

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER  
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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 TUESDAY, 23RD JANUARY 2018 - DAY 46

46

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

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INDEX

WITNESS	PAGE
FORMER COMMISSIONER NÓIRÍN O'SULLIVAN	
EXAMINED BY MS. LEADER .....	5
CROSS-EXAMINED BY MR. MCDOWELL .....	97

1 THE HEARING RESUMED ON TUESDAY, 23RD JANUARY 2018,  
2 AS FOLLOWS:

3  
4 MS. LEADER: Former Commissioner O'Sullivan, please.

5 10:02

6 FORMER COMMISSIONER NÓIRÍN O'SULLIVAN CONTINUED TO BE  
7 DIRECTLY EXAMINED BY MS. LEADER AS FOLLOWS:

8 1 Q. MS. LEADER: Ms. O'Sullivan, yesterday evening we were  
9 in July 2015, and I was asking you about a press query  
10 and a subsequent letter you received from Mr. Smyth in  
11 relation to the progress at the Commission.

10:02

12 A. Yes, Chairman, that's correct.

13 2 Q. Yes. I wonder do you remember the following September,  
14 drawing Chief Superintendent Healy's attention to a  
15 further press query in relation to a challenge of the  
16 evidence of Sergeant McCabe that came from Mr. Mooney?

10:02

17 A. Yes, Chairman. May I get the reference?

18 3 Q. Yes, certainly. It's Volume 4, 2324 of the materials.

19 A. 3234, Ms. Leader?

20 4 Q. 2324, yes.

10:03

21 A. Sorry, I -- yes, Chairman, I have that here.

22 5 Q. Yes. It would appear Mr. Mooney had phoned the Press  
23 Office, or at least Mr. McLindon, inquiring on whether  
24 the Gardaí had challenged some of the evidence of  
25 Sergeant McCabe and there was a further publication in  
26 relation to that, do you remember that?

10:03

27 A. Yes, Chairman, I do.

28 6 Q. And then you will see that Ms. Ryan emailed counsel,  
29 and that appears at page 2325 of the materials, saying

1           that:  
2  
3           "The Commissioner requested that you raise this with  
4           counsel and seek your advices as to the recommended  
5           action." 10:04  
6        A.    Yes, Chairman, that's correct.  
7        7    Q.   And I think the matter was -- you didn't speak directly  
8           with counsel at that stage, am I correct in that?  
9        A.    No, Chairman. And again, similar to the query in July,  
10       my concern was that the integrity and the ruling by 10:04  
11       Mr. Justice O'Higgins of the Commission of  
12       Investigation was being breached at that stage, and  
13       my -- the advices I was seeking was, was it necessary  
14       for us to bring it to the attention of the Commission.  
15       8    Q.   Okay. Now, if we could go forward to October/November 10:04  
16       2015, and it would appear that you were asked to appear  
17       at the O'Higgins Commission?  
18       A.    That's correct, Chairman, yes.  
19       9    Q.   Was that anticipated on your behalf, Ms. O'Sullivan?  
20       A.    Yes, Chairman, as I said yesterday, at -- certainly at 10:04  
21       the very early stages it was indicated I may be  
22       required to come before the Commission as a result of  
23       the legal argument that had arisen, to give an account  
24       as to -- to explain my instructions. Separately, I  
25       would have been in Module 5, I believe, scheduled as a 10:05  
26       witness by the Commission to appear in my capacity as  
27       Assistant Commissioner HRM, Human Resource Management.  
28       10   Q.   Okay. And I think there were a number of meetings  
29       organised in order to prepare for your evidence at the

1 Commission?

2 A. Yes, Chairman, I believe I had two consultations.

3 11 Q. Okay. Now, you'd already met with counsel, at least  
4 with Mr. Smyth, the previous May, is that correct?

5 A. That's correct, Chairman, yes. 10:05

6 12 Q. Can you tell the Tribunal about that meeting in May,  
7 first of all, before we deal with the October meetings?

8 A. Chairman, I draw the existence of that meeting to the  
9 attention of the Tribunal as a result of a note in my  
10 eCalendar. I don't have any specific memory of the 10:05  
11 meeting but I have heard Chief Superintendent Healy's  
12 evidence that it was a courtesy type of meeting, and I  
13 wouldn't disagree with that.

14 13 Q. Okay. I think that was on the 21st May?

15 A. Yes, Chairman, that's correct. 10:06

16 14 Q. Working from Chief Superintendent Healy's evidence and  
17 your own note in your diary?

18 A. And my own diary entry, yes, Chairman.

19 15 Q. Can you remember -- have you any memory that that have  
20 meeting at all? 10:06

21 A. Chairman, I have done my very best to recollect. I  
22 would concur with Chief Superintendent Healy, it was a  
23 courtesy type of meeting, and I know that it came at  
24 the end of a day of meetings and I wouldn't disagree  
25 with the description that Chief Superintendent Healy 10:06  
26 ascribed to it.

27 16 Q. So, can you remember any discussion as to what had  
28 happened at the Commission during the first week and in  
29 particular on the 15th May, in relation to the

1 provision of instructions over the phone and so forth?  
2 A. I can't recall the specific detail, but I know that one  
3 of my concerns in around that time was particularly  
4 around some of the issues we discussed here yesterday,  
5 around the discovery issues and the delays in 10:07  
6 discovery, and I know that it was causing a lot of  
7 frustration for the Commission at that time, and that  
8 would have been very much on my mind at that time, but  
9 I can't specifically recall whether we discussed that  
10 in detail or not. 10:07

11 17 Q. Okay. Now, if we could first of all turn to, what  
12 appears to be a diary entry for 16th October 2015.  
13 It's at page 2337 of the materials.

14 A. Yes, Chairman, I have that here.

15 18 Q. Yes. There would appear to have been a scheduled 10:07  
16 meeting for Friday, 16th October, at 9 -- between nine  
17 and half past in your office re the O'Higgins  
18 Commission?

19 A. Yes, Chairman.

20 19 Q. And you organised that meeting, and Chief 10:07  
21 Superintendent Healy was to attend, and I don't know if  
22 you could just scroll down a little bit, Mr. Kavanagh,  
23 "CPA" also appears that?

24 A. That would be Chief Superintendent Healy Crime Policy  
25 and Administration, it denotes his section, yes. 10:08

26 20 Q. Yes. Do you remember if that meeting took place?  
27 A. I can't, again, specifically remember, but what it  
28 would have been, Chairman, was a meeting just in  
29 advance of my own appearance. At that time, I suppose,



1 again, as I explained yesterday, there were a lot --  
2 one of the issues that we had was because things were  
3 so fluid in terms of having no deputy commissioners, a  
4 lot of meetings were arranged and then due to  
5 circumstances beyond my control, had to be cancelled. 10:08  
6 So I wouldn't be able to tell from this, it may be  
7 possible to tell it from the electronic diary,  
8 depending what colour it's marked, but I can't tell  
9 from this piece of paper.

10 21 Q. Okay. well, was there any sense that you had to meet 10:08  
11 with Chief Superintendent Healy before you met with  
12 your legal advisors in order to organise the Guards'  
13 thoughts on the instructions that had been provided in  
14 May of 2015?

15 A. No, it would have been a routine meeting to get an 10:09  
16 update from Chief Superintendent Healy in terms of  
17 where we were and so, it would have been a face-to-face  
18 meeting with Chief Superintendent Healy.

19 22 Q. Now, I think there were two subsequent meetings, one on  
20 the 20th October 2015 and a second one on 3rd November 10:09  
21 2015, both of those meetings involved the legal team,  
22 is that correct?

23 A. That's correct, Chairman, yes.

24 23 Q. Now, the one on the 20th October 2015, have you a  
25 memory of that meeting? 10:09  
26 A. Yes, Chairman, I do.

27 24 Q. Yes. And it would appear, if we just look at  
28 Ms. Ryan's notes of the meeting, just for a minute,  
29 which were at page 2339 of the materials?

1 A. Yes, I have that here.

2 25 Q. Yes. It would appear that that meeting took place in  
3 the evening in the Bridewell Garda Station, Ms. Ryan  
4 was present, Mr. Smyth, Mr. Byrne, Mr. MacNamee, all  
5 counsel, and Chief Superintendent Healy and Inspector 10:10  
6 McNamara?

7 A. That's correct, Chairman, yes.

8 26 Q. And it would appear that the first thing that was  
9 discussed at that meeting was Sergeant McCabe's  
10 motivation? 10:10

11 A. Yes, Chairman.

12 27 Q. And I wonder could you elaborate on your memory of the  
13 discussions at that meeting in relation to the  
14 motivation question?

15 A. From my recollection, Chairman, the meeting was very 10:10  
16 much around, as I said at the outset, my own  
17 preparation for my appearance as Assistant Commissioner  
18 HRM. However, as a preamble to the meeting we  
19 discussed the necessity for why it would remain  
20 necessary to challenge Sergeant McCabe's motivation in 10:10  
21 the context of what had gone before and particularly  
22 around my duty to balance the rights of the other  
23 individuals against whom allegations were being made  
24 and how that that -- it was a general discussion around  
25 the balance that I had to strike as Commissioner of An 10:11  
26 Garda Síochána representing the interests of the  
27 individual members of whom allegations were made  
28 against. But also, then, I mentioned it yesterday,  
29 Chairman, in terms of the public confidence issues in

1 the organisation as a whole and indeed the whole of the  
2 organisation in terms of all of the people in the  
3 organisation and the work that they were doing in  
4 servicing the community.

5 28 Q. Well, was there any sense, Ms. O'Sullivan, that you 10:11  
6 were under pressure from other members of the  
7 organisation, leaving Sergeant McCabe out of it, that  
8 their point of view had to be put across and Sergeant  
9 McCabe was to be challenged in relation to making  
10 various complaints? 10:11

11 A. No, Chairman, I was never under pressure from anybody  
12 within the organisation. But I was very conscious of  
13 the impact -- as Commissioner of An Garda Síochána, I  
14 was very conscious of the impact that these allegations  
15 had, I mentioned this yesterday, on public confidence 10:11  
16 in An Garda Síochána, which had an impact on how An  
17 Garda Síochána was being perceived in the community. I  
18 was also very conscious of the fact that very serious  
19 allegations had been made against individual members of  
20 An Garda Síochána, and getting the balance of their 10:12  
21 rights and giving them an opportunity to be heard  
22 before the Commission was, from the outset, part of my  
23 consideration about the instructions that I gave based  
24 on the advices that we received.

25 29 Q. Yes. Well, it would appear from Ms. Ryan's notes that 10:12  
26 consideration was given or there was mention in the  
27 meeting at least that you could refuse or object to  
28 being questioned in relation to Sergeant McCabe's  
29 motivation when you gave evidence at the Commission,

1 can you remember that?

2 A. I certainly remember, Chairman, in both of those  
3 meetings, there was an anticipation that I might be  
4 challenged by Sergeant McCabe's legal team in the  
5 context of the advices and the instructions that I 10:12  
6 gave, and I know that from my memory, in both of those  
7 meetings there were discussions around legal privilege,  
8 around the extent to which legal privilege could be  
9 challenged and my entitlements to claim privilege and  
10 the latitude that was there to examine that privilege. 10:13

11 30 Q. Okay. And then, what was the outcome of those  
12 discussions? We know you have now waived your  
13 privilege in relation to the Commission.

14 A. Yes. And the advices that I was receiving from my  
15 memory at that time, was in the context that it was an 10:13  
16 absolute entitlement for me to claim privilege, that it  
17 was possible that there would be an attempt to reveal  
18 my privilege, indeed it may be a case that the Chairman  
19 may well direct or, as -- if I use an example,  
20 Chairman, maybe, as you have done as Chairman, have 10:13  
21 asked me to waive my privilege in the interests of  
22 getting to the truth of matters, and that if that came  
23 up at the Commission, then we would have to deal with  
24 that separately, but not within the confines of the  
25 Commission because obviously I would need to take 10:14  
26 further advices in relation to that. But as it  
27 transpired, Chairman, that never arose within the  
28 Commission.

29 31 Q. If we could just turn to the top of page 2340, you see

1 Ms. Ryan has made a note:

2

3 "Commissioner would not want to set a precedent if  
4 meeting it head on."

5

10:14

6

Can you remember what that refers to?

7

A. Again, Chairman, as I said yesterday, my caveat is  
8 commenting on other people's notes but I can give you  
9 my memory from the combination of meetings. From my  
10 memory, it was that I was concerned about setting a  
11 precedent of waiving my -- as Commissioner, my  
12 constitutional right to privilege, and I was also, at  
13 the same time, endeavouring to the greatest extent  
14 possible, and the fullest extent possible, to be in a  
15 position to assist the Commission with any questions  
16 that the Chairman may put to me.

10:14

10:14

17

32 Q. Have you a memory of transcripts being at that meeting?

18

A. There was certainly transcripts, I would say at both  
19 meetings, yes.

20

33 Q. Yes. And was consideration given to what had been said  
21 during Module 1 in the O'Higgins Commission, in  
22 particular on day 2 and day 3, can you remember?

10:15

23

A. I certainly remember transcripts and I certainly  
24 remember the conversations around motivation. I  
25 remember I was very keen to be sure that we were  
26 balancing everybody's rights, including Sergeant  
27 McCabe's, and getting a balance and also the rights of  
28 the individuals and the organisation, but particularly  
29 the individuals that allegations had been made against,

10:15

1 and the more serious allegations of corruption and  
2 malpractice. But at the same time we wanted to deal  
3 with getting to the truth of the matter and  
4 establishing all of the facts before the Commission.

5 34 Q. Okay. Do you have a memory of consideration or 10:15  
6 analysis of transcripts at that meeting?

7 A. I wouldn't call it analysis, but certainly the  
8 transcripts were available and they would have been  
9 referenced at various times from my memory.

10 35 Q. During the meeting. Do you remember ever seeing the 10:16  
11 submissions that were lodged on your behalf at the end  
12 of Module 1 of the Commission's work?

13 A. Yes, from my memory, Chairman, I saw them later. The  
14 one that would have been sent to me directly for my own  
15 personal input and contribution was Module 5, at the 10:16  
16 end of Module 5, when I had personally given evidence  
17 at the Tribunal and I was asked to confirm the accuracy  
18 of that.

19 36 Q. Okay. And when do you think you saw Module 1 10:16  
20 submissions?

21 A. It was at a later stage, Chair, and I can't be  
22 definitive about exactly when but it was at a later  
23 stage when all of the submissions had been combined.

24 37 Q. Okay. Now, if we could just go to the second meeting 10:16  
25 you had, which was just before you gave evidence to the  
26 Commission, with counsel. If we look at Ms. Ryan's  
27 notes, first of all, they are at page 2667. And you  
28 will see they open:  
29

1 "Motivation, we questioned this. No particular mala  
2 fides against Sergeant McCabe, just his motivation.  
3 Initial letter from counsel re motivation, email and a  
4 letter from us to Commission."

10:17

5

6 Do you remember those being --

7 A. Just if I can just read this note for a moment.

8 38 Q. Yes, certainly. 2667.

9 A. Yes, sorry, I have read the note now, just to --

10 39 Q. Yes. Do you remember that exchange taking place?

10:17

11 A. Yes. And it's consistent with what we had -- the issue  
12 from the outset, it was never about questioning  
13 Sergeant McCabe's mala fides, it was always about  
14 getting an understanding of the context and the  
15 background and the reasons why Sergeant McCabe  
16 concluded that there was corruption and malpractice,  
17 and what elements of the individual incidents led to  
18 that belief.

10:17

19 40 Q. Okay. Well, maybe if we look at Chief Superintendent  
20 Healy's notes, which record something, I think,  
21 slightly different, and they appear - his handwritten  
22 notes, which I think he said more accurately reflect  
23 what happened at that meeting - at page 2709 of the  
24 materials.

10:18

25 A. Yes, I have that here.

10:18

26 41 Q. And you'll see he says:

27

28 "Standing over the allegation of motivation. Mala  
29 fides, bad faith."

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And the next thing that appears is his notes is:

"Would the Commissioner consider withdrawing?"

10:18

Do you remember that discussion?

- A. No, I don't ever remember anything about withdrawing, any suggestion about withdrawing any allegation, because there was never an allegation of bad faith against Sergeant McCabe, and the -- as I said earlier, the discussion that I remember was around the motivation issue, that basically the -- what that actually meant. Also, I was making the point, and I just see it on both Ms. Ryan's note and on the note here, and just from this note, I also remember explaining to counsel the background to the justice -- and my appearance before the Justice and Defence Committee meeting, how I had always said that whistleblowers and people needed to be listened to, not just whistleblowers but members who wanted to raise issues needed to be listened to and that they may not always be right. And I also recall talking in general terms about that point of view and that policy of An Garda Síochána. So even in this instance, even though some of the -- at that stage, some of the allegations were being withdrawn or had been unfounded, that basically it was still very important we got to the very bottom of this and that we saw it through the whole way through.

10:19

10:19

10:19

10:19



1 42 Q. Well, you are aware Chief Superintendent Healy, of his  
2 evidence in relation to this note, are you,  
3 Ms. O'Sullivan?

4 A. Yes, I heard his evidence, yes, yes.

5 43 Q. You heard his evidence. Well, I'm suggesting to you 10:20  
6 it's very curious that it records in this note that,  
7 underneath "motivation", "mala fides" and then the  
8 question "would the Commissioner consider withdrawing?"  
9 that those matters are set out in that note, and what  
10 happened the next day was there was a clarification 10:20  
11 given on instructions. And maybe some people might  
12 think that isn't exactly coincidental in light of the  
13 chronology that happened, the immediate chronology  
14 around this, that there was maybe an intention, and I  
15 know you firmly don't say that, Ms. O'Sullivan, but 10:20  
16 that there was an intention to challenge motivation in  
17 a very fulsome way, including integrity, and maybe that  
18 was backed off from in some way in a consideration of  
19 the transcripts and a thinking over of matters.

20 A. No, Chairman, that was never the case. There was never 10:21  
21 any intention -- and I will say this again: There was  
22 never, ever intention about challenging Sergeant  
23 McCabe's integrity. It was never about the man. It  
24 was always about the veracity and the validity of the  
25 allegations that were being made and particularly the 10:21  
26 allegations of corruption and malpractice. As I said  
27 yesterday, from the outcome of the Guerin Report, there  
28 was no question in my mind that there was shortcomings  
29 in the investigations, but what we were still trying to

1 establish -- or have the Commission establish, in the  
2 course of their investigations, is: what elements of  
3 each of those incidents led Sergeant McCabe to believe  
4 that there was corruption and malpractice? And again,  
5 just looking at Chief Superintendent Healy's note, and 10:21  
6 again I'm very hesitant to speculate, but from my  
7 memory it was the fact that some of the allegations had  
8 been already withdrawn by the time that this was  
9 happening, some of them the Chair had -- to be fair,  
10 Sergeant McCabe had withdrawn some, others the Chair 10:22  
11 had found that there was no evidence to support them,  
12 and now we were going into this, but I don't ever  
13 recall being asked to withdraw anything because I don't  
14 believe there was anything to withdraw.

15 44 Q. Okay. Well, perhaps if we just go a little bit further 10:22  
16 down in Chief Superintendent Healy's notes. He seems  
17 to -- and as I said, if you are familiar with the  
18 evidence of Chief Superintendent Healy, I don't intend  
19 going through it with you, since it was so recent, but  
20 it may be that an interpretation can be put on this, 10:22  
21 the matter of mala fides is a matter for the  
22 Commission, that it was to be left floating there and a  
23 conclusion was to be drawn in relation to Sergeant  
24 McCabe's mala fides?

25 A. No, Chairman, that's not my recollection. My 10:23  
26 recollection is very clear, that it was the fact that  
27 some allegations had either been withdrawn, some  
28 allegations had been unfounded and some allegations had  
29 not been established by the Commission, but it was a

1 matter for the Commission to continue to deal with the  
2 extent of all of the issues that were before it and it  
3 wasn't for anybody else to arrive at a conclusion as to  
4 what that may or may not have been, it was up to the  
5 Chairman to conclude, as he did in his findings. 10:23

6 45 Q. And insofar as there is a reference in that memorandum  
7 to the letter re -- I think it's re this, via the CSSO  
8 to the Commission, as I understand it the letter of the  
9 18th May, which set out, albeit inaccurately, the  
10 evidential basis that was to be offered in relation to 10:23  
11 motivation, that maybe that might also lead one to  
12 believe that the issue of integrity or mala fides was  
13 to be left floating there

14 A. No, Chairman, that was never, ever the case. And from  
15 my memory, the reference here to the CSSO may well be 10:24  
16 because I can recall the mistake in the CSSO letter,  
17 that it was another issue that may be put to my in my  
18 evidence. And as it transpired, Chairman, when I gave  
19 my -- probably I am jumping ahead, Ms. Leader, do you  
20 want me to -- 10:24

21 46 Q. No, no. It is fine.

22 A. Yes. So, actually I appeared to give my evidence on  
23 day 29, which I believe was 4th November, I think it  
24 was the day after this note.

25 47 Q. Yes. 10:24

26 A. And on that occasion, I gave my evidence relating to my  
27 capacity as Assistant Commissioner HRM. I was never  
28 questioned in terms of any of the suggestions that have  
29 been put to me now, that in any way there was

1 anything -- I wasn't questioned at all in terms of my  
2 approach or the advices or indeed the instructions that  
3 I gave to counsel, and there was nothing put to me in  
4 relation to the Chief State Solicitor's Office's letter  
5 and indeed it was never referenced in Mr. O'Higgins' 10:25  
6 report subsequently. So I appeared the following day  
7 and was there, and indeed I was cross-examined by  
8 Sergeant McCabe's counsel and I was also examined by  
9 Mr. Justice O'Higgins.

10 48 Q. Okay. Well, we have heard put to Chief Superintendent 10:25  
11 Healy that everybody at the Commission was told that  
12 you were to be cross-examined only in relation to the  
13 particular module which was being dealt with at the  
14 Commission, and people were reminded about that.

15 A. Well, I wasn't aware -- yes, I wasn't aware of that, 10:25  
16 Chairman, when I went to give my evidence.

17 49 Q. So if people were told that, it may not be surprising  
18 that you weren't cross-examined in relation to  
19 motivation, if the Chairman had directed that that was  
20 to be the case? 10:25

21 A. Well, again, I don't want to speculate or reflect back  
22 on Mr. Justice O'Higgins's actions but I am sure if  
23 Mr. Justice O'Higgins had a concern, he would have  
24 allowed the examination to take place.

25 50 Q. Well, maybe if we look at the transcript, and if we 10:26  
26 could turn to Volume 7 at page 3508. There may be  
27 something to the suggestion that you weren't to be  
28 cross-examined in relation to motivation, because  
29 Mr. Justice O'Higgins was taking it upon himself to

1 clarify matters and to give you an opportunity, albeit  
2 not under cross-examination, to clarify matters.

3 A. Well, that was never put to me, Chairman.

4 51 Q. Yes.

5 A. But I see the clarification and the matter was  
6 clarified on day 29, but it was never put to me did I  
7 wish to have the matter clarified.

10:26

8 52 Q. Okay. Well, if we look at page 3508, we will see that  
9 Mr. Justice O'Higgins says:

10

10:26

11 "Before we commence there is one matter that I would  
12 like a bit of assistance and clarification on from you,  
13 Mr. Smyth. It is in relation to a question that has  
14 been dormant for some time concerning the integrity of  
15 Sergeant McCabe and his mala fides or bona fides in  
16 making his complaints."

10:27

17

18 And thereafter, we are all familiar with that piece of  
19 transcript here, but it would appear that it was not  
20 going to be a matter of integrity or mala fides, and  
21 Mr. Smyth was clarifying his instructions at that  
22 stage, albeit you were not under cross-examination in  
23 relation to your instructions.

10:27

24 A. Yes, Chairman, Mr. Smyth -- or sorry, I beg your  
25 pardon, Mr. Justice O'Higgins, and indeed an  
26 interaction between Mr. Smyth and to my memory, and I  
27 know it's in the transcripts, Mr. Gillane, clarified  
28 the matter, and thereafter I gave my evidence.

10:27

29 53 Q. Yes. So it would appear that it took until that day,

1 which was a number of months after May, and with you  
2 under the threat of cross-examination, I suppose,  
3 Ms. O'Sullivan, to bring that to a head and to clarify  
4 the instructions?

5 A. Chairman, I never felt under threat of 10:28  
6 cross-examination. If I am before a commission or in  
7 this case the tribunal, my job is to give my evidence  
8 fully and openly and transparently to the Commission.  
9 I was always prepared to do that, from day 1. On day 2  
10 when this issue arose I was always prepared to do that. 10:28  
11 I never felt under threat at all by this. This was  
12 something that I was always prepared to deal with in  
13 the Commission and indeed if Mr. Justice O'Higgins at  
14 any stage had directed me or indeed anybody had sought  
15 to have me before the Commission, I was more than 10:28  
16 prepared to do that.

17 54 Q. And you had discussed the matter in detail with your  
18 legal team on two occasions beforehand, isn't that the  
19 case? You were prepared to be cross-examined in  
20 relation to the matter? 10:28

21 A. Yes, Chairman, I was.

22 55 Q. And you had anticipated it?

23 A. Yes, yes.

24 56 Q. Now, I think the Commission then finished its hearings  
25 and there is no further matters, unless somebody else 10:29  
26 wants to deal with, in relation to that, until such  
27 time as the report was published in May of 2016.

28 A. That's correct, Chairman. My memory is that the -- the  
29 report was published around, I believe, the 11th May.

1 I may be corrected on that, but I think it was 11th May  
2 2016.

3 57 Q. Okay. And you had had the report yourself prior to  
4 that --

5 CHAIRMAN: The leaked reports of the matter were 10:29  
6 discussed on RTÉ on 6th May 2016.

7 58 Q. MS. LEADER: I just want to shortly deal with the  
8 overview in relation to the final submissions that were  
9 put in, in relation to Sergeant McCabe. And I think  
10 they appear at page 2897 of the materials. And you 10:30  
11 will see at paragraph 39 of those submissions, there is  
12 a commentary on the motivation of Sergeant McCabe.

13 A. I beg your pardon, at paragraph?

14 59 Q. Sorry, the first page of those submissions, you will  
15 see is an overview in relation to the whole of the 10:30  
16 evidence heard at the Commission, and that the first  
17 page is at page 28 -- 2897?

18 A. 2897. I have 2897 here, I just don't see the overview.

19 60 Q. It's headed "Overview", sorry, just to put it in  
20 context. 10:30

21 A. Yes, I beg your pardon, yes, I see that.

22 61 Q. You will see at part D of those submissions there is a  
23 commentary on the motivation of Sergeant McCabe.

24 A. Yes, Chairman.

25 62 Q. And then you will see at paragraph 39: 10:31  
26  
27 "The Commission has heard evidence and received  
28 submissions in relation to sensitive allegations made  
29 against Sergeant McCabe but it may be helpful to

1 summarise the key dates. The allegation was first made  
2 in December 2006, investigated by Inspector Cunningham  
3 in early 2007 and DPP directions to the effect that  
4 there was nothing of a criminal nature in the complaint  
5 were communicated to the parties in April and May." 10:31

6  
7 That appeared to end the matter. And then there is  
8 reference to the public unpleasantness with the Ds.  
9 And then there is a reference to:

10 10:31  
11 "Up to this point, while Sergeant McCabe had made  
12 complaints against other members, they were relatively  
13 few in number and dealt with to Sergeant McCabe's  
14 satisfaction. Thereafter, he commenced making  
15 generalised complaints about behaviour, such as 10:32  
16 lateness and also some specific complaints against more  
17 junior members."

18  
19 And then there is, at paragraph 42, the reference to  
20 the DPP's direction, and: 10:32

21  
22 "Once there is a refusal, Chief Superintendent Clancy,  
23 Superintendent Cunningham and Chief Superintendent  
24 Rooney all refused, then it is after this that Sergeant  
25 McCabe began making complaints against them 10:32  
26 specifically."

27  
28 And it goes ahead to refer to him:  
29



1 "...be contacting victims of crime to encourage them to  
2 complain and redirecting some of his earlier  
3 complaints."  
4

5 It refers to targeting of officers and then at 10:32  
6 paragraph 44 it refers to Sergeant McCabe then takes  
7 the approach, that:

8  
9 "If anyone to whom he makes a complaint does not agree  
10 with him, he makes a further complaint to a further 10:32  
11 authority."  
12

13 And then we have, at paragraph 45:

14  
15 "As noted by Assistant Commissioner Byrne in his 10:33  
16 evidence during Module 7, there was a clear change in  
17 Sergeant McCabe's behaviour in late 2007 and early  
18 2008. This is not explained satisfactorily by any  
19 other cause than the severe anxiety and strain he was  
20 suffering around this time, leading to him having to 10:33  
21 take significant periods of time off duty."  
22

23 And then it completes that section by saying:

24  
25 "A very troubling aspect of this is that even after all 10:33  
26 of the hearings and after he had withdrawn so many  
27 allegations, Sergeant McCabe's submissions in relation  
28 to Module 7 made many of the same unsupportable  
29 allegations yet again."

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So, I think first of all, did you see those submissions?

A. Yes, Chairman, I saw them, again as I say, at a later stage when they were completed.

10:33

63 Q. And I think the date on those submissions, it appears at page 2908, is the 1st February 2016.

A. That's correct, Chairman, yes.

64 Q. And I suppose, to put it at its mildest, Ms. O'Sullivan, that it would be suggesting there that Sergeant McCabe was not making his complaints for a genuine reason of a concern re policing matters and policing standards in the district, but rather from some sense of dissatisfaction that he had against particular officers of An Garda Síochána?

10:34

A. Chairman, that isn't the case, but I don't know whether I should or not, and I can take your direction on it, Chairman; these submissions were made after the evidence had been heard, and I think it's a summation of what actually and factually transpired throughout the evidence. It was never the case -- and, as is Mr. Justice O'Higgins's finding, it was always the case that Sergeant McCabe made his complaints genuinely, they were genuinely held beliefs that he had, but sometimes, particularly in relation to the allegations of corruption and malpractice, unsupported by evidence. And from the outset that is what we were doing, was testing the evidence and the validity and veracity of all of the allegations that were made. As I said,

10:34

10:34

10:35

1 there was no question that Sergeant McCabe quite  
2 rightly identified, I will call them, shortcomings in  
3 investigations and quite rightly brought them to the  
4 attention of Garda management and made complaints about  
5 them and that allowed us to actually start to address 10:35  
6 those problems. But there were other allegations that  
7 Sergeant McCabe made, those of corruption and  
8 malpractice, that had to be tested, were tested in  
9 terms of the evidence that was proffered before the  
10 Commission, and they were the allegations. But it's 10:35  
11 not the case that in any way that Sergeant McCabe made  
12 these out of any ulterior motives other than to bring  
13 matters to the attention of An Garda Síochána. And  
14 certainly when the evidence was tested, I don't wish to  
15 rehearse Mr. Justice O'Higgins' findings, but the 10:36  
16 findings are laid out in the O'Higgins Report in terms  
17 of all of the allegations, including the shortcomings  
18 in the investigations, which were serious shortcomings  
19 particularly in terms of victims of crime, but also  
20 Mr. Justice O'Higgins' findings in terms of the 10:36  
21 allegations of corruption and malpractice, which he  
22 found to be either exaggerated, unfounded or  
23 overstated. And that was the facts of the matter and  
24 that was the outcome of the inquiries carried out by  
25 Mr. Justice O'Higgins. 10:36

26 65 Q. You see, Ms. O'Sullivan, I don't think anybody is  
27 suggesting that the evidence shouldn't be tested with  
28 regard to what Sergeant McCabe was saying. What is at  
29 issue is, whether it was appropriately tested, and

1 these submissions would seem to suggest that Sergeant  
2 McCabe was making his complaints because he had some  
3 sort of a grudge or a grievance for his own reasons,  
4 his own personal reasons, against senior members of An  
5 Garda Síochána in the Cavan-Monaghan district, and it's 10:37  
6 that, really, that these submissions bear out?

7 A. Chairman, I was never of the view, and I remain of the  
8 view, that Sergeant McCabe, his experiences, and I said  
9 yesterday, quite understandably, if somebody from a  
10 human perspective experiences the experiences that 10:37  
11 Sergeant McCabe endured in his -- in the Cavan-Monaghan  
12 area, one's perspective would certainly change, and  
13 that was what the issue was around what had led  
14 Sergeant McCabe, what had changed and what had led  
15 Sergeant McCabe to conclude that all of these incidents 10:37  
16 combined amounted to corruption and malpractice on  
17 behalf of individual members and indeed on behalf of An  
18 Garda Síochána.

19 66 Q. Thank you. If we could just go on then to when the  
20 report was published. The report, which you had had 10:38  
21 already, was published, I think, on 11th May 2016.

22 A. That's correct, Chairman, yes.

23 67 Q. And I think it would appear on that date, Mr. Ken  
24 O'Leary was Assistant Secretary General in the  
25 Department of Justice, am I correct in that -- 10:38

26 A. That's correct, yes.

27 68 Q. -- would appear to have emailed you that morning with a  
28 copy of the Minister's speech when the report was  
29 released. And that email, it appears in a number of

1 places but I think it's at page 4298 of the materials.

2 A. Sorry, what volume is that?

3 69 Q. It's volume 8.

4 A. I don't have to have volume 8. I beg your pardon, I  
5 do. 4298? 10:39

6 70 Q. Yes.

7 A. Yes.

8 71 Q. So that email would appear to have been sent from  
9 Mr. O'Leary to you at 9:44:  
10 10:39

11 "Re: Publication of Commission of Investigation.  
12 Certain matters relative to the Cavan-Monaghan division  
13 of An Garda Síochána. Final report."  
14

15 And if we turn to page 4299, he was in turning 10:39  
16 forwarding an email which he had received from other  
17 Department of Justice officials, which would appear to  
18 be the Minister's speech on the release of the report.

19 A. Yes, Chairman, that appears to be the case, yes.

20 72 Q. And that continues for a number of pages, and the 10:40  
21 Minister can speak to that, but would that in any way  
22 be an unusual communication from the Department of  
23 Justice to you?

24 A. No, not at all, Chairman. So, again, maybe to put it  
25 in context; the Department would regularly send press 10:40  
26 statements or press releases that the Minister had made  
27 or was about to make, and likewise, they would often be  
28 shared, we would often share press statements or press  
29 releases that we were about to make about matters that

1 were of joint concern and matters which we were both  
2 likely to have to address. So that would be very  
3 regular occurrence. And I suppose the nature of the  
4 relationship is such, there is a reporting relationship  
5 in the -- there is a reporting relationship in 10:40  
6 legislation, but also, there would be a day-to-day  
7 interaction and relationship which would be very normal  
8 practice. And indeed, it's not just between the  
9 Department of Justice and An Garda Síochána, but in my  
10 experience between other Government departments and 10:41  
11 State agencies, there would be a similar type of  
12 arrangement or relationship.

13 73 Q. Okay. Then I think the next day, you received from  
14 Mr. McLindon a press query in relation to you and the  
15 O'Higgins Commission from Mr. Clifford from The Irish 10:41  
16 Examiner?

17 A. Yes, Chairman, I recall it --

18 74 Q. 2928 may assist you.

19 A. 2928. Thank you.

20 75 Q. And essentially what Mr. Clifford was asking about was 10:41  
21 as follows:

22  
23 "We at the paper understand that the counsel for the  
24 Commissioner, on instruction, told Mr. O'Higgins that  
25 it would be the Commissioner's case in the inquiry that 10:42  
26 Maurice McCabe had acted out of malice. This  
27 submission took place in the early days of evidence  
28 hearing. We also understand that Mr. O'Higgins was  
29 told that evidence to that effect would be produced but

1 ultimately never was. In relation to that, we are just  
2 asking if Commissioner O'Sullivan wished to comment on  
3 the above assertions."  
4

5 Do you remember getting that? 10:42

6 A. Yes, I remember it very well, Chairman.

7 76 Q. Yes. And I think that started a significant media  
8 storm in relation to your instructions in the following  
9 days?

10 A. Yes, Chairman, from my memory, an article appeared the 10:42  
11 following day, 13th May 2016, which was a Friday, in  
12 The Irish Examiner, which published a particular line,  
13 and erroneous facts in terms of the O'Higgins  
14 Commission and proceedings at the O'Higgins Commission,  
15 which started what I can only describe as a vortex. 10:42

16 77 Q. Yes. Well, maybe first of all we will look at your  
17 reply to that media query. And I think it was  
18 essentially that, because of the provisions of the  
19 Commissions of Inquiry Act you couldn't comment,  
20 because of section 11 in particular? 10:43

21 A. That's correct, Chairman. Throughout the proceedings  
22 of the O'Higgins Commission, my concern -- and as  
23 Commissioner of An Garda Síochána and indeed as a  
24 member of An Garda Síochána for 36 years, my respect  
25 for the law and my objective of upholding the law would 10:43  
26 not allow me to comment. Section 11 prohibited any  
27 comment in relation to proceedings at the O'Higgins  
28 Commission, and that had been our position right  
29 throughout the proceedings of the O'Higgins Commission

1 despite the intermittent leaks.

2 78 Q. Okay. And that, the substance of that reply appears at  
3 page 2929 of the materials, and I think at least one  
4 member of An Garda Síochána noted that that reply was  
5 agreed by you on 12/5/2016? 10:44

6 A. Yes, Chairman, that's correct.

7 79 Q. And essentially it was a reference to section 11 of the  
8 Commissions of Inquiry Act?

9 A. Yes, Chairman.

10 80 Q. Now, I think the following day you said the article in 10:44  
11 The Examiner was published and Mr. O'Leary would appear  
12 to have further emailed you at quarter past three,  
13 which would appear to be a text that was being prepared  
14 for the Minister in relation to the media storm that  
15 was about to erupt? 10:44

16 A. Sorry, Ms. Leader, what page is that on, please?

17 81 Q. 4304 of the materials. It's volume 8.

18 A. Yes, Chairman, I have that.

19 82 Q. And we see on the screen that it's an email from  
20 Mr. O'Leary at, in or around quarter past three. It 10:44  
21 again refers to section 11 of the Commission of  
22 Investigations Act, and the appropriateness of  
23 commenting on private sessions of the Commission, and  
24 then he says:

25 10:45

26 "In publishing the report, the Tánaiste expressed the  
27 hope that all those affected by the report can accept,  
28 as she does fully, that Mr. Justice O'Higgins looked at  
29 all the facts fairly and dispassionately and made every



1 effort to do justice to the position of all."

2  
3 And in brackets at the very end of that email:

4  
5 "(There is no question of issues of confidence in the 10:45  
6 Garda Commissioner arising.)"

7 A. Yes, Chairman. And if I can put that in context: The  
8 13th of May 2016, as I say, was a Friday, and I  
9 remember following from the publication of that  
10 article, there was an immediate calls from both -- 10:45  
11 political calls for me to consider my position and  
12 issues began arising in terms of the Minister and  
13 whether or not there was confidence in me. And so,  
14 there were very pressing issues that day. I can recall  
15 that morning I was actually attending a seminar in 10:46  
16 Farmleigh and following from there, there was just  
17 constant calls wanting to know what was my position.

18 83 Q. Okay. Did you speak to Mr. O'Leary about the matter,  
19 do you think?

20 A. I would have spoken to Mr. O'Leary on several occasions 10:46  
21 about the matter, yes, Chairman.

22 84 Q. Okay. And did you refer back to your conversations on  
23 the 15th May in relation to the matter the previous  
24 year?

25 A. I may well have, Chairman, because Mr. O'Leary would 10:46  
26 have been well aware of the fact that there was never  
27 an issue in terms of integrity, it was always the issue  
28 about what the evidence and testing of the evidence.  
29 So yes, I may have well have, but I certainly spoke to

1 him on several occasions in relation to this specific  
2 matter.

3 85 Q. Okay. Well, that may appear slightly unusual,  
4 Ms. O'Sullivan, in circumstances where, as I understand  
5 your evidence in relation to the phone calls of the 10:47  
6 15th May, that you have no particular memory of them?

7 A. When I say I have no particular memory, I don't  
8 remember the specifics, but I have no question, I would  
9 have spoken to Ken O'Leary about the most serious and  
10 sensitive matters in An Garda Síochána from both, as 10:47  
11 the Commissioner of An Garda Síochána but also as the  
12 Head of Security and I would not dispute that I would  
13 have spoken to -- I haven't disputed that I spoke to  
14 Ken O'Leary on that day, I just don't remember the  
15 specific detail of what we spoke about. But I have no 10:47  
16 doubt that I would have raised with him about the fact  
17 that an issue had come up at the Commission of  
18 Investigation in terms of the legal argument that had  
19 arisen. So, whether or not in these conversations I  
20 refer back to that, it's a year later, I can't be 10:47  
21 certain but if I had spoken to him earlier, he would  
22 have certainly known my position in terms of I was  
23 never suggesting that anybody acted out of malice at  
24 any point in time.

25 86 Q. Okay. 10:48

26 A. And sorry, Chairman, if I may, the Department and  
27 Mr. O'Leary in particular, and Mr. Waters, would have  
28 been very aware of the supports that I was providing to  
29 Sergeant McCabe and my view of Sergeant McCabe and

1 indeed my view of whistleblowers generally. They would  
2 have been very aware of that.

3 87 Q. Okay. Well, I think yesterday we heard reference to  
4 your section 41 report of the previous March 2014,  
5 setting out each of the steps and matters that had been 10:48  
6 put in place?

7 A. Yes, that's correct, Chairman. And as I say, the  
8 Department would have been very aware of the supports  
9 to Sergeant McCabe, my attitude towards whistleblowers  
10 and indeed the reforms that I was implementing to make 10:48  
11 sure that people were speaking up, including the  
12 engagement of Transparency Ireland, to make sure that  
13 we engaged in a wholesome way with the Speak Up  
14 Campaign which they were launching for State employers.

15 88 Q. If we can then turn to the 15th May, which I think was 10:48  
16 a Sunday, at page 3976 of the materials, which is  
17 volume 7, we see Ms. Prone is emailing you a draft  
18 reply in relation to -- sorry. 3976,

19 A. Yes.

20 89 Q. -- is emailing you a draft reply in reply to Micheál 10:49  
21 Martin, leader of the Opposition, calling on you to  
22 clarify points made to the O'Higgins Commission?

23 A. Yes, Chairman, that's correct.

24 90 Q. Yes.

25 A. Yes. 10:49

26 91 Q. And later on that day, we see, at page 4305, and sorry  
27 it's volume 8 --

28 A. Yes.

29 92 Q. -- Mr. O'Leary is, later on that day, emailing you

1 something that had been emailed to the Minister earlier  
2 on that day in relation to a note that was prepared by  
3 the Tánaiste on the story, and I am quoting from the  
4 email:

5  
6 "...in The Sunday Independent about tapes introduced in  
7 evidence at the O'Higgins Commission of Inquiry,  
8 disproving the evidence of other Gardaí."  
9

10 And again there is reference to section 11 and not  
11 being able to comment.

12 A. That's correct, Justice, yes -- or Chairman, yes,  
13 sorry.

14 93 Q. Yes. And it's a fairly lengthy email setting out what  
15 Mr. O'Leary is advising her in relation to what she  
16 could and couldn't say in relation to the matter. And  
17 if we turn to page 4307 of that email, you will see in  
18 brackets there:

19  
20 "(It calls for Commissioner to make a statement in  
21 relation to the matter.)"

22 A. Yes, Chairman, that's correct.

23 94 Q. And I suppose I just ask you again for the sake of  
24 completeness, is this normal interaction between the  
25 Assistant Secretary of the Department and a  
26 Commissioner of An Garda Síochána?

27 A. Yes, Chairman, it would be normal. And I suppose  
28 again, just in context, in my experience, over 36 years  
29 in An Garda Síochána, I have never experienced anything

1           like what I would describe as this vortex that was  
2           created. The report in the, I believe it was The Irish  
3           Examiner, but of course it was carried by other media  
4           outlets over the weekend, and it led to what I would  
5           say was unprecedented politicisation of my position as 10:51  
6           Commissioner. And there were calls on both me to step  
7           down, for the Minister, whether or not she had  
8           confidence in me, and it was just completely -- it was  
9           every single news bulletin and every single hour.

10    95   Q.   Well, I suppose if you are referring to it as normal 10:52  
11           interaction, it was -- you're describing a very  
12           abnormal state of affairs?

13           A.   Sorry, Ms. Leader, maybe if I separate the two.

14    96   Q.   Yes.

15           A.   So yes, it would be very normal interaction that there 10:52  
16           would be press statements and material shared in terms  
17           of press briefings between ourselves and the  
18           Department. And, as I say, even I know from colleagues  
19           in other Government departments it's quite normal. In  
20           this case, I suppose there is a lot of email 10:52  
21           interaction here and it's daily and hourly, and this  
22           was an evolving situation on the hour literally, there  
23           were -- you mentioned, for example, the leader of the  
24           Opposition was calling on me to consider my position,  
25           the Minister was being called on to ask me to step down 10:52  
26           or had she asked me had I considered my position, and  
27           that is what I mean by unprecedented. It was the  
28           intensity of which these matters were being  
29           personalised towards me as Commissioner of An Garda

1 Síochána and, Chairman, I felt as a public servant,  
2 that I was being used as a political football, if I can  
3 put it that way, and this was the start of something  
4 that continued right up to I retired last year.

5 97 Q. Well, I suppose one way of looking at the exchange of 10:53  
6 emails which we will go through shortly in their  
7 entirety is: It wasn't exactly the sharing of  
8 information, it was writing speeches for one another  
9 and, at the end of the day, it was the Minister you  
10 were accountable to, but it would also appear, and we 10:53  
11 will see this from the email exchange that happened  
12 over the next few days, that those in the Department  
13 were preparing a response for their Minister and the  
14 response was to be given by you?

15 A. Chairman, there were suggestions -- and I know we will 10:53  
16 go through, Ms. Leader, the emails. There were  
17 suggestions of text that could be used or facts that  
18 could be used, but at all times any statement I was to  
19 make or any report I was to write would be my statement  
20 and my report and my feelings. And anybody that knows 10:54  
21 me, knows that it's very difficult to put words into my  
22 mouth; I am very well known for being outspoken in  
23 terms of my own personal beliefs and my own personal  
24 feelings.

25 98 Q. Okay. Well, if we just go forward to the following 10:54  
26 Monday, the 16th May. It would appear you met with the  
27 Minister in the evening time of that day, prior to you  
28 making a statement in relation to the report?

29 A. That's correct, Chairman. Yes.

1 99 Q. Yes.

2 A. Sorry, Ms. Leader, what page is that?

3 100 Q. It was the material that was circulated yesterday at  
4 4801 of the materials, which is volume 9. I think it  
5 may be just on top. 10:55

6 A. Yes. And page number?

7 101 Q. 4801. These are departmental records of that meeting.

8 A. Yes, Chairman, I have that, I beg your pardon.

9 102 Q. Yes.

10 A. Yes. 10:55

11 103 Q. Yesterday's documentation. We will see at 4802, there  
12 is an email from one of the departmental officials  
13 confirming that:  
14

15 "The Tánaiste will be meeting the Garda Commissioner 10:55  
16 today at 5:30pm. Items to be discussed are as follows:  
17 - O'Higgins Commission report  
18 - gangland  
19 - industrial relations."

20 A. Yes, Chairman, that's correct. And maybe again if I 10:56  
21 can put that in context. As well as having these, the  
22 politicisation issues to deal with, we were also  
23 dealing with the most deadly gangland feud in the State  
24 that had started on the 6th of February that year, with  
25 the shootings in the Regency Hotel, and there was also 10:56  
26 the threatened of unprecedented industrial actions. So  
27 they were the three burning issues for the meeting on  
28 that day.

29 104 Q. And we will see that during the course of that meeting,

1 a briefing note was prepared for the Minister and that  
2 is at page 4803 of the materials. which is --

3 A. Yes, I have that here.

4 105 Q. which is a fairly considered document. It included the  
5 terms of reference of the Commission of Investigation, 10:57  
6 a note on the establishment of the Commission, the  
7 statement made by the Minister on publication of the  
8 report, questions and answers re publications,  
9 Mr. Clifford's press articles and related briefing and  
10 implementation of the report, I beg your pardon. 10:57

11 A. Yes, Chair, I see that.

12 106 Q. And again, if we just go to the press matters, which  
13 are at page 4816 of the material, we see a reference  
14 again to Mr. Clifford's story in The Irish Examiner on  
15 the 13th May, and a briefing note to the Tánaiste on 10:57  
16 the 15th May regarding the item which was already had  
17 been forwarded to you, isn't that correct?

18 A. Yes.

19 107 Q. -- by Mr. O'Leary?

20 A. Yes, that's correct, Chairman. 10:58

21 108 Q. So where did you think you stood at the end of that  
22 meeting with the Tánaiste?

23 A. I thought that the meeting gave me an opportunity, as I  
24 say, to put it in perspective. There was the issues, I  
25 had to brief the Tánaiste in terms of the updates in 10:58  
26 relation to the gangland activity, but also in relation  
27 to the industrial relations dispute. In relation to  
28 this issue that had arisen, and as I say, I made it  
29 very clear to the Tánaiste at that meeting that what we



1 were dealing with was a report in a newspaper which did  
2 not factually portray what had actually transpired at  
3 the O'Higgins Commission, and most certainly did not  
4 portray my position or my view. And on the basis of  
5 that, I felt very strongly, as I said earlier here, 10:58  
6 that it had become a very political issue, and that I,  
7 as a public servant and as Commissioner of An Garda  
8 Síochána was being put into a position where my role  
9 and the statutory position was being politicised in a  
10 way that was unacceptable to me. And I outlined to -- 10:59  
11 insofar as I could, because even in my conversations  
12 with the Tánaiste, I was also very conscious of section  
13 11 and the proceedings being private. But I outlined  
14 as broadly and as fully as I could within the  
15 constraints of that what the position was, and what had 10:59  
16 actually transpired at the proceedings and particularly  
17 my position in relation to Sergeant McCabe.

18 109 Q. Okay. Did anything that transpired at the meeting, was  
19 anything that happened at that meeting considered in  
20 preparing your statement which was released later on 10:59  
21 that evening?

22 A. No, the preparation for my statement would have been  
23 ongoing over that weekend.

24 110 Q. Yes.

25 A. And my statement would have been released, I can't 10:59  
26 recall precisely the time, but maybe simultaneously to  
27 the meeting, I just can't recall. But my statement  
28 would have been released, my first statement would have  
29 been released on the 16th of May.

1 111 Q. Yes. I think there is a copy of that statement at page  
2 3977 of the materials.

3 A. Yes, Chairman, I have that here.

4 112 Q. Yes. And from that, it would appear it was released  
5 that evening, but that may not be correct. There is an 11:00  
6 email from the Press Office at 20:21.

7 A. Yes, and I just -- just over the page, I see it was  
8 issued by Sergeant Molloy in the Press Office at 20:20.  
9 So yes, it was that evening, and perhaps on my return,  
10 on my final approval, I just can't recall precisely. 11:00

11 113 Q. Do you think the issue of that statement was in any way  
12 dependent on what transpired during the meeting with  
13 the Minister?

14 A. No. From my recollection, this statement was being  
15 prepared over the weekend and it would have been 11:00  
16 finalised probably on my return to the office once I  
17 gave final sign-off on it.

18 114 Q. If we just go through the statement, it says:  
19

20 "As previously stated, An Garda Síochána has fully 11:01  
21 accepted the findings and recommendations of the  
22 O'Higgins Commission. We will examine what lessons can  
23 be learned and ensure the issues arising are fully  
24 addressed. Our immediate concern arising out of the  
25 O'Higgins Commission must be with victims who believe, 11:01  
26 with justification, that they were not dealt with  
27 properly by An Garda Síochána. We are sorry the  
28 victims did not get the service they were entitled to  
29 and we will seek to work with them."

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It then refers to the modernization and renewal programme in relation to victims, learning from past mistakes. There is a reference to the work of the Garda Síochána that is being done. And also then, if we just go down to five paragraphs from the bottom, there is a reference to you being asked to clarify certain matters in relation to the proceedings before the O'Higgins Commission. And again, there is a reference to section 11:

11:01

11:02

"The witnesses who gave evidence before the Commission doing so on the expectation that their evidence, except as may be included in the final report, would remain private."

11:02

And that you:

"...have been advised that you cannot discuss the details of any proceedings before the O'Higgins Commission."

11:02

Then the statement appears:

"I have consistently and without exception within An Garda Síochána and in public stated clearly that dissent is not disloyalty, that we must listen to our people at every level with respect and with trust and that we stand to gain rather than lose when members

11:02

1 bring to our attention practices they believe to be  
2 unacceptable."

3  
4 And you says:

5  
6 "Like every member of An Garda Síochána, Sergeant  
7 McCabe's contribution is valued and the service has  
8 changed for the better in response to the issues about  
9 which he has complained. I want to make it clear that  
10 I do not and have never regarded Sergeant McCabe as  
11 malicious." 11:02

12  
13 And then, there is a reference there to the charge that  
14 is made against you in the press attention in the  
15 proceeding days. 11:03

16 A. That's correct, Chairman, yes.

17 115 Q. Yes.

18  
19 "Any member of An Garda Síochána who raises issues will  
20 be fully supported. Each and every one of them must 11:03  
21 know that they have the right and responsibility to  
22 raise their concerns and be confident and that they  
23 will be listened to and addressed, but they won't  
24 always be right and we in management won't always be  
25 right either. But we are on a journey towards a 11:03  
26 markedly better policing service and we will learn from  
27 every mistake we make."

28  
29 Now, did you anticipate that that would be the end of

1 the matter at that stage?

2 A. Yes, Chairman, I hoped it would be. Because, as  
3 Mr. Justice O'Higgins had said in his report, these  
4 issues had gone on a very, very long time and a lot of  
5 people had lived under the strain of them and that he 11:03  
6 had hoped and expressed in his report that he had hoped  
7 that this could be put behind everybody. I certainly,  
8 over that weekend I had gone as far as I felt I could  
9 go at that point in time to actually explain and I  
10 thought that by issuing this statement it may give 11:04  
11 people an understanding of my position and it may also  
12 give a clear understanding of the prohibition at that I  
13 was under in terms of explaining any further what  
14 transpired at the Commission of Investigation. And I  
15 also felt very strongly, Chairman, over that weekend 11:04  
16 and in the days ensuing, that the deliberate and  
17 selective leaks that were being put into the media were  
18 designed to put me in a position where I could not  
19 respond to it and to do the maximum damage to my  
20 position and my reputation. 11:04

21 116 Q. Okay. I think there was to be a debate in the Dáil on  
22 the matter on the 17th May, is that correct?

23 A. That's correct, Chairman, yes.

24 117 Q. And we will see in or around midday on 17th May, and  
25 this is at page 4308 of the materials, which is Volume 11:05  
26 8, you will see that Mr. Forsyth, who I think is a  
27 Department of Justice official, is that correct --

28 A. That's correct, Chairman, he is.

29 118 Q. -- he is emailing you the Leaders' Questions notes on

1 the O'Higgins.

2 A. That's correct.

3 119 Q. And was that on the O'Higgins debate that was to take  
4 place later on that day?

5 A. Later on that day, yes, Chairman. 11:05

6 120 Q. Did this represent a coordinated stance between the  
7 Department and you in relation to the media leaks and  
8 media queries and pressure from -- and political  
9 pressure in relation to what had happened at the  
10 O'Higgins Commission and the question of motivation? 11:06

11 A. I wouldn't describe it as a coordinated stance,  
12 Chairman, what I would describe it as that everybody,  
13 both the Department officials and ourselves, were very  
14 anxious that the Tánaiste would be fully briefed and  
15 fully aware of, insofar as we could share, the factual 11:06  
16 position and the actual truth of the matter before she  
17 would go to Leaders' Questions.

18 121 Q. But I suppose here we have departmental officials  
19 emailing you in relation to what the Tánaiste was going  
20 to say? 11:06

21 A. Yes, Chairman, that wouldn't be unusual; they would put  
22 me on notice of -- obviously the debate would have to  
23 take place, but I would be put on notice of -- because  
24 at that time, and I am finding it even very difficult  
25 to describe the frenzied activity that was around it. 11:06  
26 There was just constant demands for me to make  
27 commentary, for the Tánaiste to make commentary, for  
28 everybody to make commentary, including other political  
29 parties, including other members of the Dáil, the

1 Seanad and of Government, and it was just a constant  
2 barrage of demands for statements and demands for  
3 commentary.

4 122 Q. Okay. So we see Mr. Forsyth emailing you the note  
5 prepared for Leaders' Questions and also we see him 11:07  
6 emailing advice that had been received to the Minister,  
7 being received by the Minister, legal advice, in  
8 relation to what she could say at Leaders' Questions?

9 A. Yes, Chairman.

10 123 Q. And that matter continues on for a while, but we see 11:07  
11 later on in the day, at page 4316 of the materials,  
12 Mr. O'Leary seems to be emailing you again some of that  
13 legal advice that the Minister was receiving in  
14 relation to what could be said at Leaders' Questions?

