

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER
THE PROTECTED DISCLOSURES ACT 2014 AND CERTAIN OTHER
MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND
SEANAD ÉIREANN ON 16 FEBRUARY 2017

ESTABLISHED BY INSTRUMENT MADE BY THE MINISTER FOR JUSTICE
AND EQUALITY UNDER THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT
1921, ON 17 FEBRUARY 2017

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

HELD IN DUBLIN CASTLE
ON FRIDAY, 12TH JANUARY 2017 - DAY 40

40

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1 THE HEARING RESUMED ON FRIDAY, 12TH DAY OF
2 JANUARY, 2018 AS FOLLOWS:

3
4 MR. MCGUINNESS: Chairman, the first witness this
5 morning is Mr. Noel Waters. If I could ask Mr. Waters 10:00
6 to come up.

7
8
9 MR. NOEL WATERS, HAVING BEEN SWORN, WAS DIRECTLY
10 EXAMINED BY MR. MCGUINNESS: 10:00

11 MR. MCGUINNESS: Just for everyone's information,
12 Mr. Waters' statement is contained at volume 6, page
13 3351 of the Tribunal documents.

14 1 Q. Mr. Waters, thank you for your statement to the
15 Tribunal. I understand that you have retired recently 10:01
16 from public service after a career of some 40 years, is
17 that correct?

18 A. That's correct, yes.

19 2 Q. Would you mind outlining to the Chairman briefly your
20 career up to the date of your retirement? 10:01

21 A. I joined the Department of Justice from Dublin City
22 Council I think in 1980, and I made my way up through
23 the ranks to become acting Secretary General in October
24 2014. My job at the time, my substantive job at the
25 time was Director General of the Immigration Service. 10:01
26 I continued to hold that job until I was, until
27 sometime in early 2016 and then later on in 2016 I
28 became Secretary General of the Department.

29 3 Q. So you remained acting Secretary General from October

1 '14, is it, until the middle of '16?

2 A. Until October '16, I think, to the best of my
3 recollection, yes.

4 4 Q. All right. And in your service in the Department from
5 1980 did you serve in a number of different divisions? 10:02

6 A. I did. I served in the Garda area. I started off in
7 the accounts area, I served Garda area, the prisons
8 area, the immigration area on a number of occasions and
9 ultimately came back as head of the immigration area in
10 2010, where I was appointed as Director General of the 10:02
11 Immigration Service. Prior to that I had been
12 Assistant Secretary in charge of the corporate area of
13 the Department. That would have been from about 2004,
14 I think. And before that, I had been Director of the
15 Refugee Integration Agency. That was a body that was 10:03
16 set up to house asylum seekers around the country,
17 until the system of direct provision. I was the first
18 director of that. I initiated that policy on behalf of
19 the Government from the year 2000 until 2004, I think.

20 5 Q. Now, when you became acting Secretary General, whom 10:03
21 were you succeeding at that point in time?

22 A. That was Mr. Brian Purcell, who had left the
23 Department. Following the difficulty that had arisen
24 at that stage, the Government sought to appoint a
25 Secretary General but they were unsuccessful in that. 10:03
26 I didn't apply in that competition, but I was
27 approached by the Minister and asked to become the
28 acting Secretary General, which I understood at the
29 time to be for a limited enough period, until they

1 figured out what they would do. And I agreed to do
2 that while continuing on with my job as Director
3 General of the Immigration Service.

4 6 Q. Okay. And you were approached by the Minister. Is
5 that the then Tánaiste and Minister for Justice? 10:04

6 A. She wasn't Tánaiste at that stage, she was Minister for
7 Justice, yes, Frances Fitzgerald.

8 7 Q. She had succeeded Minister Shatter --

9 A. That is correct.

10 8 Q. -- who had resigned in May of 2014? 10:04

11 A. That's correct. Yes. And Mr. Purcell left the
12 Department, I think, in October 2014.

13 9 Q. Yes. And at that stage were you the senior assistant
14 secretary at that time?

15 A. In terms of service, I wasn't. There were a number of 10:04
16 people who were more senior to me. But in the world of
17 the Civil Service, because I was Director General of
18 the Immigration Service, I was paid a little bit more
19 than the other assistant secretaries, closer to deputy
20 secretary, so I became -- she asked me, and we had 10:04

21 worked up a good relationship in the meantime, so she
22 asked me to step into the position, pro tem. My sense
23 of it at that stage was that it would have been for a
24 number of months. I was conscious that an election
25 possibly would follow. I think it was due at any rate 10:05
26 no later than early 2016. And that would have been a
27 natural break-point for me, but as things transpired, I
28 kept -- I was kept going in the office over that
29 period.

1 10 Q. All right. Now, just at the time you were taking over
2 as Assistant Secretary General, who in the department
3 had responsibility for policing, on the policing side?
4 A. When I was taking over as acting Secretary General?
5 11 Q. Yes. 10:05
6 A. Yes. Mr. Flahive. Mr. Michael Flahive, who had been
7 in that post for, I should think, maybe since the
8 early -- early 2000s, or in or around that time.
9 12 Q. Yes. Now, we have received statements from and
10 reference has been made in the press to Mr. Ken O'Leary 10:05
11 as well?
12 A. That's right.
13 13 Q. You knew Mr. O'Leary as well?
14 A. I did. He was a colleague too. He was an assistant
15 secretary at that stage in charge of Crime and Security 10:05
16 in the Department and he subsequently became promoted
17 to Deputy Secretary.
18 14 Q. Now, just in terms of reporting or responsibilities, if
19 there was any concern that the Commissioner of An Garda
20 Síochána had, was there any established route or any 10:06
21 protocol in relation to contact between the
22 Commissioner or on her behalf and the Department?
23 A. Not a formal protocol, but I think the time honoured
24 arrangement would be that the Commissioner of An Garda
25 Síochána would talk to the senior people, the most 10:06
26 senior people, the Secretary General, the Deputy
27 Secretary and the Assistant Secretary in the policing
28 area, and on the Crime and Security side. And that
29 varied from Commissioner to Commissioner, in my

1 experience. Some Commissioners spoke probably --
2 probably didn't speak to the Assistant Secretary, would
3 have spoken more exclusively to the Secretary General,
4 others would have spoken to others in their hierarchy
5 but at that level, at, at least, at Assistant Sec 10:06
6 level.

7 15 Q. Yes, in terms of direct contact between a commissioner
8 and a minister, did you have experience of that at
9 different stages?

10 A. Again, that varied from minister to commissioner. Some 10:07
11 ministers, in my experience -- I think I should have
12 added that I worked for about, I think, possibly 12
13 ministers during my career at a close level. In that
14 period, some ministers would have had a close contact
15 with commissioners in the sense that they would have 10:07
16 been in contact with them fairly regularly. Others
17 wouldn't have -- it would have been done, that contact
18 would have been exercised through the Civil Service.

19 16 Q. Yes.

20 A. Through the Department, I should say, rather than Civil 10:07
21 Service, yeah.

22 17 Q. Yes. Well, now, in your statement you say:

23
24 "The information set out in this statement refers to
25 the period from the establishment of the O'Higgins 10:07
26 Commission of Investigation on 19th December 2014 to
27 its first reporting on 11th May 2016."

28 A. That's right, yes.

29 18 Q. Now, obviously we have seen the instrument signed by An

1 Taoiseach formally establishing the Commission on the
2 3rd of February of 2015, but you have made reference
3 here to the date of 19th December 2014?

4 A. To my knowledge, the resolution in the Dáil I think may
5 have been passed on the 19th of December, in around 10:08
6 that, or perhaps the Government decision setting up the
7 Commission would have been in around that period.

8 19 Q. Yes. It would appear that the Government had perhaps
9 considered the matter warranted a commission in as far
10 back as November 2014, and draft terms of reference 10:08
11 were then prepared and laid before the Houses, as is
12 required --

13 A. Mm-hmm, yes.

14 20 Q. -- and they were approved without amendment by the
15 Houses? 10:08

16 A. To my recollection, yes, yes.

17 21 Q. Okay. Were you involved in any consultation about the
18 terms of reference in any way?

19 A. Not in a detailed way, other than I suppose I would
20 have had -- being the acting Secretary General I would 10:09
21 have contact with the Minister about matters that were
22 going before Government. But since I had arrived late
23 in the day in respect of these issues, my colleagues
24 would have been the key people involved in the detail
25 of this. So, I don't think my role would have been 10:09
26 particularly, you know, fine in around all the issues
27 around the terms of reference.

28 22 Q. Yes. It would appear obvious but since the Guerin
29 Report had been published, and it seemed clear that

1 consideration was being given and that a commission
2 would be established by the Government from quite an
3 early stage --

4 A. Mm-hmm.

5 23 Q. -- after the publication of the Guerin Report, is that 10:09
6 correct?

7 A. Yes, that's correct. Again, during that period I was
8 the Director General of the Immigration Service, I
9 think the Guerin Report would have been published in
10 May of that year so at that point I wasn't in the 10:09
11 position of acting Secretary General, but I would have
12 knowledge, some knowledge from my role around the
13 Department, around that.

14 24 Q. Yes. Now, obviously the terms of reference having been 10:10
15 approved, the Government made the necessary order
16 establishing it?

17 A. Mm-hmm.

18 25 Q. Requiring Mr. Justice O'Higgins to investigate the 10:10
19 Garda investigation in relation to a number of
20 incidents, but to your knowledge was it ever conceived
21 or envisaged that it would embrace, as it were, an
22 investigation into Sergeant McCabe, as such?

23 A. Not to my knowledge, no. Not to my knowledge, no.

24 26 Q. Was there any consideration given as to whether his 10:10
25 complaints would necessarily have to form part of the
26 investigation?

27 A. If I can, my recollection around that was that there
28 was a separate process underway, which was called the
29 Independent Review Mechanism.

1 27 Q. Yes.

2 A. And that a complaint had been made there, and a panel
3 of counsel were looking at those complaints and they
4 were looking at a complaint in respect of an allegation
5 I think that had been made about the investigation of a 10:11
6 criminal offence, and at that point these cases were
7 being looked at on the papers but I think they had got
8 to the point at that stage where the people who were
9 looking at that particular case wanted to see the
10 actual Garda investigation file and I think having seen 10:11
11 that investigation file, satisfied themselves that
12 there was nothing at all to that complaint in the sense
13 that there were no circumstances in which it would
14 warrant being part of the terms of reference for the
15 O'Higgins Commission. 10:11

16 28 Q. Yes. And it was not so included as such?

17 A. That's correct, yes.

18 29 Q. But insofar as Sergeant McCabe had obviously raised
19 concerns or complaints, or however you want to describe
20 them, was it your understanding or did you have any 10:11
21 concern as to whether his complaints would be examined
22 as part of the Garda investigation?

23 A. I had no knowledge of that. Speaking honestly, I had
24 no knowledge of that detail at that stage, yes.

25 30 Q. Perhaps it was a matter really for an interpretation of 10:12
26 the terms of reference as to what came within them
27 then?

28 A. I would have thought so. That the judge that was
29 appointed was obviously a retired High Court judge and

1 it was a matter for him, subject to the terms of
2 reference, as to how he conducted the Commission.

3 31 Q. Yes. And obviously the Government had chosen a
4 commission as opposed to any other form of a more
5 public inquiry, so everyone knew it was going to be 10:12
6 conducted in private --

7 A. That's correct, yes.

8 32 Q. -- and subject to the terms of the Commission of
9 Investigations Act?

10 A. Yes. I think it's fair to say that at that point, back 10:12
11 in the 1990s, you had a number, as you know, of
12 tribunals of inquiry and there was concern at
13 Government and there was concern at the escalating
14 costs and some of these are still being paid for, and I
15 think the model for inquiries then changed to a 10:13
16 commission of inquiry. And if I'm correct,
17 Mr. McDowell would have been Minister as well and would
18 have changed the legislation in around that point as
19 well, to enable this better, more effective form of
20 inquiry to take place. 10:13

21 33 Q. Yes. Well, the Commission having been established,
22 were you aware of any consultation with An Garda
23 Síochána as to how the Commissioner or the force
24 generally would approach the Commission and the
25 investigation by the learned judge of the various 10:13
26 incidents?

27 A. I had no knowledge of that and I would be surprised if
28 there was on the basis that if the Commission had been
29 established, it was now a freestanding independent

1 investigation, and that you know, people were required
2 to cooperate with it and be part of it. I should also
3 add as well, of course, that the Department itself was
4 featuring in one of the terms of reference on foot of
5 one of the issues that had arisen on foot of the Guerin 10:14
6 Report.

7 34 Q. Yes.

8 A. So I had no knowledge of the Gardaí being involved at
9 that point, and I would be surprised if they were in,
10 in fact. But again, I stand -- you know, others will 10:14
11 have more information than me on that point.

12 35 Q. Yes. But you, as certainly acting Secretary General
13 you weren't concerned to or didn't seek to establish
14 how the Commissioner or the force would be either
15 approaching the Commission or conducting themselves 10:14
16 within the Commission?

17 A. Absolutely not. I would have seen -- if I was or if
18 the Department was I would have seen that as us
19 inserting ourself into an independent process which
20 would have been quite improper and inappropriate, and I 10:14
21 would have thought that ultimately could have
22 compromised the entire process.

23 36 Q. Yes. Obviously you have mentioned there there was
24 focus within the Commission, one of the terms of
25 reference, as to how the Minister and the Department 10:14
26 had handled --

27 A. That's right, yes.

28 37 Q. And the Minister and the Department were represented
29 for a portion of the Commission's hearings, isn't that

1 correct?

2 A. That's right, yes.

3 38 Q. But it's not correct to say that there were either
4 counsel or solicitor for the Minister present
5 throughout the hearings of the Commission? 10:15

6 A. To my knowledge, no. My understanding of it is that --
7 and again, because this was an independent process I
8 was scrupulous myself personally and the people who
9 were in the Department who were colleagues of mine, I
10 never approached them or spoke to them at all about 10:15
11 what evidence or their approach to that, but my
12 understanding is that under the rules, that people who
13 could only be present when the hearings were taking
14 place were people relevant to what was happening. So
15 the Minister and the officials, my colleagues, their 10:15
16 representation didn't arise until later in 2014, I
17 think, October, November, October perhaps. But again,
18 my colleagues would be better placed to give you more
19 detail on that.

20 39 Q. Yes. But it's certainly your understanding that they 10:15
21 were represented and present at the module and only at
22 the module to which the ministerial departmental
23 interest was being considered?

24 A. That's correct, yes, yes.

25 40 Q. Now, apart from that then, did the Department or the 10:16
26 Minister have any role, to your knowledge or
27 understanding?

28 A. No, no. To my knowledge, no, no, no.

29 41 Q. And in terms of any contact, are you aware of any

1 contact between the Minister and the Commissioner or An
2 Garda Síochána in relation to the conduct of the
3 inquiry, as far as the Commissioner was concerned, at
4 that point in time, at the establishment point?

5 A. No, no, no. And I would be surprised if there was any 10:16
6 such contact. In fact, I don't believe that there
7 would have been at that stage. I think everybody would
8 have been quite clear in their own minds about, this
9 was an independent process, it was now underway and it
10 was necessary for people to get on with it and that any 10:16
11 involvement by people who weren't party to it would
12 have been inappropriate. And again, remember, this was
13 the Minister's own commission of inquiry, so for her to
14 be involved in any aspect of it would have been quite,
15 quite improper. 10:17

16 42 Q. Okay. And I suppose you'd agree that insofar as An
17 Garda Síochána were concerned, they had ample, I
18 suppose, warning and opportunity to prepare for the
19 Commission and the investigation into it, certainly
20 from when the terms of reference were published at the 10:17
21 very latest?

22 A. Yes. This would have been in early part of 2015 until,
23 as we know now, May '15. So that would have been a
24 matter for them themselves. As I say, the Department
25 would have had no role at all in any aspect of that. 10:17

26 43 Q. And you weren't consulted in relation to any matters
27 concerning the running of the Commission, the timing of
28 hearings, the scheduling of witnesses or anything
29 connected with that?

1 A. No, nothing of that nature whatsoever, nothing.

2 44 Q. Now, the Tribunal has become aware obviously of an
3 email that Mr. Flahive sent and perhaps we could look
4 at that. It's in volume 6, page 3342. And Mr. Waters,
5 you can take a paper copy from the files beside you if 10:18
6 you prefer to see that. Or if you are happy to --
7 happy to look on screen.

8 A. Yes, that's fine.

9 45 Q. Now, this represents an email to the Minister's private
10 secretary, primarily? 10:19

11 A. Yes.

12 46 Q. That is Mr. Quattrociochi?

13 A. That's correct, yes.

14 47 Q. And it's cc'ed to the sec general's office, and that
15 would be, and was, your office at the time? 10:19

16 A. That's correct. We had set up a group, an email group
17 which was sent to an a number of people in the sec
18 general's office; my private secretary, an assistant
19 principal in the corporate area and I think one other
20 person. 10:19

21 48 Q. Yes.

22 A. So I didn't -- curiously -- well, not curiously, but in
23 reality it went to them. The idea being that if I was
24 out of the office or given the volume of emails, that
25 one of the three people would have picked that up and 10:19
26 would have brought it to my attention or any email,
27 rather than emails being sent to me personally where
28 other people wouldn't have access to them, it was
29 believed important that other people in the office

1 would be able to access those emails. So that is the
2 rationale for the sec general email group.

3 49 Q. Yes. So it would mean that information is distributed
4 immediately to those who need to know it?

5 A. Yes, exactly yes. 10:20

6 50 Q. And so, if someone was absent or away it would come to
7 other officials' knowledge?

8 A. Yes. I think in reality that if I wasn't there, there
9 would have been a concern that this would have lain --
10 if it had just been sent to me in my email address, 10:20
11 that it would have just lain there and nothing would
12 have happened on foot of it, if I had been away for an
13 extended period. So that was the rationale for having
14 this group of people.

15 51 Q. Yes. It was sent from Mr. Flahive on the afternoon of 10:20
16 the 15th of May 2015 at 16:57, it's headed:
17 "Confidential Commission of Investigation." I am
18 going to read it into the record.

19

20 "Chris 10:20
21 Could you pass this on to the Minister for information
22 please?
23 I took a call this afternoon from Richard Barrett in
24 relation to the O'Higgins Commission of Investigation,
25 which is investigating the matters identified by the 10:20
26 Guerin Report. The O'Higgins Commission has started
27 hearings and the Garda Síochána are represented by
28 counsel, as is Sergeant McCabe, in his case Michael
29 McDowell, SC.

1 Richard wanted to let me know that counsel for the
2 Garda Síochána has raised as an issue in the hearings
3 an allegation made against Sergeant McCabe, which was
4 one of the cases examined by the IRM. The allegation
5 had been that a serious criminal complaint against 10:21
6 Sergeant McCabe, which he has always denied, had not
7 been properly investigated by the Garda Síochána. The
8 IRM found that an investigation file on the case had in
9 fact been submitted to the DPP, who had directed no
10 prosecution. And the IRM, which, because of the 10:21
11 seriousness of the allegation, had been considering
12 whether to recommend its inclusion in the O'Higgins
13 terms of reference, in the end recommended no further
14 action by the Minister.

15 Presumably the Garda Síochána are raising the matter on 10:21
16 the basis that they could argue, and Sergeant McCabe
17 would deny, that it is potentially relevant to
18 motivation.

19 Richard advised me that counsel for Sergeant McCabe
20 objected to the issue being raised and asked whether 10:21
21 the Garda Commissioner had authorised this approach.
22 Richard also told me that the Garda Commissioner's
23 authorisation had been confirmed, although I understand
24 separately that this may be subject to any further
25 legal advice. Richard and I agreed that this is a 10:22
26 matter for the Garda Commissioner, who is being legally
27 advised, and that neither the Attorney nor the Minister
28 has a function relating to the evidence a party to a
29 commission of investigation may adduce.

1 Regards
2 Michael"

3
4 Now, did you receive that on the 15th?

5 A. I have no recollection of that email, but my private 10:22
6 secretary advises that he received that and that he
7 brought it to my attention on the following Monday, the
8 18th, and that I -- he subsequently sent back an email
9 to the writer, to Michael Flahive, to say that I had
10 noted it. That was on the 18th, the following Monday. 10:22
11 That would have been the practice in the office, where
12 if information had come in, if I hadn't been in the
13 office -- I should add of course that on that day I
14 wasn't in my departmental office, in the afternoon I
15 was in the Immigration Service Office in Burgh Quay 10:23
16 dealing with immigration issues, wearing my immigration
17 hat on that day.

18 52 Q. Yes. Now, obviously a lot of people have access to
19 their emails when they are out of the office?

20 A. Mm-hmm. 10:23

21 53 Q. Was it your practice to receive your emails on your
22 phone or your Blackberry?

23 A. On some occasions, yes. Quite possibly that I would
24 have -- I didn't have a Blackberry. It quite possibly
25 would have come to my phone, but as I say, I have no 10:23
26 recollection of it. But I do know that -- or my
27 private secretary tells me, I should say, that he
28 brought it to my attention on the following Monday.

29 54 Q. Yes. You see, it's headed "Confidential Commission of

1 Investigation", it's the first, it would seem, in
2 relation to what was happening at the Commission --
3 A. Mm-hmm.
4 55 Q. -- being received by the Department, is that right?
5 A. It would seem to be, yes, yes. 10:23
6 56 Q. Okay. And I'm just wondering, would you have been
7 concerned by the contents of the third paragraph there,
8 the reference to raising as an issue an allegation made
9 against Sergeant McCabe?
10 A. I have no recollection of the email, so I can't 10:24
11 reconstruct what my concern would have been. The only
12 point I would make is that I imagine that, having gone
13 to the last paragraph of the email where Mr. Flahive
14 and Mr. Barrett from the AG's office had indicated that
15 there was no further action required, that that was the 10:24
16 end of the matter as far as I was concerned. Both of
17 those were officials who I knew very well:
18 Mr. Flahive, as I said, had worked in the division for
19 a long number of years; Mr. Barrett I knew very well
20 from the Attorney's office, a foremost legal adviser. 10:24
21 So, I can only assume that. Again I am not speaking
22 from direct memory of knowledge, but I suppose given
23 the business, the volume of business I was undertaking
24 across the Department and immigration service that I
25 would have assumed that, you know, this matter was 10:25
26 dealt with, there was no further action required of me
27 or the Minister, and that it rested at that. But
28 again, I am not going on a specific recollection of it,
29 I have no recollection of the email.

1 57 Q. Yes, yes, but you have obviously told the Chairman
2 earlier that you knew that the actual original
3 allegation against Sergeant McCabe had been considered
4 by the IRM, who were satisfied that it didn't warrant
5 any further investigation and the Minister had accepted 10:25
6 that advice?

7 A. Mm-hmm.

8 58 Q. Now, that obviously happened at a time when you were
9 acting Secretary General and obviously you have a
10 recollection of that -- 10:25

11 A. Mm-hmm.

12 59 Q. -- isn't that right?

13 A. Yes. But then again, as I say, I don't have a
14 recollection of the email in question.

15 CHAIRMAN: Mr. McGuinness, may I intervene here for the 10:25
16 purpose of clarity so that my thinking is right and
17 please correct me if I am wrong. As I understand it
18 there was a thing called the Independent Review
19 Mechanism and that may cause some confusion because
20 it's quite often required to as the IRM. And what that 10:26
21 involved, it seemed, was disquiet in consequence of
22 what Sergeant McCabe had brought to light over the way
23 the Gardaí had investigated a number of criminal
24 offences. Now, Ms. Leader outlined about 12 of them,
25 for instance, at the opening of this particular part of 10:26
26 this section of our work. But apart from those 12 I
27 think there were others as well, and I think the
28 background to this was - and again please correct me if
29 I am wrong - that Ms. D had raised a complaint with

1 GSOC that her complaint was not properly investigated
2 inter alia by Inspector Noel Cunningham and that matter
3 had also resulted in her visiting, as I understand it,
4 the leader of the opposition. And one of the things
5 that was done in consequence of that was that the issue 10:27
6 as to whether her case had been properly investigated,
7 not whether she had ever been abused by anybody, was
8 sent to the Independent Review Mechanism and the issue
9 before the Independent Review Mechanism was, was the
10 original investigation a proper investigation, not that 10:27
11 this was a, if you like, reinvestigation of what she
12 had already claimed. Am I right about that?
13 MR. MCGUINNESS: Well, my understanding is that Ms. D's
14 concerns were also communicated to Mr. Guerin and
15 subsequent to his report it then formed one of the 10:27
16 larger number of files that were considered by the IRM.
17 I think that's correct. Mr. Waters, is that correct?
18 A. I don't have a specific knowledge of that, but I don't
19 dispute what you are saying.
20 60 Q. Yes, yes. 10:27
21 A. Yes.
22 61 Q. But certainly from your earlier answer, you appeared to
23 be aware of the fact that the Ms. D allegation against
24 Sergeant McCabe had been within the IRM mechanism?
25 A. But not -- as the Chairman said, not the allegation as 10:28
26 I understood it. I think the allegation that was
27 within the IRM mechanism was an allegation as to
28 whether or not the Gardaí had properly investigated --
29 62 Q. Yes.

1 A. -- the allegation of the alleged criminal offence.
2 CHAIRMAN: So there was never any question of, if you
3 like, reinvestigating the matter.
4 A. Correct.
5 CHAIRMAN: In fact, the IRM, as I recollect, and I may 10:28
6 be wrong about this, but there's multiple opportunities
7 for the horse putting his foot in a pothole here and
8 throwing the rider or worse, the IRM was in fact a
9 group of barristers --
10 A. Correct, yes. 10:28
11 CHAIRMAN: -- who looked at files and said were these
12 investigated properly or not, and the Ms. D allegation
13 was one of the group of files looked at.
14 A. Correct.
15 CHAIRMAN: The purpose was not to see was anybody 10:28
16 guilty or innocent but to see whether the Gardaí had
17 done a proper job of investigating. Isn't that the
18 basic difference?
19 A. It is. And it was an informal process, it wasn't a
20 statutory basis. 10:29
21 CHAIRMAN: All right. No, I think that maybe perhaps
22 clarifies it in my mind, thank you.
23 63 Q. MR. MCGUINNESS: But my concern here in relation to
24 this third paragraph is: Did it not set off an alarm
25 bell with you as to whether the Garda Commissioner was 10:29
26 trying to raise this issue against Sergeant McCabe
27 within the Commission when it hadn't been included
28 within the terms of reference?
29 A. As I said, I have no recollection of the email. I am

1 assuming that given that Mr. Flahive and Mr. Barrett
2 had signed off on it to the effect that there was no
3 further requirement for action, for either me or for
4 the Minister, that the Commissioner was being
5 represented at the Commission and that there was no 10:29
6 further action for us to take in respect of it.

7 64 Q. Yes. Well, looking at document 3343, which is the next
8 page, that's noted as having been noted by you the
9 following Monday, is that right?

10 A. That's correct, yes. Yes, 18th of May, that's correct, 10:30
11 yes.

12 65 Q. And it then is followed the following week at page
13 3344, the 25th of May of 2015, as having been noted by
14 the Minister?

15 A. Correct. I see that. From the Private Secretary, yes, 10:30
16 yes.

17 66 Q. Now, did you have any discussion with the Minister
18 about the contents of that email?

19 A. Not to my knowledge, no.

20 67 Q. Why not? 10:30

21 A. Again, I can only assume that the last paragraph of the
22 email indicated that there was no action required of
23 the Minister or of the Attorney General. Again, as I
24 say, I don't have a recollection of these issues but I
25 am just assuming at this remove that that is why. 10:30
26 Because I had plenty of other things to be getting on
27 with and this didn't seem to me to be something that --
28 I am assuming, that needed any further action, given
29 those comments at the end of the email.

1 68 Q. Okay. And at this stage, either on the 15th or between
2 the 15th and the 25th, were you aware of any contact
3 between the Commissioner and anyone in the Department
4 of Justice?

5 A. Not to my knowledge, no, no.

10:31

6 69 Q. Okay. I think you have seen a reference in
7 Commissioner O'Sullivan's interview with the Tribunal's
8 investigators that she has a recollection of having
9 spoken to you on the 15th?

10 A. That's right, yes.

10:31

11 70 Q. Perhaps we could just look at the text of that, at page
12 3114. And there is an answer there:

13

14 "I am aware from my billing records on 15/5/2015, which
15 I understand have already been discovered to the
16 Tribunal, that I had a telephone call with the acting
17 Secretary General in the Department of Justice,
18 Mr. Noel Waters. I have no specific recollection or
19 note of the call. Given the legal arguments that had
20 arisen at the Commission it would not be unusual that I
21 would alert the Secretary General to the fact an issue
22 had arisen. While I was aware that the hearings were
23 in private I had a concern that the Department may
24 potentially receive media queries that such an issue
25 had arisen. My concern was not of my instruction
26 coming into the public domain, rather the potential
27 compromise to the integrity of the process. At no time
28 did I discuss or seek approval/advice from the
29 Department in respect of my instructions or otherwise

10:32

10:32

10:32

1 to counsel. In fact, instructions had already been
2 given to counsel. An Garda Síochána was represented
3 independently from the Department of Justice at the
4 Commission, and as such, the Department have no
5 involvement in any instructions given by me to counsel. 10:33
6 It would not be unusual in my telephone conversations
7 with the acting Secretary General that we would discuss
8 a number of current policing and security matters.
9 From my recollection, there were a number of press and
10 policing and security matters that required discussion 10:33
11 in or around that time."
12

13 Now, we've seen the billing record for that day, and
14 according to the information available to us, your
15 number does not appear on the numbers dialled by the 10:33
16 Commissioner.

17 A. Mm-hmm.

18 71 Q. I think you have had an opportunity to look at that
19 billing record?

20 A. Just this morning, yes. 10:33

21 72 Q. And could I ask you to look at page 755? It's in
22 volume 2. And I think none of the numbers dialled
23 represent your phone call, your phone number?

24 A. I am just checking here to be absolutely certain.

25 73 Q. Yes. 10:34

26 A. I don't recognise my number in these, no.

27 74 Q. And if one just goes down --

28 CHAIRMAN: This is the Garda Commissioner's mobile
29 or --

1 MR. MCGUINNESS: Yes.

2 CHAIRMAN: Official mobile phone?

3 MR. MCGUINNESS: Yes. And the second-last number
4 there, we understand that that is Assistant Secretary
5 Ken O'Leary's number. 10:35

6 A. That is 087 --

7 75 Q. It shows a phone call at 21:05 that night?

8 A. Yes, I think that may be Mr. O'Leary's number, yes.
9 From recollection, yes.

10 76 Q. But insofar as any phone calls from your phone are 10:35
11 concerned, have you any recollection of phoning the
12 Commissioner?

13 A. No.

14 77 Q. Or is it likely that you would have phoned the
15 Commissioner on receipt of this email? 10:35

16 A. I don't believe so. I was -- as I said earlier, I was
17 dealing with immigration issues on that afternoon. I
18 have no recollection of the email and I don't
19 believe -- or I certainly have no recollection of
20 having phoned her. 10:35

21 78 Q. Yes. We have received a statement from Mr. O'Leary in
22 which he does refer to a phone call with the
23 Commissioner, and could I ask you to look at page 3347?
24 And Mr. O'Leary here, in the third paragraph says:
25 10:36
26 "I believe I am the person referred to in the
27 report --"
28
29 That is the independent report of last November.

1 A. Yes.

2 79 Q. As having spoken to the Commissioner.

3

4 "It will be appreciated that the discussion in question
5 took place over two-and-a-half years ago and I do not 10:36
6 have perfectly recall of every detail of it. However,
7 I set out here my best recollection of what transpired.

8

9 On the afternoon of the 15th May 2015 former
10 Commissioner, Garda Commissioner O'Sullivan, contacted 10:36
11 me in relation to a matter which had arisen at the
12 O'Higgins Commission that day. I know it was on that
13 date based on the sequence of events set out by counsel
14 for the Disclosures Tribunal in its opening statement.
15 My understanding of what the then Commissioner said was 10:37
16 that counsel for Sergeant McCabe had reacted strongly
17 to an issue which had arisen at the Commission, that
18 somehow related to a previous criminal complaint made
19 against Sergeant McCabe and that counsel for Sergeant
20 McCabe had asked whether this issue was being raised on 10:37
21 the instructions of the Commissioner. I had no prior
22 knowledge of what evidence An Garda Síochána intended
23 to or were in a position to present at the Commission
24 or any case that they proposed making.

25

10:37

26 I can recall being acutely conscious during the
27 conversation of the proper position of the Department
28 in relation to the O'Higgins Commission and I
29 specifically remember mentioning to the then Garda

1 Commissioner at an early stage of our discussion that
2 the Department could not become involved in or attempt
3 to influence in any way the approach of An Garda
4 Síochána to the Commission, which was entirely a matter
5 for her as Garda Commissioner, taking into account the 10:37
6 legal advice available to her. The then Commissioner
7 fully accepted this. It was against that background
8 too that I did not seek any further clarification of
9 what had arisen at the Commission, the conduct of which
10 I was aware was confidential, or information as to what 10:38
11 evidence it was intended to present to the Commission
12 or the nature of any legal case to be made. The focus
13 of our conversation related to the question of
14 evidence, and I do not recall it touching on any
15 overall legal strategy counsel for the Commissioner 10:38
16 might indicate to the Tribunal as set out in the
17 transcripts which subsequently entered the public
18 domain and as referred to by counsel for the Tribunal
19 in its opening statement where counsel for An Garda
20 Síochána had made general comments in relation to their 10:38
21 approach to Sergeant McCabe.

