary, and I went in

1 to do that launch --

2 577 Q. Yes.

3 A. -- for 5:30.

4 578 Q. Yes. Did you see the email on that day?

5 A. Well, I obviously, as you'll see from my statement, I 15:33

6 obviously read the email. I'm not sure when I read it.

7 579 Q. Yes.

8 A. It's possible that I read it that evening or over the

9 weekend.

10 580 Q. Yes. 15:33

11 A. I noted it some ten days later.

12 581 Q. Yes.

13 A. It would have been my habit to -- obviously I would

14 have got, as I explained already, I would very often

15 get phone calls, often on any day of the week, but on a 15:33

16 Friday, you know, really urgent emails that would have

17 come in that would have needed a decision.

18 582 Q. Yes.

19 A. And it would be very common for my private secretary to

20 call me, and then I would look at those emails. But 15:33

21 equally, you know, either probably at home, later on, I

22 would scan through emails and see was there anything

23 else that needed action, and then I would often return

24 to them at a later point when I would note them with my

25 private secretary, either on email or obviously when I 15:34

26 was in the office.

27 583 Q. Yes. You have referred in your statement, in fairness,

28 to all of the duties and the importance of your private

29 secretary?

1 A. Yes.

2 584 Q. And as I understand it, you found him to be a very
3 efficient private secretary over the years in that
4 position?

5 A. Very diligent, yes. 15:34

6 585 Q. And I'm only trying to establish at this point when you
7 might have read it. Obviously you noted it on the --
8 he records you himself on the 25th as having -- you
9 having noted it, but he wasn't able to tell us when you
10 had noted it or when you had read it. It is quite 15:34
11 possible you might have read it on the evening of the
12 15th?

13 A. That is possible, yes. Or the weekend, certainly.

14 586 Q. And do I understand from an earlier part of the same
15 answer, that if you were out of the office, sometimes 15:35
16 the private secretary would ring you and maybe alert
17 you to --

18 A. Yes.

19 587 Q. -- emails you might have to read?

20 A. There would often be emails for a decision. 15:35

21 588 Q. Yes.

22 A. It could be -- it could be a memo going to Government
23 that needed to be cleared in time for the deadline of
24 maybe 12 o'clock on either a Thursday or a Friday, or
25 it could be a decision that needed to be taken in 15:35
26 relation, you know, to any one of a number of issues,
27 prisoner release over the weekend, whatever. And they
28 would be, they would be emails for decision, and so I
29 would often be alerted to those because clearly I would

1 be, you know, I would be busy going from various -- to
2 various events or I could be in the Dáil or the Senate
3 and I wouldn't be sitting at a desk looking at the
4 emails. I would be alert to urgent ones by a phone
5 call or text, or I would see them myself. 15:35

6 589 Q. Yes. Well, will you agree that the email informs you
7 of the strategy of the Commissioner at the Commission
8 in raising the allegation and pursuing, as she thought,
9 his motivation in making complaints?

10 A. No, I wouldn't agree with that. 15:36

11 590 Q. I beg your pardon?

12 A. I wouldn't agree that it informs me about the strategy.

13 591 Q. Okay. Well, did the email worry you when you did read
14 it?

15 A. The way -- I mean, obviously when you look back at an 15:36
16 email, I can consider the context in which I would have
17 read it at the time.

18 592 Q. Yes.

19 A. When I read it.

20 593 Q. Yes. 15:36

21 A. And my understanding of it and what my approach to it
22 would have been. So it was an email about a row that
23 had -- an event that had broken out --

24 594 Q. Yes.

25 A. -- at the Commission between the two legal teams. 15:36

26 595 Q. Yes.

27 A. And I was being informed.

28 596 Q. Well, I suppose one way of looking at it, firstly, is:
29 You knew Mr. McDowell, obviously, who was raising a

1 concern about the Commissioner's approach?

2 A. Yes.

3 597 Q. You had met Sergeant McCabe and you were familiar with
4 his concerns and his worries and what the Commissioner
5 had been doing to deal with his concerns, isn't that 15:37
6 right?