15 A. Yes, Chairman. 11:08

16 124 Q. Now, that evening, then, at page 4318 of the materials,  
17 we see Chief Superintendent Healy emailing you on the  
18 advice that you had received the previous May 2015, the  
19 email that counsel had sent to Chief Superintendent  
20 Healy in relation to the reconfirmation of your 11:08  
21 instructions?

22 A. Yes, Chairman.

23 125 Q. And Chief Superintendent Healy is saying:  
24  
25 "Commissioner, as requested." 11:08  
26  
27 And the email, it is then sent on to you. And that is  
28 at page 4318, going into 4319 of the materials.

29 A. Yes, that's correct.

1 126 Q. Could you tell us why you had asked Chief  
2 Superintendent Healy to email you on the original  
3 advice at that stage?  
4 A. I just couldn't access it at the time on my computer  
5 and for ease of speed, I asked Chief Superintendent 11:09  
6 Healy to forward it to me.  
7 127 Q. And again we see the adjournment debate on the 17th May  
8 2016 at page 2931 of the materials.  
9 A. Yes, Chairman, I have that here.  
10 128 Q. And the Minister specifically refers in the adjournment 11:09  
11 debate that she is aware of suggestions -- and this is  
12 at page 2932 of the materials:  
13  
14 "I am aware of suggestions that it would not be  
15 unlawful for the Commissioner to disclose the 11:09  
16 instructions she gave to counsel as this would not  
17 involve disclosing evidence given at the Commission."  
18  
19 And she refers to it being a very unusual thing to ask  
20 anybody to do at that stage. I am sorry, are you lost 11:10  
21 in the --  
22 A. Sorry, I am just a little bit lost.  
23 129 Q. It's page 2931 of the materials.  
24 A. I beg your pardon, yes, I have that here, yes.  
25 130 Q. Yes. I suppose you were following those proceedings -- 11:10  
26 A. With interest, Chairman, yes.  
27 131 Q. -- with interest. And did you take anything from the  
28 suggestion that there was a suggestion out there that  
29 you would waive privilege in respect to what had been



1 said to you in relation to instructions, etcetera, at  
2 the O'Higgins Commission?

3 A. I would have seen it as even more than a suggestion,  
4 Chairman; from a number of quarters there were what I  
5 would call demands. 11:10

6 132 Q. And was it in that context that you had asked Chief  
7 Superintendent Healy to email you on the advice which  
8 had been received?

9 A. I wanted to have the advice close to me, so to speak.  
10 I wanted to be able to access it readily. 11:11

11 133 Q. Okay. And I think suggestions -- or questions put on  
12 your behalf earlier on this week, I think there was a  
13 Prime Time programme that evening as well where the  
14 Minister was asked on a number of occasions had she  
15 confidence in you and she didn't give any such 11:11  
16 affirmation on Prime Time, is that correct?

17 A. That's correct, there was a Prime Time programme, that  
18 was a Tuesday evening and there was a Prime Time  
19 programme where there were further leaks of transcripts  
20 on that programme. The Tánaiste appeared on that 11:11  
21 programme and, as you say, Ms. Leader, she was asked on  
22 a number of occasions could she express confidence in  
23 me, and she didn't do so.

24 134 Q. Okay. So if we just go to the following morning, then,  
25 we see -- 11:11

26 CHAIRMAN: Could I just intervene here, just one thing.  
27 Ms. O'Sullivan, you will appreciate that the term of  
28 reference makes a specific reference to allegations of  
29 sexual abuse.

1 A. Yes, Chairman.

2 CHAIRMAN: Now, when you actually read the entire  
3 transcript, you realise it's not there, but that has  
4 been something that has been in the public eye all the  
5 way through since this whole thing started. Was the 11:12  
6 accusation against you that you authorised people to  
7 accuse Sergeant McCabe of sexually abusing a child at  
8 the Tribunal? Was that what you were facing?

9 A. Yes, Chairman. I was facing that, I was facing the  
10 fact that I in some way had underhandedly used the 11:12  
11 private sittings of the Commission to, quote, attack  
12 Sergeant McCabe. I was also -- yes, that is what I was  
13 facing and the innuendo being that I had in some way,  
14 and for improper motives, attempted to in some way  
15 impugn and attack the integrity of Sergeant McCabe by 11:12  
16 using the innuendo of the sexual allegation.

17 CHAIRMAN: But no one ever mentioned at the O'Higgins  
18 Commission anything, and I am quoting the term of  
19 reference because this has to be here for a reason,  
20 anything to do with the false allegation of sexual 11:13  
21 abuse?

22 A. No, Chairman. It was never quoted in the O'Higgins  
23 Commission, but in the public and political mind this  
24 was, if you like, the charge, inverted commas, that I  
25 was facing. 11:13

26 CHAIRMAN: And was it not possible for you to say,  
27 look, nobody ever said that?

28 A. It wasn't as explicit as that, Chairman, it was the  
29 implied charge.

1 CHAIRMAN: So you didn't know where you stood?

2 A. No.

3 CHAIRMAN: All right.

4 135 Q. MS. LEADER: Just in relation to a document I opened to  
5 you headed "17th May Adjournment Debate" that would 11:13  
6 appear to be a draft of what happened the next day on  
7 18th, not what actually happened on the Dáil.

8 A. I beg your pardon, Ms. Leader?

9 136 Q. I think you agreed with me that it was an adjournment  
10 debate -- 11:14

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

12 137 Q. -- it's my fault, it was actually a draft prepared for  
13 the next day.

14 A. Yes, that's correct, Chairman, yes.

15 138 Q. And that was the document at 2931 of the materials. 11:14  
16 Did you have access to that draft?

17 A. No, I don't believe I -- I can't say that I did,  
18 Chairman, and I don't see me on the email thread, but  
19 yes, I don't see me on the email thread.

20 139 Q. So it was simply the Prime Time programme on its own 11:14  
21 that caused maybe the actions of the next day?

22 A. Yes, but there were also ongoing debates and  
23 adjournment debates from, literally from day-to-day  
24 and, as I say, hour to hour, it was like moving sands  
25 all of the time. 11:14

26 140 Q. Okay. So if we turn to emails from the 18/5, of the  
27 morning of the 18/5, which are at page 4217, they  
28 appear on a number of occasions but if we just look at  
29 4217 of the materials.

1 A. Yes, Chairman, I have that here.

2 141 Q. And we see an email from you to Minister Fitzgerald at  
3 her Oireachtas email address at just half past nine,  
4 and you are saying:

5 11:15

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

16  
17 So we see you there providing the text of a speech to  
18 be delivered by the Minister.

19 A. No, Chairman, it's not a speech.

20 142 Q. A statement. 11:16

21 A. It's just facts.

22 143 Q. Yes.

23 A. And it's material that the Minister can rely on as  
24 facts if she wishes to use them. And at this point in  
25 time, allowing for everything that had happened, 11:16  
26 particularly the Prime Time programme, which was  
27 followed that morning by wall-to-wall coverage on every  
28 media outlet in the country, around these issues, I  
29 felt that the Minister, as my line Minister, going into

1 the House, had to be fully informed of my position in  
2 relation to this. And I could not, that day, have a  
3 situation where the Minister for Justice and Equality  
4 and the Tánaiste of the country, if she could not  
5 express confidence in me, well then I had a really 11:16  
6 serious issue to look at in terms of my own position.  
7 144 Q. well, just in relation to what you say, that it was  
8 facts for the Minister, you specifically say in the  
9 first line of the email that you understand -- you are  
10 saying: 11:17  
11  
12 "Minister  
13 I understand that you may have to make a statement this  
14 morning and I enclose a draft for your consideration."  
15 11:17  
16 So, Ms. O'Sullivan, it would appear that you were  
17 drafting a statement for the Minister.  
18 A. No, Chairman, I may have said a draft, I don't mean a  
19 draft statement, it's a draft insofar as here are  
20 pointers that you can choose to use or not. But 11:17  
21 actually, and we probably will come to the email but  
22 they were the facts, the actual facts as opposed to the  
23 erroneous facts that were floating around the  
24 commentary at that time.  
25 145 Q. Okay. well, we will go to the second email, which is 11:17  
26 on the same page, and you say:  
27  
28 "Draft material that may be of some use to you this  
29 morning."

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And it's set out as follows:

"I --"

11:17

First person.

-- have interrogated this matter in detail with the  
Commissioner --"

11:17

who was you, who was sending the email.

-- of An Garda Síochána and I now present to the House  
the outcome."

11:18

So again, I would have to suggest to you that you were  
clearly drafting a statement for the Minister there.

A. No. In fact, Chairman, what I had been doing was  
drafting a statement for myself, given that I felt I  
was in a position where I had to consider my position.  
And I may well have put it into the first person in  
terms of -- or the third person, sorry, for the purpose  
of doing this, but I was not drafting a statement for  
the Minister, but I was giving her the factual position  
and making sure that she was in possession of the full  
facts, that she could rely on.

11:18

11:18

146 Q. I think the email continues by saying:

"First of all, at no point did the Commissioner

1 instruct the legal team representing An Garda Síochána  
2 at the O'Higgins Commission to accuse Sergeant McCabe  
3 of malice. This is important because it was asserted  
4 in a headline in The Irish Examiner last week and has  
5 become a widely accepted truth since. It is not the 11:18  
6 truth and the word malice was not authorised by Nóirín  
7 O'Sullivan. The Commissioner had an absolute duty to  
8 vindicate the rights of Gardaí accused of corruption.  
9 Her legal advice was that the allegations of corruption  
10 made by Sergeant Maurice McCabe against senior members 11:19  
11 of An Garda Síochána must be tested by appropriate  
12 cross-examination. As can be seen from the report,  
13 those allegations were either withdrawn under  
14 questioning or adjudicated in the final report to be  
15 unfounded. Two points must strongly be made in 11:19  
16 relation to this:  
17 A. At no stage did the Commission instruct the legal  
18 team to suggest any question of bad faith or that  
19 Sergeant McCabe's integrity was in question.  
20 B. The Commissioner would have no control over the 11:19  
21 conduct of legal argument within the Commission.  
22  
23 The report of the Commission was published and Sergeant  
24 McCabe judged to have honourable intentions. The  
25 illegal publication of evidence presented to the 11:19  
26 Commission reopened issues the Commission had set to  
27 rest. More importantly, it robbed the Commissioner of  
28 the right to defend her good name, precluded as she was  
29 from commenting on the investigation before the

1 Commission under the provisions of section 11 of the  
2 Commission of Investigation Act 2004. She was further  
3 advised against sharing details of the confidential  
4 briefing of the legal team. I wish to state here and  
5 now that I have full confidence in the Commissioner." 11:20

6  
7 So that's what you sent to the Minister?

8 A. Yes, Chairman.

9 147 Q. And I would say, just having gone through the whole of  
10 that email, that you were drafting a speech for the 11:20  
11 Minister, concluding in a statement that she had full  
12 confidence in you, immediately after a Prime Time  
13 programme had caused you some concern because she  
14 didn't state that she had confidence in you, albeit she  
15 was pressed on the matter? 11:20

16 A. Yes, Chairman, and this was -- it was not a draft  
17 statement for the Minister, it was setting out  
18 material, factual material that the Minister could  
19 choose to use or not, which actually put to right the  
20 inaccurate reportage that had been going on all 11:21  
21 weekend, including on the programme the evening before,  
22 and the comment at the end is a demand from the  
23 Minister to know whether or not she had confidence in  
24 me. It was -- in my view it was unequivocal; either  
25 the Tánaiste and the Minister of the day had confidence 11:21  
26 in me as Garda Commissioner or she didn't have  
27 confidence in me. If she didn't have confidence in me,  
28 then that took me to a place that I had to actually  
29 consider my own position.



1 148 Q. Okay. And in any event, immediately after that you  
2 sent to the Commissioner the email that had been  
3 forwarded to you from Chief Superintendent Healy the  
4 evening before in relation to the advice that you had  
5 received on the 15th May? 11:21

6 A. I sent it to the Minister, Chairperson, yes.

7 149 Q. You sent it to the Minister?

8 A. Yes, yes.

9 150 Q. Immediately after that?

10 A. Yes, yes. 11:21

11 151 Q. And were you happy that she read that out, it would  
12 appear so from the contents of your email?

13 A. I was very reluctant, Chairman, but I felt that at this  
14 point in time, I was completely isolated, I had  
15 absolutely no recourse to anywhere, I had inquired at 11:22  
16 one stage through my own legal people whether or not it  
17 would be possible for Mr. Justice O'Higgins to come out  
18 and set the record straight, but unfortunately -- and I  
19 fully respect that, unfortunately because the  
20 Commission had concluded and had reported, I was 11:22  
21 advised that that was not possible. I was then left in  
22 a very isolated position where this, as I described it  
23 earlier, this vortex and this frenzied activity which  
24 put me into the cusp of a completely political storm,  
25 and, as I say, I felt I was being used as a political 11:22  
26 football, I could not have a situation where the  
27 Minister was going into the House uninformed and  
28 operating on inaccuracies and distorted truths that had  
29 been put out in the media.

1 152 Q. So I take it from that that a decision was made that  
2 the advice of the 15th would be distributed in the Dáil  
3 by you, I think you stated as much --

4 A. Oh, yes, Chairman, I wanted the Minister to be  
5 absolutely fully informed of my position and it wasn't 11:23  
6 a decision that I took lightly, it was a decision that  
7 I considered and I felt that if this was the only way  
8 to put the record straight and to get the truth into  
9 the political and the public domain, that this was the  
10 thing to do. 11:23

11 153 Q. Now, I think that was the day that a file was created  
12 in Garda Headquarters in respect of your instructions  
13 to the Commission and the day that perhaps Chief  
14 Superintendent Healy was called in for a meeting to  
15 discuss the matter as to what happened at the 11:23  
16 Commission?

17 A. Yes, Chairman, that's correct.

18 154 Q. Can you remember who was present at that meeting?

19 A. Again, from my memory, Chairman, it was Deputy  
20 Commissioner Twomey, I can't remember everybody, Chief 11:24  
21 Superintendent Healy obviously, Mr. Ruane, I believe,  
22 and -- I just can't remember everybody that was there.

23 155 Q. Okay. Then we see at page 3979 of the materials, it's  
24 volume 7, sorry, there is a draft statement being sent  
25 to you from Mr. McLindon, who was a media person in An 11:24  
26 Garda Síochána?

27 A. Yes, that's correct, Chairman.

28 156 Q. And what he says to you is:  
29

1 "Commissioner  
2 Please find below draft statement re instructions for  
3 your consideration."  
4

5 And Mr. McLindon says: 11:25

6  
7 "I have concerns in relation to the element and senior  
8 counsel that may need to be discussed."  
9

10 And the draft statement sets out: 11:25

11  
12 "Given the recent public comment, I have decided in  
13 these circumstances to outline my instructions to  
14 counsel."

15 A. Sorry, Ms. Leader, where is that on the page? 11:25

16 157 Q. Just underneath "Draft Statement" so we first of all --

17 A. I see it, yes.

18 158 Q. Yes. So it would appear at that stage that your  
19 instructions to counsel were to be publically revealed?

20 A. Yes, Chairman. For the reasons that I just outlined, I 11:25  
21 felt that it was the only way to get the truth and  
22 to put some right to the distorted facts that were out  
23 there.

24 159 Q. And then we have the Leaders' Questions on the 18th May  
25 in the Dáil, when the matter was interrogated by 11:26  
26 various TDs, isn't that correct?

27 A. That's correct, Chairman, yes.

28 160 Q. Yes. And the Minister was dealing with those queries.  
29 I presume you were paying attention to what was

1           happening in the Dáil?

2           A.    Yes, Chairman, very carefully, as I say.

3 161 Q.    Yes. In relation to that matter. Now, I think on the  
4           19th May you received a letter from the Minister, and  
5           you also met with the Minister directly and 11:26  
6           specifically in relation to the issue of your  
7           instructions?

8           A.    That's correct, Chairman, yes.

9 162 Q.    Can you remember which came first, the letter or the  
10          meeting? 11:26

11          A.    To the best of my memory, the letter --

12 163 Q.    Yes.

13          A.    -- followed by the meeting. But I can't be certain  
14          that I had actually received the letter in the post by  
15          the time the meeting took place. 11:27

16          CHAIRMAN: Sorry, just before you go on to that, sorry,  
17          may I just go back on one thing. You wanted the  
18          advices of counsel which are dated 15th May 2015 to go  
19          out, and you had said that the innuendo was against you  
20          was, you wanted Sergeant McCabe or you authorised that 11:27  
21          Sergeant McCabe be accused of a sexual violence at the  
22          Tribunal, a completely unfounded way. The advice of  
23          counsel actually, had it been published at that time,  
24          said that the specific issue to be put to Sergeant  
25          McCabe was regarding his conduct and interaction with 11:27  
26          senior management following the completion of a formal  
27          Garda investigation into a complaint which resulted in  
28          a direction by the DPP that no further action was to be  
29          taken. That would seem to be what you authorised,

1 certainly not that he had ever done anything to a  
2 child.

3 A. No, certainly not, Chairman. The innuendo, as I say,  
4 was that, in some way, the -- the innuendo and the  
5 background was around the historical situation that 11:28  
6 Sergeant McCabe found himself, and the allegation  
7 against me that was out there that I directed that  
8 Sergeant McCabe, that I instructed that malice would be  
9 deployed against -- an allegation of malice would be  
10 deployed against Sergeant McCabe at the Commission of 11:28  
11 Investigation, and I wanted to make sure that that was  
12 put to right, that that was never the case and that I  
13 had never, ever instructed that Sergeant McCabe had  
14 acted out of malice and that I had never done that and  
15 it was not the truth. 11:28

16 164 Q. MS. LEADER: So we see the letter from Minister  
17 Fitzgerald to you at page 4226 of the materials:  
18  
19 "Dear Commissioner --"  
20  
21 It's at page 4226, Volume 8. 11:29

22 A. Sorry, Chairman, I am mixing up my volumes. 4226,  
23 Ms. Leader?

24 165 Q. Yes.

25 A. Yes, Chairman, I have that now. 11:29

26 166 Q. And we see the Minister is writing to you:  
27  
28 "I refer to our ongoing contacts about matters arising  
29 in relation to the O'Higgins Report and in particular

1 public concerns which have been raised about certain  
2 matters relating to its proceedings. The report is due  
3 to be debated in the Dáil next week. I appreciate  
4 fully the constraints which surround the question of  
5 making further public comment about this matter. I am 11:29  
6 anxious that nothing would be done which would offend  
7 against basic principles of the rule of law. For  
8 example, regard has to be had to the statutory  
9 confidentiality of the Commission proceedings, issue of  
10 the relationship between lawyers and their clients and 11:30  
11 questions of basic fairness. Nevertheless, I think it  
12 would be useful if we met to consider whether there are  
13 any ways public concerns might be met to the greatest  
14 extent possible without offending these basic  
15 principles as well as clarifying matters arising from 11:30  
16 our contacts."

17

18 And then:

19

20 "My private secretary will be in touch to arrange such 11:30  
21 a meeting."

22 A. Yes, that's correct, Chairman.

23 CHAIRMAN: So the Minister is saying no, don't release  
24 legal advice?

25 A. Yes. 11:30

26 167 Q. MS. LEADER: And did it strike you as in any way  
27 unusual considering you had already said it was okay  
28 with you if the legal advice --

29 A. Well, it struck me as unusual, and I can absolutely

1 understand the Minister's concerns, it would be an  
2 unprecedented thing to do. As I say, I found myself in  
3 the position that I felt very isolated, I felt that I  
4 was putting in -- being put into an impossible  
5 situation where I had no choice. But I completely 11:30  
6 understand the Minister's position in relation to it.  
7 168 Q. And you were happy to take her lead in relation to the  
8 matter?  
9 A. Yes, Chairman.  
10 169 Q. If we could turn to, the meeting then was arranged for 11:31  
11 19th May and there is a minute of that meeting in  
12 volume 9, Ms. O'Sullivan, which we received yesterday.  
13 It's at page 4825 of the materials.  
14 A. Yes, Chairman.  
15 170 Q. You will see in attendance, it would appear to be the 11:31  
16 minute prepared by Justice officials in relation to the  
17 matter?  
18 A. That's correct, Chairman, yes.  
19 171 Q. So in attendance:  
20  
21 "Tánaiste NW --" 11:31  
22  
23 That is Mr. Waters, is that correct?  
24 A. Mr. Waters, that's correct.  
25 172 Q. "KOL" is Mr. O'Leary. 11:31  
26 A. Mr. O'Leary.  
27 173 Q. "JOC"?  
28 A. Mr. O'Callaghan.  
29 174 Q. He is a Department --

1 A. He is an assistant secretary in the Department.  
2 175 Q. Of Justice. And then we have Ms. Mannion who I think  
3 was an adviser to the Minister?  
4 A. That's correct, Chairman, yes.  
5 176 Q. You and Deputy Commissioner Twomey? 11:32  
6 A. That's correct, Chair, yes.  
7 177 Q. Yes. And if we just go through that minute. Maybe you  
8 might comment as to whether you think it's accurate or  
9 not.  
10 11:32  
11 "Tánaiste opened meeting speaking to note prepared by  
12 KOL."  
13  
14 I don't think we have that note, but as I said, a lot  
15 of documents were received yesterday, just I don't 11:32  
16 think we have come across it yet.  
17 A. Yes.  
18 178 Q. "Inquired as to the attitude and approach of the  
19 Commissioner at the Commission. T had written to  
20 Commissioner --" 11:32  
21  
22 Is that Tánaiste?  
23 A. The Tánaiste I would imagine.  
24 179 Q. It may have been the letter of the 19th earlier on that  
25 day. 11:32  
26  
27 "-- and would like to be able to put as much on the  
28 record at debate next week as is possible within legal  
29 confines. Commissioner responded referencing that she



1 was very constrained legally under section 11, entitled  
2 to same protections as other witnesses. JT --"

3

4

I think that is Mr. Twomey.

5

11:33

6

-- said that the most appropriate place to allegation  
7 that two officers lied is GSOC."

7

8

9

Is that correct?

10

A. That's correct, Chairman, yes.

11:33

11

180

Q. And I think as matters evolved, there was a reference  
12 made to GSOC by the Minister later on in June.

12

13

CHAIRMAN: And what are we referring to there,  
14 Ms. Leader?

14

15

MS. LEADER: Superintendent Cunningham and Sergeant  
16 Martin.

11:33

16

17

CHAIRMAN: This is all about the Mullingar meeting  
18 again, yes.

18

19

A. So, Chairman, if you wish I can expand on that.

20

CHAIRMAN: I think I know a lot about it already,  
21 unfortunately.

11:33

21

22

A. Okay.

23

181

Q. MS. LEADER: And then there is a reference to you  
24 speaking to one of the people who had been before the  
25 Commission, and then there is a note:

24

25

11:33

26

27

"In response to further questions from Tánaiste re  
28 attitude approach to Commission of Investigation,

28

29

Commissioner said that it was fair and balanced. As to

1 instructions, Commissioner said that at no stage did  
2 she ever ask counsel to question his malice. Etcetera.  
3 JT said you engage counsel to establish facts. SC then  
4 decide the tactics to use. SC represented a number of  
5 parties."

11:34

6  
7 And can you remember, was the question of representing  
8 a number of parties dealt with in any more detail than  
9 that at that time?

10 A. No, Chairman, it was just -- from my memory, it was  
11 just a factual matter that counsel represented An Garda  
12 Síochána, the Commissioner and a number of senior  
13 officers, serving and retired, of superintendent rank  
14 and higher. So it was just explaining that to the  
15 Tánaiste.

11:34

16 182 Q. "Commissioner was a witness herself. It was open to  
17 parties to question her on any issues they had."

18  
19 Did you at that stage understand that there were strict  
20 limits put on your cross-examination when you appeared  
21 there?

11:34

22 A. No, Chairman, as I say, I felt that it was open to any  
23 party, and including Mr. Justice O'Higgins, to question  
24 me if he felt that there was something inappropriate or  
25 improper in the approach that was adopted.

11:35

26 183 Q. Then we see:

27  
28 "Agreed following: Refer public interest case to  
29 GSOC."

1  
2  
3  
4  
5  
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7  
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26  
27  
28  
29

It would be for the Minister to refer that type of investigation to GSOC, not you, is that correct?

A. That's correct, Chairman. It would have to be a section 102 referral, which is a public interest investigation, and that is what subsequently was done. Because, again, a number of facts had emerged -- sorry, a number of wrong or distorted facts had emerged in the media in relation -- in certain media outlets in relation to the conduct of that particular interaction between particularly Superintendent Cunningham and the issue of the production of the tape, and in the interests of fairness to all parties and to put to bed any public disquiet which had emerged through the various reportage, I felt it was absolutely necessary to request the Minister to refer the matter under section 102 to GSOC for investigation, and to have it impartially and objectively considered.

184 Q. Then we see:

"Seek an early public hearing of PA."

Is that Policing Authority?

A. Yes, the Policing Authority, Chairman. And what I had done was, I had written to the Chairperson of the Policing Authority. Because of all of this controversy and the public disquiet I had actually written to the Chairperson of the Policing Authority asking that a scheduled meeting of the 30th May, I believe, would be

1 brought forward and that the matters could be dealt  
2 with there. I felt that was a public forum and it  
3 might give some public reassurance and allow us to deal  
4 with the matters as extensively as we could.

5 185 Q. Okay. So, do you think that's an accurate record of 11:36  
6 the meeting?

7 A. Yes, it would accord with my memory of that meeting,  
8 Chairman, yes.

9 186 Q. And is it in a sense a position being agreed between 11:36  
10 you as Commissioner for the Guards, the Deputy  
11 Commissioner Mr. Twomey, who was at the meeting,  
12 various departmental officials, including -- was  
13 Mr. Waters the Secretary General at that stage?

14 A. Yes, he was, Chairman.

15 187 Q. -- and the Minister, as to how this whole controversy 11:37  
16 was to be dealt with?

17 A. No, I think it was more -- in my opinion, it was more  
18 the Tánaiste asking me to account for what had happened  
19 as extensively as I could, given the constraints that  
20 were in place. That was my memory of what this was. 11:37

21 188 Q. Well, I suppose the note would seem to suggest that it  
22 was agreed between everybody at that meeting what was  
23 to happen from thereon in?

24 A. Oh, yes, certainly, Chairman, in terms of the referral  
25 to GSOC and bring forward the meeting of the Policing 11:37  
26 Authority, yes, that was agreed.

27 189 Q. So that was the 19th May, and I think the following  
28 day, 20th May, and you will see this at 4227 of the  
29 materials, a number of media queries were brought to

1 your attention by Mr. McLindon again?

2 A. Yes, Chairman, there were media queries pretty much  
3 every single day.

4 190 Q. And I think he had gathered a number of them together,  
5 and you will see this from perhaps page 4229. There 11:38  
6 are media queries from The Sunday Times, from The Irish  
7 Examiner, The Irish Independent, in relation to this  
8 specific matter of your instructions in relation to the  
9 O'Higgins Commission?

10 A. Yes, Chairman, that's correct. 11:38

11 191 Q. Now, we then go to the 21st May, which was the  
12 following Monday, and this appears at page 4320 of the  
13 materials. Volume 8.

14 A. Yes.

15 192 Q. And it would appear -- I don't know if you have page 11:39  
16 4320?

17 A. Yes.

18 193 Q. You have Mr. O'Leary emailing you -- Mr. O'Leary from  
19 the Department of Justice, emailing you from the  
20 Department a draft letter from you to be sent to the 11:39  
21 Department?

22 A. Yes, Chairman.

23 194 Q. Yes. So again, I don't know if you could -- that  
24 letter, which I am not going to go through in detail,  
25 the first of that letter appears at page 4321, and in 11:39  
26 essence, it says:  
27  
28 "Dear Tánaiste  
29 I refer to contacts with yourself and your officials

1 about issues which have arisen following publication of  
2 the O'Higgins Commission report and in particular your  
3 letter of the 18th May."

4  
5 And what follows would appear to be Mr. O'Leary 11:40  
6 drafting for you a letter which was to be sent from you  
7 to the Minister explaining or accounting for what had  
8 happened at the O'Higgins Commission the year earlier?

9 A. It would have been a draft which was probably, I had  
10 most likely shared something with Mr. O'Leary, first, 11:40  
11 and in the interests of completeness he would send  
12 something back. I can't just recall but there would  
13 have been lots of to-ing and fro-ing of drafts between  
14 myself and the Department at that stage, and indeed the  
15 Deputy Commissioner and the Department. 11:40

16 195 Q. Well, I stand to be corrected on this, Ms. O'Sullivan,  
17 but this would appear, from my examination of all the  
18 materials, to be the first draft of this particular  
19 letter?

20 A. It may be, but we would have certainly discussed the 11:41  
21 position of a letter and I'm not sure would we have sat  
22 down together and worked something, I can't recall at  
23 the moment. But I know there was very intense, I will  
24 call them communications between ourselves and the  
25 Department at the time and lots of sharing of drafts 11:41  
26 and materials to be put into drafts. So the objective  
27 again, Chairman, was for the purpose of the  
28 completeness, that there would nothing be left out that  
29 the Tánaiste needed to be informed of and needed to be

1           aware of and that she would have the fullest knowledge  
2           possible within the constraints within which we were  
3           working to be able to be fully informed.

4 196 Q.    Okay. Well, certainly if there is an earlier draft,  
5           you might bring it to our attention, but from our point 11:41  
6           of view, and as I say, I may have missed it in all of  
7           the paperwork, but it would appear that this is the  
8           first draft of that letter.

9           A.    It may be, Chairman. I know all of the material is  
10          disclosed, so if it hasn't been discovered -- 11:41  
11          everything that we have is disclosed, so it may well  
12          be.

13 197 Q.    Yes, yes. Do you think you had a meeting with  
14          Mr. O'Leary in relation to the drafting of this?

15          A.    I would have had several conversations and meetings 11:42  
16          with Mr. O'Leary about this particular matter, yes.

17 198 Q.    Okay. Just later on, on the 21st, we see  
18          Superintendent Cunningham at this stage, and this is at  
19          page 3983 of the materials, emailing you in relation to  
20          the press queries. 11:42

21          A.    I am sorry for the delay, Chairman. Yes, I have it.

22 199 Q.    And essentially, Superintendent Cunningham at this  
23          stage is asking you about confirmation of supports and  
24          facilities that will be provided to him in respect of  
25          matters which had arisen in relation to the Mullingar 11:43  
26          meeting?

27          A.    That's correct, Chairman. Superintendent Cunningham  
28          was quite understandably upset and distraught at some  
29          of the material that had appeared in the public domain,

1 which was a misrepresentation of his position also.

2 200 Q. Okay. Then if we go to the next day, of the 22nd May,  
3 and this is volume 9, I am sorry, Ms. O'Sullivan, at  
4 page 4792 of the materials, which I think was a Sunday.

5 A. Yes, that would be correct. 11:43

6 201 Q. We see Mr. O'Leary emailing you again saying:  
7  
8 "I have had another look at this and made some fairly  
9 significant changes. Obviously, it is entirely a  
10 matter for yourself what you feel you can say in any 11:44  
11 letter and it would be understandable if you want to  
12 consult with your legal and no doubt other advisers."  
13

14 And then there is a second version of the letter which  
15 he had sent to you on the first of all -- 11:44

16 A. Yes.

17 202 Q. -- on the 20th I think?

18 A. Yes, Chairman, that's correct.

19 203 Q. Now, you said that you would have had several  
20 conversations and meetings in relation to the creation 11:44  
21 of what eventually became a letter to the Tánaiste in  
22 relation to -- were any of those diared or documented  
23 in any place?

24 A. I don't think so, Chairman. Insofar as if they were,  
25 they would have been discovered. But this was, I can 11:44  
26 only describe it as frenzied activity because there  
27 were so many demands on getting this letter and getting  
28 this letter in its completeness, completed.

29 204 Q. Okay. where did the suggestion of a letter come from



1 originally?

2 A. From the letter of the 19th May, the Tánaiste had  
3 sought a report, from my memory.

4 205 Q. Okay. Well, I don't think she specifically looked for  
5 a report in that letter. If we just go back to page 11:45  
6 4226, what she was suggesting; it would be useful if  
7 you met, which I understand you did later on that day?

8 A. Yes. Well, it may have arisen out of maybe -- my  
9 mistake, Chairman. It may have arisen out of the  
10 meeting later that day, but there was certainly I know 11:45  
11 a requirement for a report for the Tánaiste, that she  
12 would be fully informed.

13 206 Q. Okay. And was it suggested that one of her own  
14 departmental officials would be drafting that report  
15 for her on your -- 11:46

16 A. No, Chairman. What was suggested was there would be a  
17 letter compiled for the Minister to be as fulsome as  
18 possible with the constraints that we were operating  
19 under, to give her as much information, factual  
20 information, as she could possibly have. 11:46

21 207 Q. So in any event, there is a second version of that  
22 letter sent to you from Mr. O'Leary on the 22nd May --

23 A. Yes, Chairman.

24 208 Q. -- which goes on for a number of occasions. And then  
25 we go to the 23rd May, and it would appear fairly early 11:46  
26 in the morning, and this is at page 3984 of the  
27 materials, Ms. Prone is emailing her thoughts on what  
28 she should say in relation to the matter. Sorry, it's  
29 3984 of the materials. That is volume 7.

1 A. Yes, I have that here. Yes, Chairman, I have that  
2 here.

3 209 Q. So was this to be fed into what you were to say to the  
4 Tánaiste or was it -- can you help me in relation to  
5 that? 11:47

6 A. I will just have to have a quick read of it, Chairman,  
7 sorry.

8 210 Q. Yes, sorry. It may be an article from the newspaper, I  
9 am just not sure,

10 A. Yes, I am not sure myself, Chairman, even looking at 11:47  
11 it. Actually, I think it may be an article from --  
12 there seems to be, it seems to be a newspaper article  
13 because I see there is Mary Sullivan, Cork -- I don't  
14 know, Chairman.

15 211 Q. Or it may be a letter? 11:47

16 A. It could be a letter --

17 212 Q. She is bringing --

18 A. Yes, a letter to a newspaper, or something.

19 213 Q. Okay. And then we see later on, again fairly early in  
20 the day, on the 23/5, Mr. O'Leary is emailing you 11:48  
21 another draft of the letter, and that is at page 4324  
22 of the materials in volume 8.

23 CHAIRMAN: This is not making a great deal of sense  
24 though, Ms. Leader. I mean, they are saying the terms  
25 of the O'Higgins Commission should include Mr. Justice 11:48  
26 O'Higgins inquiring into counsel, who would themselves  
27 have to be represented. I mean, that is like me being  
28 asked to inquire into you. I don't know who drafted  
29 this thing.

1 MS. LEADER: well, it would appear that Mr. O'Leary,  
2 did.  
3 CHAIRMAN: Really?  
4 MS. LEADER: I don't know what you are --  
5 CHAIRMAN: I am just confused, I'm sorry, it just 11:48  
6 doesn't make sense. But there you go.  
7 214 Q. MS. LEADER: Maybe Ms. O'Sullivan could help us. I  
8 think there was an ongoing process between you and the  
9 Department in relation to the drafting of a report for  
10 the Tánaiste in relation to the O'Higgins Commission? 11:49  
11 A. Yes, Chairman, that's correct.  
12 215 Q. And Mr. O'Leary was sending you drafts of a letter that  
13 was eventually sent to the Tánaiste about your  
14 instructions to counsel in the O'Higgins Commission?  
15 A. Yes, Chairman, there was input from Mr. O'Leary but the 11:49  
16 final letter that was sent to the Tánaiste was my  
17 letter.  
18 216 Q. You signed it, certainly?  
19 A. It was my letter, Chairman, yes.  
20 217 Q. Yes. So, and just going through the various emails 11:49  
21 which you received from Mr. O'Leary with various  
22 versions of the draft which finally ended up as a  
23 letter to the Tánaiste?  
24 A. Yes, Chairman, as I say, there was obviously  
25 tick-tacking between ourselves and the Department in 11:49  
26 terms of the compilation of the letter and the letter  
27 that was finally sent by me to the Department was the  
28 final version of the letter that I wrote and that I  
29 signed off on.

1 218 Q. And the topic of the letter was your instructions to  
2 your legal team at the O'Higgins Commission, in very  
3 short -- in very short --  
4 A. It was the approach taken by An Garda Síochána to the  
5 O'Higgins Commission, from my memory, Chairman. 11:50  
6 219 Q. And that is paraphrasing in very general terms what the  
7 contents of that letter was to cover?  
8 A. Yes, Chairman, the general approach.  
9 220 Q. Yes. So we then see again on the 23rd, an email from  
10 Mr. O'Leary, and this is at page 4329 of the materials, 11:50  
11 to you, and what he says is:  
12  
13 "I promise this is the last version I will send you  
14 which reflects some of the comments I have received."  
15 A. Yes, Chairman, that's correct. 11:50  
16 221 Q. Now, had you been speaking to Mr. O'Leary about the  
17 ongoing work in hand in relation to drafting the  
18 letter?  
19 A. Yes, Chairman. I had lots of conversations with  
20 Assistant Secretary O'Leary about this specific letter. 11:51  
21 222 Q. Okay.  
22 A. Because of the importance of it.  
23 223 Q. Okay. And then the draft continues again for a number  
24 of pages, and then you see at page 4745 of the  
25 materials, there is an email from you to Ms. Broderick, 11:51  
26 who I think was your private secretary at that time?  
27 A. That's correct, Chairman, yes.  
28 224 Q. And also to Mr. Twomey, who was the Deputy  
29 Commissioner?

1 A. Yes, Chairman.

2 225 Q. And you are asking Ms. Broderick to print off a much  
3 shorter version of the letter which eventually went to  
4 the Tánaiste, is that correct?

5 A. Yes, Chairman, this would have been something I was 11:51  
6 working on myself.

7 226 Q. Yes.

8 A. Yes.

9 227 Q. And I think later on that day, and this is at page 3985  
10 of the materials, volume 7 -- 11:52

11 A. Yes, I have that here.

12 228 Q. -- you email a longer version of the letter to David  
13 Delaney, is that correct?

14 A. Yes, he would be a person in my office, to -- so I  
15 think it was probably to print it off as well or to 11:52  
16 format it maybe for me.

17 229 Q. He is one of the staff?

18 A. He is one of my staff, yes. Or was one of my staff,  
19 Chairman.

20 230 Q. And then we go on to the next day, there is an email 11:52  
21 from you to again Mr. Twomey containing Ms. Prone's  
22 comments, I think, in relation to that letter, is that  
23 correct?

24 A. What page number?

25 231 Q. Sorry, I beg your pardon. 4749 of the materials. 11:52

26 A. Yes, Chairman, I have that.

27 232 Q. So she was providing her expertise in relation to the  
28 matter?

29 A. On the structure, yes.

1 233 Q. Yes.

2 A. Yes.

3 234 Q. And then, later on that day, on the 24th May, at page  
4 4752 of the materials, you are emailing Mr. Twomey  
5 again in relation to a draft of that letter? 11:53

6 A. That's correct, Chairman, yes.

7 235 Q. And I think it's referred to as "Last Chance Saloon" is  
8 it? That is the reference in that email?

9 A. That may be Mr. Twomey's --

10 236 Q. Mr. Twomey's categorisation of it, yes. And later on, 11:53  
11 this isn't strictly a question for you but just for  
12 completeness, Mr. Twomey is emailing Mr. O'Leary  
13 another draft of that letter, and this is page 4755 of  
14 the materials, and he is saying:

15 11:54

16 "Draft attached. Still a work in progress."

17 A. That's correct. What we were doing was working on a  
18 number of drafts and we were -- Deputy Commissioner  
19 Twomey and myself were both inputting to them.

20 237 Q. Yes. We see another draft going from Ms. Broderick to 11:54  
21 Mr. Twomey at ten to seven that evening on the 24th  
22 May, at page 4758.

23 A. Yes, Chairman. And maybe just to explain, because I  
24 know it gets very confusing with all of these drafts,  
25 but what I would normally do is, the draft would come, 11:54  
26 I would have it printed off, I would work on it on hard  
27 copy and then the comments would be made by  
28 superintendent Broderick or one of the staff in the  
29 office and then it would be reverted back.

1 238 Q. And then later on that evening, and this is at page  
2 4334 of the materials, Mr. Ruane was looking at it from  
3 a legal point of view, it would appear?  
4 A. Yes, Chairman. The importance of this letter was that  
5 there were a lot of legal input into it as well, in 11:55  
6 terms of we got some independent legal advices also, in  
7 the context of, I wanted to make sure that the maximum  
8 latitude that we had to fully inform the Tánaiste was  
9 available to us, so I wanted to understand how far we  
10 could go in the context of without infringing on any of 11:55  
11 the restrictions that were in place.  
12 239 Q. And then at quarter past eight, at page 3991 of the  
13 materials, we see Mr. Twomey emailing Mr. O'Leary,  
14 again a draft of the letter, asking him:  
15  
16 "Can you let us know what you think missing?" 11:55  
17 A. Yes. And Chairman, as you will see this is a very  
18 condensed version of the letter and we wanted to make  
19 sure that all of the points in the interests of  
20 completeness were contained within the letter. 11:55  
21 240 Q. Yes. And then at page 4232 of the materials, we see  
22 Mr. Twomey emailing Mr. O'Leary and copying you and  
23 Mr. Ó Cualáin into the email, saying:  
24  
25 "Hopefully nearing the last ." 11:56  
26  
27 And again sorry, I didn't mean to rush ahead. 4232 of  
28 the materials.  
29 A. Yes, Chairman, I have that here.

1 241 Q. And that would -- another draft of the email that was  
2 going to eventually going to be sent to the Tánaiste,  
3 is that correct?  
4 A. That's correct, Chairman, yes.

5 242 Q. Then we see, just slightly later on, we have 11:56  
6 Mr. O'Leary emailing back Mr. Twomey and copying you  
7 and Mr. Ó Cualáin into it, with a version of the -- and  
8 that is at page 4236 of the materials?  
9 A. Yes, Chairman.

10 243 Q. Yes. Then there would seem to be another exchange 11:56  
11 shortly later on at ten to ten, you emailing  
12 Mr. Ó Cualáin and Mr. Twomey in relation to what you  
13 had received from Mr. O'Leary, is that correct?  
14 A. That's correct, Chairman, yes.

15 244 Q. Then eventually at ten to eleven, Mr. Twomey sends I 11:57  
16 think what turned out to be the final -- final version  
17 or close enough to a final version, to Ms. Prone, for  
18 her comments and expertise in relation to the matter,  
19 or is that correct? It's at page 4762.  
20 A. Yes, Chairman, that's correct. 11:58

21 245 Q. And then if we go to the next day, we have Mr. Twomey  
22 emailing Ms. Broderick, who is in your office, I  
23 understand, and this is at page 4768:  
24  
25 "Marie 11:58  
26 Draft statement for Commissioner attached.  
27 John Twomey"  
28  
29 He was the Deputy Commissioner at the time.



1 A. Yes, that's correct, Chairman.

2 246 Q. And then we see that being sent to, coming back from  
3 Mr. O'Leary at ten to eight, and this is at page 4774.

4 A. Yes, Chairman, that's correct.

5 247 Q. Yes. So it would appear that quite a lot of people had 11:59  
6 an input into what was going to be sent to the Tánaiste  
7 and what was sent to the Tánaiste on the 25th?

8 A. Yes, Chairman, there was. This was a very important  
9 letter. I saw it probably as one of the most important  
10 letters that I had been required to write in my career, 11:59  
11 and I very much felt that my, my reputation, but also  
12 my position as Commissioner of An Garda Síochána, was  
13 very much dependent on it. It was very important that  
14 the Tánaiste would be as fully informed, as I said, as  
15 possible, and it was very important that we got the 11:59  
16 factual accuracy right. It was important also to  
17 explain, Chairman, it was also going to form the  
18 template for a second statement which was subsequently  
19 issued on the 25th, the same day in fact, the 25th May.

20 248 Q. Yes. But one of the people who was, it would appear 12:00  
21 from the sequence of emails that I have just opened to  
22 you, a very important contributor and maybe one would  
23 go so far as to say a vetter of the letter, was  
24 Mr. O'Leary, who himself was working in Justice  
25 underneath the Minister, the Tánaiste, to whom the 12:00  
26 letter was addressed?

27 A. I wouldn't call him a vetter, Chairman, I would call  
28 him a contributor. And certainly in the context of  
29 ensuring the completeness and that all of the

1 requirements of the Minister were met, Mr. O'Leary was  
2 certainly the conduit for that.

3 249 Q. Well, certainly Mr. Twomey was asking him was anything  
4 missing from the letter in one of the emails?

5 A. Yes. And the purpose of that, Chairman, as I say, 12:00  
6 would be to ensure the completeness of the letter.  
7 There may be other debates going on or the Minister may  
8 have other queries from either Government colleagues or  
9 opposition parties that we may not be au fait with and  
10 to ensure that all of the matters that needed to be 12:00  
11 answered, were answered in that letter.

12 250 Q. If we just turn to the letter, it's at page 2935 of the  
13 material, we will go through it, it's in volume 5.

14 A. Yes, Chairman, I have it here.

15 251 Q. I will just go through it. This was the culmination of 12:01  
16 the efforts of the previous few days:  
17  
18 "Dear Secretary General --"  
19  
20 And the Secretary General at that time was Mr. Waters. 12:01  
21 A. Mr. Waters, yes.

22 252 Q. "The O'Higgins Commission report presents inescapable  
23 lessons for An Garda Síochána based on our shortcomings  
24 in a number of critical areas, including our dealings  
25 with whistleblowers. We must radically and permanently 12:01  
26 change that pattern and we will apply the insights and  
27 learnings from our recent experiences in developing a  
28 Garda whistleblowers' charter. As I detail below,  
29 actions to address this have already been undertaken

1 and others are in progress.

2  
3 There are clear constraints around the question of  
4 making public comment about this matter. There is a  
5 requirement on me not to do something which would 12:02  
6 offend against basic principles of the rule of law,  
7 that regard must be had to the statutory  
8 confidentiality of Commission proceedings, the  
9 relationship between lawyers and their clients and the  
10 question of basic fairness. 12:02

11  
12 With reference to my previous statement of the 16th May  
13 2016, there have been calls for further clarification  
14 regarding the instructions given to the legal team  
15 representing An Garda Síochána and the approach adopted 12:02  
16 by it in relation to the proceedings of the Commission.  
17 What is at heart at the present controversy is that  
18 despite legal prohibitions and the clear view expressed  
19 by Mr. Justice O'Higgins about the confidentiality of  
20 the Commission's proceedings, certain selective 12:02  
21 information purporting to relate to those proceedings  
22 has been put into the public domain. By selective I  
23 mean transcripts of no more than three minutes of what  
24 happened at a commission which ran for 34 ten-hour days  
25 generating thousands of pages of transcripts. This has 12:03  
26 been accompanied by an unsourced and unverified account  
27 of an alleged part of the proceedings. Whatever the  
28 sources of information or misinformation that has been  
29 put into the public domain, the inevitable effect is

1 the risk to public confidence in An Garda Síochána  
2 being damaged in a very unfair way.

3  
4 Mr. Justice O'Higgins, as the Sole Member, having had  
5 the opportunity to hear and examine 97 witnesses and 12:03  
6 weigh the submissions made by the legal representatives  
7 of all parties subject of the proceedings, decided what  
8 should and should not be included in his report. In  
9 this context, it is worth noting that the Commission  
10 points out that it conducted its proceedings with 12:03  
11 particular regard to its duty of compliance with the  
12 requirements of constitutional and natural justice.

13  
14 As Garda Commissioner, having fully accepted the  
15 findings of the report, it falls to me to move swiftly 12:04  
16 to implement its recommendations. This I have done.

17  
18 while it is important to dispel any public concern in  
19 relation to this issue, I have to be mindful of section  
20 11 of the Commissions of Investigation Act 2004 which 12:04  
21 provides that a commission shall conduct its  
22 investigations in private. I am advised that everyone  
23 involved in the proceedings of the O'Higgins Commission  
24 is bound to respect the privacy of those proceedings.

25 12:04  
26 Furthermore, in relation to communications with the  
27 legal team representing An Garda Síochána, it is  
28 important in terms of receiving advice and giving  
29 instructions that privilege in such communications is

1 protected so as not to adversely impact on the workings  
2 of An Garda Síochána and its entitlement to seek and  
3 obtain legal advice on a confidential basis, in this  
4 instance and in the future.

5  
6 These constraints, which reflect on important  
7 principles of law, restrict my capacity to address the  
8 issues which have been raised in relation to the  
9 approach taken by An Garda Síochána before the  
10 O'Higgins Commission. However, I can confirm that An  
11 Garda Síochána's legal team was not at any stage  
12 instructed to impugn the integrity of Sergeant Maurice  
13 McCabe or to make a case that he was acting  
14 maliciously. I would emphasise that the overriding  
15 objective of An Garda Síochána and its legal team was  
16 at all times to assist the Commission in carrying out  
17 its statutory functions and to establish all relevant  
18 facts in relation to the matters referred to it for  
19 investigation as set out in its terms of reference.

20  
21 This brings me to the charge which is in the public  
22 domain, that is most difficult to deal with sensitively  
23 and which is one of the reasons I have been reluctant  
24 to enter into public comment about this matter.  
25 Whatever its source, the net charge that is now being  
26 made is that the credibility and motivation of Sergeant  
27 McCabe was challenged. I can only deal with this on  
28 the basis of what is set out in the Commission report  
29 and I am conscious that this involves dealing with

1 certain findings in relation to allegations of  
2 corruption and malpractice. I have no wish to rehearse  
3 this matter again but it is simply impossible not to do  
4 so in addressing it.

5  
6 As Commissioner of An Garda Síochána, I have a duty to  
7 all its members and former members. Having regard to  
8 the nature and seriousness of the allegations and the  
9 duty to assist the Commission in its task of  
10 establishing the facts and truth, I cannot see how it  
11 would in any way -- but be in any way unreasonable,  
12 improper or avoidable to appropriately test and  
13 cross-examine the evidence of persons giving evidence  
14 to the Commission, including Sergeant McCabe.

15  
16 The Commission found in relation to certain  
17 allegations, these hurtful allegations to be unfounded  
18 and in at least one case based on a belief, but  
19 unsupported by evidence, and that those against whom  
20 such complaints were made lived for many years under  
21 the strain of those allegations.

22  
23 An Garda Síochána is fully accountable for its actions  
24 or indeed inaction. We operate fully within the  
25 framework of accountability and oversight which the  
26 Oireachtas sets.

27  
28 As you are aware, I will be appearing before the  
29 Policing Authority in the coming days and will deal

1 with these matters to the fullest extent possible."

2

3 And that was the agreed stance of the meeting of 19th  
4 of May?

5 A. Yes, Chairman, yes.

12:07

6 253 Q. "In addition to the above, I have taken the following  
7 steps to address other matters arising.

8

9 There has been a suggestion in recent reportage that  
10 two senior officers had sought to misrepresent before  
11 the Commission the contents of a meeting they had with  
12 a sergeant in Mullingar in 2008. In those  
13 circumstances and in order to resolve any public  
14 disquiet, misplaced or otherwise, which may arise, and  
15 in the interests of fairness to all involved we  
16 requested, pursuant to your powers within the Garda  
17 Síochána Act, that you refer that aspect to the Garda  
18 Síochána Ombudsman Commission for the purposes of  
19 investigating it in the public interest."

12:07

12:07

20

12:08

21 and that had been an agreed position from the meeting  
22 of the 19th?

23 A. Yes, Chairman, that's correct.

24 254 Q. "On receipt of the report --"

25

12:08

26 That is the O'Higgins Commission report, I take it?

27 A. Yes, that's correct.

28 255 Q. "-- I directed Deputy Commissioner Twomey to fully  
29 examine the content, findings and recommendations of

1 the report and to further inform An Garda Síochána's  
2 modernization and renewal programme. The programme  
3 which addresses, among other things, the fundamental  
4 issues arising in the O'Higgins Report in relation to  
5 renewal of our culture, training, supervision, victim 12:08  
6 support and investigative practice, will be formally  
7 published in early course, addresses any issues arising  
8 from that examination, including lessons learned.

9  
10 In relation to whistleblowers, I have been consistent 12:08  
11 at all times. Dissent is not disloyalty and as a  
12 service we are determined to learn from our  
13 experiences. An Garda Síochána agrees that  
14 whistleblowers are part of the solution to the problems  
15 facing the service. In this regard, yesterday we met 12:09  
16 with representatives from Transparency Ireland, who  
17 have agreed to work with us to create an environment to  
18 ensure protected disclosures and people making them are  
19 welcomed and protected in An Garda Síochána.

20 12:09  
21 A protected disclosure manager has now been appointed  
22 and we have been begun establishing a dedicated team  
23 who will be appropriately trained to oversee all  
24 matters related to whistleblowers.

25 12:09  
26 In conclusion, and as stated at the outset, An Garda  
27 Síochána fully accept the findings of the O'Higgins  
28 Commission and we are committed to learning all lessons  
29 and fully implementing the recommendations. In the



1 interests of transparency, An Garda Síochána would seek  
2 to publish as a statement a version of this letter in  
3 advance of the Oireachtas debate."

4 A. That's correct, Chairman, yes.

5 256 Q. And I think in actual fact, a version of that letter, 12:09  
6 which is on the public record already, was published,  
7 is that correct?

8 A. Yes, Chairman. Practically the full content of the  
9 letter was published.

10 257 Q. Okay. I just think there is a further relevant email 12:10  
11 from Mr. O'Leary to you on the 26th May 2016, it  
12 appears at page 4336 of the materials, which refers to  
13 the order of business in the Dáil, is that correct?

14 A. Sorry, Ms. Leader?

15 258 Q. I beg your pardon, 4336 of the materials? 12:10

16 A. Yes, I have it here. Yes, that's correct, Chairman.

17 259 Q. And was he sending you this for your information, do  
18 you think, Commissioner? Do you remember getting it?

19 A. I don't specifically remember it, but, as I say, it  
20 wouldn't have been unusual, Chairman, there was lots 12:10  
21 of -- he would have been sending me a lot of issues  
22 that were arising in relation to it.

23 260 Q. So I'm suggesting to you, Ms. O'Sullivan, that that  
24 letter that went to the Tánaiste on the 25th May, was  
25 really a joint effort between quite a lot of people, 12:11  
26 you being one of them, Mr. Twomey another, Mr. O'Leary  
27 another person, and I don't know if you wish to make  
28 any comment in relation to that?

29 A. Well, Chairman, as I have explained, it was a very

1 important letter. There were a number of issues that  
2 needed to be addressed in that letter, and, in the  
3 interests of completeness, there were a number of  
4 drafts shared, to be able to, as wholesomely as  
5 possible, explain the approach taken to the Tánaiste, 12:11  
6 that she would be fully informed, and obviously there  
7 had to be a number of iterations of the letter in order  
8 to be able to do that.

9 261 Q. Yes. And just for completeness, we know in 2014 the  
10 issue -- the D issue took on, if I can put it this way, 12:11  
11 a second life, insofar as a notification had been sent  
12 to the HSE and Tusla in relation to the matter in 2013,  
13 which came to your attention in 2014, isn't that  
14 correct?

15 A. Yes, Chairman, I am aware of the referral and I know 12:12  
16 that it came to my office in 2014, yes, Chairman.

17 262 Q. And your then-private-secretary, when he gave evidence  
18 to the Tribunal in July, seemed to be under the  
19 impression that you read that referral at that time and  
20 the letter that was sent to your office by Assistant 12:12  
21 Commissioner Kenny in relation to the matter?

22 A. I have heard -- or read Superintendent Walsh's  
23 evidence, Chairman. I have no recollection of that  
24 letter specifically being brought to my attention, but  
25 I don't dispute what Superintendent Walsh was saying, 12:12  
26 that he brought it to my attention. I don't  
27 specifically remember it.

28 263 Q. Okay. I suppose since the matter was reasonably  
29 proximate to what was going on in the O'Higgins

1 Commission, and a year later the matter came up at the  
2 O'Higgins Commission in 2015, and did you ever at any  
3 time share that information with any Department of  
4 Justice officials, because we now see quite a lot of  
5 interaction between you and Department of Justice  
6 officials? 12:13

7 A. No, Chairman, I did not, and it would be very  
8 inappropriate for me to do that, even if I had seen it  
9 and if I had a recollection or remembered, it would not  
10 be appropriate to do that, and as I heard in 12:13  
11 Superintendent -- or, sorry, read in Superintendent  
12 Walsh's evidence, his view was that these were the same  
13 allegations that were dealt with in 2006/2007.

14 264 Q. Okay.