22
23 while clearly accepting that the Department could have
24 no role in determining the Garda position in relation
25 to the Commission, the Commissioner asked me if based 10:38
26 on my experience anything occurred to me which she
27 might need to be mindful of in addressing this
28 particular issue with her legal advisers. I suggested
29 she would have to be guided by her legal advice in

1 these matters, but against the background that the
2 Department was not in a position to express any view on
3 the position of An Garda Síochána at the Commission.
4 There was a discussion of factors of which she might
5 need to be mindful in the context of discussions with 10:39
6 her legal advisers. To the best of my recollection,
7 matters mentioned were the need for sensitivity in
8 relation to protecting the position of Sergeant McCabe,
9 the position of other people at the Commission against
10 whom serious allegations had been made, the likely 10:39
11 adverse reaction of the Commission to the introduction
12 of matters which it might consider inappropriate and
13 the overall duty on the Garda Commissioner to assist
14 the Commission in whatever way possible to establish
15 the facts of what the Commission had been asked to 10:39
16 investigate. The Commissioner was then going to
17 discuss these matters with her legal advisers and I
18 think I reiterated the view that she would have to be
19 guided by the legal advice available to her. I also
20 believed I suggested that from her point of view, it 10:39
21 might be helpful if it was possible to gain more time
22 so she could consider the matter more fully with her
23 legal advisers.

24
25 To the best of my recollection I received a further 10:40
26 call shortly afterwards from the then Garda
27 Commissioner. I think that at least for some of that
28 call she was also on the phone to the Garda HQ legal
29 officer at the O'Higgins Commission. As I understood

1 it, the Commissioner was being advised that her legal
2 representatives at the Commission had to respond more
3 or less immediately to the issue which had arisen
4 earlier and that the view of her legal team was that in
5 discharging her obligation to the Commission there was 10:40
6 a legal duty on her to raise matters which had arisen.
7 I believe that in the circumstances the Commissioner
8 indicated to the effect that her legal team should
9 maintain their position that afternoon but there would
10 be further detailed consultation with her legal team 10:40
11 subsequently about the matter."
12

13 He then goes on to deal with a telephone call from
14 Mr. Flahive.

15
16 Now, were you made aware of those two conversations 10:41
17 that the Commissioner had with Mr. O'Leary?

18 A. To the best of my recollection -- sorry, I have no
19 recollection that I was, I put it that way, yes.

20 80 Q. There doesn't appear to be any documentation relating 10:41
21 to that or any notes relating to that?

22 A. I don't believe so, no.

23 81 Q. Would you expect an assistant secretary of his
24 experience to note matters of such significance?

25 A. Not necessarily. Conversations with the Commissioner, 10:41
26 I wouldn't necessarily note them. I wouldn't
27 necessarily require assistant secretaries to note them
28 either. That would be a matter for their own judgement
29 at the time. I suppose in a perfect world we would all

1 like to be in a position where we note all our
2 conversations, but the nature of our jobs are such
3 that, you know, we wouldn't get much else done I think
4 if we were to do that. So I think I wouldn't, I
5 wouldn't be offering any criticism of any colleague for 10:41
6 not taking a note of any conversation of that nature.

7 82 Q. Yes. I am not asking you to obviously express any view
8 as to whether there is a conflict between what is
9 written here and the quotation I read from the
10 Commissioner's statement, on one view it would appear 10:42
11 to be at odds but, but for the recollection of
12 Mr. O'Leary there would be no record within the
13 Department of what the Commissioner had said. Just as
14 an administrator would you not be concerned as to the
15 consequences of that in the light of any subsequent 10:42
16 events?

17 A. As I say, in the perfect world, you know, we would all
18 take notes and I would occasionally take notes of
19 conversations I would have with the Commissioner or
20 other senior figures, but as I say, that would be a 10:42
21 matter for the individual themselves and I wouldn't --
22 as I say, I wouldn't offer any criticism of somebody
23 not doing that.

24 83 Q. Yes. Yes. It would appear the Commissioner spoke with
25 Mr. O'Leary twice there and perhaps later that evening 10:43
26 indeed. Would you expect Mr. O'Leary to bring those
27 conversations to the attention of the Minister?

28 A. That would be a matter for Mr. O'Leary himself. He was
29 an officer of very considerable experience. He

1 clearly -- well, on the basis of what we see here, he
2 clearly decided that it wasn't appropriate or it wasn't
3 required -- not that it wasn't appropriate, but there
4 wasn't a requirement. I am assuming that he was
5 relying on -- and again, Mr. O'Leary is a better person 10:43
6 to answer this than me obviously. I am assuming that
7 he was relying on the earlier email which said that
8 there was no action required, that the Commissioner was
9 represented at the Tribunal, she was subject to her own
10 legal advice and that it would have been improper for 10:43
11 the Department to insert itself in any way in that
12 process.

13 84 Q. Yes. We looked at Mr. O'Leary's statement there and
14 the second-last paragraph there on the screen says --
15 this is in relation to his conversation with 10:44
16 Mr. Flahive, he said:

17
18 "We both agreed it was clearly not a matter in which
19 the Department or Minister could have any involvement."

20 A. Mm-hmm. 10:44

21 85 Q. "...equally agreed that as the office of the Attorney
22 General had been in touch with him that the Minister
23 should be informed of this fact."

24 A. Mm-hmm.

25 86 Q. He says: "I do not believe that at any stage I alerted 10:44
26 the Minister to the discussion which I had with the
27 Garda Commissioner. My recollection is I took the view
28 that the Minister should not have any involvement in
29 relation to the matters relating to the case... by one

1 of the parties to the Commission, which she had
2 established, and in any event I was satisfied that she
3 would be informed of the fact that a dispute had arisen
4 between counsel by Mr. Flahive's email."

5 A. Yes.

10:44

6 87 Q. Do you interpret that, as it were, as a deliberate
7 decision by Mr. O'Leary not to inform the Minister or
8 burden her with the knowledge of the Commissioner's
9 calls?

10 A. I wouldn't at all. I would -- I would take the view --
11 again I am not speaking from recollection here at all.

10:45

12 88 Q. Yes.

13 A. But I would have -- I would interpret that now as
14 saying what it says; that the Minister had already been
15 advised by way of the email from Mr. Flahive about what
16 had transpired and that the matter rested at that.

10:45

17 89 Q. Obviously the issue of the email from Mr. Flahive
18 relates to his conversation with Mr. Barrett and
19 doesn't encompass directly the conversation that the
20 Commissioner had with Mr. O'Leary, but would you not
21 see it as a requirement to brief the Minister as to the
22 content or the concerns of the Commissioner?

10:45

23 A. Em, again, I am in the difficult position where I have
24 no recollection of this, but I wouldn't, on the basis
25 that it had already been established that the Minister
26 or the Department couldn't involve itself in the
27 proceedings at the Commission. So, you know, as I
28 said, there the matter stood.

10:46

29 90 Q. Yes?

1 A. And that it would have been quite improper for the
2 Department or the Minister to be taking any position in
3 respect of the events at the Commission.

4 91 Q. All right. In any event, you were out of the office
5 during your immigration work, as it were, on the 15th? 10:46

6 A. That's right, yes.

7 92 Q. You note Mr. Flahive's email on the 18th?

8 A. Mm-hmm.

9 93 Q. And the Minister is recorded by her private secretary
10 as having noted it, certainly by the latest on the 10:46
11 25th, but you must have met the Minister presumably
12 during the week, and Mr. O'Leary, presumably?

13 A. I am assuming I did. I have no specific recollection
14 of any such meetings, but I assume in the normal
15 course, yes, we would have been in the office and we 10:47
16 would have conducted business normally, yes.

17 94 Q. But do you have a strategic catch-up meeting with the
18 Minister with all the assistant secretaries on a weekly
19 basis?

20 A. We have our management board meetings on a weekly basis 10:47
21 and we meet the Minister on a monthly basis with a
22 ministerial management board, and we would meet then.
23 I would meet the Minister regularly, colleagues would
24 meet the Minister regularly to discuss the issues of
25 the day or anything that needed to be addressed. But I 10:47
26 go back to my point: I am assuming, taking it that the
27 fact that the advice from Mr. Flahive and Mr. Barrett
28 was that there was no role -- there was no function for
29 the Department here and effectively that any

1 involvement of the Department at that point would have
2 been quite improper.

3 95 Q. So, what the Commissioner was doing was her concern,
4 her responsibility and --

5 A. Exactly, and that she was a party to the Commission, 10:48
6 legally represented, subject to whatever legal advice
7 was available to her. So the Department clearly
8 couldn't have become involved in that at all.

9 96 Q. Can I move on to a slightly later period in time, July
10 of 2015. In your statement you refer to emails July 10:48
11 the 4th --

12 A. Mm-hmm.

13 97 Q. -- authored by Assistant Secretary Flahive and Deputy
14 Secretary O'Leary, and could I ask you to look at
15 volume 3, page 2012. 10:48

16 A. I think for clarity, I think my reference in my
17 statement about the email being authored by Mr. Flahive
18 was relating to the email of the 15th of May, not the
19 email of the 4th of July.

20 98 Q. All right. Well, in any event, the email that we are 10:49
21 looking at was authored by Deputy Secretary O'Leary?

22 A. That's right, yes, yes.

23 99 Q. So you are referring to that --

24 A. Yes.

25 100 Q. -- as the second, the second email? 10:49

26 A. Yes, exactly. Yes, yes.

27 101 Q. This is an email then from Mr. O'Leary to the Minister,
28 and it says:
29

1 "Good evening, Minister

2
3 The Garda Commissioner phoned me to let me know they
4 had received queries from Colm Ó Mongáin about Sergeant
5 McCabe. They were asked was it the case that Sergeant 10:49
6 McCabe was looking to be taken out of the traffic unit
7 in Mullingar and was it the Garda Commissioner who had
8 instructed counsel to adopt an aggressive stance
9 towards Sergeant McCabe at the O'Higgins Commission.
10 The Gardaí are not commenting. 10:50

11
12 I understand that some weeks ago Sergeant McCabe
13 indicated to his authorities in Mullingar that he no
14 longer wanted to stay in his post in the traffic unit.
15 Apparently he blamed the Commissioner for this, though 10:50
16 he could not be more specific as he was bound by
17 confidentiality. This coincided with hearings at the
18 O'Higgins Commission. These hearings are being held in
19 private and there is a prohibition on disclosing
20 evidence given at them. 10:50

21
22 Sergeant McCabe remains in his post at the traffic
23 unit, though in practice his time recently has been
24 taken up giving evidence to the Commission.

25
26 If these matters are raised with you, you could say
27 both the Garda Commissioner and myself have made it
28 clear that Sergeant McCabe is a valued member of the
29 force. I think it is a matter of public record that at 10:50

1 various times he has raised various concerns regarding
2 his position in the force. I know there has been an
3 ongoing process in attempting to address those
4 concerns. I, of course, have made it clear, including
5 to Sergeant McCabe himself when I met him, that it 10:50
6 would not be acceptable if anyone in the force were to
7 be disadvantaged in any way by bringing wrongdoing to
8 light. I am glad too that the legal regime in relation
9 to whistleblowers has been changed fundamentally by the
10 Protected Disclosures Acts, so there are now proper 10:51
11 procedures in place to deal with matters brought to
12 light by whistleblowers.

13
14 As to Sergeant McCabe's present situation, I have to be
15 conscious that he no more or no less than any serving 10:51
16 member of the force is entitled to confidentiality in
17 his dealings with the Garda authorities, so it would
18 not be appropriate for me to comment publically in any
19 way on those dealings. In particular I think it would
20 be very unfair to Sergeant McCabe for me to do so. I 10:51
21 have to be conscious too that at present various
22 matters raised by Sergeant McCabe about policing in
23 Cavan-Monaghan are being dealt with by the Commission
24 of Investigation under Justice Kevin O'Higgins and it
25 would be wrong to make public comment which might 10:51
26 interfere or attempt to influence those proceedings in
27 any way. That Commission clearly has to be let take
28 its course.

29

1 Regards
2 Ken"

3
4 Now, do you recall receiving that email?

5 A. I don't, no. No. I think on that -- that was Saturday 10:52
6 night, or Saturday evening, if I remember correctly. I
7 was actually out of the country on that evening. I was
8 abroad.

9 102 Q. Okay. If one goes to the next page, 2013 --
10 CHAIRMAN: Just for the sake of -- Mr. Ó Mongáin is a 10:52
11 journalist, and do you know what paper he is attached
12 to or generally writes for?

13 A. RTE as I understand it.

14 103 Q. MR. MCGUINNESS: I think a subsequent email clarified
15 that it had come as an inquiry from another RTE 10:52
16 reporter, Mr. John Burke?

17 A. Yes.

18 104 Q. But at page 2013 here, if one goes to the top of that
19 page, further up the page, Mr. O'Leary, within 15
20 minutes of communicating with the Minister and 10:53
21 suggesting a response, is providing the Garda
22 Commissioner, it would appear, with his briefing note
23 to the Minister and what she might be saying. Did you
24 see that that had happened?

25 A. I have no recollection of that, no. I wouldn't 10:53
26 necessarily see that as unusual, in that in responding
27 to press queries -- and this, as I understood it, was a
28 response to a press query, so I mean people would share
29 the information that was being made available.

1 105 Q. Yes. If one looks at the next page, 2015, one sees
2 that clarification of what the exact query had been to
3 the Garda Press Office had been forwarded to the
4 Commissioner?
5 A. Mm-hmm. 10:54

6 106 Q. And the Commissioner forwards that on to Mr. O'Leary at
7 20:56, if one looks at the middle of the page.
8 A. Mm-hmm.

9 107 Q. Further down the page. The Commissioner is forwarding
10 that on to Mr. O'Leary. 10:54
11 A. Mm-hmm.

12 108 Q. And then if one goes up the page, Mr. O'Leary then is
13 forwarding that on to the Minister.
14 A. Mm-hmm.

15 109 Q. And that is circulated to you, then, also. 10:54
16 A. Mm-hmm.

17 110 Q. Did you recall seeing those on your return?
18 A. No. My first knowledge of these emails, when they were
19 uncovered in the departmental trawl that we spoke about
20 earlier, which took place in November, last November. 10:54
21 I had no recollection at the time of having seen them
22 at all.

23 CHAIRMAN: Could I just intervene? Judges get an
24 official phone and email is attached to it and no
25 matter where you are you get your emails. And I 10:55
26 presume you are in the same position?
27 A. Yes.
28 CHAIRMAN: Yes. So even if you were in Tamanrasset,
29 even nonetheless on -- it wouldn't be a Blackberry any

1 more, but something like that, you would have got these
2 emails. But what you seem to be saying is, I didn't
3 pay a great deal of attention to them, I am not saying
4 that by way of any sense of blame, but they were just
5 among a series of emails that were being passed for 10:55
6 your information, so you don't recall seeing them as
7 opposed to not seeing them.

8 A. Exactly. I don't recall seeing them. That is exactly
9 my point, Judge, yes.

10 CHAIRMAN: You didn't have a habit of, when you went 10:55
11 back to your office to go through your emails in detail
12 because looking at them on a phone, well, for one thing
13 the page is smaller and it's harder to get any
14 information out of them if they are complicated.

15 A. No, I didn't. Ordinarily, I wouldn't have had that 10:55
16 habit, no.

17 CHAIRMAN: All right. Thanks.

18 111 Q. MR. MCGUINNESS: You presumably then have no
19 recollection of having discussed them with the Minister
20 or with Mr. O'Leary at any stage? 10:56

21 A. No recollection at all of that nature, no, no.

22 112 Q. And did you hear any discussion at that point in time
23 about whether the Commissioner's strategy at the
24 Commission could be published or discussed in any way
25 publically? 10:56

26 A. No, not at that stage at all. Absolutely not, no, no.
27 No.

28 113 Q. Could I ask you to look at volume 7, page 3996? And
29 this is one of a number of emails recovered from

1 Commissioner O'Sullivan's iPad relating to emails that
2 she has apparently sent to the Minister, Minister
3 Fitzgerald, at that point in time, and the date of that
4 is 18th May 2016?

5 A. Yes. 10:57

6 114 Q. And I think at that point in time, the O'Higgins Report
7 had been published?

8 A. Yes. I think the report was published the 12th of May,
9 but I am not exactly sure of the date but it had been
10 published by the 18th, yes. 10:57

11 115 Q. Yes. Certainly at paragraph 1 of your statement you
12 are referring to the 11th of May?

13 A. 11th of May, yeah.

14 116 Q. And I take it that as Secretary General you are aware
15 of a considerable degree of controversy that arose 10:57
16 after both commentary on the report and the leaking of
17 some transcripts?

18 A. That's correct, yes, yes.

19 117 Q. Is that right?

20 A. That's correct, yes. 10:57

21 118 Q. Okay. And it would appear that the Minister had been
22 on television on the evening of the 17th, were you
23 aware of that?

24 A. I have no specific recollection of that, but I know
25 that the Minister would have had media appearances in 10:58
26 around that period at the time, yes.

27 119 Q. Yes. And it would appear also from her statement to
28 the Dáil on the 18th of May, when she was answering a
29 number of priority questions at leaders question time

1 that she had met the Commissioner the day before, on
2 the 17th?

3 A. Mm-hmm.

4 120 Q. Were you present at any such meeting?

5 A. I can't recall if I was, but I probably -- I would have 10:58
6 thought I probably would have been. I do recall from
7 the time that the Minister had asked the Commissioner
8 to put as much information as she could into the public
9 domain in the light of the controversy which had
10 arisen. But bearing in mind, of course, that it was 10:58
11 her decision and bearing in mind, if I remember
12 correctly, that it was, the process was confidential
13 and which was always going to be a difficulty for any
14 anybody responding to what had arisen, and bearing in
15 mind, if I remember correctly, the matter of her 10:59
16 client-lawyer relationship and how far she could go
17 with that. But that was my broad recollection of what
18 the issues around at the time were.

19 121 Q. Yes. Just to look at the content of this, because it
20 would appear, and we will see subsequently that you 10:59
21 appear to have received these emails --

22 A. I beg your pardon, sorry?

23 122 Q. It would appear subsequently that you appear to have
24 received these, so I just want to put the text --

25 A. I don't think that is actually true. I think I have 10:59
26 found out overnight that it was directed to me but not
27 to my email address, to the email address -- it wasn't
28 my email address.

29 123 Q. Well, we will come to that perhaps in due course. But

1 this says:

2

3 "Minister

4 I understand you may have to make a statement this
5 morning, and I enclose the draft for your 10:59
6 consideration. Secondly, I enclose the advice given to
7 me by the legal team on 15th May 2015. You may choose
8 to put this on the record in the House. If you do, I
9 would request you to state that I volunteered this
10 document to you in the public interest. My directions 11:00
11 at all times were to assist the Commission to establish
12 the facts and the truth, and never at any stage change
13 those directions."

14

15 That appears to have been sent at 9:36:23, that 11:00
16 morning. Now, there is a second one then sent slightly
17 later and it says:

18

19 "Minister

20 I understand you may have to make a statement this 11:00
21 morning. I enclose a draft for your consideration.
22 Secondly, I enclose the advice given to me by the legal
23 team on 15th of May 2015. You may choose to put this
24 on the record in the House. If you do I would request
25 you state I volunteered this document to you in the 11:00
26 public interest. My directions at all times were to
27 assist the Commission to establish the facts and the
28 truth. I never at any stage changed those directions."
29

1 There was a third one slightly later at 9:40:56.
2 CHAIRMAN: What is the particular minute on that one?
3 It's 9 what?
4 MR. MCGUINNESS: That is 9:36:42, that second one.
5 CHAIRMAN: So, it's literally seconds after the first 11:01
6 one?
7 MR. MCGUINNESS: Yes.
8 CHAIRMAN: Yes. Okay. Same minute.
9 MR. MCGUINNESS: It appears to be similar.
10 CHAIRMAN: Yes. 11:01
11 MR. MCGUINNESS: And then the third one is 9:40:56,
12 which reads:
13
14 "I have interrogated this material in detail with the
15 Commissioner of An Garda Síochána." 11:01
16 CHAIRMAN: What page are you on there?
17 MR. MCGUINNESS: Page 3997.
18 CHAIRMAN: Let us catch up there.
19 MR. MCGUINNESS: Yes.
20 11:01
21 "I have interrogated this matter in detail with the
22 Commissioner of An Garda Síochána and now present to
23 the House the outcome.
24
25 First of all, at no point did the Commissioner instruct 11:01
26 the legal team representing An Garda Síochána at the
27 O'Higgins Commission to accuse Sergeant McCabe of
28 malice. This is important because it was asserted in a
29 headline in the Irish Examiner last week and has become

1 a widely accepted truth since. It is not the truth and
2 the word malice was not authorised by Nóirín
3 O'Sullivan.

4
5 The Commissioner has an absolute duty to vindicate the 11:02
6 rights of Gardaí accused of corruption. Her legal
7 advice was that the allegations of corruption made by
8 Sergeant McCabe against senior members of An Garda
9 Síochána must be tested by appropriate
10 cross-examination. As can be seen from the report, 11:02
11 those allegations were either withdrawn under
12 questioning or judged in the final report to be
13 unfounded.

14
15 Two points must be made strongly in relation to this: 11:02
16 A. At no stage did the Commissioner instruct the legal
17 team to suggest any question of bad faith or that
18 Sergeant McCabe's integrity was in question.
19 B. The Commissioner would have had no control over the
20 conduct of legal argument within the Commission. 11:02

21
22 The report of the Commission was published and Sergeant
23 McCabe was judged to have had honourable intentions.
24 The illegal publication of evidence presented to the
25 Commission reopened issues the Commission had set to 11:03
26 rest. More importantly, it robbed the Commissioner of
27 the right to defend her good name, precluded as she was
28 from commenting on the evidence before the Commission
29 under the provisions of section 11 of the Commissions

1 of Investigation Act 2004. She was further advised
2 against sharing details of the confidential briefing of
3 the legal team.

4
5 I wish to state here now that I have full confidence in 11:03
6 the Commissioner."

7
8 Now, I am just wondering, were you consulted by the
9 Minister in relation to the content of those?

10 A. My recollection around the time was that there was much 11:03
11 to-ing and fro-ing between the Minister and the
12 Department and the Commissioner in respect of those
13 news reports that had emerged. And as I said, I think
14 the Minister had asked the Commissioner to put as much
15 information as she could in the public domain. So 11:03
16 beyond that, I have no particular specific
17 recollection. But I think the important thing here,
18 from reading it, is that this happened after the
19 Commission's report was published.

20 124 Q. Yes. It's just, in your statement you say: 11:04
21

22 "In relation to the Minister having any knowledge of
23 the Commissioner's legal strategy at the Commission, I
24 have no knowledge beyond the material set out in the
25 emails of the 15th May 2015 and the 4th July 2015." 11:04

26 A. Mm-hmm.

27 125 Q. And I am just wondering, did you in fact receive those
28 emails with the advice that she had received from her
29 lawyers?

1 A. I don't believe I did.

2 126 Q. Okay. And can I ask you to look at volume 8, page
3 4221?

4 CHAIRMAN: Yes, as you are going on to that,
5 Mr. McGuinness, this particular stream of documents, 11:05
6 does it also include the letter, the famous long letter
7 with the 19 paragraphs --

8 MR. MCGUINNESS: No.

9 CHAIRMAN: -- or did it not?

10 MR. MCGUINNESS: No. 11:05

11 CHAIRMAN: Well, was it not attached, perhaps, by
12 mistake or something like that? In other words, does
13 it look as if it's there or is it something different?

14 MR. MCGUINNESS: No. It's the legal advice given by
15 counsel in writing on the afternoon of the 15th of May. 11:05

16 CHAIRMAN: That is the earliest email. That is the
17 one. All right, I understand, thank you.

18 127 Q. MR. MCGUINNESS: You see, this is page 4221, and this
19 had been provided to us by the Minister,
20 Mrs. Fitzgerald, through the Chief State Solicitor's 11:05
21 Office. Perhaps we'd just look at the terms of the
22 letter at page 4216.

23 A. Could I just go back up, if I may, for a second, just
24 before, at the top of that, that document, you had
25 just -- 11:06

26 128 Q. Yes, I will come to that in sequence.

27 A. Okay.

28 129 Q. But just to deal with it in sequence and I will give
29 you the opportunity to comment on that.

1 A. Okay.

2 130 Q. This is in response to a letter written by the
3 Tribunal, but it's stated in the second paragraph:

4
5 "Ms. Fitzgerald has given her full cooperation 11:06
6 throughout in respect of Tribunal requests for
7 disclosure. Having made enquiries with Ms. Fitzgerald,
8 we are instructed that she has carried out a search of
9 her Oireachtas email address for any correspondence
10 with former Commissioner of An Garda Síochána Nóirín 11:06
11 O'Sullivan.

12
13 This has resulted in three emails, now attached,
14 received by Ms. Fitzgerald and transmitted on by her at
15 that time, into the Department of Justice and Equality 11:06
16 ("Department") system by sending them to the Secretary
17 General of the Department, also now attached. These
18 emails were not caught by any existing order of the
19 Tribunal.

20 11:07
21 As you know, the Department is carrying out further
22 searches and thus these emails are likely to be
23 captured by that exercise. These emails are not
24 contemporaneous but a "look back" in May 2016 regarding
25 events which occurred in May 2015." 11:07
26

27 And then the next page at 4217 are the three emails
28 that we have seen retrieved from the Commissioner's
29 iPad with slightly different timestamps on them.

1 A. Mm-hmm.

2 131 Q. And the third one is on page 4218. It encloses the
3 written advice of counsel, which is set out there.
4 Perhaps we would look at that fully. And that reads --
5 this was sent, just for the record, by Mr. Garret Byrne 11:08
6 BL to Fergus Healy, who was the chief superintendent,
7 at 15:29 on 15/5. And the text of it is on the
8 following page:
9

10 "Dear Superintendent Healy 11:08
11 As counsel appointed to represent the interests of An
12 Garda Síochána before the O'Higgins Commission it is
13 our view that it is appropriate and necessary that the
14 conduct of any member of the force be challenged by way
15 of cross-examination if and to the extent necessary. 11:08
16 It is likely that in the course of the process which is
17 a private hearing, it will become necessary to put to
18 Sergeant Maurice McCabe certain background issues which
19 touch upon and concern the history of his dealings with
20 members of Garda management. In particular, we would 11:08
21 consider it necessary, in the interests of fair and
22 balanced examination of the subject matter of
23 investigation, that specific issues be put to Sergeant
24 McCabe regarding his conduct and interactions with
25 senior management following the completion of the 11:09
26 formal Garda investigation into a complaint against
27 Sergeant McCabe which resulted in a direction by the
28 DPP that no further action was to be taken against
29 Sergeant McCabe. The purpose of such a line of inquiry

1 is to open to the Commission of Investigation the full
2 factual background surrounding the complaints made by
3 Sergeant McCabe so that all the circumstances are
4 clearly put before the Commission for consideration.

11:09

5
6 Yours sincerely

7 Colm Smyth SC

8 Garret Byrne BL

9 Michael MacNamee BL"

10
11:09

10 Do you remember receiving that?

11 A. No.

12
13 132 Q. Now to go on to the email which is said to have been
14 forwarded to you, at page 4221. And you see that it
15 appears to be from Frances Fitzgerald, Member of the
16 Oireachtas, to nwaters@justice.ie, did you have a
17 comment in relation to that?

11:10

18 A. My email is nwaters@justice.ie, I don't have that email
19 address.

20 133 Q. And do you think that didn't get to you?

11:10

21 A. I believe so, I have no -- I don't have that email, so
22 I can only assume it didn't get to me because it was
23 sent to an incorrect email address.

24 CHAIRMAN: Does your second name in fact begin with an
25 A?

11:10

26 A. It does, yes. Yes.

27 CHAIRMAN: Yes.

28 A. It does, yes. But in my email for the Department, it's
29 nwaters@justice.ie.

1 134 Q. MR. MCGUINNESS: Okay. And leaving aside the email, I
2 think you told the Tribunal that you were aware that
3 the Minister and the Commissioner were anxious that as
4 many details as could be put into the public domain as
5 possible. 11:11

6 A. Yeah.

7 135 Q. Now, were you, in those circumstances, consulted about
8 putting the Commissioner's legal advice into the public
9 domain before the House by the Minister?

10 A. I don't believe -- I don't have any recollection of 11:11
11 that, but there was much to-ing and fro-ing at the
12 time. But I don't have any recollection of that
13 specific point, whether I was consulted.

14 136 Q. Well, you know that the Tánaiste did take priority
15 questions at leaders questions time on the 18th? 11:11

16 A. Yes, yes, she was meeting the House at that time, yes.

17 137 Q. The day after she had met the Commissioner?

18 A. Mm-hmm.

19 138 Q. You were probably there, I think?

20 A. At the meeting with the Commissioner, yeah, I should 11:11
21 think so. Probably, yes.

22 139 Q. And did you go to the House with her the next day?

23 A. I have no recollection of that. I wouldn't ordinarily
24 go to the House with the Minister when she is taking
25 questions, not ordinarily. 11:12

26 140 Q. Okay. Well, we have included the Tánaiste's answers on
27 that day, starting at 4278. It's volume 8. And at the
28 bottom of page 4279, the Tánaiste takes over from the
29 previous speaker, replying there. Now the first thing

1 she does at the bottom there, she quotes from the
2 Commission report, which is the beginning of paragraph
3 3.20 of the O'Higgins Report, commencing:

4
5 "Some people wrongly and unfairly cast aspersion on 11:13
6 Sergeant McCabe's motives, others were ambivalent about
7 them."

8
9 Etcetera, etcetera. Had you in fact read the report?

10 A. The O'Higgins Commission Report? 11:13

11 141 Q. Yes.

12 A. Yes, I assume I would have had, yes, yes.

13 142 Q. Okay. And one of the issues raised in the course of
14 the various questions and answers were, whether she
15 would be prepared to waive her confidentiality with her 11:14
16 lawyers?

17 A. Mm-hmm.

18 143 Q. And at page 4278 -- 4287, in answer to Deputy Burton,
19 she says, middle of page 4287:

20 11:14
21 "Let me make a number of points regarding the deputy's
22 questions. The Garda Commissioner is as entitled to
23 confidentiality in her dealings with her lawyers as is
24 any citizen, litigant or participant at a trial,
25 tribunal of commission or investigation. That is the 11:15
26 first point I would make. I said that yesterday, that
27 it is --"

28
29 And she is interrupted.

1
2 "It is going down a dangerous path to suggest that
3 instructions be put in the public domain. Deputies
4 around the House would understand that. If we were to
5 ask that the instructions that Maurice McCabe gave to
6 his senior counsel or those that various gardaí gave or
7 that any Deputy appearing before a Commission gave
8 should be put in the public arena, how would Deputies
9 feel if that were the situation?"

10
11 And she is interrupted there, and at page 4288 she
12 continues:

13
14 "I want to make the point - it is worth the House
15 reflecting on this - that when one is giving
16 instructions or having discussions with lawyers, a
17 litigant will say various things in regard to those
18 instructions. They are within the privilege of that
19 relationship and that discussion. That is clearly
20 understood. It is a basic tenet of justice.

21
22 I stated also that it is imprudent --"

23
24 MR. McDOWELL: Sorry, I have a different 4288.

25 MR. CHAIRMAN: Do you have it on the screen,
26 Mr. McDowell, at the moment?

27 MR. McDOWELL: No, it's not coming up.

28 CHAIRMAN: Could we try and follow it on the screen at
29 the moment and then if there's page problems we will --

11:16

1 MR. MCDOWELL: Sorry.

2 CHAIRMAN: No, there is no problem -- we will try and
3 sort it out at lunchtime.

4 MR. MCGUINNESS: She continued there:

5

6 "I stated also that it is imprudent and a dangerous
7 precedent for such discussions to be thrown into the
8 public domain as it will affect the reputations of
9 persons - I already made the point about reputation -
10 as they have no comeback and the person who made
11 allegations in giving instructions would have no
12 comeback either. We have to reflect carefully on what
13 is being asked here. The ability of persons to engage
14 with a commission of investigation could be seriously
15 compromised. One should think about what is being
16 asked. What we are asking of the Commissioner in
17 regard to this commission of investigation is that the
18 private briefings that one has with lawyers or
19 solicitors should be put into the public domain.

20

21 It is illegal for me, for example, to have access to
22 those transcripts. I do not have access to them -
23 neither does Deputy Micheál Martin or Deputy Burton.
24 Deputy Burton does not know the context of them. That
25 is important."

11:17

26

27 Just, it appears to have been a concern of the
28 Commissioner in communicating the legal advice she had
29 been given that it be put on the House, and the

1 Minister appears to have taken a completely different
2 view.

3 A. Mm-hmm.

4 144 Q. Were you aware of that at the time?

5 A. I have no recollection of that, no. I don't, no. 11:17

6 145 Q. Was there no discussion within the Department or
7 between you and the Minister about that?