7 A. Yes, yes.

8 598 Q. It's obviously from Mr. Flahive, who is your assistant
9 secretary, who is very competent, I presume,
10 Mr. Flahive, whom you knew well? 15:37

11 A. Yes.

12 599 Q. And it's going to your private secretary, whom you
13 relied on, isn't that right?

14 A. Yes.

15 600 Q. And it's conveying information from Mr. Barrett, and I 15:37
16 take it you knew who Mr. Barrett was?

17 A. I did, yes.

18 601 Q. All right. So you knew everyone, in fact, who has been
19 named in the email, firstly, isn't that right?

20 A. Yes, yes. 15:37

21 602 Q. And did you think that Mr. Barrett was phoning, as it
22 were, for no reason, or did you ascribe any reason as
23 to why he was phoning?

24 A. No, I mean, the way I would have responded to the email
25 was that, first of all, it was about something that was 15:38
26 happening at the O'Higgins Commission. Now, I would
27 have regarded the O'Higgins Commission as really
28 quasi-judicial under the Commission of Investigation
29 Act, it was private, it was independent and I did not

1 see any role for myself in relation to the O'Higgins
2 Commission. I think obviously if I had interfered in
3 any way with the O'Higgins Commission, I would be
4 answering different questions now. It would have been
5 completely inappropriate for me, as Minister, to 15:38
6 interfere, to have any political interference. The day
7 of political interference in something like that was
8 well gone, as far as I was concerned. And I was being
9 told about something that had happened at the O'Higgins
10 Commission and I was being informed -- 15:39

11 603 Q. Yes.

12 A. -- informed in relation to it, but I had appointed --
13 the Government had appointed a very eminent judge to
14 deal with the O'Higgins -- to, you know, do the work of
15 the O'Higgins Commission. 15:39

16 604 Q. Yes.

17 A. And I would be very satisfied that whatever arose would
18 be dealt with by the Judge. So I saw it as
19 information, yes, coming from the people you have
20 described, and, of course, the important point as well, 15:39
21 that there was no role for me as Minister or indeed no
22 role for the Attorney General, and that was emphasised.
23 Now, having said that, I would, of course, have
24 considered it myself and my own judgment, you know, I
25 would have used my own judgment, having read the email 15:39
26 as well, but I noted that part of the email. I would
27 have noted that part of the email. When you asked me
28 to consider that email, that would have been my -- that
29 would have been my approach to it.

1 605 Q. Yes. Well obviously I understand what you said about
2 your ultimate conclusion of not interfering, but I'm
3 trying to get your evidence according to the best of
4 your recall at this point in time and looking at the
5 email and knowing what position you were in in May 15:40
6 2015. So could we just look at each of the portions of
7 the email.
8 A. Yes. Could I ask you what page that email is on,
9 please?
10 606 Q. I'm sorry, we're looking at 3481. 15:40
11 A. 3481. Yes.
12 607 Q. Now, the first thing is, it's headed:
13
14 "Confidential Commission of Investigation."
15 15:40
16 Had you been aware that the Commission had commenced
17 its hearings?
18 A. Em, if I -- I probably was at that point, yes.
19 608 Q. Yes.
20 A. Yes. 15:40
21 609 Q. And was this the first --
22 A. I didn't know, like, what day it was on, or anything.
23 It might have been as much from the media as from
24 anybody saying to me it has started, because I wasn't
25 getting any updates on the Commission. It was quite 15:41
26 separate.
27 610 Q. Yes. Well, presumably this was the first email you got
28 in relation to the Commission?
29 A. Since it had started, yes, I assume it was, other than

1 if there was any practical details, there might have
2 been one or two very technical points that might have
3 come to the AG about the establishment of the
4 Commission, but other than that, no.

5 611 Q. There's nothing ordinary, I suppose, in Mr. Flahive 15:41
6 requesting:

7
8 "Chris, could you pass this on to the Minister for
9 information, please?"

10 A. Yeah. 15:41

11 612 Q. And I take it that Mr. Flahive sending it on for your
12 information, he would expect you to read it?

13 A. Of course.

14 613 Q. Yes. And it then says:

15 15:41
16 "I took a call this afternoon from Richard Barrett in
17 relation to the O'Higgins Commission of Investigation
18 which is investigating the matters identified by the
19 Guerin Report."