15 CHAIRMAN: Well, I know, but the unfortunate aspect of 12:13  
16 it was, and this is -- you are the victim of this, is  
17 that what was sent up to you was the allegation of  
18 Ms. Y, which I presume is correct, but which had been  
19 cut and pasted in error into the Ms. D allegation,  
20 which was a much more serious matter, his evidence was 12:14  
21 you read it without comment and just went on.

22 A. Yes, Chairman, my view of that would be that,  
23 ordinarily, in the ordinary course, there are two  
24 aspects to it: In the ordinary course, if a Tusla  
25 referral comes to the office, it would normally be 12:14  
26 dealt with by local Garda management. I suppose again  
27 when this issue arose in 2017 and it became a matter of  
28 public concern and we received a number of queries both  
29 from Sergeant McCabe but also from a particular media

1 outlet, when we went looking for this, it was actually  
2 filed on a different file to do with, as it transpired,  
3 Ms. D as opposed to Sergeant McCabe's file. So I think  
4 that it was -- perhaps the relevance of it, if I can  
5 put it that way, and 'relevance' may be the wrong term 12:15  
6 to use, to Sergeant McCabe as such, was not evident to  
7 me immediately from what Superintendent Walsh brought  
8 to my attention.

9 265 Q. MS. LEADER: And just finally, Ms. O'Sullivan, in  
10 relation to the GSOC referral arising out of the 12:15  
11 O'Higgins Commission, did Chief Superintendent Healy  
12 not ever tell you that Sergeant Martin didn't attend at  
13 the Commission, never gave evidence at the Commission,  
14 and he, in fact, had one telephone call whereupon he  
15 asked her was she available to give evidence? 12:15

16 A. I don't believe that we ever discussed it in detail,  
17 but the purpose of the referral was in the public  
18 interest, to ensure -- so the allegation that was in  
19 the public domain was the fact that two members of An  
20 Garda Síochána, and we now know that Sergeant Martin 12:15  
21 actually, I note that she has corresponded with the  
22 Tribunal, but two members of An Garda Síochána had  
23 intended to perjure themselves at the O'Higgins  
24 Commission of Investigation, and my understanding is,  
25 that was the issue that we were referring to GSOC, 12:16  
26 along with, separately, some other issues that had been  
27 raised to us by another party who was in attendance at  
28 the Commission.

29 266 Q. But I think the issue was that people had perjured

1 themselves, so do you not think maybe it was a bit  
2 severe to send Sergeant Martin to GSOC, via the  
3 Minister, when nobody had actually spoken to her about  
4 her evidence to the O'Higgins Commission?

5 A. Chairman, I am not aware that anybody was found to have 12:16  
6 perjured themselves at the O'Higgins Commission. That  
7 was certainly never brought to my attention.

8 267 Q. The charge was in the public domain at that time?  
9 A. Oh, yes, the charge in the public domain --

10 268 Q. Yes. 12:16

11 A. -- was that -- well, Chairman, if I can explain it like  
12 this: GSOC were set up to have independent oversight  
13 of investigating serious issues in relation to members  
14 of An Garda Síochána. I think I have attempted to  
15 explain to the Tribunal the position I found myself in 12:17  
16 at this time, nobody was going to accept my word that  
17 this was the case, and that was the fact of what I was  
18 facing to deal with, the appropriate mechanism to have  
19 these matters dealt with, in fairness to both  
20 Superintendent Cunningham and Sergeant Martin, to have 12:17  
21 their names cleared, so to speak.

22 CHAIRMAN: I am sorry, I had taken it down that it was  
23 Superintendent Rooney who was referred to GSOC. It  
24 wasn't, it was Sergeant Martin.

25 A. No, Chairman, it was -- 12:17

26 CHAIRMAN: I mean, how could she be committing perjury  
27 as she had never even given evidence? I mean, it  
28 seems -- I know that's been reported, but newspapers --  
29 sorry, I beg your pardon, the paper won't refuse ink,

1 but, I mean, why compound that, is the question by  
2 Ms. Leader?

3 A. It was completely erroneous, Chairman, but this was  
4 what was in the public domain and this was what was  
5 causing the political and public disquiet and this was 12:17  
6 what had been erroneously reported in a number of media  
7 outlets and this was what was in the public and  
8 political mind, and, as I say, the position I found  
9 myself in, if I were to say that Sergeant Martin, for  
10 example, hadn't done something, actually I don't think 12:18  
11 anybody was within the frame of mind.

12 CHAIRMAN: If you had said she had never given  
13 evidence, I would imagine people might well have  
14 believed you.

15 A. Not necessarily, Chairman, the position that we found 12:18  
16 ourselves in --

17 CHAIRMAN: well, then the second thing was, if you  
18 actually read her statement, and this has come up a  
19 number of times, but, well, you know, she may well have  
20 her rights, but this statement which she gave, which 12:18  
21 could perhaps have been, to use the now very popular  
22 word, deployed at the O'Higgins Commission, was  
23 completely backing up Sergeant McCabe --

24 A. Oh, completely.

25 CHAIRMAN: -- in relation to the Mullingar meeting, in 12:18  
26 the event that there was a misunderstanding about that.

27 A. Yes, completely, Chairman, and I think the unfortunate  
28 situation that everybody found themselves in, the  
29 erroneous facts and the distorted truths that were put

1 into the public domain led to a situation which was  
2 completely unfair to everybody involved in this process  
3 from the outset.

4 CHAIRMAN: Yes. Sorry, Ms. Leader, I am interrupting,  
5 and I know you want to --

12:19

6 MS. LEADER: No, I am finished, sir, actually.

7 CHAIRMAN: Well, if you are finished then, there was  
8 just one other thing that puzzled me. It had been  
9 reported, as well, that parts of the transcripts of the  
10 O'Higgins Commission had gone missing and that maybe  
11 some of the tape recordings had gone missing. That was  
12 widely reported in the public media. Were you aware of  
13 that?

12:19

14 A. No, I wasn't aware of them. I am aware of the reports  
15 of that, Chairman.

12:19

16 CHAIRMAN: No, the reports of it?

17 A. Yes, I am aware of the reports of it.

18 CHAIRMAN: Which makes it look like Richard Nixon and  
19 his secretary and the tapes disappearing. Maybe some  
20 people in the room are old enough to remember that  
21 time. But we have the complete transcript.

12:19

22 A. Yes, Chairman, that's correct.

23 CHAIRMAN: So that didn't happen either.

24 A. No, Chairman. Unfortunately, as you have quite rightly  
25 pointed out, there are a number of distorted facts  
26 which have been reported all the way back to 2015 in  
27 the course of these proceedings, and they were the  
28 realities that we were faced with that we had to deal  
29 with, and, as I say, I think it has been a disservice

12:19

1 to all of the people, including Sergeant McCabe, that  
2 actually made themselves available to the Commission of  
3 Investigation.

4 CHAIRMAN: Mr. McDowell, would it be appropriate to  
5 take a break now? 12:20

6 MR. MCDOWELL: Whatever suits the Tribunal.

7 CHAIRMAN: Yes. And then the other thing is, I would  
8 make inquiries through Mr. Barnes in the event it might  
9 be possible to sit a bit late today. It would help in  
10 relation to anyone who is -- wishes to ask 12:20

11 Ms. O'Sullivan questions. Appreciating that this is an  
12 inquiry and we are inquiring into things, I still  
13 really need to know what position people are adopting.  
14 That is what I am actually listening for when people  
15 are asking questions. So we will break for an hour 12:20  
16 then, so that will be twenty past one. Thank you.

17 THE HEARING ADJOURNED FOR LUNCH

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29



1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2  
3 FORMER COMMISSIONER NÓIRÍN O'SULLIVAN WAS  
4 CROSS-EXAMINED BY MR. MCDOWELL:

5 13:20

6 269 Q. MR. MCDOWELL: Good afternoon, Ms. O'Sullivan. Could I  
7 deal with the last matter that you were being asked  
8 about before lunch, firstly? As I understand it, you  
9 received a report from Assistant Commissioner Kieran  
10 Kenny in July of 2014 in connection with the Tusla  
11 affair, is that right? 13:21

12 A. That's correct, Chairman. A report came to my office  
13 in 2014 from Assistant Commissioner Kieran Kenny.

14 270 Q. And am I right in saying that that material that he  
15 sent you included a description -- or, sorry, it  
16 included the Tusla reference, isn't that right? 13:21

17 A. The Tusla referral was attached, as I understand it,  
18 Chairman, yes.

19 271 Q. Yes. And that's the referral which mistakenly, as the  
20 Tribunal Chairman said, suggested that Sergeant McCabe  
21 had been referred for digital, anal and vaginal rape of  
22 Ms. D, is that right? 13:22

23 A. I understand that to be correct now, yes, Chairman.

24 272 Q. And did you read it at the time?

25 A. No, Chairman, I have no memory of reading it. It was,  
26 as I said earlier, I read Superintendent Walsh's  
27 evidence, and my understanding is that he brought it in  
28 in the normal course of post, and my understanding of  
29 what Superintendent Walsh gave evidence on was that he 13:22

1 read over the content to me, not of the referral but of  
2 the overall piece of correspondence.

3 273 Q. I see. And have you seen the evidence that was given  
4 in the Tusla module here about Assistant Commissioner  
5 Kenny having a meeting in Mullingar on the 18th July 13:22  
6 2014?

7 A. I read it at the time of the -- the module was going  
8 on, Chairman. I have not read it since.

9 274 Q. And you are aware that Sergeant Karen Duffy made a note  
10 of that meeting? 13:23

11 A. Yes, Chairman. I seem to recall that sergeant Duffy  
12 gave evidence in relation to that.

13 275 Q. Yes. And I take it that you have acquainted yourself  
14 with the note of the meeting, or did you?

15 A. No, Chairman, not specifically. I wasn't in attendance 13:23  
16 at the meeting. The meeting was in the office of the  
17 assistant commissioner, northern region, as I  
18 understand.

19 276 Q. Well, perhaps then I could ask you to look at page  
20 1836. Since we're not in the same module, it'll be a 13:23  
21 different document.

22 [SAME HANDED]

23 A. Thank you.

24 277 Q. This was a minute of a meeting --

25 A. Sorry, Mr. McDowell, I don't just -- the page -- 13:24

26 278 Q. Page 1835. I'm sorry.

27 A. 18?

28 279 Q. 35.

29 A. Yes, thank you. I have that.

1 280 Q. This is a minute of a meeting, presided over by  
2 Assistant Commissioner Kenny?  
3 A. That's correct, Chairman, yes.  
4 281 Q. I see. And could I bring you to a few portions of the  
5 minutes, particularly at the top of 1837. 13:24  
6 A. Yes, Chairman, I see that here.  
7 282 Q. The first paragraph refers to:  
8  
9 "Superintendent Leo McGinn outlined that the suspected  
10 offender was not arrested at the time and this may be 13:24  
11 an issue and also the fact that the matter was  
12 investigated by members of the Cavan-Monaghan  
13 division."  
14  
15 You saw that? 13:25  
16 A. I see that now, yes, Chairman.  
17 283 Q. Yes. And had you any idea from your dealings with  
18 Assistant Commissioner Kenny that he had been looking  
19 at -- that he had been dealing with this material  
20 himself, that he had presided at this meeting? 13:25  
21 A. No, Chairman, other than the material that  
22 superintendent Walsh administered in my office, no, and  
23 obviously I was not at this meeting.  
24 284 Q. And I think you had meetings with Mr. Costello,  
25 attended by Sergeant McCabe and Assistant Commissioner 13:25  
26 Kenny?  
27 A. Yes, Chairman. There were a number of meetings that I  
28 attended, I think perhaps three in all, if I am not  
29 mistaken, and there were also a number of meetings held

1 with Deputy Commissioner Twomey and Mr. Costello and  
2 Sergeant McCabe also, at various stages.

3 285 Q. I see. And am I right in thinking that no effort was  
4 made to inform you that the false material in the Tusla  
5 referral was, in fact, a mistake? 13:26

6 A. Well, again, I've read Assistant Commissioner Kenny's  
7 evidence, Chairman, so I've read his evidence, and my  
8 understanding is that is what he has said in his  
9 evidence.

10 286 Q. No, I am asking about your own recollection. You were 13:26  
11 never informed that the material that had been sent to  
12 you contained a major error, is that right?

13 A. No, Chairman, I was not.

14 287 Q. I see. And it remained -- the uncorrected Tusla  
15 referral remained on your desk, so to speak, is that 13:26  
16 right?

17 A. As I said earlier, Chairman, and from Superintendent  
18 Walsh's evidence, the correspondence that was received  
19 at the office was actually filed under a completely new  
20 file number at the office, and, yes, it was there until 13:26  
21 such time as the issue arose, I believe, in February or  
22 March 2017. I believe it was February.

23 288 Q. Now, could I ask you to look at page 1836.

24 A. Yes.

25 289 Q. And the top of the page: 13:27  
26  
27 "Chief Superintendent Sheridan outlined that the  
28 referral does state that the matter was investigated  
29 and there was no prosecution. He raised the issue that

1 if An Garda Síochána meets with the HSE, would social  
2 services and the suspect's family need to be informed  
3 as he has children?"

4 A. Yes, I see that.

5 290 Q. Yes.

13:27

6 A. Yes.

7 291 Q. You weren't aware that that was the attitude of  
8 Assistant Commissioner Kieran Kenny to the  
9 investigation as of July 2014?

10 A. No, Chairman.

13:27

11 292 Q. And reading on again:

12

13 "Assistant Commissioner Kenny outlined that safety  
14 issues don't appear to be on the HSE radar agenda."

15

13:27

16 And then:

17

18 "Chief Superintendent Sheridan outlined that if there  
19 are safety issues, An Garda Síochána didn't do anything  
20 for the last six or seven years."

21

13:28

22 And then:

23

24 "Chief Superintendent Leo McGinn raised the issue that  
25 the suspect --" and this is Sergeant McCabe "-- has  
26 access to his kids in relation to his job, etcetera.  
27 Is there a risk?"

28 A. I see that, Chairman, yes.

29 293 Q. Now, I'm asking you, this shows that the assistant

1 commissioner for the northern area, is that right --

2 A. For the northern region.

3 294 Q. -- yes -- was actively discussing in July of 2014  
4 whether Sergeant McCabe was a risk to children, and his  
5 own children in particular. Does that surprise you, 13:28  
6 firstly?

7 A. Em, Chairman, I can't comment on the minutes of a  
8 meeting that I didn't attend. I can only accept them  
9 on what I am reading now.

10 295 Q. Yes, well, accepting them at face value, does it 13:29  
11 surprise you that Assistant Commissioner Kenny was  
12 investigating the matter as to whether Sergeant McCabe  
13 was a risk to his own children?

14 A. Chairman, I think the only person that can answer that  
15 is Assistant Commissioner Kenny. I'm not in a position 13:29  
16 to get into his mind, and I'm going on the minutes of a  
17 meeting. I accept what is written in the minutes of  
18 the meeting, but I can't get into Assistant  
19 Commissioner Kenny's mind, and I know he has already  
20 given evidence before the Tribunal. 13:29

21 296 Q. Yes. When it came to appointing a liaison officer  
22 between An Garda Síochána and the O'Higgins Commission,  
23 you appointed, initially, Assistant Commissioner Kenny,  
24 is that right?

25 A. That's correct, Chairman. And as I explained 13:29  
26 yesterday, I appointed Assistant Commissioner Kenny in  
27 the interest -- because he was the assistant  
28 commissioner in the northern region and because the  
29 primary documentation would have been available between

1 the Donegal and the Cavan-Monaghan divisions.

2 297 Q. And this was a man who, months earlier, five or six  
3 months, maybe six months earlier, was considering  
4 whether Sergeant McCabe was a risk to his own children?

5 A. Chairman, I was not aware of that at the time, and, as 13:30  
6 I say, my purpose in appointing or nominating Assistant  
7 Commissioner Kenny in the first place was in the  
8 interest of servicing the requirements of the  
9 Commission of Investigation and the retrieval of  
10 documentation. 13:30

11 298 Q. Just in general terms, you were aware also that there  
12 was an active inquiry going on in GSOC as to whether  
13 the Ms. D allegations had been properly investigated at  
14 this time, isn't that right?

15 A. Yes, Chairman, I was aware of that. 13:30

16 299 Q. And were you also aware that the matter had been sent  
17 to the Independent Review Mechanism, which was  
18 considering whether or not Sergeant McCabe's -- the  
19 allegations against Sergeant McCabe should be included  
20 in the O'Higgins Commission? 13:31

21 A. No, Chairman. I only became aware of that after the  
22 fact. I wasn't aware of that at the time. That was  
23 done by the Department of Justice, as I understand.

24 300 Q. And when did you become aware of that after the fact?

25 A. I believe in -- maybe even in relation to this module 13:31  
26 of the Tribunal, I can't exactly recall, but we  
27 wouldn't have been up to date or kept up to date with  
28 all of the IRM process at the time. But I was  
29 certainly aware that, in between times, there was some

1 media reporting, but, Chairman, as you said earlier,  
2 you can't always take that. But we hadn't been  
3 officially informed of the fact.

4 301 Q. And is it the case -- is it not the case that in August  
5 of 2014, you had a meeting with Mr. Séan Costello,  
6 Sergeant McCabe and Kieran Kenny, among others, to  
7 discuss his welfare issues? 13:31

8 A. Yes. And perhaps if I can put that in context,  
9 Chairman. As I mentioned at the outset of the hearings  
10 yesterday, we had very depleted resources which 13:31  
11 resulted in Assistant Commissioner Kenny, amongst other  
12 assistant commissioners, covering a number, indeed  
13 sometimes two and sometimes three portfolios, and in  
14 the capacity that he attended the meeting with me on  
15 7th August 2013 with Mr. Costello and Sergeant McCabe, 13:32  
16 he was performing the functions of assistant  
17 commissioner eastern region in the absence of a  
18 full-time person to that position. So it was as  
19 Sergeant McCabe's assistant commissioner in the region  
20 in which he was now working that he attended that 13:32  
21 meeting.

22 302 Q. Well, I assume that you will tell us that Kieran Kenny  
23 said nothing to you about the Tusla matter or the fact  
24 that he was holding a meeting -- had recently held a  
25 meeting to consider whether Sergeant McCabe was a 13:32  
26 threat to his own children?

27 A. That's correct, Chairman, yes.

28 303 Q. Are you surprised that he didn't mention this to you?

29 A. Yes, Chairman. I would have expected, if it was a live



1 issue with him. But as I say, the matter -- and it  
2 would not be unusual that Tusla referrals would be  
3 dealt with locally. That would be the normal practice  
4 for dealing with Tusla referrals. And indeed the  
5 Children First Guidelines would stress the importance 13:33  
6 of keeping matters locally. So it would normally be  
7 dealt with, in normal circumstances, by the  
8 superintendent and chief superintendent in the district  
9 or division.

10 304 Q. But in this particular case you were meeting with 13:33  
11 Sergeant McCabe and Assistant Commissioner Kenny and  
12 Sergeant McCabe's solicitor to discuss matters relating  
13 to Sergeant McCabe?

14 A. Matters relating to workplace issues --

15 305 Q. Yes. 13:33

16 A. -- that Sergeant McCabe was experiencing in Mullingar,  
17 yes, Chairman.

18 306 Q. Yes. And I am suggesting to you that it was surprising  
19 in those circumstances, and extraordinary, that at no  
20 time did Assistant Commissioner Kenny relay to you his 13:33  
21 concerns in this matter?

22 A. It is surprising, Chairman, but I cannot speak for  
23 Assistant Commissioner Kenny.

24 307 Q. I see. Well, in any event, the summation of your  
25 evidence, as I understand it, is that although a false 13:34  
26 and very damaging allegation against Sergeant McCabe  
27 had been sent to your office and remained on a file in  
28 your office, you yourself hadn't adverted to it, is  
29 that what you are saying?

1 A. Yes, Chairman. As I understand from Superintendent  
2 Walsh's evidence, he believed, having looked at the  
3 file, that it was the same set of circumstances that  
4 pertained in 2006/2007 which had already been  
5 investigated and which had been adjudicated upon by the 13:34  
6 Director.

7 308 Q. Well, were you aware of the actual detail of the  
8 2006/2007 allegation?

9 A. No, Chairman. I would have been aware of the fact  
10 that -- as I said yesterday in my evidence here, my 13:34  
11 knowledge of the facts of the case extended to a report  
12 received from Chief Superintendent Terry McGinn in the  
13 Donegal division, back in 2009, I believe, when I was  
14 the assistant commissioner in HRM.

15 309 Q. So if you had seen the allegations of anal and 13:34  
16 digital -- anal and vaginal and digital rape, you  
17 wouldn't have known whether they were the original  
18 allegations being rehashed or new and mistaken  
19 allegations?

20 A. That would be correct, Chairman, yes. 13:35

21 310 Q. And nobody bothered at any time to go to your office  
22 and say there's a -- been a mistake here?

23 A. No, Chairman. But as I say, that would not be unusual  
24 insofar as matters of this nature would be dealt with  
25 by the regional command -- not even by the regional 13:35  
26 commander. In most circumstances it would be dealt  
27 with by the district and divisional officers and in  
28 most normal cases generally by the district officer,  
29 the superintendent in charge of the district.

1 311 Q. Do you think now, in retrospect, that Sergeant McCabe  
2 is due an apology in respect of the failure to clear  
3 the file in your office of this allegation?  
4 A. Well, I would not like to preempt or pre-determine what  
5 the Chairman -- I know the Chairman of this Tribunal 13:35  
6 has not yet concluded in relation to terms of reference  
7 (d) and I would not like to preempt or pre-determine  
8 what the Chairman may conclude.  
9 312 Q. You don't think that, independent of anything that the  
10 Chairman would do, that you should apologise for the 13:36  
11 fact that An Garda Síochána has, in your office, an  
12 uncorrected and -- or false allegation about him?  
13 A. Well, I'm not saying that, Chairman. What I am saying  
14 is that I think it is wise and prudent to wait 'til the  
15 outcome of the module (d) of the Tribunal that's 13:36  
16 currently sitting.  
17 313 Q. I see. Now, could I bring you to the evidence that you  
18 gave yesterday to Ms. Leader, and at page 189 of the  
19 Tribunal Ms. Leader asked you the question:  
20 13:36  
21 "Perhaps I might ask you again, Ms. O'Sullivan, Chief  
22 Superintendent Healy records that the issue of  
23 motivation was to be opened up in front of the  
24 Commission. I am correct in that, and that was your  
25 understanding in relation to that?" 13:37  
26  
27 And you answered:  
28  
29 "Yes, Chairman.

1 Q. And in giving instructions to Chief Superintendent  
2 Healy, did you ever make it clear to him that at no  
3 time was Sergeant McCabe's integrity to be challenged?"  
4

5 And you answered: "Yes." 13:37

6 A. Excuse me, Mr. McDowell, can you tell me where this is  
7 on the --

8 314 Q. It's page 189 of yesterday's transcript.

9 A. Is it on the screen? I don't seem to have it here in  
10 front of me. 13:37

11 CHAIRMAN: There was a subsequent question,  
12 Mr. McDowell. Ms. Leader said to Ms. O'Sullivan:

13

14 "Wouldn't it have been prudent to make it absolutely  
15 clear --" 13:37

16 MR. MCDOWELL: Sorry, I'm going to ask the question.  
17 She doesn't need to be assisted, Judge, on this matter.

18 CHAIRMAN: Now, if you actually think I'm assisting  
19 Ms. O'Sullivan --

20 MR. MCDOWELL: I am trying to -- 13:37

21 CHAIRMAN: You've just said that, Mr. McDowell.

22 MR. MCDOWELL: Sorry, Judge, I am trying to conduct a  
23 cross-examination without interruption, Judge.

24 CHAIRMAN: Do you know what, Mr. McDowell, that is a  
25 dreadful thing to say to me. But I think we should  
26 just go on. 13:37

27 315 Q. MR. MCDOWELL: The question was put to you:

28

29 "And in giving instructions to Chief Superintendent

1 Healy, did you ever make it clear to him that at no  
2 time was Sergeant McCabe's integrity to be challenged?"

3  
4 And the answer was:

5  
6 "Yes."

13:38

7  
8 And you were asked:

9  
10 "When?"

13:38

11  
12 And you said:

13  
14 "Chief Superintendent Healy would have been aware of my  
15 views in relation to Sergeant McCabe and that it was  
16 not about Sergeant McCabe. So, from the outset, it was  
17 always about putting the facts before the Commission  
18 and making sure that all of the relevant facts were put  
19 before the Commission in order to allow them to do  
20 their job. It was never about making a case that  
21 Sergeant McCabe was motivated out of any bad motive or  
22 any improper motive."

13:38

13:38

23  
24 That's what you said.

25 A. Sorry, Chairman and Mr. McDowell, this is not on the  
26 screen in front of me, so I know you have read it over,  
27 but it just isn't appearing here in front of me. This  
28 seems to be on the schedule.

13:38

29 316 Q. well, I don't know whether the Tribunal has a copy

1 available for you.

2 MS. LEADER: I can hand the witness a copy.

3 A. Mr. McDowell, if you want to, or, Chairman, if

4 Mr. McDowell wants to ask the question --

5 317 Q. MR. MCDOWELL: what I really want to do, I want to ask 13:39

6 you, you were asked did you make it clear to Chief

7 Superintendent Healy --

8 [SAME HANDED]

9 A. Thank you very much.

10 318 Q. -- that at no time was Sergeant McCabe's integrity to 13:39

11 be challenged, and you answered "yes" yesterday.

12 A. Yes, Chairman, that's the answer I gave yesterday.

13 319 Q. And are you standing over that?

14 A. Yes, Chairman.

15 320 Q. Because this was not put by your counsel to Chief 13:39

16 Superintendent Healy, that you had told him that at no

17 time was his integrity to be challenged.

18 A. Chairman, maybe if I can assist, to explain, and I hope

19 I covered this yesterday. From the outset, the

20 instructions that I gave to Chief Superintendent Healy 13:39

21 was that what we were to do was to get to the truth

22 of -- I explained yesterday the context in which it was

23 important that we put all of the facts before the

24 Commission to get to the truth of matters. It was

25 never about any individual member of An Garda Síochána, 13:39

26 including Sergeant McCabe. It was to ensure that all

27 of the facts, the relevant facts, that the Oireachtas

28 had decided were to be investigated by Mr. Justice

29 O'Higgins. All of the relevant facts were put before

1 the Commission. It was never about any individual,  
2 including Sergeant McCabe. And as I said yesterday, it  
3 was never, ever about the man. It was about the  
4 credibility of the evidence to support the facts.

5 321 Q. But you were asked the simple question, and I just want 13:40  
6 to know do you stand over the simple question and  
7 answer:

8  
9 "Did you make it clear to him that at no time was  
10 Sergeant McCabe's integrity to be challenged?" 13:40

11 A. Yes, Chair, from my recollection, it was always the  
12 case, in my discussions with Chief Superintendent Healy  
13 from the outset, that it was simply to put the facts  
14 before the Commission of Investigation, that they could  
15 be properly and thoroughly investigated by Mr. Justice 13:40  
16 O'Higgins. There was never any instruction on my  
17 behalf to challenge anybody's integrity or anybody's --  
18 sorry, not motives, but mala fides in terms of making  
19 allegations, or anything like that, that has been  
20 suggested. 13:41

21 322 Q. But there's two possibilities here: that you said --  
22 that you told him, I only want the facts to emerge, the  
23 true facts to emerge, or that you said, as this  
24 question and answer would suggest, that you actually  
25 told him you did not want his integrity to be 13:41  
26 challenged; which is it?

27 A. Chairman, it's both, if that makes sense, it's both  
28 insofar as the facts were the facts, and there was  
29 never a question but that the facts were going to be

1 tested, from my perspective: put all the facts before  
2 the Commission and it would be done. At no stage was  
3 there ever any suggestion that Sergeant McCabe's  
4 integrity was going to be challenged in any way  
5 whatsoever, and I hope I made that clear yesterday as  
6 well. 13:41

7 323 Q. And you're saying that you made that clear to Chief  
8 Superintendent Healy?

9 A. Yes, Chairman, I made it clear that the facts that were  
10 going to be tested were never about -- nobody ever 13:42  
11 suggested, in all of the feedback that I got from Chief  
12 Superintendent Healy, nobody ever suggested to me that  
13 there was any suggestion of an attack on Sergeant  
14 McCabe's integrity.

15 324 Q. Well, I wonder then would you go to Book 1B then, 13:42  
16 please. In particular, could I ask you to look at page  
17 698 in the book.

18 A. Yes, Chairman, I have that.

19 325 Q. There's a passage there -- and we're now dealing with  
20 day 2, Friday 15th. I, on behalf of Sergeant McCabe, 13:43  
21 said:

22  
23 "I want to say the following: that, as far as I know,  
24 he proposes to make no criticism of any other person in  
25 this room, save to say that he actually did, right, if 13:43  
26 he's called to give evidence, that's what he proposes  
27 to do. Now, the Commission may invite him to make  
28 criticisms of others, but it wasn't his intention to  
29 proffer them or to volunteer criticism in general terms



1 of other people."

2

3

That is the first thing. Were you aware that that attitude had been adopted by Sergeant McCabe's legal team?

13:43

6

A. I'm aware now, Mr. McDowell. Obviously, I wasn't down at the Commission when these hearings were going on.

7

8

326 Q. Yes.

9

A. But if I could, Chairman, or if I may, my understanding was that the allegations had already been made and that the Commission had been established to deal with the allegations that had been made.

13:44

10

11

12

13

327 Q. Well, we will come to that in a while. Could I ask you to go to page 695 in the same book.

14

15

A. Yes, Chairman, I have that here.

13:44

16

328 Q. And this is after a resumption of the Commission, after an adjournment, Mr. Justice O'Higgins says:

17

18

19

"Yes."

20

13:44

21

And Mr. Smyth says:

22

23

"My instructions are re-confirmed."

24

25

And Mr. Justice O'Higgins says:

13:44

26

27

"Very good. Your instructions, as I understand them, are that Sergeant McCabe acted as he did for improper motives."

28

29

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And Mr. Smyth answered:

"Yeah."

13:44

And then Mr. Justice O'Higgins said:

"Okay. And that his integrity is being challenged in that respect."

13:45

And the answer was:

"In that respect."

Now, you've seen that?

13:45

A. Yes, I see that now, Chairman, yes.

329 Q. Are we to understand that that was the diametric opposite of your instruction?

A. Well, Chairman, I never instructed that Sergeant McCabe's integrity be challenged.

13:45

330 Q. No, but you went further. Yesterday, with Ms. Leader, you said that you told Chief Superintendent Healy that his integrity was not to be challenged?

A. Yes, Chairman, as I say, the purpose of An Garda Síochána going -- the objective of An Garda Síochána going into the Commission was to put all the facts before the Commission and to get to the truth of the matters, once and for all.

13:45

331 Q. Well, now would you answer the question: Was that the

1 diametric opposite of what you had instructed your  
2 legal team to do via Chief Superintendent Healy?

3 A. All I can say, Chairman, is, I did not instruct that  
4 any challenge be put to Sergeant McCabe's integrity.  
5 And if I may, Mr. McDowell, on day 29 that was actually 13:45  
6 corrected, on day 29 of the Commission.

7 332 Q. Yes. But we will come to day 29 in the fullness of  
8 time, Ms. O'Sullivan. But I'm suggesting to you that  
9 if you made it clear to Chief Superintendent Healy that  
10 that was not to be done, in his presence, the diametric 13:46  
11 opposite was done and stated to be your instructions,  
12 as re-confirmed. Now, I'm asking you, is that not the  
13 opposite of what you believe you instructed the team to  
14 do?

15 A. It's not what I instructed, Chairman, but I understood 13:46  
16 that this dialogue took place in the course of legal  
17 argument, and maybe Mr. Smyth is better placed to  
18 answer that question than I. I can only tell you what  
19 I instructed.

20 333 Q. Yes. You see, the Commission had adjourned so that 13:46  
21 your instructions could be re-confirmed?

22 A. That's correct, Chairman, yes.

23 334 Q. And when your counsel is asked what those instructions  
24 are, by Mr. Justice O'Higgins, he says two things; he  
25 said that Sergeant McCabe acted as he did for improper 13:47  
26 motives, and secondly, that his integrity is being  
27 challenged in that respect. He said both of those  
28 things immediately after he had received a  
29 reconfirmation of your instructions.

1 A. Well, Chairman, the instructions that I gave and  
2 re-confirmed on that day, were -- the advices were a  
3 reconfirmation of the advices that were contained in  
4 the email that was received and the email that is on  
5 the record, which was that it would be necessary to put 13:47  
6 the full factual backgrounds before the Commission in  
7 order to put everything before the Commission for them  
8 to investigate and their remit.

9 335 Q. Yes. You see, what I am putting to you is, now, that  
10 apparently within minutes of you relaying your 13:47  
11 reconfirmation of your instructions via Chief  
12 Superintendent Healy to your counsel, they did the two  
13 things that you say you had expressly prohibited them  
14 from doing in conversation with Chief Superintendent  
15 Healy? 13:48

16 A. Chairman, all I can say is that I never instructed that  
17 Sergeant McCabe's integrity be challenged.

18 336 Q. Yes.

19 A. And I can't account for the legal -- or what occurred  
20 at the Commission of Investigation. I was not there 13:48  
21 and I cannot account for that.

22 337 Q. But the answer you gave to Ms. Leader yesterday, when  
23 she asked you "Did you ever make it clear that at no  
24 time was Sergeant McCabe's integrity to be  
25 challenged?", you said "Yes". 13:48

26 A. Yes, Chairman, insofar as that it was never suggested  
27 that there was any suggestion that Sergeant McCabe,  
28 that his integrity was to be challenged, or that there  
29 was any suggestion other than he brought these matters

1 forward, genuinely brought them forward. But the  
2 evidence that supported all of the allegations had to  
3 be tested, and that was my understanding from the  
4 outset.

5 338 Q. Well, we know that, on that day, the instructions that 13:49  
6 you had given caused Ms. Annmarie Ryan, firstly,  
7 surprise, or that she thought that you'd given, and  
8 secondly, that she sought to have, according to her  
9 evidence, she sought immediately to have a consultation  
10 with you? 13:49

11 A. I heard Ms. Ryan's -- or, sorry, I read Ms. Ryan's  
12 evidence, Chairman, yes.

13 339 Q. Yes. That's in day 42.

14 A. What page is that, Chairman, please?

15 340 Q. Again, this is a transcript which I don't think you 13:50  
16 have been furnished with. It's page 16 on day 42.  
17 [SAME HANDED]  
18 And again, do I understand your evidence now to be --  
19 that's day 16, page 42.

20 A. It's page 42, Mr. McDowell, yes? 13:50

21 341 Q. Yes. Sorry, page 16.

22 A. 16.

23 342 Q. And it's at line 9 on page 16 -- or lines 7 to 9.

24 A. Yes, Chairman, I see that.

25 343 Q. And did you -- in that context, am I to understand that 13:50  
26 nobody ever told you she was looking for a  
27 consultation?

28 A. Well, Chairman, as I said yesterday, I was certainly  
29 never given the impression that Ms. Ryan was so

1 desirous of having a consultation. I was available  
2 that weekend and, as always, if I understood that  
3 either our solicitor or indeed counsel required a  
4 consultation or needed a consultation, I would most  
5 certainly, no matter what I was doing, make myself 13:51  
6 available. And as it transpired that day -- or, sorry,  
7 that weekend, I would have been available and I could  
8 have made myself available. Also, I understand from  
9 Ms. Ryan's evidence that she also conveyed that again  
10 on Saturday night, and my understanding, and the 13:51  
11 impression I was left with on the Friday evening, was  
12 that the work that was continuing was to prepare the  
13 document for Monday.

14 344 Q. I see. Now can we come back to the question that I put  
15 to you. Did anybody ever tell you that Ms. Ryan was 13:52  
16 looking urgently for a consultation with you?

17 A. I was certainly never given that impression. As I say,  
18 my memory of the telephone call that I had that  
19 evening, the first thing that evening after the  
20 proceedings, I had the email at 19:17 from Chief 13:52  
21 Superintendent Healy. That never made any reference to  
22 a requirement for a consultation. And from my memory  
23 of the phone call, I most certainly wasn't left with  
24 the impression that there was a consultation required.  
25 I heard both Ms. Ryan's evidence, that, later that 13:52  
26 evening, she had spoken to Chief Superintendent Healy,  
27 and whether Chief Superintendent Healy believed that I  
28 was doing something else, or whatever, I can only tell  
29 you what I know, Mr. McDowell.

1 345 Q. You see, the point that I am driving at is this: that  
2 Chief Superintendent Healy seems to have failed utterly  
3 in conveying your instructions that day, which was that  
4 Sergeant McCabe's integrity was not to be challenged  
5 and that there was no question of him being motivated 13:53  
6 by improper -- improperly motivated?

7 A. I don't believe that Chief Superintendent Healy -- I  
8 cannot accept that, Mr. McDowell. Chief Superintendent  
9 Healy is a very experienced officer, and I don't  
10 believe that he failed. 13:53

11 346 Q. Well, he didn't succeed in conveying your instruction  
12 that there was to be no attack on Sergeant McCabe's  
13 integrity and no questioning -- or no suggestion that  
14 he was improperly motivated?

15 A. Well, Mr. McDowell, I don't accept that Chief 13:53  
16 Superintendent Healy failed. Chief Superintendent  
17 Healy, as I said yesterday, was the primary conduit  
18 with the legal team, and I don't accept that he failed.  
19 I believe that the matter was resolved on day 29 and  
20 the record was corrected. Because we now know that 13:53  
21 there was a lot of interaction and a lot of dialogue  
22 between a number of parties and there was confusion had  
23 arisen, but that was corrected on day 29.

24 347 Q. Now, Chief Superintendent Healy, in examination, and  
25 this on page 88 of day 44, was asked by the Chairman 13:54  
26 here:

27  
28 "But she's never allowed to see the Garda Commissioner  
29 until the Garda Commissioner is actually there to give

1 evidence."

2

3 And the Chairman said:

4

5 "I just -- I don't understand that."

13:54

6

7 And the answer that came back from Chief Superintendent  
8 Healy was:

9

10 "Well, I suppose Ms. Ryan was pushing for a  
11 consultation, yes, and I conveyed that to the  
12 Commissioner. At the weekend concerned, the  
13 Commissioner was unavailable."

13:54

14

15 [SAME HANDED]

13:54

16

17 Sorry, we're at day 44, page 88, line 19 to 29.

18 A. Yes, Chairman, I see that.

19 348 Q. Have you read that?

20 A. Yes, Chairman, I've seen it.

13:54

21 349 Q. How, possibly, could Chief Superintendent Healy have  
22 got the impression that he had conveyed Ms. Ryan's  
23 request for a consultation to you and that at the  
24 weekend concerned you were unavailable?

25 A. Chairman, I can't account for that. What I can tell  
26 you is, it was a particularly busy weekend, but no  
27 busier than normal. As it transpired, and I've already  
28 said this in my evidence yesterday, I was on -- on the  
29 Friday, I was in my office late into the evening. I

13:55



1 was available that evening. I was also available the  
2 next day, albeit that we had the memorial service for  
3 the 88 members who had died in the line of duty. That  
4 would have been another day that I was available. And  
5 I was available at any stage on Sunday, and I was also 13:55  
6 available all day Monday. So if the impression had  
7 been given to me that Ms. Ryan, or indeed anybody, was  
8 desirous of having a consultation, I would have made  
9 myself available if I had understood that that was the  
10 case. My impression from speaking to Chief 13:56  
11 Superintendent Healy on the Friday evening, both from  
12 the email I received and from our subsequent  
13 conversation, that the focus for that weekend was on  
14 preparing the document that was required by Mr. Justice  
15 O'Higgins for the Monday morning. 13:56

16 350 Q. So, insofar as Ms. Ryan thought that she was pushing  
17 for an urgent consultation with you arising out of the  
18 instructions that we've just heard relayed to the  
19 Chairman of the Commission, and insofar as Chief  
20 Superintendent Healy believes he conveyed to you that 13:56  
21 Ms. Ryan was pushing for such a consultation, they're  
22 both wrong?

23 A. I'm not saying anybody is wrong, Chairman. What I am  
24 saying is, I heard -- I read Ms. Ryan's evidence that  
25 she was -- she would have liked to have a consultation, 13:57  
26 and I can quite understand that. I also heard  
27 Superintendent Healy and read some of his evidence.  
28 And all I can say, Chairman, is, my position on it is  
29 that certainly I wasn't left with that impression. But

1 as always, and it does not matter whether it's  
2 litigation, it doesn't matter whether it's a trial or  
3 it doesn't matter whether it is a Commission or a  
4 Tribunal, if the legal requirement is to have a  
5 consultation, I will always make myself available for a 13:57  
6 consultation.

7 351 Q. You see, on page -- if you could look at page 3272.

8 A. Sorry, what volume is that, Mr. McDowell?

9 352 Q. Now, which book is that in? I will get you the book  
10 reference now. 3272. I think it is volume 6. 13:57

11 A. 3272. Yes, Chairman, I have that.

12 353 Q. This is a statement made to this Tribunal by Ms. Ryan,  
13 who appears to be an efficient and intelligent  
14 solicitor.

15 A. She is an excellent solicitor, Chairman. 13:58

16 354 Q. Yes. And she says at paragraph 14, in her statement  
17 there:

18  
19 "On Friday, 15th May, after the Commissioner  
20 re-confirmed her instructions, I sought a consultation 13:58  
21 with the Commissioner over the weekend. Counsel  
22 confirmed that they would make themselves available on  
23 the Saturday or the Sunday. Chief Superintendent  
24 Fergus Healy, later that weekend, informed me that the  
25 Commissioner had prior engagements over the weekend and 13:58  
26 was not available for a consultation. Later that  
27 night, I sought to arrange a consultation with the  
28 Commissioner for early Monday morning, but, as matters  
29 transpired, a consultation with the Commissioner was

1 not possible."

2

3 Now, is that right or wrong?

4 A. Well, Chairman, I can put it no further than saying I  
5 was available, with the engagement which, particularly 13:58  
6 in Dublin Castle, as you would know, Mr. McDowell, that  
7 focuses very much on the families of the deceased and  
8 that would take some time, but nothing that I couldn't  
9 step away from for a short time. And likewise, on  
10 Sunday I was available. As I say, and looking at the 13:59  
11 second part of Ms. Ryan's, about the Monday morning, I  
12 was available and in my office on Monday. I had  
13 actually made myself free on the Monday, lest I be  
14 required to go to the Commission. And I have  
15 absolutely -- so I was available for a consultation if 13:59  
16 that had been conveyed to me in the way which Ms. Ryan  
17 intended.

18 355 Q. Well, can I suggest to you, and I don't think it is  
19 unfair to Chief Superintendent Healy, that he certainly  
20 seems to have failed to convey to you what Ms. Ryan was 13:59  
21 looking for and to Ms. Ryan your availability?

22 A. Well, Chairman, I can only say the impression I was  
23 left with on the Friday evening, and I don't see it as  
24 a failure on behalf of Chief Superintendent Healy. As  
25 he gave and testified in his evidence, he was extremely 13:59  
26 busy and extremely focused on a number of things, and  
27 that isn't an excuse, that is a fact. And my  
28 impression and his impression -- my impression and his  
29 impression may differ, but certainly my impression

1 was -- but, as I say, the facts speak for themselves.  
2 I was available, I was here, I was physically here in  
3 the city, and I would have been available at any time  
4 for a consultation.

5 356 Q. The transcript of what transpired on Friday before 14:00  
6 Mr. Justice O'Higgins, Friday 15th May 2014, was  
7 available to you?

8 A. Yes, Chairman, after -- after the 15th May, I believe.  
9 I can't say exactly when.

10 357 Q. Yes. And when was the first time you ever read it? 14:00

11 A. I can't recall precisely, Chairman, but I would have  
12 read it along the way with other transcripts. I  
13 certainly know that day 3 came in, and I can't remember  
14 the date or the day.

15 358 Q. Well, let's -- do you believe that you read it at any 14:01  
16 time in the month of May 2014?

17 A. Yes, I would have read it. I can't say when, Chairman.  
18 I just don't know.

19 359 Q. Well, when you read it, was it not apparent to you that 14:01  
20 your counsel had gone completely off your instructions  
21 and was doing the very things that you had told your  
22 counsel, through Chief Superintendent Healy, that they  
23 were not to do?

24 A. Well, Chairman, my impression again of day 2 and the 14:01  
25 legal arguments that had arisen on day 2, on day 3 my  
26 impression was that Mr. Justice O'Higgins had made a  
27 ruling on the matter when he had received the document  
28 which set out the facts, and therefore it rested.

29 360 Q. Sorry, did you -- when did you first ask to see the

1 document that had been given to him that day?

2 A. I didn't see it until after I would -- I can't remember  
3 exactly when, Chairman, but not over the weekend. I  
4 didn't see it over the weekend because it was only  
5 being prepared over the weekend. 14:02

6 361 Q. Well, did you read it in May of 2014?

7 A. No, I can't --

8 362 Q. '15, rather?

9 A. I can't be certain I did. I would have read the  
10 transcript of day 3 and the ruling of Mr. Justice 14:02  
11 O'Higgins in relation to it, and, as far as I was  
12 concerned, therefore, the matter was dealt with. And I  
13 know another issue came up, from my memory, in June,  
14 and that was where the error was identified.

15 363 Q. Sorry, I just want to be clear about this. You 14:02  
16 thought, did you, that Mr. Justice O'Higgins had dealt  
17 with the matter of motivation on Monday, 18th May 2015,  
18 is that right?

19 A. Yes, Chairman. My understanding was that the issue had  
20 been dealt with by -- the legal argument that had 14:03  
21 arisen on the Friday, which was day 2, was adjudicated  
22 on and ruled upon by Mr. Justice O'Higgins on the  
23 Monday.

24 364 Q. I see. So am I right in thinking then that you read  
25 the transcripts for Friday the 15th and Monday the 18th 14:03  
26 fairly shortly after the events of those days?

27 A. No, I can't remember, Chairman, when exactly I would  
28 have read them. I would have been briefed by Chief  
29 Superintendent Healy, but I don't remember when exactly

1 I read the transcripts in detail.

2 365 Q. You were aware that the question of recordings had come  
3 up on the 18th, isn't that right?

4 A. That was the 18th of -- day --

5 366 Q. Monday, 18th May. 14:04

6 A. Oh, yes, I beg your pardon, Chairman, yes, yes.

7 367 Q. And when did you become aware of the recordings?

8 A. Em, I would have thought it was later, Chairman, but it  
9 may have been the 18th. I just can't recall when  
10 specifically. I thought it was later, I thought it was 14:04  
11 in June or some time, but I can't be sure.

12 368 Q. I see. But the recordings -- the recordings by  
13 Sergeant McCabe were mentioned on the 18th, isn't that  
14 right?

15 A. Yes, Chairman, that may well be the case. 14:04

16 369 Q. I see. Well, do you accept now that your counsel told  
17 Mr. Justice O'Higgins that Sergeant McCabe was acting  
18 for improper motives?

19 A. Chairman, I understand the -- I have seen the  
20 transcripts of day 2. 14:05

21 370 Q. Yes.

22 A. But as I say, the matter was clarified on day 3 and --  
23 or, sorry, I beg your pardon, on day 29, and therefore  
24 I believe the matter was clarified before Mr. Justice  
25 O'Higgins. 14:05

26 371 Q. Can that be the case, Ms. O'Sullivan? Because could I  
27 ask you to go to Volume 5, page 3047, please. On that  
28 page, there's an email from Fiona Bailey, who I think  
29 works in your headquarters, does she?

1 A. I think it's to Fiona Bailey, Chairman.

2 372 Q. Sorry, from John Walsh, yes.

3 A. Yes.

4 373 Q. It was brought to your attention, was it not, the  
5 following day -- or that day, which is 19th May? 14:06

6 A. This related to the issue, Chairman, where Sergeant  
7 McCabe had indicated to his superintendent, Alan  
8 Murray, in Mullingar, that he felt he could no longer  
9 work in the traffic unit.

10 374 Q. Yes, that's right. 14:06

11 A. I beg your pardon, as sergeant in charge of the  
12 traffic --

13 375 Q. I asked you was it brought to your attention on that  
14 day?

15 A. It would -- this matter would have been brought to my 14:06  
16 attention, from my memory, on the evening of the 18th  
17 May.

18 376 Q. I see. Which is the evening of the events where  
19 counsel for you had suggested, on your behalf, had  
20 suggested to Sergeant McCabe that he was -- that he 14:07  
21 only made his allegations against Superintendent Clancy  
22 because he wished to force his hand in relation to the  
23 DPP's directions?

24 A. Chairman, it wasn't an issue that he wished to force  
25 Superintendent Clancy's hand, as I understand it. It 14:07  
26 was actually Sergeant McCabe's frustration with not  
27 being able to get the DPP's direction.

28 377 Q. Sorry, did you read what your counsel said on Monday,  
29 18th May?

1 A. Yes, Chairman, I would have read it after the  
2 transcripts had been provided.

3 378 Q. Yes, yes. And, you see, the thing that we're faced  
4 with here is, that you became aware on the evening of  
5 those transactions that Sergeant McCabe had resigned as 14:07  
6 head of the traffic corps in Mullingar and had told his  
7 superiors that the reason he had done it was because of  
8 what you had done?

9 A. Well, actually, Chairman, no, that is not what he said.  
10 And as I said in my evidence yesterday, and maybe if I 14:08  
11 can just read, Mr. McDowell, what he said.

12 379 Q. Yes. We will read it down, yes. First of all, I think  
13 you say:

14  
15 "I am directed by the Commissioner to forward the 14:08  
16 attached report from assistant commissioner eastern  
17 region for your information and necessary attention,  
18 please. You will note that in his conversation with  
19 Superintendent Murray, Sergeant McCabe states he could  
20 no longer carry on as sergeant in charge of the traffic 14:08  
21 unit. As an explanation, he indicated the reason was  
22 Nóirín O'Sullivan and that he felt under threat. He  
23 later states he did not feel safe and that if anything  
24 was to go wrong, they would be down on him like a ton  
25 of bricks. Sergeant McCabe gave evidence before the 14:08  
26 O'Higgins Commission yesterday and is due to give  
27 further evidence today. In light of the  
28 confidentiality issues surrounding the Commission and  
29 its work, the Commissioner is anxious to ensure that



1 any actions taken by An Garda Síochána in response to  
2 this issue should not in any way trespass into any  
3 matters being considered by the Commission. Contact  
4 should be made with Sergeant McCabe to address the  
5 issues and concerns he has expressed to Superintendent 14:09  
6 Murray and whatever actions are deemed necessary to  
7 assuage his concerns should be put in place. Sergeant  
8 McCabe should be informed that Garda management,  
9 including the HR department, local management, other  
10 specific support mechanisms and the Garda welfare 14:09  
11 services, are available to support him, and should he  
12 wish to avail of such service, such request should be  
13 facilitated immediately. Likewise, Sergeant McCabe  
14 should be reminded that Chief Superintendent O'Brien,  
15 his nominated point of contact, is also available to 14:09  
16 speak with him should he so wish.

17  
18 Given the content of the email correspondence received  
19 at this office, please ensure that Sergeant McCabe  
20 continues to be afforded every support and protection 14:10  
21 in his workplace by his management team and that  
22 ongoing contacts are maintained and enhanced as  
23 necessary.

24  
25 To reiterate, great care must be taken in any 14:10  
26 discussions with Sergeant McCabe to ensure that any  
27 evidence given before the Commission, questions raised,  
28 discussions with legal representatives or any other  
29 matters touching the work of the Commission should not

1 be addressed or discussed in any way."

2

3 Now, you knew that he had resigned his position arising  
4 out of what had happened that day, the previous Friday,  
5 in the O'Higgins Commission, isn't that right? 14:10

6 A. I knew that Sergeant McCabe, Chairman, had raised  
7 issues with Superintendent Murray, his local  
8 superintendent. What I was at a loss to understand  
9 from this correspondence was why -- firstly, what was  
10 the connection between what was happening at the 14:11  
11 O'Higgins Commission and Sergeant McCabe's position as  
12 the sergeant in charge of traffic, but also, why would  
13 Sergeant McCabe believe that I, as in Nóirín  
14 O'Sullivan, not the Garda Commissioner, but Nóirín  
15 O'Sullivan, that he felt under threat from me? What 14:11  
16 the nature and extent of that threat was, I was at a  
17 loss to understand, and that he did not feel safe and  
18 that if anything was to go wrong I would be down on him  
19 like a ton of bricks, because that was never the case  
20 Chairman, and I don't know how Sergeant McCabe ever 14:11  
21 came to conclude that that was the case.

22 380 Q. Well, firstly, this must have alerted to you, to the  
23 fact that something bad had happened, as far as  
24 Sergeant McCabe was concerned, on the previous Friday  
25 and on that day, Monday the 18th, isn't that right? 14:11

26 A. Well, as I gave yesterday, Chairman, it was always my  
27 anticipation that Sergeant McCabe's view or perspective  
28 of me would change, but I most certainly never felt  
29 that Sergeant McCabe had a cause or a reason to feel

1 that he was under threat from me in any way, or that,  
2 indeed, that his position in the traffic unit in  
3 Mullingar, where he was doing an excellent job and all  
4 the reports were that he was doing an excellent job,  
5 and he appeared to be enjoying it, why he would want 14:12  
6 to -- as it transpired, he then subsequently revisited  
7 that and he remained on in his position as the sergeant  
8 in charge of the traffic corps as a result of the  
9 interactions of local Garda management with him.

10 381 Q. You knew that your counsel had put to him that day that 14:12  
11 the only reason he made allegations against  
12 Superintendent Clancy was to force the Garda  
13 authorities to make the DPP's decision available to  
14 Ms. D's family, isn't that right?

15 A. I knew that there was the issue of the DPP's 14:12  
16 directions, yes.

17 382 Q. No, I'm putting a different point to you. You knew  
18 that your own counsel had put it to him that the only  
19 reason he had made allegations against Superintendent  
20 Clancy was because he wanted to force a favourable 14:13  
21 decision in respect of the giving of the DPP's  
22 direction to the D family, isn't that right?

23 A. Well, Chairman, my understanding, the mistake was  
24 "against" and "to".

25 383 Q. Sorry, that was not -- you see, this is the point, 14:13  
26 Ms. O'Sullivan, You're conflating two very different  
27 things. That was all resolved on the 24th June.

28 A. Yes, that's correct, Chairman.

29 384 Q. Yes. But now we're dealing with what you thought had

1 happened on the 15th and the 18th May, and you couldn't  
2 possibly have thought it was just a simple error. You  
3 knew that your counsel had put to Sergeant McCabe that  
4 he was -- that his motivation in making the allegations  
5 against Superintendent Clancy was that he wanted to 14:14  
6 force a different decision in respect of the DPP's  
7 directions, isn't that right?

8 A. Chairman, I was dealing -- as again I tried to explain  
9 yesterday, there were the issues going on at the  
10 Commission of Investigation which were private, and as 14:14  
11 you will see from this minute, we were very anxious not  
12 to trespass in relation to the integrity and the  
13 privacy of that process. Here we had Sergeant McCabe  
14 saying that he had to stand down from a position. It  
15 was not immediately related to the fact of anything 14:14  
16 that had transpired at the Commission, other than he  
17 felt that he was under threat from me personally, and  
18 that if anything happened, and that was taken to  
19 believe -- to mean that if anything happened in the  
20 traffic unit in Mullingar, that Garda management and I 14:14  
21 would come down on him like a ton of bricks.

22 385 Q. Sorry, you said it wasn't connected with what had  
23 happened at the Tribunal?

24 A. Chairman, it was very difficult. I couldn't figure how  
25 it was connected because this related specifically to 14:14  
26 his position as a sergeant in charge of the traffic  
27 unit in Mullingar.

28 386 Q. Well, maybe I will refresh your memory again,  
29 Ms. O'Sullivan. If you would look at page 3048 and

1 page 3049.

2 A. Yes, Chairman, I see that.

3 387 Q. This was from Thomas Murray, isn't that right, to  
4 Lorraine Wheatley and Fintan Fanning?

5 A. Yes, it's from Fintan Fanning to me, and then it 14:15  
6 forwards on the correspondence received by Alan Murray,  
7 yes.

8 388 Q. Yes, exactly. And you read that, I take it, at the  
9 time?

10 A. Yes, I certainly did, Chairman. 14:15

11 389 Q. It says:

12

13 "With reference to the above, as you are aware Sergeant  
14 McCabe is currently performing duty as a sergeant in  
15 charge of the traffic corps based in Mullingar. This 14:15  
16 was a mutually accepted arrangement with Garda

17 management in Mullingar and himself following the  
18 request of Sergeant Moran to be redeployed within  
19 Mullingar Garda Station. On this date --" and that is  
20 the 18th "-- at 2:40pm, I received a text from Sergeant 14:16  
21 McCabe asking me to meet him at 7:00pm this evening.