8 A. I can't say that I recall that. There may well have
9 been but I can't say that I recall that there was. It
10 may well have been the case, but I am speculating here, 11:18
11 I just don't know that the Minister may have consulted
12 further on it with the Attorney, for example. I don't
13 know, I just -- I don't know, I can't say that that is
14 the case.

15 146 Q. Okay. Could I ask you to look at the second email that 11:18
16 Ms. Fitzgerald believes she had forwarded to you and go
17 to the bottom of page 4223. And at the bottom of page
18 4223, this appears to be the second email being
19 forwarded at 16:12 in the afternoon of the 18th. And
20 if one goes over the page, one sees that, the text of 11:18
21 it there as having been sent by Commissioner O'Sullivan
22 to Ms. Fitzgerald. Did you receive that email?

23 A. Again, I note from the top of it, it went to
24 "nawaters", which is not my email address.

25 147 Q. Yes. Okay. And at the bottom of page 4224, this is 11:19
26 the third email, again did you receive that?

27 A. Again, I note that it was sent to nawaters@justice.ie,
28 which again isn't my email address.

29 148 Q. Okay. Well, were you aware of what reply the Minister

1 sent to the Commissioner?

2 A. I have no recollection of that, no.

3 149 Q. Okay. Perhaps you would look at a letter on 4226.

4 Now, bearing in mind what the Minister had said in the

5 House the previous day, you would presumably be

11:20

6 normally briefed, if not listening in to what the

7 Minister would be saying on a matter such as that?

8 A. More than likely I would think so, yes, yes.

9 150 Q. And then, this, in context, would appear to be a fairly
10 strong direct rebuff to the Commissioner about

11:20

11 publishing the legal advice, on one interpretation. It
12 says:

13

14 "19th of May 2016

15

11:20

16 Dear Commissioner

17 I refer to our ongoing contacts about matters arising

18 in relation to the O'Higgins Report and in particular

19 public concerns that have been raised about certain

20 matters relating to its proceedings. The report is due

11:20

21 to be debated in the Dáil next week. I appreciate

22 fully the constraints which surround making further

23 public comment about this matter. I am anxious that

24 nothing would be done which would offend against basic

25 principles of the rule of law. For example, regard has

11:21

26 to be had to the statutory confidentiality of

27 Commission proceedings, issues of the relationship

28 between lawyers and their clients and questions of

29 basic fairness. Nevertheless, I think it would be

1 useful if we met to consider whether there are any ways
2 public concerns might be met to the greatest extent
3 possible without offending these basic principles as
4 well as clarifying matters arising from our contacts.
5 My private secretary will be in touch to arrange such a 11:21
6 meeting."

7
8 Now, were you consulted about that letter?

9 A. I have no recollection of that, no.

10 151 Q. Is it likely that you would have been? 11:21

11 A. Not necessarily. Not necessarily. One of my
12 colleagues, other colleagues may have been. Not
13 necessarily, no. As I say, I have no recollection of
14 it and the Minister wouldn't always consult me in
15 respect of correspondence that she would be issuing. 11:22

16 152 Q. Okay. well, in paragraph 1 of your statement to the
17 Tribunal -- or at paragraph 2:

18
19 "As the Disclosures Tribunal will be aware, shortly
20 after the publication of the report on 11th of May 11:22
21 controversy arose following the leaking of an apparent
22 section of the transcript concerning the alleged legal
23 strategy of the Garda Commissioner at the Commission.
24 In preparing material to respond to parliamentary
25 questions, Dáil debates and so forth in relation to the 11:22
26 matter there would have been contact between officials,
27 the Minister and Garda authorities. This would have
28 been normal practice and, as indicated, arose following
29 the completion of the Commission of Inquiry and

1 publication of its report. Therefore, the question of
2 any party seeking to influence the legal strategy in
3 question did not arise."
4

5 That would appear to be written, as it were, with 11:23
6 knowledge of what views the Commissioner had and what
7 view the Minister was taking about this issue.

8 A. I wouldn't -- no, no, that wasn't in my mind.

9 153 Q. Well, what was in your mind, Mr. Waters, when you wrote
10 this; that there would have been contact between 11:23
11 officials, the Minister and the Garda authorities?

12 A. That very fact that there was, that there was contact,
13 that there was a public issue, a public controversy
14 around it, but my concern was that that that was
15 included there, even though it had happened after the 11:23
16 event, as it were, after the report had been published,
17 but in writing that I wasn't referring to any specific
18 issue within my knowledge other than, as I say, there
19 was contact between, you know, the people I referred to
20 there, between colleagues, the Minister and the Gardaí, 11:23
21 the Garda authorities.

22 154 Q. But were you not aware of this tension between the
23 position of the Commissioner, who was anxious to, as it
24 were, rely on the legal advice and if necessary have it
25 published and was pushing the Minister to publish it? 11:24

26 A. I have no recollection of that at this stage, no. No,
27 no.

28 155 Q. And seeing these documents and having been at the
29 meeting with the Commissioner and the Minister on the

1 17th and being conscious of what the Minister was
2 saying in the Dáil, surely this must refresh your
3 memory in that regard.

4 A. Again, as I say, I can only tell you what my
5 recollection of it is, that there was much controversy 11:24
6 around this issue. I suppose my concern around the
7 time was that the Minister wanted to put as much
8 information out as she could. As I say, the question
9 of whether the Commissioner wanted to put her legal
10 advice out and whether the Minister had taken a 11:24
11 different view, I have no specific recollection of
12 conversations around that.

13 156 Q. Yes. But it didn't emerge, did it, on behalf of the
14 Minister that she had been given the legal advice that
15 the Commissioner had received and acted upon, or did 11:25
16 it?

17 A. Sorry?

18 157 Q. Did it emerge that the Minister had received the legal
19 advice?

20 A. Well, these documents would indicate that, yes, yes. 11:25

21 158 Q. But at the time?

22 A. I can't recall if at the time, if that was the case.
23 But I assume -- I assume that the documents were made
24 available to the Minister at the time, yes.

25 159 Q. Yes. Well, you see, we have the email from the 11:25
26 Commissioner to the Minister --

27 A. Mm-hmm.

28 160 Q. -- enclosing the legal advice.

29 A. Mm-hmm.

1 CHAIRMAN: Well, it's the first bit, it's not the
2 detailed legal advice. It's, if you like, a bit like a
3 monofilm net, it kind of catches everything.

4 MR. MCGUINNESS: Well, there is only one piece of legal
5 advice from the counsel there. 11:25

6 CHAIRMAN: Yes. That is true. But that is the very
7 first one, isn't it, Mr. McGuinness?

8 MR. MCGUINNESS: But it's the only one on the 15th of
9 May.

10 CHAIRMAN: Sure. No, no, I very much appreciate that. 11:26
11 We are talking about going down the way, and my query
12 earlier on in relation to the long letter with the 19
13 paragraphs, did that ever go to the Minister?

14 MR. MCGUINNESS: Well, that is not legal advice. That
15 was just the statement relating -- the statement 11:26
16 relating to Sergeant McCabe's alleged motivation.

17 CHAIRMAN: No, no, I see you are making that
18 distinction, yes. But it didn't go to the Minister, is
19 what I was asking?

20 MR. MCCANN: Chairman, Patrick McCann, I appear on 11:26
21 behalf of the Department of Justice. I just have a
22 concern that it could be that some confusion could
23 arise, sir, in the public mind that we have to
24 distinguish carefully between such information as has
25 come into the possession of Frances Fitzgerald in May 11:26
26 2016, which is after the Commission has deliberated and
27 issued its report, Chairman, and to remember the terms
28 of reference, and that term of reference (e) is
29 concerned with investigating whether or not the

1 Minister or the Department of Justice was aware of
2 whether unjustified grounds were relied on before the
3 Commission. So it just seems to me, Chair, that even
4 allowing for reasonable latitude for the Tribunal
5 counsel, that we seem to have strayed off perhaps the 11:27
6 terms of reference and we are moving into areas of
7 political controversy which shouldn't concern you.
8 That is my concern.

9 CHAIRMAN: Mr. McCann, are you concerned -- look, I
10 don't find the chronology of this thing easy to be 11:27
11 quite frank about it and we worked on it before coming
12 in here, nor are the various subtleties of things
13 terribly easy either, and indeed it seems that there
14 have been many mistakes made in terms of public
15 reporting of this matter, but is your concern that or 11:28
16 is it something else?

17 MR. MCCANN: It's two concerns. First of all, that
18 unintentionally some of the language used by counsel
19 referring to the Minister being aware of the -- of the
20 then-minister -- sorry, that the Minister being aware 11:28
21 of the Commissioner's legal strategy, that we are
22 discussing now a period in 2016 when the Commission of
23 Inquiry is over. And so, it's a completely different
24 point. And the issue before you, Chairman, is whether
25 or not the Department of Justice and the Minister were 11:28
26 aware of inappropriate grounds being relied on.

27 CHAIRMAN: All right, Mr. McCann, I think I actually do
28 understand what you are saying, and thank you for your
29 observation. As I understand it, the piece of

1 information that went to the Minister for her
2 attention, possibly for her comment, is that email of
3 the 15th May 2015 at 1700 hours, indicating, inter
4 alia, that an issue had been raised at the hearings of
5 an allegation made against Sergeant McCabe, one of the 11:29
6 cases examined by the Independent Review Mechanism as
7 to whether it had been properly investigated by the
8 Gardaí, but in terms of her attitude to that, it can be
9 the case that events later will inform that, and that,
10 as I understand it, is the reason for the series of 11:29
11 questions, and whereas that is a confusing and very
12 difficult area, I'm not being in any way, it seems to
13 me, sidetracked or misled by it, and I think it's
14 appropriate that we go on on that basis. I have made
15 more interventions this morning than is usual, simply 11:29
16 because I am aware that a lot of this has been got
17 wrong in comment on the matter, and I don't want to get
18 it wrong if at all possible.

19 MR. MCCANN: Thank you, Chairman.

20 CHAIRMAN: So, Mr. McGuinness, you were at -- 11:30

21 MR. MCGUINNESS: Yes, thank you, Chairman.

22 161 Q. Mr. Waters, I was just trying to establish one thing as
23 a matter of fact.

24 A. Mm-hmm.

25 162 Q. It would appear that the Minister was, at this time in 11:30
26 2016, sent, by the Commissioner, the legal advice that
27 she had received --

28 A. Mm-hmm.

29 163 Q. -- in relation to the running of the Commission?

1 A. Mm-hmm.

2 164 Q. She was being urged by the Commission to publish that,
3 isn't correct?

4 A. Well, according to these documents, yes, correct, yes.

5 165 Q. And is it your sworn evidence that you were aware of 11:30
6 that at the time or not aware of that at the time?

7 A. I can't say with certainty that I was aware of that at
8 the time.

9 166 Q. But is it the case, and can you confirm, that the
10 Minister didn't, as it were, let it be known that she 11:30
11 had received the legal advice or that she was being
12 asked to sanction its release?

13 A. I can't say that it is the case.

14 167 Q. There doesn't appear to be any trace of that in public,
15 isn't that correct? 11:31

16 A. Yes, yes.

17 168 Q. Was that discussed within the Department, though, to
18 your knowledge?

19 A. I have no recollection of that. I would imagine that
20 we -- everybody would have had a concern that here was 11:31
21 a basic principle in terms of the client-lawyer
22 relationship which was at issue, but what discussions
23 took place around that and what decisions were taken on
24 foot of it, I have no recollection of that.

25 169 Q. No. You see, you do, helpfully, refer in paragraph 2 11:31
26 of your statement to the contact between officials, the
27 Minister and Garda authorities?

28 A. Mm-hmm.

29 170 Q. And obviously I have asked you about the Minister's

1 letter back to the Commissioner on the 19th, but there
2 were further contacts in relation to the matter, isn't
3 that correct? Could I ask you to look at volume 7,
4 page 3991. This appears to be a draft letter from
5 Mr. Twomey, from the Commissioner's, I think that is 11:32
6 the Commissioner's private secretary, it means, at the
7 top, "Commissioner PS", to Mr. O'Leary?

8 A. Mm-hmm.

9 171 Q. And this is sent on the 24th of May 2016, at 20:16 in
10 the evening, and it appears to be a draft letter 11:32
11 intended to be sent to the Tánaiste on behalf of the
12 Commissioner?

13 A. Mm-hmm.

14 172 Q. And Mr. Twomey appears to be asking for Mr. O'Leary's
15 comments in relation to that. 11:32

16 A. Mm-hmm.

17 173 Q. And is that the sort of contact you are describing in
18 the aftermath of the O'Higgins Report?

19 A. I think, broadly, would encompass that, yes, broadly,
20 yeah. 11:33

21 174 Q. All right. And it appears that Mr. O'Leary sent back a
22 draft, if one turns to page 3993, and this is sent back
23 on the same day, the 21st -- 24th May 2016, at 21:36,
24 and that is a very substantial document; it's almost
25 twice the size, as it were. Have you seen that before? 11:33

26 A. I have seen it in recent days when -- in documentation
27 that was produced, yes, yes.

28 175 Q. Okay, okay. But certainly at the top of the second
29 page, there's the following paragraph:

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"While it is important to dispel any public concern in relation to this issue, I have to be mindful of section 11 of the Commissions of Investigation Act 2004 which provides that a commission shall conduct its investigation in private. I am advised that everyone involved in the proceedings of the O'Higgins Commission is bound to respect the privacy of those proceedings. Furthermore, in relation to communications with the legal team representing An Garda Síochána, it is important in terms of receiving advice and giving instructions that privilege in such communications is protected so as not to adversely impact on the workings of An Garda Síochána and its entitlement to seek and obtain legal advice on a confidential basis in this instance and in the future. These constraints which reflect important principles of law restrict my capacity to address the issues which have been raised in relation to the approach taken by An Garda Síochána before the O'Higgins Commission. However, I can confirm that An Garda Síochána's legal team was not at any stage instructed to impugn the integrity of Sergeant Maurice McCabe or to make a case that he was acting maliciously. It would not be appropriate to say anything further about the proceedings of the Commission, but I would emphasise that the overriding objective of An Garda Síochána and its legal team was at all times to assist the Commission in carrying out its statutory functions and to establish all relevant

11:34

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1 facts in relation to the matters referred to it for
2 investigation as set out in the terms of reference."

3 And --

4 CHAIRMAN: Mr. McGuinness, would you mind helping me on
5 this because, as you will appreciate, people draft 11:35
6 speeches for the Minister, and public servants produce
7 drafts of, like, position papers or information, but
8 who is writing this?

9 MR. MCGUINNESS: Mr. O'Leary, the Deputy Secretary, is
10 writing this and apparently sending it back to the 11:35
11 Commissioner's office as the text of the letter that
12 the Commissioner might send.

13 CHAIRMAN: To?

14 MR. MCGUINNESS: To the Tánaiste, in relation to the
15 O'Higgins Report. 11:36

16 176 Q. would that be a usual procedure of collaboration?

17 A. I -- as Judge Charleton says, it wouldn't be unusual
18 that drafts were provided. I think the normal conduct
19 of Government business is that if circumstances warrant
20 it and it was sufficient, that a draft might be 11:36
21 provided, but, in the finish, it would have to be the
22 case that the ownership of the document would have to
23 be the sender of it or the -- in the ultimate.

24 CHAIRMAN: No, but, I mean, what seems to be happening
25 is that the Assistant Secretary General of the 11:36
26 Department of Justice is giving a draft to the Garda
27 Commissioner as to what the Garda Commissioner might
28 say to the Minister for Justice.

29 A. Mm-hmm.

1 CHAIRMAN: I mean, I think I am not going to say any
2 more than that, but, okay, you can take the letter and
3 you can amend it, but it seems to be a fairly clear
4 direction that what we want you to say is something
5 along the following lines. I mean -- 11:37

6 A. I wouldn't necessarily characterise it as we saying we
7 want you to say this.

8 CHAIRMAN: Yes.

9 177 Q. It would be of the nature of, here is something you
10 might consider, but ultimately it would be for you to 11:37
11 decide what you want to send back to us.

12 CHAIRMAN: would they not consider themselves what they
13 want to say themselves? why does the Department need
14 to say to them, this is what you might consider saying
15 to the Department? 11:37

16 A. Well, that is what I meant by the contact back and
17 forward. I mean, it was a difficult situation for
18 everybody at the time, the leak, and the sense was that
19 the Commissioner had been put in a difficult position
20 in order to respond to the leak, but it was very 11:37
21 difficult --

22 CHAIRMAN: No, I appreciate that, but -- and I
23 appreciate that.

24 178 Q. MR. MCGUINNESS: If we look at the document that was
25 then actually sent the next day, at page 2935 of the 11:38
26 Tribunal documents. And this is addressed, as it were,
27 not -- not like the draft to the Tánaiste, but this is
28 addressed to the Secretary General.

29 A. Mm-hmm.

1 179 Q. So that was addressed to you then?
2 A. Mm-hmm.
3 180 Q. Is that right?
4 A. I see my -- I see "Secretary General", yes, yes.
5 181 Q. And it's dated the 25th May. And just to read that. 11:38
6 It says:
7
8 "Dear Secretary General,
9
10 The O'Higgins Commission report presents inescapable 11:39
11 lessons for An Garda Síochána based on our shortcomings
12 in a number of critical areas, including our dealings
13 with whistleblowers. We must radically and permanently
14 change that pattern and apply the insights and
15 learnings from our recent experiences in developing a 11:39
16 Garda whistleblowers' charter. As I have detailed
17 below, actions to address this have already been
18 undertaken and others are in progress. There are clear
19 constraints around the making of public comment about
20 this matter. There is a requirement on me not to do 11:39
21 something which would offend against basic principles
22 of the rule of law, that regard must be had to the
23 statutory confidentiality of Commission proceedings,
24 the relationship between lawyers and their clients and
25 questions of basic fairness." 11:39
26
27 Now, that is a phrase taken from the Minister's riposte
28 of the 19th of May to the Commissioner. Do you see
29 that?

1 A. Mm-hmm.

2 182 Q. All right.

3

4 "With reference to my previous statement of the 16th
5 May 2016, there have been calls for further 11:40

6 clarification regarding the instructions given to the
7 legal team representing An Garda Síochána and the
8 approach adopted by it in relation to the proceedings
9 of the Commission. What is at the heart of the present
10 controversy is that, despite legal prohibitions and the 11:40

11 clear view expressed by Mr. Justice O'Higgins about the
12 confidentiality of the Commission's proceedings,

13 certain selective information purporting to relate to
14 those proceedings have been put into the public domain.

15 By 'selective', I mean transcripts of no more than 11:40
16 three minutes of what happened at a Commission which

17 ran for 34 ten-hour days, generating thousands of pages
18 of transcripts. This has been accompanied by an

19 unsourced and unverified account of an alleged part of
20 the proceedings. Whatever the sources of information 11:40

21 or misinformation that has been put into public domain,
22 the inevitable risk, the effect is the risk to public

23 confidence in An Garda Síochána being damaged in a very
24 unfair way. Mr. Justice O'Higgins, as the sole Member,

25 having had the opportunity hear and examine 97 11:40
26 witnesses and weigh the submissions made by the legal

27 representatives of all parties the subject of the
28 proceedings, decided what should and should not be

29 included in his report. In this context, it is worth

1 noting that the Commission points out that it conducted
2 its proceedings with particular regard to its duty of
3 compliance with the requirements of constitutional and
4 natural justice. An Garda Síochána having fully
5 accepted the findings of the report, it falls to me to 11:41
6 move swiftly to implement its recommendations. This, I
7 have done. While it is important to dispel any public
8 concern in relation to this issue, I have to be mindful
9 of section 11 of the Commissions of Investigation Act
10 2004 which provides that a commission shall conduct its 11:41
11 investigation in private. I am advised that everyone
12 involved in the proceedings of the O'Higgins Commission
13 is bound to respect the privacy of those proceedings.
14 Furthermore, in relation to the communications with the
15 legal team representing An Garda Síochána, it is 11:41
16 important, in terms of receiving advice and giving
17 instructions, that privilege in such communications is
18 protected so as to not to adversely impact on the
19 workings of An Garda Síochána and its entitlement to
20 seek and obtain legal advice on a confidential basis in 11:42
21 this instance and in the future. These constraints
22 which reflect important principles of law restrict my
23 capacity to address the issues which have been raised
24 in relation to the approach taken by An Garda Síochána
25 before the O'Higgins Commission. However, I can 11:42
26 confirm that An Garda Síochána's legal team was not at
27 any stage instructed to impugn the integrity of
28 Sergeant Maurice McCabe or to make a case that he was
29 acting maliciously. I would emphasise that the

1 overriding objective of An Garda Síochána and its legal
2 team was at all times to assist the Commission in
3 carrying out its statutory functions and to establish
4 all relevant facts in relation to the matters referred
5 to it for investigation as set out in its terms of
6 reference. 11:42

7
8 This brings me to the charge which is in the public
9 domain that is the most difficult to deal with
10 sensitively and which is one of the reasons I have been 11:43
11 reluctant to enter into public comment about this
12 matter. Whatever its source, the net charge that is
13 now being made is that the credibility and motivation
14 of Sergeant McCabe be challenged. I can only deal with
15 this on the basis of what is set out in the Commission 11:43
16 report. I am conscious that this involves dealing with
17 certain findings in relation to allegations of
18 corruption and malpractice. I have no wish to rehearse
19 this matter again, but it is simply impossible not to
20 do so in addressing it. As Commissioner of An Garda 11:43
21 Síochána, I have a duty to all its members and former
22 members, having regard to the nature and seriousness of
23 the allegations and the duty to assist the Commission
24 in its task of establishing the facts and the truth. I
25 cannot see how it would have been in any way 11:43
26 unreasonable, improper or avoidable to appropriately
27 test in cross-examination the evidence of persons
28 giving evidence to the Commission, including Sergeant
29 McCabe. The Commission found in relation to certain

1 allegations these hurtful allegations to be unfounded,
2 and, in at least one case, based upon a belief but
3 unsupported by evidence, and that those against whom
4 such complaints were made lived for many years under
5 the strain of those allegations. 11:44

6
7 An Garda Síochána is fully accountable for its actions
8 or indeed inaction. We operate fully within the
9 framework of accountability and oversight which the
10 Oireachtas sets. As you are aware, I will be appearing 11:44
11 before the Policing Authority in the coming days and
12 will deal with these matters to the fullest extent
13 possible.

14
15 In addition to the above, I have taken the following 11:44
16 steps to address other matters arising:

17
18 There has been a suggestion in recent reportage that
19 two senior officers had sought to misrepresent before
20 the Commission the contents of a meeting they had with 11:44
21 the sergeant in Mullingar in 2008. In those
22 circumstances, and in order to resolve any public
23 disquiet, misplaced or otherwise, which may rise, in
24 the interests of fairness to involve, we request,
25 pursuant to your powers within the Garda Síochána Act, 11:44
26 that you refer that aspect to the Garda Síochána
27 Ombudsman Commission for the purpose of investigating
28 it in the public interest.
29

1 On receipt of the report, I directed Deputy
2 Commissioner John Twomey to fully examine the content,
3 findings and recommendations of the report and to make
4 further and form An Garda Síochána Modernisation and
5 Renewal Programme. The programme, which addresses, 11:45
6 amongst other things, the fundamental issues arising in
7 the O'Higgins Report in relation to renewal of our
8 culture, training, supervision, victim support and
9 investigative practices, would be formally published in
10 early course, address any issues arising from that 11:45
11 examination, including lessons learned that, in
12 relation to whistleblowers, I have been consistent at
13 all times. Dissent is not disloyalty, and, as a
14 service, we are determined to learn from their
15 experiences. An Garda Síochána agrees that 11:45
16 whistleblowers are part of the solution to the problems
17 facing the service. In this regard, yesterday we met
18 with representatives from Transparency Ireland, who
19 have agreed to work with us to create an environment to
20 ensure protected disclosures and the people making them 11:46
21 are welcome and protected in An Garda Síochána. A
22 protected disclosures manager has now been appointed,
23 and we have begun establishing a dedicated team who
24 will be appropriately trained to oversee all matters
25 relating to whistleblowers. 11:46

26
27 In conclusion, and as stated at the outset, An Garda
28 Síochána fully accept the findings of the O'Higgins
29 Commission, and we are committed to learning all

1 lessons and fully implementing the recommendations. In
2 the interests of transparency, An Garda Síochána would
3 seek to publish as a statement a version of this letter
4 in advance of the Oireachtas debates."

5
6 And it's signed "Nóirín O'Sullivan, Commissioner of An
7 Garda, 25th May 2016".

8
9 And you received that, I take it?

10 A. Yes.

11 183 Q. And it represents effectively an agreed statement
12 reached, as it were, on behalf of the Minister and the
13 Commissioner before it was sent to you as the Deputy
14 Secretary -- Secretary General?

15 A. Secretary General, yes, yes.

16 184 Q. Is that right?

17 A. Well, as I say, I think looking at it and looking at
18 the earlier drafts, it would seem to me, yes, that
19 there was a degree of agreement on the nature of what
20 the response would be from the Commissioner, yes.

21 185 Q. Yes. And the Commissioner appears to have abandoned
22 any attempt to further publish the legal advice given
23 to her or to persuade the Minister to deploy it, isn't
24 that right?

25 A. That seems to be the case, yes.

26 186 Q. And it appears, howsoever that was brought about, that
27 the Minister in the House appears to have been very
28 resistant to An Garda Síochána taking what might have
29 been seen as a drastic step of publishing legal advice,

1 and the Commissioner appears to have bowed to that
2 view, is that your interpretation?

3 A. That would appear to be the case, yes.

4 CHAIRMAN: But, Mr. McGuinness, am I right in thinking
5 that much of this letter is, in fact, a letter -- is 11:47
6 what has been drafted by the Department?

7 MR. MCGUINNESS: Yes.

8 CHAIRMAN: So it's -- I am sorry, I am not familiar
9 with it, there may be a reason for it, but, at first
10 blush, the Garda Commissioner writing her views to the 11:48
11 Department, which have already been written by the
12 Department, would seem to be a somewhat empty exercise.

13 A. It wouldn't be unusual that, in the exchange of
14 correspondence where drafts might be exchanged between
15 the parties and there would be agreement as to what 11:48
16 might or might not be included in them and that then
17 they would form the -- ultimately form the
18 correspondence --

19 CHAIRMAN: Well, the problem, Mr. Waters, is, I mean,
20 if the person who is having a dialogue with somebody 11:48
21 else is telling the person who is having a dialogue
22 with them what to say, how can you possibly know what
23 that person's views or how genuine they are?

24 A. But, of course, it was always open to the Commissioner
25 to send something else. 11:48

26 CHAIRMAN: No, I appreciate that. I don't know if
27 anyone reads Myles na gCopaleen anymore, it used to be
28 very popular, but I am thinking one of the passages in
29 that is a series of letters which were published in

1 book form as between a young lady and a young gentleman
2 as their relationship improves and then gets worse and
3 eventually ends with one that is called the stinging
4 riposte, so what they actually do is write to each
5 other out of this book, which was apparently a quite 11:49
6 widely publicised book at the time. But the comment
7 made is, and it seems to be one that I can't escape at
8 least asking a question about is, if you are taking
9 something out of precedence, namely a book, how is it
10 genuine, how is it your thoughts? If the Garda 11:49
11 Commissioner is writing to the Department of Justice
12 what the Department of Justice wants to have written to
13 it, what in heaven's name does that mean in terms of
14 any genuine progress in terms of attitude?

15 A. I'm not certain that I would agree that it was a case 11:50
16 of what the Department of Justice wants to have written
17 to it. Again, as I say, it was a matter for the
18 Commissioner in the finish if she disagreed with the
19 contents of the letter and wished to frame it in
20 another way. I think ultimately that was the case. 11:50

21 CHAIRMAN: Well, if you want to know what somebody
22 thinks, what you normally do is, you say, 'what do you
23 think?', as opposed to 'here is what you think'. I
24 mean, maybe it's my lack of appreciation of public
25 administration that has me in this state of breaking my 11:50
26 normal rule of trying to ask as few questions as
27 possible, but --

28 A. I am trying to --

29 CHAIRMAN: -- you might be able to throw light on it, I

1 don't know.

2 A. I am trying to think of other precedents which would
3 arise where this would happen, and I am thinking in
4 terms of perhaps in or around the exchange of documents
5 around when the Peace Process was underway. There 11:51
6 was -- to my recollection, there would have been drafts
7 back and forward which would have been agreed before
8 the parties would put them out publically, this would
9 be normal, and I think this would be in or around --
10 you know, this would be, you know, something which 11:51
11 would be broadly similar to that.

12 CHAIRMAN: Yes, no, and I am familiar with the phrase
13 'the Sherpas', which are the people who precede
14 ministers, for instance, to EU meetings and who
15 basically knock out where they are going, but the 11:51
16 Sherpas from each country, each have instructions on
17 the basis of what their particular government or
18 minister thinks. I don't think it's a question of a
19 Sherpa going over and telling - and that is what they
20 are called, by the way, you know that as well as I know 11:52
21 that, I am not using the term in any way derogatory,
22 they do wonderful work - but there is no question of a
23 Sherpa going over from one country and saying to a
24 Sherpa from another country, 'here you are, this is
25 what you are going to tell me'. 11:52

26 A. There would be discussion and debate around what, you
27 know, parties would agree. I mean, that's -- I can't
28 put it no further than that, Judge. I can put it no
29 further than that.

1 187 Q. MR. MCGUINNESS: Mr. Waters, in the concluding sentence
2 there it says that:
3
4 "An Garda Síochána would seek to publish as a statement
5 a version of this letter in advance of the Oireachtas 11:52
6 debate?"
7
8 And I think the Commissioner issued a public statement
9 also on the 26th, is that right? Do you have any
10 recollection of that? 11:52
11 A. I don't, but I assume if there is a public statement,
12 it's on the public record.
13 188 Q. Yes.
14 A. Yes.
15 189 Q. And did you discuss this letter then with the Minister? 11:52
16 A. I don't recollect having done that at the time. I
17 don't recollect, no.
18 190 Q. Obviously in the context of an Oireachtas debate having
19 been scheduled or imminent, I take it it would be most
20 likely rather than unlikely that you would have brought 11:53
21 this to her attention --
22 A. I would have thought so, yes.
23 191 Q. -- if not actually discussed the substance of it?
24 A. It would have been brought to the Minister's attention,
25 I would have thought so, yes, yes. 11:53
26 192 Q. And at that stage, was there any discussion about the
27 legal advice that had been sent to the Minister, albeit
28 in May 2016?
29 A. I have no recollection of that particular point. My

1 recollection around, as I said earlier on, this issue,
2 was that there was a concern that there was a precedent
3 here being -- perhaps being established.

4 193 Q. A precedent if it were to be published?
5 A. On the basis that if the client-lawyer relationship was 11:54
6 to be breached, and where would that -- you know, what
7 precedent, what would that mean in future? I have some
8 recollection of discussions around that, and that's it,
9 really.

10 194 Q. And did those discussions encompass officials from the 11:54
11 Attorney's office or is this entirely within the
12 Department?
13 A. I can't say if they included officials from the
14 Attorney's office, but I can't say if they weren't
15 consulted, either. I just can't say if that was the 11:54
16 case.

17 195 Q. Can you recall did it involve Garda Legal Affairs
18 section, Mr. Ruane, who was head of that at the time?
19 A. I don't recall that. I don't know if it did, I just
20 don't know. 11:54

21 196 Q. Okay. But it appears to have been settled certainly by
22 this point in time as between the Minister and the
23 Commissioner that it wouldn't be published, is that
24 right?
25 A. That the legal advice wouldn't be published? 11:54

26 197 Q. Yes.
27 A. Well that letter would seek to suggest that, yes, yes.

28 198 Q. All right. Thank you. Thank you, Mr. Waters.
29

1 MR. NOEL WATERS WAS CROSS-EXAMINED BY MR. MCDOWELL:

2
3 MR. MCDOWELL: Good afternoon, Mr. Waters.

4 CHAIRMAN: It's actually still morning, Mr. McDowell.

5 199 Q. MR. MCDOWELL: Could I ask you, Mr. Waters, first of 11:55
6 all, to deal with the question of the Independent
7 Review Mechanism. As I understand it, this was a
8 non-statutory process which was set up for people who
9 felt that their cases had been improperly or
10 inadequately investigated by An Garda Síochána, to come 11:55
11 forward with their complaint, so to speak?

12 A. Mm-hmm.

13 200 Q. And to have it adjudicated -- or, sorry, examined by a
14 group of barristers, who would each take a file, or
15 whatever, from the bundle of complaints, which I think 11:55
16 numbered between two and three hundred?

17 A. I think close to 300, yes.

18 201 Q. And they would make a report on whether there had or
19 had not been a proper investigation and whether or not
20 a further investigation or a reopening of the matter 11:56
21 was warranted, is that right?

22 A. That's correct, yes.

23 202 Q. And that arose out of the Guerin Report, is that right?

24 A. It arose out of -- yes, I think it -- again, I wasn't
25 directly involved in it at that stage, but I think that 11:56
26 what emerged was that a large number of people, I think
27 possibly 300 or -- 300 cases emerged where they were
28 complaining that they hadn't had their cases properly
29 addressed by the Gardaí.

1 203 Q. Yes.