20 15:42

21 And you knew what they were, isn't that right?

22 A. Yes, because they were the terms of reference.

23 614 Q. And you knew what they weren't, also. You knew what
24 wasn't in it, isn't that right?

25 A. Yes. 15:42

26 615 Q. It says:

27
28 "The O'Higgins Commission has started hearings and the
29 Garda Síochána are represented by counsel, as is

1 Sergeant McCabe, in his case Michael McDowell SC.

2
3 Richard wanted to let me know that counsel for the
4 Garda Síochána has raised as an issue in the hearings
5 an allegation made against Sergeant McCabe which was 15:42
6 one of the cases examined by the IRM."
7

8 Now, could I just stop there? Did that not set off
9 alarm bells or lead to concern on your part as to what
10 was going on, why was that being done, or was it being 15:42
11 done?

12 A. It said that counsel for the Garda Síochána had raised
13 it as an issue. I didn't know any more details.
14 Remember, I didn't have any details at all about what
15 was happening down at the Commission. I wouldn't have 15:43
16 any knowledge of, you know, what counsel had said, or
17 all of the material that's emerged at the Tribunal, I
18 wouldn't have had any knowledge whatsoever about any of
19 that, nor indeed of the -- as it turned out, the
20 earlier conversations about this. 15:43

21 616 Q. Yes. But just looking at the elements of that, you
22 knew that the allegation against Sergeant McCabe had
23 been one of the cases that was examined by the IRM,
24 isn't that right?

25 A. Yes. 15:43

26 617 Q. You knew it hadn't been included in the terms of
27 reference. Did you not ask yourself what is going on,
28 what is the Commissioner doing down there, with this?

29 A. Well, I didn't have the details of precisely what had

1 happened, and my attitude to it would have been that
2 Judge O'Higgins will deal with that in the appropriate
3 way because he knew what the terms of reference were.
4 And my understanding, as well, is that following the
5 IRM, that he may well have been informed that the Ms. D 15:43
6 case had concluded and that there was no further
7 action --

8 618 Q. Yes.
9 A. -- by, perhaps, the Attorney.

10 619 Q. Yes. 15:44
11 A. So I didn't -- you know, I felt that this is something
12 that Judge O'Higgins would deal with.

13 620 Q. Well, that's what I am wondering, I'm asking you really
14 what was your reaction? Did you read that and say,
15 look, that does seem outside the terms of reference, 15:44
16 but I know the Judge will deal with that?

17 A. Well, the way I would have looked at it was that this
18 was happening down at the Commission of Investigation
19 and I had no role in that Commission. It was an
20 independent body. It would not have been appropriate 15:44
21 for me in any way to get involved, and, yes, I would
22 have assumed that Judge O'Higgins, that whatever the
23 issue was, that it would be worked through at the
24 Commission under the guidance of Judge O'Higgins.

25 621 Q. Well, Mr. Flahive, who wrote the email, said that he 15:44
26 didn't understand the nuance of what was being raised,
27 but this appears to put it, does it not, in very stark
28 terms, that they were pushing it in in some way or
29 taxing Sergeant McCabe about it in some way, when they

1 perhaps shouldn't have been? Did you not read it that
2 way?

3 A. Well, you know, it was difficult to know how to read
4 it --

5 622 Q. Yes. 15:45

6 A. -- because I couldn't quite understand the context in
7 which this would have been raised.

8 623 Q. Yes.

9 A. But as I say, whatever the context, it was up to the
10 Commission of Investigation to analyse that. 15:45

11 624 Q. Yes.

12 A. And to deal with it in whatever was the most
13 appropriate way.

14 625 Q. Well, if it was perhaps difficult to read it, did you
15 discuss it with Mr. Flahive, who wrote it? 15:45

16 A. No.

17 626 Q. I see. The next part of that says:

18
19 "The allegation had been that a serious criminal
20 complaint against Sergeant McCabe, which he has always 15:45
21 denied, had not been properly investigated by the Garda
22 Síochána. The IRM found that an investigation file on
23 the case had, in fact, been submitted to the DPP, who
24 had directed no prosecution, and the IRM, which,
25 because of the seriousness of the allegation, had been 15:46
26 considering whether to recommend its inclusion in the
27 O'Higgins terms of reference, in the end recommended no
28 further action by the Minister."
29