22 He indicated that it was important. I agreed to meet  
23 him, and Sergeant McCabe later explained that he was  
24 running late and that it would be 7:30. At 7:35pm

25 Sergeant McCabe met me in my office. Sergeant McCabe 14:16  
26 stated that he could no longer carry on as sergeant in  
27 charge of the traffic unit. As an explanation, he

28 indicated the reason was N6ir6n O'Sullivan and he felt  
29 under threat. Sergeant McCabe informed me that he was

1 bound by confidentiality clause and could not give me  
2 any more information. At 8:24pm I again spoke to  
3 Sergeant McCabe by telephone. Sergeant McCabe  
4 indicated that he had no problem with me stating in my  
5 report the reason that he did not want to do duty as 14:16  
6 sergeant IC and also further explained that he did not  
7 feel safe, that if anything was to go wrong, they would  
8 be down on him like a ton of bricks. I asked him if he  
9 wanted me to contact Chief Superintendent O'Brien, and  
10 he indicated there was no point. He did not wish me to 14:17  
11 do anything else. Sergeant McCabe is currently  
12 attending the O'Higgins Commission of Inquiry and is  
13 due to attend the Commission of Inquiry again tomorrow.  
14 Sergeant McCabe has indicated that he wishes to remain  
15 as unit sergeant in the traffic unit and I hope to 14:17  
16 discuss the matter as sergeant IC of the unit in  
17 Mullingar with you in due course."

18  
19 Now, you were under no illusion, were you not, that he  
20 was protesting about how he had been treated at the 14:17  
21 Tribunal over the previous two days?

22 A. No, Chairman. As I say, this factually states that  
23 Sergeant McCabe is attending at the O'Higgins  
24 Commission and he is due to appear the following day.  
25 That is fact and that is true. 14:17

26 390 Q. Yes.

27 A. And this wasn't immediately -- obviously, this was an  
28 issue that Sergeant McCabe had raised with his local  
29 management in Mullingar, but if Sergeant McCabe had an

1 issue with the way that he had been treated at the -- I  
2 beg your pardon, not the Tribunal, but the  
3 Commission --

4 391 Q. Yes.

5 A. -- this isn't immediately obvious that there's a 14:17  
6 connection, because why would he feel under threat and  
7 if something happened in the traffic unit, Mullingar,  
8 that I or we would be down on him like a ton of bricks?  
9 But, Chairman, I accept Mr. McDowell's point, insofar  
10 as I'm not sure how much further I can put this. I can 14:18  
11 only tell what you is written on the document.

12 392 Q. Yeah, I know. But the point I'm putting to you,  
13 Ms. O'Sullivan, and I don't want to waste time on this,  
14 is that you knew that -- that, on Friday, your team of  
15 counsel and solicitor had apparently raised issues with 14:18  
16 Sergeant McCabe which caused Chief Superintendent Healy  
17 to go back to you and seek reconfirmation of  
18 instructions?

19 A. Well, sorry, Chairman, if I may, my understanding of  
20 what transpired and the reason that Chief 14:18  
21 Superintendent Healy contacted me on Friday the 15th  
22 was that legal argument had arisen and counsel for  
23 Sergeant McCabe - yourself, Mr. McDowell - that you had  
24 sought to know that the instructions were coming from  
25 the Garda Commissioner. 14:19

26 393 Q. Yes.

27 A. And subsequently you wanted to know that the  
28 instructions had come from N6oir6in O'Sullivan, and I was  
29 asked can I confirm my instructions.

1 394 Q. Yes.

2 A. I was surprised by that, because I had given my  
3 instructions to counsel, as would be normal, and, yes,  
4 I re-confirmed those instructions. But that was my  
5 understanding of the legal argument that had arisen on 14:19  
6 day 2. And thereafter, my understanding was that  
7 Mr. Justice O'Higgins had required, and quite rightly,  
8 that a document be prepared that set out what -- the  
9 matters that were to be put to Sergeant McCabe. Yes, I  
10 was absolutely aware of that. 14:19

11 395 Q. And in relation to the matters that were to be put to  
12 Sergeant McCabe, did you understand them -- did you  
13 understand what counsel was proposing to put to him,  
14 the 18 or 19 paragraphs in that letter?

15 A. I didn't have the factual knowledge of those matters, 14:19  
16 chair, because I did not have the opportunity, as I  
17 said yesterday, to be in a position to meet, and nor  
18 would it be appropriate that I would meet, with  
19 prospective witnesses, but counsel had, and, on the  
20 basis of those consultations, the document was then put 14:20  
21 together with contributions from the various people who  
22 were in a position to give the factual evidence and  
23 provide the accuracy in relation to it.

24 396 Q. So can we recap just where we are at the moment.  
25 You're telling this Tribunal that you told Chief 14:20  
26 Superintendent Healy that under no circumstances was  
27 the integrity of Sergeant McCabe to be challenged? Did  
28 you tell him that?

29 A. There was never a question of Sergeant McCabe's



1 integrity being challenged, and certainly in my  
2 conversations with Chief Superintendent Healy, I would  
3 have said it is always about just putting the facts.  
4 We were never arriving at a pre-determination of who  
5 was right and who was wrong. That was not our job;  
6 that was the job of Mr. Justice O'Higgins. 14:21

7 397 Q. Well, then I have to ask you how it is that when I've  
8 read to you what your counsel said to Mr. Justice  
9 O'Higgins, it doesn't cause you to come to the  
10 conclusion that your counsel was disobeying your  
11 instructions? 14:21

12 A. Chairman, as I say, my understanding was that this was,  
13 the word I will use is confusion that arose in legal  
14 argument. Mr. Justice O'Higgins had ruled on the  
15 matter on the 15th, 16th, 17th -- 18th, which was day  
16 3, and my understanding was that the matter rested 14:21  
17 there and then the matter was subsequently clarified on  
18 day 29.

19 398 Q. Let's be clear about this. Sergeant McCabe's  
20 motivation was the subject of a lengthy discussion  
21 before Mr. Justice O'Higgins, is that right? 14:21

22 A. But, Chairman, again I tried to explain this yesterday,  
23 my understanding of the motivation issue that was going  
24 to be put to Sergeant McCabe related to what happened  
25 or what circumstances had arisen that led Sergeant  
26 McCabe to conclude that each of the specific incidents 14:22  
27 that he quite rightly had highlighted as shortcomings  
28 in investigations and handling of prisoners, etcetera,  
29 how they had combined together to result in a belief of

1 allegations of corruption and malpractice, and what  
2 evidence did Sergeant McCabe have to support that and  
3 in terms of the testing of that evidence. That was  
4 always my understanding, Chairman. It was never about  
5 Sergeant McCabe or the man; it was always about the  
6 allegations.

14:22

7 399 Q. Well, I just want to understand, what you are saying  
8 is, in effect, that your counsel never had instructions  
9 to suggest that he was improperly motivated, is that  
10 right or wrong?

14:23

11 A. Well, Chairman, I can certainly speak, I never  
12 instructed counsel to suggest that Sergeant McCabe was  
13 acting out of improper motives.

14 400 Q. You didn't give them instructions to say that. Did you  
15 ever give them instructions not to say that?

14:23

16 A. There was never a suggestion that that was the case,  
17 Chairman. From the outset with my conversations with  
18 Chief Superintendent Healy and particularly after the  
19 consultations, it was always the case that Sergeant  
20 McCabe's behaviour had changed. It was never suggested  
21 it was for any bad reason, but that, as I tried to  
22 explain yesterday, that Sergeant McCabe's experience  
23 had led him to view things in a particular way after  
24 his, I'm using the word, frustration or after his  
25 failure or Garda management's refusal to give him the  
26 DPP's direction. That was always my understanding from  
27 my conversations with Chief Superintendent Healy, that  
28 that is what we were dealing with, the factual  
29 circumstances surrounding those matters.

14:23

14:23

1 401 Q. I see. Looking now at the letter that was sent, it  
2 doesn't deal with those issues, does it?

3 A. It deals, as I understand it, Chairman, with the issues  
4 arising from the failure of management to release the  
5 DPP's directions in the manner in which Sergeant McCabe 14:24  
6 required.

7 402 Q. Yes.

8 A. But I accept now, Mr. McDowell, that there are, as has  
9 been identified in this Tribunal, factual inaccuracies  
10 in that letter. Some of those were also identified 14:24  
11 during the course of the O'Higgins Commission.

12 403 Q. Well, they're not factual inaccuracies; they're gross  
13 falsehoods, aren't they?

14 A. Well, Chairman, again, I wasn't present at the  
15 consultations and I'm not in a position to arrive at a 14:24  
16 determination on that. I wasn't there, so I do not  
17 know about the compilation of that letter and I do not  
18 know what the inputs were from the various  
19 contributors, so I'm not a position to arrive at that  
20 determination. 14:25

21 404 Q. So you think it was a matter of factual inaccuracy that  
22 Sergeant McCabe -- it's purely a factual inaccuracy  
23 that his complaints against Superintendent Clancy were  
24 motivated by the way described in paragraph 19 of the  
25 letter? 14:25

26 A. I beg your pardon, Mr. McDowell, could you just --

27 405 Q. You think that it is purely a factual inaccuracy that  
28 the suggestion was being put to Sergeant McCabe that he  
29 was motivated by the matters set out at paragraph 19 of

1 the letter?

2 A. Well, my understanding from my conversations with Chief  
3 Superintendent Healy was that there was the "to" and  
4 "against", and I absolutely understand the difference  
5 in context. 14:25

6 406 Q. When did you have that conversation? It must have been  
7 after the 24th June?

8 A. Yes, Chairman.

9 407 Q. So it could not have been relevant to the 15th and 18th  
10 May? 14:25

11 A. No. But, Chairman, my understanding of the 15th and  
12 18th May, as I said, was, that that was -- the issue  
13 there was around the legal argument and the issues that  
14 had been raised, whether or not it was appropriate to  
15 put these matters to Sergeant McCabe. Mr. Justice 14:26  
16 O'Higgins made a ruling on that on the Monday, and  
17 thereafter, the letter, when the letter or the document  
18 was produced. In June, my understanding was from Chief  
19 Superintendent Healy, that the error in the letter,  
20 paragraph 19 of the letter, the "to" and "against", 14:26  
21 which is a significant error, that that had been  
22 identified, and that in fairness, I believe, or I  
23 understand, that Superintendent Cunningham had agreed  
24 that that was an error, at the hearings.

25 408 Q. Yes. Now, on the 18th May 2015, Sergeant McCabe found 14:26  
26 himself confronted with a letter which suggested that  
27 he had created his complaints against Superintendent  
28 Clancy because of wholly improper reasons, that he  
29 wanted to force him to change his mind about the DPP's

1 directions. That's the factual situation, isn't it?

2 A. Yes. The error was there on day 3.

3 409 Q. Yes.

4 A. Yes, Chairman.

5 410 Q. And on the previous Friday, Mr. Justice O'Higgins had 14:27  
6 been told that he was -- that his motives were  
7 improper?

8 A. Yes, Chairman, I see that now, yes.

9 411 Q. And that his integrity would be in issue the whole way  
10 through the Commission? 14:27

11 A. Chairman --

12 412 Q. Sorry, do you accept that that is what he understood on  
13 those days?

14 A. I can understand how Sergeant McCabe may have  
15 understood that from the interactions, but again, 14:27  
16 Chairman, as I say, my understanding was that this was  
17 in the thrust of legal argument and that the matter was  
18 cleared up on day 3 when the letter was produced, and  
19 I'm not in any way underestimating the inaccuracy and  
20 the effect that that had in paragraph 19. But the fact 14:28  
21 is, that it was never the intention, and nobody, to the  
22 best of my knowledge, had ever suggested that Sergeant  
23 McCabe had made complaints against Superintendent  
24 Clancy. My understanding always was that the  
25 complaints had been made to Superintendent Clancy for 14:28  
26 the purpose as Superintendent Clancy had requested.

27 413 Q. Ms. O'Sullivan, you know full well, don't you, that, in  
28 addition to that letter, submissions were put in on the  
29 11th saying precisely the same things and elaborating

1 on it, so it couldn't have been fixed up that  
2 afternoon?

3 A. Chairman, I understand that now. As I say, the issue  
4 that I'm saying was cleared up on the 18th May, as I  
5 understood, was the fact of the issue whether or not it 14:28  
6 was relevant to challenge Sergeant McCabe's motivation,  
7 and Mr. Justice O'Higgins ruled on that on the 18th, as  
8 I understand.

9 414 Q. He ruled that the most your counsel could put to him  
10 was that he was motivated by, I don't want to use the 14:29  
11 word a grudge, but a grievance against An Garda  
12 Síochána?

13 A. Yes, Chairman, that's correct.

14 415 Q. Now, was that on your instruction, that he was  
15 motivated by a grievance? 14:29

16 A. As I said yesterday, Chairman, I would not describe it  
17 as a grievance. I believe that Sergeant McCabe -- and  
18 again, there's what I know now and what I knew then.  
19 What I knew then was the fact that Sergeant McCabe's  
20 behaviour or attitude had changed. Now what I 14:29  
21 understand is, as was found by Mr. Justice O'Higgins,  
22 Sergeant McCabe had genuinely-held beliefs, some of  
23 them unsupported by evidence, which led him to conclude  
24 that there was corruption and malpractice and that a  
25 number of these incidents led to corruption and 14:29  
26 malpractice on behalf of some senior officers.

27 416 Q. Yes. But I've got to suggest to you that, as of day 2,  
28 Module 1, the whole question of corruption and  
29 malpractice had not arisen and was being raised by your

1 counsel for the first time?

2 A. Well, Chairman, and I don't wish to -- for obvious  
3 reasons, I don't wish to repeat what I said yesterday,  
4 but the fact is that the corruption and malpractice  
5 allegations, my understanding, were there from the 14:30  
6 outset. And certainly in terms of Mr. O'Higgins -- or,  
7 sorry, I beg your pardon, Mr. Guerin's examination of  
8 the matters raised by Sergeant McCabe, Mr. Guerin saw  
9 these allegations as being so serious that he  
10 recommended to the Government and to the Oireachtas 14:30  
11 that a commission of investigation had to be set up.  
12 And I know that Sergeant McCabe's legal team had also,  
13 I understand, suggested that these matters were so  
14 serious that a commission of investigation was  
15 required. Certainly, in the public and in the 14:31  
16 political mind at that time, in the immediate aftermath  
17 of Guerin, and indeed before it, the matter was  
18 relating to corruption, and the matter was relating to  
19 how all of these incidents combined to be corruption  
20 and indeed how Garda management had handled all of the 14:31  
21 investigations in relation to these incidents, and  
22 whether, for example, that there was cover-up or there  
23 were matters ignored. So I would sum it up, that in  
24 the public mind, and certainly in my mind, was that  
25 what was being alleged were acts of either omission or 14:31  
26 Commission on behalf of members of An Garda Síochána,  
27 to cover up very, very serious offences, very serious  
28 offences, and to not properly investigate very serious  
29 offences.

1 417 Q. Well, you had a team of lawyers obviously acting for  
2 you and you had a legal adviser in Mr. Ruane, isn't  
3 that right?

4 A. Yes, that's correct, Chairman.

5 418 Q. And I have to suggest to you that, for instance, the 14:31  
6 core booklet and the statement of facts that was used  
7 in the first module of the O'Higgins Commission did not  
8 mention corruption or malpractice?

9 A. Chairman, I don't have it here in front of me, but I  
10 can only talk about what was in my mind at the time, 14:32  
11 Mr. McDowell.

12 419 Q. Could I show you the statements of facts that the  
13 O'Higgins Commission circulated.  
14 [SAME HANDED]

15 A. Thank you. 14:32

16 420 Q. First of all, can we agree that the statement of facts  
17 for the O'Higgins Commission, Module 1, do not refer to  
18 corruption or malpractice in any shape or form?

19 A. Obviously I'm reading them very quickly here, but from  
20 what I can see, Chairman, yes. But if I look at what 14:33  
21 the terms of reference of the Commission were, there  
22 was certainly a term of reference looking at how did  
23 Garda management also respond to these matters, and my  
24 understanding, that was also being looked at by the  
25 Commission of Investigation. 14:33

26 421 Q. These were sent to you personally by David O'Hagan, the  
27 solicitor to the Commission, on the 24th April?

28 A. Yes, Chairman, and I see that. But I also see at the  
29 top it's terms of reference 1(a), (j) and (k), and I



1 forget whether it is (j) or (k) now, but one of these  
2 relates to how did Garda management deal with these  
3 matters, is my understanding.

4 MS. LEADER: It's page 116 in our materials.

5 MR. MCDOWELL: Page 116.

14:34

6 A. In Volume 1?

7 MS. LEADER: Volume 1A.

8 A. I beg your pardon, Ms. Leader, what page? 116?

9 MS. LEADER: 116, yes.

10 A. Yes.

14:34

11 422 Q. MR. MCDOWELL: Were you aware that the Tribunal had --  
12 or, sorry, the Commission had indicated that nobody  
13 could offer criticism of other witnesses without  
14 seeking, first, the permission of the Commission and  
15 setting out the facts on which it was proposed to  
16 criticise any witness?

14:34

17 A. I'm aware of now that, Chairman. I don't remember  
18 specifically being aware of it at the time, but, as I  
19 say, I wasn't at the Commission, but I'm aware of it  
20 now, yes.

14:35

21 423 Q. Were you aware, therefore, that insofar as it was  
22 proposed to put to Sergeant McCabe that he had improper  
23 motivation, that the rules of the Commission required  
24 that permission should be sought from the Commission  
25 before that was done --

14:35

26 A. I'm aware of that now --

27 424 Q. -- and the factual basis laid out?

28 A. Yes, I'm aware of that now, Chair, and my understanding  
29 is that that is what led to the creation of the

1 document on the Monday morning.

2 425 Q. And you were aware, because you read at some stage in  
3 May what happened on the 15th and the 18th May, you  
4 were aware that it had been made very clear to the  
5 Commission that Sergeant McCabe was offering no  
6 criticism of anybody else at that Commission? 14:35

7 A. Well, I'm not as clear on that, Chairman, because my  
8 understanding, as I say, was that very serious  
9 allegations. And I suppose maybe if I step back from  
10 this for a moment, if I may, Mr. McDowell, as 14:36  
11 Commissioner of An Garda Síochána, I had a very  
12 delicate balance, to balance between the allegations  
13 that were being made by Sergeant McCabe, including  
14 allegations in relation to specific senior officers of  
15 allegation of malpractice and the rights of those 14:36  
16 persons to be able to respond and to be able to have  
17 the case against them heard. And certainly, that was  
18 my objective, was to make sure that there was a fair  
19 and balanced hearing, as I knew and entrusted it to  
20 Mr. Justice O'Higgins, as I knew he would do, but to 14:36  
21 have the rights of all of the parties, including  
22 Sergeant McCabe, but also the rights of the parties  
23 against whom allegations were made and to have their  
24 rights vindicated.

25 426 Q. Yes. Now, could I ask you, on page 1 in book 1A -- 14:36

26 A. Yes, Chairman.

27 427 Q. -- which were the terms of reference promulgated by the  
28 Taoiseach on the 3rd February 2015, do the words  
29 "corruption" or "malpractice" appear other than in the

1 context of the alteration of the Pulse records in  
2 paragraph (i)?

3 A. No, Chairman, but I do note at paragraph (j), and my  
4 apologies, I couldn't recall whether it was (j) or (k)  
5 earlier, but at paragraph (j), which was also included 14:37  
6 in Module 1 of the terms of reference of the  
7 Commission, it says:

8

9 "The investigation by An Garda Síochána and the  
10 Minister for Justice and Equality and Department of 14:37  
11 Justice and Equality of complaints made by Sergeant  
12 McCabe in relation to matters (a) to (i)."

13

14 which would include (a), which is the Kingscourt bus  
15 incident, if I can call it that. And in my 14:38  
16 understanding of what was included in term of reference  
17 (j) was actually Garda management's failure to  
18 adequately and properly address the quite right issues  
19 and appropriate issues that Sergeant McCabe had brought  
20 to attention. 14:38

21 428 Q. I see. Well, if we just stop for a second and deal  
22 with the Kingscourt incident.

23 A. Yes.

24 429 Q. You knew, did you not, that it had been considered by  
25 the Byrne/McGinn inquiry? 14:38

26 A. Yes, Chairman. To the best of my memory, all of these  
27 matters were dealt with by the Byrne/McGinn inquiry.

28 430 Q. And you knew that they had done two things: they had  
29 not upheld Sergeant McCabe's complaint about it, and

1 secondly, that they'd indicated that insofar as he had  
2 described it, what had happened on the bus as a sexual  
3 assault, he had engaged in gross exaggeration?  
4 A. Chair, yes, I recall that. I don't have a specific  
5 memory of the very detail of the incident now, but I 14:39  
6 do, yes, I recall that.  
7 431 Q. Tell me, you know some of the basic aspects of that, of  
8 the Kingscourt event. You knew, for instance, that the  
9 issue of how it came to the attention of An Garda  
10 Síochána that something had gone wrong, as a result of 14:39  
11 Ms. Lorraine Browne complaining to Sergeant Regina  
12 McArdle, you knew that, did you not?  
13 A. Chairman, I hadn't got possession of the detailed  
14 knowledge of each of the specific incidents. I have  
15 much more detailed knowledge now, but even now I don't 14:39  
16 believe that I have as complete knowledge as the people  
17 that dealt with this, these matters, over the 34 days  
18 of the hearings before Mr. Justice O'Higgins.  
19 432 Q. Well, you're not suggesting that Sergeant McArdle acted  
20 wrongly in telling Lorraine Browne to go to GSOC, are 14:40  
21 you?  
22 A. Chairman, I would have to go back and revisit all that.  
23 I can't remember the specifics of Sergeant McArdle's  
24 involvement in it.  
25 433 Q. No, but if I put it this way: It was suggested that 14:40  
26 Sergeant McArdle and Sergeant McCabe had told  
27 Ms. Lorraine Browne that she should bring her complaint  
28 to GSOC, you know that?  
29 A. Em, I recall that, but I don't know of the

1 circumstances which gave rise to Sergeant McArdle, or I  
2 can't recall, here and now, the circumstances. But,  
3 Chairman, maybe if I can, and Mr. McDowell, it might  
4 help you: I didn't know the detail, the intricate  
5 detail of all of these individual incidents -- 14:40

6 434 Q. And I accept that.

7 A. There were incidents -- sorry, Mr. McDowell, if I could  
8 maybe finish. The incidents related to policing  
9 matters in Bailieboro district.

10 435 Q. Yes. 14:40

11 A. And it would never be the case that the Garda  
12 Commissioner would know the intricate details of all of  
13 these individual matters. They would be matters that  
14 would be dealt with normally, as I said earlier, by the  
15 local sergeant, the inspector or the superintendent. 14:41

16 So it was never a case that I would have a detailed  
17 knowledge of all of these. They were dealt with, yes,  
18 in the Byrne/McGinn investigation, but again, the  
19 detail of those would be part of the investigative  
20 process. 14:41

21 436 Q. I'm asking you now, when your counsel put it to  
22 Sergeant McCabe that he acted effectively disloyally to  
23 An Garda Síochána by telling Ms. Browne to go to GSOC,  
24 was that done on your instruction?

25 A. Well, I've never regarded Sergeant McCabe as disloyal, 14:41  
26 and --

27 437 Q. No, but did you think there was anything improper about  
28 that?

29 A. Well, again, Chairman, I will just point out that

1 counsel were acting, yes, on behalf of me as  
2 Commissioner and as the head of An Garda Síochána, but  
3 they were also representing a number of interests of  
4 other parties who would have a far more detailed  
5 knowledge of these individual incidents, far more than 14:41  
6 I would. So I am not aware of the instructions -- or,  
7 I beg your pardon, not the instructions, but the  
8 factual input of all of those people, so I don't want  
9 to speculate, Chairman. But I certainly know that I  
10 never instructed that disloyalty would be a matter put. 14:42  
11 But I would also qualify that, if I may, Mr. McDowell,  
12 by saying, I also, no more than here at this  
13 Commission, I would not interfere with the legal  
14 positions that are put forward by people, by learned  
15 counsel, and I certainly wasn't at the Commission 14:42  
16 interfering with the presentation of facts that may  
17 have been given by other witnesses. I'm not aware of  
18 what other witnesses were presenting to the tribunal --  
19 or, I beg your pardon, to the Commission.

20 438 Q. I take that point, Ms. O'Sullivan. But I am suggesting 14:42  
21 to you that your counsel put it to Sergeant McCabe that  
22 he was wrong and that Sergeant McArdle was wrong to  
23 tell Ms. Lorraine Browne that they should bring their  
24 complaint to GSOC and that that was done on your  
25 behalf? 14:42

26 A. well --

27 439 Q. Nobody else's behalf, your behalf.

28 A. well, Chairman, unless that I'm going to reconsider  
29 every element of what Mr. Justice O'Higgins

1 reconsidered, Mr. Justice O'Higgins heard all of the  
2 evidence from all of the parties and he came to his  
3 conclusions --

4 440 Q. Yes.

5 A. -- in relation to all of that.

14:43

6 441 Q. No, I'm just asking, by Friday, by the end of Friday,  
7 15th May, it had been -- questions had been put to a  
8 number of witnesses suggesting it was wrong and  
9 inappropriate for Sergeant McArdle and Sergeant McCabe  
10 to recommend Mrs. Browne to go to GSOC, and by the end  
11 of that evening Mr. Smyth was telling the Judge that  
12 Sergeant McCabe had acted for improper motives and that  
13 he was -- his instructions were to impugn his  
14 integrity. And I'm just - you needn't comment on that  
15 so far - I'm saying, by the end of Friday, what do you  
16 think was going on in Sergeant McCabe's mind?

14:43

14:43

17 A. Well, as I say, Chairman, I often find, in my  
18 experience, the cut and thrust of legal fora and  
19 commissions, tribunals, even court cases, has a very --  
20 I suppose they're so impersonal that they have a very  
21 big impact on people, including on victims of crime, on  
22 witnesses, they have a very big impact. I can only  
23 imagine what was going on in Sergeant McCabe's mind at  
24 that time, and indeed in the mind, Mr. McDowell, if I  
25 may say, of all of the people that were before the  
26 Commission, some of them who felt that they were there  
27 accused of very serious matters.

14:44

14:44

28 442 Q. Now, you say you can only imagine what's going on in  
29 Sergeant McCabe's mind. What do you imagine was going

1 on in his mind?

2 A. well, as I said yesterday, Chairman, I can imagine that  
3 his perspective in relation to me, I'm not sure that --  
4 and I feel very uncomfortable speculating on what is  
5 happening in anybody else's mind, Mr. McDowell, and I 14:44  
6 don't think it is a fair -- if I may say so, it is not  
7 a very fair question to ask me to speculate.

8 443 Q. very well. I withdraw it. I will put it this way to  
9 you: would you agree with the proposition that any  
10 person in his position would feel that his Commissioner 14:45  
11 was instructing counsel to undermine him and seriously  
12 damage him in the eyes of this Commission?

13 A. well, again, Mr. McDowell, if I may repeat what I said  
14 yesterday, I was faced, going into this Commission,  
15 with an almost impossible dilemma. And if you put 14:45  
16 yourself in my shoes and if you put -- from both the  
17 Commissioner of An Garda Síochána but also a  
18 perspective from where, from my point of view and from  
19 putting yourself in my shoes, I was faced into a  
20 Commission of Investigation where I had to balance the 14:45  
21 rights of all of the individuals, including Sergeant  
22 McCabe. what we were faced with was a situation where  
23 a number of members of An Garda Síochána, An Garda  
24 Síochána as a whole, which includes all of the members  
25 of An Garda Síochána, the allegations that were there 14:45  
26 were having such a huge impact on public confidence in  
27 An Garda Síochána, a negative impact, and, as I said  
28 yesterday, confidence in An Garda Síochána in April  
29 2014 had dropped to an all-time low of 67%. I am not



1 just suggesting from these matters, I'm suggesting from  
2 the combination of matters that were happening at that  
3 time and in the public domain. In 2015, we now had an  
4 opportunity, once and for all, to have all of these  
5 matters dealt with. It was not a decision that I took 14:46  
6 lightly, it was not a decision that I would take  
7 without having account of how everybody might think.

8 444 Q. What was the decision that you didn't take lightly?  
9 A. The decision to actually put all of the facts before  
10 the Commission of Investigation and to test the 14:46  
11 evidence that supported all sides of that. And the  
12 fact was that the advices I got that it would be  
13 necessary, in the course of the investigations -- or,  
14 sorry, of the Commission work, the investigation of the  
15 Commission, to put certain factual background and to 14:46  
16 cross-examine all the members.

17 445 Q. Yes.  
18 A. And this is something that I am very aware of, the  
19 impact on all of the members of an An Garda Síochána,  
20 and indeed not just the members of An Garda Síochána, 14:47  
21 civilian witnesses as well.

22 446 Q. Did it ever strike you in that context that you had  
23 opted to be represented by the same team of counsel  
24 that represented some of the people whose behaviour was  
25 under scrutiny? 14:47  
26 A. Yes, Mr. McDowell. As I said yesterday, what we did  
27 was, followed established practice. I was advised by  
28 the Head of Legal Affairs that, basically, this was  
29 what would be done, that members, serving and retired,

1 of superintendent rank and upwards, would be  
2 represented, and, if a conflict arose, then the matter  
3 would be revisited, and we followed that practice,  
4 Chairman.

5 447 Q. Could I ask you to go to page 2897 in volume 5, please. 14:47

6 UNKNOWN SPEAKER: Is there a record of the...  
7 (inaudible)?

8 A. Sorry, Mr. McDowell, 2897, is that right?

9 MR. MCDOWELL: 2897 in volume 5.

10 CHAIRMAN: I am sorry, sir, I didn't hear you. 14:48

11 UNKNOWN SPEAKER: Is there a ...(inaudible)... being  
12 allowed to record in camera and you don't disclose who  
13 was it. In that case and the... (inaudible)... Nóirín  
14 O'Sullivan, Garda Commissioner, was she not invited to  
15 the tape of which would record the conversation in 14:48  
16 camera and in court, would she not do the same.

17 CHAIRMAN: I think the best answer to give is, firstly,  
18 I don't mean to be discourteous, but you're not  
19 entitled to intervene. But to answer your question, we  
20 have, in fact, a complete audio tape of everything that 14:48  
21 went on at the Commission and we also have a complete  
22 transcript.

23 UNKNOWN SPEAKER: (Inaudible).

24 CHAIRMAN: All right, I'm going to rise for a minute.

25 14:49

26 AFTER A SHORT ADJOURNMENT THE HEARING RESUMED

27 AS FOLLOWS:

28

29 448 Q. MR. MCDOWELL: Ms. O'Sullivan, could I ask you to look

1 in Volume 5, page 2905.

2 A. Yes, Chairman, I have that here.

3 449 Q. Could I ask you to look at paragraphs 47 and 48. 47,  
4 firstly:

5

14:57

6 "The Commission has heard from a number of witnesses in  
7 relation to the effect on them by the allegations made  
8 by Sergeant McCabe. This included the emotional toll,  
9 the reputational effect, and in some cases being forced  
10 to resign from their positions."

14:57

11

12 Could I ask you who you were referring to in that  
13 submission as having been forced to resign from their  
14 positions?

15 A. Well, Chairman, I suppose a number of things had arisen 14:58  
16 and there were a number of people that felt that they  
17 had to resign from their positions, and I suppose again  
18 in terms of the privilege that applies to some of this,  
19 I'm not sure that all of the parties have waived their  
20 privilege, so I'm not -- I'm not sure whether can I say 14:58  
21 that or not, because, again, these would have been  
22 instructions given by some of the parties to counsel.

23 450 Q. Hold on a second. This is a submission you're making  
24 to Mr. Justice O'Higgins and you're telling him that  
25 some people had been forced to resign their positions 14:58  
26 because of accusations made by Sergeant McCabe. Unless  
27 the Chairman directs otherwise, there's no question of  
28 privilege arising from being asked -- in you being  
29 asked to identify those people who you claim were

1 forced to resign as a consequence of his allegations?  
2 A. Well, Chairman, I'm not sure if it's -- I don't want to  
3 speak on behalf of somebody that may have imparted this  
4 to -- their feeling on what their position, how tenable  
5 their position was or not, arising from this. I wasn't 14:59  
6 present at those consultations and I don't want to  
7 speak on behalf of somebody that I wasn't present there  
8 for, so I am not sure, Chairman, whether I can or not.  
9 But that was certainly the input from some of the  
10 people that were consulted in relation to the overall 14:59  
11 consultations.  
12 451 Q. Sorry, this was a submission being made to Mr. Justice  
13 O'Higgins. He was being informed as a matter of fact  
14 that Sergeant McCabe's allegations had forced some  
15 officers to resign their positions. I'm just asking 14:59  
16 you, since you caused this submission to be sent to  
17 Mr. Justice O'Higgins, who you thought Mr. Justice  
18 O'Higgins was supposed to believe had been forced to  
19 resign their position by Sergeant McCabe's allegation?  
20 A. Well, Chairman, again, my understanding from this 14:59  
21 paragraph is that:  
22  
23 "The Commission has heard from a number of witnesses in  
24 relation to the effect on them of the allegations  
25 made... 15:00  
26 This includes the emotional toll, the reputational  
27 effect and in some cases being forced to resign from  
28 their position."  
29



1 454 Q. MR. MCDOWELL: That is what I thought you were driving  
2 at, and I have got to suggest to you that that is a  
3 dark lie?

4 A. Well, Chairman, again, I can only take it so far as,  
5 the question I was asked is, had anybody retired from 15:01  
6 their position, and the fact is that Mr. Callinan had  
7 retired from his position in March 2014. Again, I can  
8 only state the fact.

9 455 Q. But he did not retire because of allegations made  
10 against him by Sergeant McCabe. 15:02

11 A. Well, Chairman, again, without being present for all of  
12 the consultations, I can only tell you what I  
13 understand to be here, to be written here, and the  
14 question that the Chairman asked me was, had anybody  
15 retired from their positions in this period of time 15:02  
16 between 2014 and 2015, and, yes, Mr. Callinan had.

17 456 Q. Well, you weren't seriously suggesting to Mr. Justice  
18 O'Higgins that your predecessor had resigned because of  
19 Sergeant McCabe's allegations, were you?

20 A. Well, Chairman, and I will take your guidance on this, 15:02  
21 the fact is that there were allegations made against  
22 Commissioner Callinan, allegations of corruption and  
23 malpractice made against Commissioner Callinan going  
24 back as far as 2012 in relation to these ongoing  
25 matters, and I don't want to put myself into -- or put 15:02  
26 words into Mr. Callinan's mouth, but whether that  
27 contributed or not is a matter for Mr. Callinan how he  
28 felt about the position that he found himself in when  
29 he retired from An Garda Síochána.

1 457 Q. The only allegation against former Commissioner  
2 Callinan was that he had improperly advanced the career  
3 of Superintendent Clancy, and that was rejected. Is  
4 there some other allegation that you think is being --  
5 A. Yes, Chairman. In fact, it's in -- Mr. O'Higgins, in 15:03  
6 his final report, referred specifically to the  
7 allegations of corruption made against, sorry, former  
8 Commissioner Callinan.

9 458 Q. What was that?  
10 A. He also says that they were hurtful and that he had to 15:03  
11 live under the strain of them for a very long time.

12 459 Q. And when the Commission looked at the issue, the only  
13 imputation against Martin Callinan was that he had  
14 improperly, in the eyes of Sergeant McCabe, advanced  
15 the career of Superintendent Clancy. 15:03

16 A. Well, Chairman, I don't have the findings of  
17 Mr. O'Higgins here in front of me, but maybe somebody  
18 can refer to me, because my recollection and my memory  
19 is that, actually, Mr. O'Higgins made specific  
20 reference that the allegation of corruption against the 15:04  
21 former Commissioner, Mr. Callinan, was seen by him as  
22 an allegation of criminal corruption, and maybe  
23 somebody can help me with the reference. I just can't  
24 recall the specific reference at the moment.

25 460 Q. I see. 15:04  
26 MR. MURPHY: Chairman, if it assists the Tribunal,  
27 paragraphs 13.88 of the report, page 301.

28 461 Q. MR. McDOWELL: That's precisely what I said. Have you  
29 got that?

1 A. No, Chairman, I don't.

2 462 Q. It says:

3

4 "The complaint of corruption against the Commissioner

5 was in placing Superintendent Clancy on a promotion

15:05

6 list. Sergeant McCabe told the Commissioner he was

7 guarded in his complaints against the Commissioner by

8 stating in his report to the confidential recipient

9 that Commissioner Callinan may not have been given all

10 the evidence in my complaints and he may have been

15:05

11 misled by the investigation team. This does not alter

12 the fact that the complaint of corruption subsisted.

13 Sergeant McCabe maintained in his evidence to the

14 Commission that, in his belief, the Commissioner had

15 influence in promotions. He did not withdraw his

15:05

16 allegation regarding the involvement --" sorry, and

17 later at paragraph 13:78:

18

19 "It would be a gross abuse of process and most unfair

20 to the Commissioner to invoke the regulations in the

15:05

21 absence of a genuine complaint. The evidence before

22 the Commission falls short of establishing that such

23 was the case. Although the complaint of Sergeant

24 McCabe against the Commissioner was motivated in part

25 by his desire to ensure that the matter came before the

15:05

26 Minister, the Commission is satisfied that Sergeant

27 McCabe did hold genuine concerns that there was some

28 impropriety in the promotion of Chief Superintendent

29 Clancy."



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Now, are you suggesting that that caused Marin Callinan to resign as Commissioner --

A. Well, certainly, as Mr. Justice O'Higgins, Mr. McDowell, you just read it there, the complaint of corruption subsisted against Sergeant McCabe [sic] all the way through throughout the O'Higgins Commission until such time as Mr. Justice O'Higgins ruled on it. 15:06

463 Q. Yes. But the corruption and malpractice allegation against him was that he had improperly -- 15:06

CHAIRMAN: Just, we need to correct the transcript. You said Sergeant McCabe; you should have said Commissioner Callinan.

A. I beg your pardon, Chairman.

464 Q. MR. McDOWELL: Sorry, we're getting mixed up in who we are talking about. I am suggesting to you that the only imputation against former Commissioner Callinan was that he had improperly advanced the career of Superintendent Clancy, in Sergeant McCabe's correct or incorrect view? 15:06

A. Well, Chairman, I'm not disputing Sergeant McCabe's view, and I have heard what you've read, Mr. McDowell, I don't have it in front of me, but while Mr. Justice O'Higgins concluded that Sergeant McCabe's belief might be genuinely held, the fact is that the allegation of corruption and malpractice was made under the corruption and malpractice regulations against Mr. Callinan; it was made, as I recall, in 2012, and it subsisted right throughout up to 2015 until such time 15:07

1 as Mr. Justice O'Higgins concluded. And if I may,  
2 Chairman, just, I know that I read in the transcripts  
3 recently there was various definitions of corruption,  
4 but in -- if I can put it from a policeman's  
5 perspective. Corruption is corruption, and it is one 15:07  
6 of the most gravest allegations that can be made  
7 against an individual officer, and it's something that  
8 we, as professional police officers, take  
9 extraordinarily seriously. And to have an allegation  
10 of corruption made against you is something that is 15:07  
11 enormously serious. And also, in the public and  
12 political mind, corruption is corruption. And that is  
13 the prevailing sense of what corruption is.

14 465 Q. Well, I think that is a well-made point, and I agree  
15 with you, just in case you think I'm arguing with you. 15:08  
16 I think it is a very serious charge to put against  
17 somebody. But could I then ask you to look at  
18 paragraph 48:

19  
20 "Also affected were victims of crime with whom Sergeant 15:08  
21 McCabe dealt directly, who were erroneously led to  
22 believe that they were disserved by An Garda Síochána.  
23 This, in turn, led to those victims being put through  
24 further unnecessary suffering."

25  
26 Now, this is a submission made by you to Mr. Justice 15:08  
27 O'Higgins, and do you stand over that?

28 A. Well, again, as I explained yesterday and today in my  
29 evidence, An Garda Síochána police with the consent of

1 the community that we serve, and particularly the  
2 people that are most vulnerable and depend on us mostly  
3 are victims of crime and they need to know that they  
4 have been serviced appropriately by An Garda Síochána  
5 and by members of An Garda Síochána. And when -- if 15:09  
6 people are led to believe, for whatever reason, whether  
7 genuinely held or not, and I'm not suggesting for a  
8 moment, Mr. McDowell, and please don't interpret it in  
9 the wrong way, if there are shortcomings in  
10 investigations and victims are not served properly, of 15:09  
11 course it is appropriate, but there is a mechanism in  
12 which to do that. But where victims are -- we'll say  
13 the perception is created that, in some way, a victim  
14 has not been served appropriately, that serves to  
15 undermine confidence in An Garda Síochána and 15:09  
16 particularly -- and if I may say so as well, and I said  
17 this yesterday, and I would like to again acknowledge  
18 the contribution of Sergeant McCabe in this, in the  
19 Guerin Report it was very clear that victims of crime,  
20 in some instances, had not been served appropriately, 15:09  
21 and the issues that were identified by Sergeant McCabe  
22 allowed us to prioritise putting in place structures  
23 for victims of crime, our victims' service offices.  
24 which we began implementation of in 2014. And Sergeant  
25 McCabe, the issues he brought to light very much 15:10  
26 contributed to that. But at the same time, there is a  
27 responsibility on all members of An Garda Síochána to  
28 make sure that victims are appropriately supported and  
29 that the appropriate mechanisms are in place.

1 466 Q. Well, I'm just asking you to read the paragraph that  
2 you caused to be sent in to Mr. Justice O'Higgins at  
3 the end of this hearing, of the Commission:

4  
5 "Also affected were victims of crime with whom Sergeant 15:10  
6 McCabe dealt with directly..."

7  
8 So we're not talking about victims of crime on the  
9 street; we're talking about people he dealt with.

10  
11 "... who were erroneously led to believe that they were 15:10  
12 disserved by An Garda Síochána. This, in turn, led to  
13 those victims..."

14  
15 Not any victims. 15:10

16  
17 "... those victims, being put through further  
18 unnecessary suffering."

19  
20 Now, I'm suggesting to you that that is wholly false, 15:10  
21 there isn't a shred of evidence for that, and it's a  
22 serious imputation against Sergeant McCabe?

23 A. But, will I -- sorry, Chairman. Yes, but there were  
24 victims of crime who were dealt with by Sergeant  
25 McCabe. 15:11

26 467 Q. Yes.

27 A. And the perception that they may have created out of  
28 that is that they were not served fully by -- in some  
29 cases, that was absolutely right, but there is a

1 mechanism by which to bring those matters.

2 468 Q. Sorry, well who are we talking about?

3 A. I don't recall specifically who here. I would have to  
4 look at all of the --

5 469 Q. Well, can I put it to you that there were no such 15:11  
6 persons, that nobody expressed any dissatisfaction with  
7 how Sergeant McCabe had dealt with them, and, in fact,  
8 all of the victims of the poor policing praised him to  
9 the Commission.

10 A. Yes, Chairman, I accept that. But there was a 15:11  
11 perception given to some victims of crime that they had  
12 not been properly dealt with by An Garda Síochána, and  
13 again, what I will say, Chair, and this will be  
14 available, I know that from the consultations there  
15 would have been specific incidents which people -- 15:11  
16 again, I come back, Mr. McDowell, to the fact that  
17 these were matters in the Bailieboro district, and the  
18 managers in the Bailieboro district would know  
19 specifically who these victims of crime are. I can't  
20 recall them now, but they would be aware of who the 15:12  
21 victims of crime were.

22 CHAIRMAN: Look, it is possible we're getting the wrong  
23 end of the stick in relation to this thing. If we just  
24 take one example, because we have been fixated on  
25 Module 1, where I suppose all of this happened, but if 15:12  
26 you take Module 1. So, the lady is driving a  
27 late-night bus, there's a sexual assault, two people  
28 create mayhem, she's battered around the place, and  
29 then the Garda response is that somebody turns up with

1 a brown envelope containing €150 and suggests that she  
2 accepts that, drop the charges and that everything is  
3 going to be hunky-dory, instead of investigating it.  
4 Now, I suppose I read that, and I may be old-fashioned,  
5 and I was appalled. But nobody can say, in consequence 15:12  
6 of that, that Sergeant McCabe failed in any way.  
7 Rather, it's a public service for him to point out that  
8 if this is the way policing is carried out in  
9 Bailieboro, well then they need a new police force or  
10 new managers. So that's it. But on the other hand, 15:13  
11 the submission seems to say victims were discommoded or  
12 undermined in consequence of Sergeant McCabe, and that  
13 doesn't seem to emerge anywhere. And I have read  
14 everything, by the way.

15 A. Yes, Chairman. Yes, Chairman, and I accept that. 15:13  
16 Certainly in the Kingscourt incident, that is a very  
17 good example, exactly as you describe, of where victims  
18 were not served well by An Garda Síochána. The  
19 specifics of these victims, again that would have been  
20 as a result of the input from the consultations. 15:13

21 CHAIRMAN: No, but it's not. The point of  
22 Mr. McDowell's question, I think, is this: that, you  
23 know, one might perhaps make the argument that Sergeant  
24 McCabe exaggerates, I understand there was a finding to  
25 that effect, but you couldn't say that in respect of 15:13  
26 any case where he was dealing with anybody, that he  
27 undermined public confidence in the police by saying,  
28 look, the police aren't doing their job properly and  
29 I'm going to make a complaint to try and make the

1 police do their job better. That is what I think the  
2 point is. But that seems to say exactly the opposite  
3 to that, that he was, in effect, creating disaffection  
4 among victims by his own conduct, and I don't see how  
5 that comes out of anywhere. So that is, I think, the  
6 point. 15:14

7 MR. MCDOWELL: Yes.

8 A. Yes, Chairman. And it may be the way in which this is  
9 worded, because I absolutely accept that point.

10 Sergeant McCabe quite rightly identified where there 15:14  
11 were failings and shortcomings in the service to  
12 victims. I think what this point is getting to is the  
13 manner in which these people were led to believe -- and  
14 absolutely, I absolutely accept that victims were not  
15 served appropriately by An Garda Síochána, and that was 15:14  
16 one of the first things that we accepted, and there is  
17 no doubt in the findings of Mr. Justice O'Higgins he  
18 also finds that. But this, as I say, was on the  
19 perspective of some of the people who had also dealt  
20 with the victims of crime, and that was their 15:15

21 perspective, that this had caused further anguish and  
22 anxiety to some of the members who felt that in some  
23 way they were being - and this is my word, Chair, not  
24 anybody else's - they were being duped by An Garda  
25 Síochána, or in some manner as such. But again, 15:15  
26 Chairman --

27 CHAIRMAN: If you just take the first example, that's  
28 clearly what happened.

29 A. Yes, Chairman, yes.

1 CHAIRMAN: I mean, you wouldn't approve of anyone  
2 turning up to the victim of a sexual assault with €150  
3 and saying, will you sign a note saying this is the end  
4 of the matter?

5 A. No, I would not. 15:15

6 CHAIRMAN: No. Well, that is not what anybody is here  
7 in policing for.

8 A. Yes.

9 CHAIRMAN: So, I mean, it is hard to know why that  
10 submission, therefore, could have any rational basis. 15:15  
11 I mean, if it's a mistake, it's a mistake. If it comes  
12 from somebody else, it comes from somebody else, then  
13 we're in the conflict of interest situation, but I'm  
14 not sure that any form of words can stand over it.

15 A. No, Chairman, and I absolutely agree with you, and I 15:15  
16 think the point that I'm making is, this was the  
17 perspective of some of the people, as I understand it,  
18 who had dealt also with the victims of crime. But  
19 there is no doubt, and I fully accept it, on the  
20 receipt of the O'Higgins report, and even before that, 15:16  
21 victims of crime were not well served by An Garda  
22 Síochána, and improvements to victims of crime  
23 certainly took place as a result of the matters that  
24 Sergeant McCabe brought forward. Because it is  
25 unacceptable that victims are not dealt with 15:16  
26 appropriately.

27 MR. SREENAN: Chairman, just in relation to that  
28 intervention, can I just point out that  
29 Superintendent Cunningham --



1 CHAIRMAN: Do you mean my intervention?  
2 MR. SREENAN: Yes, sir.  
3 CHAIRMAN: You do?  
4 MR. SREENAN: Yes, sir.  
5 CHAIRMAN: Right. Well, please continue. 15:16  
6 MR. SREENAN: Superintendent Cunningham did give  
7 evidence in relation to a particular investigation in a  
8 fatal case involving Ms. Shields that may be relevant  
9 there. I just draw the Tribunal's attention to that.  
10 CHAIRMAN: What was that, Mr. Sreenan? 15:16  
11 MR. SREENAN: The evidence was that an approach had  
12 been made to the father of a young girl who had been  
13 involved in a fatal accident, as a result of which, to  
14 put it mildly, he was led to believe that a police  
15 investigation was inadequate and that belief was 15:17  
16 incorrect. And that's in the evidence, I believe, of  
17 Superintendent Cunningham.  
18 CHAIRMAN: And the approach was made by?  
19 MR. SREENAN: I understand that Sergeant McCabe was  
20 involved in that approach. 15:17  
21 CHAIRMAN: Anybody else?  
22 MR. SREENAN: I believe there was one other, but I  
23 can't immediately bring the person to mind. I can  
24 arrange to have the -- it's in the transcript -- that's  
25 in the books of papers that the Tribunal has circulated 15:17  
26 of the evidence of Superintendent Cunningham.  
27 CHAIRMAN: And had the evidence been given as of this  
28 point, Mr. Sreenan, before the O'Higgins Commission?  
29 MR. SREENAN: Well, this, I believe, is February 2016,

1 so I believe so. These submissions relate to Module 4,  
2 Module 2 part 2 and Module 2 part 4, I understand.  
3 These are general submissions at the end.

4 CHAIRMAN: Well, let's -- thank you for that, and let's  
5 come back to it in due course. 15:17

6 470 Q. MR. McDOWELL: Am I right in thinking, Ms. O'Sullivan,  
7 that you were relying in most cases on a small number  
8 of members of An Garda Síochána to instruct counsel on  
9 the facts of the various matters?

10 A. The representation, Chairman, was granted to all 15:18  
11 members of, serving and retired, of superintendent rank  
12 and above.

13 CHAIRMAN: No, but I think what Mr. McDowell is asking  
14 you is this: You didn't know any of these facts?  
15 Like, you were never at a meeting in Mullingar, for 15:19  
16 instance, or you were never involved in the fatal  
17 accident of which we have heard, you were never  
18 involved in relation to the bus and the sexual assault.  
19 So insofar as anything is based on fact, it doesn't  
20 come from you, it had to come from somebody else? 15:19

21 A. That's correct, Chairman.

22 CHAIRMAN: That's the only question.

23 A. Yes, yes. I would have no factual knowledge or  
24 involvement in any of these incidents.

25 471 Q. MR. McDOWELL: Yes. So that to some extent in having a 15:19  
26 joint team with a number of senior Gardaí from  
27 superintendent rank upward, you were deferring to them  
28 as regards the factual instruction of counsel, is that  
29 right?

1 A. They were instructing counsel in terms of the factual  
2 input, yes, Chairman.

3 472 Q. Yes. But on day 2, the very specific query was being  
4 put in relation to motivation as to whether this was  
5 coming from you or from somebody else? 15:20

6 A. That's correct, Chairman, yes.

7 473 Q. And that was your call, was it not?

8 A. Yes, Chairman, as I have explained, I received advices  
9 from counsel that, having had the consultations with  
10 the witnesses who were to give evidence in Module 1, 15:20  
11 that it was their view that certain matter had to be  
12 put before the Commission, certain background matters  
13 had to be put before the Commission, and that certain  
14 evidence would have to be tested by way of  
15 cross-examination for the Commission, the full factual 15:20  
16 background to be put before the Commission, in order  
17 that the Commission and Mr. Justice O'Higgins could do  
18 their work.

19 474 Q. Well, could it be that counsel representing you and  
20 other senior members of An Garda Síochána, could it be 15:20  
21 that they viewed themselves as being instructed to  
22 query Sergeant McCabe's motivation to suggest it was  
23 improper, that those counsel considered themselves  
24 instructed along those lines by other people?

25 A. Well, Chairman, the advices I received were the advices 15:21  
26 that I acted on and I gave the instructions on, and  
27 certainly in terms of the consultations, at no stage  
28 did anybody advise me that there were any matters  
29 arising which would create a conflict of interest, and,

1 as Mr. Ruane had advised from the outset, that if such  
2 matters arose, that then it could be revisited, and  
3 nobody advised me that that was occurring throughout  
4 the proceedings.

5 475 Q. I see. You see what I am suggesting to you is that by 15:21  
6 the 24th June, it became clear that Mr. Smyth and his  
7 fellow counsel had made a fundamental mistake of fact  
8 in the letter they'd written and in the submissions  
9 they'd made and the questions they'd put to Sergeant  
10 McCabe about his motivation? 15:22

11 A. Yes, there was certainly errors made in the letter,  
12 yes, Judge -- or Chairman. I beg your pardon.

13 476 Q. And wherever they got, they seemed to misunderstand 15:22  
14 what they had been told about what happened between  
15 Superintendent Cunningham and Sergeant Martin and  
16 Sergeant McCabe, isn't that right?

17 A. Well, Chairman, I wasn't there for the consultation, so  
18 I can only go on the facts that emerged in the course  
19 of the hearings.

20 477 Q. But your counsel seemed to be putting a version which 15:22  
21 was not correct to Sergeant McCabe?

22 CHAIRMAN: There's no doubt about that.

23 MR. MCDOWELL: Yes.

24 478 Q. And I am just asking you, in that context, was it not 15:22  
25 apparent to you that a major blunder had been made?

26 A. It was apparent that mistakes had been made, yes,  
27 Chairman.

28 479 Q. Well, it was a major blunder to put this proposal to  
29 Sergeant McCabe that the only reason he was making

1 these allegations was that he had a grievance against  
2 An Garda Síochána and that it was explained by the  
3 failure to give the DPP's directions to the D family,  
4 that was a major mistake, wasn't it?

5 A. Well, Chairman, I'm not -- again, I wasn't present at 15:23  
6 the consultations, so the consultations in relation to  
7 those factual matters that took place between the  
8 contributors and counsel are probably best recounted  
9 either by counsel or by the contributors. I'm just not  
10 in a position to say how those matters arose. But I 15:23  
11 accept they were mistaken, yes.

12 480 Q. And, alas, we're not going to be told. But I'm  
13 asking -- not asking you about what happened between  
14 counsel and their informants, I'm asking you that it  
15 must have been apparent to you that a major mistake had 15:24  
16 been made?

17 A. Yes, Chairman, it became apparent during the course of  
18 proceedings that this was a mistake, yes.

19 481 Q. Yes. And what I have got to ask you is, on the 21st 15:24  
20 May, three days after Sergeant McCabe had resigned his  
21 position in charge of the traffic unit in Mullingar and  
22 three days after a transcript had been delivered to you  
23 which set out exactly what was being put to Sergeant  
24 McCabe about his motivation and the like, you had a  
25 meeting with Mr. Smyth? 15:24

26 A. That's correct, Judge. As I say, there's an entry in  
27 my diary and I heard Chief Superintendent Healy's  
28 evidence in relation to that.

29 482 Q. And, you see, there's two things that worry me, because

1 your original statement didn't deal with this, but you  
2 discovered your diary at a later point, isn't that  
3 right?

4 A. Chairman, from my recollection, but we can check this,  
5 I believe that I had discovered the entry in the diary 15:25  
6 before I made my statement and I drew the Tribunal  
7 investigators' attention to the fact that there was a  
8 meeting in my diary.

9 483 Q. Yes.

10 A. And as I said yesterday, unfortunately I cannot recall 15:25  
11 the meeting, but I don't dispute Chief Superintendent  
12 Healy's evidence, as such, that it was a, I'll call it  
13 a courtesy type of meeting.

14 484 Q. Well, as I understood Superintendent Healy's evidence,  
15 he went on to say that almost the only topic of 15:25  
16 conversation between you and Mr. Smyth was the grave  
17 allegations of corruption and malpractice which you  
18 understood Sergeant McCabe to have previously made?

19 A. Well, Chairman, I would like to assist the Commission  
20 with this. I can't recall the meeting. What I do know 15:26  
21 is, on that particular day, if I'm not mistaken,  
22 foremost in my mind was correspondence that had been  
23 received by the Commission in terms of discovery, and  
24 that would have been very much on my mind, but I cannot  
25 recall the detail of that meeting. 15:26

26 485 Q. You see, it occurred within three days of a fairly  
27 heavy attack on Sergeant McCabe's integrity and his  
28 motivation. And is it your evidence now, that although  
29 you met Mr. Smyth within three days of that happening,

1           you never discussed it with him?