2 A. But it would have been coterminous, I suspect, with the
3 Guerin Report, yes.

4 204 Q. And the Guerin Report came into the public domain in
5 early 2014, is that right? 11:57

6 A. Yes.

7 205 Q. Or at the time that Minister Shatter resigned, isn't
8 that right?

9 A. That's correct, yes, in May --

10 206 Q. May of 2014? 11:57

11 A. May of 2014, yes.

12 207 Q. And am I right in thinking that the Independent Review
13 Mechanism was established at some point between May
14 2014 and the end of that year?

15 A. That's correct, yes. 11:57

16 208 Q. Now, the Tribunal has heard in a different module that
17 Ms. D, following interaction with Paul Williams,
18 brought a complaint to GSOC, the Garda Síochána
19 Ombudsman Commission, concerning the manner in which
20 her allegation against Sergeant McCabe had been 11:58
21 examined, is that right, dealt with, the investigation?

22 A. I have no knowledge of that, but I...

23 209 Q. I see. Well, I think we know that, and we have seen it
24 in another module, that GSOC ultimately reported on the
25 matter and said that the investigation was all right 11:58
26 and --

27 CHAIRMAN: Yes, 22nd of December 2014.

28 MR. McDOWELL: Sorry, Judge?

29 CHAIRMAN: 22nd of December 2014.

1 MR. MCDOWELL: Yes. And investigated that matter and
2 came to the conclusion that it was all right. Were you
3 aware of that?

4 A. I wasn't, no, no.

5 210 Q. And could I ask you then in relation to Mr. Flahive's 11:59
6 email, a number of questions. You find his statement
7 at volume 6, page 3336. And, in particular, could I
8 ask you, first of all, to go to the email that he sent
9 to you, Mr. O'Leary and Mr. Power and to
10 Mr. Quattrociochi, who is the private secretary to the 12:00
11 Minister, on the 15th of May 2015. Have you got that
12 on the screen in front of you there?

13 A. I don't have it yet. It's coming up now. Yes.

14 211 Q. And this is page 3340. And it says: 12:00
15
16 "Richard wanted to let me know that counsel for the
17 Garda Síochána has raised as an issue in the hearings
18 an allegation made against Sergeant McCabe, which is
19 one of the cases examined by the IRM."
20 12:00

21 Now, this is in May 2015. Were you aware that these
22 allegations had been raised by -- in the Independent
23 Review Mechanism as well as in the GSOC?

24 A. I cannot give you a definitive answer on that. I
25 assume that I would have been aware that they were 12:01
26 raised in the IRM, yes, I assume I would have been,
27 yes. I assume I would have been, yeah, yeah.

28 212 Q. Well, maybe I should have asked you a more general
29 question. Were you aware, in 2014 and 2015, of the

1 Ms. D allegation?

2 A. Em, I don't believe I would have been aware of it in
3 2014. I only came on the scene in late 2014. As to my
4 knowledge of it in 2015, I'm -- I can't say at this
5 stage what precisely it was, but I do recall at one 12:01
6 point a discussion around whether or not the terms of
7 reference, and this would have been in 2014 because I
8 think they were finalised in 2014, the terms of
9 reference for the --

10 213 Q. Well, the O'Higgins Commission was established in 12:02
11 February 2015.

12 A. '15.

13 214 Q. So I was going to ask you about, when was -- first of
14 all, I just want to ask you a simple question, and that
15 is: Mr. Flahive says that he made a reference to the 12:02
16 IRM in his email so that he could avoid describing
17 Ms. D's allegation against Sergeant McCabe, and that he
18 did it in code.

19 A. Hmm.

20 215 Q. So that the people receiving the email would know the 12:02
21 allegation -- what the allegation was.

22 A. Mm-hmm.

23 216 Q. That's his view.

24 A. Yes.

25 217 Q. So I'm asking you would you have understood the 12:02
26 significance of the IRM reference in that email?

27 A. As I indicated earlier, I don't remember having seen
28 the email, so what I understood it to mean at that
29 stage I cannot reconstruct in my mind now. As I said,

1 my sense of it is that when you go to the very bottom
2 where he said that the Department had no role or
3 function, that would have been the issue that would
4 have been foremost in my mind, I assume.

5 218 Q. Well, Mr. Flahive is explaining why he referred to the 12:03
6 IRM by a statement that he thought that rather than
7 explicitly repeat the allegation that Ms. D had made,
8 that people who received the email would know what he
9 was talking about.

10 A. Hmm. 12:03

11 219 Q. And I am asking you now, did you know, in May 2015,
12 that allegations -- that Ms. D had made this allegation
13 against Sergeant McCabe?

14 A. I understood that to mean that the allegation that had
15 been raised in the IRM related to an allegation that 12:04
16 the complaint had not been appropriately investigated.

17 220 Q. Yes, I accept that. But did you know what the
18 substance of her complaint was - an accusation of
19 sexual assault?

20 A. I assume I did at that stage, yes, I assume I did. 12:04

21 CHAIRMAN: Well, I think what Mr. McDowell is asking
22 you about is, did you know any of the details of that?

23 I know they have been widely publicised because of --

24 MR. McDOWELL: I didn't ask about the detail. I just
25 wanted to put it to the witness, was it knowledge, was 12:04

26 it common knowledge in the Department, in May 2015,
27 that Ms. -- that a Ms. D had made an allegation of
28 indecent assault against Sergeant McCabe?

29 A. I -- when you say 'common knowledge', this wouldn't

1 225 Q. And am I right in saying that the statute provides that
2 the Minister who is effectively initiating the
3 inquiry -- the Commission of Investigation, rather,
4 sets the terms of reference?
5 A. Mm-hmm. 12:06
6 226 Q. Isn't that right?
7 A. Yeah, yeah.
8 227 Q. It's not like the Tribunals of Inquiries Act which
9 requires --
10 A. The Oireachtas. 12:06
11 228 Q. -- the entire Oireachtas to agree to these terms of
12 reference?
13 A. Mm-hmm.
14 229 Q. So can we take it then that the terms of reference of
15 the Commission of Investigation chaired by Mr. Justice 12:07
16 O'Higgins were discussed and elaborated on in your
17 Department prior to the establishment of the O'Higgins
18 Commission?
19 A. The -- as I recall it, the terms of reference were
20 drawn directly from the Guerin Report, and I don't 12:07
21 think there was any particular deviation from that.
22 230 Q. Yes. That may be as in the end.
23 A. Mm-hmm.
24 231 Q. But it was -- it was the business of your Department to
25 frame the terms of reference, isn't that right? 12:07
26 A. Mm-hmm.
27 232 Q. And in the ordinary course of events, Minister
28 Fitzgerald would have to go to Cabinet with a
29 memorandum saying she was proposing to establish such a

1 Commission, isn't that right?

2 A. Mm-hmm, yeah.

3 233 Q. And your Department would have to prepare that
4 documentation, isn't that right?

5 A. Mm-hmm. 12:08

6 234 Q. I mean, I take it that is the procedure?

7 A. That would be normal, yeah. You would have been
8 familiar with that yourself, yes.

9 235 Q. And then I ask you to look at page 3340, and the third
10 paragraph: 12:08

11

12 "Richard wanted to let me know that counsel for the
13 Garda Síochána had raised as an issue at the hearings
14 an allegation made against Sergeant McCabe which was
15 one of the cases examined by the IRM. The allegation 12:08
16 had been that a serious criminal complaint against
17 Sergeant McCabe, which he has always denied, had not
18 been properly investigated by the Garda Síochána. The
19 IRM found that an investigation file on the case had,
20 in fact, been submitted to the DPP, who directed no 12:08
21 prosecution, and the IRM, which because of the
22 seriousness of the allegation had been considering
23 whether to recommend its inclusion in the O'Higgins
24 terms of reference, in the end recommended no further
25 action by the Minister." 12:09

26

27 Now, could I ask you about that. In what sense would a
28 barrister examining a file in relation to a complaint
29 by Ms. D be considering adding the -- that matter as an

1 additional issue to be investigated by the O'Higgins
2 Commission?

3 A. That would have been a matter for the barrister. The
4 Department -- it was independent, it was in the name of
5 the IRM. The Department wouldn't have been influencing 12:09
6 the barrister in terms of what he might be
7 recommending, but, in the finish, because this was
8 turning things on their head entirely, it was felt
9 that, given the nature of it, that the only way to
10 resolve this issue was to get hold of the Garda -- make 12:10
11 the Garda investigation file available to the barrister
12 looking at this and I think --

13 236 Q. Sorry, to the what?

14 A. To the barrister in the IRM looking at this.

15 237 Q. Yes. 12:10

16 A. And then, having seen that, the barrister came back and
17 clearly, as it says there, recommended that there would
18 be no further action by the Minister, so it shouldn't
19 be included in the terms of reference.

20 238 Q. What I am asking you is a slightly different question. 12:10
21 I think maybe I have not made myself clear. It was no
22 function of a barrister examining Ms. D's complaint to
23 recommend that the O'Higgins Commission should
24 investigate the matter, isn't that right?

25 A. Well, in the finish, that's what happened, there was 12:10
26 no --

27 239 Q. I accept that. But I'm asking you a different
28 question. A barrister appearing -- had no function to
29 say this should be sent to Mr. Justice Kevin O'Higgins

1 to investigate?

2 A. Again, it wasn't for the Department to direct the
3 barrister to do something or not to do something.

4 240 Q. No, but the point I am making is that Mr. Flahive is
5 reciting that consideration was being given to asking 12:11
6 Mr. Justice O'Higgins to consider that matter in
7 addition to the other matters that he was going to
8 examine in his Commission of Investigation.

9 A. Mm-hmm.

10 241 Q. And I'm asking, who was giving that consideration or 12:11
11 giving consideration to that possibility?

12 A. As I understand it, and again I think Mr. Flahive is --
13 who will be giving evidence, is the best person here on
14 the detail of this, but, as I understand it, it
15 emanated from the barrister in the IRM. 12:11

16 242 Q. A suggestion that the O'Higgins Commission might
17 investigate this matter?

18 A. On the basis of having seen the papers. At that point,
19 there was -- all those cases were looked at on the
20 papers and nothing else. 12:12

21 243 Q. And you are suggesting that a barrister was considering
22 recommending that Mr. Justice O'Higgins should examine
23 Ms. D's complaint, is that right?

24 A. That is what it appeared to be at that point, yes.

25 244 Q. And are you aware, did that possibility, was that 12:12
26 bounced off the Department?

27 A. I think it was, but I think the Department, we would
28 have recognised that this would have been a most
29 serious development.

1 245 Q. Yes. And so can we take it then that there is some
2 record in the Department, somewhere, of the Department
3 considering whether it would or would not be
4 appropriate for Mr. Justice O'Higgins to consider
5 Ms. D's allegations in addition to the other matters 12:12
6 that he investigated?

7 A. I have no sense of what records might be available
8 around that, but I think the point here is that we
9 would have been, in the Department, deeply conscious
10 that Sergeant McCabe had come forward, had exposed 12:13
11 wrongdoing.

12 246 Q. Yes.

13 A. And now we had an IRM process which was dealing with
14 another matter entirely, which was an allegation that
15 the Gardaí had failed to deal with the complaint, that 12:13
16 he would then end up as being part of the O'Higgins
17 Commission.

18 247 Q. He would end up effectively as an accused person?

19 A. As one of the terms of reference.

20 248 Q. Yes. 12:13

21 A. But having seen the import of that, the only way to
22 resolve it was to establish what did actually happen,
23 and the only way that that could have happened was, and
24 Mr. Flahive would be better on this in terms of the
25 detail, I think he may have asked the barrister in 12:13
26 question, I think, now, would it be appropriate or
27 would it be helpful if he saw the Garda investigation
28 file.

29 249 Q. But are you saying that you believed that the barrister

1 was coming forward with this idea and Mr. Flahive was
2 countering 'surely you should see the investigation
3 file'?

4 A. Yeah, I think that probably is the sequence of it, yes.

5 CHAIRMAN: Well, Mr. McDowell, there is some 12:14

6 interesting points being made there, but one of the
7 problems I have is myself getting confused. Maybe you
8 would help me on this. As I understood it, the

9 O'Higgins Commission, at the point where the
10 Independent Review Mechanism was set up, wasn't even 12:14

11 thought of, but the point of the Independent Review
12 Mechanism was to look at, it seems, up to 300 cases and

13 say, look, this is what Sergeant McCabe, and perhaps
14 other people as well, have said are really badly

15 investigated cases where the victims have been let 12:14

16 down, which a victim would be if there was a very, very
17 bad investigation, and report back. And there was a

18 number of people doing that; there could have been a
19 dozen of them, as far as I know, and they were each

20 looking at, let's say, 10, for the sake of argument. 12:14

21 So they -- when I have your attention. Just, I need to
22 get this right. So they would look at a whole load of

23 these investigations, and maybe, in some instances,
24 look at the full Garda file. In this particular

25 instance, Mr. Waters' view is that they probably did 12:15

26 look at the full Garda file.

27 A. Yes.

28 CHAIRMAN: But when the final report was made by the
29 Independent Review Mechanism, in other words when you

1 gather the whole thing together, they would have said,
2 look, here is the following dozen cases or two dozen
3 cases where it appears to us there is a serious issue
4 about the investigation, and then the next step would
5 be, the Minister, what do we do about it? Set up a
6 Commission of Investigation into this. 12:15

7 MR. MCDOWELL: Yes.

8 CHAIRMAN: So I think that's it, but I don't --

9 MR. MCDOWELL: There is no difference between my
10 understanding and your understanding, Chairman, on
11 that. 12:15

12 CHAIRMAN: Yes.

13 MR. MCDOWELL: But I am asking Mr. Waters to elaborate
14 on the suggestion that there was a debate going on
15 between the Department and the barrister as to whether
16 Mr. Justice O'Higgins should be investigating the Ms. D
17 matter. 12:16

18 CHAIRMAN: Yes. So this may be a chronological matter.
19 So when the O'Higgins Commission is set up, is there a
20 further, if you like, lookback on the Ms. D allegation
21 to see whether that should be referred once it's there
22 and up in place and running, do you know anything about
23 that, is what Mr. McDowell is asking you. 12:16

24 250 Q. MR. MCDOWELL: In other words, was there a discussion
25 within the Department or between the Department and the
26 barrister as to whether it would or would not be
27 appropriate to have Mr. Justice O'Higgins reopen the
28 Ms. D matter? 12:16

29 A. I think the Department in this case, having been

1 apprised of the IRM report on it, was of the view this
2 is a very serious matter and the only way it can be
3 resolved is by the Garda investigation file being made
4 available, which clearly showed this had been
5 investigated and the DPP had directed that there was no 12:17
6 prosecution.

7 251 Q. Yes.

8 A. Yes. And I think the Department would have been in
9 a -- very deeply conscious that if, out of the process,
10 further victimisation would have taken place in respect 12:17
11 of Sergeant McCabe, and I think that's why we would
12 have sought or asked the IRM barrister would it be
13 helpful if you saw the DPP file.

14 252 Q. That is the whole point I'm making, or I'm asking
15 questions directed to establishing this, that, firstly, 12:17
16 it was under consideration; secondly, the Department
17 would have appreciated immediately that this would have
18 transformed the O'Higgins inquiry into something
19 radically different in which Sergeant McCabe was
20 effectively an accused person or a defendant? 12:17

21 A. It would have added one further term of reference onto
22 it and -- in the circumstances in which you described
23 them, yes.

24 253 Q. And insofar as we were all, according to what we have
25 been reading for the last half hour, all in favour of 12:18
26 whistleblowers and treating them properly and
27 respectfully and learning from what they put before us,
28 had, in fact, the O'Higgins Commission had its terms of
29 reference extended to deal with Ms. D's allegations, it

1 would have been a monstrous inversion of that policy,
2 wouldn't it?

3 A. But the point is --

4 254 Q. Sorry, wouldn't it have been a monstrous inversion of
5 that policy? 12:18

6 A. The point is that it wasn't.

7 255 Q. I accept that. But I am asking you wouldn't it have
8 been a monstrous inversion of that policy if this had
9 been added in for consideration by Mr. Justice
10 O'Higgins? 12:18

11 A. It was something that we, as I said earlier, that we
12 would have been very concerned about in the Department,
13 yes, but it was -- this did not happen, and I think the
14 Department, if I may say so, to its credit, took steps
15 to ensure that this was properly done. 12:19

16 256 Q. Yes. So I am trying to get to that point.

17 A. Yes.

18 257 Q. You see, you are saying, and I don't disagree with you
19 for a moment and neither would Sergeant McCabe, that it
20 would have been inappropriate for Mr. Justice O'Higgins 12:19
21 to be asked to consider that allegation in conjunction
22 with all of the other matters which he was being asked
23 to inquire into, isn't that right?

24 A. Yes, that that was stopped, yes.

25 258 Q. Because it would effectively have put Sergeant McCabe 12:19
26 in the dock at the Commission, isn't that right?

27 A. Yeah.

28 259 Q. And I'm just asking you now, in relation to that
29 proposal, was that discussed with you, the proposal of

1 the barrister, as you understand it?

2 A. Not with me personally, no, no.

3 260 Q. Were you aware of it?

4 CHAIRMAN: Can I make sure that I know the question
5 that you are asking, Mr. McDowell, and please forgive 12:20
6 my interruptions, they are designed to be helpful,
7 because, at the end of the day, if I am the most
8 confused person in the room, nobody benefits, or I
9 certainly would imagine that, in any event. I am just
10 a wee bit worried, to start out with, with the 12:20
11 paragraph, and I tend to ask myself the question, is
12 this bad phraseology as opposed to legal phraseology,
13 which is very exact? And then the second thing is, I
14 am a wee bit worried about Mr. Waters' actual knowledge
15 of this as opposed to Mr. Flahive's actual -- 12:20

16 MR. MCDOWELL: That is what I am trying to --

17 CHAIRMAN: No, I appreciate you are doing that. And
18 the third thing is, look, if it comes to be the case
19 that this is indeed so, well obviously that's a fact
20 and I am not going to ignore that fact, but it seems to 12:20
21 me from the way that the thing is worded that you could
22 take the view, and you have taken the view, that the
23 O'Higgins Commission is up and running or the terms of
24 reference are being set and there is an active debate,
25 notwithstanding that the IRM has ruled it out, about 12:20
26 actually getting the Ms. D allegations and putting that
27 in as well. Now, that is a very different thing to the
28 Ms. D allegations being part of the 300 cases examined
29 by the various barristers.

1 MR. MCDOWELL: That is the point.

2 CHAIRMAN: And then reporting back and saying, look, on
3 all of this, we have had a look at this but these are
4 the most serious cases where the Garda investigation
5 seems to be let down, you probably need to have a 12:21
6 commission on that, and then they contact Mr. Justice
7 O'Higgins. So there is a big difference. And it may
8 be that we are all -- I am getting confused or perhaps
9 Mr. Waters is getting confused, but that is the stark
10 difference. 12:21

11 MR. MCDOWELL: Judge, I am not criticising
12 Mr. Waters --

13 CHAIRMAN: No, I know that, I know that.

14 MR. MCDOWELL: -- or his Department for the decision
15 they make. 12:21

16 261 Q. I am trying to elicit one point from you, and that is,
17 that by the time May of 2015 arose, the Department had
18 recently -- was well aware of Ms. D's allegations and
19 had recently taken steps to make sure that Ms. D's
20 allegations would not be part of the O'Higgins 12:22
21 Commission of investigation, isn't that the situation?

22 A. Mm-hmm.

23 262 Q. So everybody, in May 2015, who became aware of what
24 actually happened at the O'Higgins Commission, was well
25 aware that a decision had been made not to include that 12:22
26 matter in the O'Higgins Commission of Investigation?

27 A. Mm-hmm.

28 263 Q. And I'm suggesting to you that its sensitivity must
29 have been apparent to everyone in the Department who

1 one way or another, appear on the table, so to speak,
2 at the O'Higgins Commission of Investigation?

3 A. Well, the Department, and again I think -- I am not --
4 I wasn't a file-holder, and I think Mr. Flahive is
5 probably better placed to talk to you about this in 12:24
6 detail, but I would say that the Department, to have
7 acted on foot of what you are suggesting, would have
8 involved itself directly in the attitude of a witness
9 before the -- or a party before the O'Higgins
10 Commission. That would have been the only obvious 12:24
11 outcome. If, as you say, the sensitivity was such that
12 it would have raised alarm bells, that, then, would
13 have led to the Department having to go to the
14 Commission or go to the Commissioner and say, sorry,
15 you are wrong here, you should not be doing this, and 12:25
16 that would have been a clear breach of what we would
17 have expected we should be doing or what we should not
18 have been doing in respect of our -- of the approach of
19 the witnesses and parties to the Commission. We simply
20 could not have gone there. 12:25

21 268 Q. I accept the point you are making, but I'm putting a
22 different point to you, and that is that when the
23 Department and senior officials in it became aware, in
24 May 2015, that, in a different forum, the Ms. D
25 allegation was arising, even tangentially in the 12:25
26 Commission, it must have been apparent that this was a
27 matter of acute sensitivity?

28 A. Well, clearly it was a matter of acute sensitivity, but
29 I suppose it was a different question as to what could

1 be done about it in those circumstances.

2 269 Q. Yes, yes. Well, we will come to that later. I am
3 suggesting to you that the people in the Department who
4 dealt with that email, whether they read it or not or
5 whether they spent much time thinking about it or not, 12:26
6 they knew exactly what the issue was and they knew that
7 the Department had taken a stance against this issue
8 being put into the terms of reference of Mr. Justice
9 O'Higgins' inquiry, isn't that right?

10 A. I can only speak in terms of my own knowledge of it, 12:26
11 that's it, and, as I say, I didn't have a
12 recollection --

13 270 Q. Yourself then, you were aware of that?

14 A. That what had happened prior to that, yes, yes.

15 271 Q. Yes. There had been a suggestion that it should go to 12:26
16 Mr. Justice O'Higgins, and the Department said no, no,
17 this should not happen, is that right?

18 A. Yes -- well, that was the shorthand version of what
19 actually happened.

20 272 Q. I am shortening it just to make it simple. The 12:26
21 Department stance was hostile to it?

22 CHAIRMAN: Possibly, Mr. McDowell, but I still, I have
23 a query in my mind, and the query in my mind was, did
24 that actually ever happen?

25 MR. MCDOWELL: Did what happen? 12:27

26 CHAIRMAN: Did one of the people doing the IRM actually
27 suggest that this one should go forward? And I don't
28 know that yet.

29 MR. MCDOWELL: That is the point. We will come to

1 that -- is it your belief that a barrister suggested it
2 and that the Department batted it down, or is it your
3 suggestion -- your belief that that the suggestion
4 might have come from in the Department itself?

5 A. That the -- this would be included as part of the terms 12:27
6 of reference?

7 273 Q. Yes.

8 A. It certainly, to my knowledge, wasn't -- didn't come
9 from the Department itself. And as to whether it was
10 suggested, I think suggested - again, I am not speaking 12:27
11 of direct knowledge of this - 'suggested' is one word;
12 'considered' is perhaps another word.

13 274 Q. Considered?

14 A. Again, I want to be clear, I am not speaking of direct
15 knowledge of this now, but it certainly did not come 12:27
16 from the Department, it certainly didn't.

17 275 Q. Well, for instance, were you aware that, in May of
18 2014, the former Minister, Mr. Alan Shatter, suggested
19 on the floor of the Dáil that that allegation should be
20 considered by the -- by the inquiry which was to follow 12:28
21 Mr. Guerin's report?

22 A. I wasn't in post at that stage. I have no knowledge of
23 that at all.

24 276 Q. Could the consideration of that issue have originated
25 there? 12:28

26 A. In the -- in the Department?

27 277 Q. In a public suggestion by the former Minister that
28 Mr. -- that any inquiry should consider that issue?

29 A. I have no knowledge of that. I couldn't comment with

1 any view on that at all. I wasn't --

2 CHAIRMAN: Are you in a position to give us a date on
3 that, Mr. McDowell? Because if you were to give us a
4 date, we would look it up and just see where it may fit
5 in, but you can think about that over lunch if you
6 want. 12:28

7 MR. MCCANN: And also, Chairman, the difficulty for the
8 witness is that that is not among the papers that have
9 been supplied by the Tribunal.

10 CHAIRMAN: No. And again, you will appreciate that 12:29
11 papers are directly about this term of reference. But
12 if something else becomes important, I am happy to look
13 at it, within reason.

14 MR. MCCANN: Absolutely. Within reason.

15 MR. MCDOWELL: I think my solicitors did supply the 12:29
16 Dáil debate, and I will get you the exact date for it.

17 MR. MCCANN: But it hasn't been supplied to the witness
18 in advance.

19 MR. MCDOWELL: Sorry, I am just asking the witness, is
20 that a possibility, that a third party was making this 12:29
21 suggestion, and that's where the consideration was
22 coming from, or was it the barrister's idea or was it
23 coming from within the Department? The Chairman is
24 asking where was this idea, this consideration -- what
25 was -- what was triggering this consideration as to 12:29
26 whether Mr. Justice O'Higgins should deal with that
27 application?

28 A. Again, from my knowledge of this, of the detail of this
29 is limited, my sense is that it was coming from the

1 barrister who had seisin of the application or the case
2 before the IRM. I had no knowledge whether a previous
3 minister was involved in this or had made any
4 suggestion. I know that the Department would have been
5 completely running against our view for us to have
6 suggested this and then only sometime later to say no,
7 we can't do this. 12:30

8 CHAIRMAN: Yes. Just from the point of view of the
9 dates of this, it would help if you had that, and we
10 are going to break now, Mr. McDowell, if that is a 12:30
11 convenient time for you. But as I understand it, on
12 19th February 2014, the D investigation, and I am going
13 to call it the D investigation because that is properly
14 what it is, was part of the dossier which was handed by
15 the leader of the Opposition to the Taoiseach, as far 12:30
16 as I know, and, as far as I know, on 29th April 2014
17 Ms. D complained to GSOC that her case had not been
18 properly investigated. They informed the Gardaí of
19 that investigation on 22nd December 2014, and then on
20 19th May, which is quite coincidental, 2015, they 12:31
21 informed Garda Headquarters that there was nothing
22 wrong at all --

23 MR. MCDOWELL: Yes.

24 CHAIRMAN: -- with the investigation in relation to
25 Ms. D. 12:31

26 MR. MCDOWELL: It would seem that in the IRM on a
27 parallel process, this issue -- this possibility was
28 being canvassed. That is all -- I am not putting it
29 further than that.

1 CHAIRMAN: No, I appreciate that, but the real issue
2 that you have raised is, was something more significant
3 happening in the sense of movement or pressure from
4 within the Department or elsewhere.
5 MR. MCDOWELL: Well, where was this idea coming from, 12:31
6 is what I am asking this witness to recollect, if he
7 can.
8 CHAIRMAN: Well, maybe you would think about that, if
9 you wouldn't mind, over lunch.
10 A. To the best of my knowledge, Judge, this would have 12:31
11 come from the barrister who was examining the complaint
12 in the papers.
13 CHAIRMAN: Yes. No disrespect, Mr. Waters, but I am
14 not sure you are speaking with exact knowledge of
15 matters. It could be others will help us more rather 12:31
16 than -- and that is, again, no disrespect intended.
17 A. Mr. Flahive I think is --
18 MR. MCDOWELL: I think the date is in June 2014, it was
19 discussed in Dáil Éireann.
20 CHAIRMAN: Well, if you wouldn't mind communicating, we 12:32
21 will see that, and the terms in which it was discussed
22 may be important. So, a one-hour break, please.
23
24 THE HEARING ADJOURNED FOR LUNCH
25 13:23
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1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

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278 Q. MR. MCDOWELL: Good afternoon, Mr. Waters.
Do I understand your evidence to be that on the
afternoon of the 15th May 2015 you were in the
Immigration Section, is that right?

13:35

A. That's correct, yes.

279 Q. And that you first became aware of, to the best of your
knowledge, Mr. Flahive's email on the following Monday,
after the weekend, is that right?

13:35

A. To the best of my knowledge, yes.

280 Q. And bearing in mind the sensitivity of the Ms. D
allegation and the recent departmental emphatic
decision that Mr. Justice O'Higgins should not have it
in his terms of reference, can you explain why
Mr. Flahive's email didn't ring a bell in your mind
that this was something of equal sensitivity?

13:36

A. I can't. As I say, I have no recollection of having
received the email.

281 Q. Because on one view, having excluded the idea that
Mr. Justice O'Higgins would look at the Ms. D
allegation as part of his terms of reference, it was
being brought in in a collateral way, the same issue
was being raised in a collateral way, to deal with
Sergeant McCabe's motivation and credibility. Would it
not have rung a bell in your mind that this is very,
very sensitive and I wonder why this is being done?

13:36

13:37

A. I have given my evidence. I have no recollection of
the email. As I say, subsequent to it, I would have to

1 take the view that Mr. Flahive and Mr. Barrett had
2 stated an opinion on it, both of whom I had known, and
3 the matter rested there, as far as I was concerned.

4 282 Q. Going back to the previous Friday when you were in the
5 Immigration Section, it would appear that, at the 13:37
6 Tribunal, a dispute had arisen between counsel as to
7 whether it was appropriate that Chief Superintendent
8 Rooney should give evidence in relation to Sergeant
9 McCabe's attitude to the Ms. D investigation and the
10 DPP's direction; you're aware of that now anyway? 13:38

11 A. Now, yes, yeah.

12 283 Q. And are you aware that at about ten past three, 15:10,
13 that day, the Commission of Investigation had risen so
14 that instructions could be taken from the Commissioner?

15 A. I'm aware of that now from the papers and from the 13:38
16 opening statement here during the week, yes.

17 284 Q. And that during that time, a letter of comfort, as it
18 is described, which is now claimed to be legal
19 advice --

20 CHAIRMAN: No, no, I was the one who used that phrase 13:39
21 and I --

22 MR. MCDOWELL: No, no, the letter of comfort has been
23 used by others, Judge.

24 CHAIRMAN: I'm sorry, Mr. McDowell, I'm going to do my
25 very best to keep my mouth shut, I promise. But I 13:39
26 asked Mr. McGuinness this this morning. The legal
27 advice is the email that went on the 15th.

28 MR. MCDOWELL: Yes.

29 CHAIRMAN: But then obviously the Commission had asked,

1 look, I want to know what your case that you're making
2 is in relation to credit.

3 MR. MCDOWELL: No, no, no.

4 CHAIRMAN: And then the letter came in after that. So
5 I called that legal advice. I think I was wrong to do 13:39
6 so, but it encapsulates the legal advice or approach.

7 MR. MCDOWELL: No, Chairman. The email, the short
8 email --

9 CHAIRMAN: Yes.

10 MR. MCDOWELL: -- the three paragraphs, was referred to 13:39
11 by the Garda authorities as a letter of comfort, and we
12 will come back to that.

13 CHAIRMAN: Right. Okay.

14 285 Q. MR. MCDOWELL: But are you aware that that email was
15 sent by the three counsel during the recess of the 13:39
16 Commission?

17 A. I think it is important to point out that neither I nor
18 anybody in the Department, to the best of my knowledge,
19 would have any idea of what was happening in the
20 Commission of Inquiry at the time. These were all held 13:40
21 in private. They weren't public sessions. So the
22 Department wouldn't -- and it would have been quite
23 improper for it to have -- because our issues weren't
24 before the Tribunal, before the Commission, at that
25 stage, so we would have had no knowledge of what was 13:40
26 actually going on in the course of that afternoon, or
27 any afternoon, in that Commission of Inquiry.

28 286 Q. I want to just put to you that that email was sent to
29 the Commissioner at 15:29 via Superintendent Healy, and

1 at 15:36 the Commission resumed its activities. I'm
2 just putting this to you. You obviously haven't a note
3 of the times or all the rest of it, but it did. And at
4 eight minutes past four, that is -- at 3:36 the
5 Commission resumed. At eight minutes past four 13:41
6 Mr. Smyth sought time, further time, and the Commission
7 rose again at ten past four, and Mr. Smyth told the
8 Commission that his instructions were re-confirmed at
9 16.34. That's what happened in that Commission. Now,
10 you've seen the -- you've seen, have you, the statement 13:41
11 of Nóirín O'Sullivan, the former Commissioner, to the
12 effect that she believed that she had contacted you
13 during that period?

14 A. Correct, yes.

15 287 Q. And as I understand your evidence here this morning, is 13:41
16 that you don't believe you were contacted at that time?

17 A. Well, I have no recollection of having been contacted
18 at that time.

19 288 Q. And --

20 A. And if I may, I think Nóirín O'Sullivan in her 13:42
21 statement refers to the fact that she is aware of this
22 by virtue of phone records.

23 289 Q. Yes.

24 A. But that she has no specific recollection, or no
25 recollection either of that phone call. 13:42

26 290 Q. I see. Well, you see, Mr. McGuinness here asked you to
27 look at some phone -- list of phone calls and to
28 identify whether or not your number appeared on them,
29 and you said it didn't.

1 A. Not on that list that was presented to me this morning,
2 no, no.

3 291 Q. Yes. Could I ask you to go to page 760, please, in
4 folder 2A. I should say, Mr. McGuinness was asking you
5 to look at records of Ms. O'sullivan's mobile phone. 13:43
6 But at page 760 there's a record of her landline
7 communications that day. And I think you'll see that
8 the first two items on page 760 are phone calls to
9 yourself, isn't that right, and that their timing is
10 straight in the middle of that recess? 13:43

11 A. I am just checking here now.

12 292 Q. At 15:26.