1 And were you happy that that was, as it were, broadly
2 accurate or that you knew that already?

3 A. Yes, I was aware of the details of the IRM, so I would
4 have been aware of those details, yes, that the
5 complaint from Ms. D had -- a complaint from Ms. D had 15:46
6 been that the Gardaí had not investigated her
7 allegation properly, but that had been -- from my point
8 of view, obviously, I was aware that the DPP had
9 already made a decision and the IRM, the process I had
10 set up, that there was a conclusion to that as well -- 15:46

11 627 Q. Yes.

12 A. -- towards the end of '14.

13 628 Q. But, you see, that's what I'm just going to ask you
14 about now, the juxtaposition between the first sentence
15 and the second sentence, you knew the whole of the 15:47
16 second and third sentences to be pretty accurate, you
17 knew the conclusion of the IRM, and did that not
18 exacerbate any query you might have over how they were
19 raising, as an issue in the hearings, an allegation
20 made against Sergeant McCabe? 15:47

21 A. Well, I mean, Judge O'Higgins has in his final report,
22 which is obviously after this, but he talked about an
23 opportunity, obviously, right through the O'Higgins
24 Commission, there was an opportunity, where
25 appropriate, to cross-examine, to raise issues that had 15:47
26 been stressful for people down there because their
27 evidence was questioned in small detail and in great
28 detail.

29 629 Q. Yes.

1 A. And again, you know, my view would have been that,
2 whatever was being raised down there, that it would be
3 an issue for the Commission of Investigation to deal
4 with.

5 630 Q. But, I mean, you've obviously read this many times 15:48
6 since you first read it, but when you first read it did
7 it strike you as there being a complete conflict or
8 clash between what was said to be going on down there
9 and what you knew to be accurate in the second and
10 third sentence? 15:48

11 A. Well, I mean, I knew the terms of reference, I knew
12 what had happened in relation to the Ms. D case and the
13 IRM, I knew that I had set up the Commission of
14 Investigation, that it was independent and private,
15 Section 9 and Section 11 of the Commissions of 15:48
16 Investigation Act and that those were the terms of the
17 Commission of Investigation. So, as I say, the
18 approach I would have taken is that whatever, and I do
19 think it's a somewhat confusingly-written email, I
20 think it does put a lot of different things together, 15:48
21 and I say that in my submission, I mean, and I think
22 Mr. Flahive talked about, you know, that he went on to
23 speak about the IRM. The investigation into the IRM,
24 was what he was apparently referencing there.

25 631 Q. Well, you've referred to it there in that answer as 15:49
26 being confusing as well, and I know you say you
27 obviously didn't speak to Mr. Flahive about it, but is
28 there any reason why you didn't speak to Mr. Flahive
29 about it?

1 A. Well, because, first of all, it was an email for
2 information. Secondly, because both he and Richard
3 Barrett, who was the second most senior person in the
4 Attorney General's office, had decided that there was
5 no role for either the Attorney or the Minister in 15:49
6 relation to this information coming through. I didn't
7 have the details of precisely what had arisen because I
8 was not party in any way to the Commission, and when
9 you put all of that together --

10 632 Q. Yes. 15:50

11 A. -- I felt it was appropriate for the Commission to get
12 on with its work. As I said, I mean, if -- in terms of
13 raising, so these questions, the question is, well, you
14 know, should I have started investigating this, I
15 think, and doing -- you know, getting involved in it, I 15:50
16 would effectively be getting involved in the Commission
17 of Investigation, what had happened at it, you know,
18 exploring it with different people, and I felt that
19 that was not -- that was not appropriate and that it
20 would be dealt with at the Commission. And obviously 15:50
21 what I know now is that, from the evidence before the
22 Tribunal, that the question, for example, of a judicial
23 review was discussed with Richard Barrett. That was
24 never brought to my attention. Now, if I had been told
25 there was a judicial review being taken down at the 15:50
26 Commission, that would have been a different kind of
27 email altogether that I was getting. But I wasn't
28 informed of any of those conversations or any of the
29 detail that, you know, has become apparent to the