2           A.    Well, Chairman, as I recall, it was not -- if it was a  
3           consultation with Mr. Smyth, the legal team would have  
4           been present and I would have had more -- a more  
5           detailed recollection of it. This, as I understand it   15:27  
6           from Chief Superintendent Healy, and, as I say, I just  
7           do not have a recall of the meeting, but I accept Chief  
8           Superintendent Healy's evidence insofar as it was a  
9           type of courtesy meeting, and it was at the end of a  
10          day, so I can't put it any further than that Chairman,   15:27  
11          at this point.

12   486   Q.    I see. Because it seems extraordinary that Sergeant  
13          McCabe, you must have known, was deeply upset about  
14          something that had happened at the Tribunal, and here  
15          is the man who presumably upset him, and you don't   15:27  
16          discuss with him what had happened 72 hours earlier?

17          A.    As I said, Chairman, what I recall it -- or I don't  
18          recall it, but I accept Chief Superintendent Healy's  
19          account of the meeting.

20   487   Q.    I see. Well, now, at any point in respect of your   15:27  
21          advices, or your instructions, rather, to counsel, as  
22          to how they were to conduct themselves in this  
23          Tribunal, at any point did you make a record of what  
24          you had said to anybody?

25          A.    No, Chairman, I didn't. I was depending on Chief   15:28  
26          Superintendent Healy to do that.

27   488   Q.    I see. And therefore, when you told Chief  
28          Superintendent Healy that under no circumstances was  
29          Sergeant McCabe's integrity or his motivation to be

1 challenged on the basis that it was improperly  
2 motivated, you expected him to note that somewhere, did  
3 you?

4 A. well, Chairman, as I say, the conversation with Chief  
5 Superintendent Healy and the instructions I gave to him 15:28  
6 at the outset of his role was that this was to get to  
7 the truth, to establish the facts and get to the truth.  
8 The issue specifically of any challenge to Sergeant  
9 McCabe's integrity never came up then or now. But  
10 certainly there was no question of challenging 15:28  
11 anybody's integrity, anybody's mala fides. It was  
12 always the case that it was about putting the factual  
13 matters before the Commission to allow the Commission  
14 to investigate their terms of reference thoroughly.

15 489 Q. well, we're not going to have another debate on mala 15:29  
16 fides or good faith or bad faith. But do you agree  
17 that to put to Sergeant McCabe that his motivation was  
18 improper in making complaints, was something that you  
19 had never countenanced being done?

20 A. well, Chairman, as I say, my understanding of the 15:29  
21 advices I received and the instructions I gave were  
22 that counsel were of the view that it would be  
23 necessary, having had consultations with all of the  
24 witnesses, it would be necessary to put certain  
25 background matters to Sergeant McCabe arising from his 15:29  
26 interactions with senior management in the Bailieboro  
27 district and the Cavan-Monaghan division, from their  
28 refusal or from Sergeant McCabe's failure to get the  
29 DPP's directions in the manner in which he wanted them.



1 And thereafter, a number of issues arose, and looking  
2 at what gave rise to those issues, what were the  
3 circumstances and what was the evidence, my  
4 understanding of what needed to be tested was the  
5 evidence that supported those allegations thereafter. 15:30

6 490 Q. I see. On that subject, various versions of what  
7 Sergeant McCabe is supposed to have been aggrieved  
8 about have been floated, some that he wanted the DPP's  
9 directions circulated as widely as possible, others  
10 that he wanted them given to himself, when, as we now 15:30  
11 know, he knew them, and others that he wanted them  
12 given to the D family. Which did you understand to be  
13 the case?

14 A. My understanding, Chairman, was that Sergeant McCabe  
15 had sought the release of the DPP's direction to him, 15:31  
16 and that what he was to do with them thereafter I'm not  
17 sure, but my understanding was that Sergeant McCabe's  
18 desire was to have the DPP's directions released to  
19 him, as best as I can recollect, Chairman, but it was  
20 about having the DPP's directions, and what he intended 15:31  
21 to do with them I'm not quite clear.

22 491 Q. We know --

23 CHAIRMAN: Mr. McDowell, I'm sorry.

24 MR. MCDOWELL: Sorry, Judge.

25 CHAIRMAN: My understanding of the matter, please 15:31  
26 correct me if I am wrong, was that, as counsel said in  
27 opening this particular section of our work, as would  
28 be natural, Sergeant McCabe would be friendly with the  
29 State solicitor, and the State solicitor read out the

1 DPP's letter to him over the phone, that is what I  
2 understood, so he never had it in writing. Now, unless  
3 he had a photographic memory and took it down  
4 straightaway and wrote it down, but he never had the  
5 letter. And in terms of the options, I think 15:32  
6 Ms. Leader put a number of options, including it was  
7 simply the D family and himself. But I'm, I suppose,  
8 focusing more on the fact that since the complaints  
9 made were in relation to the D family and him having to  
10 work with Garda D, if I can put it that way, that the 15:32  
11 release of the letter to them would have helped as well  
12 as to himself. And nobody was intending to have it  
13 pinned up on the station notice board, so to speak.  
14 That is what I think now at the moment.  
15 MR. McDOWELL: well, yes. It would have been a bit 15:32  
16 unusual to put it up on the station board, I suppose.  
17 492 Q. So I was just asking you what you understood his  
18 underlying desire to be?  
19 A. From -- again, my recollection is, Chairman, that the  
20 issues were, following Sergeant McCabe's failure or 15:32  
21 Garda management's refusal to get the DPP's directions,  
22 the focus of what I was informed was on the behaviours  
23 or the attitude of Sergeant McCabe that ensued  
24 thereafter.  
25 493 Q. I see. And I think it's fairly obvious from the 15:33  
26 submission that was put in in February of 2016 that the  
27 case was being made that he had become hostile to the  
28 officers. Maybe I should show it to you so that we are  
29 clear about what we are talking about. At paragraph 39

1 on page 2904, in volume 5, it's stated:

2  
3 "The Commission had heard evidence and received  
4 submissions in relation to sensitive allegations made  
5 against Sergeant McCabe, but it may be helpful to 15:34  
6 summarise the key dates. The allegation was first made  
7 in December 2006."

8  
9 This is Ms. D's allegation.

10  
11 "Investigated by Inspector Cunningham, as he then was,  
12 in early 2007, and DPP directions to the effect that  
13 there was nothing of a criminal nature in the complaint  
14 were communicated to the parties in April and May." 15:34

15  
16 That's not right, is it?

17 A. My understanding again from the evidence was that, yes,  
18 I think it was communicated, to the best of my --  
19 CHAIRMAN: I think, in fact, what had happened was,  
20 there was a shorthand used by the officers involved, 15:34  
21 which was lack of evidence, or insufficient evidence,  
22 that is a kind of a shibboleth that is used in a lot of  
23 things.

24 A. Yes.

25 CHAIRMAN: But whereas, I think, as we've already said, 15:34  
26 the state solicitor had read out the letter to Sergeant  
27 McCabe and certainly no one would blame him for doing  
28 that. It is somewhat inaccurate.

29 494 Q. MR. MCDOWELL: And then the sentence is:

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"That appeared to be the end of the matter. However, in mid-October 2007..."

And then there is a reference to Ms. D confronting Sergeant McCabe in public. That is blacked out there, you can't read it.

15:35

"This was understandably very stressful for Sergeant McCabe and caused him to take sickness leave.

15:35

41. Up to this point, while Sergeant McCabe had made complaints against other members, they were relatively few in number and dealt with to Sergeant McCabe's satisfaction. Thereafter, however, he commenced making generalised complaints about behaviour, such as lateness, also some specific complaints against some more junior members of the station party, including Garda Naughton, Garda Martin and Garda Daly.

15:35

42. Sergeant McCabe then decided to seek to obtain the DPP's directions in order to exonerate himself in the eyes of his accusers. Chief Superintendent Clancy, Superintendent Cunningham and Chief Superintendent Rooney all refused, and it is after this that Sergeant McCabe began making complaints against them specifically. He also began contacting victims of crime to encourage them to complain. He also redirected some of his earlier complaints, such as

15:35

15:36

1 against Garda Martin, whom he absolved during her  
2 disciplinary proceedings in order to point the blame at  
3 Chief Superintendent Clancy. The targeting of these  
4 officers continued with Sergeant McCabe willing to make  
5 a false allegation against Superintendent Callinan 15:36  
6 simply for the purpose of stymieing the promotion of  
7 Chief Superintendent Clancy. Even during the hearings  
8 before the Commission, he continued to do so in that he  
9 absolved Garda Naughton of all responsibility for delay  
10 in his investigation when he discovered a file had 15:36  
11 remained in the superintendent's office. Sergeant  
12 McCabe then takes the approach that if anyone to whom  
13 he makes a complaint does not agree with him, he makes  
14 a further complaint, in some cases knowingly without  
15 justification, to a further authority." 15:37  
16

17 And that was a fairly serious assault on his  
18 motivation, wasn't it?

19 A. And, Chairman, that was what had transpired as a result  
20 of the evidence that had been heard at that stage 15:37  
21 before the Commission.

22 495 Q. I see. But you're not saying that that wasn't a  
23 suggestion of improper motivation?

24 A. But what I am saying, Chairman, and I would agree, as I  
25 have done, I accepted the findings of Mr. Justice 15:37  
26 O'Higgins, that Sergeant McCabe's complaints were  
27 sometimes, they were genuinely held beliefs but in some  
28 cases unsupported by evidence, and I think that's what  
29 transpired in the course of the Commission.

1 496 Q. Now, I would ask you, if we may, to move to the  
2 question of asking for their barristers' advice in  
3 writing.

4 A. Yes.

5 497 Q. That idea first occurred to you during the afternoon of 15:38  
6 Friday, 15th May, is that right?

7 A. Yes, I believe so, Chairman, yes.

8 498 Q. Up to that point, you saw no need to give them any  
9 written instruction or to have their advice as to what  
10 they proposed to do on your behalf written down 15:38  
11 anywhere?

12 A. Well, Chairman, as I said yesterday, I entrusted the  
13 process to the legal team that had been appointed and  
14 Chief Superintendent Healy as a liaison officer, who  
15 was a very experienced officer. 15:38

16 499 Q. And I have to ask you this: Are you finding fault with  
17 your legal team?

18 A. No, Chairman. I think the legal team were faced with a  
19 momentous task in acquainting themselves and acquiring  
20 all of the knowledge that they had to acquire in a 15:39  
21 short space of time, and I think the legal team did  
22 what they were instructed by me to do and followed  
23 through on the advices that they had conveyed to me.

24 500 Q. But we know, though, that, on day 3, Mr. Justice  
25 O'Higgins believed, and said so, that your team was 15:39  
26 instructed to challenge Sergeant McCabe's integrity and  
27 to challenge his credibility?

28 A. Yes, the credibility, yes. The integrity was corrected  
29 on day 29. But the credibility in the context, as I

1 understood it, of what evidence did Sergeant McCabe  
2 have to support his conclusion of corruption and  
3 malpractice, and to test that evidence of all of the  
4 witnesses in terms of the cross-examination. Because  
5 as I said earlier, Mr. McDowell, my duty of care 15:40  
6 obliged me to ensure that all of the witnesses had an  
7 opportunity to be heard and have their account of  
8 matters heard and, thereafter, for Mr. Justice  
9 O'Higgins to determine where the facts lay.

10 501 Q. Yes. Could I ask you to look at page 973 of the 15:40  
11 transcript?

12 A. Sorry, what volume is that, Mr. McDowell?

13 502 Q. Sorry, 973, it's in book 2A. It's transcript of day 3.

14 A. Yes, Chairman, I have that.

15 503 Q. At line 4 Mr. Justice O'Higgins. Speaking to me. 15:41  
16 Says:  
17  
18 "Certainly there is no doubt that the integrity of the  
19 witness is being impugned in no uncertain terms.  
20 Secondly, in relation to the inquiry. It seems to me 15:41  
21 the case is being made that I cannot accept the  
22 evidence of your client. This is the case that is  
23 being made."  
24  
25 That is what Mr. Justice O'Higgins thought. 15:41  
26 CHAIRMAN: What day of the hearing is that?  
27 MR. MCDOWELL: This is day 3. Judge.  
28 CHAIRMAN: Day 3.  
29 MR. MCDOWELL: Yes.

1 CHAIRMAN: So it's the 18th May.

2 MR. McDOWELL: 18th May. At page 192 of the  
3 transcript.

4 A. And I see that follows an argument, Mr. McDowell.

5 504 Q. Yes? 15:41

6 A. A legal argument, yes.

7 505 Q. But your counsel is sitting there, watching this, and  
8 according to you, he'd been told that he was not to do  
9 anything of the sort?

10 A. Chairman, I understand that, and I see that this 15:42  
11 interaction took place, but I'm sure you will  
12 appreciate, Mr. O'Higgins [sic], I'm not in a position  
13 to, and nor would I, interfere with the course of legal  
14 argument or how counsel is reacting or interacting at  
15 proceedings. I wasn't there on that day. 15:42

16 506 Q. If we get to page 974, I said to the Judge:  
17  
18 "Mr. Smyth has never told you any point of fact  
19 relating to this module on which this witness is to be  
20 disbelieved. He has come up with an entirely 15:42  
21 collateral argument about motivation but he's never  
22 suggested that he wasn't -- that the sergeant in charge  
23 at Bailieboro, he never suggested --"  
24  
25 And Mr. Justice O'Higgins: 15:43  
26  
27 "He hasn't."  
28  
29 And I say:



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"How -- as I understand from Mr. Smyth on Friday and from today he says the issues of motivation and credibility are inextricably linked."

15:43

And I said:

"Motivation with the greatest of respect is not relevant. Credibility is something on which he's entitled to cross-examine. We are dealing with statements of facts here. He came to this Commission not intending to say anything controversial at all, and Mr. Smyth and the Commissioner have decided to stage a battle with him about his motives in making these complaints."

15:43

15:43

And Mr. Justice O'Higgins said:

"He has made certain complaints, he has characterised Garda McCarthy's behaviour as disgraceful."

15:43

That was the young Garda who, perhaps due to inexperience, had produced £150 from the alleged perpetrators to settle a criminal matter, isn't that right?

15:44

A. Yes, Chairman, that's correct.

507 Q. "And said there was a failure to investigate a hijack, false imprisonment and sexual assault."

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I said:

"Those are his views of the issue."

And Mr. Justice O'Higgins said:

15:44

"As I understand it, the Commissioner was saying those allegations are false and motivated by malice."

Now, Mr. Justice O'Higgins was listening to what Mr. Smyth was saying, was he picking it up -- do you think he was picking it all up wrong or was it that you had failed to communicate your instructions to your counsel?

15:44

A. Well, Chairman, I can only recount my understanding of the advices that were received and the instructions that I relayed to counsel. And my understanding of that was, it was the motivation and, I saw it here a moment saying, the reasons that Sergeant McCabe believed that some of these incidents led to corruption and malpractice and what evidence was there to support the basis for that belief. And to cross-examine that evidence.

15:44

15:45

508 Q. If we go to page 980, we see at page 199 of the transcript, Mr. Smyth cross-examining Sergeant McCabe and he says at question 733:

15:45

"In the course of that meeting you advised Superintendent Cunningham that the only reason you made

1 a complaint against Superintendent Clancy was to force  
2 him to allow you to have the full authority, directions  
3 conveyed to you."

4  
5 And Sergeant McCabe said:

15:45

6  
7 "That's absolutely false."

8  
9 And Mr. Smyth says:

10  
11 "Right.

15:46

12 A. Absolutely, Judge.

13 MR. JUSTICE O'HIGGINS: The only reason?

14 MR. SMYTH: The only reason. And this will be the  
15 evidence of Superintendent Cunningham, the only reason  
16 you wrote those lists of complaints for Superintendent  
17 Clancy, do you understand, that you made the complaints  
18 about Superintendent Clancy was that you wanted to put  
19 pressure on Superintendent Clancy to get the full  
20 directions from the authority conveyed to you."

15:46

15:46

21  
22 And Sergeant McCabe said:

23  
24 "That is absolutely false. Absolutely."

25 A. And that is a mistake, Chairman. That was -- the  
26 complaints were made to Superintendent Clancy and my  
27 understanding is that subsequently -- I beg your  
28 pardon -- yes, to Superintendent Clancy, and my  
29 understanding is that subsequently Superintendent

15:46

1 Cunningham corrected that.

2 509 Q. After, that was on the 24th June.

3 CHAIRMAN: No, I think it was the next day, on the 19th

4 May. As far as I know it was on the 19th May, if one

5 reads on in the transcript in that day. 15:47

6 MR. MCDOWELL: Maybe you're right, Judge.

7 CHAIRMAN: I think it was. Mr. Justice O'Higgins in

8 fact starts by saying, look, the following has been

9 said at paragraph 19 and it's wrong and then asks

10 Superintendent Cunningham and he says that's fine. NOW 15:47

11 unless I have got it wrong.

12 MS. LEADER: It was actually in June.

13 CHAIRMAN: Was it?

14 MR. MCDOWELL: Am I wrong.

15 MS. LEADER: It was on day 5. 15:47

16 MR. MCDOWELL: No, I'm right, Judge.

17 CHAIRMAN: I stand corrected. You're right.

18 MR. MCDOWELL: On the 24th June.

19 CHAIRMAN: The Commission resumed on 24th June 2015.

20 And that was day 5. 15:47

21 510 Q. MR. MCDOWELL: And in the interval Superintendent

22 Cunningham had a chance to see the transcript of the

23 recording, and in the interval a submission had been

24 put in on the 11th June repeating the error that

25 Mr. Smyth had put orally on that afternoon, and it was 15:47

26 after that, and only after that, that Mr. Smyth finally

27 agreed that his submission was wrong.

28 A. Yes, Judge. The transcript speaks to that.

29 511 Q. And you didn't discuss it, you say, at a meeting on the

1 21st, three days after this with Mr. Smyth, that he had  
2 made this error?

3 A. Chairman, to the best -- I can only say to the best of  
4 my recollection, no. But as I say I just have no  
5 recall of the meeting.

15:48

6 512 Q. Did you know that when you met Mr. Smyth that the Judge  
7 believed that Mr. Smyth was asking him to believe that  
8 he wanted -- sorry, that he wanted on your instructions  
9 to challenge Sergeant McCabe's integrity, to challenge  
10 his credibility, to put to him that he was acting in  
11 bad faith and to put to him that he made these  
12 allegations maliciously? Did you know that that had  
13 happened on the 18th?

15:48

14 A. Chairman, no. My understanding was that the matters  
15 that had been raised on the 18th related to the legal  
16 argument about the instructions, where the instructions  
17 were coming from. And also then in terms of day 3,  
18 which was the 18th, I understand, that once the letter  
19 or the document had been produced that the Judge ruled  
20 thereafter on it, that motivation could only be dealt  
21 with in a -- I don't want to misquote Mr. Justice  
22 O'Higgins, but I believe in a peripheral way.

15:49

23 513 Q. I think we know that when he read the letter he said he  
24 was ruling it all out and saying the most that  
25 Mr. Smyth could put against him was that there was a  
26 grievance, an unnamed grievance against An Garda  
27 Síochána?

15:49

28 A. Yes, Judge. I think they were Mr. Justice O'Higgins'  
29 words.

1 514 Q. Yes. And I'm suggesting to you -- well, sorry, can I  
2 ask you is this: Do you feel in the slightest bit  
3 surprised that Chief Superintendent Fergus Healy didn't  
4 tell you on Monday, Tuesday or Wednesday, before you  
5 met Mr. Smyth, that this is what was happening at the 15:50  
6 Tribunal, that the man who was -- sorry, the  
7 Commission, that the man who was conducting the  
8 Commission believed that you were now instructing your  
9 counsel to make claims of malice against Sergeant  
10 McCabe? 15:50

11 A. Well, what Chief Superintendent Healy advised me was  
12 that the legal argument had arisen, there was a  
13 requirement that my instructions would be confirmed to  
14 counsel, on day 3 he advised me that the matter had  
15 been adjudicated upon or ruled upon by Mr. Justice 15:50  
16 O'Higgins, and that it had then moved on.

17 515 Q. But it had moved on to this extent: It had moved on to  
18 the extent that those questions were put to Sergeant  
19 McCabe on day 3.

20 A. Chairman, that was my understanding from my 15:50  
21 conversation with Chief Superintendent Healy.

22 516 Q. You have a very laudable habit of not being willing to  
23 criticise anybody, but I mean are you disappointed that  
24 the true state of affairs was apparently kept back from  
25 you either by a failure on the part of Chief 15:51  
26 Superintendent Healy to understand what was going on or  
27 that he didn't want to tell you that the Judge thought  
28 that you were accusing Sergeant McCabe of malice?

29 A. Chairman, I wouldn't accept that Chief Superintendent

1 Healy held something back from me. I think he gave me  
2 his true assessment of the situation as transpired it  
3 on day 3.

4 517 Q. Well, would you in retrospect like to have been told  
5 that Mr. Justice O'Higgins thought that you were 15:51  
6 proposing for the rest of the Commission to run the  
7 case on the basis that Sergeant McCabe was never to be  
8 believed, that he was a man acting maliciously, that he  
9 was acting in bad faith and that his integrity was up  
10 to question? 15:51

11 A. Well, Chairman, again I might go to day 29, because on  
12 day 29 the matter is clarified. It's clarified before  
13 Mr. Justice O'Higgins and indeed Mr. Gillane sums up  
14 the situation quite correctly.

15 518 Q. I see. And I am asking you a different question. Do 15:52  
16 you not think you should have been told by somebody  
17 what was going on before Mr. Justice O'Higgins?

18 A. Well, Chairman, all I can say is the facts and the  
19 facts were what I was informed by Chief Superintendent  
20 Healy. 15:52

21 519 Q. Well, the facts weren't what you were informed by Chief  
22 Superintendent Healy?

23 A. Well, Mr. McDowell, the fact is that Chief  
24 Superintendent Healy informed me, if I say what he  
25 informed me was that the matter had been, I won't say 15:52  
26 resolved, but had been adjudicated or ruled upon by  
27 Mr. Justice O'Higgins on day 3, and thereafter Justice  
28 O'Higgins had ruled that the motivation issue was a  
29 peripheral issue and it could only be advanced in the

1 manner that he had adjudicated upon.

2 520 Q. And he never told you about malice or any of that?

3 A. No, Chairman.

4 521 Q. And does that disappoint you or even surprise you that  
5 you were not told about that? 15:53

6 A. Well, Chairman, Chief Superintendent Healy gave me his  
7 assessment of the situation as he relayed it to me  
8 after day 3.

9 522 Q. Are you surprised in any way that Sergeant McCabe would  
10 have been so shocked by the accusations of malice that 15:53  
11 was being put to him that on the day it was put to him  
12 he resigned his position in charge of the Mullingar  
13 traffic unit?

14 A. Well, I still, Mr. McDowell, I'm not -- I can  
15 understand perfectly well from a human perspective how 15:53  
16 Sergeant McCabe may have felt. But I still am at a  
17 loss to understand how Sergeant McCabe who was working  
18 very, very well in Mullingar, how he could make a  
19 connection between something -- and this isn't a  
20 criticism of Sergeant McCabe, but how he could connect 15:53  
21 something that happened in the thrust of legal argument  
22 at a Commission of Investigation with his ability. And  
23 I still am at a loss to know, Chairman, where Sergeant  
24 McCabe believed that in any way he was under threat  
25 from me or that I or we would be down on him like a ton 15:54  
26 of bricks and I'm still at a loss to understand what  
27 that threat is.

28 523 Q. Well, perhaps I can assist you.

29 A. Thank you.



1 524 Q. If he actually, if he actually thought that counsel on  
2 your instructions was accusing him of being malicious,  
3 of acting in bad faith, of being untrustworthy and of  
4 being somebody who lacked integrity, and that that was  
5 being put to him on your personal instructions, do you 15:54  
6 think he would have some reason to doubt as to whether  
7 all of this talk about supports in Mullingar and nice  
8 HR talk in relation to him was wholly insincere and  
9 wholly hypocritical?

10 A. Well firstly, Mr. McDowell, it was not nice HR talk, it 15:55  
11 was not hypocritical and it was not insincere.

12 525 Q. No --

13 A. Sorry, Mr. McDowell, if you allow me finish, please. I  
14 invested significant time and significant energy and  
15 significant thought in terms of what structures could 15:55  
16 be put in place to support Sergeant McCabe all  
17 throughout 2014 and 2015. There was nothing insincere,  
18 there was nothing hypocritical and there was nothing of  
19 nice, soft HR talk about that. And I would not have  
20 invested the time of myself, an assistant commissioner, 15:55  
21 two assistant commissioners in fact, an executive  
22 director of HR, two, if not three, chief  
23 superintendents, a number of superintendents and  
24 inspector in providing direct support to Sergeant  
25 McCabe if I was in some way being hypocritical. And I 15:55  
26 might say, Mr. McDowell, throughout that process it was  
27 disappointing to me on occasion Sergeant McCabe may  
28 have believed that there was insincerity in that  
29 approach and that we were not as committed to it as we

1 were. And indeed he through his legal advisers and in  
2 meetings, he actually wasn't happy with the fact that I  
3 had to delegate down some of those actions to other  
4 people. And again, that was the fact of what we were  
5 dealing with. So, at a time when I was running the 15:56  
6 organisation as Commissioner of An Garda Síochána, as  
7 the Head of Security, facing some of the most  
8 significant national and international challenges ever  
9 faced, if anybody thinks that was hypocritical of me or  
10 that I was doing it for some other rationale or reason 15:56  
11 other than to show Sergeant McCabe support, well they  
12 are very mistaken.

13 526 Q. Now perhaps you will deal with the question I put to  
14 you: That he, having heard your counsel accuse him of  
15 acting out of malice, being untrustworthy, being a 15:56  
16 person who should not be believed and a person without  
17 integrity, that he would think that all of those  
18 actions which you had taken in public and spoken about  
19 to Dáil committees were hypocritical?

20 A. No. 15:57

21 527 Q. That he would think that?

22 A. No, I don't accept that, Chairman. I can't speak for  
23 Sergeant McCabe. And, as I say, from a human  
24 perspective I know the impact from experience that  
25 commissions and tribunals have on individuals and how 15:57  
26 they perceive different things happen. I was well  
27 aware going into this process that Sergeant McCabe's  
28 perspective on me and his perception of me may be  
29 changed and it may be changed by himself or by others.

1 But the fact is that what I had to do, and I have  
2 described it as an impossible dilemma, I had to balance  
3 my duty of care to Sergeant McCabe which I was doing  
4 and continued to do, and I also had to balance my  
5 obligation to the Commission and my duty of care to all 15:57  
6 members of An Garda Síochána, to allow them to have  
7 their rights vindicated as well. And that was the fact  
8 of the matter that we were dealing with.

9 528 Q. Let's deal with, you now accept from me, that your  
10 counsel led Mr. Justice O'Higgins to believe that 15:58  
11 Sergeant McCabe was acting maliciously, was a man of no  
12 integrity, was a man acting in bad faith, making these  
13 allegations in bad faith and was a man who should not  
14 be believed, whose word should not be believed; do you  
15 accept that, that that is what Mr. Justice O'Higgins 15:58  
16 understood your counsel to be saying?

17 A. Well, what I understand from the transcripts, and on  
18 reflection, is that, and again I am going to refer back  
19 to page -- sorry, day 29, Mr. Justice O'Higgins  
20 accepted that mala fides was introduced in the course 15:58  
21 of legal argument. It was never suggested by  
22 Mr. Smyth, to the best of my knowledge, that Sergeant  
23 McCabe was acting out of mala fides. It was also, the  
24 fact is that Mr. Smyth on day 29 accepted that it was  
25 mistaken on his behalf. But I accept what you are 15:58  
26 saying, that Sergeant McCabe's perspective may have  
27 been different and he may not have fully understood the  
28 cut and thrust of the legal arguments as they arose and  
29 I can understand the impact that that may have had on

1 him, yes.

2 529 Q. The Judge understood it that way. The Judge understood  
3 your counsel to be saying all of those things. Why was  
4 Sergeant McCabe to take a different view and to say oh  
5 no, the Judge is misunderstanding what Mr. Smyth is 15:59  
6 telling him?

7 A. Well, what I have said to you, Mr. McDowell, is I can  
8 absolutely understand Sergeant McCabe and how this may  
9 have the perception that he may have developed as a  
10 result of this, yes. 15:59

11 530 Q. Yes. And if he did believe that you were making those  
12 charges against him of lack of integrity, acting in bad  
13 faith, being malicious and being a person whose words  
14 should not be taken, do you not think that in the  
15 circumstances he must have wondered about all of the HR 15:59  
16 support you were giving him?

17 A. Well, as I say, Chairman, throughout --

18 531 Q. Publicly, publicly.

19 A. -- throughout 2014 and 2015 Sergeant McCabe on occasion  
20 expressed whether I was being sincere or not, insofar 16:00  
21 as at one stage in January '15 he expressed that he  
22 shouldn't have supported my appointment as  
23 Commissioner. He has expressed that at a particular  
24 meeting. And that didn't deter me in any way from  
25 continuing those supports. My commitment to Sergeant 16:00  
26 McCabe and by extension to all other people in An Garda  
27 Síochána who wanted to speak up, was absolutely  
28 resolute. And as I said yesterday I was setting the  
29 tone from the top, I was making sure that we were there

1 with Sergeant McCabe, to support Sergeant McCabe and to  
2 make sure that Sergeant McCabe could continue to  
3 operate in a positive working environment. And I  
4 outlined yesterday, Chairman, I won't rehearse them  
5 again, all of the actions that I took in that regard. 16:00

6 532 Q. When we came to the --

7 CHAIRMAN: Mr. McDowell, I'm under a three-line whip  
8 I'm afraid. One, two, three.

9 MR. MCDOWELL: I won't be much longer.

10 CHAIRMAN: Well, also one has to have regard to the 16:01  
11 stenographers, do you think --

12 MR. MCDOWELL: I won't be much longer tomorrow, Judge.

13 CHAIRMAN: Yes. That is fine. But you don't want me  
14 to try and sit down today?

15 MR. MCDOWELL: No, I'm not going to ask you to do that. 16:01

16 CHAIRMAN: All right, that is grand. We have done over  
17 five hours, so thank you.

18

19 THE TRIBUNAL THEN ADJOURNED UNTIL WEDNESDAY, 24TH

20 JANUARY 2018 AT 10:00AM 16:01

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	<b>189</b> [2] - 107:18, 108:8	158:16, 163:24, 193:17, 196:19	<b>2908</b> [1] - 26:7	51:29
	<b>18th</b> [29] - 19:9, 51:7, 59:24, 70:3, 98:5, 125:17, 125:25, 126:3, 126:4, 126:5, 126:9, 126:13, 127:16, 127:29, 130:25, 132:1, 133:20, 137:15, 140:9, 140:12, 140:25, 142:4, 142:7, 146:3, 184:1, 184:2, 189:13, 189:15, 189:18	<b>2015</b> [22] - 5:9, 6:16, 8:12, 9:14, 9:20, 9:21, 9:24, 47:18, 52:10, 60:18, 91:2, 95:26, 125:17, 140:25, 146:28, 153:3, 157:20, 158:16, 161:29, 188:19, 193:17, 196:19	<b>2928</b> [2] - 30:18, 30:19	<b>4226</b> [4] - 61:17, 61:21, 61:22, 73:6
<b>'15</b> [2] - 125:8, 196:21	<b>19</b> [7] - 120:17, 136:14, 139:24, 139:29, 140:20, 141:20, 188:9	<b>2016</b> [12] - 22:27, 23:2, 23:6, 26:7, 28:21, 31:11, 33:8, 48:8, 83:13, 89:11, 169:29, 178:26	<b>2929</b> [1] - 32:3	<b>4227</b> [1] - 68:28
<b>'relevance'</b> [1] - 92:5	<b>192</b> [1] - 184:2	<b>2017</b> [4] - 1:6, 1:10, 91:27, 100:22	<b>2931</b> [3] - 48:8, 48:23, 51:15	<b>4229</b> [1] - 69:5
<hr/> <b>1</b> <hr/>	<b>191</b> [1] - 1:10	<b>2018</b> [3] - 1:18, 5:1, 197:20	<b>2932</b> [1] - 48:12	<b>4232</b> [2] - 79:21, 79:27
<b>1</b> [12] - 13:21, 14:12, 14:19, 22:9, 142:28, 144:17, 145:6, 146:25, 147:6, 165:25, 165:26, 171:10	<b>199</b> [1] - 186:24	<b>2020</b> [1] - 42:8	<b>2935</b> [1] - 82:12	<b>4236</b> [1] - 80:8
<b>1(a)</b> [1] - 144:29	<b>1917</b> [1] - 118:20	<b>2021</b> [1] - 42:6	<b>2:40pm</b> [1] - 133:20	<b>4298</b> [2] - 29:1, 29:5
<b>102</b> [2] - 67:5, 67:17	<b>19th</b> [10] - 60:4, 63:11, 64:24, 68:27, 73:2, 87:3, 87:22, 127:5, 188:3, 188:4	<b>20th</b> [4] - 9:20, 9:24, 68:28, 72:17	<b>2A</b> [1] - 183:13	<b>4299</b> [1] - 29:15
<b>10:00AM</b> [1] - 197:20	<b>1A</b> [2] - 145:7, 146:25	<b>21st</b> [5] - 7:14, 69:11, 71:17, 173:19, 189:1	<hr/> <b>3</b> <hr/>	<b>4304</b> [1] - 32:17
<b>11</b> [10] - 31:20, 31:26, 32:7, 32:21, 36:10, 41:13, 43:10, 56:1, 65:1, 84:20	<b>1B</b> [1] - 112:15	<b>22nd</b> [2] - 72:2, 73:22	<b>3</b> [18] - 13:22, 124:13, 124:25, 125:10, 126:22, 137:16, 141:2, 141:18, 182:24, 183:13, 183:27, 183:28, 189:17, 190:14, 190:19, 191:3, 191:27, 192:8	<b>4305</b> [1] - 35:26
<b>116</b> [4] - 145:4, 145:5, 145:8, 145:9	<b>1st</b> [1] - 26:7	<b>23/5</b> [1] - 74:20	<b>301</b> [1] - 159:27	<b>4307</b> [1] - 36:17
<b>11th</b> [5] - 22:29, 23:1, 28:21, 141:29, 188:24	<hr/> <b>2</b> <hr/>	<b>2324</b> [2] - 5:18, 5:20	<b>3047</b> [1] - 126:27	<b>4308</b> [1] - 45:25
<b>12/5/2016</b> [1] - 32:5	<b>2</b> [14] - 3:6, 13:22, 22:9, 112:20, 124:24, 124:25, 125:21, 126:20, 136:6, 142:27, 170:2, 171:3	<b>2325</b> [1] - 5:29	<b>3048</b> [1] - 132:29	<b>4316</b> [1] - 47:11
<b>13.88</b> [1] - 159:27	<b>2004</b> [2] - 56:2, 84:20	<b>2337</b> [1] - 8:13	<b>3049</b> [1] - 133:1	<b>4318</b> [2] - 47:16, 47:28
<b>13:78</b> [1] - 160:17	<b>2006</b> [2] - 24:2, 179:7	<b>2339</b> [1] - 9:29	<b>30th</b> [1] - 67:29	<b>4319</b> [1] - 47:28
<b>13th</b> [3] - 31:11, 33:8, 40:15	<b>2006/2007</b> [3] - 91:13, 106:4, 106:8	<b>2340</b> [1] - 12:29	<b>32</b> [1] - 2:12	<b>4320</b> [2] - 69:12, 69:16
<b>14</b> [2] - 2:25, 122:16	<b>2007</b> [3] - 24:3, 25:17, 179:12	<b>2340</b> [1] - 12:29	<b>3234</b> [1] - 5:19	<b>4321</b> [1] - 69:25
<b>15th</b> [22] - 7:29, 33:23, 34:6, 35:15, 40:16, 52:10, 57:5, 58:2, 60:18, 112:20, 122:19, 124:6, 124:8, 125:25, 132:1, 135:21, 137:15, 140:9, 140:11, 146:3, 151:7, 182:6	<b>2007..</b> [1] - 180:3	<b>2340</b> [1] - 12:29	<b>3272</b> [3] - 122:7, 122:10, 122:11	<b>4324</b> [1] - 74:21
<b>16</b> [6] - 1:6, 117:16, 117:19, 117:21, 117:22, 117:23	<b>2008</b> [2] - 25:18, 87:12	<b>23RD</b> [2] - 1:18, 5:1	<b>34</b> [2] - 83:24, 148:17	<b>4329</b> [1] - 76:10
<b>16th</b> [6] - 8:12, 8:16, 38:26, 41:29, 83:12, 137:15	<b>2009</b> [1] - 106:13	<b>23rd</b> [2] - 73:25, 76:9	<b>35</b> [1] - 98:28	<b>4334</b> [1] - 79:2
<b>17</b> [1] - 1:10	<b>2012</b> [2] - 158:24, 161:28	<b>24th</b> [9] - 78:3, 78:21, 131:27, 140:7, 144:27, 172:6, 188:2, 188:18, 188:19	<b>3508</b> [2] - 20:26, 21:8	<b>4336</b> [2] - 89:12, 89:15
<b>17th</b> [5] - 45:22, 45:24, 48:7, 51:5, 137:15	<b>2013</b> [2] - 90:12, 104:15	<b>24th</b> [9] - 78:3, 78:21, 131:27, 140:7, 144:27, 172:6, 188:2, 188:18, 188:19	<b>36</b> [2] - 31:24, 36:28	<b>44</b> [3] - 25:6, 119:25, 120:17
<b>18</b> [2] - 98:27, 136:14	<b>2014</b> [20] - 1:4, 35:4, 90:9, 90:13, 90:16, 97:10, 97:13, 98:6, 101:9, 102:3, 104:5, 124:6, 124:16, 125:6, 152:29, 158:7,	<b>24th</b> [9] - 78:3, 78:21, 131:27, 140:7, 144:27, 172:6, 188:2, 188:18, 188:19	<b>39</b> [3] - 23:11, 23:25, 178:29	<b>45</b> [1] - 25:13
<b>18/5</b> [2] - 51:26, 51:27		<b>24TH</b> [1] - 197:19	<b>3976</b> [2] - 35:16, 35:18	<b>46</b> [1] - 1:18
<b>1835</b> [1] - 98:26		<b>25th</b> [4] - 81:7, 81:19, 89:24	<b>3977</b> [1] - 42:2	<b>47</b> [2] - 155:3
<b>1836</b> [2] - 98:20, 100:23		<b>2667</b> [2] - 14:27, 15:8	<b>3979</b> [1] - 58:23	<b>4745</b> [1] - 76:24
<b>1837</b> [1] - 99:5		<b>26th</b> [1] - 89:11	<b>3983</b> [1] - 71:19	<b>4749</b> [1] - 77:25
		<b>2709</b> [1] - 15:23	<b>3984</b> [2] - 73:26, 73:29	<b>4752</b> [1] - 78:4
		<b>28</b> [1] - 23:17	<b>3985</b> [1] - 77:9	<b>4755</b> [1] - 78:13
		<b>2897</b> [7] - 23:10, 23:17, 23:18, 154:5, 154:8, 154:9	<b>3991</b> [1] - 79:12	<b>4758</b> [1] - 78:22
		<b>29</b> [16] - 3:5, 19:23, 21:6, 115:5, 115:6, 115:7, 119:19, 119:23, 120:17, 126:23, 137:18, 182:29, 191:11, 191:12, 195:19, 195:24	<b>3rd</b> [2] - 9:20, 146:28	<b>4762</b> [1] - 80:19
		<b>2904</b> [1] - 179:1	<hr/> <b>4</b> <hr/>	<b>4768</b> [1] - 80:23
		<b>2905</b> [1] - 155:1	<b>4</b> [4] - 5:18, 170:1, 170:2, 183:15	<b>4774</b> [1] - 81:3
			<b>41</b> [2] - 35:4, 180:12	<b>4792</b> [1] - 72:4
			<b>42</b> [6] - 24:19, 117:13, 117:16, 117:19, 117:20, 180:21	<b>48</b> [2] - 155:3, 162:18
			<b>4217</b> [2] - 51:27,	<b>4801</b> [2] - 39:4, 39:7
				<b>4802</b> [1] - 39:11
				<b>4803</b> [1] - 40:2
				<b>4816</b> [1] - 40:13
				<b>4825</b> [1] - 63:13
				<b>4th</b> [1] - 19:23
				<hr/> <b>5</b> <hr/>
				<b>5</b> [12] - 4:4, 6:25, 14:15, 14:16, 82:13, 126:27, 154:5, 154:9, 155:1, 179:1, 188:15, 188:20
				<b>5:30pm</b> [1] - 39:16

---

**6**

---

**6**<sup>[1]</sup> - 122:10  
**67%**<sup>[1]</sup> - 152:29  
**695**<sup>[1]</sup> - 113:14  
**698**<sup>[1]</sup> - 112:17  
**6th**<sup>[2]</sup> - 23:6, 39:24

---

**7**

---

**7**<sup>[9]</sup> - 2:13, 20:26,  
25:16, 25:28, 35:17,  
58:24, 73:29, 77:10,  
117:23  
**72**<sup>[1]</sup> - 175:16  
**733**<sup>[1]</sup> - 186:26  
**7:00pm**<sup>[1]</sup> - 133:21  
**7:30**<sup>[1]</sup> - 133:24  
**7:35pm**<sup>[1]</sup> - 133:24  
**7th**<sup>[1]</sup> - 104:15

---

**8**

---

**8**<sup>[10]</sup> - 2:20, 3:14,  
29:3, 29:4, 32:17,  
35:27, 45:26, 61:21,  
69:13, 74:22  
**88**<sup>[3]</sup> - 119:25,  
120:17, 121:3  
**8:24pm**<sup>[1]</sup> - 134:2

---

**9**

---

**9**<sup>[6]</sup> - 8:16, 39:4,  
63:12, 72:3, 117:23  
**97**<sup>[2]</sup> - 4:5, 84:5  
**973**<sup>[2]</sup> - 183:10,  
183:13  
**974**<sup>[1]</sup> - 184:16  
**980**<sup>[1]</sup> - 186:24  
**9:44**<sup>[1]</sup> - 29:9

---

**A**

---

**ability**<sup>[1]</sup> - 192:22  
**able**<sup>[10]</sup> - 9:6, 36:11,  
49:10, 64:27, 71:3,  
90:4, 90:8, 127:27,  
146:16  
**abnormal**<sup>[1]</sup> - 37:12  
**above-named**<sup>[1]</sup> -  
1:27  
**absence**<sup>[2]</sup> -  
104:17, 160:21  
**absolute**<sup>[2]</sup> - 12:16,  
55:7

**absolutely**<sup>[19]</sup> -  
57:15, 58:5, 62:29,  
67:15, 108:14,  
123:15, 136:10,  
140:4, 164:29, 167:9,  
167:14, 168:15,  
187:7, 187:12,  
187:24, 196:8, 196:27  
**absolved**<sup>[2]</sup> - 181:1,  
181:9

**abuse**<sup>[3]</sup> - 49:29,  
50:21, 160:19  
**abusing**<sup>[1]</sup> - 50:7  
**accept**<sup>[27]</sup> - 32:27,  
88:27, 93:16, 102:8,  
102:17, 119:8,  
119:15, 119:18,  
126:16, 135:9, 139:8,  
141:12, 149:6,  
165:10, 166:15,  
167:9, 167:14,  
168:19, 173:11,  
175:7, 175:18,  
183:21, 190:29,  
194:22, 195:9,  
195:15, 195:25

**accepted**<sup>[8]</sup> - 42:21,  
55:5, 84:14, 133:16,  
167:16, 181:25,  
195:20, 195:24  
**accepting**<sup>[1]</sup> -  
102:10  
**accepts**<sup>[1]</sup> - 166:2  
**access**<sup>[4]</sup> - 48:4,  
49:10, 51:16, 101:26

**accident**<sup>[2]</sup> -  
169:13, 170:17  
**accompanied**<sup>[1]</sup> -  
83:26  
**accord**<sup>[1]</sup> - 68:7  
**according**<sup>[2]</sup> -  
117:8, 184:8  
**account**<sup>[9]</sup> - 6:23,  
68:18, 83:26, 116:19,  
116:21, 120:25,  
153:7, 175:19, 183:7

**accountability**<sup>[1]</sup> -  
86:25  
**accountable**<sup>[2]</sup> -  
38:10, 86:23  
**accounting**<sup>[1]</sup> - 70:7  
**accuracy**<sup>[3]</sup> - 14:17,  
81:16, 136:23  
**accurate**<sup>[2]</sup> - 64:8,  
68:5  
**accurately**<sup>[1]</sup> -  
15:22  
**accusation**<sup>[1]</sup> - 50:6  
**accusations**<sup>[2]</sup> -  
155:26, 192:10

**accuse**<sup>[3]</sup> - 50:7,  
55:2, 194:14  
**accused**<sup>[3]</sup> - 55:8,  
60:21, 151:27  
**accusers**<sup>[1]</sup> -  
180:23

**accusing**<sup>[2]</sup> -  
190:28, 193:2  
**acknowledge**<sup>[1]</sup> -  
163:17  
**acquainted**<sup>[1]</sup> -  
98:13

**acquainting**<sup>[1]</sup> -  
182:19  
**acquire**<sup>[1]</sup> - 182:20  
**acquiring**<sup>[1]</sup> -  
182:19  
**act**<sup>[3]</sup> - 31:19, 32:8,  
56:2

**ACT**<sup>[2]</sup> - 1:4, 1:9  
**Act**<sup>[3]</sup> - 32:22,  
84:20, 87:17  
**acted**<sup>[9]</sup> - 30:26,  
34:23, 61:14, 113:28,  
115:25, 148:19,  
149:22, 151:12,  
171:26

**acting**<sup>[14]</sup> - 85:13,  
126:17, 138:13,  
144:1, 150:1, 189:10,  
191:8, 191:9, 193:3,  
194:15, 195:11,  
195:12, 195:23,  
196:12

**action**<sup>[3]</sup> - 1:28, 6:5,  
60:28  
**actions**<sup>[10]</sup> - 20:22,  
39:26, 51:21, 82:29,  
86:23, 129:1, 129:6,  
194:3, 194:18, 197:5  
**active**<sup>[1]</sup> - 103:12  
**actively**<sup>[1]</sup> - 102:3

**activity**<sup>[4]</sup> - 40:26,  
46:25, 57:23, 72:26  
**acts**<sup>[1]</sup> - 143:25  
**actual**<sup>[4]</sup> - 46:16,  
53:22, 89:5, 106:7  
**addition**<sup>[2]</sup> - 87:6,  
141:28

**address**<sup>[8]</sup> - 27:5,  
30:2, 52:3, 82:29,  
85:7, 87:7, 129:4,  
147:18  
**addressed**<sup>[5]</sup> -  
42:24, 44:23, 81:26,  
90:2, 130:1  
**addresses**<sup>[2]</sup> - 88:3,  
88:7  
**addressing**<sup>[1]</sup> - 86:4  
**adequately**<sup>[1]</sup> -

147:18  
**ADJOURNED**<sup>[2]</sup> -  
96:17, 197:19  
**adjourned**<sup>[1]</sup> -  
115:20

**adjournment**<sup>[6]</sup> -  
48:7, 48:10, 51:5,  
51:9, 51:23, 113:17  
**ADJOURNMENT**<sup>[1]</sup>  
- 154:26

**adjudicated**<sup>[6]</sup> -  
55:14, 106:5, 125:21,  
190:15, 191:26, 192:1  
**administered**<sup>[1]</sup> -  
99:22

**administration**<sup>[1]</sup> -  
8:25  
**adopted**<sup>[3]</sup> - 66:25,  
83:15, 113:4  
**adopting**<sup>[1]</sup> - 96:13  
**advance**<sup>[2]</sup> - 8:29,  
89:3

**advanced**<sup>[4]</sup> -  
159:2, 159:14,  
161:18, 191:29  
**adversely**<sup>[1]</sup> - 85:1  
**adverted**<sup>[1]</sup> - 105:28

**advice**<sup>[18]</sup> - 47:6,  
47:7, 47:13, 47:18,  
48:3, 49:7, 49:9, 52:9,  
55:9, 57:4, 58:2,  
60:22, 62:24, 62:28,  
84:28, 85:3, 182:2,  
182:9

**advices**<sup>[19]</sup> - 6:4,  
6:13, 11:24, 12:5,  
12:14, 12:26, 20:2,  
60:18, 79:6, 116:2,  
116:3, 153:12, 171:8,  
171:25, 175:21,  
176:21, 182:23,  
186:16

**advise**<sup>[1]</sup> - 171:28  
**advised**<sup>[10]</sup> - 43:19,  
56:3, 57:21, 84:22,  
153:27, 172:1, 172:3,  
186:28, 190:11,  
190:14

**adviser**<sup>[2]</sup> - 64:3,  
144:2  
**advisers**<sup>[2]</sup> - 72:12,  
194:1  
**advising**<sup>[1]</sup> - 36:15  
**advisors**<sup>[1]</sup> - 9:12  
**affair**<sup>[2]</sup> - 97:11,  
157:18

**affairs**<sup>[2]</sup> - 37:12,  
190:24  
**Affairs**<sup>[1]</sup> - 153:28  
**affected**<sup>[3]</sup> - 32:27,

162:20, 164:5  
**affirmation**<sup>[1]</sup> -  
49:16

**afforded**<sup>[1]</sup> - 129:20  
**afraid**<sup>[1]</sup> - 197:8  
**AFTER**<sup>[2]</sup> - 97:1,  
154:26  
**aftermath**<sup>[1]</sup> -  
143:16

**afternoon**<sup>[4]</sup> - 97:6,  
142:2, 182:5, 188:25  
**agencies**<sup>[1]</sup> - 30:11  
**agenda**<sup>[1]</sup> - 101:14  
**aggrieved**<sup>[1]</sup> - 177:7

**agree**<sup>[8]</sup> - 25:9,  
144:16, 152:9,  
162:14, 168:15,  
176:16, 181:13,  
181:24  
**agreed**<sup>[12]</sup> - 32:5,  
51:9, 66:28, 68:9,  
68:22, 68:26, 87:3,  
87:21, 88:17, 133:22,  
140:23, 188:27

**agrees**<sup>[1]</sup> - 88:13  
**ahead**<sup>[3]</sup> - 19:19,  
24:28, 79:27  
**Alan**<sup>[2]</sup> - 127:7,  
133:6

**alas**<sup>[1]</sup> - 173:12  
**albeit**<sup>[5]</sup> - 19:9,  
21:1, 21:22, 56:14,  
121:2  
**alerted**<sup>[1]</sup> - 130:22  
**all-time**<sup>[1]</sup> - 152:29

**allegation**<sup>[29]</sup> -  
15:28, 16:8, 16:9,  
24:1, 50:16, 50:20,  
61:6, 61:9, 65:6,  
91:17, 91:19, 92:18,  
105:26, 106:8, 107:3,  
107:12, 146:15,  
156:19, 159:1, 159:4,  
159:20, 159:22,  
160:16, 161:9,  
161:25, 162:9, 179:6,  
179:9, 181:5

**allegations**<sup>[70]</sup> -  
10:23, 10:27, 11:14,  
11:19, 13:29, 14:1,  
16:25, 17:25, 17:26,  
18:7, 18:27, 18:28,  
23:28, 25:27, 25:29,  
26:25, 26:29, 27:6,  
27:10, 27:17, 27:21,  
49:28, 55:9, 55:13,  
86:1, 86:8, 86:17,  
86:21, 91:13, 103:13,  
103:19, 106:15,  
106:18, 106:19,

111:19, 113:10,  
113:12, 117:2,  
127:21, 131:11,  
131:19, 132:4, 138:1,  
138:6, 143:5, 143:9,  
146:9, 146:12,  
146:14, 146:23,  
152:25, 155:7, 156:1,  
156:14, 156:24,  
158:9, 158:19,  
158:21, 158:22,  
159:7, 162:6, 173:1,  
174:17, 177:5, 179:4,  
186:8, 189:12, 195:13  
**alleged** [3] - 83:27,  
143:25, 185:23  
**allow** [7] - 31:26,  
68:3, 109:19, 176:13,  
187:2, 193:13, 195:6  
**allowed** [5] - 20:24,  
27:5, 119:28, 154:12,  
163:22  
**allowing** [1] - 52:25  
**almost** [2] - 152:15,  
174:15  
**alter** [1] - 160:11  
**alteration** [1] - 147:1  
**amounted** [1] - 28:16  
**anal** [3] - 97:21,  
106:15, 106:16  
**analysis** [2] - 14:6,  
14:7  
**AND** [3] - 1:4, 1:5,  
1:9  
**ANGLESEA** [1] - 3:5  
**anguish** [1] - 167:21  
**Annamarie** [1] - 117:6  
**answer** [12] - 102:14,  
109:4, 110:12, 111:7,  
111:24, 114:11,  
114:29, 115:18,  
116:22, 120:7,  
154:17, 154:19  
**answered** [6] -  
82:11, 107:27, 108:5,  
110:11, 114:2  
**answers** [1] - 40:8  
**anticipate** [1] - 44:29  
**anticipated** [2] -  
6:19, 22:22  
**anticipation** [2] -  
12:3, 130:27  
**anxiety** [2] - 25:19,  
167:22  
**anxious** [4] - 46:14,  
62:6, 128:29, 132:11  
**apologies** [1] - 147:4  
**apologise** [1] -  
107:10  
**apology** [1] - 107:2

**appalled** [1] - 166:5  
**apparent** [6] -  
124:19, 157:1,  
172:25, 172:26,  
173:15, 173:17  
**appear** [41] - 5:22,  
6:16, 6:26, 8:15, 9:27,  
10:2, 10:8, 11:25,  
15:21, 21:19, 21:29,  
23:10, 28:23, 28:27,  
29:8, 29:17, 32:11,  
32:13, 34:3, 38:10,  
38:26, 42:4, 51:6,  
51:28, 53:16, 57:12,  
59:18, 63:15, 69:15,  
70:5, 70:17, 71:7,  
73:25, 75:1, 79:3,  
81:5, 81:20, 101:14,  
134:24, 146:29  
**appearance** [3] -  
8:29, 10:17, 16:17  
**APPEARANCES** [1] -  
2:1  
**appeared** [9] - 19:22,  
20:6, 24:7, 31:10,  
49:20, 66:20, 71:29,  
131:5, 180:2  
**appearing** [2] -  
86:28, 109:27  
**applies** [1] - 155:18  
**apply** [1] - 82:26  
**appointed** [4] -  
88:21, 102:23,  
102:26, 182:13  
**appointing** [2] -  
102:21, 103:6  
**appointment** [1] -  
196:22  
**appreciate** [3] -  
49:27, 62:3, 184:12  
**appreciating** [1] -  
96:11  
**approach** [15] - 20:2,  
25:7, 64:18, 65:28,  
66:25, 76:4, 76:8,  
83:15, 85:9, 90:5,  
169:11, 169:18,  
169:20, 181:12,  
193:29  
**appropriate** [10] -  
55:11, 65:6, 91:10,  
93:18, 96:4, 136:18,  
140:14, 147:19,  
163:11, 163:29  
**appropriately** [9] -  
27:29, 86:12, 88:23,  
163:4, 163:14,  
163:20, 163:28,  
167:15, 168:26  
**appropriateness** [1]

- 32:22  
**approval** [1] - 42:10  
**approve** [1] - 168:1  
**April** [4] - 24:5,  
144:27, 152:28,  
179:14  
**area** [2] - 28:12,  
102:1  
**areas** [1] - 82:24  
**arguing** [1] - 162:15  
**argument** [19] - 6:23,  
34:18, 55:21, 115:17,  
125:20, 135:22,  
136:5, 137:14,  
140:13, 141:17,  
166:23, 184:4, 184:6,  
184:14, 184:21,  
189:16, 190:12,  
192:21, 195:21  
**arguments** [2] -  
124:25, 195:28  
**arise** [1] - 87:14  
**arisen** [16] - 6:23,  
34:19, 40:28, 70:1,  
71:25, 73:8, 73:9,  
119:23, 124:25,  
125:21, 135:22,  
136:5, 137:25,  
142:29, 155:15,  
190:12  
**arising** [18] - 33:6,  
33:12, 42:23, 42:24,  
61:28, 62:15, 87:7,  
88:4, 88:7, 89:22,  
92:10, 121:17, 130:3,  
139:4, 155:28, 156:5,  
171:29, 176:25  
**arose** [10] - 12:27,  
22:10, 91:27, 100:21,  
137:13, 154:2, 172:2,  
173:10, 177:1, 195:28  
**ARRAN** [1] - 2:12  
**arrange** [3] - 62:20,  
122:27, 169:24  
**arranged** [2] - 9:4,  
63:10  
**arrangement** [2] -  
30:12, 133:16  
**arrested** [1] - 99:10  
**arrive** [3] - 19:3,  
139:15, 139:19  
**arriving** [1] - 137:4  
**article** [6] - 31:10,  
32:10, 33:10, 74:8,  
74:11, 74:12  
**articles** [1] - 40:9  
**AS** [4] - 5:2, 5:7,  
97:1, 154:27  
**ascribed** [1] - 7:26  
**aspect** [3] - 25:25,