13 A. The first two -- yes, sorry, yes, I see my number here,
14 yes. The first two numbers, yes.

15 293 Q. And the duration is just short of a quarter of an hour? 13:44

16 A. Mm-hmm, mm-hmm.

17 294 Q. 14 minutes and some odd seconds?

18 A. Mm-hmm.

19 295 Q. And we know that, during that period, Superintendent
20 Healy had contacted her at 15:23, at 15:37, at 15:39 13:44
21 and at 15:41. So this was a live issue she was dealing
22 with at that time. And you seem to have spoken to her
23 on the phone for nearly a quarter of an hour, seconds
24 short of a quarter of an hour, at that critical
25 juncture. Now, in light of that, do you still say that 13:44
26 her recollection is wrong?

27 A. Her recollection being?

28 296 Q. That she contacted you to inform you of what was
29 happening at the Tribunal or the Commission at that

1 time and spoke to you about it?

2 A. Sorry, could you repeat that? I'm confused, sorry.

3 297 Q. In the light of the fact that it appears that you were
4 speaking to her for a quarter of an hour during that
5 recess -- 13:45

6 A. Okay.

7 298 Q. -- or just short of a quarter of an hour, I don't want
8 to exaggerate, and that she says she believes she was
9 speaking to you on that occasion --

10 A. Okay. 13:45

11 299 Q. -- would you now accept that her memory is probably
12 correct and yours is incorrect?

13 A. She says she was speaking to me on foot of telephone
14 records which -- or billing records, correct, yes. I
15 have no reason to disbelieve that she says she was 13:46
16 speaking to me, in the light of having seen the billing
17 records there, yes.

18 300 Q. So straight, at the very centre of seeking, of
19 receiving counsel's email of comfort and while the
20 whole question of whether she was reconfirming her 13:46
21 instructions in relation to Sergeant McCabe, confirming
22 or reconfirming her instructions in respect of the line
23 of questioning of Sergeant McCabe, she was speaking to
24 you for nearly a quarter of an hour, isn't that right?

25 A. According to the records here, yes. 13:46

26 301 Q. And I've got to suggest to you that she must have been
27 telling you what was going on on that occasion?

28 A. And I have to say, in response, that I have no
29 recollection of that at all.

1 302 Q. Well, now, you saw her statement that she prepared for
2 this Tribunal, did you?
3 A. Em --
4 303 Q. Have you -- before today?
5 A. Yes. Sorry, yes, yes, yes. 13:47
6 304 Q. And you saw her statement that she believed that she
7 had informed you of this?
8 A. I -- my recollection from her statement is that she had
9 mentioned that there was an issue, or an issue had
10 arisen. 13:47
11 305 Q. Yes.
12 A. But --
13 306 Q. If she was talking to you for quarter of an hour, she
14 could hardly just say 'an issue has arisen but I'm not
15 telling you what it is'? 13:47
16 A. Again, as I say, I have no recollection whatsoever of
17 the phone call and the contents of the phone call. I
18 have to take it that what she says in her statement,
19 that there were other issues occurring at the time, and
20 she -- relating to policing and crime and security, and 13:48
21 so forth, and that she would have discussed those with
22 me, but again, I can't -- as I say, I don't have a
23 recollection around it.
24 307 Q. Well, I just want to give you a fair -- a fair
25 opportunity to deal with this. It would appear that 13:48
26 she was receiving a succession of phone calls from
27 Superintendent Fergus Healy, four phone calls between
28 15:23 and 15:41, and this is referred to in Book 2A at
29 page 755, just in case anyone wants to check it. And

1 at the same time she's dealing with you for more than
2 14 minutes, on the phone, and I've got to suggest to
3 you that she must have been speaking to you about what
4 was happening at the Commission?

5 A. And, as I say, all I can say in response: I have no 13:49
6 recollection whatsoever of that.

7 308 Q. But if she was speaking to you, just take it -- just
8 assume for the purpose of the argument that she was
9 speaking to you about the developments at the
10 Commission that afternoon, as she believes she was, how 13:49
11 would it be that on the following Monday, when you saw
12 the email, that it meant little or nothing to you?

13 A. We're speculating here. I can't reconstruct in my mind
14 what happened on that afternoon, other than to say to
15 you that I was in my immigration office that afternoon, 13:49
16 I was dealing with immigration issues. The records
17 there indicate that the Commissioner, that you have now
18 shown us, indicate that the Commissioner had made a
19 phone call to me. I can't put it beyond that, in the
20 sense of my memory of that phone call and what was 13:50
21 discussed at that phone call.

22 309 Q. But this was a phone conversation between the most
23 senior civil servant in the Department of Justice and
24 the most senior member of An Garda Síochána?

25 A. Yes, but -- that's correct, but this -- phone calls 13:50
26 between me and the Commissioner would have been a
27 pretty regular event -- a regular occurrence. They
28 could have been -- depending on the issue, they could
29 have been a couple a day, they could have been a couple

1 a week. It would be rare that a week would pass by
2 where we wouldn't have phone calls. So the fact that
3 she phoned me, there wouldn't be anything unusual in
4 that at all.

5 310 Q. Yes. But on this occasion she was in the middle of a 13:50
6 very delicate matter, trying to get legal advice. She
7 says she spoke to you and informed you of the situation
8 in the Commission at that time --

9 A. According --

10 311 Q. -- and I've got to suggest to you that, on any 13:51
11 standard, it is probable that that was the subject,
12 front and centre, in her mind at the time. She was
13 dealing with a very delicate situation.

14 A. I can't confirm that at all because I have no
15 recollection of the phone call. When you mention 13:51
16 there, when you say there that she spoke to me about
17 the issue, I think in her statement, if I correctly
18 remember, was that she mentioned that an issue had
19 arisen, not about the detail of the issue. But again,
20 that's her, that's her recollection of it. And I think 13:51
21 she also said that she had no specific recollection of
22 the phone call either. But as I say, I have no
23 recollection of the phone call.

24 312 Q. Well, moving on to Monday the 18th of May 2015. At
25 that stage you had access to that email, and if you 13:52
26 read it at all, I've got to suggest to you, it would
27 have to have registered that an unusual development had
28 taken place at the Commission of Investigation?

29 A. And it also went on to say that there was nothing for

1 either the Minister or the Department or the Attorney
2 General to do on foot of it.

3 313 Q. Yes. And we know that Mr. Flahive and Mr. O'Leary say
4 that they discussed the matter. Can you explain why
5 neither of them would have discussed the matter with 13:52
6 you and why you wouldn't have discussed the matter with
7 your Minister?

8 A. On the first point, I can't explain as to why they
9 didn't discuss it with me. I'm assuming again on the
10 basis that nothing remains to be done on foot of it, as 13:53
11 to my recollection of it, I would have assumed, as
12 well, that on the basis of what I said, nothing further
13 was to be done with it. It was a matter for the
14 Commissioner herself and her legal team as to how they
15 conducted their business at the Commission of Inquiry. 13:53

16 314 Q. In retrospect now would you have been concerned if you
17 had understood what was happening at the Commission of
18 Inquiry?

19 A. I have reflected on that question to the best of my
20 ability, and again it is applying -- it is writing 13:53
21 history backwards, but I have to say, truthfully, that
22 I'm not sure that I would be taking any different
23 action right now, on the basis that the advice from
24 Mr. Flahive, whose barrister, Mr. Barrett, senior
25 officer holder in the Attorney General's office, said 13:53
26 it was nothing for the Department to do, that this is a
27 matter for the Commissioner and her legal team.

28 315 Q. Well, could you see any potential problem arising for
29 the Department, the Minister or the Gardaí from what

1 was set out in Mr. Flahive's email to you and to the
2 Minister?

3 A. You will know, being a former minister yourself, there
4 are potential problems everywhere in the Department of
5 Justice and every issue you deal with, there's no
6 question about that. 13:54

7 316 Q. Yes, but usually I think that as a Secretary General,
8 former Secretary General, yourself and Mr. Flahive,
9 your duty was to keep your antenna up and to look for
10 sensitive issues? 13:54

11 A. But looking for sensitive issues and keeping the
12 antenna up but then being in a position to do something
13 about them. Where it was clear in this case the advice
14 was that it was not a matter for us to do anything
15 about it. If we had intervened, we would be
16 interfering with potentially a witness before the
17 Tribunal at that stage. 13:55

18 317 Q. When I asked you -- first of all, Judge, I should say
19 that the reference to the Dáil debate, Mr. Shatter's
20 suggestion that the Ms. D allegation should be
21 included, was, I think, 19th June 2014. 13:55

22 And you've had some time over lunch to think about
23 this, Mr. Waters. Are we to believe that, to the best
24 of your knowledge, it was a barrister who was
25 considering recommending that the Ms. D allegation
26 should be brought into the terms of reference of the
27 O'Higgins Commission? 13:56

28 A. Yes, to the best of my knowledge, but what I would
29 suggest to you is that further knowledge may be

1 available or further information may be available to
2 you in respect of Mr. Flahive, who would be dealing
3 with that matter at the time.

4 318 Q. I see, I see.

5 A. And that is not from any specific knowledge I have, but 13:56
6 Mr. Flahive would have been familiar with all those
7 issues at the time.

8 319 Q. I see. And as far as you, I just want to be very clear
9 about this, as far as you were concerned, insofar as
10 you were aware of that consideration taking place, you 13:56
11 and the Department were emphatically opposed to it, is
12 that what I am to understand?

13 A. It was a case of we had understood immediately what
14 the -- if this were to happen, we had understood
15 immediately what the implications of it were, that this 13:57
16 would be turning things on their head.

17 320 Q. Yes.

18 A. But if, in the finish, having the Independent Review
19 Mechanism and having looked at all the evidence and
20 looked at all the papers, we're to turn around and make 13:57
21 a recommendation, well they were to make a
22 recommendation. But as far as I'm concerned, we would
23 have been wanting to ensure that, in making any
24 recommendation, that they had the fullest possible
25 information in front of them, and this is where the 13:57
26 Garda investigation file which completely blew this
27 issue out of the water in that respect.

28 321 Q. And is there any paper trail in the Department relating
29 to that interaction with the barrister - memos, notes,

1 documents, emails of any kind?

2 A. I have no information on that. I know that the papers
3 relating to the IRM were -- I understand were
4 discovered to the Tribunal.

5 CHAIRMAN: We have a lot of those and we can have a 13:57
6 look at that, just to see is there anything there.

7 MR. MCDOWELL: Yes.

8 CHAIRMAN: Mr. Shatter mentioning it on the 9th June
9 2014, one has to be aware that the O'Higgins Commission
10 only started on 3rd February 2015. 13:58

11 MR. MCDOWELL: That's right.

12 CHAIRMAN: I don't even know if he had, by then, been
13 contacted and asked, look, will you do this? whereas
14 Séan Guerin had made a report which was somewhat
15 critical of the Byrne/McGinn investigation on 6th May 13:58
16 2015.

17 MR. MCDOWELL: Yes, I think, Judge, you have to look at
18 the Dáil debate. Mr. Shatter was suggesting that if
19 other matters were to be investigated by the Commission
20 to be established, the inquiry to be established, that 13:58
21 that should be one of them.

22 CHAIRMAN: Yes. Well, we will ask Ms. Toal and
23 Ms. Pillay to get those out and see if there is
24 anything there, and, if there is, we can come back to
25 it certainly, Mr. McDowell. 13:58

26 322 Q. MR. MCDOWELL: But using your phrase that it would have
27 been standing the whole process on its head to include
28 that in the terms of reference, was that not further
29 reason for you, when you saw Mr. Flahive's email, which

1 was imprecise and which could have been misunderstood,
2 was that not something which would have been very
3 surprising to you; here's something we have decided
4 would be totally wrong and it seems to be cropping up
5 in some shape or form at the Commission? 13:59

6 A. Again, all I can say to you is that I don't have a
7 recollection of having read that email. What
8 registered with me, I simply cannot say, I cannot, in
9 truth, say to you.

10 323 Q. Well, when your own private secretary said that you had 13:59
11 noted -- it had been noted by you, which he did, on the
12 18th --

13 A. Yes.

14 324 Q. -- and that is shown at 3343, what would that have 14:00
15 meant?

16 A. That I had seen it --

17 325 Q. You got it on the 15th?

18 A. Yes.

19 326 Q. And your private secretary replies to Mr. Flahive and 14:00
20 says you've noted it. Can you just explain to me why
21 would your private secretary say that to Mr. Flahive
22 unless you told him that you had noted it?

23 A. What would ordinarily happen is, that in my absence
24 from the office, if emails accumulated, my private
25 secretary would print them off, would bring them into 14:00
26 my office during the course of the day or evening when
27 a free moment had arisen and he would go through them
28 and we would take any action that was required on foot
29 of them, or note them, or whatever. And that was the

1 pretty normal process and it would have been the case
2 in perhaps a number of areas. So that when an email
3 was printed off and brought in to me, into my office,
4 he would have noted that I had noted it and he would
5 have sent it back then to the originator to say that I 14:00
6 had noted it.

7 327 Q. It was headed "Confidential Commission of
8 Investigation", so it wasn't just, you know, there's a
9 change in the parking arrangements in the Department or
10 something; it was something of significance? 14:01

11 A. Well, I wouldn't be made aware of -- emails wouldn't
12 come to me about the change of parking arrangements.

13 328 Q. Exactly, unless it was your own car or something like
14 that. But, I mean, the point I'm making to you is
15 that, on the face of it, it was headed "confidential 14:01
16 Commission of Investigation", and this was confidential
17 information being given to the Commissioner, yourself,
18 Mr. O'Leary and Mr. Power. Why wouldn't you have read
19 it?

20 A. I'm not saying I didn't read it. That is not what I am 14:01
21 saying. I'm saying I have no recollection of having
22 read it. And all I'm saying is that I -- assuming that
23 having read it and having had regard to the last
24 paragraph in it, was that no further action was
25 required, that is what my -- I would have taken the 14:02
26 view that, well, there's something that is now being
27 dealt with, there's no further action required of me on
28 foot of that.

29 329 Q. Taking into account what's -- again, I'm on page 3343,

1 the first two lines of the second paragraph, which it
2 has to be accepted were mildly misleading, and they
3 said:

4
5 "Richard wanted to let me know that counsel for the 14:02
6 Garda Síochána has raised as an issue in the hearings
7 an allegation made against Sergeant McCabe which was
8 one of the cases examined by the IRM."

9
10 Surely, at that stage, reading it, you said, what in 14:02
11 heaven's name is going on here? We made a decision
12 that was not to be considered by the O'Higgins
13 Commission, and here counsel is raising it?

14 A. All I can say in response is what I've said earlier,
15 I've had -- I've no recollection of having read the 14:02
16 email. So what I would have understood that what had
17 happened or what it meant, I just can't say at this
18 remove. I just simply can't say.

19 330 Q. And you've no recollection of a conversation on which,
20 on the face of it, Nóirín O'Sullivan, at the very 14:03
21 central point in time when she was dealing with this
22 issue, is supposed to have had with you on the previous
23 Friday?

24 A. That's correct, yes. And I think she also says that
25 she had no recollection of the conversation either. 14:03

26 331 Q. And no official in the Department ever discussed this
27 matter with you at any proximate time thereafter?

28 A. To the best of my knowledge, no.

29 332 Q. And nobody spoke to the Minister on the matter either?

1 A. The email went to the Minister, as we know from the
2 email chain, but have I no sense that anybody -- I have
3 no knowledge that anybody spoke to the Minister. I
4 don't believe anybody -- I certainly -- speaking for
5 myself, I didn't speak to the Minister on foot of it. 14:03

6 333 Q. Was the Minister aware of the IRM consideration of
7 whether it should go to the O'Higgins Commission?

8 A. I cannot say with any certainty whether she was or not,
9 but I should think that she probably was aware.

10 334 Q. I see. 14:04

11 A. But again, I cannot be, you know, certain about on that
12 point.

13 335 Q. I see. And again, for some reason, as far as we know,
14 this email made no impression on her memory at all.

15 A. That is her evidence, as I understand it. 14:04

16 336 Q. Could I ask --

17 A. Again, I'm just speaking for myself.

18 337 Q. Yeah.

19 A. Again, I have to say, and again I have no recollection
20 of the email, as you know, as I said, but I'm assuming 14:04
21 I would have taken comfort from the fact that both
22 Mr. Flahive and Mr. Barrett had said that no further
23 action was warranted by the Department or the Minister
24 or the Attorney on foot of the information contained in
25 it. 14:05

26 338 Q. Well, undoubtedly that might be comforting if you
27 didn't want to take any further action, but I am
28 putting it to you that the content of the email and the
29 probable content of the conversation you had with

1 Nóirín O'Sullivan in the midst of this crisis for
2 nearly a quarter of an hour on the previous Friday,
3 should have created in your mind extreme disquiet that
4 effectively a decision made in the Department that the
5 O'Higgins Commission was to have nothing to do with 14:05
6 this issue was being circumvented?

7 A. That may be your view, but, as I say, my evidence is
8 that I have no recollection of that at all.

9 339 Q. I see. In relation to the draft speeches that we were
10 dealing with earlier today, which were sent to an email 14:06
11 account at nawaters@justice.ie, are you saying that
12 there is no such email account or is there another N.A.
13 Waters who was getting all of this unsolicited
14 material?

15 A. I don't believe there is another N.A. Waters in the 14:06
16 Department.

17 340 Q. And could I ask you in that context, is it your
18 experience that if you send an email to a non-existing
19 account, it bounces back, you're informed of it?

20 A. In my case -- 14:06

21 341 Q. Certainly in mine.

22 A. Yes, ordinarily.

23 342 Q. My mail daemon tells me you've got it wrong.

24 A. But I wasn't sending -- I wasn't sending those emails.

25 343 Q. No. 14:06

26 CHAIRMAN: It depends on how it is set up,
27 Mr. McDowell. As I understand, the vast majority of
28 email servers, you set them up so that anything at, let
29 us say, disclosuretribunal.i.e. gets through to the

1 disclosuretribunal.i.e. Once you put
2 @disclosuretribunal.ie, you can put any manner of
3 names, and I am not going to -- you can put
4 michaelmcdowell@disclosuretribunal.ie. It will still
5 go to the info account. That is what I understand. So 14:07
6 it would have definitely gone somewhere in Justice
7 unless this was --

8 MR. MCDOWELL: I don't know whether you, Chairman, have
9 had the experience of misspelling an email addressee
10 and being told it's gone nowhere. 14:07

11 CHAIRMAN: Yes. One of two things can happen: it can
12 come back to you saying no such person exists, if it is
13 set up that way, but most email servers are set up so
14 that they will accept anything, provided you have the
15 correct @ whatever it is. 14:07

16 MR. MCDOWELL: I see.

17 CHAIRMAN: Yes. But it could go into the ether, but
18 usually it will be instructed to go to the info@
19 whatever it is account instead.

20 344 Q. MR. MCDOWELL: So in respect of all that material, you 14:07
21 just think you never saw it at all?

22 A. Yes, I have -- as I say, that is not my email address,
23 so --

24 345 Q. Well, insofar as it was addressed to you, does it 14:08
25 surprise you, for instance, that the Commissioner
26 should be drafting a speech for the Minister in which
27 the Minister was to state that she had full confidence
28 in the Commissioner?

29 A. Em, there was much to-ing and fro-ing at the time in

1 the context of what had happened - the leak, the great
2 public controversy. The Minister had asked the
3 Commissioner to put as much information as she could
4 into the public domain, you know, cognisant with her
5 obligations. So there was correspondence back and
6 forward. As to what emotion I would have had in
7 respect of what either side was saying, you know, I'm
8 not sure that adds anything to anything.

14:08

9 346 Q. But the point I'm making is that if the Commissioner of
10 An Garda Síochána was suggesting to the Minister a text
11 in which the Minister was to inform the Dáil that she
12 had full confidence in the Garda Commissioner, is that
13 unusual for a Commissioner of An Garda Síochána to put
14 words in the Minister's mouth or suggested words of
15 total confidence in the Commission?

14:09

16 A. Well, of course it was for the Minister to decide not
17 to use the words if she decided not to use them. So
18 where they emanated from, you know, wasn't, you know,
19 of any great import. But it was for the Minister to
20 decide whether or not, in the ultimate, she had
21 confidence in the Commissioner.

14:09

22 347 Q. Yes. But on this occasion the Commissioner felt
23 sufficiently involved to actually suggest an expression
24 of full confidence in herself to the Minister arising
25 out of challenges to the Commissioner's own behaviour,
26 Dáil challenges?

14:09

27 A. As I say, that's something that obviously should be
28 taken up with the Commissioner.

29 348 Q. And did it suggest -- do you even now -- I mean, you

1 say you may never have received those documents, but,
2 even now, does it surprise you that speeches for the
3 Minister were being composed in the Phoenix Park?

4 A. Ah, these were drafts that were going back and forward
5 between the Department and the Garda authorities. It 14:10
6 was always open to anybody at any stage to decide,
7 well, we're not using this or we're not happy with this
8 phrase or we're not happy with this paragraph or we
9 want to rephrase it. So that was -- that would be the
10 way business was done. As I say, I don't remember 14:10
11 another occasion involving the Gardaí where this was
12 done, but that is not to say it wasn't done in previous
13 times before I was Secretary General. It could well
14 have been, I simply don't know. But in my time,
15 limited time at that stage was a matter of a year, I 14:11
16 hadn't seen it being done before.

17 349 Q. But, before lunch, I know Mr. McGuinness drew to your
18 attention an exchange in which a draft letter was
19 prepared initially to present to the Minister, as I
20 understood it, but eventually you were made the 14:11
21 addressee of the letter?

22 A. Yes.

23 350 Q. And in the drafting process, the Minister's own
24 Assistant Secretary effectively overruled the
25 Commissioner's willingness to divulge the legal advice 14:11
26 she had received?

27 A. I don't believe that to be the case, that anybody would
28 have overruled what the Commissioner intended to do.

29 351 Q. The Commissioner clearly was willing in the

1 circumstance to have the so-called letter of comfort or
2 legal advice put into the public domain, is that right?

3 A. And the Minister decided not to put that into the
4 public domain.

5 352 Q. Well, the Minister merely decided not to put it into 14:12
6 the public domain but to redraft a letter to be sent to
7 the Minister by the Commissioner so that it wouldn't
8 appear in the public domain and defending a decision
9 not to put it into the public domain and to make it
10 look as if that was the Commissioner's view of the 14:12
11 world rather than the Minister's view of the world;
12 isn't that right?

13 A. The Minister may have taken other advices in respect of
14 that, as to whether or not it would have been
15 appropriate for that to go into the public domain. I'm 14:12
16 not party to that. She may well have, I don't know, I
17 simply don't know.

18 353 Q. Does it strike you now that if the letter of comfort
19 had gone into the public domain, it would have been
20 clear that, on the day, on the 15th May, a very short 14:13
21 email had been sent purporting -- at 15:29, purporting
22 to contain legal advice from the three barristers
23 involved; the public would have seen that this was --
24 it was an ex post facto written advice which was sent
25 as a letter of comfort during the dispute at the 14:13
26 Commission?

27 A. Yes. On the face of it, a lot of trouble could have
28 been avoided, but I'm assuming that a major precedent
29 was being established here in that it was being

1 disclosed what advice a party to the Commission had
2 received and that was now being put into the public
3 domain, and I would have thought that, in that
4 precedent, that it would be very difficult to step back
5 from that on future occasions about any garda or any 14:14
6 security matter, for example, if the Commissioner had
7 committed herself to doing this on this particular
8 occasion. I would have thought that, looking back on
9 it now, that that may well have been a consideration.

10 354 Q. At some stage in the documentation which has been 14:14
11 furnished to us, we have seen a proposed public
12 statement being made by the Minister which was composed
13 by Terry Prone for the Commissioner of An Garda
14 Síochána?

15 A. I have no knowledge of that. 14:14

16 355 Q. You haven't seen that. Were you aware that she was
17 advising the Commissioner of An Garda Síochána in
18 relation to a PR matter?

19 A. Not at that stage, no.

20 356 Q. Did she have any contract with the Minister at the 14:15
21 time?

22 A. Not to my knowledge.

23 357 Q. Did she furnish service, either voluntarily or for
24 remuneration, to the Minister at the same time?

25 A. I have no information that she did. From my 14:15
26 recollection, there was no question of Terry Prone
27 being hired by the Department and paid out of the
28 public purse in respect of services for the Department
29 at that stage. She would have been in previous

1 administrations, but certainly not at that stage.

2 358 Q. I see. I take it that you would agree with me that,
3 for better or worse, Sergeant McCabe and the issues
4 that he raised and the controversies surrounding him in
5 relation to a number of issues were very high profile 14:16
6 matters for your Department?

7 A. Yes.

8 359 Q. And people would ask whether it was credible in the
9 circumstances, or incredible, that an email of this
10 kind could have excited no reaction, no consideration 14:16
11 or no discussion in your Department whatsoever?

12 A. But remember the context. The context is, there was a
13 live Commission underway at that stage. And the
14 Department would have been -- from my knowledge, would
15 have been very careful and very proper about not 14:16
16 getting involved in any live commission of inquiry, not
17 having any view on it, not any perception that would
18 arise around it. I can give you my own sense of that,
19 in that three of my colleagues were very much part of
20 that Commission in terms of one of the terms of 14:17
21 reference, and I had no conversation with them at all
22 in any shape or form around what their evidence might
23 be or what their approach to it or what their legal
24 advice was, and that was my view very much, that this
25 was completely off limits, this was a process that was 14:17
26 underway.

27 360 Q. Since it was a private tribunal or commission, did it
28 surprise you that you were being informed at all as to
29 what was happening at it?

1 A. Again, you're asking me now to what my view of it back
2 at the time, and I can't offer a view on that, so I
3 can't, because, as I say, I have no recollection of
4 having received the email. But clearly, the fact that
5 it was being reported by Mr. Barrett in to Mr. Flahive, 14:18
6 he took the view that this is something that should be
7 brought to the Minister's attention. And I think if I
8 remember now, looking at the paperwork, it was on the
9 basis that if this were to emerge in public or that
10 there was press queries about it, that the Minister 14:18
11 wouldn't be left in a position of surprise.

12 361 Q. We also have had circulated to us a memorandum of a
13 note made by Annmarie Ryan, the solicitor acting for
14 the Commissioner at the O'Higgins Commission, of a
15 conversation she had with Mr. Dreelan in the Attorney 14:18
16 General's office. And he apparently, it looks as if
17 that is the case, was discussing what had happened that
18 afternoon with Ms. Ryan, and this led to Mr. Barrett
19 and Mr. Flahive having a phone conversation recorded in
20 the email, isn't that right? 14:19

21 A. Mm-hmm.

22 362 Q. And in the course of the conversation between Ms. Ryan,
23 the solicitor, and the official in the Attorney
24 General's office, the line appears "political dynamite"
25 with a number of exclamation marks. 14:19

26 MR. MCCANN: Chairman, I think it would be very helpful
27 for the witness if he had sight of that document and
28 its content.

29 CHAIRMAN: I wonder do we have a reference,

1 Mr. McGuinness, for that?

2 MR. MCCANN: I didn't bring it up. It's Mr. McDowell's
3 question.

4 CHAIRMAN: No, no, I was asking Mr. McGuinness --

5 MR. MCCANN: Sorry, Judge. 14:20

6 CHAIRMAN: -- because we have these at our fingertips,
7 more or less.

8 MR. MCGUINNESS: I think, Chairman, it's at page 691.
9 It's Ms. Ryan's note of her phone call. It's
10 Ms. Ryan's note of her phone call with Mr. Dreehan, her 14:20
11 third phone call that afternoon, at 17:55, or
12 thereabouts.

13 MR. MCDOWELL: I think it's on the screen now,
14 Mr. Chairman. And you will see there:

15 14:21

16 "I telephoned FH and informed him of AGO's comments."
17

18 That is Superintendent Fergus Healy.

19

20 "Not directing Commissioner's decision" is the next 14:21
21 thing.

22

23 "Line of questioning may have some validity. Political
24 dynamite?? We briefed Commissioner."
25 14:21

26 I'm just putting it to you that if two officials, one
27 an experienced solicitor and the other a legal
28 assistant in the Attorney General's office, saw what
29 was happening as "political dynamite", how is it that

1 when it came to the Department of Justice, to use the
2 old phrase, it was handball against a hay stack - no
3 reaction whatsoever by anybody, no discussion, EXCEPT
4 between Mr. Flahive and Mr. O'Leary, and no surprise
5 even as to the matter arising in this collateral way 14:22
6 when it had been determined that it should not be
7 considered at the O'Higgins Commission

8 A. The phrase "political dynamite" is what it is. It
9 didn't change.

10 363 Q. Would you disagree with it, by the way? 14:22

11 A. That it was political dynamite?

12 364 Q. That if the public had seen what was happening that
13 day, they'd have been very alarmed by it?

14 A. I can't make a comment on that, on the basis that my
15 knowledge at the time was, as you know, very limited. 14:22
16 There was no context around this. Whether this did or
17 did not constitute political dynamite, it didn't change
18 the facts that the Commission was underway, that people
19 were legally represented and it had to keep going with
20 its business. If the Department were to operate on the 14:23
21 basis of something being political dynamite and to take
22 some steps that could have compromised the entire
23 process, well that would have been political dynamite.

24 365 Q. Could you look at page 3252, which is Ms. Ryan's notes
25 from the same day. That page reads: 14:23
26

27 "Judge asked do we believe the question of motive is
28 relevant in this module. Colm Smyth SC says yes, as
29 McCabe and McArdle went to --" Colette Browne that

1 should be, I think.

2

3 "And encouraged her to go to GSOC. Missed some as
4 making calls."

5

14:24

6 So she obviously missed some of the evidence.

7

8 "Went back to Colm Smyth and informed him of
9 Commissioner's instructions as per Fergus Healy.

10 Commission asked do we want five minutes. We say yes. 14:24

11 Before rising, Judge asked: Does this have to be
12 introduced in this module?"

13

14 And then a line across the page.

15

14:24

16 "Fergus made numerous calls directly to Commissioner.
17 Appears she consulted with others. Perhaps Minister."

18

19 Next line:

20

14:25

21 "I phoned Michael Dreehan, AGO, and informed him of
22 this event. I also phoned Paul Flemming, CSSO, to
23 inform him."

24

25 She was clearly quite disturbed at what was going on,
26 isn't that right?

14:25

27 A. You're quoting evidence to me.

28 366 Q. This is her note.

29 A. Her note. Assuming that either I or colleagues in the

1 Department were in the knowledge of what was going on
2 at the Commission of Inquiry. We weren't. This
3 information first came to light to us in recent days
4 and weeks, so we had no knowledge about all this going
5 on at all, and we couldn't; it would have been
6 completely improper for us to have had this knowledge
7 during the course of a live tribunal.

14:25

8 CHAIRMAN: Yes. I suppose the question, Mr. Waters,
9 is, if other people were alarmed, would you not have
10 been alarmed? That's basically it.

14:25

11 MR. MCDOWELL: That's it, that's it.

12 A. Yeah. And as I say, going back to my earlier point,
13 whether it was political dynamite or otherwise, it
14 didn't alter the fact that the Commission goes on about
15 its business. And for the Department to intervene in
16 some shape or form, I'm not quite sure what is being
17 suggested, would have meant that the Department would
18 have been intervening potentially in the evidence or in
19 the process around parties to it, and that would have
20 been a major difficulty for everybody. I would have
21 thought that would perhaps have compromised the entire
22 process. So, as I say, the fact that somebody regarded
23 it as political dynamite didn't change the fact that,
24 you know, business had to continue.

14:26

14:26

25 367 Q. But it didn't arise -- arouse any curiosity on your
26 part and it didn't arouse any conversation between you
27 and anybody else, and this whole incident was such that
28 you seem to have forgotten reading the email and seem
29 to have forgotten the phone call made to you at the

14:26

1 height of this crisis by the Commissioner?
2 A. And which the Commissioner herself has also indicated,
3 as I understand it, she had no recall of the phone call
4 either. As I say, that's it, I can't put it any
5 differently. I had no recollection of the email or of 14:27
6 the phone call. Again, sorry to have to repeat it, but
7 the fact is that I have to assume that the remarks by
8 Mr. Flahive and Mr. Barrett were such that there was no
9 action required on foot of it.

10 368 Q. But one point perhaps you would consider: If you were 14:27
11 phoned up by the Commissioner during that recess, you
12 hadn't had the advice from the Attorney General's
13 office, from Mr. Dreelan, from Mr. Barrett, to the
14 effect that there was nothing you could do about it at
15 that point? 14:27

16 A. Well --

17 369 Q. This was -- you were involved -- if that phone call
18 concerned this, you were involved centrally at the time
19 and you had no advice from the AG's office about hands
20 off or don't get involved? 14:28

21 A. Again, I had no recollection of the phone call, but my
22 sense of it is that I wouldn't have been in a position
23 to offer the Commissioner any advice on foot of this.
24 She had her own legal team. You know, I had no
25 knowledge of the issues around this, so I couldn't have 14:28
26 been in a position of offering her advice, looking at
27 it from the perspective now. But, as I say, I have no
28 recollection of the phone call.