1 Tribunal. And in the context of the information that I
2 had here, it's -- Michael, for example, he says:

3
4 "Presumably the Gardaí are raising the matter on the
5 basis they could argue and Sergeant McCabe would deny 15:51
6 that it is potentially relevant to motivation."
7

8 So -- and there was also another point here, I think
9 that there was a comment made that the Commissioner was
10 getting further legal advice. So I saw it as an issue 15:51
11 that would develop further, you know, if it was going
12 to develop further, because that point was put in there
13 as well. So it was, if you like, unfinished business
14 down at the Commission, would have been the approach
15 that I would have taken to it. 15:51

16 633 Q. Obviously you are correctly quoting the next paragraph
17 that begins "Presumably". But you saw there that:

18
19 "Sergeant McCabe's counsel had objected to the issue
20 being raised and had asked whether the Commissioner had 15:52
21 authorised this approach. Richard also told me the
22 Garda Commissioner's authorisation had been confirmed,
23 although I understand separately this may be subject to
24 any further legal advice."
25

26 Did it not appear to be clear from the email that,
27 whatever about the flesh on the bones of the
28 Commissioner's strategy, you were given a very clear
29 X-ray of the skeleton of the strategy: they were

1 intent on raising an issue which appeared to be outside
2 the terms of reference and also perhaps questioning his
3 motivation?

4 A. What I would say is that it was certainly something
5 that was happening down at the Commission. As such, it 15:52
6 was a matter for the Judge at the Commission, and it
7 wasn't for me to make an interpretation such as you've
8 made, one way or another.

9 634 Q. All right.

10 A. But it was very much for the Judge to make that 15:52
11 decision.

12 635 Q. Yes.

13 A. Given his terms of reference and what he knew about the
14 situation overall.

15 636 Q. Yes. 15:53

16 A. So, you know, I didn't move on to interpretations
17 around it.

18 637 Q. Okay.

19 A. I took the approach as I've outlined it to you, and I
20 think it was the appropriate approach. I mean -- yes. 15:53

21 638 Q. It does go on to say:
22
23 "Richard and I agreed that it was a matter for the
24 Garda Commissioner to be legally advised and neither
25 the Attorney nor the Minister has a function relating 15:53
26 to the evidence a party to the Commission of
27 Investigation may adduce."
28
29 Now, it doesn't contemplate or discuss the issue of

1 interfering in the Commission, isn't that right, as
2 such?

3 A. Well, it just says that there is no role.

4 639 Q. Yes. Well, I'm not sure it says that.

5 A. "Neither the Attorney... has a function relating to the 15:53
6 evidence."

7 640 Q. Yes. But did you -- I mean, this is Mr. Flahive a
8 conversation that he's had with Mr. Barrett, but you
9 had experienced other officials in the Department,
10 Mr. O'Leary; did you discuss this with Mr. O'Leary? 15:54

11 A. No.

12 641 Q. Why not?

13 A. I didn't actually know until I heard it in the Tribunal
14 that he'd had a conversation with Michael about it.

15 642 Q. Okay. Did you know he had had a conversation with the 15:54
16 Commissioner about it?

17 A. No. I didn't.

18 643 Q. And when did you first learn of that, if I may ask?

19 A. When the statements were taken for this Tribunal.

20 644 Q. All right. So Mr. O'Leary, I think he retired from -- 15:54
21 A. Yes.

22 645 Q. -- his position by the time he provided the statement?

23 A. Yes.

24 646 Q. That was after the publication of the emails, after
25 they had been located and published, isn't that 15:54
26 correct?

27 A. Yes.

28 647 Q. Now --

29 A. By the way, I think that, that approach of, for

1 example, Mr. O'Leary discussing it with the
2 Commissioner and not, if you like, proactively
3 approaching me in relation to that, that would be very
4 much in keeping with the view in the Department, both
5 at my -- you know, at ministerial level and at official 15:55
6 level, that the Commission of Investigation was
7 separate, you know, from -- very totally independent
8 from the Department and that we didn't have any role in
9 relation to it, except also that members of the
10 Department itself, because I had put in the Department 15:55
11 into the terms of reference, and the role of the former
12 Minister. So it was, you know it was very much seen as
13 you know something totally separate to the Department,
14 that there wasn't a role for the Department in relation
15 to -- and it was, I think I would say it was observed 15:55
16 in a very, in a very careful and consistent manner. So
17 that would explain to me why, for example, Mr. Ken
18 O'Leary wouldn't have approached me proactively to say
19 we just see it as separate.