87:17, 91:15  
**aspects** [2] - 91:24,  
148:7  
**assault** [6] - 148:3,  
165:27, 168:2,  
170:18, 181:17,  
185:28  
**asserted** [1] - 55:3  
**assertions** [1] - 31:3  
**assessment** [2] -  
191:2, 192:7  
**assist** [8] - 13:15,  
30:18, 52:14, 85:16,  
86:9, 110:18, 174:19,  
192:28  
**assistance** [1] -  
21:12  
**Assistant** [22] -  
10:17, 19:27, 90:20,  
97:9, 97:13, 98:4,  
99:2, 99:18, 99:25,  
100:6, 101:8, 101:13,  
102:11, 102:15,  
102:18, 102:23,  
102:26, 103:6,  
104:11, 105:11,  
105:20, 105:23  
**assistant** [16] - 6:27,  
25:15, 28:24, 36:25,  
64:1, 76:20, 98:17,  
101:29, 102:27,  
104:12, 104:16,  
104:19, 106:14,  
128:16, 193:20,  
193:21  
**assisted** [1] - 108:17  
**assisting** [1] -  
108:18  
**assists** [1] - 159:26  
**assuage** [1] - 129:7  
**assume** [1] - 104:22  
**AT** [1] - 197:20  
**attached** [4] - 78:16,  
80:26, 97:17, 128:16  
**attack** [5] - 50:11,  
50:15, 112:13,  
119:12, 174:27  
**attempt** [1] - 12:17  
**attempted** [2] -  
50:14, 93:14  
**attend** [4] - 8:21,  
92:12, 102:8, 134:13  
**attendance** [4] -  
63:15, 63:19, 92:27,  
98:15  
**attended** [4] - 99:25,  
99:28, 104:14, 104:20  
**attending** [3] - 33:15,  
134:12, 134:23  
**attention** [23] - 5:14,

6:14, 7:9, 27:4, 27:13,  
44:1, 44:14, 59:29,  
69:1, 71:5, 90:13,  
90:24, 90:26, 92:8,  
93:7, 127:4, 127:13,  
127:16, 128:17,  
147:20, 148:9, 169:9,  
174:7  
**attitude** [7] - 35:9,  
64:18, 65:28, 101:7,  
113:4, 142:20, 178:23  
**au** [1] - 82:9  
**audio** [1] - 154:20  
**August** [2] - 104:4,  
104:15  
**authorised** [4] -  
50:6, 55:6, 60:20,  
60:29  
**authorities** [1] -  
131:13  
**authority** [4] - 25:11,  
181:15, 187:2, 187:20  
**Authority** [6] - 67:23,  
67:24, 67:26, 67:28,  
68:26, 86:29  
**avail** [1] - 129:12  
**availability** [1] -  
123:21  
**available** [30] - 14:8,  
79:9, 92:15, 96:2,  
102:29, 110:1, 118:1,  
118:6, 118:7, 118:8,  
121:1, 121:4, 121:5,  
121:6, 121:9, 122:5,  
122:22, 122:26,  
123:5, 123:10,  
123:12, 123:15,  
124:2, 124:3, 124:7,  
129:11, 129:15,  
131:13, 165:14  
**avoidable** [1] - 86:12  
**aware** [52] - 17:1,  
20:15, 33:26, 34:28,  
35:2, 35:8, 46:15,  
48:11, 48:14, 71:1,  
86:28, 90:15, 93:5,  
95:12, 95:14, 95:17,  
98:9, 101:7, 103:5,  
103:11, 103:15,  
103:16, 103:21,  
103:22, 103:24,  
103:29, 106:7, 106:9,  
109:14, 113:3, 113:6,  
126:2, 126:7, 128:4,  
133:13, 136:10,  
145:11, 145:17,  
145:18, 145:19,  
145:21, 145:26,  
145:28, 146:2, 146:4,  
150:6, 150:17,



153:18, 165:20,  
194:27

---

## B

---

**backed** [1] - 17:18  
**background** [7] -  
15:15, 16:16, 61:5,  
153:15, 171:12,  
171:16, 176:25  
**backgrounds** [1] -  
116:6  
**backing** [1] - 94:23  
**bad** [13] - 15:29,  
16:9, 55:18, 109:21,  
130:23, 138:21,  
176:16, 189:11,  
191:9, 193:3, 195:12,  
195:13, 196:12  
**Bailey** [2] - 126:28,  
127:1  
**Bailieboro** [6] -  
149:9, 165:17,  
165:18, 166:9,  
176:26, 184:23  
**balance** [9] - 10:22,  
10:25, 11:20, 13:27,  
146:12, 152:20,  
195:2, 195:4  
**balanced** [2] - 65:29,  
146:19  
**balancing** [1] - 13:26  
**BALDWIN** [1] - 3:5  
**Barnes** [1] - 96:8  
**barrage** [1] - 47:2  
**BARRETT** [1] - 2:22  
**barristers** [1] -  
182:2  
**based** [5] - 11:23,  
82:23, 86:18, 133:15,  
170:19  
**basic** [7] - 62:7,  
62:11, 62:14, 83:6,  
83:10, 148:7, 157:23  
**basis** [10] - 19:10,  
41:4, 85:3, 85:28,  
136:20, 145:27,  
168:10, 176:1,  
186:22, 191:7  
**battered** [1] - 165:28  
**battle** [1] - 185:14  
**BE** [1] - 5:6  
**bear** [1] - 28:6  
**became** [6] - 72:21,  
91:27, 103:21, 128:4,  
172:6, 173:17  
**become** [5] - 41:6,  
55:5, 103:24, 126:7,  
178:27

**bed** [1] - 67:13  
**beforehand** [1] -  
22:18  
**beg** [24] - 21:24,  
23:13, 23:21, 29:4,  
39:8, 40:10, 48:24,  
51:8, 51:11, 77:25,  
89:15, 93:29, 126:6,  
126:23, 127:11,  
135:2, 139:26, 143:7,  
145:8, 150:7, 150:19,  
161:14, 172:12,  
187:27  
**began** [5] - 24:25,  
33:12, 163:24,  
180:26, 180:27  
**begun** [1] - 88:22  
**behalf** [19] - 6:19,  
14:11, 28:17, 49:12,  
111:17, 112:20,  
123:24, 127:19,  
142:26, 143:26,  
150:1, 150:25,  
150:27, 156:3, 156:7,  
182:10, 195:25  
**behaviour** [7] -  
24:15, 25:17, 138:20,  
142:20, 153:24,  
180:16, 185:20  
**behaviours** [1] -  
178:22  
**behind** [1] - 45:7  
**belief** [7] - 15:18,  
86:18, 137:29,  
160:14, 161:24,  
169:15, 186:22  
**beliefs** [4] - 26:24,  
38:23, 142:22, 181:27  
**believes** [1] - 121:20  
**below** [2] - 59:2,  
82:28  
**best** [11] - 7:21,  
60:11, 141:22,  
147:26, 154:17,  
173:8, 177:19,  
179:18, 189:3, 195:22  
**better** [4] - 44:8,  
44:26, 115:17, 167:1  
**between** [30] - 8:16,  
21:26, 30:8, 30:10,  
36:24, 37:17, 46:6,  
62:10, 67:11, 68:9,  
68:22, 70:13, 70:24,  
75:8, 75:25, 83:9,  
89:25, 91:5, 102:22,  
102:29, 103:29,  
119:22, 130:10,  
146:12, 158:16,  
172:14, 173:7,  
173:13, 174:16,

192:19  
**beyond** [1] - 9:5  
**big** [2] - 151:21,  
151:22  
**bit** [8] - 8:22, 18:15,  
21:12, 48:22, 93:1,  
96:9, 178:15, 190:2  
**BL** [9] - 2:7, 2:10,  
2:16, 2:17, 3:1, 3:2,  
3:2, 3:3, 3:11  
**blacked** [1] - 180:6  
**blame** [2] - 179:27,  
181:2  
**blunder** [2] - 172:25,  
172:28  
**board** [2] - 178:13,  
178:16  
**bona** [1] - 21:15  
**Book** [1] - 112:15  
**book** [6] - 112:17,  
113:14, 122:9,  
146:25, 183:13  
**booklet** [1] - 144:6  
**books** [1] - 169:25  
**bothered** [1] -  
106:21  
**bottom** [2] - 16:28,  
43:6  
**bound** [2] - 84:24,  
134:1  
**brackets** [2] - 33:3,  
36:18  
**breached** [1] - 6:12  
**break** [2] - 96:5,  
96:15  
**BREFFNI** [1] - 2:10  
**bricks** [6] - 128:25,  
130:19, 132:21,  
134:8, 135:8, 192:26  
**Bridewell** [1] - 10:3  
**brief** [1] - 40:25  
**briefed** [2] - 46:14,  
125:28  
**briefing** [4] - 40:1,  
40:9, 40:15, 56:4  
**briefings** [1] - 37:17  
**bring** [12] - 6:14,  
22:3, 27:12, 44:1,  
68:25, 71:5, 99:4,  
107:17, 148:27,  
150:23, 165:1, 169:23  
**bringing** [1] - 74:17  
**brings** [1] - 85:21  
**broadly** [1] - 41:14  
**Broderick** [5] -  
76:25, 77:2, 78:20,  
78:28, 80:22  
**brought** [16] - 27:3,  
68:1, 68:29, 90:24,  
90:26, 92:7, 93:7,

97:27, 116:29, 117:1,  
127:4, 127:13,  
127:15, 147:19,  
163:25, 168:24  
**brown** [1] - 166:1  
**Browne** [6] - 148:11,  
148:20, 148:27,  
149:23, 150:23,  
151:10  
**BUILDING** [1] - 2:24  
**bulletin** [1] - 37:9  
**burning** [1] - 39:27  
**bus** [4] - 147:14,  
148:2, 165:27, 170:18  
**busier** [1] - 120:27  
**business** [1] - 89:13  
**busy** [2] - 120:26,  
123:26  
**BY** [12] - 1:5, 1:8,  
2:11, 2:18, 2:23, 3:4,  
3:12, 4:4, 4:5, 5:7,  
97:4  
**Byrne** [2] - 10:4,  
25:15  
**BYRNE** [1] - 3:2  
**Byrne/McGinn** [3] -  
147:25, 147:27,  
149:18

---

## C

---

**Callinan** [16] -  
157:28, 158:6,  
158:16, 158:22,  
158:23, 158:27,  
159:2, 159:8, 159:13,  
159:21, 160:9, 161:2,  
161:13, 161:17,  
161:28, 181:5  
**Callinan's** [1] -  
158:26  
**camera** [2] - 154:12,  
154:16  
**campaign** [1] - 35:14  
**cancelled** [1] - 9:5  
**cannot** [8] - 43:19,  
86:10, 105:22,  
116:21, 119:8,  
174:10, 174:24,  
183:21  
**capacity** [4] - 6:26,  
19:27, 85:7, 104:14  
**care** [4] - 129:25,  
183:5, 195:3, 195:5  
**career** [4] - 81:10,  
159:2, 159:15, 161:18  
**carefully** [1] - 60:2  
**carried** [3] - 27:24,  
37:3, 166:8

**carry** [2] - 128:20,  
133:26  
**carrying** [1] - 85:16  
**case** [45] - 12:18,  
17:20, 19:14, 20:20,  
22:7, 22:19, 26:16,  
26:21, 26:22, 27:11,  
29:19, 30:25, 37:20,  
61:12, 66:28, 85:13,  
86:18, 93:17, 104:4,  
105:10, 106:11,  
109:20, 111:12,  
121:10, 126:15,  
126:26, 130:19,  
130:21, 138:16,  
138:19, 146:17,  
149:11, 149:16,  
154:13, 160:23,  
162:15, 166:26,  
169:8, 176:12,  
177:13, 178:27,  
183:21, 183:22, 191:7  
**cases** [9] - 106:28,  
151:19, 155:9,  
156:27, 157:13,  
164:29, 170:7,  
181:14, 181:28  
**CASTLE** [1] - 1:17  
**Castle** [1] - 123:6  
**categorisation** [1] -  
78:10  
**CATHERINE** [1] - 3:3  
**caused** [9] - 51:21,  
56:13, 117:6, 135:16,  
156:16, 161:2, 164:2,  
167:21, 180:10  
**causing** [2] - 8:6,  
94:5  
**Cavan** [6] - 28:5,  
28:11, 29:12, 99:12,  
103:1, 176:27  
**Cavan-Monaghan**  
[6] - 28:5, 28:11,  
29:12, 99:12, 103:1,  
176:27  
**caveat** [1] - 13:7  
**CERTAIN** [1] - 1:4  
**certain** [16] - 29:12,  
34:21, 43:8, 60:13,  
62:1, 67:9, 83:20,  
86:1, 86:16, 125:9,  
153:15, 171:11,  
171:12, 171:13,  
176:24, 185:19  
**certainly** [56] - 5:18,  
6:20, 12:2, 13:18,  
13:23, 14:7, 15:8,  
27:14, 28:12, 33:29,  
34:22, 41:3, 45:7,  
61:1, 61:3, 68:24,

70:20, 71:4, 73:10,  
75:18, 81:28, 82:2,  
82:3, 93:7, 103:29,  
117:28, 118:5,  
118:17, 118:23,  
121:29, 123:19,  
123:29, 124:13,  
130:28, 133:10,  
137:1, 138:11, 143:6,  
143:15, 143:24,  
144:22, 146:17,  
150:9, 150:15, 156:9,  
157:3, 157:8, 161:4,  
166:16, 168:23,  
171:27, 172:11,  
176:10, 179:27,  
183:18  
**certify** [1] - 1:25  
**chair** [3] - 18:10,  
136:16, 148:4  
**Chair** [8] - 14:21,  
18:9, 40:11, 64:6,  
111:11, 145:28,  
165:13, 167:23  
**CHAIRMAN** [72] -  
23:5, 49:26, 50:2,  
50:17, 50:26, 51:1,  
51:3, 60:16, 62:23,  
65:13, 65:17, 65:20,  
74:23, 75:3, 75:5,  
91:15, 93:22, 93:26,  
94:12, 94:17, 94:25,  
95:4, 95:7, 95:16,  
95:18, 95:23, 96:4,  
96:7, 108:11, 108:18,  
108:21, 108:24,  
154:10, 154:17,  
154:24, 157:16,  
157:25, 157:27,  
161:11, 165:22,  
166:21, 167:27,  
168:1, 168:6, 168:9,  
169:1, 169:3, 169:5,  
169:10, 169:18,  
169:21, 169:27,  
170:4, 170:13,  
170:22, 172:22,  
177:23, 177:25,  
179:19, 179:25,  
183:26, 183:28,  
184:1, 188:3, 188:7,  
188:13, 188:17,  
188:19, 197:7,  
197:10, 197:13,  
197:16  
**Chairman** [403] -  
5:12, 5:17, 5:21, 5:27,  
6:6, 6:9, 6:18, 6:20,  
7:2, 7:5, 7:8, 7:15,  
7:18, 7:21, 8:14, 8:19,

8:28, 9:23, 9:26, 10:7,  
10:11, 10:15, 10:29,  
11:11, 12:2, 12:18,  
12:20, 12:27, 13:7,  
13:16, 14:13, 17:20,  
18:25, 19:5, 19:14,  
19:18, 20:16, 20:19,  
21:3, 21:24, 22:5,  
22:21, 22:28, 23:24,  
26:4, 26:8, 26:16,  
26:18, 28:7, 28:22,  
29:19, 29:24, 30:17,  
31:6, 31:10, 31:21,  
32:6, 32:9, 32:18,  
33:7, 33:21, 33:25,  
34:26, 35:7, 35:23,  
36:12, 36:22, 36:27,  
38:1, 38:15, 38:29,  
39:8, 39:20, 40:20,  
42:3, 44:16, 45:2,  
45:15, 45:23, 45:28,  
46:5, 46:12, 46:21,  
47:9, 47:15, 47:22,  
48:9, 48:26, 49:4,  
50:1, 50:9, 50:22,  
50:28, 51:14, 51:18,  
52:1, 52:19, 53:18,  
54:18, 56:8, 56:16,  
57:13, 58:4, 58:17,  
58:19, 58:27, 59:20,  
59:27, 60:2, 60:8,  
61:3, 61:22, 61:25,  
62:22, 63:9, 63:14,  
63:18, 64:4, 65:10,  
65:19, 66:10, 66:22,  
67:4, 67:24, 68:8,  
68:14, 68:24, 69:2,  
69:10, 69:22, 70:27,  
71:9, 71:21, 71:27,  
72:18, 72:24, 73:9,  
73:16, 73:23, 74:1,  
74:6, 74:10, 74:14,  
75:11, 75:15, 75:19,  
75:24, 76:5, 76:8,  
76:15, 76:19, 76:27,  
77:1, 77:5, 77:19,  
77:26, 78:6, 78:23,  
79:4, 79:17, 79:29,  
80:4, 80:9, 80:14,  
80:20, 81:1, 81:4,  
81:8, 81:17, 81:27,  
82:5, 82:14, 87:5,  
87:23, 89:4, 89:8,  
89:16, 89:20, 89:29,  
90:15, 90:16, 90:23,  
91:7, 91:22, 93:5,  
93:11, 93:25, 94:3,  
94:15, 94:27, 95:15,  
95:22, 95:24, 97:12,  
97:18, 97:20, 97:23,  
97:25, 98:8, 98:11,

98:15, 99:3, 99:6,  
99:16, 99:21, 99:27,  
100:7, 100:13,  
100:17, 101:10,  
101:28, 102:7,  
102:14, 102:25,  
103:5, 103:15,  
103:21, 104:1, 104:9,  
104:27, 104:29,  
105:17, 105:22,  
106:1, 106:9, 106:20,  
106:23, 107:5, 107:8,  
107:10, 107:13,  
107:29, 109:25,  
110:3, 110:12,  
110:14, 110:18,  
111:27, 112:9,  
112:18, 113:9,  
113:15, 114:16,  
114:19, 114:24,  
115:3, 115:15,  
115:22, 116:1,  
116:16, 116:26,  
117:12, 117:14,  
117:24, 117:28,  
119:25, 120:3,  
120:18, 120:20,  
120:25, 121:19,  
121:23, 121:28,  
122:11, 122:15,  
123:4, 123:22, 124:8,  
124:11, 124:17,  
124:24, 125:3,  
125:19, 125:27,  
126:6, 126:8, 126:15,  
126:19, 127:1, 127:6,  
127:24, 128:1, 128:9,  
130:6, 130:20,  
130:26, 131:23,  
131:28, 132:8,  
132:24, 133:2,  
133:10, 134:22,  
135:9, 135:19,  
137:12, 137:22,  
138:4, 138:11,  
138:17, 139:3,  
139:14, 140:8,  
140:11, 141:4, 141:8,  
141:11, 141:16,  
142:3, 142:13,  
142:16, 143:2, 144:4,  
144:9, 144:20,  
144:28, 145:17,  
146:7, 146:26, 147:3,  
147:26, 148:13,  
148:22, 149:3,  
149:29, 150:9,  
150:28, 151:17,  
152:2, 154:4, 155:2,  
155:15, 155:27,  
156:2, 156:8, 156:20,

157:28, 158:4,  
158:11, 158:14,  
158:20, 159:5,  
159:16, 159:26,  
160:1, 161:14,  
161:21, 162:2,  
164:23, 165:10,  
166:15, 167:8,  
167:26, 167:29,  
168:15, 168:27,  
170:10, 170:21,  
171:2, 171:6, 171:8,  
171:25, 172:12,  
172:17, 172:27,  
173:5, 173:17, 174:4,  
174:19, 175:2,  
175:10, 175:17,  
175:25, 176:4,  
176:20, 177:14,  
177:19, 178:19,  
181:19, 181:24,  
182:7, 182:12,  
182:18, 183:14,  
184:10, 185:26,  
186:15, 187:25,  
189:3, 189:14,  
190:20, 190:29,  
191:11, 191:18,  
192:3, 192:6, 192:23,  
194:22, 196:17, 197:4  
**Chairperson** [3] -  
57:6, 67:25, 67:28  
**challenge** [11] - 5:15,  
10:20, 17:16, 111:17,  
115:4, 142:6, 176:8,  
182:26, 182:27, 189:9  
**challenged** [23] -  
5:24, 11:9, 12:4, 12:9,  
85:27, 108:3, 109:2,  
110:11, 110:17,  
111:10, 111:26,  
112:4, 114:8, 114:20,  
114:23, 115:27,  
116:17, 116:25,  
116:28, 119:4,  
136:27, 137:1, 176:1  
**challenges** [1] -  
194:8  
**challenging** [2] -  
17:22, 176:10  
**chance** [2] - 78:7,  
188:22  
**change** [5] - 25:16,  
28:12, 82:26, 130:28,  
140:29  
**changed** [7] - 28:14,  
44:8, 52:15, 138:20,  
142:20, 194:29  
**changes** [1] - 72:9  
**characterised** [1] -

185:19  
**charge** [19] - 44:13,  
50:24, 50:29, 85:21,  
85:25, 93:8, 93:9,  
106:29, 127:11,  
128:20, 130:12,  
131:8, 132:26,  
133:15, 133:27,  
162:16, 173:21,  
184:22, 192:12  
**charges** [2] - 166:2,  
196:12  
**CHARLES** [1] - 3:12  
**CHARLETON** [2] -  
1:12, 2:2  
**charter** [1] - 82:28  
**check** [1] - 174:4  
**CHIEF** [2] - 2:18,  
3:12  
**Chief** [98] - 5:14,  
7:11, 7:16, 7:22, 7:25,  
8:20, 8:24, 9:11, 9:16,  
9:18, 10:5, 15:19,  
17:1, 18:5, 18:16,  
18:18, 20:4, 20:10,  
47:17, 47:19, 47:23,  
48:1, 48:5, 49:6, 57:3,  
58:13, 58:20, 92:11,  
100:27, 101:18,  
101:24, 106:12,  
107:21, 108:1,  
108:29, 109:14,  
110:6, 110:15,  
110:20, 111:12,  
112:7, 112:11,  
114:22, 115:2, 115:9,  
116:11, 116:14,  
118:20, 118:26,  
118:27, 119:2, 119:7,  
119:8, 119:15,  
119:16, 119:24,  
120:7, 120:21,  
121:10, 121:19,  
122:23, 123:19,  
123:24, 124:22,  
125:28, 129:14,  
134:9, 135:16,  
135:20, 136:25,  
137:2, 138:18,  
138:27, 140:2,  
140:18, 160:28,  
173:27, 174:11,  
175:6, 175:7, 175:18,  
175:25, 175:27,  
176:4, 180:23,  
180:24, 181:3, 181:7,  
182:14, 190:3,  
190:11, 190:21,  
190:25, 190:29,  
191:19, 191:21,

191:23, 192:6  
**chief** [4] - 24:22,  
24:23, 105:8, 193:22  
**child** [2] - 50:7, 61:2  
**children** [6] - 101:3,  
102:4, 102:5, 102:13,  
103:4, 104:26  
**Children** [1] - 105:5  
**choice** [1] - 63:5  
**choose** [3] - 52:10,  
53:20, 56:19  
**CHRISTOPHER** [1] -  
3:10  
**chronology** [2] -  
17:13  
**circulated** [4] - 39:3,  
144:13, 169:25, 177:9  
**circumstances** [16] -  
9:5, 34:4, 59:13,  
87:13, 105:7, 105:19,  
106:3, 106:26,  
136:26, 137:25,  
138:29, 149:1, 149:2,  
175:28, 177:3, 196:15  
**city** [1] - 124:3  
**civilian** [1] - 153:21  
**claim** [3] - 12:9,  
12:16, 155:29  
**claims** [1] - 190:9  
**Clancy** [24] - 24:22,  
127:21, 131:12,  
131:20, 132:5,  
139:23, 140:28,  
141:24, 141:25,  
141:26, 159:3,  
159:15, 160:5,  
160:29, 161:19,  
180:23, 181:3, 181:7,  
187:1, 187:17,  
187:18, 187:19,  
187:26, 187:28  
**Clancy's** [1] - 127:25  
**clarification** [4] -  
17:10, 21:5, 21:12,  
83:13  
**clarified** [8] - 21:6,  
21:7, 21:27, 126:22,  
126:24, 137:17,  
191:12  
**clarify** [5] - 21:1,  
21:2, 22:3, 35:22,  
43:7  
**clarifying** [2] - 21:21,  
62:15  
**CLARKE** [1] - 3:4  
**clause** [1] - 134:1  
**clear** [26] - 18:26,  
25:16, 40:29, 44:9,  
45:12, 83:3, 83:18,  
107:2, 108:2, 108:15,  
109:1, 110:6, 111:9,  
112:5, 112:7, 112:9,  
115:9, 116:23,  
125:15, 137:19,  
146:4, 146:7, 163:19,  
172:6, 177:21, 178:29  
**cleared** [3] - 93:21,  
141:18, 142:4  
**clearly** [3] - 43:26,  
54:17, 167:28  
**client** [1] - 183:22  
**clients** [2] - 62:10,  
83:9  
**Clifford** [2] - 30:15,  
30:20  
**Clifford's** [2] - 40:9,  
40:14  
**close** [2] - 49:9,  
80:17  
**coincidental** [1] -  
17:12  
**collateral** [1] -  
184:21  
**colleagues** [2] -  
37:18, 82:8  
**COLM** [1] - 3:1  
**colour** [1] - 9:8  
**combination** [2] -  
13:9, 153:2  
**combined** [4] -  
14:23, 28:16, 137:29,  
143:19  
**coming** [5] - 81:2,  
86:29, 135:24, 171:5,  
189:17  
**command** [1] -  
106:25  
**commander** [1] -  
106:26  
**commas** [1] - 50:24  
**commence** [1] -  
21:11  
**commenced** [2] -  
24:14, 180:15  
**comment** [15] - 31:2,  
31:19, 31:26, 31:27,  
36:11, 56:22, 59:12,  
62:5, 64:8, 83:4,  
85:24, 89:28, 91:21,  
102:7, 151:14  
**commentary** [7] -  
23:12, 23:23, 46:27,  
46:28, 47:3, 53:24  
**commenting** [3] -  
13:8, 32:23, 55:29  
**comments** [4] -  
76:14, 77:22, 78:27,  
80:18  
**commission** [5] -  
22:6, 83:24, 84:21,  
143:11, 143:14  
**Commission** [210] -  
5:11, 6:11, 6:14, 6:17,  
6:22, 6:26, 7:1, 7:28,  
8:7, 8:18, 11:22,  
11:29, 12:13, 12:23,  
12:25, 12:28, 13:15,  
13:21, 14:4, 14:26,  
15:4, 18:1, 18:22,  
18:29, 19:1, 19:8,  
20:11, 20:14, 22:8,  
22:13, 22:15, 22:24,  
23:16, 23:27, 27:10,  
29:11, 30:15, 31:14,  
31:22, 31:28, 31:29,  
32:21, 32:23, 34:17,  
35:22, 36:7, 39:17,  
40:5, 40:6, 41:3,  
42:22, 42:25, 43:9,  
43:12, 43:21, 45:14,  
46:10, 48:17, 49:2,  
50:11, 50:18, 50:23,  
52:14, 55:2, 55:17,  
55:21, 55:23, 55:26,  
56:1, 56:2, 57:20,  
58:13, 58:16, 61:10,  
62:9, 64:19, 65:25,  
65:28, 69:9, 70:2,  
70:8, 74:25, 75:10,  
75:14, 76:2, 76:5,  
82:22, 83:8, 83:16,  
84:9, 84:23, 85:10,  
85:16, 85:28, 86:9,  
86:14, 86:16, 87:11,  
87:18, 87:26, 88:28,  
91:1, 91:2, 92:11,  
92:13, 92:24, 92:28,  
93:4, 93:6, 94:22,  
95:10, 96:2, 102:22,  
103:9, 103:20,  
107:24, 109:17,  
109:19, 110:24,  
111:1, 111:14, 112:2,  
112:27, 113:7,  
113:11, 113:16,  
114:26, 114:27,  
115:6, 115:20, 116:6,  
116:7, 116:20,  
121:19, 122:3,  
123:14, 128:26,  
128:28, 129:3,  
129:27, 129:29,  
130:5, 130:11,  
132:10, 132:16,  
134:12, 134:13,  
134:24, 135:3,  
139:11, 141:10,  
143:26, 144:7,  
144:13, 144:17,  
144:21, 144:25,  
144:27, 145:12,  
145:14, 145:19,  
145:23, 145:24,  
146:5, 146:6, 147:7,  
150:13, 150:15,  
150:19, 151:26,  
152:12, 152:14,  
152:20, 153:10,  
153:14, 153:15,  
154:21, 155:6,  
156:23, 159:12,  
160:14, 160:22,  
160:26, 161:7, 164:3,  
165:9, 169:28,  
171:12, 171:13,  
171:15, 171:16,  
171:17, 174:19,  
174:23, 176:13,  
179:3, 181:8, 181:21,  
181:29, 185:11,  
188:19, 190:7, 190:8,  
191:6, 192:22, 195:5  
**Commission's** [2] -  
14:12, 83:20  
**commissioner** [14] -  
6:27, 25:15, 68:11,  
70:15, 76:29, 80:29,  
98:17, 102:1, 102:28,  
104:17, 104:19,  
106:14, 128:16,  
193:20  
**Commissioner** [110] -  
- 5:4, 6:3, 10:17,  
10:25, 11:13, 13:3,  
13:11, 16:4, 17:8,  
19:27, 30:24, 31:2,  
31:23, 33:6, 34:11,  
36:20, 36:26, 37:6,  
37:29, 39:15, 41:7,  
47:25, 48:15, 54:9,  
54:29, 55:7, 55:20,  
55:27, 56:5, 56:26,  
57:2, 58:20, 59:1,  
61:19, 64:5, 64:19,  
64:20, 64:29, 65:29,  
66:1, 66:12, 66:16,  
68:10, 78:18, 80:26,  
81:12, 84:14, 86:6,  
87:28, 89:18, 90:21,  
97:9, 97:13, 98:4,  
99:2, 99:18, 99:25,  
100:1, 100:6, 101:8,  
101:13, 102:11,  
102:15, 102:19,  
102:23, 102:26,  
103:7, 104:11,  
105:11, 105:20,  
105:23, 119:28,  
119:29, 120:12,  
120:13, 122:19,  
122:21, 122:25,  
122:28, 122:29,  
128:15, 128:29,  
130:14, 135:25,  
146:11, 149:12,  
150:2, 152:10,  
152:17, 154:14,  
157:28, 158:22,  
158:23, 159:1, 159:8,  
159:21, 160:4, 160:6,  
160:7, 160:9, 160:14,  
160:20, 160:24,  
161:3, 161:13,  
161:17, 185:13,  
186:7, 194:6, 196:23  
**COMMISSIONER** [4] -  
- 2:15, 4:3, 5:6, 97:3  
**Commissioner's** [1] -  
- 30:25  
**commissioners** [3] -  
9:3, 104:12, 193:21  
**Commissions** [3] -  
31:19, 32:8, 84:20  
**commissions** [2] -  
151:19, 194:25  
**commitment** [1] -  
196:25  
**committed** [2] -  
88:28, 193:29  
**Committee** [1] -  
16:18  
**committees** [1] -  
194:19  
**committing** [1] -  
93:26  
**communicate** [1] -  
186:13  
**communicated** [3] -  
24:5, 179:14, 179:18  
**communication** [1] -  
29:22  
**communications** [3] -  
- 70:24, 84:26, 84:29  
**community** [3] -  
11:4, 11:17, 163:1  
**COMPANY** [1] - 2:11  
**compilation** [2] -  
75:26, 139:17  
**compiled** [1] - 73:17  
**complain** [2] - 25:2,  
180:28  
**complained** [1] -  
44:9  
**complaining** [1] -  
148:11  
**complaint** [17] -  
24:4, 25:9, 25:10,  
60:27, 147:29,  
148:27, 150:24,  
160:4, 160:12,  
160:21, 160:23,  
161:5, 166:29,

179:13, 181:13,  
181:14, 187:1  
**complaints** [32] -  
11:10, 21:16, 24:12,  
24:15, 24:16, 24:25,  
25:3, 26:11, 26:23,  
27:4, 28:2, 86:20,  
139:23, 140:27,  
141:23, 141:25,  
147:11, 160:7,  
160:10, 176:18,  
178:8, 180:13,  
180:16, 180:17,  
180:26, 180:29,  
181:26, 185:15,  
185:19, 187:16,  
187:17, 187:26  
**complete** [4] - 95:21,  
148:16, 154:20,  
154:21  
**completed** [2] - 26:5,  
72:28  
**completely** [12] -  
37:8, 57:14, 57:24,  
60:22, 63:5, 94:3,  
94:23, 94:24, 94:27,  
95:2, 100:19, 124:20  
**completeness** [10] -  
36:24, 70:11, 70:28,  
72:28, 78:12, 79:20,  
81:29, 82:6, 90:3,  
90:9  
**completes** [1] -  
25:23  
**completion** [1] -  
60:26  
**compliance** [1] -  
84:11  
**compound** [1] - 94:1  
**computer** [1] - 48:4  
**concern** [9] - 6:10,  
20:23, 26:12, 30:1,  
31:22, 42:24, 56:13,  
84:18, 91:28  
**concerned** [5] -  
13:10, 120:12,  
120:24, 125:12,  
130:24  
**concerning** [1] -  
21:14  
**concerns** [10] - 8:3,  
44:22, 59:7, 62:1,  
62:13, 63:1, 105:21,  
129:5, 129:7, 160:27  
**conclude** [6] - 19:5,  
28:15, 107:8, 130:21,  
137:26, 142:23  
**concluded** [5] -  
15:16, 57:20, 107:6,  
161:24, 162:1  
**concluding** [1] -  
56:11  
**conclusion** [5] -  
18:23, 19:3, 88:26,  
137:10, 183:2  
**conclusions** [1] -  
151:3  
**concur** [1] - 7:22  
**condensed** [1] -  
79:18  
**conduct** [7] - 55:21,  
60:25, 67:10, 84:21,  
108:22, 167:4, 175:22  
**conducted** [1] -  
84:10  
**conducting** [1] -  
190:7  
**conduit** [2] - 82:2,  
119:17  
**confidence** [20] -  
10:29, 11:15, 33:5,  
33:13, 37:8, 49:15,  
49:22, 53:5, 56:5,  
56:12, 56:14, 56:23,  
56:25, 56:27, 84:1,  
152:26, 152:28,  
163:15, 166:27  
**confident** [1] - 44:22  
**confidential** [3] -  
56:3, 85:3, 160:8  
**confidentiality** [5] -  
62:9, 83:8, 83:19,  
128:28, 134:1  
**confines** [2] - 12:24,  
64:29  
**confirm** [3] - 14:17,  
85:10, 135:29  
**confirmation** [1] -  
71:23  
**confirmed** [8] -  
113:23, 115:12,  
115:21, 116:2,  
122:20, 122:22,  
136:4, 190:13  
**confirming** [1] -  
39:13  
**conflating** [1] -  
131:26  
**conflict** [3] - 154:2,  
168:13, 171:29  
**confronted** [1] -  
140:26  
**confronting** [1] -  
180:5  
**confused** [1] - 75:5  
**confusing** [1] - 78:24  
**confusion** [2] -  
119:22, 137:13  
**connect** [1] - 192:20  
**connected** [2] -  
132:22, 132:25  
**connection** [4] -  
97:10, 130:10, 135:6,  
192:19  
**CONOR** [1] - 2:16  
**conscious** [5] -  
11:12, 11:14, 11:18,  
41:12, 85:29  
**consent** [1] - 162:29  
**consequence** [4] -  
156:1, 157:21, 166:5,  
166:12  
**consider** [8] - 16:4,  
17:8, 33:11, 37:24,  
54:20, 56:29, 62:12,  
104:25  
**consideration** [8] -  
11:23, 11:26, 13:20,  
14:5, 17:18, 52:8,  
53:14, 59:3  
**considered** [9] -  
37:26, 40:4, 41:19,  
58:7, 67:18, 129:3,  
147:24, 157:22,  
171:23  
**considering** [3] -  
62:27, 103:3, 103:18  
**consistent** [2] -  
15:11, 88:10  
**consistently** [1] -  
43:25  
**constant** [3] - 33:17,  
46:26, 47:1  
**constitutional** [2] -  
13:12, 84:12  
**constrained** [1] -  
65:1  
**constraints** [7] -  
41:15, 62:4, 68:19,  
71:2, 73:18, 83:3,  
85:6  
**consult** [1] - 72:12  
**consultation** [24] -  
117:9, 117:27, 118:1,  
118:4, 118:16,  
118:22, 118:24,  
120:11, 120:23,  
121:8, 121:17,  
121:21, 121:25,  
122:5, 122:6, 122:20,  
122:26, 122:27,  
122:29, 123:15,  
124:4, 172:17, 175:3  
**consultations** [16] -  
7:2, 136:20, 138:19,  
139:15, 156:6,  
156:11, 157:4,  
157:11, 158:12,  
165:14, 166:20,  
171:9, 171:27, 173:6,  
176:23  
**consulted** [1] -  
156:10  
**contact** [3] - 129:3,  
129:15, 134:9  
**contacted** [1] -  
135:21  
**contacting** [2] - 25:1,  
180:27  
**contacts** [4] - 61:28,  
62:16, 69:29, 129:22  
**contained** [3] -  
79:20, 100:12, 116:3  
**containing** [2] -  
77:21, 166:1  
**content** [4] - 87:29,  
89:8, 98:1, 129:18  
**contents** [3] - 57:12,  
76:7, 87:11  
**context** [23] - 10:21,  
12:5, 12:15, 15:14,  
23:20, 29:25, 33:7,  
36:28, 39:21, 49:6,  
79:7, 79:10, 81:28,  
84:9, 104:8, 110:22,  
117:25, 140:5, 147:1,  
153:22, 157:22,  
172:24, 182:29  
**continue** [3] - 19:1,  
169:5, 197:2  
**continued** [4] - 38:4,  
181:4, 181:8, 195:4  
**CONTINUED** [1] -  
5:6  
**continues** [5] -  
29:20, 47:10, 54:27,  
76:23, 129:20  
**continuing** [2] -  
118:12, 196:25  
**contributed** [2] -  
158:27, 163:26  
**contribution** [3] -  
14:15, 44:7, 163:18  
**contributions** [1] -  
136:21  
**contributor** [2] -  
81:22, 81:28  
**contributors** [3] -  
139:19, 173:8, 173:9  
**control** [2] - 9:5,  
55:20  
**controversial** [1] -  
185:12  
**controversy** [3] -  
67:26, 68:15, 83:17  
**conversation** [8] -  
116:14, 121:13,  
128:18, 140:6,  
154:15, 174:16,  
176:4, 190:21  
**conversations** [11] -  
13:24, 33:22, 34:19,  
41:11, 71:15, 72:20,  
76:19, 137:2, 138:17,  
138:27, 140:2  
**convey** [1] - 123:20  
**conveyed** [8] -  
118:9, 120:11,  
120:22, 121:20,  
123:16, 182:23,  
187:3, 187:20  
**conveying** [2] -  
119:3, 119:11  
**coordinated** [2] -  
46:6, 46:11  
**copy** [5] - 28:28,  
42:1, 78:27, 109:29,  
110:2  
**copying** [2] - 79:22,  
80:6  
**core** [1] - 144:6  
**Cork** [1] - 74:13  
**corps** [3] - 128:6,  
131:8, 133:15  
**correct** [99] - 5:12,  
6:6, 6:8, 6:18, 7:4,  
7:5, 7:15, 9:22, 9:23,  
10:7, 22:28, 26:8,  
28:22, 28:25, 28:26,  
31:21, 32:6, 35:7,  
35:23, 36:12, 36:22,  
38:29, 39:20, 40:17,  
40:20, 42:5, 44:16,  
45:22, 45:23, 45:27,  
45:28, 46:2, 47:29,  
49:16, 49:17, 51:14,  
58:17, 58:27, 59:26,  
59:27, 60:8, 62:22,  
63:18, 63:23, 63:24,  
64:4, 64:6, 65:9,  
65:10, 67:3, 67:4,  
69:10, 71:27, 72:5,  
72:18, 75:11, 76:15,  
76:27, 77:4, 77:13,  
77:23, 78:6, 78:17,  
80:3, 80:4, 80:13,  
80:14, 80:19, 80:20,  
81:1, 81:4, 87:23,  
87:27, 89:4, 89:7,  
89:13, 89:16, 90:14,  
91:18, 95:22, 97:12,  
97:23, 99:3, 102:25,  
104:27, 106:20,  
107:24, 115:22,  
131:28, 142:13,  
144:4, 161:11,  
161:19, 170:21,  
171:6, 172:21,  
173:26, 177:26,  
185:26

**corrected** [8] - 23:1, 70:16, 115:6, 119:20, 119:23, 182:28, 188:1, 188:17  
**correctly** [1] - 191:14  
**corresponded** [1] - 92:21  
**correspondence** [6] - 98:2, 100:18, 129:18, 130:9, 133:6, 174:22  
**corruption** [41] - 14:1, 15:16, 17:26, 18:4, 26:26, 27:7, 27:21, 28:16, 55:8, 55:9, 86:2, 138:1, 142:24, 142:25, 142:28, 143:4, 143:18, 143:19, 144:8, 144:18, 146:29, 158:22, 159:7, 159:20, 159:22, 160:4, 160:12, 161:6, 161:9, 161:26, 161:27, 162:3, 162:5, 162:10, 162:12, 162:13, 174:17, 183:2, 186:20  
**Costello** [4] - 99:24, 100:1, 104:5, 104:15  
**COSTELLO** [1] - 2:11  
**counsel** [79] - 5:28, 6:4, 6:8, 7:3, 10:5, 14:26, 15:3, 16:16, 20:3, 20:8, 30:23, 47:19, 48:16, 59:8, 59:14, 59:19, 60:18, 60:23, 66:2, 66:3, 66:11, 74:26, 75:14, 110:15, 115:23, 116:12, 118:3, 122:21, 124:20, 124:22, 126:16, 127:19, 127:28, 131:10, 131:18, 132:3, 135:15, 135:22, 136:3, 136:13, 136:19, 137:8, 137:10, 138:8, 138:12, 142:9, 143:1, 149:21, 150:1, 150:15, 150:21, 152:11, 153:23, 155:22, 170:8, 170:28, 171:1, 171:9, 171:19, 171:23, 172:7, 172:20, 173:8, 173:9, 173:14, 175:21, 176:22, 177:26, 184:7, 184:14, 186:14, 186:17, 190:9, 190:14, 193:1, 194:14, 195:10, 195:16, 196:3  
**countenanced** [1] - 176:19  
**country** [2] - 52:28, 53:4  
**course** [21] - 18:2, 37:3, 39:29, 88:7, 91:23, 91:24, 95:27, 97:28, 115:16, 134:17, 139:11, 153:13, 157:18, 163:11, 170:5, 172:18, 173:17, 181:29, 184:13, 186:28, 195:20  
**court** [2] - 151:19, 154:16  
**COURT** [2] - 1:13, 2:3  
**courtesy** [4] - 7:12, 7:23, 174:13, 175:9  
**cover** [3] - 76:7, 143:22, 143:27  
**cover-up** [1] - 143:22  
**coverage** [1] - 52:27  
**covered** [1] - 110:19  
**covering** [1] - 104:12  
**CPA** [1] - 8:23  
**create** [3] - 88:17, 165:28, 171:29  
**created** [5] - 37:2, 58:11, 140:27, 163:13, 164:27  
**creating** [1] - 167:3  
**creation** [2] - 72:20, 145:29  
**credibility** [8] - 85:26, 111:4, 182:27, 182:28, 182:29, 185:4, 185:9, 189:10  
**crime** [19] - 8:24, 25:1, 27:19, 151:21, 162:20, 163:3, 163:19, 163:23, 164:5, 164:8, 164:24, 165:11, 165:19, 165:21, 167:20, 168:18, 168:21, 168:22, 180:28  
**criminal** [4] - 24:4, 159:22, 179:13, 185:24  
**critical** [1] - 82:24  
**criticise** [2] - 145:16, 190:23  
**criticism** [5] - 112:24, 112:29, 145:13, 146:6, 192:20  
**criticisms** [1] - 112:28  
**CROSS** [2] - 4:5, 97:4  
**cross** [19] - 20:7, 20:12, 20:18, 20:28, 21:2, 21:22, 22:2, 22:6, 22:19, 55:12, 66:20, 86:13, 108:23, 153:16, 171:15, 183:4, 185:10, 186:22, 186:25  
**cross-examination** [9] - 21:2, 21:22, 22:2, 22:6, 55:12, 66:20, 108:23, 171:15, 183:4  
**cross-examine** [4] - 86:13, 153:16, 185:10, 186:22  
**CROSS-EXAMINED** [2] - 4:5, 97:4  
**cross-examined** [5] - 20:7, 20:12, 20:18, 20:28, 22:19  
**cross-examining** [1] - 186:25  
**CSSO** [3] - 19:7, 19:15, 19:16  
**Cualáin** [3] - 79:23, 80:7, 80:12  
**culmination** [1] - 82:15  
**culture** [1] - 88:5  
**Cunningham** [21] - 24:2, 24:23, 65:15, 67:11, 71:18, 71:22, 71:27, 93:20, 140:23, 168:29, 169:6, 169:17, 169:26, 172:15, 179:11, 180:24, 186:29, 187:15, 188:1, 188:10, 188:22  
**curious** [1] - 17:6  
**cusps** [1] - 57:24  
**cut** [3] - 91:19, 151:18, 195:28

---

**D**

---

**d's** [2] - 131:14, 179:9  
**daily** [1] - 37:21  
**Daly** [1] - 180:19  
**damage** [2] - 45:19, 152:12  
**damaged** [1] - 84:2  
**damaging** [1] - 105:26  
**dark** [1] - 158:3  
**date** [6] - 26:6, 28:23, 103:27, 124:14, 133:19  
**dated** [1] - 60:18  
**dates** [2] - 24:1, 179:6  
**David** [2] - 77:12, 144:26  
**DAY** [1] - 1:18  
**day-to-day** [2] - 30:6, 51:23  
**days** [17] - 30:27, 31:9, 38:12, 44:15, 45:16, 82:16, 83:24, 86:29, 125:26, 134:21, 141:13, 148:17, 173:20, 173:22, 174:26, 174:29, 189:1  
**deadly** [1] - 39:23  
**deal** [23] - 7:7, 12:23, 14:2, 19:1, 22:12, 22:26, 23:7, 39:22, 68:3, 74:23, 85:22, 85:27, 86:29, 93:18, 95:28, 97:7, 113:11, 139:2, 145:2, 147:21, 174:1, 194:13, 195:9  
**dealing** [14] - 39:23, 41:1, 59:28, 85:29, 99:19, 105:4, 112:19, 131:29, 132:8, 138:28, 166:26, 185:10, 194:5, 195:8  
**dealings** [2] - 82:24, 99:17  
**deals** [1] - 139:3  
**dealt** [32] - 20:13, 24:13, 42:26, 66:8, 68:1, 68:16, 91:13, 91:26, 93:19, 105:3, 105:7, 106:24, 106:26, 125:12, 125:16, 125:20, 147:27, 148:17, 149:14, 149:17, 153:5, 162:21, 164:6, 164:9, 164:24, 165:7, 165:12, 167:19, 168:18, 168:25, 180:14, 189:20  
**dear** [3] - 61:19, 69:28, 82:18  
**debate** [10] - 45:21, 46:3, 46:22, 48:7, 48:11, 51:5, 51:10, 64:28, 89:3, 176:15  
**debated** [1] - 62:3  
**debates** [3] - 51:22, 51:23, 82:7  
**deceased** [1] - 123:7  
**December** [2] - 24:2, 179:7  
**decide** [1] - 66:4  
**decided** [5] - 59:12, 84:7, 110:28, 180:21, 185:13  
**decision** [10] - 58:1, 58:6, 131:13, 131:21, 132:6, 153:5, 153:6, 153:8, 153:9  
**dedicated** [1] - 88:22  
**deemed** [1] - 129:6  
**deeply** [1] - 175:13  
**Defence** [1] - 16:17  
**defend** [1] - 55:28  
**deferring** [1] - 170:27  
**definitions** [1] - 162:3  
**definitive** [1] - 14:22  
**Delaney** [1] - 77:13  
**delay** [2] - 71:21, 181:9  
**delays** [1] - 8:5  
**delegate** [1] - 194:3  
**deliberate** [1] - 45:16  
**delicate** [1] - 146:12  
**delivered** [2] - 52:18, 173:22  
**demand** [1] - 56:22  
**demands** [5] - 46:26, 47:2, 49:5, 72:27  
**denotes** [1] - 8:25  
**Department** [28] - 28:25, 29:17, 29:22, 29:25, 30:9, 34:26, 35:8, 36:25, 37:18, 38:12, 45:27, 46:7, 46:13, 63:29, 64:1, 69:19, 69:20, 69:21, 70:14, 70:15, 70:25, 75:9, 75:25, 75:27, 91:3, 91:5, 103:23, 147:10  
**department** [1] - 129:9  
**departmental** [5] - 39:7, 39:12, 46:18, 68:12, 73:14  
**departments** [2] - 30:10, 37:19  
**dependent** [2] - 42:12, 81:13  
**depleted** [1] - 104:10  
**deployed** [3] - 61:9,

61:10, 94:22  
**deputy** [8] - 9:3, 58:19, 64:5, 68:10, 70:15, 76:28, 78:18, 80:29  
**Deputy** [2] - 87:28, 100:1  
**describe** [8] - 31:15, 37:1, 46:11, 46:12, 46:25, 72:26, 142:16, 166:17  
**described** [4] - 57:22, 139:24, 148:2, 195:2  
**describing** [1] - 37:11  
**description** [2] - 7:25, 97:15  
**designed** [1] - 45:18  
**desire** [3] - 160:25, 177:18, 178:18  
**desirous** [2] - 118:1, 121:8  
**desk** [1] - 100:15  
**despite** [2] - 32:1, 83:18  
**detail** [16] - 8:2, 8:10, 22:17, 34:15, 54:8, 66:8, 69:24, 82:28, 92:16, 106:7, 126:1, 148:5, 149:4, 149:5, 149:19, 174:25  
**detailed** [5] - 148:13, 148:15, 149:16, 150:4, 175:5  
**details** [3] - 43:20, 56:3, 149:12  
**deter** [1] - 196:24  
**determination** [3] - 137:4, 139:16, 139:20  
**determine** [3] - 107:4, 107:7, 183:9  
**determined** [1] - 88:12  
**developed** [1] - 196:9  
**developing** [1] - 82:27  
**dialogue** [2] - 115:16, 119:21  
**diametric** [3] - 114:17, 115:1, 115:10  
**diaried** [1] - 72:22  
**DIARMAID** [1] - 2:6  
**diary** [8] - 7:17, 7:18, 8:12, 9:7, 173:27, 174:2, 174:5, 174:8  
**died** [1] - 121:3  
**differ** [1] - 123:29  
**difference** [1] - 140:4  
**different** [10] - 15:21, 92:2, 98:21, 131:17, 131:26, 132:6, 191:15, 194:26, 195:27, 196:4  
**difficult** [4] - 38:21, 46:24, 85:22, 132:24  
**digital** [3] - 97:21, 106:16  
**DIGNAM** [1] - 2:16  
**dilemma** [2] - 152:15, 195:2  
**direct** [2] - 12:19, 193:24  
**directed** [5] - 20:19, 22:14, 61:7, 87:28, 128:15  
**direction** [7] - 24:20, 26:17, 60:28, 127:27, 131:22, 138:26, 177:15  
**directions** [18] - 24:3, 52:13, 52:15, 127:23, 131:16, 132:7, 139:5, 141:1, 173:3, 176:29, 177:9, 177:18, 177:20, 178:21, 179:12, 180:22, 187:2, 187:20  
**DIRECTLY** [1] - 5:7  
**directly** [4] - 6:7, 14:14, 60:5, 162:21  
**directly..** [1] - 164:6  
**Director** [1] - 106:6  
**director** [1] - 193:22  
**directs** [1] - 155:27  
**disaffection** [1] - 167:3  
**disagree** [2] - 7:13, 7:24  
**disappearing** [1] - 95:19  
**disappoint** [1] - 192:4  
**disappointed** [1] - 190:23  
**disappointing** [1] - 193:27  
**disbelieved** [1] - 184:20  
**disciplinary** [1] - 181:2  
**disclose** [2] - 48:15, 154:12  
**disclosed** [2] - 71:10, 71:11  
**disclosing** [1] - 48:17  
**disclosure** [1] - 88:21  
**DISCLOSURES** [2] - 1:3, 1:4  
**disclosures** [1] - 88:18  
**discommoded** [1] - 166:11  
**discourteous** [1] - 154:18  
**discovered** [5] - 71:10, 72:25, 174:2, 174:5, 181:10  
**discovery** [3] - 8:5, 8:6, 174:23  
**discuss** [7] - 43:19, 58:15, 104:7, 105:12, 134:16, 175:16, 188:29  
**discussed** [12] - 8:4, 8:9, 10:9, 10:19, 22:17, 23:6, 39:16, 59:8, 70:20, 92:16, 130:1, 175:1  
**discussing** [1] - 102:3  
**discussion** [5] - 7:27, 10:24, 16:6, 16:11, 137:20  
**discussions** [6] - 10:13, 12:7, 12:12, 111:12, 129:26, 129:28  
**disgraceful** [1] - 185:20  
**disloyal** [1] - 149:25  
**disloyally** [1] - 149:22  
**disloyalty** [3] - 43:27, 88:11, 150:10  
**disobeying** [1] - 137:10  
**dispassionately** [1] - 32:29  
**dispel** [1] - 84:18  
**disproving** [1] - 36:8  
**dispute** [4] - 34:12, 40:27, 90:25, 174:11  
**disputed** [1] - 34:13  
**disputing** [1] - 161:21  
**disquiet** [4] - 67:14, 67:27, 87:14, 94:5  
**dissatisfaction** [2] - 26:14, 165:6  
**dissent** [2] - 43:27, 88:11  
**disserved** [2] - 162:22, 164:12  
**disservice** [1] - 95:29  
**distorted** [5] - 57:28, 59:22, 67:8, 94:29, 95:25  
**distraught** [1] - 71:28  
**distributed** [1] - 58:2  
**district** [10] - 26:13, 28:5, 105:8, 106:27, 106:28, 106:29, 149:9, 165:17, 165:18, 176:27  
**division** [5] - 29:12, 99:13, 105:9, 106:13, 176:27  
**divisional** [1] - 106:27  
**divisions** [1] - 103:1  
**document** [15] - 40:4, 51:4, 51:15, 52:12, 98:21, 118:13, 121:14, 124:27, 125:1, 135:11, 136:8, 136:20, 140:17, 146:1, 189:19  
**documentation** [3] - 39:11, 102:29, 103:10  
**documented** [1] - 72:22  
**documents** [1] - 64:15  
**domain** [11] - 58:9, 71:29, 83:22, 83:29, 85:22, 92:19, 93:8, 93:9, 94:4, 95:1, 153:3  
**DONAL** [1] - 2:16  
**DONALD** [1] - 2:18  
**done** [24] - 7:21, 12:20, 43:5, 61:1, 61:14, 62:6, 67:6, 67:25, 84:16, 94:10, 103:23, 112:2, 115:10, 115:11, 128:7, 128:8, 145:25, 147:28, 149:24, 150:24, 153:29, 176:19, 181:25, 197:16  
**Donegal** [2] - 103:1, 106:13  
**DONNELLY** [1] - 3:3  
**dormant** [1] - 21:14  
**dory** [1] - 166:3  
**doubt** [7] - 34:16, 72:12, 167:17, 168:19, 172:22, 183:18, 193:6  
**down** [21] - 8:22, 18:16, 37:7, 37:25, 43:6, 70:22, 93:22, 113:6, 128:12, 128:24, 130:18, 132:14, 132:21, 134:8, 135:8, 178:3, 178:4, 182:10, 192:25, 194:3, 197:14  
**DPP** [3] - 24:3, 60:28, 179:12  
**DPP's** [19] - 24:20, 127:23, 127:27, 131:13, 131:15, 131:21, 132:6, 138:26, 139:5, 140:29, 173:3, 176:29, 177:8, 177:15, 177:18, 177:20, 178:1, 178:21, 180:22  
**draft** [32] - 35:17, 35:20, 51:6, 51:12, 51:16, 52:8, 53:14, 53:18, 53:19, 53:28, 56:16, 58:24, 59:2, 59:10, 59:16, 69:20, 70:9, 70:18, 71:4, 71:8, 74:21, 75:22, 76:23, 78:5, 78:13, 78:16, 78:20, 78:25, 79:14, 80:1, 80:26  
**drafted** [1] - 74:28  
**drafting** [10] - 53:17, 54:17, 54:19, 54:23, 56:10, 70:6, 71:14, 73:14, 75:9, 76:17  
**drafts** [7] - 70:13, 70:25, 70:26, 75:12, 78:18, 78:24, 90:4  
**draw** [2] - 7:8, 169:9  
**drawing** [1] - 5:14  
**drawn** [1] - 18:23  
**dreadful** [1] - 108:25  
**drew** [1] - 174:6  
**driving** [3] - 119:1, 158:1, 165:26  
**drop** [1] - 166:2  
**dropped** [1] - 152:29  
**Ds** [1] - 24:8  
**Dublin** [1] - 123:6  
**DUBLIN** [6] - 1:17, 2:13, 2:20, 2:25, 3:6, 3:14  
**due** [9] - 9:4, 62:2, 107:2, 128:26, 134:13, 134:17, 134:24, 170:5, 185:22  
**Duffy** [2] - 98:9, 98:11  
**DUNDRUM** [1] - 2:25  
**duped** [1] - 167:24  
**during** [11] - 7:28, 13:21, 14:10, 25:16,