29 370 Q. But Mr. O'Leary, who is the Assistant Secretary General

1 in your Department, does remember having a conversation
2 in which, under some pressure from the Commissioner, he
3 brought to her attention factors which she should bear
4 in mind if she was proceeding with this strategy?

5 A. That is Mr. O'Leary's evidence, yeah. But I think that 14:28
6 was -- as I understand it, these were factors that she
7 should have in her mind in circumstances where she was
8 addressing the question of what legal advice would be
9 available to her.

10 MR. MCDOWELL: Thank you. 14:29

11 CHAIRMAN: Yes. Mr. McDowell, just one matter I wanted
12 to discuss with you, if I might, please. You'll be
13 aware of a strong view expressed in the Supreme Court
14 in a case called McDonagh v. Sunday World Newspapers
15 about the rule in Browne v. Dunn, yes. 14:29

16 MR. MCDOWELL: No, Judge, you will have to refresh my
17 memory.

18 CHAIRMAN: The rule in Browne v. Dunn is that if you
19 have a case, it is appropriate to put it to the
20 witness. 14:29

21 MR. MCDOWELL: Sorry, yes.

22 CHAIRMAN: No, just bear with me for a second. I'm
23 afraid this may be a wee bit long-winded. I'm aware
24 also that, you know, in a civil case, it's kind of, the
25 plaintiff says such and such and particulars are given, 14:29
26 or whatever, and the Tribunal is different, obviously,
27 because we're inquiring, but nonetheless, things do
28 begin to solidify. Now, one of the things that is very
29 much in my mind is the following, and that is what I

1 want to ask for your assistance on:

2

3 Ms. Leader, in opening this, said, from her reading,
4 and I would take a similar reading at this particular
5 point in time, in relation to what was actually 14:30
6 happening in the O'Higgins Commission, the following
7 appears to have been what was going on. There was, of
8 course, the Ms. D allegation. Of course it was very
9 upsetting. I think Ms. Leader referred to it as
10 nightmarish. There was the DPP's response to that, 14:30
11 which was, look, this wasn't an assault at all, never
12 mind a sexual assault, even if there were no
13 credibility issues. I'm paraphrasing, but that is
14 effectively what she said. And then, Sergeant McCabe
15 has that, I believe, read out to him by the local State 14:30
16 solicitor, with -- of course who he would have been on
17 very friendly terms, and then there's the meeting with
18 Inspector Cunningham, who had investigated where
19 Sergeant McCabe comes with another AGSI person for the
20 purpose of support, and again there's nothing wrong 14:30
21 with that. What Superintendent Cunningham merely says
22 at that meeting, a lack of evidence. Now, that is a
23 long introduction to the following thing. This is
24 perhaps being discussed elsewhere on the basis that
25 people were intent on accusing Sergeant McCabe of 14:31
26 sexually abusing Ms. D. No, but that is what I want to
27 clarify. What it looked like what was happening at the
28 Commission was this: that Sergeant McCabe had an
29 issue, and I think Ms. Leader referred to it as a

1 reasonable point of view, that given that he had been
2 attacked publicly by members of the D family in
3 relation to this allegation, that the DPP's view, which
4 was very soundly what I have said it was, ought to be
5 given to him at least and to the D family and that 14:31
6 perhaps in that way the view might circulate more
7 widely that an official had taken a view on this. Now,
8 is it the case, or do you take a different view, that
9 nobody ever intended, counsel or otherwise, to accuse
10 Sergeant McCabe at the O'Higgins Commission in the 14:32
11 classic way that one challenges a witness, weren't you
12 sleeping with your best friend's girlfriend type thing,
13 of saying didn't you sexually abuse a child? That is
14 question number one.

15
16 And I suppose question number two is: Given that that
17 is the construction, and again going back to Browne v.
18 Dunn, are you making the case, perhaps, that Sergeant
19 McCabe was worried that that might be happening or was
20 it simply the whole question of shouldn't the DPP's 14:32
21 letter be circulated in order to vindicate me? So do
22 you see where I am getting at? Your position on that
23 would help me, if you wouldn't mind.

24 MR. McDOWELL: I follow the points that the Tribunal is
25 raising. Firstly, in relation to the opening speech, I 14:32
26 had in mind at some point, and perhaps I should have
27 done it this morning, to draw to the Tribunal's
28 attention that the phrase "circulated, distributed and
29 given as wide a currency as possible" were attributed

1 as aims of Sergeant McCabe.

2 CHAIRMAN: Yes. That's right, Mr. McDowell, but also a
3 number of alternatives were given, or perhaps it was
4 simply the case that he wanted it --

5 MR. MCDOWELL: Yes. 14:33

6 CHAIRMAN: I wasn't clear reading the documentation.

7 MR. MCDOWELL: I want to be clear on this, though.

8 CHAIRMAN: Yes.

9 MR. MCDOWELL: Because Sergeant McCabe was a bit
10 concerned that that indication would get into the 14:33
11 public mind. At no point did he ever ask for the
12 circulation, distribution, or whatever, of the DPP's
13 direction.

14 CHAIRMAN: So it wasn't to be pinned up in the Garda
15 station, so to speak. 14:33

16 MR. MCDOWELL: Exactly.

17 CHAIRMAN: Yes.

18 MR. MCDOWELL: Or brought to the attention of other
19 Gardaí, or whatever. That was never his intention.

20 CHAIRMAN: Right. 14:33

21 MR. MCDOWELL: His intention was, as the Tribunal
22 probably well understands, that, in order to make his
23 working relationship with Mr. D, because they were
24 working together in the same station, remotely
25 civilised, that it should not be left in the air that 14:34
26 there was just simply insufficient evidence against
27 him, and that that should be communicated to Mr. D.
28 And that's why, when he put that point to
29 Superintendent Clancy, Superintendent Clancy said,

1 would you tell me what the problem is in your working
2 relationship with Mr. D, what all the background to all
3 this is, and that's why he wrote the report which,
4 later, Superintendent Cunningham, much later,
5 Superintendent Cunningham was told to go and 14:34
6 investigate at the time. You'll recall by that stage,
7 Sergeant McCabe was in Mullingar and said, this is
8 over, I don't want to go back to any of this, it's
9 behind me now. So that's the first thing, Chairman.

10
11 The second thing is that Ms. Leader's opening 14:34
12 emphasised slightly, in my view, as a kind of straw man
13 argument, that nobody was suggesting that, at the
14 O'Higgins Commission, Mr. Justice O'Higgins should
15 allow a debate as to whether Ms. D's allegation was 14:35
16 true or false to be put. Nobody has ever suggested
17 that

18 CHAIRMAN: So she was absolutely right about that?

19 MR. McDOWELL: Yes, she was right about it. But on the
20 other hand, that doesn't, that doesn't -- that doesn't 14:35
21 deal with what was actually happening, if I may say so
22 now, since it may save a submission at a later point.

23 CHAIRMAN: No, but it is helpful to know this now,
24 Mr. McDowell, because otherwise we will be jumping
25 around. 14:35

26 MR. McDOWELL: What was actually happening in Sergeant
27 McCabe's view, and this is a view which his legal team
28 prefers, was an effort to bring in utterly irrelevantly
29 in module 1 and to push into the mouth of

1 Superintendent Rooney this background material solely
2 for the purpose of embarrassing Sergeant McCabe and
3 raising a question mark in the minds of the Commission,
4 why is this man -- is he really concerned with bad
5 policing at all or is he trying to settle a score with 14:36
6 Superintendent Clancy and other people --

7 CHAIRMAN: All right.

8 MR. MCDOWELL: -- in the Garda Síochána. And his
9 motivation and his credibility and, from time to time,
10 his integrity was stated to be in issue precisely 14:36
11 because of that. And we say that, and this is why I
12 pursued the line of questioning with this witness
13 earlier this morning, or earlier in the day, we say
14 that there was consideration, God knows by whom, given
15 to the question of putting Ms. D's allegation firmly in 14:36
16 the middle of the table at the O'Higgins Commission.
17 It was firmly rejected and would have been an
18 outrageous thing to do. But we believe and we say, and
19 Sergeant McCabe is adamant on this, that it was dragged
20 back in in a collateral way to embarrass him, to query 14:37
21 his motives, to make him -- to demean him in the eyes
22 of the Commission and to make it appear that none of
23 his complaints about poor policing in his area were
24 genuine, but that they were all concocted with a view
25 to getting back at An Garda Síochána. 14:37

26 CHAIRMAN: Right.

27 MR. MCDOWELL: That's the position.

28 CHAIRMAN: So would you mind if I just asked you a
29 couple of questions on that so I am clear in my mind.

1 So it is agreed by everybody that nobody at the
2 O'Higgins Commission ever intended to ask Sergeant
3 McCabe any such question as, didn't you sexually abuse
4 a child?
5 MR. MCDOWELL: Yes. 14:37
6 CHAIRMAN: You agree -- everybody agrees with that?
7 MR. MCDOWELL: Well, we certainly hope so, yes.
8 CHAIRMAN: All right. Well, that is fine, because as
9 you're aware in public discussion of this matter, that
10 has been the thing that has been uppermost in a lot of 14:38
11 people's mind.
12 MR. MCDOWELL: Yes.
13 CHAIRMAN: Now, I'm going to ignore that --
14 MR. MCDOWELL: Yes.
15 CHAIRMAN: -- because it is neither here nor there. 14:38
16 The second thing then is this: Ms. Leader said in
17 opening the case that in terms of complaining about
18 policing in the Bailieboro district, the very
19 legitimate concerns it seems to me were raised and
20 which were upheld by Mr. Justice O'Higgins, none of 14:38
21 them involved Sergeant McCabe himself.
22 MR. MCDOWELL: Practically none.
23 CHAIRMAN: Yes.
24 MR. MCDOWELL: With the exception of the computer.
25 CHAIRMAN: Yes. And the only exception that anyone has 14:38
26 pointed out so far, but it's early days, but the sooner
27 we move the days on the better --
28 MR. MCDOWELL: Yes.
29 CHAIRMAN: -- the only thing that could possibly ever

1 have arisen, a classic conflict of interest, you say
2 something, I say something different, but amn't I
3 motivated against you because of something that
4 happened in the school playground 50 years ago.
5 MR. MCDOWELL: Exactly. 14:38
6 CHAIRMAN: Let's put it that way, to put a ludicrous
7 example for the purpose of clarifying matters.
8 MR. MCDOWELL: Yes.
9 CHAIRMAN: It was only in relation to who was the
10 custody officer for the computer that there was any 14:39
11 conflict of interest -- sorry, there was any conflict
12 of fact between Sergeant McCabe and any other person.
13 Other than that, he simply wasn't involved.
14 MR. MCDOWELL: Well, there were two other incidences,
15 but they weren't similar. 14:39
16 CHAIRMAN: They were very minor.
17 MR. MCDOWELL: They were minor.
18 CHAIRMAN: Yes. So that had been floated.
19 MR. MCDOWELL: Just to give you the two other
20 instances. 14:39
21 CHAIRMAN: Yes.
22 MR. MCDOWELL: It was alleged that Sergeant McCabe had
23 released the murderer, Mr. McGrath.
24 CHAIRMAN: On station bail?
25 MR. MCDOWELL: On station bail. 14:39
26 CHAIRMAN: Had he?
27 MR. MCDOWELL: And that this was thrown against him.
28 And secondly, it was alleged, do you remember,
29 Chairman --

1 CHAIRMAN: Yes.

2 MR. MCDOWELL: -- that there was an attempted assault
3 on a young girl.

4 CHAIRMAN: I do, in Cootehill.

5 MR. MCDOWELL: And it was alleged that after 22 minutes 14:39
6 of interrogation, Sergeant McCabe said he was to be
7 released.

8 CHAIRMAN: Yes.

9 MR. MCDOWELL: And both of those two accounts were
10 attempted to be mounted in the O'Higgins Commission and 14:40
11 were absolutely false.

12 CHAIRMAN: Those three were rejected. But those, if
13 you like, are three classic --

14 MR. MCDOWELL: They were attempted to be brought
15 home -- 14:40

16 CHAIRMAN: Yes.

17 MR. MCDOWELL: -- against him.

18 CHAIRMAN: So those are three instances where the
19 classic situation arises.

20 MR. MCDOWELL: Credibility was an issue. 14:40

21 CHAIRMAN: Mr. A says something, Mr. B says the
22 opposite, whether it is about a conversation or a fact,
23 and counsel put it to Mr. A, the reason you're giving
24 this evidence is you hate Mr. B because of something
25 totally unconnected. 14:40

26 MR. MCDOWELL: Yes.

27 CHAIRMAN: Those are the three. Now, again, it would
28 help if we perhaps continue this. When it comes then
29 to the embarrassment factor, insofar as that could ever

1 be relevant to the background of this, the issue in
2 Sergeant McCabe's mind was, look, I have a problem with
3 the D family, I've got to work with the particular
4 policeman, who happens to be the father of Ms. D, and
5 if he knew, and if I had the letter myself, that the 14:41
6 DPP had taken the following attitude, then things would
7 calm down, but the stubborn policemen, and I'm just
8 going to use that by way of a colloquialism, are
9 saying, no, the only thing we can say is lack of
10 evidence. That was the only credibility issue that was 14:41
11 being raised, isn't that it?
12 MR. MCDOWELL: Yes, can I make one point?
13 CHAIRMAN: Yes, certainly, but --
14 MR. MCDOWELL: Insofar as, and this is ample warning
15 for other people who are here, insofar as Sergeant 14:41
16 McCabe's credibility and motivation were concerned, on
17 the very first module which had to deal with
18 Ms. Lorraine Browne, or Ms. Colette Browne driving her
19 bus --
20 CHAIRMAN: Yes, who was attacked, yes. 14:41
21 MR. MCDOWELL: -- his motivation and his credibility,
22 on an issue where he had no input hardly at all except
23 in relation to the complaint to GSOC, whether or not
24 she was told or put up to complaining about how she was
25 dealt with by GSOC. This is the lady who was given -- 14:42
26 CHAIRMAN: Yes, yes.
27 MR. MCDOWELL: -- meal vouchers to try and keep her
28 quiet.
29 CHAIRMAN: I know.

1 MR. MCDOWELL: What was done here by Mr. Smyth was to
2 attempt, in that particular module, where Sergeant
3 McCabe had virtually nothing to do with it except to
4 query the standards of policing afterwards, Mr. Smyth
5 said, I want to impugn this man's credibility and 14:42
6 motivation, and eventually he used the term and query
7 his integrity. And at that point Mr. Justice O'Higgins
8 said this must be irrelevant to this module, it could
9 not be relevant to the module. The letter, the
10 19-paragraph letter was sent, and the Tribunal should 14:43
11 also remember that on the 11th June a written
12 submission was put in which didn't contain a clerical
13 error, which alleged, in terms, that Superintendent
14 Clancy was not supporting -- that Sergeant McCabe's
15 complaint that Superintendent Clancy was showing a lack 14:43
16 of support for him, was motivated by a desire to -- his
17 complaint against Superintendent Clancy was motivated
18 by a desire to force the DPP's decision to be given to
19 the D family. Now, what I am saying is, Judge, and I'm
20 saying it very, very clearly: there was absolutely no 14:43
21 basis to launch an attack on his credibility or his
22 motivation in that module. But a determination -- a
23 determined effort was made to say it was both
24 necessary, with this little email, and that it was
25 relevant, and it was apparent to Sergeant McCabe that 14:44
26 he was -- that the attempt by Mr. Smyth on behalf of
27 the Commissioner was to say let's examine why this man
28 is complaining about how Ms. Browne was dealt with,
29 rather than was this good policing.

1 CHAIRMAN: Yes. No, I --

2 MR. MCDOWELL: And that it is centred on this
3 allegation that brought back the Ms. D allegation to
4 centre stage.

5 CHAIRMAN: No, I appreciate that. Yes. 14:44

6 MR. MCDOWELL: And that, in the circumstances,
7 Chairman, so that nobody here should misunderstand,
8 that that was deliberately done to damage him in the
9 eyes of the Tribunal.

10 CHAIRMAN: But appreciating that is your case, 14:44
11 Mr. McDowell, it is good to know that, but you will
12 appreciate as well other people may have a different
13 point of view.

14 MR. MCDOWELL: I accept that other people probably will
15 have a different point of view, but Ms. Leader's 14:45
16 opening, and I know she was trying to correct public
17 misimpressions rather than -- but I just want to be
18 very, very clear: we have never made the case that the
19 very next question was, did you not assault Ms. D? We
20 have never made the case that that was going to happen. 14:45

21 CHAIRMAN: Yes. No --

22 MR. MCDOWELL: It was a far more subtle but far more
23 pernicious effort to get the same material out on the
24 table so as to embarrass him and to make it look
25 like -- 14:45

26 CHAIRMAN: well, I'm not sure, sitting where I am,
27 there is anything much more pernicious than saying,
28 'didn't you sexually abuse a child?'

29 MR. MCDOWELL: Yes, but --

1 CHAIRMAN: Now, I mean, seriously. Now --

2 MR. MCDOWELL: But aren't you motivated by -- haven't

3 you behaved -- haven't you effectively turned against

4 the force because of the way in which that matter was

5 dealt with? 14:45

6 CHAIRMAN: Because of your dispute over the letter.

7 MR. MCDOWELL: Yes.

8 CHAIRMAN: Yes. So when I read - this is the last

9 matter I wanted to ask you about, Mr. McDowell, because

10 it may help matters in the future and shorten matters - 14:45

11 when I read paragraph (e) of the Terms of Reference,

12 which requires me to investigate whether the false

13 allegations of sexual abuse were inappropriately relied

14 upon by the Commissioner, the answer to that is no?

15 MR. MCDOWELL: The next bit is the crucial bit. 14:46

16 CHAIRMAN: So what I am -- the answer to that is no.

17 MR. MCDOWELL: They weren't -- the false allegation --

18 no, but the fact that --

19 CHAIRMAN: No, no, just hang on. So whether

20 unjustified grounds were inappropriately relied on is a 14:46

21 different matter, and that is what you are saying --

22 MR. MCDOWELL: Which was centred on -- which had its

23 origin in the abuse allegation.

24 CHAIRMAN: Well, it did, but it had its origin in the

25 way the matter was dealt with. 14:46

26 MR. MCDOWELL: Yes.

27 CHAIRMAN: Not the allegation itself.

28 MR. MCDOWELL: Yes.

29 CHAIRMAN: And I think it is very important for us

1 certainly to be absolutely clear about that.

2 MR. MCDOWELL: I'm fully with you, Judge.

3 CHAIRMAN: Yes.

4 MR. MCDOWELL: That we don't want the public to have
5 the wrong end of the stick or to misunderstand what 14:46
6 Sergeant McCabe is saying.

7 CHAIRMAN: No.

8 MR. MCDOWELL: But I do also want to make the point,
9 Judge, that Superintendent Rooney, from what we now
10 see, Chief Superintendent Rooney was not expecting to 14:46
11 be asked about these matters by Mr. Smyth on the day.

12 CHAIRMAN: No, maybe not.

13 MR. MCDOWELL: He didn't expect this to happen, and
14 Superintendent Cunningham, we know, towards the end of
15 the O'Higgins Commission, blurted out this allegation 14:47
16 when it had been ruled, time after time, to be
17 irrelevant.

18 CHAIRMAN: Blurted out the allegation about not
19 distributing the letter?

20 MR. MCDOWELL: No, blurted out -- he said that the 14:47
21 truth will out, and he then started saying that he had
22 never -- he had never informed any person who he
23 shouldn't have that Sergeant McCabe had been -- that he
24 had been investigated for assaulting what he called a
25 nine-year-old girl at the time. 14:47

26 CHAIRMAN: Well, that is an entirely different matter.

27 MR. MCDOWELL: Yes.

28 CHAIRMAN: And you will appreciate that I am looking
29 into what the Commissioner's instructions were as

1 opposed to any witness can say anything. So,
2 Mr. McDowell, thanks for that clarification.
3 MR. MCDOWELL: I should also say, while we're at it --
4 CHAIRMAN: Yes.
5 MR. MCDOWELL: -- so the time isn't wasted, Ms. Leader 14:47
6 said -- I think she said:
7
8 "What is disappointing, perhaps, is that an error was
9 made in ascribing to Superintendent Cunningham a view
10 that Sergeant McCabe had told him that he had made 14:48
11 allegations against Superintendent Clancy."
12
13 And the Tribunal will know that
14 Superintendent Cunningham was shown the 19-paragraph
15 letter and signed a copy of it. 14:48
16 CHAIRMAN: I know he did, yes.
17 MR. MCDOWELL: And secondly, that he was shown by
18 Ms. Ryan, who is a very diligent solicitor, showed him
19 it and asked him for his agreement of its contents, and
20 secondly, did the same in respect of submissions on the 14:48
21 11th June which repeated the allegation in more
22 particular terms --
23 CHAIRMAN: Yes, I know.
24 MR. MCDOWELL: -- that he was so motivated.
25 CHAIRMAN: Yes. I am aware that he signed the letter. 14:48
26 Now, it will be a matter for him when he comes. But
27 that wasn't the only submission, I'm afraid, which
28 raised that matter. There was some later on.
29 Mr. McDowell, thank you for that clarification.

1 MR. MCDOWELL: Thank you.

2 CHAIRMAN: And I think we should go on then. If
3 anybody else has any questions for the Secretary
4 General?

5 MR. MURPHY: Chairman, I wonder if I might address you 14:49
6 very briefly in relation to the opening. I mentioned
7 one matter to Ms. Leader this morning.

8 MR. MCCANN: Just before Mr. Murphy takes this up, if
9 this witness has completed his evidence, in fairness to
10 the witness, he should be allowed complete his evidence 14:49
11 before there's submissions on the opening.

12 CHAIRMAN: Absolutely, yes. Well, look, the point of
13 me doing that, and may have raised eyebrows, again it
14 is Browne v. Dunn. I would just like to know where
15 people stand. I mean, it is all very well to have all 14:49
16 this evidence floating around the place, but, at the
17 end of the day, I have to ask myself certain questions
18 and answer those questions, otherwise I'm wasting
19 everybody's time sitting here.

20 MR. MCCANN: Judge, it is very helpful dialogue, but I 14:49
21 am just conscious of my witness being still under oath.

22 CHAIRMAN: Yes.

23 MR. MCCANN: And I'm wondering whether there are more
24 questions.

25 CHAIRMAN: Well, I hope -- there are. So maybe people 14:49
26 will identify who they are appearing for, for the
27 witness's benefit, please, and ask any questions that
28 you feel are necessary. Mr. Ó hOisín, do you have any
29 questions.

1 MR. Ó HOISÍN: No, no, Chairman.

2 CHAIRMAN: I don't know, Mr. Murphy, do you have any
3 questions?

4 MR. DIGNAM: Judge, I have a few brief questions on
5 behalf of An Garda Síochána and in particular on behalf 14:50
6 of former Commissioner O'Sullivan.

7

8 MR. NOEL WATERS WAS CROSS-EXAMINED BY MR. DIGNAM:

9

10 371 Q. MR. DIGNAM: Mr. Waters, my name is Conor Dignam. I 14:50

11 appear on behalf of An Garda Síochána, including former
12 Commissioner Nóirín O'Sullivan. I just want to explore

13 a few areas with you, mainly for the purpose of

14 bringing some clarity to some of the areas that have

15 been covered, particularly in your questioning by 14:50

16 Mr. McDowell. Firstly, just in relation to the phone

17 calls on the 15th May, you correctly describe what

18 former Commissioner O'Sullivan says in her statement,

19 that she has no specific recollection of a phone call

20 with you but that her billing records and phone logs 14:50

21 show that she had a conversation -- a telephone call

22 with you at approximately half three, and Mr. McDowell

23 correctly pointed to the landline phone call which is

24 disclosed at page 760. And Ms. O'Sullivan confirms

25 that that is the call that she was referring to when 14:51

26 she said in her statement that her phone records show

27 that there was a call. You accept, I think you said to

28 Mr. McDowell, that that is your phone number?

29 A. It is, yes, correct, yes.

1 372 Q. Yes. And I think I will just put to you that there was
2 no phone call from Ms. O'Sullivan's mobile number on
3 the afternoon of the 15th May. And I think
4 Mr. McGuinness pointed you towards a phone call from
5 former Commissioner's mobile number to Mr. O'Leary's 14:51
6 mobile number. If you just look at page 755, would you
7 confirm -- and I know Mr. O'Leary is scheduled to give
8 evidence so we can ask him about that, Mr. Waters, but
9 would you mind just confirming that, on page 755, the
10 second-last call registered there is to Mr. O'Leary's 14:51
11 number?
12 A. Yes, I can confirm that that his number, yes.
13 373 Q. Yes. And then just for the purposes of assisting the
14 Tribunal, if I can just ask you then to go to page 759,
15 which I think is the former Commissioner's landline 14:52
16 number, would you mind just confirming that, on page
17 759, seven calls from the bottom, that that is a call
18 to Mr. O'Leary's phone number, is that right?
19 A. What number did you say?
20 374 Q. It's the seventh call up, I think. 14:52
21 A. Seventh.
22 375 Q. It was at, sorry, I am just trying to --
23 A. Yes. At 16:18, is that right?
24 376 Q. 16:18 or 16:16.
25 A. Yes, that is the number, yes. 14:52
26 377 Q. That is Mr. O'Leary's number, is that right?
27 A. Yes.
28 378 Q. Now, Mr. Waters, in relation to that period -- sorry,
29 jumping forward now to 2016, to May 2016, particularly

1 the period in or around the 15th -- sorry, the 17th,
2 18th, 19th May 2016, I think you've been careful in
3 your language and perhaps somewhat coy in that you have
4 referred to some to-ing and fro-ing?

5 A. Yes. 14:53

6 379 Q. And it was put to you by Mr. McDowell was it not
7 surprising that speeches for the Minister were being
8 composed in the Phoenix Park?

9 A. Mm-hmm.

10 380 Q. Do you think that is a fair characterisation of what 14:53
11 was -- of the draft or of the email that Ms. O'Sullivan
12 sent to the Minister? I know you didn't see it at the
13 time, Mr. Waters, but you've seen it now.

14 A. Yes. I think, as I said, it was always open to either
15 party, if it was composed as a draft, it was either for 14:54
16 the Minister to decide to use it or not use it, if it
17 was a draft.

18 381 Q. Yes.

19 A. So the issue of it being a completed speech and handed
20 to the Minister for her delivery simpliciter, I don't 14:54
21 think that would have been the case.

22 382 Q. Yes.

23 A. The Minister could have at any stage decided to use or
24 not use it.

25 383 Q. Yes. Ms. O'Sullivan's evidence in that respect, 14:54
26 Mr. Waters, will be that this is what she was proposing
27 would be said and this is what she would have liked to
28 have seen in any statement or speech given by the
29 Minister, but of course it is a matter for the Minister

1 to decide what she ultimately says.

2 A. Just to make the point that in my own case through my
3 career, I would have drafted speeches for ministers and
4 they would have decided maybe to use them on some
5 occasions and other occasions not to, or partly use 14:54
6 them, and that is very much the normal way in which we
7 do business in the public service, in the Department.

8 384 Q. Mr. Waters, you refer to being slightly coy, referring
9 to to-ing and fro-ing?

10 A. Mm-hmm. 14:55

11 385 Q. Were you aware that around that period, and that period
12 being the 17th, 18th, 19th May, that Commissioner
13 O'Sullivan was anxious to know whether Minister
14 Fitzgerald had confidence in her as Commissioner of An
15 Garda Síochána? 14:55

16 A. I do recall, and I can't place this in time because
17 this was an ongoing issue right up to September of this
18 year and to her retirement, an ongoing issue was
19 running all the time with the Government about whether
20 or not they had confidence in her. So I can't say for 14:55
21 definite if -- to go back to that period, but I do know
22 that this was running for a long, long time, and that
23 there was a point where, you know, a minister appearing
24 in public, it was always the case that the first
25 question that was being put to them, do you have 14:55
26 confidence in the Garda Commissioner? And that was
27 clearly, you know, undermining, I suppose, to put it
28 like that, the policing in the country and the capacity
29 of the Gardaí to do their work and it was a major

1 difficulty. And I certainly, speaking personally,
2 would have been aware of what had happened in the
3 previous Commissioner and how that ended. So this was
4 an issue, as I say, that was there. But sorry to have
5 been long-winded about it, but precisely when this 14:56
6 arose in the first case, I can't say definitively now
7 at this stage.

8 386 Q. Yes. Perhaps would this jog your memory: that on the
9 'Prime Time' programme -- I think Minister Fitzgerald
10 was on 'Prime Time' on 17th May, do you remember that? 14:56

11 A. I have a recollection of her being on 'Prime Time',
12 yes, at some point, yes.

13 387 Q. Do you recall the contents of that, that --
14 A. I can't at this remove.

15 388 Q. Just to put it to you, Mr. Waters, former Commissioner 14:56
16 O'Sullivan quite frankly will say that she was anxious
17 to know whether the Minister had confidence in her at
18 that stage, but you don't remember any specific
19 conversations in relation to that, do you?

20 A. I can't at this remove, no, no, no. 14:57

21 389 Q. In relation to the IRM process, Mr. Waters, I don't
22 want to get into it in any huge detail, but the email
23 from Mr. Flahive of the 15th May, at 16:57, it's at
24 page 3341, which is where the reference to the IRM
25 comes from. 14:57

26 A. Yes.

27 390 Q. You will see there, the first main -- the first large
28 paragraph:
29

1 "Richard wanted to let me know that counsel for the
2 Garda Síochána has raised as an issue in the hearings
3 an allegation made against Sergeant McCabe, which was
4 one of the cases examined by the IRM."

14:57

5
6 Do you know now, Mr. Waters, you may not have known at
7 the time, but do you know now that that, in fact, is an
8 incorrect characterisation? Whatever was happening in
9 the Commission, it wasn't that the allegation which had
10 been investigated or was being investigated by the IRM
11 was raised.

14:58

12 A. I know now, having read it, that it was a different
13 issue that was being investigated with the IRM, not the
14 allegation of sexual abuse. The allegation that was
15 being investigated by the IRM was whether or not the
16 Gardaí had appropriately or properly investigated that
17 allegation in the first case.

14:58

18 391 Q. Yes. Well, if I can just take one step back, firstly.

19 A. Mm-hmm.

20 392 Q. Mr. Flahive is recording that Mr. Barrett in the
21 Attorney General's office identified the issue that had
22 been raised in the Commission on the 15th May as being
23 the allegation made against Sergeant McCabe, which is
24 one of the cases examined by the IRM. That seems to
25 suggest that what was raised in the Commission was the
26 IRM matter; in other words, the adequacy of the
27 investigation?

14:58

14:58

28 A. Looking at it now, yes. But, as I say, going back to
29 my earlier evidence, when this email arrived, as I say,

1 I have no recollection of it, but looking at it now, I
2 take your point, yes.

3 393 Q. Now, if I can then just ask you about that IRM process.
4 The matter -- I think you have said this, Mr. Waters, a
5 couple of times, but I just want to be absolutely 14:59
6 clear. The matter which is being investigated -- or,
7 sorry, 'investigated' perhaps is the wrong word. The
8 matter which is being reviewed by the IRM was the
9 complaint which was made by Ms. D wherein she said that
10 the investigation which had been conducted by 14:59
11 then-Inspector Cunningham was inadequate?

12 A. I can't put a name on it, whether it was Inspector
13 Cunningham or any inspector.

14 394 Q. No.

15 A. But that, leaving that aside, that is the net issue, 14:59
16 yes, that it was inadequate, yes.

17 395 Q. So the IRM were looking at the adequacy or inadequacy
18 of a Garda investigation?

19 A. Yes.

20 396 Q. Not of the truth, or otherwise, of any allegation which 15:00
21 had been made against any individual?

22 A. Absolutely, yes. Absolutely, yes.

23 397 Q. And the IRM ultimately, the barrister from the IRM
24 panel, so to speak, ultimately saw the investigation
25 file and expressed the view and opinion that it was an 15:00
26 adequate and appropriate investigation?

27 A. Yes.

28 398 Q. Yes. And that there was no need for any further
29 investigation?

1 A. Mm-hmm.

2 399 Q. Or review of that investigation?

3 A. Correct, yes.

4 400 Q. Yes. And you were asked then at length by Mr. McDowell
5 about whether the matter which was before the IRM was 15:00
6 considered or whether it was debated that that should
7 be part of the O'Higgins Commission of Investigation?

8 A. Yeah.

9 401 Q. Yes. And is it fair to say, Mr. Waters, that at least
10 part, if not all, of the reason for deciding that it 15:01
11 wasn't necessary or appropriate that it be reviewed as
12 part of the O'Higgins Commission of Investigation was
13 because you had -- the Independent Review Mechanism
14 barrister had already said an adequate investigation,
15 appropriate investigation, nothing more to look at? 15:01

16 A. Yes. On the wider process, my recollection, I think
17 the Minister took all the recommendations on foot of
18 the IRM and clearly didn't depart from those
19 recommendations in any case, to the best of my
20 recollection. And certainly the independent reviewer, 15:01
21 the barrister, having reviewed the Garda investigation
22 file, would have recommended to the Minister no further
23 action is required here.