20 648 Q. We'll come back to that in due course, but as you say 15:56
21 the view of the Department about the role of the
22 Department and the Minister in the Commission, when was
23 that discussed?

24 A. From very early on. When the terms of reference -- I
25 mean, it was obvious that it was being set up under the 15:56
26 Commission of Investigation Act, it was very clear what
27 the role was in relation to that. It would have come
28 up I suppose in a practical way in terms of, you know,
29 questions in the Dáil and parliamentary questions and

1 require the Commission of Investigation, that's the
2 O'Higgins Commission of investigation, to investigate
3 and report on, (j), the investigation by the Minister
4 for Justice and the Department of complaints made by
5 Sergeant McCabe. Is that what you were referring to? 15:58

6 A. Yes, that was part of the terms of reference.

7 653 Q. MR. MCGUINNESS: But just to be clear, did you consult
8 with Mr. Waters about this email in and around this
9 time or not?

10 A. No, I didn't. 15:58

11 654 Q. And Mr. Power has given evidence this morning, did you
12 consult with Mr. Power about it in any way?

13 A. No.

14 655 Q. And your special advisers who were copied on it, did
15 you discuss it with either of them? 15:58

16 A. I don't believe I did, no.

17 656 Q. And it goes to a wider group, the Sec Gen group, we've
18 heard evidence from Ms. Phelan, Ms. Monks,
19 Mr. Sunderland and Mr. Griffin, did you discuss with
20 any of them? 15:59

21 A. No, they were the various private secretaries to
22 different people and administrative staff, I don't
23 think I would ever -- you know, it would never be -- it
24 just wouldn't arise that I would have discussions in
25 relation to these issues with a wider group. 15:59

26 657 Q. Okay. One of the remarks noted down by Ms. Annmarie
27 Ryan, who was the solicitor for the Commissioner, after
28 she had spoken to Mr. Dreelan from the Attorney
29 General's office, was that this was political dynamite.

1 Did you see this as political dynamite?

2 A. Well, I mean, I suppose I think Mr. Waters said working
3 in the Department of Justice there were ongoing issues
4 that one might call political dynamite.

5 658 Q. Yes. 16:00

6 A. But in relation to this, no. I mean, I very much saw
7 it as, you know, an issue that had arisen, that counsel
8 had objected to, counsel for Sergeant McCabe had
9 objected to, it had arisen in what were the early days
10 of the Commission of Investigation. There were clear 16:00
11 terms of reference. There was -- you know, both sides
12 were represented and capable of, you know, responding
13 to whatever arose on the day and I saw it very much in
14 that context, that it would be dealt at the O'Higgins
15 Commission, it would be dealt with at the O'Higgins 16:00
16 Commission.

17 659 Q. But leaving aside the perhaps dramatic description of
18 it as political dynamite, did you not consider that the
19 course of action, albeit sketchily indicted as having
20 been commenced on the part of the Commissioner, was 16:01
21 likely to cause some ripples in relation to how you
22 treat people who make protected disclosures, or how the
23 Commissioner was treating this particular --

24 A. Well, it was a private Commission, I would have hoped
25 that anything that was happening down at that 16:01
26 Commission would remain private. You used the word
27 "sketchily indicated", and that is my point when I
28 originally said that it didn't give an indication of
29 the overall strategy. It's sketchily indicated, as you

1 say. And I absolutely felt that the place for that to
2 be worked through was at the Commission.

3 660 Q. Just in terms of policy or reaction to it, I mean the
4 email concludes by just focusing on whether the
5 Attorney or the Minister had a function in relation to 16:01
6 the evidence a party to the Commission may adduce, but
7 there was nothing to prevent you considering whether it
8 might have any impact, either with your departmental
9 advisers or your special advisers, isn't that right?

10 A. Well, if I was raising it in terms of something that 16:02
11 emerged down at the Commission, I don't think it would
12 have been that appropriate.