39:29, 42:12, 139:11,  
173:17, 181:1, 181:7,  
182:5  
**duty** [12] - 10:22,  
25:21, 55:7, 84:11,  
86:6, 86:9, 121:3,  
133:14, 134:5, 183:5,  
195:3, 195:5  
**DÁIL** [1] - 1:5  
**Dáil** [9] - 45:21,  
46:29, 51:7, 58:2,  
59:25, 60:1, 62:3,  
89:13, 194:19

## E

**early** [10] - 6:21,  
24:3, 25:17, 30:27,  
67:21, 73:25, 74:19,  
88:7, 122:28, 179:12  
**ease** [1] - 48:5  
**eastern** [2] - 104:17,  
128:16  
**eCalendar** [1] - 7:10  
**effect** [12] - 24:3,  
30:29, 83:29, 138:8,  
141:20, 155:7, 155:9,  
156:24, 156:27,  
166:25, 167:3, 179:12  
**effectively** [1] -  
149:22  
**efficient** [1] - 122:13  
**effort** [3] - 33:1,  
89:25, 100:3  
**efforts** [1] - 82:16  
**eight** [2] - 79:12,  
81:3  
**either** [12] - 18:27,  
27:22, 44:25, 55:13,  
56:24, 82:8, 95:23,  
118:3, 143:25,  
157:27, 173:9, 190:25  
**elaborate** [1] - 10:12  
**elaborating** [1] -  
141:29  
**electronic** [1] - 9:7  
**element** [2] - 59:7,  
150:29  
**elements** [2] - 15:17,  
18:2  
**eleven** [1] - 80:15  
**ELIZABETH** [1] - 2:7  
**ELLEN** [1] - 3:2  
**em** [3] - 102:7, 126:8,  
148:29  
**email** [43] - 15:3,  
28:29, 29:8, 29:16,  
32:19, 33:3, 36:4,  
36:14, 36:17, 37:20,

38:11, 39:12, 42:6,  
47:19, 47:27, 48:2,  
49:7, 51:18, 51:19,  
52:2, 52:3, 53:9,  
53:21, 53:25, 54:11,  
54:27, 56:10, 57:2,  
57:12, 76:9, 76:25,  
77:12, 77:20, 78:8,  
79:23, 80:1, 89:10,  
116:4, 118:20,  
121:12, 126:28,  
129:18  
**emailed** [4] - 5:28,  
28:27, 32:12, 36:1  
**emailing** [22] - 35:17,  
35:20, 35:29, 45:29,  
46:19, 47:4, 47:6,  
47:12, 47:17, 69:18,  
69:19, 71:19, 72:6,  
73:27, 74:20, 78:4,  
78:12, 79:13, 79:22,  
80:6, 80:11, 80:22  
**emails** [6] - 38:6,  
38:16, 51:26, 75:20,  
81:21, 82:4  
**emerge** [3] - 111:22,  
111:23, 166:13  
**emerged** [4] - 67:7,  
67:8, 67:14, 172:18  
**emotional** [4] -  
155:8, 156:26, 157:5,  
157:7  
**emphasise** [1] -  
85:14  
**employers** [1] -  
35:14  
**enclose** [3] - 52:8,  
52:9, 53:14  
**encourage** [2] - 25:1,  
180:28  
**end** [18] - 7:24,  
14:11, 14:16, 24:7,  
33:3, 38:9, 40:21,  
44:29, 56:22, 151:6,  
151:10, 151:15,  
164:3, 165:23, 168:3,  
170:3, 175:9, 180:2  
**endeavouring** [1] -  
13:13  
**ended** [1] - 75:22  
**endured** [1] - 28:11  
**energy** [1] - 193:14  
**engage** [1] - 66:3  
**engaged** [2] - 35:13,  
148:3  
**engagement** [2] -  
35:12, 123:5  
**engagements** [1] -  
122:25  
**enhanced** [1] -

129:22  
**enjoying** [1] - 131:5  
**enormously** [1] -  
162:11  
**ensued** [1] - 178:23  
**ensuing** [1] - 45:16  
**ensure** [11] - 42:23,  
82:6, 82:10, 88:18,  
92:18, 110:26,  
128:29, 129:19,  
129:26, 160:25, 183:6  
**ensuring** [1] - 81:29  
**enter** [1] - 85:24  
**entire** [2] - 50:2,  
157:18  
**entirely** [2] - 72:9,  
184:20  
**entirety** [1] - 38:7  
**entitled** [4] - 42:28,  
65:1, 154:19, 185:10  
**entitlement** [2] -  
12:16, 85:2  
**entitlements** [1] -  
12:9  
**entrusted** [2] -  
146:19, 182:12  
**entry** [4] - 7:18, 8:12,  
173:26, 174:5  
**envelope** [1] - 166:1  
**environment** [2] -  
88:17, 197:3  
**equality** [1] - 53:3  
**Equality** [2] - 147:10,  
147:11  
**EQUALITY** [1] - 1:9  
**erroneous** [4] -  
31:13, 53:23, 94:3,  
94:29  
**erroneously** [3] -  
94:6, 162:21, 164:11  
**error** [10] - 91:19,  
100:12, 125:14,  
132:2, 140:19,  
140:21, 140:24,  
141:2, 188:24, 189:2  
**errors** [1] - 172:11  
**erupt** [1] - 32:15  
**essence** [1] - 69:26  
**essentially** [4] -  
30:20, 31:18, 32:7,  
71:22  
**establish** [6] - 18:1,  
52:14, 66:3, 85:17,  
176:7  
**established** [3] -  
18:29, 113:11, 153:27  
**ESTABLISHED** [1] -  
1:8  
**establishing** [4] -  
14:4, 86:10, 88:22,

160:22  
**establishment** [1] -  
40:6  
**etcetera** [4] - 49:1,  
66:2, 101:26, 137:28  
**evening** [26] - 5:8,  
10:3, 38:27, 41:21,  
42:5, 42:9, 47:16,  
49:13, 49:18, 56:21,  
57:4, 78:21, 79:1,  
118:11, 118:19,  
118:26, 120:29,  
121:1, 121:11,  
123:23, 127:16,  
127:18, 128:4,  
133:21, 151:11  
**event** [6] - 57:1,  
73:21, 94:26, 96:8,  
105:24, 148:8  
**events** [2] - 125:26,  
127:18  
**eventually** [5] -  
72:21, 75:13, 77:3,  
80:2, 80:15  
**EVIDENCE** [1] - 1:9  
**evidence** [122] -  
5:16, 5:24, 6:29, 7:12,  
7:16, 11:29, 14:16,  
14:25, 17:2, 17:4,  
17:5, 18:11, 18:18,  
19:18, 19:22, 19:26,  
20:16, 21:28, 22:7,  
23:16, 23:27, 25:16,  
26:19, 26:21, 26:26,  
26:28, 27:9, 27:14,  
27:27, 30:27, 30:29,  
33:28, 34:5, 36:7,  
36:8, 43:12, 43:13,  
48:17, 55:25, 86:13,  
86:19, 90:17, 90:23,  
91:12, 91:20, 92:13,  
92:15, 93:4, 93:27,  
94:13, 97:27, 97:29,  
98:3, 98:12, 100:7,  
100:9, 100:18,  
102:20, 105:25,  
106:2, 106:10,  
107:17, 111:4,  
112:26, 117:2, 117:9,  
117:12, 117:18,  
118:9, 118:25, 120:1,  
120:28, 121:24,  
121:27, 123:25,  
128:10, 128:25,  
128:27, 129:27,  
136:22, 138:2, 138:3,  
142:23, 151:2,  
153:11, 157:3, 157:8,  
157:9, 160:10,  
160:13, 160:21,

162:29, 164:21,  
169:7, 169:11,  
169:16, 169:26,  
169:27, 171:10,  
171:14, 173:28,  
174:12, 174:14,  
174:28, 175:8, 177:3,  
177:5, 179:3, 179:17,  
179:21, 181:20,  
181:28, 183:1, 183:3,  
183:22, 186:21,  
186:23, 187:15  
**evident** [1] - 92:6  
**evidential** [1] - 19:10  
**evolved** [1] - 65:11  
**evolving** [1] - 37:22  
**exactly** [12] - 14:22,  
17:12, 38:7, 103:26,  
124:9, 125:3, 125:27,  
125:29, 133:8,  
166:17, 167:2, 173:23  
**exaggerated** [1] -  
27:22  
**exaggerates** [1] -  
166:24  
**exaggeration** [1] -  
148:3  
**examination** [14] -  
20:24, 21:2, 21:22,  
22:2, 22:6, 55:12,  
66:20, 70:17, 88:8,  
108:23, 119:24,  
143:7, 171:15, 183:4  
**examine** [8] - 12:10,  
42:22, 84:5, 86:13,  
87:29, 153:16,  
185:10, 186:22  
**EXAMINED** [4] - 4:4,  
4:5, 5:7, 97:4  
**examined** [6] - 20:7,  
20:8, 20:12, 20:18,  
20:28, 22:19  
**examiner** [7] - 30:16,  
31:12, 32:11, 37:3,  
40:14, 55:4, 69:7  
**examining** [1] -  
186:25  
**example** [8] - 12:19,  
37:23, 62:8, 94:10,  
143:22, 165:24,  
166:17, 167:27  
**excellent** [3] -  
122:15, 131:3, 131:4  
**except** [1] - 43:13  
**exception** [1] - 43:25  
**exchange** [4] -  
15:10, 38:5, 38:11,  
80:10  
**excuse** [2] - 108:6,  
123:27

**executive** [1] - 193:21  
**existence** [1] - 7:8  
**exonerate** [1] - 180:22  
**expand** [1] - 65:19  
**expectation** [1] - 43:13  
**expected** [2] - 104:29, 176:2  
**experience** [5] - 30:10, 36:28, 138:22, 151:18, 194:24  
**experienced** [3] - 36:29, 119:9, 182:15  
**experiences** [5] - 28:8, 28:10, 82:27, 88:13  
**experiencing** [1] - 105:16  
**expertise** [2] - 77:27, 80:18  
**explain** [11] - 6:24, 45:9, 78:23, 81:17, 90:5, 93:11, 93:15, 110:18, 132:8, 137:22, 138:22  
**explained** [10] - 9:1, 25:18, 89:29, 102:25, 110:22, 133:23, 134:6, 162:28, 171:8, 173:2  
**explaining** [4] - 16:16, 45:13, 66:14, 70:7  
**explanation** [2] - 128:21, 133:27  
**explicit** [1] - 50:28  
**express** [2] - 49:22, 53:5  
**expressed** [9] - 32:26, 45:6, 83:18, 129:5, 157:5, 165:6, 196:20, 196:21, 196:23  
**expressly** [1] - 116:13  
**extended** [1] - 106:11  
**extension** [1] - 196:26  
**extensively** [2] - 68:4, 68:19  
**extent** [10] - 12:8, 13:13, 13:14, 19:2, 62:14, 87:1, 130:16, 170:25, 190:17, 190:18  
**extraordinarily** [1] - 162:9

**extraordinary** [2] - 105:19, 175:12  
**extremely** [2] - 123:25, 123:26  
**eye** [1] - 50:4  
**eyes** [3] - 152:12, 159:14, 180:23

## F

**face** [3] - 9:17, 102:10  
**face-to-face** [1] - 9:17  
**faced** [7] - 95:28, 128:3, 152:14, 152:19, 152:22, 182:18, 194:9  
**facilitated** [1] - 129:13  
**facilities** [1] - 71:24  
**facing** [8] - 50:8, 50:9, 50:13, 50:25, 88:15, 93:18, 194:7  
**fact** [54] - 11:18, 18:7, 18:26, 33:26, 34:16, 50:10, 54:18, 81:19, 89:5, 92:14, 92:19, 93:17, 99:11, 100:5, 103:22, 103:24, 104:3, 104:23, 106:9, 107:11, 123:27, 130:23, 132:15, 134:25, 141:20, 142:5, 142:19, 143:4, 153:12, 154:20, 156:13, 157:27, 158:6, 158:8, 158:21, 159:5, 160:12, 161:25, 165:7, 165:16, 170:19, 172:7, 174:7, 178:8, 179:19, 184:18, 188:8, 191:23, 193:21, 194:2, 194:4, 195:1, 195:7, 195:24  
**facts** [56] - 14:4, 27:23, 31:13, 32:29, 38:17, 52:14, 52:21, 52:24, 53:8, 53:22, 53:23, 54:26, 59:22, 66:3, 67:7, 67:8, 85:18, 86:10, 94:29, 95:25, 106:11, 109:17, 109:18, 110:23, 110:27, 110:29, 111:4, 111:13, 111:22, 111:23, 111:28,

111:29, 112:1, 112:9, 114:26, 124:1, 124:28, 137:3, 144:6, 144:12, 144:16, 145:15, 150:16, 153:9, 170:9, 170:14, 172:18, 176:7, 183:9, 185:11, 191:18, 191:19, 191:21  
**factual** [25] - 46:15, 54:24, 56:18, 66:11, 73:19, 81:16, 116:6, 136:15, 136:22, 138:28, 139:9, 139:12, 139:21, 139:22, 139:27, 141:1, 145:27, 150:8, 153:15, 170:23, 170:28, 171:1, 171:15, 173:7, 176:12  
**factually** [3] - 26:20, 41:2, 134:22  
**failed** [7] - 119:2, 119:10, 119:16, 119:18, 123:20, 166:6, 186:13  
**failings** [1] - 167:11  
**failure** [10] - 107:2, 123:24, 138:25, 139:4, 147:17, 173:3, 176:28, 178:20, 185:27, 190:25  
**fair** [5] - 18:9, 65:29, 146:18, 152:6, 152:7  
**fairly** [10] - 32:29, 36:14, 40:4, 72:8, 73:25, 74:19, 125:26, 174:26, 178:25, 181:17  
**fairness** [6] - 62:11, 67:13, 83:10, 87:15, 93:19, 140:22  
**fait** [1] - 82:9  
**faith** [11] - 15:29, 16:9, 55:18, 176:16, 189:11, 191:9, 193:3, 195:12, 195:13, 196:13  
**falls** [2] - 84:15, 160:22  
**false** [10] - 50:20, 100:4, 105:25, 107:12, 164:20, 181:5, 185:28, 186:8, 187:7, 187:24  
**falsehoods** [1] - 139:13  
**familiar** [2] - 18:17, 21:18  
**families** [1] - 123:7

**family** [7] - 101:2, 131:14, 131:22, 173:3, 177:12, 178:7, 178:9  
**Fanning** [2] - 133:4, 133:5  
**far** [12] - 45:8, 79:9, 81:23, 112:23, 125:11, 130:23, 150:4, 150:5, 151:15, 158:4, 158:24, 188:4  
**Farmleigh** [1] - 33:16  
**fashioned** [1] - 166:4  
**fatal** [3] - 169:8, 169:13, 170:16  
**father** [1] - 169:12  
**fault** [2] - 51:12, 182:16  
**favourable** [1] - 131:20  
**February** [7] - 26:7, 39:24, 100:21, 100:22, 146:28, 169:29, 178:26  
**FEBRUARY** [2] - 1:6, 1:10  
**fed** [1] - 74:3  
**feedback** [1] - 112:11  
**feelings** [2] - 38:20, 38:24  
**FELIX** [1] - 2:23  
**fellow** [1] - 172:7  
**felt** [30] - 22:5, 22:11, 38:1, 41:5, 45:8, 45:15, 52:29, 54:19, 57:13, 57:25, 58:7, 59:21, 63:3, 66:22, 66:24, 67:15, 68:2, 81:11, 127:8, 128:22, 130:15, 130:28, 132:17, 133:28, 151:26, 155:16, 158:28, 167:22, 192:16  
**Fergus** [2] - 122:24, 190:3  
**feud** [1] - 39:23  
**few** [5] - 24:13, 38:12, 82:16, 99:4, 180:14  
**fides** [15] - 15:2, 15:13, 15:29, 17:7, 18:21, 18:24, 19:12, 21:15, 21:20, 111:18, 176:11, 176:16, 195:20, 195:23  
**figure** [1] - 132:24  
**file** [8] - 58:11, 92:2, 92:3, 100:20, 105:27,

106:3, 107:3, 181:10  
**filed** [2] - 92:2, 100:19  
**final** [12] - 23:8, 29:13, 42:10, 42:17, 43:14, 55:14, 75:16, 75:28, 80:16, 80:17, 159:6  
**finalised** [1] - 42:16  
**finally** [4] - 75:22, 75:27, 92:9, 188:26  
**findings** [12] - 19:5, 27:15, 27:16, 27:20, 42:21, 84:15, 86:1, 87:29, 88:27, 159:16, 167:17, 181:25  
**fine** [3] - 19:21, 188:10, 197:13  
**finish** [2] - 149:8, 193:13  
**finished** [3] - 22:24, 95:6, 95:7  
**Fintan** [2] - 133:4, 133:5  
**Fiona** [2] - 126:28, 127:1  
**firmly** [1] - 17:15  
**first** [37] - 7:7, 7:28, 8:11, 10:8, 14:27, 23:14, 23:16, 24:1, 26:2, 31:16, 41:28, 53:9, 54:6, 54:21, 54:29, 59:16, 60:9, 69:25, 70:10, 70:18, 71:8, 72:15, 99:7, 103:7, 113:3, 118:19, 124:10, 124:29, 128:12, 143:1, 144:7, 144:16, 145:14, 167:16, 167:27, 179:6, 182:5  
**First** [1] - 105:5  
**firsthand** [1] - 157:9  
**firstly** [8] - 97:8, 102:6, 117:6, 130:9, 130:22, 154:17, 155:4, 193:10  
**Fitzgerald** [2] - 52:2, 61:17  
**FITZGERALD** [2] - 2:17, 3:8  
**five** [3] - 43:6, 103:2, 197:17  
**fixated** [1] - 165:24  
**fixed** [1] - 142:1  
**FLAHIVE** [1] - 3:8  
**floated** [1] - 177:8  
**floating** [3] - 18:22, 19:13, 53:23  
**fluid** [1] - 9:3



**focus** [2] - 121:13, 178:22  
**focused** [1] - 123:26  
**focuses** [1] - 123:7  
**focusing** [1] - 178:8  
**followed** [5] - 52:27, 60:13, 153:27, 154:3, 182:22  
**FOLLOWING** [1] - 1:5  
**following** [23] - 1:26, 5:13, 20:6, 31:8, 31:11, 32:10, 33:9, 33:16, 38:25, 48:25, 49:24, 60:26, 66:28, 68:27, 69:12, 70:1, 87:6, 112:23, 127:5, 133:17, 134:24, 178:20, 188:8  
**follows** [5] - 30:21, 39:16, 54:2, 70:5, 184:4  
**FOLLOWS** [4] - 5:2, 5:7, 97:1, 154:27  
**football** [2] - 38:2, 57:26  
**FOR** [8] - 1:8, 2:6, 2:9, 2:15, 2:22, 3:1, 3:8, 96:17  
**fora** [1] - 151:18  
**force** [8] - 127:22, 127:24, 131:12, 131:20, 132:6, 140:29, 166:9, 187:1  
**forced** [8] - 155:9, 155:13, 155:25, 156:1, 156:14, 156:18, 156:27, 157:13  
**foremost** [1] - 174:22  
**forget** [1] - 145:1  
**form** [3] - 81:17, 144:18, 168:14  
**formal** [1] - 60:26  
**formally** [1] - 88:6  
**format** [1] - 77:16  
**FORMER** [3] - 4:3, 5:6, 97:3  
**former** [6] - 5:4, 86:7, 159:1, 159:7, 159:21, 161:17  
**forsyth** [2] - 45:26, 47:4  
**forth** [1] - 8:1  
**forum** [1] - 68:2  
**forward** [10] - 6:15, 38:25, 48:6, 68:1, 68:25, 117:1, 128:15, 150:14, 168:24

**forwarded** [2] - 40:17, 57:3  
**forwarding** [1] - 29:16  
**forwards** [1] - 133:6  
**frame** [1] - 94:11  
**framework** [1] - 86:25  
**FRANCES** [1] - 3:8  
**FRANKFORT** [1] - 2:24  
**free** [1] - 123:13  
**frenzied** [3] - 46:25, 57:23, 72:26  
**Friday** [23] - 8:16, 31:11, 33:8, 112:20, 118:11, 120:29, 121:11, 122:19, 123:23, 124:5, 124:6, 125:21, 125:25, 130:4, 130:24, 135:14, 135:21, 141:5, 151:6, 151:15, 182:6, 185:2  
**friendly** [1] - 177:28  
**fro** [1] - 70:13  
**fro-ing** [1] - 70:13  
**front** [7] - 107:23, 108:10, 109:26, 109:27, 144:9, 159:17, 161:23  
**frustration** [3] - 8:7, 127:26, 138:24  
**full** [10] - 54:25, 56:5, 56:11, 89:8, 104:18, 116:6, 141:27, 171:15, 187:2, 187:19  
**full-time** [1] - 104:18  
**fullest** [3] - 13:14, 71:1, 87:1  
**fullness** [1] - 115:7  
**fully** [26] - 22:8, 32:28, 41:14, 42:20, 42:23, 44:20, 46:14, 46:15, 53:1, 57:19, 58:5, 62:4, 71:3, 73:12, 79:8, 81:14, 84:14, 86:23, 86:24, 87:28, 88:27, 88:29, 90:6, 164:28, 168:19, 195:27  
**fulsome** [2] - 17:17, 73:17  
**functions** [2] - 85:17, 104:16  
**fundamental** [2] - 88:3, 172:7  
**furnished** [1] - 117:16  
**furthermore** [1] -

84:26  
**future** [1] - 85:4

---

**G**

---

**gain** [1] - 43:29  
**gangland** [3] - 39:18, 39:23, 40:26  
**Garda** [135] - 10:3, 10:26, 11:13, 11:16, 11:17, 11:20, 16:24, 26:15, 27:4, 27:13, 28:5, 28:18, 29:13, 30:9, 31:23, 31:24, 32:4, 33:6, 34:10, 34:11, 36:26, 36:29, 37:29, 39:15, 41:7, 42:20, 42:27, 43:5, 43:26, 44:6, 44:19, 54:13, 55:1, 55:11, 56:26, 58:12, 58:26, 60:27, 66:11, 76:4, 81:12, 82:23, 82:28, 83:15, 84:1, 84:14, 84:27, 85:2, 85:9, 85:11, 85:15, 86:6, 86:23, 87:16, 87:17, 88:1, 88:13, 88:19, 88:26, 89:1, 91:26, 92:20, 92:22, 93:14, 101:1, 101:19, 102:22, 107:11, 110:25, 114:24, 114:25, 119:28, 119:29, 129:1, 129:8, 129:10, 130:14, 131:9, 131:12, 132:20, 133:16, 133:19, 135:25, 138:25, 142:11, 143:20, 143:26, 144:23, 145:2, 146:11, 147:9, 147:17, 148:9, 149:11, 149:23, 150:2, 152:17, 152:23, 152:25, 152:27, 152:28, 153:19, 153:20, 154:14, 158:29, 162:22, 162:29, 163:4, 163:5, 163:15, 163:27, 164:12, 165:12, 165:29, 166:18, 167:15, 167:24, 168:21, 170:8, 171:20, 173:2, 178:10, 178:21, 180:19, 181:1, 181:9, 185:20, 185:22,

189:26, 194:6, 195:6, 196:26  
**Gardaí** [5] - 5:24, 36:8, 55:8, 157:20, 170:26  
**GARRET** [1] - 3:2  
**gathered** [1] - 69:4  
**general** [7] - 10:24, 16:22, 76:6, 76:8, 103:11, 112:29, 170:3  
**General** [4] - 28:24, 68:13, 82:18, 82:20  
**generalised** [2] - 24:15, 180:16  
**generally** [2] - 35:1, 106:28  
**generating** [1] - 83:25  
**genuine** [3] - 26:12, 160:21, 160:27  
**genuinely** [7] - 26:23, 26:24, 117:1, 142:22, 161:25, 163:7, 181:27  
**genuinely-held** [1] - 142:22  
**GERALDINE** [1] - 3:4  
**GERARD** [1] - 3:11  
**Gillane** [2] - 21:27, 191:13  
**girl** [1] - 169:12  
**given** [31] - 11:26, 13:20, 14:16, 17:11, 38:14, 48:17, 52:9, 54:19, 59:12, 68:19, 83:14, 93:27, 94:12, 98:3, 102:20, 117:6, 117:7, 117:29, 118:17, 121:7, 125:1, 129:18, 129:27, 136:2, 150:17, 155:22, 160:9, 165:11, 169:27, 177:10, 177:12  
**GLEESON** [2] - 3:2, 3:5  
**GORDON** [1] - 2:10  
**Government** [5] - 30:10, 37:19, 47:1, 82:8, 143:10  
**grand** [1] - 197:16  
**granted** [1] - 170:10  
**grave** [1] - 174:16  
**gravest** [1] - 162:6  
**great** [2] - 74:23, 129:25  
**greatest** [3] - 13:13, 62:13, 185:8  
**grievance** [7] - 28:3, 142:11, 142:15,

142:17, 173:1, 189:26  
**gross** [3] - 139:12, 148:3, 160:19  
**grudge** [2] - 28:3, 142:11  
**GSOC** [17] - 65:7, 65:12, 66:29, 67:3, 67:17, 68:25, 92:10, 92:25, 93:2, 93:12, 93:23, 103:12, 148:20, 148:28, 149:23, 150:24, 151:10  
**guarded** [1] - 160:7  
**guards** [1] - 68:10  
**guards'** [1] - 9:12  
**Guerin** [4] - 17:27, 143:8, 143:17, 163:19  
**Guerin's** [1] - 143:7  
**guidance** [1] - 158:20  
**Guidelines** [1] - 105:5  
**Gwen** [1] - 1:25  
**GWEN** [1] - 1:30

---

## H

---

**habit** [1] - 190:22  
**half** [2] - 8:17, 52:3  
**HALIDAY** [1] - 2:12  
**hand** [5] - 76:17, 110:2, 127:22, 127:25, 166:10  
**HANDED** [5] - 98:22, 110:8, 117:17, 120:15, 144:14  
**handled** [1] - 143:20  
**handling** [1] - 137:28  
**handwritten** [1] - 15:21  
**happy** [3] - 57:11, 63:7, 194:2  
**hard** [2] - 78:26, 168:9  
**head** [6] - 13:4, 22:3, 34:12, 128:6, 150:2, 194:7  
**Head** [1] - 153:28  
**headed** [2] - 23:19, 51:5  
**headline** [1] - 55:4  
**headquarters** [1] - 126:29  
**Headquarters** [1] - 58:12  
**Healy** [77] - 7:22, 7:25, 8:21, 8:24, 9:11, 9:16, 9:18, 10:5, 17:1,

18:18, 20:11, 47:17,  
47:20, 47:23, 48:2,  
48:6, 49:7, 57:3,  
58:14, 58:21, 92:11,  
107:22, 108:2, 109:1,  
109:14, 110:7,  
110:16, 110:20,  
111:12, 112:8,  
112:12, 114:22,  
115:2, 115:9, 116:12,  
116:15, 118:21,  
118:26, 118:27,  
119:2, 119:7, 119:9,  
119:16, 119:17,  
119:24, 120:8,  
120:21, 121:11,  
121:20, 121:27,  
122:24, 123:19,  
123:24, 124:22,  
125:29, 135:16,  
135:21, 136:26,  
137:2, 138:18,  
138:27, 140:3,  
140:19, 175:6,  
175:26, 175:28,  
176:5, 182:14, 190:3,  
190:11, 190:21,  
190:26, 191:1,  
191:20, 191:22,  
191:24, 192:6  
**Healy's** [11] - 5:14,  
7:11, 7:16, 15:20,  
18:5, 18:16, 173:27,  
174:12, 174:14,  
175:8, 175:18  
**hear** [2] - 84:5,  
154:10  
**heard** [28] - 7:11,  
11:21, 17:4, 17:5,  
20:10, 23:16, 23:27,  
26:19, 35:3, 90:22,  
91:10, 117:11,  
118:25, 121:18,  
121:24, 121:26,  
146:17, 151:1, 155:6,  
156:23, 161:22,  
170:17, 173:27,  
179:3, 181:20, 183:7,  
183:8, 194:14  
**hearing** [5] - 30:28,  
67:21, 146:19, 164:3,  
183:26  
**HEARING** [4] - 5:1,  
96:17, 97:1, 154:26  
**hearings** [8] - 22:24,  
25:26, 104:9, 113:7,  
140:24, 148:18,  
172:19, 181:7  
**heart** [1] - 83:17  
**heavy** [1] - 174:27

**held** [8] - 26:24,  
99:29, 104:24,  
142:22, 161:25,  
163:7, 181:27, 191:1  
**HELD** [1] - 1:17  
**help** [5] - 74:4, 75:7,  
96:9, 149:4, 159:23  
**helped** [1] - 178:11  
**helpful** [2] - 23:29,  
179:5  
**herself** [1] - 66:16  
**hesitant** [1] - 18:6  
**higher** [1] - 66:14  
**highlighted** [1] -  
137:27  
**hijack** [1] - 185:27  
**himself** [12] - 20:29,  
61:6, 81:24, 99:20,  
133:17, 140:26,  
158:28, 177:10,  
178:7, 178:12,  
180:22, 194:29  
**historical** [1] - 61:5  
**hold** [2] - 155:23,  
160:27  
**holding** [1] - 104:24  
**honourable** [1] -  
55:24  
**hope** [4] - 32:27,  
110:18, 112:5, 134:15  
**hoped** [3] - 45:2,  
45:6  
**hopefully** [1] - 79:25  
**hostile** [1] - 178:27  
**hotel** [1] - 39:25  
**hour** [6] - 37:9,  
37:22, 51:24, 83:24,  
96:15  
**hourly** [1] - 37:21  
**hours** [2] - 175:16,  
197:17  
**House** [4] - 52:11,  
53:1, 54:13, 57:27  
**HOUSE** [3] - 2:12,  
2:19, 3:13  
**HR** [6] - 129:9, 193:8,  
193:10, 193:19,  
193:22, 196:15  
**HRM** [4] - 6:27,  
10:18, 19:27, 106:14  
**HSE** [3] - 90:12,  
101:1, 101:14  
**huge** [1] - 152:26  
**human** [3] - 28:10,  
192:15, 194:23  
**Human** [1] - 6:27  
**hunky** [1] - 166:3  
**hunky-dory** [1] -  
166:3  
**hurtful** [2] - 86:17,

159:10  
**hypocritical** [6] -  
193:9, 193:11,  
193:18, 193:25,  
194:9, 194:19  

---

**I**

---

  
**i)** [1] - 147:12  
**IC** [2] - 134:6, 134:16  
**idea** [2] - 99:17,  
182:5  
**identified** [7] - 27:2,  
125:14, 139:9,  
139:10, 140:22,  
163:21, 167:10  
**identify** [1] - 155:29  
**ignored** [1] - 143:23  
**illegal** [1] - 55:25  
**illusion** [1] - 134:19  
**imagine** [6] - 64:23,  
94:13, 151:23,  
151:28, 151:29, 152:2  
**immediate** [4] -  
17:13, 33:10, 42:24,  
143:16  
**immediately** [11] -  
56:12, 57:1, 57:9,  
92:7, 115:28, 117:9,  
129:13, 132:15,  
134:27, 135:5, 169:23  
**impact** [11] - 11:13,  
11:14, 11:16, 85:1,  
151:21, 151:22,  
152:26, 152:27,  
153:19, 194:24,  
195:29  
**imparted** [2] - 156:3,  
157:11  
**impartially** [1] -  
67:18  
**impersonal** [1] -  
151:20  
**implement** [1] -  
84:16  
**implementation** [2] -  
40:10, 163:24  
**implementing** [2] -  
35:10, 88:29  
**implied** [1] - 50:29  
**importance** [3] -  
76:22, 79:4, 105:5  
**important** [14] -  
16:27, 55:3, 81:8,  
81:9, 81:13, 81:15,  
81:16, 81:22, 84:18,  
84:28, 85:6, 90:1,  
110:23, 133:22  
**importantly** [1] -

55:27  
**impossible** [4] -  
63:4, 86:3, 152:15,  
195:2  
**impression** [17] -  
90:19, 117:29,  
118:11, 118:17,  
118:24, 120:22,  
121:6, 121:10,  
121:29, 123:22,  
123:28, 123:29,  
124:24, 124:26  
**imprisonment** [1] -  
185:28  
**improper** [17] -  
50:14, 66:25, 86:12,  
109:22, 113:28,  
115:25, 119:6,  
126:18, 138:13,  
140:28, 141:7,  
145:22, 149:27,  
151:12, 171:23,  
176:18, 181:23  
**improperly** [8] -  
119:6, 119:14, 138:9,  
159:2, 159:14,  
161:10, 161:18, 176:1  
**impropriety** [1] -  
160:28  
**improvements** [1] -  
168:22  
**impugn** [3] - 50:15,  
85:12, 151:13  
**impugned** [1] -  
183:19  
**imputation** [3] -  
159:13, 161:17,  
164:22  
**IN** [1] - 1:17  
**inaccuracies** [3] -  
57:28, 139:9, 139:12  
**inaccuracy** [4] -  
139:21, 139:22,  
139:27, 141:19  
**inaccurate** [2] -  
56:20, 179:28  
**inaccurately** [1] -  
19:9  
**inaction** [1] - 86:24  
**inadequate** [1] -  
169:15  
**inappropriate** [3] -  
66:24, 91:8, 151:9  
**inaudible** [1] - 154:7  
**Inaudible** [1] -  
154:23  
**inaudible)..** [2] -  
154:11, 154:13  
**incident** [4] - 147:15,  
147:22, 148:5, 166:16

**incidents** [15] -  
15:17, 18:3, 28:15,  
137:26, 142:25,  
143:19, 143:21,  
148:14, 149:5, 149:7,  
149:8, 150:5, 165:15,  
170:24, 186:20  
**include** [2] - 74:25,  
147:14  
**included** [9] - 40:4,  
43:14, 84:8, 97:15,  
97:16, 103:19, 147:5,  
147:16, 155:8  
**includes** [2] -  
152:24, 156:26  
**including** [22] -  
13:26, 17:17, 27:17,  
35:11, 46:28, 46:29,  
56:21, 66:23, 68:12,  
82:24, 86:14, 88:8,  
96:1, 110:26, 111:2,  
129:9, 146:13,  
146:21, 151:21,  
152:21, 178:6, 180:18  
**incorrect** [2] -  
161:20, 169:16  
**indeed** [26] - 11:1,  
12:18, 20:2, 20:5,  
20:7, 21:25, 22:13,  
22:14, 28:17, 30:8,  
31:23, 35:1, 35:10,  
70:14, 86:24, 104:12,  
105:4, 118:3, 121:7,  
131:2, 143:17,  
143:20, 151:24,  
153:20, 191:13, 194:1  
**Independent** [3] -  
36:6, 69:7, 103:17  
**independent** [3] -  
79:6, 93:12, 107:9  
**INDEX** [1] - 4:1  
**indicated** [10] - 6:21,  
127:7, 128:21,  
133:22, 133:28,  
134:4, 134:10,  
134:14, 145:12, 148:1  
**individual** [10] -  
10:27, 11:19, 15:17,  
28:17, 110:25, 111:1,  
149:5, 149:13, 150:5,  
162:7  
**individuals** [5] -  
10:23, 13:28, 13:29,  
152:21, 194:25  
**industrial** [3] - 39:19,  
39:26, 40:27  
**inescapable** [1] -  
82:22  
**inevitable** [1] - 83:29  
**inexperience** [1] -

185:23  
**inextricably** [1] - 185:4  
**influence** [1] - 160:15  
**inform** [3] - 79:8, 88:1, 100:4  
**informants** [1] - 173:14  
**information** [9] - 38:8, 73:19, 73:20, 83:21, 83:28, 89:17, 91:3, 128:17, 134:2  
**informed** [19] - 53:1, 58:5, 70:29, 71:3, 73:12, 81:14, 90:6, 100:11, 101:2, 104:3, 122:24, 129:8, 133:29, 156:13, 178:22, 191:19, 191:21, 191:24, 191:25  
**infringing** [1] - 79:10  
**ing** [2] - 70:13  
**initial** [1] - 15:3  
**ink** [1] - 93:29  
**innuendo** [5] - 50:13, 50:16, 60:19, 61:3, 61:4  
**input** [8] - 14:15, 75:15, 79:5, 81:6, 150:8, 156:9, 166:20, 171:2  
**inputs** [1] - 139:18  
**inputting** [1] - 78:19  
**inquire** [1] - 74:28  
**inquired** [2] - 57:15, 64:18  
**inquiries** [2] - 27:24, 96:8  
**inquiring** [3] - 5:23, 74:26, 96:12  
**INQUIRY** [2] - 1:3, 1:9  
**Inquiry** [2] - 134:12, 134:13  
**inquiry** [9] - 30:25, 31:19, 32:8, 36:7, 96:12, 103:12, 147:25, 147:27, 183:20  
**insights** [1] - 82:26  
**insincere** [3] - 193:8, 193:11, 193:17  
**insincerity** [1] - 193:28  
**insofar** [17] - 19:6, 41:11, 46:15, 53:19, 72:24, 90:11, 106:24, 111:28, 116:26, 121:16, 121:19, 135:9, 145:21, 148:1, 170:19, 175:8, 196:20  
**inspector** [2] - 149:15, 193:24  
**Inspector** [3] - 10:5, 24:2, 179:11  
**instance** [5] - 16:24, 85:4, 144:5, 148:8, 170:16  
**instances** [1] - 163:20  
**instead** [1] - 166:3  
**instruct** [4] - 55:1, 55:17, 115:3, 170:8  
**INSTRUCTED** [5] - 2:11, 2:18, 2:23, 3:4, 3:12  
**instructed** [15] - 61:8, 61:13, 85:12, 114:19, 115:1, 115:13, 115:15, 115:19, 116:16, 138:12, 150:10, 171:21, 171:24, 182:22, 182:26  
**instructing** [3] - 152:11, 171:1, 190:8  
**instruction** [8] - 30:24, 111:16, 114:18, 119:11, 142:14, 149:24, 170:28, 182:9  
**instructions** [67] - 6:24, 8:1, 9:13, 11:23, 12:5, 17:11, 20:2, 21:21, 21:23, 22:4, 31:8, 47:21, 48:16, 49:1, 58:12, 59:2, 59:13, 59:19, 60:7, 66:1, 69:8, 75:14, 76:1, 83:14, 84:29, 108:1, 108:29, 110:20, 113:23, 113:27, 115:11, 115:21, 115:23, 115:29, 116:1, 116:11, 117:5, 119:3, 121:18, 122:20, 124:20, 135:18, 135:24, 135:28, 135:29, 136:3, 136:4, 137:11, 138:8, 138:14, 138:15, 150:6, 150:7, 151:13, 155:22, 171:26, 175:21, 176:5, 176:21, 186:13, 186:16, 189:8, 189:16, 190:13, 193:2, 193:5  
**INSTRUMENT** [1] - 1:8  
**insufficient** [1] - 179:21  
**integrity** [47] - 6:10, 17:17, 17:23, 19:12, 21:14, 21:20, 33:27, 50:15, 55:19, 85:12, 108:3, 109:2, 110:10, 110:17, 111:10, 111:17, 111:25, 112:4, 112:14, 114:8, 114:20, 114:23, 115:4, 115:26, 116:17, 116:24, 116:28, 119:4, 119:13, 132:12, 136:27, 137:1, 141:9, 151:14, 174:27, 175:29, 176:9, 176:11, 182:26, 182:28, 183:18, 189:9, 191:9, 193:4, 194:17, 195:12, 196:12  
**intelligent** [1] - 122:13  
**intend** [1] - 18:18  
**intended** [3] - 92:23, 123:17, 177:20  
**intending** [2] - 178:12, 185:12  
**intense** [1] - 70:23  
**intensity** [1] - 37:28  
**intention** [6] - 17:14, 17:16, 17:21, 17:22, 112:28, 141:21  
**intentions** [1] - 55:24  
**interacting** [1] - 184:14  
**interaction** [11] - 21:26, 30:7, 36:24, 37:11, 37:15, 37:21, 60:25, 67:10, 91:5, 119:21, 184:11  
**interactions** [3] - 131:9, 141:15, 176:26  
**interest** [11] - 48:26, 48:27, 52:13, 66:28, 67:5, 87:19, 92:18, 102:27, 103:8, 168:13, 171:29  
**interests** [9] - 10:26, 12:21, 67:13, 70:11, 79:19, 87:15, 89:1, 90:3, 150:3  
**interfere** [2] - 150:13, 184:13  
**interfering** [1] - 150:16  
**intermittent** [1] - 32:1  
**international** [1] - 194:8  
**interpret** [1] - 163:8  
**interpretation** [1] - 18:20  
**interrogated** [2] - 54:8, 59:25  
**interrupting** [1] - 95:4  
**interruption** [1] - 108:23  
**interval** [2] - 188:21, 188:23  
**intervene** [2] - 49:26, 154:19  
**intervention** [2] - 168:28, 169:1  
**INTO** [1] - 1:3  
**intricate** [2] - 149:4, 149:12  
**introduced** [2] - 36:6, 195:20  
**inverted** [1] - 50:24  
**invested** [2] - 193:14, 193:20  
**investigate** [4] - 116:8, 143:28, 176:14, 185:27  
**investigated** [8] - 24:2, 99:12, 100:28, 103:13, 106:5, 110:28, 111:15, 179:11  
**investigating** [4] - 87:19, 93:13, 102:12, 166:3  
**Investigation** [19] - 6:12, 29:11, 34:18, 40:5, 45:14, 56:2, 61:11, 65:28, 84:20, 92:24, 96:3, 103:9, 111:14, 116:20, 132:10, 144:25, 152:20, 153:10, 192:22  
**investigation** [16] - 55:29, 60:27, 67:3, 67:6, 67:17, 85:19, 101:9, 143:11, 143:14, 147:9, 149:18, 153:14, 160:11, 169:7, 169:15, 181:10  
**investigations** [9] - 17:29, 18:2, 27:3, 27:18, 84:22, 137:28, 143:21, 153:13, 163:10  
**Investigations** [1] - 32:22  
**investigative** [2] - 88:6, 149:19  
**investigators'** [1] - 174:7  
**invite** [1] - 112:27  
**invited** [1] - 154:14  
**invoke** [1] - 160:20  
**involve** [1] - 48:17  
**involved** [9] - 9:21, 84:23, 87:15, 95:2, 169:13, 169:20, 170:16, 170:18, 179:20  
**involvement** [3] - 148:24, 160:16, 170:24  
**involves** [1] - 85:29  
**involving** [1] - 169:8  
**Ireland** [1] - 88:16  
**ireland** [1] - 35:12  
**Irish** [7] - 30:15, 31:12, 37:2, 40:14, 55:4, 69:6, 69:7  
**IRM** [1] - 103:28  
**isolated** [3] - 57:14, 57:22, 63:3  
**issue** [49] - 15:11, 16:12, 19:12, 19:17, 22:10, 27:29, 28:13, 33:27, 34:17, 40:28, 41:6, 42:11, 53:6, 60:6, 60:24, 62:9, 67:12, 84:19, 90:10, 91:27, 92:25, 92:29, 99:11, 100:21, 100:29, 101:24, 105:1, 107:22, 125:13, 125:19, 127:6, 127:24, 129:2, 131:15, 134:28, 135:1, 137:23, 140:12, 141:9, 142:3, 142:5, 148:9, 159:12, 176:8, 186:3, 191:28, 191:29  
**issued** [2] - 42:8, 81:19  
**issues** [47] - 8:4, 8:5, 9:2, 10:29, 16:21, 19:2, 33:5, 33:12, 33:14, 39:22, 39:27, 40:24, 42:23, 44:8, 44:19, 45:4, 52:28, 55:26, 66:17, 70:1, 85:8, 88:4, 88:7, 89:21, 90:1, 92:26, 93:13, 101:14,

101:19, 104:7,  
105:14, 128:28,  
129:5, 130:7, 132:9,  
135:15, 139:2, 139:3,  
140:13, 147:18,  
147:19, 163:21,  
163:25, 177:1, 177:2,  
178:20, 185:3  
**issuing** [1] - 45:10  
**it'll** [1] - 98:20  
**item** [1] - 40:16  
**items** [1] - 39:16  
**iterations** [1] - 90:7

---

## J

---

**January** [1] - 196:21  
**JANUARY** [3] - 1:18,  
5:1, 197:20  
**job** [9] - 22:7,  
101:26, 109:20,  
131:3, 131:4, 137:5,  
137:6, 166:28, 167:1  
**JOC** [1] - 63:27  
**John** [2] - 80:27,  
127:2  
**JOHN** [3] - 2:17, 2:22  
**joint** [3] - 30:1,  
89:25, 170:26  
**journey** [1] - 44:25  
**JT** [2] - 65:2, 66:3  
**JUDGE** [2] - 1:12,  
2:3  
**Judge** [21] - 108:17,  
108:22, 108:23,  
151:11, 172:12,  
173:26, 177:24,  
183:27, 184:16,  
187:12, 188:6,  
188:16, 188:28,  
189:6, 189:19,  
189:28, 190:27,  
196:2, 196:5, 197:12  
**judged** [1] - 55:24  
**July** [7] - 5:9, 6:9,  
90:18, 97:10, 98:5,  
101:9, 102:3  
**jumping** [1] - 19:19  
**June** [13] - 65:12,  
125:13, 126:11,  
131:27, 140:7,  
140:18, 157:20,  
172:6, 188:2, 188:12,  
188:18, 188:19,  
188:24  
**junior** [2] - 24:17,  
180:18  
**JUSTICE** [4] - 1:8,  
1:12, 2:2, 187:13

**justice** [9] - 16:16,  
33:1, 36:12, 53:3,  
63:16, 64:2, 81:24,  
84:12, 191:27  
**Justice** [92] - 6:11,  
16:17, 20:9, 20:22,  
20:23, 20:29, 21:9,  
21:25, 22:13, 26:22,  
27:15, 27:20, 27:25,  
28:25, 29:17, 29:23,  
30:9, 32:28, 45:3,  
45:27, 57:17, 66:23,  
69:19, 74:25, 83:19,  
84:4, 91:4, 91:5,  
103:23, 110:28,  
111:15, 113:17,  
113:25, 114:6,  
115:24, 121:14,  
124:6, 124:26,  
125:10, 125:16,  
125:22, 126:17,  
126:24, 136:7, 137:6,  
137:8, 137:14,  
137:21, 140:15,  
141:5, 142:7, 142:21,  
146:20, 147:10,  
147:11, 148:18,  
150:29, 151:1,  
155:24, 156:12,  
156:17, 157:15,  
158:17, 161:4, 161:8,  
161:23, 162:1,  
162:26, 164:2,  
167:17, 171:17,  
181:25, 182:24,  
183:8, 183:15,  
183:25, 184:25,  
185:17, 186:5,  
186:10, 188:7,  
189:21, 189:28,  
190:15, 191:5,  
191:13, 191:17,  
191:27, 195:10,  
195:15, 195:19  
**justification** [2] -  
42:26, 181:15

---

## K

---

**Karen** [1] - 98:9  
**KATHLEEN** [1] - 2:7  
**KATHY** [1] - 2:18  
**Kavanagh** [1] - 8:22  
**KAVANAGH** [1] - 2:4  
**keen** [1] - 13:25  
**keeping** [1] - 105:6  
**ken** [1] - 28:23  
**Ken** [2] - 34:9, 34:14  
**KEN** [1] - 3:9  
**Kenny** [20] - 90:21,

97:10, 97:13, 98:5,  
99:2, 99:18, 99:26,  
101:8, 101:13,  
102:11, 102:15,  
102:23, 102:26,  
103:7, 104:6, 104:11,  
104:22, 105:11,  
105:20, 105:23  
**Kenny's** [2] - 100:6,  
102:19  
**kept** [2] - 103:27,  
190:24  
**key** [2] - 24:1, 179:6  
**kids** [1] - 101:26  
**Kieran** [5] - 97:9,  
97:13, 101:8, 104:6,  
104:22  
**kind** [1] - 179:22  
**Kingscourt** [4] -  
147:14, 147:22,  
148:8, 166:16  
**knowingly** [1] -  
181:14  
**knowledge** [12] -  
71:1, 106:11, 136:15,  
141:22, 148:14,  
148:15, 148:16,  
149:17, 150:5,  
170:23, 182:20,  
195:22  
**known** [4] - 34:22,  
38:22, 106:17, 175:13  
**knows** [2] - 38:20,  
38:21  
**KOL** [2] - 63:25,  
64:12

---

## L

---

**lack** [2] - 179:21,  
196:12  
**lacked** [1] - 193:4  
**lady** [1] - 165:26  
**laid** [2] - 27:16,  
145:27  
**last** [8] - 38:4, 55:4,  
76:13, 78:7, 79:25,  
97:7, 101:20, 157:18  
**late** [5] - 25:17, 96:9,  
120:29, 133:24,  
165:27  
**late-night** [1] -  
165:27  
**lateness** [2] - 24:16,  
180:17  
**latitude** [2] - 12:10,  
79:8  
**laudable** [1] - 190:22  
**launching** [1] - 35:14

**law** [5] - 31:25, 62:7,  
83:6, 85:7  
**lawyers** [3] - 62:10,  
83:9, 144:1  
**lay** [1] - 183:9  
**lead** [2] - 19:11, 63:7  
**leader** [17] - 5:19,  
35:21, 37:23, 38:16,  
39:2, 51:8, 59:15,  
61:23, 89:14, 95:4,  
107:18, 107:19,  
108:12, 114:21,  
116:22, 145:8, 178:6  
**Leader** [7] - 19:19,  
32:16, 37:13, 49:21,  
65:14, 74:24, 94:2  
**LEADER** [22] - 2:7,  
4:4, 5:4, 5:7, 5:8,  
23:7, 51:4, 61:16,  
62:26, 65:15, 65:23,  
75:1, 75:4, 75:7, 92:9,  
95:6, 110:2, 145:4,  
145:7, 145:9, 188:12,  
188:15  
**leaders'** [6] - 45:29,  
46:17, 47:5, 47:8,  
47:14, 59:24  
**leading** [1] - 25:20  
**leaked** [1] - 23:5  
**leaks** [4] - 32:1,  
45:17, 46:7, 49:19  
**learn** [2] - 44:26,  
88:12  
**learned** [3] - 42:23,  
88:8, 150:14  
**learning** [2] - 43:3,  
88:28  
**learnings** [1] - 82:27  
**least** [5] - 5:23, 7:3,  
11:27, 32:3, 86:18  
**leave** [1] - 180:10  
**leaving** [1] - 11:7  
**led** [20] - 15:17, 18:3,  
28:13, 28:14, 37:4,  
95:1, 137:25, 138:23,  
142:23, 142:25,  
145:29, 162:21,  
162:23, 163:6,  
164:11, 164:12,  
167:13, 169:14,  
186:20, 195:10  
**left** [8] - 18:22,  
19:13, 57:21, 70:28,  
118:11, 118:23,  
121:29, 123:23  
**legal** [63] - 6:23,  
9:12, 9:21, 12:4, 12:7,  
12:8, 22:18, 34:18,  
47:7, 47:13, 52:9,  
55:1, 55:9, 55:17,

55:21, 56:4, 57:16,  
62:24, 62:28, 64:28,  
72:12, 76:2, 79:3,  
79:5, 79:6, 83:14,  
83:18, 84:6, 84:27,  
85:3, 85:11, 85:15,  
113:4, 115:2, 115:16,  
116:19, 119:18,  
122:4, 124:25,  
125:20, 129:28,  
135:22, 136:5,  
137:13, 140:13,  
141:17, 143:12,  
144:2, 150:13,  
151:18, 175:3,  
182:13, 182:17,  
182:18, 182:21,  
184:6, 184:13,  
189:15, 190:12,  
192:21, 194:1,  
195:21, 195:28  
**Legal** [1] - 153:28  
**legally** [1] - 65:1  
**legislation** [1] - 30:6  
**lengthy** [2] - 36:14,  
137:20  
**Leo** [2] - 99:9,  
101:24  
**lessons** [4] - 42:22,  
82:23, 88:8, 88:28  
**lest** [1] - 123:13  
**letter** [93] - 5:10,  
15:3, 15:4, 19:7, 19:8,  
19:16, 20:4, 60:4,  
60:9, 60:11, 60:14,  
61:16, 64:24, 69:20,  
69:24, 69:25, 70:3,  
70:6, 70:19, 70:21,  
71:8, 72:11, 72:14,  
72:21, 72:27, 72:28,  
72:29, 73:2, 73:5,  
73:17, 73:22, 74:15,  
74:16, 74:18, 74:21,  
75:12, 75:16, 75:17,  
75:19, 75:23, 75:26,  
75:28, 76:1, 76:7,  
76:18, 76:20, 77:3,  
77:12, 77:22, 78:5,  
78:13, 79:4, 79:14,  
79:18, 79:20, 81:9,  
81:23, 81:26, 82:4,  
82:6, 82:11, 82:12,  
89:2, 89:5, 89:9,  
89:24, 90:1, 90:2,  
90:7, 90:20, 90:24,  
136:14, 139:1,  
139:10, 139:17,  
139:25, 140:1,  
140:17, 140:19,  
140:20, 140:26,

141:18, 141:28,  
172:8, 172:11, 178:1,  
178:5, 178:11,  
179:26, 189:18,  
189:23  
**letters** [1] - 81:10  
**level** [1] - 43:28  
**liaison** [2] - 102:21,  
182:14  
**lie** [1] - 158:3  
**lied** [1] - 65:7  
**life** [1] - 90:11  
**light** [3] - 17:12,  
128:27, 163:25  
**lightly** [3] - 58:6,  
153:6, 153:8  
**likely** [2] - 30:2,  
70:10  
**likewise** [3] - 29:27,  
123:9, 129:13  
**limits** [1] - 66:20  
**line** [8] - 31:12,  
52:29, 53:9, 117:23,  
120:17, 121:3,  
183:15, 197:7  
**lines** [2] - 117:23,  
171:24  
**linked** [1] - 185:4  
**list** [1] - 160:6  
**listen** [1] - 43:27  
**listened** [3] - 16:19,  
16:21, 44:23  
**listening** [2] - 96:14,  
186:10  
**lists** [1] - 187:16  
**literally** [2] - 37:22,  
51:23  
**litigation** [1] - 122:2  
**LITTLE** [2] - 2:19,  
3:14  
**live** [2] - 104:29,  
159:11  
**lived** [3] - 45:5,  
86:20, 157:12  
**local** [6] - 91:26,  
129:9, 130:7, 131:9,  
134:28, 149:15  
**locally** [2] - 105:3,  
105:6  
**lodged** [1] - 14:11  
**look** [27] - 9:27,  
14:26, 15:19, 20:25,  
21:8, 31:16, 50:27,  
51:28, 53:6, 72:8,  
95:18, 98:19, 100:23,  
112:16, 122:7,  
132:29, 144:20,  
154:29, 155:3,  
157:16, 157:19,  
162:17, 165:4,

165:22, 166:28,  
183:10, 188:8  
**looked** [5] - 32:28,  
73:4, 106:2, 144:24,  
159:12  
**looking** [13] - 18:5,  
38:5, 74:10, 79:2,  
92:1, 99:18, 117:26,  
118:16, 123:10,  
123:21, 139:1,  
144:22, 177:1  
**Lorraine** [5] - 133:4,  
148:11, 148:20,  
148:27, 150:23  
**lose** [1] - 43:29  
**loss** [5] - 130:8,  
130:17, 192:17,  
192:23, 192:26  
**lost** [2] - 48:20,  
48:22  
**low** [1] - 152:29  
**LUNCH** [2] - 96:17,  
97:1  
**lunch** [1] - 97:8