24 402 Q. Yes. And is it fair to say, Mr. Waters, and if you
25 feel that you can't answer any of these questions 15:02
26 please say so, but is it fair to say, Mr. Waters, that
27 if the Department had decided that the matter which had
28 been reviewed by the IRM, i.e. the adequacy of the
29 investigation, should, in fact, form part of Judge

1 O'Higgins' Commission of Investigation, is it fair to
2 say that the subject of that inquiry would have been
3 the officer who had carried out the investigation, the
4 alleged inadequate investigation?

5 A. I think that question is probably better asked of my 15:02
6 colleagues, as to what exactly would have -- if it, and
7 we're speculating here, had it gone a different way,
8 what the nature of that would have been. But I think
9 going back to my earlier evidence to Mr. McDowell, I
10 think, to be clear, we were very concerned that if, on 15:02
11 foot of the IRM process, an outcome of it was that
12 there was going to be a term of reference included in
13 the O'Higgins Commission which, in effect, had turned
14 everything on its head, that would have been a very
15 difficult issue for us to deal with. 15:03

16 403 Q. But how would that have turned anything on its head,
17 Mr. Waters, because it would have been another -- just
18 bear with me for one minute -- what would have been
19 sent to Judge O'Higgins as an additional term of
20 reference is, please carry out an investigation or an 15:03
21 inquiry into the adequacy of this other investigation,
22 which is entirely consistent with paragraphs --
23 CHAIRMAN: Mr. Dignam, you have a point, I am
24 absolutely with you on this, but there is one point
25 that I think does need to be made. I mean, for a 15:03
26 start, I don't know at what point this was considered.
27 I certainly know it went to the IRM, but it would seem
28 in due course, and, as I said, we're going to look at
29 the documents in relation to that. Certainly if an

1 investigation had been put before the O'Higgins
2 Commission to say, look, what is the standard of
3 policing in the light of everything you know about
4 this, in every other case the statement of the victim
5 was taken as absolutely true. For instance, the lady 15:04
6 on the bus, the lady who owned the chip shop. But if
7 this had come in, it would have been an entirely
8 different matter and, you know, that would have raised
9 different matters, but certainly the whole point of it
10 would have been how good was the investigation as 15:04
11 opposed to was it true or not. But I'm not sure in
12 this instance that the statement of the victim was
13 simply taken at face value as true, which in every
14 other instance it was. I'm not casting aspersions on
15 Ms. D, or anything like that, but that is the 15:04
16 difference.

17 MR. DIGNAM: Yes. And I should just say I'm not
18 advancing the case that it should have been sent to
19 Judge O'Higgins.

20 CHAIRMAN: Yes. But it would have been an 15:04
21 investigation into the investigation.

22 MR. DIGNAM: Precisely, Judge.

23 CHAIRMAN: Yes. I am with you on that point.

24 MR. DIGNAM: Thank you, Judge.

25 404 Q. And then finally, Mr. Waters, just in relation to, you 15:04
26 were asked at the beginning of your evidence whether
27 you were aware of the matters which Judge O'Higgins was
28 being asked to investigate and inquire into as part of
29 his terms of reference. Were you aware or did you

1 appreciate that the matters to be investigated by Judge
2 O'Higgins encompassed serious allegations of corruption
3 and malpractice against senior members of An Garda
4 Síochána?

5 A. From memory, I think that would have derived from the 15:05
6 Guerin Report on foot of his scoping study and that
7 that would have fed directly into the O'Higgins. From
8 memory, I think all of the matters that he had raised
9 in his scoping report were included in that, in the
10 sense of terms of reference, including, I think, the 15:05
11 physical condition of the barracks in Cootehill or
12 perhaps somewhere else which -- on one level which --
13 compared to the other issues which were being the
14 subject of that investigation, which showed you the
15 scope of it. 15:06

16 CHAIRMAN: Mr. Dignam, there is one thing I want to
17 clarify with you, if I might, in the same way as
18 Mr. McDowell. You mentioned corruption and
19 malpractice. Now, as I understand it, the only place
20 'corruption' was used, and it was used in a technical 15:06
21 sense as opposed to in terms of the ordinary meaning of
22 it, was against the Garda Síochána, Martin Callinan,
23 for putting a particular superintendent on a promotions
24 list for chief superintendent, and that is the only
25 time corruption came up, isn't that right? 15:06

26 MR. DIGNAM: Judge, I haven't got --

27 CHAIRMAN: well, I think so. You can tell me tomorrow.

28 MR. DIGNAM: I will, Judge.

29 CHAIRMAN: By which I mean Monday, if you like. But in

1 terms of malpractice, I think the malpractice was, as I
2 understand it, in failing to actually ensure that the
3 investigations were done properly in a supervisory
4 level. Now, if you want to come back on that, but I
5 just don't want those words here without an explanation 15:06
6 of their factual background.

7 MR. DIGNAM: Yes, Judge, and I will come back in
8 detail, Judge. I don't want to give a sort of an
9 inaccurate answer to the question, but I should just
10 also say that paragraph (i), also, of the terms of 15:07
11 reference specifically refers to corruption in relation
12 to Pulse accounts -- or, sorry, Pulse records, and it
13 specifically says malpractice and corruption in
14 relation to Pulse records.

15 CHAIRMAN: That was upheld. 15:07

16 MR. DIGNAM: Oh, I don't doubt that, Judge.

17 CHAIRMAN: Yes.

18 MR. DIGNAM: I'm simply saying that that is also where
19 corruption and malpractice was referred to.

20 CHAIRMAN: Yes. Right. 15:07

21 MR. DIGNAM: And as the Tribunal knows, the allegations
22 against senior members of An Gardaí were either
23 withdrawn or were not upheld in the main, Judge.

24 In any event, Mr. Waters, just to finish out on that --
25 CHAIRMAN: On the Pulse thing, though, it certainly 15:07
26 was.

27 MR. DIGNAM: In some instances, Judge.

28 CHAIRMAN: Well, if you look at the, and there should
29 be a pie chart there, it's not very impressive. There

1 relative to the Cavan-Monaghan division of the Garda
2 Síochána which were examined in the report to the
3 Taoiseach by Séan Guerin of the 6th May 2014 and which
4 are set out in the proposed terms of reference of the
5 Commission."

15:09

6
7 So that was the stated reasons put before the House for
8 the proposal to establish the Commission.

9 A. Mm-hmm.

10 408 Q. You would agree with that?

15:09

11 A. Yes, yes.

12 409 Q. Now, just touching upon an issue raised by Mr. Dignam
13 there, during the currency of the IRM process which
14 involved the Ms. D investigation file, was there any
15 consultation by you or by anyone in the Department, to
16 your knowledge, with the Commissioner about the
17 inclusion of that in the terms of reference?

15:09

18 A. I can say with certainty not by me. As to whether
19 other colleagues were involved in that, I can't say.
20 Perhaps the person who would be best in a position to
21 answer that would be my colleague, Mr. Flahive, who was
22 dealing with the matter.

15:10

23 410 Q. All right. But you seem to have had a very clear view
24 of the concern of the Department that it would be
25 inappropriate to have it within the terms of reference
26 of the Commission and perhaps a worry as to whether the
27 IRM process might recommend it, you were on top of
28 that, obviously?

15:10

29 A. Yes, I think the issue, from memory, on this was that

1 you had somewhere of the order of 300/320 cases, and
2 that, on foot of those cases, various recommendations
3 were emerging, including, you know, some simple thing
4 like the Gardaí should get in contact with a person, to
5 setting up inquiries provided for under the Garda Act 15:10
6 which were informal inquiries, right up to a commission
7 of inquiry or a tribunal, and that, at that point, that
8 the only one that was heading in that direction,
9 potentially heading in that direction, was this
10 particular case, heading into a commission of inquiry, 15:11
11 and that that would have been, as I say, you know, a
12 very major development; that, under the process, it was
13 set up to look at people's unhappiness with the way the
14 Gardaí did their work, that the only thing that would
15 come from it in terms of a commission of inquiry was 15:11
16 this particular case.

17 411 Q. Yes.

18 A. And that would have been odd, to put it at its very,
19 very basest [sic].

20 412 Q. But can you assure the Chairman that once the IRM 15:11
21 process had been completed into the Ms. D investigation
22 file, there was no question within the Department of
23 including it within the terms of reference?

24 A. Once it was completed and once the IRM counsel had seen
25 the Garda investigation file, my information is that 15:11
26 that was taken off the table completely. Mr. Flahive
27 may have more to add to that, but that is my
28 understanding.

29 413 Q. Can you assure the Chairman that, from your knowledge,

1 there was no contact with the Commissioner or Garda HQ
2 with a view to including it in the terms of reference
3 of the Commission after the IRM had reported on it?
4 A. After the IRM had reported that this wasn't worthy --
5 414 Q. Yes. 15:12
6 A. -- of a -- yes, from my own personal knowledge, no,
7 there would have been no connection with the
8 Commissioner, but perhaps Mr. Flahive may be able to
9 fill that out more fully for you, but I would have
10 thought not, because it was a dead issue at that stage. 15:12
11 415 Q. Yes. Well, that is why I am just concerned about the
12 importance of the alarm bells that perhaps should and
13 ought to have gone off, or perhaps did go off in your
14 head when you saw the email of the 15th May, that this
15 seemed to be dragging -- have been dragged into the 15:12
16 Commission, one way or the other?
17 A. As I say, my evidence in respect of the email is that I
18 have no recollection of it at all. This other issue --
19 416 Q. Yes.
20 A. -- would have emerged or would have been dealt with 15:13
21 some time before that. Precisely when, I can't say,
22 whether it was weeks or months, in terms of the IRM, I
23 just can't say. But Mr. Flahive may be able to help
24 you on that.
25 417 Q. Okay. Forget about the IRM for the moment. We know 15:13
26 that both you and the Commissioner now agree that the
27 telephone records show that you spoke in the early part
28 of the afternoon, but neither of you have any
29 recollection of that conversation?

1 A. That's correct, yes.

2 418 Q. Mr. O'Leary has a recollection of a number of
3 conversations, but you never spoke to him about those,
4 is that right?

5 A. No, no, not to my recollection, no, and I think he's of 15:13
6 a similar view as well, that --

7 419 Q. Yes, yes. But you have adhered to the view and agreed
8 with the view as apparently expressed both in the email
9 and Mr. O'Leary's statement, that the Department
10 couldn't intervene in the Commission. But can I not 15:13
11 ask you whether consideration was given to seeking
12 advice on that, because the Department, on behalf of
13 the Minister, either was or was going to be represented
14 in the Commission, and would it not have been
15 appropriate for the Minister's lawyers, perhaps without 15:14
16 intervening in the Commission, to speak to the
17 Commissioner's lawyers to find out what was going on
18 here, was this an attempt to drag this in by the back
19 door?

20 A. The lawyers representing the officials of the 15:14
21 Department were there in respect and hadn't been in
22 this part of the Commission, as I understand it, they
23 were only there later in the year in respect of the
24 very particular term of reference which related to what
25 the Department did or didn't do in responding to 15:14
26 Sergeant McCabe's complaints in the first case. So the
27 question, as I understand it, of the Department's or
28 the Minister's orders raising with the Commissioner
29 issues around that wouldn't have arisen. Secondly, I

1 think the fact that the email, looking at it from this
2 remove again --

3 420 Q. Yes.

4 A. -- referred to the fact that Mr. Barrett, from the
5 Office of the Attorney General, who would be our 15:15
6 principal legal advisor at official level, had agreed
7 with Mr. Flahive that no further action was required on
8 foot of it, would suggest that that was the legal
9 advice that was available.

10 421 Q. Well, I'm not quite clear whether what was being 15:15
11 proffered was intended to be legal advice, but in terms
12 of the Department or the Minister intervening, should
13 you not have, in the light of the content of the email,
14 have considered whether the Commissioner was acting
15 appropriately or not in raising the issue apparently 15:15
16 being suggested by the email?

17 A. But as I say, Mr. Flahive, in conjunction with
18 Mr. Barrett, had indicated that there was nothing
19 further for the Minister or the Department to do. So,
20 as far as I was concerned, looking at it again, looking 15:16
21 at it backwards, the matter rested there.

22 MR. MCGUINNESS: Thank you, Mr. Waters.

23 MR. MCDOWELL: Chairman, could I ask one question?

24 CHAIRMAN: Yes, if you feel you should, Mr. McDowell.

25 15:16

26 MR. NOEL WATERS WAS FURTHER CROSS-EXAMINED BY
27 MR. MCDOWELL:
28

29 422 Q. MR. MCDOWELL: I just wanted to ask, Mr. Waters, you

1 said that after the IRM process was completed, that
2 issue was dead, is that right, the question of it going
3 to O'Higgins was dead?

4 A. The issue of it forming part of the terms of reference
5 for the O'Higgins Commission, yes. 15:16

6 423 Q. Have you any view as to whether, while the IRM was
7 interacting with the Gardaí and their file at the time,
8 have you any view on the question as to whether anybody
9 in An Garda Síochána suggested that it should be the
10 subject of a Commission of Investigation? 15:16

11 A. I have no knowledge to that effect.

12 424 Q. Either way?

13 A. Either way. But perhaps Mr. Flahive may be able to add
14 further on that, but I have no knowledge at all of
15 that. 15:17

16 CHAIRMAN: There doesn't seem to be anything in our
17 documents which would suggest that at the moment,
18 Mr. McDowell.

19 MR. McDOWELL: I haven't seen the IRM documents.

20 CHAIRMAN: No, I mean, we are trying to -- I think 15:17
21 that's potentially relevant so --

22 MR. McDOWELL: It is an open question.

23 CHAIRMAN: No, it is fair enough to ask an open
24 question, but it's also fair to inform you that there's
25 nothing in the documents to suggest that at all. 15:17

26 MR. McDOWELL: No.

27 CHAIRMAN: Yes.

28 MR. McDOWELL: I'm not alleging that that is the case.

29 CHAIRMAN: No, no, but equally, it is best to inform

1 you of that because there's a lot of stuff on the
2 memory stick. Is that it, Mr. McDowell?

3 MR. MCDOWELL: Yes.

4 CHAIRMAN: Thank you very much, Mr. Waters.

5 A. Thank you, Judge.

15:17

6
7 THE WITNESS THEN WITHDREW

8
9 MR. MCDOWELL: Chairman, on the 19th June 2014 in the
10 course of a Dáil debate, the former Minister said,
11 Mr. Shatter said:

15:17

12
13 "If the statutory inquiry is to be comprehensive, it
14 should include all cases dealt with in Bailieboro Garda
15 Station which had given rise to complaint. There is a
16 matter which has been the subject of articles in the
17 Irish Independent, which included a report of Deputy
18 Micheál Martin meeting an individual who alleges she
19 was the victim of a sexual assault and her complaint
20 was not recorded on the Pulse system and did not result
21 in a prosecution. I understand from the newspaper
22 report that Deputy Martin was to provide information on
23 this matter to the Taoiseach and I presume he has done
24 so. This case should clearly form part of any
25 statutory inquiry."

15:17

15:18

15:18

26
27 That is the quotation of Mr. Shatter.

28 CHAIRMAN: Thank you for pointing that out. It will be
29 appreciated by me, certainly, that sometimes people

1 speak with limited knowledge as to what's there.

2 MR. MCDOWELL: Yes.

3 CHAIRMAN: You get, sometimes, not even the tip of the
4 iceberg. So who is next?

5 MR. MCGUINNESS: Mr. Murphy, I think, wanted to make 15:18
6 some observations.

7 CHAIRMAN: I'm sorry, Mr. Murphy. Thank you. Please.
8

9 MR. MURPHY: Chairman, if it would assist you, just
10 arising from the opening, I'm very grateful for the 15:18
11 opportunity to make this point very briefly.

12 Ms. Leader, in her very comprehensive opening, said at
13 the end of the first page:

14

15 "The facts were established at the inquiry that were 15:19
16 mainly independent of the evidence of Sergeant McCabe.
17 There's only one exception of which we're aware, namely
18 the inquiry into the computer. This is one example.
19 If there are others, then it is time for those who are
20 aware of the same to elucidate what these are." 15:19

21 CHAIRMAN: Yes.

22 MR. MURPHY: And there is one point, I brought this to
23 Ms. Leader's attention earlier today, and I do so not
24 in any spirit of criticism, in a constructive
25 engagement with the work of the Tribunal, and I wonder 15:19
26 if I could ask the Tribunal, in the course of its
27 reflection in all of these points and in the opening,
28 to examine chapter 3 and chapter 13 of the O'Higgins
29 Report. Because that perspective, that is to say

1 Mr. Justice O'Higgins' perspective, is not what is
2 contained in the opening, and I would invite you,
3 Chairman, to consider that the starting point is to
4 consider what Mr. Justice O'Higgins says. So by way of
5 reference, if I can very briefly give you the extracts. 15:19
6 At paragraph 3.1, for example, Mr. Justice O'Higgins
7 said:

8
9 "Sergeant McCabe is the central figure in the
10 Commission of Investigation." 15:20

11
12 Secondly, he said, at 3.2:

13
14 "Sergeant McCabe impressed the Commission as being
15 nevertheless truthful, even if prone to exaggeration at 15:20
16 times."

17
18 At 3.3, he said:

19
20 "Some of the complaints have been upheld in this 15:20
21 report, especially in respect of the quality of
22 investigations examined by the Commission. Other
23 complaints made by him have been proven to be
24 overstated or exaggerated. Some are unfounded and some
25 have been withdrawn." 15:20

26
27 At paragraph 3.5 and 3.6 he addresses the question,
28 Chairman, which you raised, as to against whom were
29 allegations of corruption made, and at paragraph 3.6

1 Mr. Justice O'Higgins said:

2
3 "Complaints of corruption in the context of the charge
4 were also made against Assistant Commissioner Byrne,
5 Chief Superintendent Rooney, Superintendent Clancy and 15:20
6 also against Commissioner Callinan."
7

8 And at 3.5 he indicates that these were, in the words
9 of Mr. Justice O'Higgins:

10 15:20
11 "Hurtful allegations, based on a belief unsupported by
12 any evidence, that the Commissioner had put
13 Superintendent Clancy on a promotion list. The
14 complaint was in part a device to ensure that the
15 complaint came before the Minister for Justice and 15:20
16 Equality."
17

18 And at chapter 13, which I would also urge you,
19 Chairman, is relevant to your assessment, in paragraph
20 13.1 Mr. Justice O'Higgins said: 15:21
21

22 "This section should not be read in isolation."
23

24 And there he deals with the issues of the complaints
25 made. And from paragraph 13.1 onwards he deals with 15:21
26 all the issues concerning the various complaints made
27 in relation to corruption, and his conclusion can be
28 found at 13.84 onwards. So, for example, he said:
29

1 "In evidence to the Commission, Sergeant McCabe
2 withdrew all allegations of impropriety of any kind
3 against Assistant Commissioner Byrne. This is in
4 contrast to the position he adopted concerning the
5 former Commissioner. His only subsisting complaints 15:21
6 against Assistant Commissioner Byrne are in relation to
7 the quality of the Byrne/McGinn report."
8

9 At paragraph 13.88 he also then deals with the evidence
10 of Sergeant McCabe in relation to allegations of 15:21
11 corruption, and concludes at paragraph 13.89, and I
12 quote:
13

14 "It must be stated clearly and unambiguously that there
15 is not a scintilla of evidence to support an allegation 15:21
16 of any type of corruption against the former
17 Commissioner and that these particular allegations were
18 "unfounded and were deeply hurtful"."
19

20 Now insofar as that point is made, Chairman, both of 15:22
21 those chapters demonstrate that in fact what was
22 important for the Commission was the testimony of
23 Sergeant McCabe. And one could have had the impression
24 from part of the opening that in fact somehow Sergeant
25 McCabe was a bystander, that what he said and what he 15:22
26 did was not relevant, when, in fact, what he said as an
27 accuser was central to the consideration of the
28 Commission. I ask you, Chairman, in those
29 circumstances to bear that in mind as a factor to which

1 I will return in submissions later on.

2
3 The second brief point is that in relation to the
4 question for giving the DPP's reasons for his decision
5 to Sergeant McCabe. A very heavy emphasis was laid in 15:22
6 the opening on the fact that this was perceived to be
7 punctiliousness on the part of the Gardaí or Garda
8 rules. But in fact the DPP's directions from 2010, two
9 years after these events, made it absolutely clear the
10 policy of the Director of Public Prosecutions, not the 15:23
11 Gardaí, was that this information would not be put
12 forward. If I can quote from the 2010 extracts, and I
13 can furnish these to you, Chairman, it says
14 effectively:

15 15:23
16 "When the Director of Public Prosecutions decides not
17 to prosecute a particular case the reasons for the
18 decision may be given to the local state solicitor and
19 to the investigating Garda. It is the Director's
20 policy not to disclose this information publicly. This 15:23
21 policy may be justified on a number of grounds."

22
23 So ultimately, the directions of the DPP had been
24 regarded by the Supreme Court in the case of H v. DPP
25 in 1994, and that 's quoted as saying, and I quote: 15:23
26

27 "The stance taken by the DPP is that he should not in
28 general give his reasons in any individual case as to
29 why he has not brought a prosecution, because if he

1 does so in one case he must be expected to do so in all
2 cases. I will uphold his position as being a correct
3 one."

4
5 That is the Supreme Court. Again just by way of a 15:23
6 point of emphasis, I would respectfully submit that the
7 focus of a Tribunal's assessment on that issue should
8 be not towards what the Garda rules were, but what the
9 policy of the DPP was in relation to giving the
10 decisions or the reasons for decisions. 15:24

11 CHAIRMAN: Okay.

12 MR. MURPHY: They are my submissions.

13 CHAIRMAN: Thank you for that intervention, Mr. Murphy,
14 it is helpful. Now it seems to me I perhaps ought to
15 add something, because there's always a danger of 15:24
16 confusion. I'm trying to, I suppose, reduce things
17 down to a palatable and easily swallowable dish.

18 Reading basic textbooks such as Cross and Wilkinson on
19 the Law of Evidence, of course you can challenge
20 someone's credit where there is a reason to do so. The 15:24
21 usual way in which it happens is that, which I
22 explained to Mr. McDowell, A says something happened, B
23 says something else happened, or A and B are in a room
24 and have a conversation and they each have a different
25 view as to what the conversation was. If an issue then 15:24
26 arises in relation to the issue as to why they are
27 differing from each other, it is perfectly proper to
28 put to a person the reason is that because you have a
29 difference, for instance, over planning permission on a

1 house with this person who happens to be your next-door
2 neighbour or whatever it happens to be. But in that,
3 it seems the only three instances where that could
4 possibly arise where Sergeant McCabe was taking a
5 different view to any other witnesses were the Molloy 15:25
6 computer, the release of the later murderer on station
7 bail and the interviewing of the Cootehill prisoner and
8 his release after 22 minutes. I'm not sure,
9 Mr. Murphy, but I hear your submission now and I will
10 consider it and you can make submissions at the end, 15:25
11 that that applies to simply saying that I wasn't
12 involved in this but as it appears to me the following
13 in the Garda is wrong, not anything I had anything to
14 do with. And then that seems to be that, but please
15 come back in the event that you feel that's incorrect. 15:25

16
17 vis-à-vis the opening statement itself, well I thought
18 it was great, and apart from that, I think it is very
19 useful to lay down where things are so as people can
20 say well, I have a different point of view. That is 15:26
21 the part of the process. It is really helpful. Did
22 you want to come back?

23 MR. MURPHY: No, Chairman, I will return to the issue
24 at a later stage that is convenient to the Chair.

25 CHAIRMAN: Yes. 15:26

26 MR. MURPHY: I merely wanted to highlight the issue
27 that the matters that were being tested went beyond the
28 scope of what other Gardaí had done in relation to
29 Bailieboro Garda Station, was the allegations of

1 corruption are clearly seen by Mr. Justice O'Higgins as
2 very significant and serious matters, and we reject
3 them.

4 CHAIRMAN: Yes. I suppose it is also the case, but I
5 don't know, Mr. Murphy, that the DPP has a view, look, 15:26
6 we don't release the letters analysing the reason for
7 no prosecution to victims or to persons accused, and I
8 take it the Garda is saying the same thing?

9 MR. MURPHY: The Gardaí are following the DPP's policy.

10 CHAIRMAN: Yes. And you feel you have no room for 15:27
11 manoeuvre there?

12 MR. MURPHY: No.

13 CHAIRMAN: Or didn't at the time?

14 MR. MURPHY: At that time, no.

15 CHAIRMAN: It's changed a wee bit since, hasn't it? 15:27

16 MR. MURPHY: There's now a Statement of Reasons Project
17 which the Director has introduced.

18 CHAIRMAN: Yes. It's a pilot, isn't it?

19 MR. MURPHY: Yes. But at that time, in 2008, it will
20 be our submission that the policy was very clear and 15:27
21 that Sergeant McCabe was told that and I think at one
22 stage was even invited to write to the DPP if he wished
23 to do so. It's not clear if he ever actually did do
24 so.

25 CHAIRMAN: Yes. And I think reading out the letter to 15:27
26 him that was a private matter vis-à-vis the state
27 solicitor and him, they obviously knew each other very
28 well. Thank you very much for those clarification.
29 So, who are we going to next?

1 MR. MARRINAN: The next witness is Mr. Ken Ruane.

2 CHAIRMAN: Yes.

3

4

5

15:27

6 MR. KEN RUANE, HAVING BEEN SWORN, WAS DIRECTLY EXAMINED

7 BY MR. MARRINAN, AS FOLLOWS:

8

9 MR. MARRINAN: Mr. Ruane's statement appears at page
10 3258 of the Tribunal's material.

15:28

11 425 Q. Mr. Ruane, would you just simply state your career to
12 date?

13 A. Yes. I qualified as a solicitor in 1998, did my
14 apprenticeship in what was then O'Donnell Sweeney, now
15 Eversheds, moved to the Chief State Solicitor's Office
16 in '99 and worked in conveyancing there for
17 approximately two years and then moved into what's
18 known as the justice and crime section, until I left
19 the office in December 2011.

15:28

20 426 Q. And I think at that time you were appointed as Head of
21 Legal Affairs --

15:28

22 A. Yes.

23 427 Q. -- as legal adviser?

24 A. Yes, apologies, yes. In December 2011, I moved on
25 promotion, having been appointed as Head of Legal
26 Affairs within An Garda Síochána and I have worked
27 within that office since.

15:29

28 428 Q. And as such you were the legal adviser to the Garda
29 Commissioner and to Garda management in relation to

1 civil litigation, corporate matters, employment and
2 European and human rights, is that right?

3 A. Yes, yes. And I made the distinction, there is a
4 separate section within Garda Headquarters. It was
5 crime legal section, crime policy and administration, 15:29
6 and that section effectively deals with legal issues
7 that arise from time to time in relation to operational
8 matters or matters pertaining to criminal
9 investigations. Sometimes there's a crossover but
10 that's the intention. 15:29

11 429 Q. In terms of a Commission of Investigation, such as the
12 O'Higgins Commission, it wouldn't necessarily fall
13 within your remit or alternatively that of a chief
14 superintendent in the legal section for crime and
15 policy, would it? 15:30

16 A. No. It would, normally the directions would be gone
17 through an officer who would be appointed by the
18 Commissioner as a liaison officer.

19 430 Q. Yes. But in this particular instance I think that you
20 assumed responsibility for a number of matters in 15:30
21 relation to the setting up of the Garda legal team for
22 the Commission, is that right?

23 A. Certainly, yes. In respect of establishing a legal
24 team, contacting the Chief State solicitor's Office to
25 get legal representation, that certainly was my 15:30
26 responsibility, yes.

27 431 Q. And indeed you've provided a statement to the Tribunal
28 dated 17th December of 2017 --

29 A. Yes.

1 432 Q. -- and you start off on the 1st April of 2015 when you
2 point out that you sought instructions from the
3 Commissioner on seeking a nomination of counsel --
4 A. Yes.

5 433 Q. -- from the Attorney General's office to represent and 15:31
6 advise the Commissioner on all aspects of the O'Higgins
7 Commission. If you don't mind, we might just go back a
8 little bit before that.
9 A. Yes.

10 434 Q. You haven't dealt with it in your statement, but a 15:31
11 number of issues do arise for consideration. The
12 first, and I suppose the most obvious, is that you
13 would have been aware of Sergeant McCabe and his
14 various interactions with the Gardaí, isn't that right,
15 senior management? 15:31
16 A. Yes. There were ongoing, what would I call, workplace
17 issues and HR matters, absolutely.

18 435 Q. And there were files that had to be opened in relation
19 to that and you had to give legal advice to the
20 Commissioner? 15:32
21 A. I did. And I would also add, I'm dealing, there's
22 certain other files, litigation files which are still
23 live and my office has at all times had responsibility
24 for those matters.

25 436 Q. So certainly you would have been familiar with Sergeant 15:32
26 McCabe and his various issues from the time that you
27 went to your post --
28 A. Absolutely.

29 437 Q. -- in December of 2011, isn't that right?

1 A. From whenever my first interaction with certain files
2 relating to Sergeant McCabe -- yes, that's correct.

3 438 Q. And I suppose you would have been familiar that Séan
4 Guerin was conducting investigations, isn't that right?

5 A. Yes. 15:32

6 439 Q. Or an examination. And were you involved in relation
7 to that in any way?

8 A. No. Only to -- we disclosed a number of files from our
9 own office to the -- there was a Chief Superintendent
10 Sheridan, as I recall was a liaison officer for the 15:33
11 Guerin Inquiry, so we would have disclosed certain
12 material from our office.

13 440 Q. That was relevant to Mr. Guerin's inquiry?

14 A. I'm not sure if all of it was relevant, but we
15 disclosed it in any event just for completeness. 15:33

16 441 Q. And you'd have been aware of the fact that on the 6th
17 May 2014 that Mr. Guerin had reported on his
18 investigation, isn't that right?

19 A. Yes, I would have been aware of that.

20 442 Q. And were you aware at that time that part of his report 15:33
21 was a recommendation that a Commission of Investigation
22 should be set up to look into some of the matters and
23 complaints of Sergeant McCabe?

24 A. Yes, I would have been aware.

25 443 Q. So in November 2014 I think that there was an 15:34
26 announcement by the government towards the end of that,
27 that there was an intention to set up a commission of
28 investigation --

29 A. Yes.

1 444 Q. -- on foot of Mr. Guerin's recommendation?
2 A. Yes.
3 445 Q. Were you aware of that?
4 A. Yes.
5 446 Q. And we've heard this morning that it was laid before 15:34
6 the House on the 19th December when the draft terms of
7 reference were laid before the House and that the
8 Commission was set up on the 3rd February 2015?
9 A. Yes.
10 447 Q. But certainly, as of the 6th May, the Gardaí would have 15:34
11 been aware of the fact that a commission of
12 investigation was likely, isn't that right?
13 A. Yeah.
14 448 Q. And certainly from November of 2014 the Commissioner
15 and senior Gardaí would have been aware of the fact 15:35
16 that in fact there was an intention to set up that
17 Commission, isn't that so?
18 A. Yes, that's correct.
19 449 Q. And we know, and we'll come to it, perhaps not today,
20 because there are a number of matters that I have to go 15:35
21 through with you, but we know that you didn't seek a
22 nomination for counsel or for representation until 1st
23 April --
24 A. That's correct.
25 450 Q. -- of 2015 is, that correct? 15:35
26 A. 2015, that's correct.
27 451 Q. Why was there such a delay in relation to that?
28 A. Well, I suppose, Mr. Marrinan, when the Commission was
29 established in February a liaison officer had been

1 appointed and in terms of commissions -- the primary
2 work that I do is in relation to civil litigation cases
3 before the courts where An Garda Síochána or the
4 Commissioner is a defendant, and in terms of
5 commissions of investigation or for example other 15:36
6 section 42 inquiries, it didn't always be the -- wasn't
7 always the case that a legal team for An Garda Síochána
8 would be put in place as such. For example, in January
9 '15 there were, I'm aware there were, I think it was
10 under section 42 or there was a statutory inquiry in 15:36
11 relation to the, I think it was Ms. Emily Logan in
12 relation to --
13 CHAIRMAN: I'm sorry, hang on a second. There is
14 something wrong with the microphone. There's continual
15 drumming going on. 15:36
16 A. Sorry, Chairman.
17 CHAIRMAN: Are you drumming your fingers, maybe?
18 A. No.
19 CHAIRMAN: Somebody is. would everyone turn off their
20 microphones except for the witness. I'm sorry for 15:37
21 accusing you in the wrong.
22 452 Q. MR. MARRINAN: Sorry, continue on.
23 A. I suppose if you look at Commissions of Investigation
24 Act, and particularly section 11, it's not necessarily
25 designed to be a multiparty cross-examination type 15:37
26 inquiry. In fact, I believe the O'Higgins Commission
27 was, certainly from when I had started within An Garda
28 Síochána it was set up in a multiparty type procedure
29 or process, whereas I suppose for example the Fennelly

1 Commission was held in private. I'm not aware of any
2 instances where cross-examination was permitted or
3 allowed within that Commission and there was no legal
4 team established to represent the interests of An Garda
5 Síochána at that particular Commission. 15:38

6 453 Q. At what point then was a decision made either by
7 yourself or by the Commissioner in consultation with
8 you or others?