13 661 Q. Well, I'm not talking about down at the Commission.
14 Put the Commission out of your mind for the moment, if
15 that is possible. 16:02

16 A. Yes.

17 662 Q. You get this and you read it and you obviously consider
18 it, and I'm just suggesting that perhaps one of the
19 things that might have struck you was, well, what
20 should I do with this, if anything, and maybe I should 16:02
21 discuss that issue with my advisers, whether legal,
22 political, departmental?

23 A. No. Well, I mean the approach that I was taking to
24 whistleblowers, I mean the Commission was sitting and
25 doing its work, I mean parallel to that I had a whole 16:02
26 series of initiatives which were underway and which
27 would continue to be underway in relation to, you know,
28 how whistleblowers were treated. So, you know, I would
29 see that my role was very much to work on the policy

1 development, that I would be very clear both publicly
2 and privately how whistleblowers should be dealt with.
3 I made it absolutely clear in every public statement
4 that I made, I made it clear again and again in the
5 Dáil of what the government approach was to this, what 16:03
6 my approach was to it. I had ample opportunities in
7 other fora to do the kind of work that you're
8 suggesting in terms of making sure that there was
9 absolutely no ambiguity about how whistleblowers would
10 be dealt with, either within An Garda Síochána and my 16:03
11 meetings with them or indeed when I spoke about it in
12 the Dáil or when I went to Templemore or wherever I had
13 an opportunity, and I was following that up with
14 action. So the action that I was following it up with,
15 which was like, it's parallel to the work on the 16:04
16 Commission, but it consisted of a number of initiatives
17 that were very important. We already had the protected
18 disclosure, then we had the change where Gardaí could
19 refer directly, if they had protected disclosures they
20 could go to GSOC, I was bringing that legislation 16:04
21 through, and very importantly establishing the Police
22 Authority, so that there would be an outside body
23 with -- you know, having an overview of the work of An
24 Garda Síochána. And so, all of those were initiatives
25 and places where there would be moreover sight and 16:04
26 accountability for An Garda Síochána in relation to
27 whistleblowing as well as everything else, and that's
28 borne out by the fact that when the O'Higgins
29 Commission reported in May of -- April/May of '16 that

1 within two or three days I referred it to the Police
2 Authority and the Commissioner who was down there
3 discussing the O'Higgins Commission and the minutes of
4 that meeting are up on the web, where they were taking
5 up all of the issues that had arisen in the O'Higgins
6 Commission report. 16:05

7 663 Q. Yes. Just to go back to the issue to try and bring it
8 to a conclusion on this point: Did you consider
9 discussing it with any of the departmental officials
10 involved? 16:05

11 A. No. At that point I didn't. No.

12 664 Q. Did you consider discussing it with any of your
13 political advisers, special advisers?

14 A. No. I mean, it's an email that I got, that I probably
15 read over a weekend, I mean things moved on, you know, 16:05
16 to the various work that was being done in the
17 Department and the O'Higgins Commission got on with its
18 work and that was the approach that I took to it.

19 665 Q. But did you consider discussing it with your legal
20 advisers perhaps? 16:06

21 A. Well -- the Attorney General or the staff from the
22 Attorney General's office?

23 666 Q. Yes.

24 A. Well, I mean, I'd had the advice from somebody I had
25 worked very closely with on many issues, mostly 16:06
26 legislation, Richard Barrett, and he had been very
27 clear, it seemed, from the email, that there wasn't a
28 role for the Attorney or for the Minister. And in
29 fact, subsequently, although that's probably not

1 relevant, but just to make the point, subsequently the
2 current AG, in more recent times, confirmed that, that
3 that was the case; that there was no role for the
4 Minister in relation to the legal approach that would
5 be taken by somebody who was at a Commission of
6 Investigation.

16:06

7 667 Q. Obviously you knew that Mr. Barrett had an initiated
8 this phone call and you've referred to your
9 interactions with him in the past, but is it the case
10 that you didn't consult with Mr. Barrett about this
11 matter having received the email?

16:07

12 A. About this email?

13 668 Q. Yes.

14 A. No.

15 669 Q. It's just, the following year, and we will come to it
16 in due course, the following year when the Commissioner
17 actually sent you her legal advice you did appear to
18 consult with the Attorney General at that stage?

16:07

19 A. Of course. Yes. I did. That was post the O'Higgins
20 Commission. It's when it had been published.

16:07

21 670 Q. And obviously that related to her advice and what she
22 wanted to do with her advice, but you weren't concerned
23 at this stage in any event to seek advice on what she
24 was doing at the Commission or what approach she was
25 taking at the Commission, whether it was relevant or
26 outside the terms of reference or not?

16:07

27 A. No. I mean, just imagine if I had - I mean, I would
28 have been accused of interfering with the legal
29 strategy of a party to a commission. I mean, if that

1 A. Asking about the strategy at the Commission? No, I
2 didn't consider that.

3 675 Q. Okay. Well, just in the light of the close
4 relationship between yourself and the Commissioner over
5 all sorts of policing matters and in particular dealing 16:09
6 with Sergeant McCabe, did you consider speaking to the
7 Commissioner yourself?

8 A. About this?

9 676 Q. Yes.

10 A. No. 16:09

11 677 Q. Okay. And I take it from that you didn't speak to the
12 Commissioner about this?

13 A. No. So I mean. You're asking me would I consider
14 discussing her legal strategy at the O'Higgins
15 Commission with her. No. 16:10

16 678 Q. Okay. Well, did you take any view as to whether you
17 agreed with this strategy or you approved of it?

18 A. No. The approach I took was that it had emerged down
19 -- this issue between counsel had emerged down at the
20 O'Higgins Commission, it was -- it also mentioned, for 16:10
21 example, further legal advice, the Commission would be
22 obviously meeting again, there were various options to
23 different parties there into the Judge and I would
24 have -- you know, the Commission was getting on with
25 its work. 16:10

26 679 Q. All right.

27 CHAIRMAN: Have you finished that point,
28 Mr. McGuinness?

29 MR. MCGUINNESS: I'm sorry, Judge?

1 CHAIRMAN: Do you think you've finished on that point?
2 MR. MCGUINNESS: I've a considerable amount on to go.
3 CHAIRMAN: No, I said on that point.
4 MR. MCGUINNESS: On that point, almost.
5 CHAIRMAN: You said to finish on this point -- 16:11
6 MR. MCGUINNESS: I'm just going to ask perhaps one more
7 question on this point.
8 680 Q. The upshot of it then appears to be that you decided
9 that you didn't need to consult anyone about this, nor
10 be advised about it, nor do anything about it and just 16:11
11 leave matters as they stood?
12 A. Well, I'd frame it a different way.
13 681 Q. All right. Please do.
14 A. I would say that it was about a Commission of
15 Investigation, I made a conscious decision to obviously 16:11
16 not interfere in the Commission of Investigation --
17 682 Q. Yes?
18 A. -- in any way because I would have considered it
19 inappropriate.
20 683 Q. Yes? 16:11
21 A. And I made a conscious decision that Judge O'Higgins
22 would deal with whatever issues, as I expected he
23 would, at the Commission. And of course in the
24 meantime I was doing lots of other work in relation to
25 how whistleblowers were dealt with. 16:12
26 684 Q. Yes. Well, that's the final question on this point:
27 Did you consider that this might have an impact on how
28 whistleblowers were dealt with, or did you feel that
29 that was a matter for the Commissioner to have deal

1 with if there was any actual fallout?
2 A. I would have thought that -- I mean, it would be --
3 clearly if there was fallout I did believe that it
4 should be dealt with within, you know, An Garda
5 Síochána, yes. I did. Insofar as I thought about that 16:12
6 at the time.
7 685 Q. Yes?
8 A. As I say my prime, my primary response was as I've
9 outlined I think very clearly to this.
10 686 Q. Yes. All right. 16:13
11 CHAIRMAN: You're happy to leave it there?
12 MR. MCGUINNESS: Yes, Chairman.
13 CHAIRMAN: Very good. Ten o'clock in the morning.
14 Thank you.
15 16:13
16 THE TRIBUNAL THEN ADJOURNED UNTIL THURSDAY, 1ST
17 FEBRUARY 2018 AT 10:00AM
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