9 A. Well, I know I had a conversation, for example, towards
10 the end of March with Mr. Fleming, Paul Fleming, who is 15:38
11 an assistant Chief State Solicitor, at the time in the
12 Chief State Solicitor's Office, and it came up during
13 that conversation about whether An Garda Síochána would
14 be seeking legal representation. I can't say for sure
15 but I may have, it may have come to my notice at that 15:38
16 point that some of the representative bodies were
17 appointing solicitors to deal with certain of their
18 members and having -- looking at the terms of reference
19 of the O'Higgins Commission it certainly appeared that
20 some of the issues would be contentious and there would 15:38
21 be corporate matters for An Garda Síochána. So at that
22 point in time I sought instructions from the
23 Commissioner as to whether she wished to have a legal
24 team in place.

25 454 Q. And that was on the 1st April, is that right? 15:39

26 A. That was on the 1st April, yes.

27 455 Q. You had already been in communication, had you not,
28 with Mr. David O'Hagan, who is solicitor to the
29 Commission?

1 A. In relation to discovery issues Mr. O'Hagan had been in
2 contact, yes, with me.

3 456 Q. And you had been notified and put on notice that the
4 Commission intended to commence its hearing on the 14th
5 May, isn't that right? 15:39

6 A. Yeah. I'm not sure -- I was on notice, I'm not sure at
7 what date specifically I became --

8 457 Q. Just while we're dealing with it, I think some issues
9 arose in relation to liaison officers. In the first
10 instance, was it Assistant Commissioner Kenny? 15:39

11 A. It was Assistant Commissioner Kenny. And I suppose, if
12 I can put this, there's no point in having a legal team
13 in place unless you have effectively all of the
14 material ready to brief the legal team. And certainly
15 the first couple of months the sense -- or sorry, since 15:40
16 February '15 when I believe contact was first made by
17 Mr. O'Hagan, certainly from a corporate point of view
18 the intention was to gather up all of the necessary
19 documentation to ensure discovery could be made in a
20 timely fashion to the Commission. But to go back to 15:40
21 your point, Chief Superintendent Healy actually as I
22 understood it was the third liaison officer to have
23 been appointed by the Commissioner.

24 458 Q. And I think that if we can just perhaps -- things
25 weren't maybe quite as rosey as we're indicating as we 15:40
26 are going along.

27 A. Yeah.

28 459 Q. If I can refer to you a letter from Mr. O'Hagan. Page
29 59 of the material, please.

1 A. Yes, I have that.

2 460 Q. If we can just look in the first instance, yes, at the
3 bottom of page 59, this is to Chief Superintendent
4 Ward --

5 A. Yes. 15:41

6 461 Q. -- from Mr. O'Hagan, who is solicitor to the
7 Commission. And it's dated 15th April 2015. And it is
8 sent at 11:23. Detective Chief Superintendent Ward was
9 then the liaison officer, is that right?

10 A. Yes, he was. 15:41

11 462 Q. And he had come in because Assistant Commissioner Kenny
12 had identified a possible conflict?

13 A. I believe it was the Commission who possibly identified
14 the conflict with Assistant Commissioner Kenny.

15 463 Q. Insofar as he was potentially a witness -- 15:42

16 A. In one of the modules, yes.

17 464 Q. -- before the Commission. But anyway, Mr. O'Hagan
18 writes:
19

20 "I refer to your email of the 8th April 2015 and I am 15:42
21 directed to respond as follows.
22

23 The Commission wrote to An Garda Síochána on the 26th
24 February 2015 giving directions and stating the
25 statutory basis for those directions. The Commission 15:42
26 also furnished a model form of affidavit verification
27 in the copy of its rules and procedures accompanying
28 the directions. You were given until the 27th March
29 2015 to comply.

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The Commission wrote to the Garda Commissioner on the 27th March advising her that it would be holding a hearing in mid May 2015 on the issues referred to in paragraph 1A of its terms of reference. In the light of the above we are shocked, disappointed and extremely concerned to read in your email of the 8th April that you have only now seem to have realised the need to arrange for legal advice in relation to representation and in relation to the review of the documents you were obliged to disclose.

The continuing delay by An Garda Síochána in fully complying with the Commission's directions is impacting greatly on the work of the Commission and its preparations for the hearing. This cannot be allowed continue. Accordingly, I have been directed to advise you that unless An Garda Síochána makes full disclosure of all documents covered by the direction of 26th February 2015, by 4:00pm on Thursday, 16th April 2015, the Commission will be requesting you to attend a meeting here with an appropriate officer from the office of the Attorney General to explain the reasons for the delay."

I think that that was forwarded to you, is that right?

A. Yes.

465 Q. And obviously that gave rise to considerable cause for concern, because Mr. O'Hagan is quite clearly

1 indicating that the Commission wants to move matters
2 along and that the Guards or the Garda Commissioner
3 isn't cooperating at that juncture, is that right?
4 A. Absolutely. And if I could state, Mr. Marrinan, when I
5 was first contacted in February by Mr. O'Hagan, I don't 15:44
6 have the email in front of me but I do recall sending
7 an email to the Commissioner's office effectively
8 telling them immediately to appoint a liaison person
9 for the purpose of gathering up. And in terms of my
10 function and my office, I'm a legal adviser within An 15:45
11 Garda Síochána and the contact point for the Chief
12 State Solicitor's Office, and the Chief State
13 Solicitor's Office through the Attorney General's
14 office. In terms of discovery in both commissions and
15 civil litigation, particularly in large cases, it's 15:45
16 simply just not feasible that my office could
17 effectively take on the task of gathering up all the
18 documentation. There has to be a separate office,
19 similar to the office that's in existence for this very
20 Tribunal, doing that. 15:45
21 466 Q. Indeed. And I think that on the same day, on page 59,
22 we'll see you wrote to Deputy Commissioner SCM. What
23 is SCM?
24 A. Strategy and Change Management, at that point.
25 467 Q. Who was the Deputy Commissioner at the time? 15:45
26 A. At that time, as I recall, there was a vacancy in the
27 office, so what the Commissioner -- the Commissioner
28 had appointed two assistant commissioners to take up
29 acting deputy posts and a third, Assistant Commissioner

1 Kieran Kenny, to take up acting responsibility for
2 legal affairs.

3 468 Q. I will just read from the email:

4

5 "I refer to the above and to the email below, which has 15:46
6 been received from the above Commission.

7

8 I discussed the issue of legal representation for the
9 Commissioner at the above Commission on 30th March --"

10

15:46

11 A. Yes.

12 469 Q. This is the conversation that you had with the
13 Commissioner, is that right?

14 A. Yes.

15 470 Q. "-- and following same I submitted a document to the 15:46
16 Commissioner seeking instructions in relation to same.
17 I received a phone call from David O'Hagan, solicitor
18 to the Commission, at 11:35am, who indicated that he
19 has this morning sent an email to Chief Superintendent
20 Ward, which is in strong terms and has been drafted by 15:47
21 Mr. Justice O'Higgins.

22

23 The Commission requires documentation to be furnished
24 to it by tomorrow or else it will seek the attendance
25 of Chief Superintendent Séan Ward and an official from 15:47
26 the Attorney General's office to explain the delay. In
27 the circumstances, pending the appointment of a
28 solicitor from the Chief State Solicitor's Office and
29 counsel I am of the view that the directions of the

1 Commission to furnish documentation should be adhered
2 to. I expect the most structured approach is to
3 provide the Commission with the information on a
4 modular basis. I understand the first module being
5 investigated pertains to an incident involving 15:47
6 Ms. Lorraine Browne at Kings Court. An affidavit of
7 verification as per the template provided by the
8 Commission should be sworn by Chief Superintendent Ward
9 on behalf of the Commissioner.

10
11 Regards
12 Ken Ruane"

13
14 A. Yes.

15 471 Q. And that is dated 15th April at ten past five. 15:48

16 A. Yes.

17 472 Q. So it is clear that you were expressing your concerns
18 there?

19 A. I was. And it's clear there were concerns, and I
20 suppose it was just a suggestion as to whether the 15:48
21 discovery could be made on a modular basis to avoid any
22 delay in the Commission getting started effectively.

23 473 Q. And we know from the documentation, and I don't intend
24 to open all the correspondence with you, but we know
25 that on the 22nd April was the first time that Annmarie 15:48
26 Ryan, who is a solicitor with the Chief State
27 solicitor's Office, an experienced solicitor, was in
28 fact assigned to the case, is that right?

29 A. Yes.

1 474 Q. Sorry, that is the 27th April and on the following day,
2 28th April, that she sought the nomination of counsel
3 and counsel were nominated on 3rd May by the Attorney
4 General's office, where Mr. Colm Smyth, senior counsel,
5 along with Mr. MacNamee and Mr. Gareth Byrne -- 15:49

6 A. Yes.

7 475 Q. -- were asked to accept the brief at the Commission.
8 And they didn't receive papers I think until 6th May,
9 which was which was less than a week before the
10 Commission was to commence its business, isn't that 15:49
11 right?

12 A. That's correct.

13 476 Q. The reason I'm opening that to you and showing that to
14 you, I mean one might complain about that scenario
15 arising because this was to be quite a complex matter 15:50
16 before the Commission and it would appear that from the
17 off, as it were, that there was an element of catch up?

18 A. There was most definitely an element of catch up, but I
19 would say it was catch up within a corporate sense,
20 within An Garda Síochána. As soon as the documentation 15:50
21 was made available to me from the Commission Liaison
22 Office it was produced to the Chief State Solicitor's
23 Office.

24 477 Q. In general terms were you aware of what O'Higgins
25 Commission of Investigation was inquiring into? 15:50

26 A. Yes. I was aware of the terms of reference.

27 478 Q. And had you discussed those with the Commissioner?

28 A. No. I had no specific discussion with the Commissioner
29 about the terms of reference.

1 479 Q. If I can just read from the report of Mr. Justice Kevin
2 O'Higgins under "Observations on whistleblowers" in
3 chapter 1, at page 17 of that report. Unfortunately we
4 don't have it on the system but at paragraph 117, for
5 the parties, it's only a short quote so I will read it 15:51
6 to you, he said:

7
8 "Many organisations and institutions have an
9 instinctive hostility to whistleblowers. This may be
10 explained by culture or historical reasons. The 15:51
11 hostility may be as a result of a particular
12 understanding of what constitutes loyalty. Under that
13 understanding any criticism from within is regarded as
14 suspect, disloyal or even treacherous. This notion of
15 loyalty can be all the more engrained in organisations 15:52
16 such as An Garda Síochána, with a strong tradition of
17 internal solidarity. However, there is a growing
18 realisation that the activities of whistleblowers, so
19 far from being disloyal, may be motivated by a concern
20 for and dedication to an organisation. In that 15:52
21 context, an open minded consideration of genuine
22 complaints from within is important in any
23 organisation. A fair consideration of the merits of
24 such complaints rather than a focus on the complainant
25 may be a considerable benefit to an organisation." 15:52
26

27 Okay. would you agree with those sentiments that he
28 has expressed there?

29 A. Yes. Yes, I would.

1 480 Q. And what's clear from that is that perhaps there ought
2 to be -- where a whistleblower, to use that expression
3 comes forward, that there ought to be a focus on his
4 complaint, his or her complaints, rather than the
5 complainant, do you understand? 15:53

6 A. Yes. And what I would say, if you look at the
7 Protected Disclosures Act 2014 --

8 481 Q. Yes?

9 A. -- which is in place, a very comprehensive piece of
10 legislation now, as opposed to the previous 15:53
11 confidential reporting regulations that existed within
12 An Garda Síochána, the 2014 Act now, specifically in
13 section 5, as I understand it, points out that when
14 looking at a complaint as to whether it is a Protected
15 Disclosure or not motivation is to be deemed 15:53
16 irrelevant.

17 482 Q. Indeed. But, in any event, looking at Sergeant McCabe,
18 motivation wasn't an issue, sure it wasn't?

19 A. Well, if I could explain. What I was told -- if we can
20 move forward maybe to -- 15:54

21 483 Q. Well, we will deal with it in early January of 2015.

22 A. Yeah.

23 484 Q. Byrne and McGinn had done a report, isn't that right?

24 A. Yes.

25 485 Q. And part of that report they had referred to the fact 15:54
26 that the bona fides of Sergeant McCabe weren't being
27 called into question, isn't that right?

28 A. That's correct.

29 486 Q. So as of January 2015 the bona fides and motivation,

1 because the two go hand in hand, isn't that right --

2 A. Yes.

3 487 Q. -- wasn't an issue to be called into question?

4 A. No. It wasn't an issue.

5 488 Q. Yes? 15:54

6 A. And there was, certainly in early 2015, January,
7 February, March, April, and in the number of files that
8 I had with Sergeant McCabe, the issue of his motivation
9 was never brought to my attention in terms of the
10 complaints that he had made. 15:55

11 489 Q. Yes?

12 A. That there was a link.

13 490 Q. So in terms of the Commissioner's approach to the
14 O'Higgins Commission of Investigation,
15 Sergeant McCabe's motivation was not to be an issue, is 15:55
16 that right?

17 A. It certainly was never -- no, never an issue.

18 491 Q. And it wasn't an issue for a number of reasons, but in
19 particular because Chief Superintendent McGinn and
20 Assistant Commissioner Derek Byrne had examined this 15:55
21 matter and in their report had included a finding that
22 the bona fides of Sergeant McCabe weren't an issue and
23 he was acting in good faith, isn't that right?

24 A. That's correct.

25 492 Q. So from that point of view you in fact had met with 15:56
26 Sergeant McCabe, hadn't you --

27 A. Yes.

28 493 Q. -- along with the Commissioner --

29 A. Yes.

1 494 Q. -- in February?
2 A. No, in August '14.
3 495 Q. Yeah. Well, that was the first meeting --
4 A. Yes.
5 496 Q. -- that you had had with him, but I just want to -- 15:56
6 A. There was a meeting in February '15, I think Deputy
7 Commissioner, acting Deputy Commissioner Twomey and
8 Chief Superintendent McLoughlin had met with Sergeant
9 McCabe to do with workplace issues.
10 497 Q. If you just give me one moment. 15:56
11 A. I think I attended one meeting with Sergeant McCabe and
12 his solicitor.
13 498 Q. Yes. If I could have page 3004 up on the screen
14 please. This is a meeting with Séan Costello and
15 Sergeant Maurice McCabe at the Commissioner's 15:57
16 conference room on the 12th February 2014 at 12 noon?
17 CHAIRMAN: 2014, is it, Mr. Murrinan?
18 499 Q. MR. MARRINAN: 2015, I beg your pardon. Do you see
19 that? Attendees: The Commissioner, Assistant
20 Commissioner Twomey, Assistant Commissioner Fanning, 15:57
21 Chief Superintendent Tony McLoughlin, yourself --
22 A. Yes.
23 500 Q. -- Superintendent Frank Walsh, and then Mr. Costelloe
24 was there along with Sergeant McCabe, do you see that?
25 A. Yes. 15:57
26 501 Q. I am not going to go through the whole document and the
27 whole meeting but I'm just going to highlight the
28 Commissioner's approach to Sergeant McCabe as of
29 February of 2015:

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"Commissioner welcomed all present and made the necessary introductions. She said it was useful to meet because engagement needs to continue. Said Sergeant McCabe's input into the fixed charge penalty system report was very useful and thanked him for that. The recommendations are being put in place. We are trying to resolve the workplace issues and know that you are engaging with Chief Superintendent Barry O'Brien. There is an external mediator now available to advise on all matters and you can avail of that. We are trying to ensure a positive working environment. All here are and will remain available to tease out any issues or problems. Also the welfare service remain available to you. I appreciate that it is not easy for you and your family. The Executive Director of Human Recourses and People Management was also to be here to assist but has had to send his apologies. He is also available to assist."

15:58

15:58

15:59

15:59

I think that was a Mr. John Barrett, is that right?

A. Yes Mr. Barrett.

502 Q. "This is the purpose of this meeting today."

So that was the Commissioner's introduction. It would appear that there is no doubt that she acknowledged the problems that he had in the workplace, but had thanked him for his contribution.

15:59

A. Yes.

1 503 Q. And the whole approach was one that he was a valued
2 member of the force, isn't that right?

3 A. That's one of a number of meetings that took place, not
4 with Sergeant McCabe, but seeking to deal with
5 workplace issues that he had, as I recall, at the time 16:00
6 in Mullingar and there were other issues he had raised
7 in relation to certain publications and raised concerns
8 about those. So I would agree with you; from January,
9 February, March, April on -- sorry, January, February
10 March, April there were a lot of meetings and I recall 16:00
11 particularly on the 25th February Chief Superintendent
12 Barry O'Brien and the Executive Director HR,
13 Mr. Barrett, had met with Sergeant McCabe to try and
14 resolve certain issues that were going on in the
15 workplace. 16:00

16 504 Q. So this was an ongoing process and certainly Sergeant
17 McCabe could be forgiven for taking the view at that
18 time that his complaints were being taken seriously --

19 A. Yes.

20 505 Q. -- by An Garda Síochána? 16:01

21 A. Yes. There was a consideration of whether, because
22 maybe internal people hadn't been able to resolve them,
23 as to whether external people or experts would be
24 brought in to try and resolve workplace issues, that's
25 correct. 16:01

26 506 Q. Yes. Do you recall in the build up to that meeting,
27 and/or afterwards, whether or not at any meetings that
28 you attended that a strategy in relation to how
29 Sergeant McCabe was to be treated in private at the

1 O'Higgins Commission was discussed?

2 A. Absolutely not. But I can tell that you there were
3 discussions about establishing an expert panel of
4 mediators to deal with workplace issues, appointing
5 contact persons. The focus of all of those meetings 16:02
6 were seeking to reach out to Sergeant McCabe and
7 particularly Mr. Barrett had taken a very keen interest
8 from February on in trying to resolve workplace issues.

9 507 Q. The reason that I ask you the question is because
10 Mr. Barrett has made a statement to the Tribunal dated 16:02
11 27th April 2017, and the relevant portion is to be
12 found at page 2968 of the materials, if we could have
13 that up on the screen please, at paragraphs B1 he says:

14
15 "After my appointment as interlocutor with Sergeant 16:03
16 McCabe and prior to my first meeting with him, I
17 received a briefing in February of 2015 from a number
18 of senior staff in An Garda Síochána, including the
19 acting Commissioner Nóirín O'Sullivan, the then Chief
20 Administrative Officer Cyril Dunne, also present at the 16:03
21 meeting were Chief Superintendent Barry O'Brien, Chief
22 Superintendent Tony McLoughlin and Mr. Ken Ruane, Head
23 of Legal Affairs, and others. The briefing given to me
24 may be of assistance to the Tribunal in seeking to gain
25 an insight into the manner in which Sergeant McCabe and 16:03
26 the issues that had been raised by him were perceived
27 in Garda Headquarters at that time."

28
29 Regrettably he doesn't then go on to enlighten the

1 Tribunal as to how the Tribunal will find this of
2 assistance or in fact indicate what was discussed. But
3 do you remember any meeting in February of 2015 at
4 which Mr. Barrett was present and Sergeant McCabe's
5 appearance before the O'Higgins Commission was to be
6 discussed? 16:04

7 A. No. Certainly in February '15, say for example on the
8 25th February, when that was the date that Chief
9 Superintendent Barry O'Brien and Mr. Barrett had met
10 Sergeant McCabe, there was a meeting that evening in 16:04
11 the Commissioner's office where Mr. Barrett had dialled
12 in on speakerphone to give a briefing as to how the
13 meeting had gone. Chief Superintendent Barry O'Brien
14 had come over to the Commissioner's office. I think
15 Mr. Barrett had other engagements, so he rang in. 16:05
16 There was also, as I had understood it, a pre-meeting
17 on the 25th February. I have a record of a meeting,
18 but that was to, again, discuss workplace issues and
19 the fact of what Mr. Barrett and Mr. O'Brien were going
20 to deal with, with Sergeant McCabe. But Mr. Barrett, I 16:05
21 certainly don't have a record of Mr. Barrett being at
22 that meeting. But to answer your question, I
23 certainly -- there was never any reference at any of
24 those meetings to discussions about a strategy at the
25 Commission or otherwise. 16:05

26 508 Q. Do you have notes of those meetings that you attended?

27 A. Yes, I do.

28 509 Q. It's just, that they haven't been provided to the
29 Tribunal. You may have considered them to be

1 irrelevant?

2 A. I understand the Coordination Office have deemed them
3 potentially of interest, but I have no difficulty with
4 those notes being furnished.

5 510 Q. Yes. They may be made available to the Tribunal. 16:06

6 A. There were two particular meetings that took place in a
7 privileged context, so I will seek instructions.

8 511 Q. It may well be --

9 A. I have no issue with those.

10 512 Q. -- that arises. Well, it's more in terms of 16:06
11 identifying the dates on which this occurred.

12 A. Yes.

13 513 Q. Because Mr. Barrett goes on to say at paragraph E, at
14 page 2969:

15 16:06

16 "Prior to the commencement of the O'Higgins Commission
17 hearings, at the conclusion of a meeting in the office
18 of the Chief Administrative Officer, Cyril Dunne,
19 Mr. Dunne asked me to remain in his office after the
20 other attendees had left and with reference to Sergeant 16:07
21 McCabe said 'we're going after him in the Commission'.
22 My role as interlocutor principal point of contact with
23 Sergeant McCabe was well established at this stage. I
24 indicated my shock and dismay that such an approach
25 would be taken in the O'Higgins Commission." 16:07

26

27 Do you remember a meeting in the office of the Chief
28 Administrative Officer, Mr. Dunne, that you may have
29 attended?

1 A. Well, there were a number of meetings. Well, certainly
2 one or two meetings to do with Sergeant McCabe where
3 Mr. Dunne was in attendance, but was there a particular
4 date?

5 514 Q. Well, unfortunately we haven't been provided with that. 16:08

6 A. Yes.

7 515 Q. That is why I am asking you the questions --

8 A. Sorry, my apologies.

9 516 Q. -- in this rather loose way.

10 A. No, the meetings I would have attended would have been 16:08
11 in the Commissioner's office. But I do know Mr. Dunne
12 attended one or two of those meetings from February
13 onwards, because -- well, he was the Chief
14 Administrative Officer and Mr. Barrett reported to him,
15 as I understood. 16:08

16 517 Q. Well, in any event, the statement that Mr. Barrett
17 attributes to Mr. Dunne is denied by him in a statement
18 that he has made to the Tribunal. But in terms of any
19 meetings that you attended was a strategy discussed --

20 A. No. 16:09

21 518 Q. -- a strategy that was going to be adopted at the
22 O'Higgins Commission?

23 A. No. None of the meetings that I attended with
24 Mr. Dunne referenced any strategy to do with the
25 O'Higgins Commission, or the O'Higgins Commission. 16:09
26 They were in relation to workplace matters, trying to
27 establish an external mediator to deal with issues.
28 There were -- I do know in March it had got to a very
29 advanced stage about bringing in an external person, a

1 workplace expert. And Mr. Dunne would have been also
2 involved in that, in that process.

3 519 Q. I think that was Mr. Kieran Mulvey, is that right?
4 A. Yes, that's correct.

5 520 Q. And I think that you in fact had communicated with the 16:09
6 Attorney General's office in relation to the terms of
7 reference that would apply to Mr. Mulvey's examination
8 of --

9 A. That's correct. I actually -- it didn't occur in a
10 privileged context, so I attended a meeting in 16:10
11 Mr. Barrett's office on the 21st April with Mr. Mulvey
12 and others. I was trying to recollect why Mr. Mulvey
13 never came in. I don't believe he ultimately came in.
14 But I just can't recall why not.

15 521 Q. Well then in terms of, as it were, setting the scene 16:10
16 and if I can just summarise your evidence in relation
17 to this --

18 A. Yes.

19 522 Q. -- because I'm going to come a fairly lengthy meeting
20 that you had and you attended with counsel on the 11th 16:10
21 May of 2015.

22 A. Yes.

23 523 Q. But prior to that meeting, would this be a fair summary
24 of your position, and I will just go through it and
25 that of the Garda Commissioner -- 16:10

26 A. Yes.

27 524 Q. -- that you were aware of the background to Sergeant
28 McCabe's interactions with the Gardaí?

29 A. I was. And I would say that I deal with civil

1 litigation, as I mentioned, and part of that process is
2 to gather in documentation from the various divisions
3 to brief counsel in the case. So I had seen references
4 to that matter, yes.

5 525 Q. So you were familiar with the complaints that he was 16:11
6 making --

7 A. I was. I was, yeah.

8 526 Q. -- that had been the subject-matter of the Guerin
9 investigation?

10 A. Yes. 16:11

11 527 Q. You were familiar with the Byrne/McGinn report?

12 A. Yes.

13 528 Q. You attended a meeting with Sergeant McCabe and the
14 Commissioner in which she expressed support and thanked
15 him for his contribution, is that right? 16:11

16 A. Yes.

17 529 Q. And you had been involved with the Attorney General's
18 office and communicating with them to bring Mr. Mulvey
19 in and terms of reference, I'm not going to go through
20 those you with -- 16:11

21 A. No, that's all correct.

22 530 Q. -- you provided those papers to the Tribunal.

23 A. That's all correct, yeah.

24 531 Q. And in your dealings with Mr. O'Hagan in the first
25 instance you were perhaps isolated and alone until such 16:12
26 time as Annmarie Ryan came on forward?

27 A. Certainly there was a sense of -- yeah.

28 532 Q. Yeah.

29 A. It was very helpful to have Ms. Ryan and someone of

1 Ms. Ryan's capability on board.

2 533 Q. So it was then, then she set up a meeting with counsel
3 that you attended?

4 A. Yes. That was the first meeting with counsel.

5 534 Q. Now, why was it that you were attending that meeting? 16:12

6 A. Well, it was the first meeting with counsel, it was
7 also, it was a hand over from Chief Superintendent Ward
8 who was finishing up his role as liaison officer and he
9 was handing it over effectively to Chief Superintendent
10 Fergus Healy, and because it was the first meeting I 16:12
11 wanted to attend just to get the legal team up and
12 running as such.

13 535 Q. And tell me, had you -- prior to that meeting,
14 obviously you had formed a view in relation to Sergeant
15 McCabe, and had you countenanced a situation where 16:13
16 Sergeant McCabe's motivation would be challenged before
17 O'Higgins Commission of Investigation?

18 A. No. Up to that point it had never been indicated to me
19 that there was a link between Sergeant McCabe's
20 motivation and the making of the complaints. 16:13

21 536 Q. Motivation is motivation. I mean, he's made complaints
22 against the investigation of a number of incidents in
23 Cavan-Monaghan. But as far as you were concerned at
24 that stage there was to be no attack on his motivation?

25 A. No. No. 16:13

26 537 Q. And was that the position of the Commissioner as well,
27 as far as you could ascertain?

28 A. Well, I hadn't been in discussions with the
29 Commissioner on it, but I certainly was not aware of

1 any contrary view.

2 538 Q. And prior to the meeting, I think that you had
3 communicated with Ms. Ryan about the possibility of any
4 potential conflict arising?

5 A. Chief Superintendent Healy had pointed out to me that 16:14
6 even with one retired officer he already, there was
7 potentially a conflict of interest arising, as to
8 whether the -- I suppose for all cases, Mr. Marrinan,
9 we would always take a view in terms of representation
10 for serving officers or retired officers that 16:14
11 organisational representation would always be subject
12 to review if a conflict of interest did arise.

13 539 Q. And the conflict or potential conflict that had been
14 identified to you --

15 A. Yes. 16:15

16 540 Q. -- did that concern Chief Superintendent Rooney?

17 A. Yes. Chief Superintendent Healy had outlined that
18 there was a concern in relation to one particular
19 investigation, that HR, Garda HR had issued a direction
20 for chief superintendent -- as I recall it now, so 16:15
21 apologies, Chief Superintendent Rooney was to appoint
22 somebody from outside the division to investigate some
23 issue, but as I understood it he appointed somebody
24 from within the division, if I have that correct.

25 541 Q. Okay. So you had indicated to Ms. Ryan that it was the 16:15
26 intention of the Commissioner to represent everybody of
27 superintendent rank and above, is that right?

28 A. Well, again, in the documentation that I submitted to
29 the Commissioner it was the first time I believe that I

1 had arranged representation for a commission or an
2 inquiry as opposed to a civil case, and I had, I
3 made -- Chief Superintendent Healy had indicated to me
4 that as he had understood it precedent was for the
5 legal team to represent superintendent and up, i.e. 16:16
6 officer level, but I had spoken to another chief
7 superintendent, John McMahon, who was referencing I
8 think it was the Cloyne Inquiry or one of the inquiries
9 that the legal team represented all, members of all
10 ranks. So there was a disparity there. I think I even 16:16
11 referenced it in my submission going up. So the way I
12 left it, Mr. Marrinan, was that the Commissioner's
13 legal team would represent officer level up and that if
14 any other member sought representation that that would
15 be considered on an individual basis. But at that 16:17
16 point in time the members who were making inquiries
17 about representation, the serving and retired members
18 were all officer rank.

19 542 Q. In the first instance why did you think it was
20 necessary that the Commissioner should have
21 representation? 16:17

22 A. Well, when I talk about the Commissioner having
23 representation I use that word interchangeably with the
24 organisation. Because if you look at the document that
25 I sent to the Chief State Solicitor's Office, it's, I 16:17
26 spoke about the organisation being represented, but if
27 you look at the defendant in any civil case or --
28 ultimately the Commissioner is the ultimate client, but
29 for example in any correspondence that I would send to

1 the Chief State Solicitor's Office for any litigation I
2 would use the words "the Commissioner" and/or "An Garda
3 Síochána" interchangeably.

4 543 Q. And insofar as that, why did you think it was necessary
5 that the organisation should have representation, if we 16:18
6 use it in the broadest sense?

7 A. Yeah, well, looking at the terms of reference there
8 were clearly representational and corporate and
9 sensitive issues that were going to arise at the
10 Commission. 16:18

11 544 Q. Such as?

12 A. Well, looking at the -- well, there were clearly
13 reputational matters in terms of any -- if you look at
14 any of the issues that were going to be dealt with.

15 545 Q. That concerned individual officers? 16:18

16 A. Yes.

17 546 Q. Yes. Well, you're allowing for that --

18 A. When they concerned individual officers, invariably any
19 findings would have ramifications for the organisation
20 as well. 16:18

21 547 Q. Well, I suppose any adverse findings against any person
22 appearing before the Commission who is a member of An
23 Garda Síochána has an adverse effect on the force as a
24 whole --

25 A. Yes. 16:19

26 548 Q. -- isn't that so?

27 A. I suppose, Mr. Marrinan, there is a legal team here
28 today representing the organisation because of the
29 issues that are being dealt with by this Tribunal. In

1 any of the civil cases that I have, it's always
2 necessary -- well, I suppose a civil case is perhaps
3 different.

4 CHAIRMAN: Yes, it is. I mean, someone saying they
5 lost their hand in Garda custody is different, isn't
6 it? Yes. Okay. 16:19

7 A. Yes.

8 549 Q. MR. MARRINAN: So the organisation as such is
9 represented?

10 A. Yes. 16:19

11 550 Q. And a conflict, potentially, could arise where, as a
12 policy consideration on behalf of the organisation, as
13 a whole, conflicted with perhaps instructions that had
14 been given by individual senior officers?

15 A. Or it would be possible during evidence that an issue 16:19
16 might come to light where simply the organisation
17 couldn't stand over the actions of a particular member
18 who was in under the umbrella, I suppose, to call it,
19 of the organisation had legal representation.

20 551 Q. Well, it might be difficult to make a judgment call in 16:20
21 relation to that, where the matter is before a
22 Commission of Investigation, but more importantly in
23 the context of what we are inquiring into. Potentially
24 senior officers could be giving instructions to the
25 same counsel who are representing the organisation that 16:20
26 conflicted with the view that was being taken by the
27 organisation, isn't that right?

28 A. That's a possibility, yes.

29 552 Q. Well, applying it to the circumstances that we're

1 looking at here, it would appear that the view of the
2 organisation, as expressed by the Commissioner to
3 Sergeant McCabe and his legal adviser, was that he was
4 a valued member of the organisation and, as I pointed
5 out, Chief Superintendent McGinn and Assistant 16:21
6 Commissioner Byrne had said that his complaints were
7 made in good faith, all right?

8 A. Yes.

9 553 Q. So there is no issue in relation to his motivation?
10 A. There certainly wasn't, as I said earlier on, no. 16:21

11 554 Q. So if an individual officer wanted to question his
12 motivation in order to blacken him in some way in the
13 hope that his evidence may not be accepted by the
14 Commission, that clearly would be in conflict with the
15 view that had been taken by the organisation? 16:21

16 A. Well, I think if a senior officer was effectively
17 giving instructions to that effect what you would
18 expect to happen is that the head of the organisation,
19 i.e. the Commissioner, would be given an opportunity to
20 indicate whether they are the instructions of the 16:21
21 organisation as such.

22 555 Q. Indeed. And that I think arises --

23 A. Yeah.

24 556 Q. -- during the course of this consultation, there is
25 quite a lengthy consultation, which I will turn to now. 16:22
26 CHAIRMAN: well, I think that this might be the right
27 time to break.

28 MR. MARRINAN: Very well.

29 CHAIRMAN: Yes. All right. So we are ten o'clock on

1 Monday. I can't sit for reasons of other duties on
2 Tuesday. Thank you.

3
4 THE HEARING THEN ADJOURNED UNTIL MONDAY, 15TH JANUARY
5 2018 AT 10:00AM

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