---

**M**

---

**MacNamee** [2] - 3:1,  
10:4  
**MADE** [2] - 1:3, 1:8  
**made..** [1] - 156:25  
**maintained** [2] -  
129:22, 160:13  
**major** [5] - 100:12,  
172:25, 172:28,  
173:4, 173:15  
**mala** [14] - 15:1,  
15:13, 15:28, 17:7,  
18:21, 18:24, 19:12,  
21:15, 21:20, 111:18,  
176:11, 176:15,  
195:20, 195:23  
**malice** [14] - 30:26,  
34:23, 55:3, 55:6,  
61:8, 61:9, 61:14,  
66:2, 186:8, 190:9,  
190:28, 192:2,  
192:10, 194:15  
**malicious** [3] -  
44:11, 193:2, 196:13  
**maliciously** [4] -  
85:14, 189:12, 191:8,  
195:11  
**Malone** [1] - 1:25  
**MALONE** [1] - 1:30  
**malpractice** [25] -  
14:2, 15:16, 17:26,  
18:4, 26:26, 27:8,  
27:21, 28:16, 86:2,

138:1, 142:24,  
142:26, 142:29,  
143:4, 144:8, 144:18,  
146:15, 146:29,  
158:23, 161:9,  
161:26, 161:27,  
174:17, 183:3, 186:21  
**man** [11] - 17:23,  
103:2, 111:3, 138:5,  
175:15, 190:6, 190:7,  
191:8, 195:11,  
195:12, 195:13  
**Management** [1] -  
6:27  
**management** [16] -  
27:4, 44:24, 60:26,  
91:26, 129:8, 129:9,  
129:21, 131:9,  
132:20, 133:17,  
134:29, 139:4,  
143:20, 144:23,  
145:2, 176:26  
**management's** [3] -  
138:25, 147:17,  
178:21  
**manager** [1] - 88:21  
**managers** [2] -  
165:18, 166:10  
**manner** [5] - 139:5,  
167:13, 167:25,  
176:29, 192:1  
**Mannion** [1] - 64:2  
**March** [3] - 35:4,  
100:22, 158:7  
**Marie** [1] - 80:25  
**Marin** [1] - 161:2  
**marked** [1] - 9:8  
**markedly** [1] - 44:26  
**MARRINAN** [1] - 2:6  
**Martin** [12] - 35:21,  
65:16, 92:12, 92:20,  
93:2, 93:20, 93:24,  
94:9, 159:13, 172:15,  
180:19, 181:1  
**MARTIN** [1] - 3:10  
**Mary** [1] - 74:13  
**material** [15] - 37:16,  
39:3, 40:13, 52:23,  
53:28, 56:18, 71:9,  
71:29, 82:13, 97:14,  
99:19, 99:21, 100:4,  
100:11  
**materials** [48] - 5:18,  
5:29, 8:13, 9:29,  
15:24, 23:10, 29:1,  
32:3, 32:17, 35:16,  
39:4, 40:2, 42:2,  
45:25, 47:11, 47:16,  
47:28, 48:8, 48:12,  
48:23, 51:15, 51:29,

58:23, 61:17, 63:13,  
68:29, 69:13, 70:18,  
70:26, 71:19, 72:4,  
73:27, 73:29, 74:22,  
76:10, 76:25, 77:10,  
77:25, 78:4, 78:14,  
79:2, 79:13, 79:21,  
79:28, 80:8, 89:12,  
89:15, 145:4  
**matter** [92] - 6:7,  
14:3, 18:21, 19:1,  
21:5, 21:7, 21:11,  
21:20, 21:28, 22:17,  
22:20, 23:5, 24:7,  
27:23, 33:18, 33:21,  
33:23, 34:2, 36:16,  
36:21, 45:1, 45:22,  
46:16, 47:10, 54:8,  
56:15, 58:15, 59:25,  
60:3, 62:5, 63:8,  
63:17, 66:11, 67:16,  
69:8, 71:16, 72:10,  
73:28, 77:28, 80:18,  
83:4, 85:24, 86:3,  
90:12, 90:21, 90:28,  
91:1, 91:20, 91:27,  
97:7, 99:11, 100:28,  
102:12, 103:16,  
104:23, 105:1,  
105:21, 108:17,  
118:5, 119:19, 122:1,  
122:2, 122:3, 124:27,  
125:12, 125:17,  
126:22, 126:24,  
127:15, 134:16,  
137:15, 137:16,  
137:17, 139:21,  
141:17, 143:17,  
143:18, 150:10,  
154:2, 156:13,  
158:27, 160:25,  
168:4, 171:11,  
177:25, 180:2,  
185:24, 190:14,  
191:12, 191:25, 195:8  
**matters** [75] - 12:22,  
17:9, 17:19, 21:1,  
21:2, 22:25, 26:12,  
27:13, 29:12, 29:29,  
30:1, 34:10, 35:5,  
37:28, 40:12, 43:8,  
61:28, 62:2, 62:15,  
65:11, 68:1, 68:4,  
71:25, 82:10, 85:18,  
87:1, 87:7, 88:24,  
93:19, 105:6, 105:12,  
105:14, 106:24,  
110:24, 114:28,  
116:29, 122:28,  
129:3, 129:29, 136:9,  
136:11, 136:15,

138:29, 139:29,  
140:15, 143:8,  
143:13, 143:23,  
144:23, 145:3,  
147:12, 147:27,  
148:17, 149:9,  
149:13, 151:27,  
153:1, 153:2, 153:5,  
157:16, 158:25,  
165:1, 165:17,  
168:23, 170:9,  
171:12, 171:28,  
172:2, 173:7, 173:10,  
176:13, 176:25,  
183:8, 189:14  
**MATTERS** [1] - 1:5  
**Maurice** [3] - 30:26,  
55:10, 85:12  
**maximum** [2] -  
45:19, 79:7  
**mayhem** [1] - 165:28  
**McArdle** [6] - 148:12,  
148:19, 148:26,  
149:1, 150:22, 151:9  
**McArdle's** [1] -  
148:23  
**McCabe** [222] - 2:9,  
5:16, 5:25, 11:7, 11:9,  
15:2, 15:15, 16:10,  
18:3, 18:10, 21:15,  
23:9, 23:12, 23:23,  
23:29, 24:11, 24:25,  
25:6, 26:11, 26:23,  
27:1, 27:7, 27:11,  
27:28, 28:2, 28:8,  
28:11, 28:14, 28:15,  
30:26, 34:29, 35:9,  
41:17, 44:10, 50:7,  
50:12, 50:15, 55:2,  
55:10, 55:24, 60:20,  
60:21, 60:25, 61:6,  
61:8, 61:10, 61:13,  
85:13, 85:27, 86:14,  
91:29, 92:6, 94:23,  
96:1, 97:20, 99:25,  
100:2, 101:25, 102:4,  
102:12, 103:4,  
103:19, 104:6,  
104:15, 104:25,  
105:11, 105:13,  
105:16, 105:26,  
107:1, 109:15,  
109:16, 109:21,  
110:26, 111:2,  
112:20, 113:28,  
115:25, 116:27,  
126:13, 126:17,  
127:7, 127:20, 128:5,  
128:19, 128:25,  
129:4, 129:8, 129:13,

129:19, 129:26,  
130:6, 130:13,  
130:20, 130:24,  
130:29, 132:3,  
132:13, 133:14,  
133:21, 133:23,  
133:25, 133:29,  
134:3, 134:11,  
134:14, 134:23,  
134:28, 134:29,  
135:16, 135:23,  
136:9, 136:12,  
136:27, 137:24,  
137:26, 138:2, 138:5,  
138:12, 139:5,  
139:22, 139:28,  
140:15, 140:25,  
141:14, 141:23,  
142:17, 142:22,  
143:8, 145:22, 146:5,  
146:13, 146:22,  
147:12, 147:19,  
148:26, 149:22,  
149:25, 150:21,  
151:9, 151:12,  
152:22, 155:8,  
155:26, 157:22,  
158:10, 159:14,  
160:6, 160:13,  
160:24, 160:27,  
161:6, 161:12,  
162:21, 163:18,  
163:21, 163:25,  
164:6, 164:22,  
164:25, 165:7, 166:6,  
166:12, 166:24,  
167:10, 168:24,  
169:19, 172:10,  
172:16, 172:21,  
172:29, 173:20,  
173:24, 174:18,  
175:13, 176:17,  
176:25, 177:7,  
177:14, 177:28,  
178:23, 179:5,  
179:27, 180:6,  
180:10, 180:12,  
180:21, 180:26,  
181:4, 181:12, 183:1,  
186:19, 186:25,  
187:5, 187:22,  
190:10, 190:19,  
190:28, 191:7, 192:9,  
192:16, 192:17,  
192:20, 192:24,  
193:16, 193:25,  
193:27, 194:11,  
194:23, 195:3,  
195:11, 195:23,  
196:4, 196:8, 196:19,  
196:26, 197:1, 197:2

**McCabe's** [64] - 10:9,  
10:20, 11:28, 12:4,  
13:27, 15:13, 17:23,  
18:24, 20:8, 24:13,  
25:17, 25:27, 44:7,  
55:19, 92:3, 103:18,  
104:19, 105:12,  
108:3, 109:2, 110:10,  
111:10, 112:3,  
112:14, 113:4,  
114:20, 115:4,  
116:17, 116:24,  
119:4, 119:12,  
127:26, 130:11,  
130:27, 136:29,  
137:19, 138:20,  
138:22, 142:6,  
142:19, 143:12,  
147:29, 151:16,  
151:23, 151:29,  
156:14, 156:19,  
158:19, 161:19,  
161:21, 161:24,  
171:22, 174:27,  
175:29, 176:9,  
176:28, 177:17,  
178:20, 180:14,  
181:26, 182:26,  
189:9, 194:27, 195:26  
**MCCANN** [1] - 3:10  
**McCarthy's** [1] -  
185:20  
**McDowell** [1] -  
108:12  
**McDowell** [82] - 2:9,  
96:4, 96:6, 97:4, 97:6,  
98:25, 108:6, 108:16,  
108:20, 108:21,  
108:22, 108:24,  
108:27, 109:25,  
110:3, 110:4, 110:5,  
113:6, 115:5, 117:20,  
118:29, 119:8,  
119:15, 122:8, 123:6,  
128:11, 135:23,  
139:8, 139:26,  
144:11, 145:5,  
145:11, 146:10,  
149:3, 149:7, 150:11,  
151:24, 152:5,  
152:13, 153:26,  
154:8, 154:9, 154:29,  
157:6, 157:24, 158:1,  
159:28, 161:5,  
161:15, 161:22,  
163:8, 165:16, 167:7,  
170:6, 170:13,  
170:25, 172:23,  
177:23, 177:24,  
178:15, 179:29,

183:5, 183:12,  
183:27, 183:29,  
184:2, 184:4, 188:6,  
188:14, 188:16,  
188:18, 188:21,  
191:23, 192:14,  
193:10, 193:13,  
193:26, 196:7, 197:7,  
197:9, 197:12, 197:15  
**MCDOWELL** [1] - 4:5  
**McDowell's** [2] -  
135:9, 166:22  
**McGARRY** [1] - 2:10  
**McGinn** [3] - 99:9,  
101:24, 106:12  
**MCGRATH** [1] - 3:5  
**MCGUINNESS** [1] -  
2:6  
**McGUINNESS** [1] -  
2:16  
**McLindon** [5] - 5:23,  
30:14, 58:25, 59:5,  
69:1  
**McNamara** [1] - 10:6  
**McTIERNAN** [1] -  
2:23  
**mean** [16] - 37:27,  
53:18, 74:24, 74:27,  
79:27, 83:23, 93:26,  
93:27, 94:1, 132:19,  
154:18, 168:1, 168:9,  
168:11, 169:1, 190:23  
**meant** [2] - 16:13,  
157:14  
**mechanism** [3] -  
93:18, 163:11, 165:1  
**Mechanism** [1] -  
103:17  
**mechanisms** [2] -  
129:10, 163:29  
**media** [19] - 31:7,  
31:17, 32:14, 37:3,  
45:17, 46:7, 46:8,  
52:28, 57:29, 58:25,  
67:9, 68:29, 69:2,  
69:6, 91:29, 94:6,  
95:12, 104:1  
**MEEHAN** [1] - 3:11  
**meet** [5] - 9:10,  
133:21, 133:22,  
136:17, 136:18  
**meeting** [93] - 7:6,  
7:8, 7:11, 7:12, 7:20,  
7:23, 8:16, 8:20, 8:26,  
8:28, 9:15, 9:18, 9:25,  
9:28, 10:2, 10:9,  
10:13, 10:15, 10:18,  
11:27, 13:4, 13:17,  
14:6, 14:10, 14:24,  
15:23, 16:18, 39:7,

39:15, 39:27, 39:29,  
40:22, 40:23, 40:29,  
41:18, 41:19, 41:27,  
42:12, 58:14, 58:18,  
60:10, 60:13, 60:15,  
62:21, 63:10, 63:11,  
64:11, 65:17, 67:29,  
68:6, 68:7, 68:11,  
68:22, 68:25, 71:13,  
71:26, 73:10, 87:3,  
87:11, 87:21, 94:25,  
98:5, 98:10, 98:14,  
98:16, 98:24, 99:1,  
99:20, 99:23, 102:8,  
102:17, 102:18,  
104:5, 104:14,  
104:21, 104:24,  
104:25, 105:10,  
170:15, 173:25,  
174:8, 174:11,  
174:13, 174:20,  
174:25, 175:7, 175:9,  
175:19, 186:28,  
188:29, 189:5, 196:24  
**meetings** [16] - 6:28,  
7:7, 7:24, 9:4, 9:19,  
9:21, 12:3, 12:7, 13:9,  
13:19, 71:15, 72:20,  
99:24, 99:27, 99:29,  
194:2  
**meets** [1] - 101:1  
**MEMBER** [2] - 1:12,  
2:2  
**member** [5] - 31:24,  
32:4, 44:6, 44:19,  
110:25  
**Member** [1] - 84:4  
**members** [34] -  
10:27, 11:6, 11:19,  
16:20, 24:12, 24:17,  
28:4, 28:17, 43:29,  
46:29, 55:10, 86:7,  
92:19, 92:22, 93:13,  
99:12, 121:3, 143:26,  
152:23, 152:24,  
153:16, 153:19,  
153:20, 153:29,  
163:5, 163:27,  
167:22, 170:8,  
170:11, 171:20,  
180:13, 180:18, 195:6  
**memorandum** [1] -  
19:6  
**memorial** [1] - 121:2  
**memory** [36] - 7:10,  
7:19, 9:25, 10:12,  
12:6, 12:15, 13:9,  
13:10, 13:17, 14:5,  
14:9, 14:13, 18:7,  
19:15, 21:26, 22:28,

31:10, 34:6, 34:7,  
58:19, 60:11, 66:10,  
68:7, 68:20, 73:3,  
76:5, 97:25, 118:18,  
118:22, 125:13,  
127:16, 132:28,  
147:26, 148:5,  
159:18, 178:3  
**mention** [3] - 11:26,  
104:28, 144:8  
**mentioned** [6] -  
10:28, 11:15, 37:23,  
50:17, 104:9, 126:13  
**met** [13] - 7:3, 9:11,  
38:26, 60:5, 62:12,  
62:13, 73:7, 82:1,  
88:15, 133:25,  
174:29, 189:6, 190:5  
**MICHAEL** [3] - 2:9,  
3:1, 3:8  
**Micheál** [1] - 35:20  
**mid** [1] - 180:3  
**mid-October** [1] -  
180:3  
**midday** [1] - 45:24  
**might** [16] - 12:3,  
17:11, 19:11, 62:13,  
64:8, 68:3, 71:5,  
94:13, 96:8, 107:21,  
149:3, 153:7, 161:24,  
166:23, 191:11,  
193:26  
**mildest** [1] - 26:9  
**mildly** [1] - 169:14  
**mind** [22] - 8:8,  
17:28, 50:23, 94:8,  
94:11, 102:16,  
102:19, 140:29,  
143:16, 143:24,  
144:10, 151:16,  
151:23, 151:24,  
151:29, 152:1, 152:5,  
162:12, 169:23,  
174:22, 174:24  
**mindful** [1] - 84:19  
**Minister** [59] - 29:21,  
29:26, 32:14, 33:12,  
36:1, 37:7, 37:25,  
38:9, 38:13, 38:27,  
40:1, 40:7, 42:13,  
47:6, 47:7, 47:13,  
48:10, 49:14, 52:2,  
52:6, 52:18, 52:23,  
52:29, 53:3, 53:8,  
53:12, 53:17, 54:17,  
54:24, 56:7, 56:11,  
56:17, 56:18, 56:23,  
56:25, 57:6, 57:7,  
57:27, 58:4, 59:28,  
60:4, 60:5, 61:16,

61:26, 62:23, 64:3,  
65:12, 67:2, 67:16,  
68:15, 70:7, 73:17,  
81:25, 82:1, 82:7,  
93:3, 147:10, 160:26  
**MINISTER** [1] - 1:8  
**Minister's** [4] -  
28:28, 29:18, 63:1,  
63:6  
**minute** [8] - 9:28,  
63:11, 63:16, 64:7,  
98:24, 99:1, 132:11,  
154:24  
**minutes** [6] - 83:23,  
99:5, 102:7, 102:16,  
102:17, 116:10  
**misinformation** [1] -  
83:28  
**misled** [1] - 160:11  
**misplaced** [1] -  
87:14  
**misquote** [1] -  
189:21  
**misrepresent** [1] -  
87:10  
**misrepresentation**  
[1] - 72:1  
**missed** [1] - 71:6  
**missing** [4] - 79:16,  
82:4, 95:10, 95:11  
**mistake** [13] - 19:16,  
44:27, 73:9, 100:5,  
106:22, 131:23,  
168:11, 172:7, 173:4,  
173:15, 173:18,  
187:25  
**mistaken** [6] - 99:29,  
106:18, 173:11,  
174:21, 194:12,  
195:25  
**mistakenly** [1] -  
97:19  
**mistakes** [2] - 43:4,  
172:26  
**misunderstand** [1] -  
172:13  
**misunderstanding**  
[2] - 94:26, 196:5  
**mixed** [1] - 161:15  
**mixing** [1] - 61:22  
**modernization** [2] -  
43:2, 88:2  
**Module** [15] - 6:25,  
13:21, 14:12, 14:15,  
14:16, 14:19, 142:28,  
144:17, 147:6,  
165:25, 165:26,  
170:1, 170:2, 171:10  
**module** [10] - 20:13,  
25:16, 25:28, 98:4,  
98:7, 98:20, 103:25,  
107:15, 144:7, 184:19  
**Molloy** [1] - 42:8  
**moment** [8] - 15:7,  
70:23, 136:24,  
146:10, 159:24,  
163:8, 178:14, 186:19  
**momentous** [1] -  
182:19  
**Monaghan** [6] - 28:5,  
28:11, 29:12, 99:12,  
103:1, 176:27  
**Monday** [18] - 38:26,  
69:12, 118:13, 121:6,  
121:15, 122:28,  
123:11, 123:12,  
123:13, 125:17,  
125:23, 125:25,  
126:5, 127:28,  
130:25, 140:16,  
146:1, 190:4  
**month** [1] - 124:16  
**months** [4] - 22:1,  
103:2, 103:3  
**Mooney** [2] - 5:16,  
5:22  
**Moran** [1] - 133:18  
**morning** [13] - 28:27,  
33:15, 49:24, 51:27,  
52:8, 52:27, 53:14,  
53:29, 73:26, 121:15,  
122:28, 123:11, 146:1  
**most** [19] - 34:9,  
39:23, 41:3, 65:6,  
70:10, 81:9, 85:22,  
106:26, 106:28,  
118:4, 118:23,  
130:28, 142:9,  
160:19, 162:6, 163:2,  
170:7, 189:24, 194:7  
**mostly** [1] - 163:2  
**motivated** [12] -  
109:21, 119:5, 119:6,  
119:14, 138:9,  
139:24, 139:29,  
142:10, 142:15,  
160:24, 176:2, 186:8  
**motivation** [41] -  
10:10, 10:14, 10:20,  
11:29, 13:24, 15:1,  
15:2, 15:3, 15:28,  
16:12, 17:7, 17:16,  
19:11, 20:19, 20:28,  
23:12, 23:23, 46:10,  
85:26, 107:23,  
125:17, 132:4,  
137:20, 137:23,  
142:6, 145:23, 171:4,  
171:22, 172:10,  
173:24, 174:28,  
175:29, 176:17,  
181:18, 181:23,  
184:21, 185:3, 185:8,  
186:18, 189:20,  
191:28  
**motive** [2] - 109:21,  
109:22  
**motives** [10] - 27:12,  
50:14, 111:18,  
113:29, 115:26,  
126:18, 138:13,  
141:6, 151:12, 185:14  
**mouth** [2] - 38:22,  
158:26  
**move** [2] - 84:15,  
182:1  
**moved** [3] - 190:16,  
190:17  
**moving** [1] - 51:24  
**MR** [75] - 1:12, 2:2,  
2:4, 2:6, 2:6, 2:9,  
2:10, 2:10, 2:15, 2:15,  
2:16, 2:16, 2:17, 2:22,  
2:23, 3:1, 3:1, 3:2,  
3:4, 3:8, 3:9, 3:9,  
3:10, 3:10, 3:11, 3:12,  
4:5, 96:6, 97:4, 97:6,  
108:16, 108:20,  
108:22, 108:27,  
110:5, 145:5, 145:11,  
154:9, 154:29,  
157:24, 158:1,  
159:26, 159:28,  
161:15, 167:7,  
168:27, 169:2, 169:4,  
169:6, 169:11,  
169:19, 169:22,  
169:29, 170:6,  
170:25, 172:23,  
177:24, 178:15,  
179:29, 183:27,  
183:29, 184:2,  
187:13, 187:14,  
188:6, 188:14,  
188:16, 188:18,  
188:21, 197:9,  
197:12, 197:15  
**MS** [28] - 2:7, 2:7,  
2:18, 3:2, 3:3, 3:4,  
3:8, 4:4, 5:4, 5:7, 5:8,  
23:7, 51:4, 61:16,  
62:26, 65:15, 65:23,  
75:1, 75:4, 75:7, 92:9,  
95:6, 110:2, 145:4,  
145:7, 145:9, 188:12,  
188:15  
**MULLAN** [1] - 2:7  
**Mullingar** [22] -  
65:17, 71:25, 87:12,  
94:25, 98:5, 105:16,  
127:8, 128:6, 131:3,  
132:20, 132:27,  
133:15, 133:17,  
133:19, 134:17,  
134:29, 135:7,  
170:15, 173:21,  
192:12, 192:18, 193:7  
**MURPHY** [2] - 2:15,  
159:26  
**Murray** [6] - 127:8,  
128:19, 129:6, 130:7,  
133:3, 133:6  
**must** [13] - 42:25,  
43:27, 44:20, 55:11,  
55:15, 82:25, 83:7,  
129:25, 130:22,  
140:6, 173:15,  
175:13, 196:15  
**mutually** [1] - 133:16  
**MICHEÁL** [1] - 2:15

---

**N**

---

**name** [1] - 55:28  
**named** [1] - 1:27  
**names** [1] - 93:21  
**national** [1] - 194:8  
**natural** [2] - 84:12,  
177:28  
**nature** [6] - 24:4,  
30:3, 86:8, 106:24,  
130:16, 179:13  
**Naughton** [2] -  
180:19, 181:9  
**nearing** [1] - 79:25  
**necessarily** [1] -  
94:15  
**necessary** [10] -  
6:13, 10:20, 67:15,  
116:5, 128:17, 129:6,  
129:23, 153:13,  
176:23, 176:24  
**necessity** [1] - 10:19  
**need** [9] - 12:25,  
59:8, 96:13, 101:2,  
108:17, 161:11,  
163:3, 166:9, 182:8  
**needed** [8] - 16:19,  
16:21, 70:29, 82:10,  
90:2, 118:4, 177:4  
**needn't** [1] - 151:14  
**negative** [1] - 152:27  
**net** [1] - 85:25  
**never** [74] - 11:11,  
12:27, 15:12, 16:9,  
17:20, 17:22, 17:23,  
19:14, 19:27, 20:5,  
21:3, 21:6, 22:5,  
22:11, 26:21, 28:7,  
31:1, 33:26, 34:23,  
36:29, 44:10, 50:22,  
52:15, 61:12, 61:13,  
61:14, 92:13, 93:7,  
93:27, 94:12, 100:11,  
109:20, 110:25,  
111:1, 111:3, 111:16,  
111:29, 112:10,  
114:19, 116:16,  
116:26, 117:29,  
118:17, 118:21,  
119:28, 130:19,  
130:28, 136:29,  
137:4, 138:4, 138:8,  
138:11, 138:16,  
138:20, 141:21,  
149:11, 149:16,  
149:25, 150:10,  
170:15, 170:16,  
170:17, 175:1, 176:9,  
176:19, 178:2, 178:4,  
184:18, 184:21,  
184:23, 191:7, 192:2,  
195:21  
**nevertheless** [1] -  
62:11  
**new** [4] - 100:19,  
106:18, 166:9, 166:10  
**news** [1] - 37:9  
**newspaper** [4] -  
41:1, 74:8, 74:12,  
74:18  
**newspapers** [1] -  
93:28  
**next** [14] - 16:2,  
17:10, 30:13, 38:12,  
51:6, 51:13, 51:21,  
62:3, 64:28, 72:2,  
77:20, 80:21, 121:2,  
188:3  
**nice** [3] - 193:7,  
193:10, 193:19  
**night** [3] - 118:10,  
122:27, 165:27  
**nine** [2] - 8:16, 52:3  
**Nixon** [1] - 95:18  
**NOBLE** [1] - 2:24  
**nobody** [14] - 50:27,  
93:3, 93:16, 106:21,  
112:10, 112:12,  
117:26, 141:21,  
145:12, 150:27,  
165:6, 166:5, 172:3,  
178:12  
**NOEL** [1] - 3:9  
**nominated** [1] -  
129:15  
**nominating** [1] -  
103:6  
**normal** [12] - 30:7,

36:24, 36:27, 37:10,  
37:15, 37:19, 97:28,  
105:3, 105:7, 106:28,  
120:27, 136:3  
**normally** [4] - 78:25,  
91:25, 105:6, 149:14  
**northern** [4] - 98:17,  
102:1, 102:2, 102:28  
**note** [29] - 7:9, 7:17,  
13:1, 15:7, 15:9,  
16:14, 16:15, 17:2,  
17:6, 17:9, 18:5,  
19:24, 36:2, 40:1,  
40:6, 40:15, 47:4,  
64:11, 64:14, 65:25,  
68:21, 92:21, 98:9,  
98:14, 128:18, 147:3,  
168:3, 176:2  
**noted** [2] - 25:15,  
32:4  
**notes** [10] - 1:27,  
9:28, 11:25, 13:8,  
14:27, 15:20, 15:22,  
16:2, 18:16, 45:29  
**nothing** [10] - 20:3,  
24:4, 62:6, 70:28,  
104:23, 123:8,  
179:13, 193:17,  
193:18  
**notice** [3] - 46:22,  
46:23, 178:13  
**notification** [1] -  
90:11  
**noting** [1] - 84:9  
**November** [2] - 9:20,  
19:23  
**number** [50] - 6:28,  
22:1, 24:13, 28:29,  
29:20, 39:6, 49:4,  
49:14, 49:22, 51:28,  
66:4, 66:8, 66:12,  
67:7, 67:8, 68:29,  
69:4, 73:24, 76:23,  
77:24, 78:18, 82:24,  
90:1, 90:3, 90:7,  
91:28, 94:6, 94:19,  
95:25, 99:27, 99:29,  
100:20, 104:12,  
119:22, 123:26,  
142:25, 150:3, 151:8,  
152:23, 155:6,  
155:15, 155:16,  
156:23, 157:4, 170:7,  
170:26, 177:1, 178:6,  
180:14, 193:23  
**NW** [1] - 63:21  
**NÓIRÍN** [3] - 4:3, 5:6,  
97:3  
**Noírín** [7] - 55:6,  
128:22, 130:13,

130:14, 133:28,  
135:28, 154:13

## O

**O'Brien** [2] - 129:14,  
134:9

**O'BRIEN** [1] - 3:4

**O'Callaghan** [1] -  
63:28

**O'Hagan** [1] - 144:26

**O'HIGGINS** [2] -

2:15, 187:13

**O'Higgins** [145] -

6:11, 6:17, 8:17,  
13:21, 20:9, 20:23,  
20:29, 21:9, 21:25,  
22:13, 27:16, 27:25,  
30:15, 30:24, 30:28,  
31:13, 31:14, 31:22,  
31:27, 31:29, 32:28,  
35:22, 36:7, 39:17,  
41:3, 42:22, 42:25,  
43:9, 43:20, 45:3,  
46:1, 46:3, 46:10,  
49:2, 50:17, 50:22,  
55:2, 57:17, 61:29,  
66:23, 69:9, 70:2,  
70:8, 74:25, 74:26,  
75:10, 75:14, 76:2,  
76:5, 82:22, 83:19,  
84:4, 84:23, 85:10,  
87:26, 88:4, 88:27,  
90:29, 91:2, 92:11,  
92:23, 93:4, 93:6,  
94:22, 95:10, 102:22,  
103:20, 110:29,  
111:16, 113:17,  
113:25, 114:6,  
115:24, 121:15,  
124:6, 124:26,  
125:11, 125:16,  
125:22, 126:17,  
126:25, 128:26,  
130:5, 130:11,  
134:12, 134:23,  
136:7, 137:6, 137:9,  
137:14, 137:21,  
139:11, 140:16,  
141:5, 142:7, 142:21,  
143:6, 144:7, 144:13,  
144:17, 146:20,  
148:18, 150:29,  
151:1, 155:24,  
156:13, 156:17,  
156:18, 157:15,  
158:18, 159:5,  
159:17, 159:19,  
161:4, 161:7, 161:8,  
161:24, 162:1,

162:27, 164:2,  
167:17, 168:20,  
169:28, 171:17,  
181:26, 182:25,  
183:9, 183:15,  
183:25, 184:12,  
184:25, 185:17,  
186:5, 186:10, 188:7,  
189:22, 190:16,  
191:5, 191:13,  
191:17, 191:27,  
191:28, 195:10,  
195:15, 195:19

**O'Higgins'** [4] - 20:5,  
27:15, 27:20, 189:28

**O'Higgins's** [2] -

20:22, 26:22

**O'Leary** [42] - 28:24,

29:9, 32:11, 32:20,  
33:18, 33:20, 33:25,  
34:9, 34:14, 34:27,  
35:29, 36:15, 40:19,  
47:12, 63:25, 63:26,  
69:18, 70:5, 70:10,  
71:14, 71:16, 72:6,  
73:22, 74:20, 75:1,  
75:12, 75:15, 75:21,  
76:10, 76:16, 76:20,  
78:12, 79:13, 79:22,  
80:6, 80:13, 81:3,  
81:24, 82:1, 89:11,  
89:26

**O'LEARY** [1] - 3:9

**O'SULLIVAN** [3] -

4:3, 5:6, 97:3

**O'Sullivan** [40] - 5:4,

5:8, 6:19, 11:5, 17:3,  
17:15, 22:3, 26:10,  
27:26, 31:2, 34:4,  
49:27, 53:16, 55:7,  
63:12, 70:16, 72:3,  
75:7, 89:23, 92:9,  
96:11, 97:6, 107:21,  
108:12, 108:19,  
115:8, 126:26,  
128:22, 130:14,  
130:15, 131:26,  
132:29, 133:28,  
135:13, 135:28,  
141:27, 150:20,  
154:14, 154:29, 170:6

**object** [1] - 11:27

**objective** [5] - 31:25,

70:26, 85:15, 114:25,  
146:18

**objectively** [1] -

67:18

**obligation** [1] - 195:5

**obliged** [1] - 183:6

**obtain** [2] - 85:3,

180:21  
**obvious** [3] - 135:5,  
143:2, 178:25

**obviously** [11] -

12:25, 46:22, 58:21,  
72:9, 75:24, 90:6,  
99:23, 113:6, 134:27,  
144:1, 144:19

**occasion** [3] - 19:26,

193:27, 196:19

**occasions** [7] -

22:18, 33:20, 34:1,  
49:14, 49:22, 51:28,  
73:24

**occurred** [3] -

116:19, 174:26, 182:5

**occurrence** [1] -

30:3

**occurring** [1] - 172:3

**October** [6] - 7:7,

8:12, 8:16, 9:20, 9:24,  
180:3

**October/November**

[1] - 6:15

**OF** [4] - 1:3, 1:9,

1:12, 2:3

**offences** [3] -

143:27, 143:28,

143:29

**offend** [2] - 62:6,

83:6

**offender** [1] - 99:10

**offending** [1] - 62:14

**offer** [1] - 145:13

**offered** [1] - 19:10

**offering** [1] - 146:5

**office** [23] - 8:17,

42:16, 77:14, 78:29,

80:22, 90:16, 90:20,

91:25, 97:12, 98:16,

99:22, 100:19,

100:20, 105:27,

105:28, 106:21,

107:3, 107:11,

120:29, 123:12,

129:19, 133:25,

181:11

**OFFICE** [2] - 2:18,

3:13

**Office** [3] - 5:23,

42:6, 42:8

**Office's** [1] - 20:4

**officer** [6] - 102:21,

106:28, 119:9, 162:7,

182:14, 182:15

**officers** [13] - 25:5,

26:15, 65:7, 66:13,

87:10, 106:27,

142:26, 146:14,

156:15, 162:8,

178:28, 179:20, 181:4

**offices** [1] - 163:23

**official** [1] - 45:27

**officially** [1] - 104:3

**officials** [10] - 29:17,

39:12, 46:13, 46:18,

63:16, 68:12, 69:29,

73:14, 91:4, 91:6

**often** [3] - 29:27,

29:28, 151:17

**Oireachtas** [5] -

52:3, 86:26, 89:3,

110:27, 143:10

**old** [2] - 95:20, 166:4

**old-fashioned** [1] -

166:4

**Ombudsman** [1] -

87:18

**omission** [1] -

143:25

**ON** [4] - 1:6, 1:10,

1:18, 5:1

**once** [5] - 24:22,

42:16, 114:28, 153:4,

189:18

**one** [44] - 8:2, 9:2,

9:19, 9:20, 9:24,

14:14, 19:11, 21:11,

32:3, 38:5, 38:8,

39:12, 44:20, 49:26,

50:17, 57:16, 60:17,

65:24, 73:13, 77:17,

77:18, 78:28, 81:9,

81:20, 81:22, 82:4,

85:23, 86:18, 89:26,

92:14, 95:8, 96:16,

145:1, 162:5, 165:24,

166:23, 167:16,

169:22, 179:27,

188:4, 196:21, 197:8,

197:10

**one's** [1] - 28:12

**ongoing** [7] - 41:23,

51:22, 61:28, 75:8,

76:17, 129:22, 158:24

**open** [3] - 14:28,

66:16, 66:22

**opened** [4] - 51:4,

64:11, 81:21, 107:23

**opening** [1] - 177:27

**openly** [1] - 22:8

**operate** [2] - 86:24,

197:3

**operating** [2] -

57:28, 73:18

**opinion** [1] - 68:17

**opportunity** [7] -

11:21, 21:1, 40:23,

84:5, 136:16, 153:4,

183:7



**opposed** [2] - 53:22, 92:3  
**opposite** [5] - 114:18, 115:1, 115:11, 115:13, 167:2  
**opposition** [3] - 35:21, 37:24, 82:9  
**opted** [1] - 153:23  
**options** [2] - 178:5, 178:6  
**orally** [1] - 188:25  
**order** [10] - 6:29, 9:12, 87:13, 89:13, 90:7, 109:19, 116:7, 171:16, 180:22, 181:2  
**ordinarily** [1] - 91:23  
**ordinary** [2] - 91:23, 91:24  
**organisation** [7] - 11:1, 11:2, 11:3, 11:7, 11:12, 13:28, 194:6  
**organise** [1] - 9:12  
**organised** [2] - 6:29, 8:20  
**original** [3] - 48:2, 106:17, 174:1  
**originally** [1] - 73:1  
**OSMOND** [2] - 2:19, 3:13  
**OTHER** [1] - 1:4  
**otherwise** [2] - 87:14, 155:27  
**ourselves** [1] - 70:24  
**ourselves** [4] - 37:17, 46:13, 75:25, 94:16  
**outcome** [5] - 12:11, 17:27, 27:24, 54:14, 107:15  
**outlet** [2] - 52:28, 92:1  
**outlets** [3] - 37:4, 67:9, 94:7  
**outline** [1] - 59:13  
**outlined** [8] - 41:10, 41:13, 59:20, 99:9, 100:27, 101:13, 101:18, 197:4  
**outset** [15] - 10:16, 11:22, 15:12, 26:27, 88:26, 95:3, 104:9, 109:16, 110:19, 111:13, 117:4, 138:17, 143:6, 172:1, 176:6  
**outsoken** [1] - 38:22  
**overall** [2] - 98:2, 156:10  
**overriding** [1] -

85:14  
**oversee** [1] - 88:23  
**oversight** [2] - 86:25, 93:12  
**overstated** [1] - 27:23  
**overview** [4] - 23:8, 23:15, 23:18, 23:19  
**own** [21] - 7:17, 7:18, 8:29, 10:16, 14:14, 28:3, 28:4, 38:23, 51:20, 53:6, 56:29, 57:16, 73:13, 100:10, 102:5, 102:13, 103:4, 104:26, 131:18, 167:4

## P

**PA** [1] - 67:21  
**page** [102] - 5:29, 8:13, 9:29, 12:29, 14:27, 15:23, 20:26, 21:8, 23:10, 23:14, 23:17, 26:7, 29:1, 29:15, 32:3, 32:16, 35:16, 35:26, 36:17, 39:2, 39:6, 40:2, 40:13, 42:1, 42:7, 45:25, 47:11, 47:16, 47:28, 48:8, 48:12, 48:23, 51:27, 53:26, 58:23, 59:15, 61:17, 61:21, 63:13, 69:5, 69:12, 69:15, 69:25, 71:19, 72:4, 73:5, 73:26, 74:21, 76:10, 76:24, 77:9, 77:24, 78:3, 78:13, 78:22, 79:1, 79:12, 79:21, 80:8, 80:19, 80:23, 81:3, 82:12, 89:12, 98:19, 98:25, 98:26, 100:23, 100:25, 107:18, 108:8, 112:16, 113:14, 117:14, 117:16, 117:19, 117:20, 117:21, 117:23, 119:25, 120:17, 122:7, 126:27, 126:28, 132:29, 133:1, 145:4, 145:5, 145:8, 146:25, 154:5, 155:1, 159:27, 179:1, 183:10, 184:2, 184:16, 186:24, 195:19  
**PAGE** [1] - 4:2  
**pages** [3] - 29:20, 76:24, 83:25

**paper** [3] - 9:9, 30:23, 93:29  
**papers** [1] - 169:25  
**paperwork** [1] - 71:7  
**paragraph** [21] - 23:11, 23:13, 23:25, 24:19, 25:6, 25:13, 99:7, 122:16, 139:24, 139:29, 140:20, 141:20, 147:2, 147:3, 147:5, 156:21, 160:17, 162:18, 164:1, 178:29, 188:9  
**paragraphs** [4] - 43:6, 136:14, 155:3, 159:27  
**paraphrasing** [1] - 76:6  
**pardon** [24] - 21:25, 23:13, 23:21, 29:4, 39:8, 40:10, 48:24, 51:8, 51:11, 77:25, 89:15, 93:29, 126:6, 126:23, 127:11, 135:2, 139:26, 143:7, 145:8, 150:7, 150:19, 161:14, 172:12, 187:28  
**part** [10] - 11:22, 23:22, 83:27, 88:14, 123:11, 149:19, 160:24, 170:2, 190:25  
**particular** [25] - 7:29, 13:22, 15:1, 20:13, 26:15, 31:12, 31:20, 34:6, 34:7, 34:27, 61:29, 67:10, 70:2, 70:18, 71:16, 84:11, 91:29, 102:5, 105:10, 112:16, 138:23, 169:7, 174:21, 177:27, 196:23  
**particularly** [15] - 8:3, 10:21, 13:28, 17:25, 26:25, 27:19, 41:16, 52:26, 67:11, 99:5, 120:26, 123:5, 138:18, 163:1, 163:16  
**parties** [17] - 24:5, 46:29, 66:5, 66:8, 66:17, 67:13, 82:9, 84:7, 119:22, 146:21, 146:22, 150:4, 151:2, 155:19, 155:22, 157:8, 179:14  
**parts** [1] - 95:9  
**party** [3] - 66:23, 92:27, 180:18  
**passage** [1] - 112:19  
**PASSED** [1] - 1:5

**past** [7] - 8:17, 32:12, 32:20, 43:3, 52:3, 79:12, 96:16  
**pasted** [1] - 91:19  
**PATRICK** [2] - 2:6, 3:10  
**pattern** [1] - 82:26  
**PAUL** [2] - 2:10, 3:2  
**paying** [1] - 59:29  
**people** [48] - 11:2, 16:19, 17:11, 20:14, 20:17, 35:11, 43:28, 45:5, 45:11, 50:6, 57:16, 65:24, 81:5, 81:20, 88:18, 89:25, 92:29, 94:13, 95:20, 96:1, 96:13, 96:14, 113:1, 136:21, 148:16, 150:8, 150:14, 151:21, 151:25, 153:24, 155:16, 155:25, 155:29, 156:10, 157:5, 157:12, 157:17, 163:2, 163:6, 164:9, 165:15, 165:27, 167:13, 167:19, 168:17, 171:24, 194:4, 196:26  
**people's** [1] - 13:8  
**perceive** [1] - 194:26  
**perceived** [1] - 11:17  
**perception** [5] - 163:13, 164:27, 165:11, 194:28, 196:9  
**perfectly** [1] - 192:15  
**performing** [2] - 104:16, 133:14  
**perhaps** [14] - 18:15, 42:9, 58:13, 69:5, 92:4, 94:21, 98:19, 99:28, 104:8, 107:21, 166:23, 185:22, 192:28, 194:13  
**period** [1] - 158:15  
**periods** [1] - 25:21  
**peripheral** [2] - 189:22, 191:29  
**perjure** [1] - 92:23  
**perjured** [2] - 92:29, 93:6  
**perjury** [1] - 93:26  
**permanently** [1] - 82:25  
**permission** [2] - 145:14, 145:24  
**perpetrators** [1] - 185:24  
**person** [14] - 54:6, 54:21, 54:22, 58:25,

77:14, 89:27, 102:14, 104:18, 112:24, 152:10, 169:23, 194:16, 196:13  
**personal** [5] - 14:15, 28:4, 38:23, 193:5  
**personalised** [1] - 37:29  
**personally** [3] - 14:16, 132:17, 144:26  
**persons** [3] - 86:13, 146:16, 165:6  
**perspective** [15] - 28:10, 28:12, 40:24, 112:1, 130:27, 152:3, 152:18, 162:5, 167:19, 167:21, 168:17, 192:15, 194:24, 194:28, 195:26  
**pertained** [1] - 106:4  
**PETER** [3] - 1:12, 2:2, 2:4  
**phone** [4] - 8:1, 34:5, 118:23, 178:1  
**phoned** [1] - 5:22  
**photographic** [1] - 178:3  
**physically** [1] - 124:2  
**picking** [2] - 186:11, 186:12  
**piece** [3] - 9:9, 21:18, 98:2  
**pinned** [1] - 178:13  
**place** [24] - 8:26, 10:2, 15:10, 20:24, 30:27, 35:6, 46:4, 46:23, 56:28, 60:15, 65:6, 68:20, 72:23, 79:11, 103:7, 115:16, 129:7, 163:22, 163:29, 165:28, 168:23, 173:7, 184:11, 193:16  
**placed** [1] - 115:17  
**places** [1] - 29:1  
**placing** [1] - 160:5  
**point** [41] - 11:8, 16:13, 16:23, 24:11, 34:24, 45:9, 52:24, 54:29, 57:14, 71:5, 79:3, 119:1, 129:15, 131:17, 131:25, 134:10, 135:9, 135:12, 149:29, 150:20, 152:18, 157:21, 157:29, 162:14, 166:7, 166:21, 167:2, 167:6,

167:9, 167:12,  
168:16, 168:28,  
169:28, 174:2,  
175:11, 175:20,  
175:23, 180:12,  
181:2, 182:8, 184:18  
**pointed** [1] - 95:25  
**pointers** [1] - 53:20  
**points** [4] - 35:22,  
55:15, 79:19, 84:10  
**police** [7] - 162:8,  
162:29, 166:9,  
166:27, 166:28,  
167:1, 169:14  
**policeman's** [1] -  
162:4  
**Policing** [6] - 67:23,  
67:24, 67:26, 67:28,  
68:25, 86:29  
**policing** [7] - 26:12,  
26:13, 44:26, 149:8,  
165:8, 166:8, 168:7  
**policy** [2] - 8:24,  
16:23  
**political** [13] - 33:11,  
38:2, 41:6, 46:8,  
46:28, 50:23, 57:24,  
57:25, 58:9, 94:5,  
94:8, 143:16, 162:12  
**politicisation** [2] -  
37:5, 39:22  
**politicised** [1] - 41:9  
**poor** [1] - 165:8  
**popular** [1] - 94:21  
**portfolios** [1] -  
104:13  
**portions** [1] - 99:4  
**portray** [2] - 41:2,  
41:4  
**position** [63] - 13:15,  
31:28, 33:1, 33:11,  
33:17, 34:22, 37:5,  
37:24, 37:26, 41:4,  
41:8, 41:9, 41:15,  
41:17, 45:11, 45:18,  
45:20, 46:16, 53:1,  
53:6, 54:20, 54:24,  
56:29, 57:22, 58:5,  
63:3, 63:6, 68:9,  
70:21, 72:1, 81:12,  
87:21, 93:15, 94:8,  
94:15, 96:13, 102:15,  
104:18, 121:28,  
130:3, 130:11, 131:2,  
131:7, 132:14,  
132:26, 136:17,  
136:22, 139:15,  
139:19, 152:10,  
156:4, 156:5, 156:19,  
156:28, 157:29,  
158:6, 158:7, 158:28,  
173:10, 173:21,  
184:12, 192:12  
**positions** [8] -  
150:14, 155:10,  
155:14, 155:17,  
155:25, 156:15,  
157:14, 158:15  
**positive** [1] - 197:3  
**possession** [2] -  
54:25, 148:13  
**possibilities** [1] -  
111:21  
**possible** [18] - 9:7,  
12:17, 13:14, 50:26,  
57:17, 57:21, 62:14,  
64:28, 71:2, 73:18,  
81:15, 87:1, 90:5,  
96:9, 123:1, 165:22,  
177:9  
**possibly** [3] - 73:20,  
120:21, 132:2  
**post** [2] - 60:14,  
97:28  
**POWER** [1] - 3:10  
**powers** [1] - 87:16  
**practically** [1] - 89:8  
**practice** [5] - 30:8,  
88:6, 105:3, 153:27,  
154:3  
**practices** [1] - 44:1  
**praised** [1] - 165:8  
**pre** [3] - 107:4,  
107:7, 137:4  
**pre-determination**  
[1] - 137:4  
**pre-determine** [2] -  
107:4, 107:7  
**preamble** [1] - 10:18  
**precedent** [2] - 13:3,  
13:11  
**precisely** [5] - 41:26,  
42:10, 124:11,  
141:29, 159:28  
**precluded** [1] - 55:28  
**predecessor** [1] -  
158:18  
**preempt** [2] - 107:4,  
107:7  
**preparation** [2] -  
10:17, 41:22  
**prepare** [2] - 6:29,  
118:12  
**prepared** [15] - 22:9,  
22:10, 22:12, 22:16,  
22:19, 32:13, 36:2,  
40:1, 42:15, 47:5,  
51:12, 63:16, 64:11,  
125:5, 136:8  
**preparing** [3] -  
38:13, 41:20, 121:14  
**presence** [1] -  
115:10  
**present** [10] - 10:4,  
54:13, 58:18, 83:17,  
139:14, 156:6, 156:7,  
158:11, 173:5, 175:4  
**presentation** [1] -  
150:16  
**presented** [1] - 55:25  
**presenting** [1] -  
150:18  
**presents** [1] - 82:22  
**presided** [2] - 99:1,  
99:20  
**press** [13] - 5:9, 5:15,  
29:25, 29:26, 29:28,  
30:14, 37:16, 37:17,  
40:9, 40:12, 44:14,  
71:20  
**Press** [3] - 5:22,  
42:6, 42:8  
**pressed** [1] - 56:15  
**pressing** [1] - 33:14  
**pressure** [5] - 11:6,  
11:11, 46:8, 46:9,  
187:19  
**presumably** [1] -  
175:15  
**presume** [2] - 59:29,  
91:18  
**pretty** [1] - 69:2  
**prevailing** [1] -  
162:13  
**previous** [10] - 7:4,  
33:23, 35:4, 47:18,  
82:16, 83:12, 130:4,  
130:24, 134:21, 141:5  
**previously** [2] -  
42:20, 174:18  
**primary** [2] - 102:29,  
119:17  
**Prime** [7] - 49:13,  
49:16, 49:17, 49:18,  
51:20, 52:26, 56:12  
**principles** [4] - 62:7,  
62:15, 83:6, 85:7  
**print** [2] - 77:2, 77:15  
**printed** [1] - 78:26  
**prioritise** [1] -  
163:22  
**prisoners** [1] -  
137:28  
**privacy** [2] - 84:24,  
132:13  
**private** [9] - 32:23,  
41:13, 43:15, 50:11,  
62:20, 76:26, 84:22,  
90:17, 132:10  
**privilege** [14] - 12:7,  
12:8, 12:9, 12:10,  
12:13, 12:16, 12:18,  
12:21, 13:12, 48:29,  
84:29, 155:18,  
155:20, 155:28  
**privileged** [1] -  
157:25  
**privy** [1] - 157:4  
**problem** [1] - 134:4  
**problems** [2] - 27:6,  
88:14  
**proceeding** [1] -  
44:15  
**proceedings** [26] -  
31:14, 31:21, 31:27,  
31:29, 41:13, 41:16,  
43:8, 43:20, 48:25,  
62:2, 62:9, 83:8,  
83:16, 83:20, 83:21,  
83:27, 84:7, 84:10,  
84:23, 84:24, 95:27,  
118:20, 172:4,  
173:18, 181:2, 184:15  
**process** [9] - 75:8,  
95:2, 103:28, 132:13,  
149:20, 160:19,  
182:13, 193:26,  
194:27  
**produced** [5] -  
30:29, 140:18,  
141:18, 185:23,  
189:19  
**production** [1] -  
67:12  
**professional** [1] -  
162:8  
**proffer** [1] - 112:29  
**proffered** [1] - 27:9  
**programme** [12] -  
43:3, 49:13, 49:17,  
49:19, 49:20, 49:21,  
51:20, 52:26, 56:13,  
56:21, 88:2  
**progress** [3] - 5:11,  
78:16, 83:1  
**prohibited** [2] -  
31:26, 116:13  
**prohibition** [1] -  
45:12  
**prohibitions** [1] -  
83:18  
**promise** [1] - 76:13  
**promotion** [3] -  
160:5, 160:28, 181:6  
**promotions** [1] -  
160:15  
**promulgated** [1] -  
146:27  
**prone** [3] - 35:17,  
73:27, 80:17  
**prone's** [1] - 77:21  
**properly** [8] - 42:27,  
103:13, 111:15,  
143:28, 147:18,  
163:10, 165:12,  
166:28  
**proposal** [1] - 172:28  
**proposed** [3] -  
145:15, 145:22,  
182:10  
**proposes** [2] -  
112:24, 112:26  
**proposing** [2] -  
136:13, 191:6  
**proposition** [1] -  
152:9  
**prosecution** [1] -  
100:29  
**prospective** [1] -  
136:19  
**PROTECTED** [2] -  
1:3, 1:4  
**protected** [4] - 85:1,  
88:18, 88:19, 88:21  
**protection** [1] -  
129:20  
**protections** [1] -  
65:2  
**protesting** [1] -  
134:20  
**provide** [1] - 136:23  
**provided** [3] - 9:13,  
71:24, 128:2  
**provides** [1] - 84:21  
**providing** [4] - 34:28,  
52:17, 77:27, 193:24  
**provision** [1] - 8:1  
**provisions** [2] -  
31:18, 56:1  
**proximate** [1] - 90:29  
**prudent** [2] - 107:14,  
108:14  
**public** [51] - 10:29,  
11:15, 24:8, 38:1,  
41:7, 43:26, 50:4,  
50:23, 52:13, 58:9,  
59:12, 62:1, 62:5,  
62:13, 66:28, 67:5,  
67:14, 67:21, 67:27,  
68:2, 68:3, 71:29,  
83:4, 83:22, 83:29,  
84:1, 84:18, 85:21,  
85:24, 87:13, 87:19,  
89:6, 91:28, 92:17,  
92:19, 93:8, 93:9,  
94:4, 94:5, 94:7, 95:1,  
95:12, 143:15,  
143:24, 152:26,  
153:3, 162:11, 166:7,  
166:27, 180:6, 194:18

**publically** [1] - 59:19  
**publication** [6] - 5:25, 29:11, 33:9, 40:7, 55:25, 70:1  
**publications** [1] - 40:8  
**publicly** [2] - 196:18  
**publish** [1] - 89:2  
**published** [11] - 22:27, 22:29, 28:20, 28:21, 31:12, 32:11, 55:23, 60:23, 88:7, 89:6, 89:9  
**publishing** [1] - 32:26  
**Pulse** [1] - 147:1  
**purely** [2] - 139:22, 139:27  
**purporting** [1] - 83:21  
**purpose** [8] - 54:22, 70:27, 82:5, 92:17, 103:6, 114:24, 141:26, 181:6  
**purposes** [1] - 87:18  
**pursuant** [1] - 87:16  
**pushing** [3] - 120:10, 121:16, 121:21  
**put** [119] - 11:8, 13:16, 18:20, 19:17, 19:29, 20:3, 20:10, 21:3, 21:6, 23:9, 23:19, 26:9, 29:24, 33:7, 35:6, 38:3, 38:21, 39:21, 40:24, 41:8, 45:7, 45:17, 45:18, 46:21, 46:23, 49:11, 52:10, 54:21, 56:19, 57:24, 57:29, 58:8, 59:22, 60:24, 61:12, 63:4, 64:27, 66:20, 67:13, 70:26, 83:22, 83:29, 90:10, 92:5, 94:29, 104:8, 108:27, 109:18, 110:15, 110:23, 110:29, 111:13, 112:1, 114:26, 115:4, 116:5, 116:7, 118:14, 123:4, 129:7, 131:10, 131:18, 132:3, 135:10, 136:9, 136:11, 136:13, 136:20, 137:24, 139:28, 140:15, 141:28, 142:9, 145:22, 148:25, 149:21, 150:10, 150:14, 150:21, 151:7, 152:8, 152:15,

152:16, 153:9, 153:15, 158:25, 162:4, 162:16, 162:23, 164:17, 165:5, 169:14, 171:4, 171:12, 171:13, 171:16, 172:9, 172:28, 173:23, 175:10, 176:17, 176:24, 178:6, 178:10, 178:16, 178:26, 187:18, 188:24, 188:25, 189:10, 189:11, 189:25, 190:18, 192:11, 193:5, 193:16, 194:13  
**putting** [10] - 63:4, 109:17, 116:9, 131:17, 135:12, 137:3, 152:19, 163:22, 172:20, 176:12  
**puzzled** [1] - 95:8

## Q

**qualify** [1] - 150:11  
**quarter** [3] - 32:12, 32:20, 79:12  
**quarters** [1] - 49:4  
**QUATTROCIOCCHI** [1] - 3:10  
**QUAY** [1] - 2:12  
**queries** [8] - 46:8, 59:28, 68:29, 69:2, 69:6, 71:20, 82:8, 91:28  
**query** [7] - 5:9, 5:15, 6:9, 30:14, 31:17, 171:3, 171:22  
**questioned** [4] - 11:28, 15:1, 19:28, 20:1  
**questioning** [3] - 15:12, 55:14, 119:13  
**questions** [17] - 13:15, 40:8, 45:29, 46:17, 47:5, 47:8, 47:14, 49:11, 59:24, 62:11, 65:27, 96:11, 96:15, 129:27, 151:7, 172:9, 190:18  
**quick** [1] - 74:6  
**quickly** [1] - 144:19  
**quite** [16] - 27:1, 27:3, 28:9, 37:19, 71:28, 81:5, 89:25, 91:4, 95:24, 121:26, 136:7, 137:27,

147:18, 167:10, 177:21, 191:14  
**quote** [1] - 50:11  
**quoted** [1] - 50:22  
**quoting** [2] - 36:3, 50:18

## R

**radar** [1] - 101:14  
**radically** [1] - 82:25  
**raise** [3] - 6:3, 16:20, 44:22  
**raised** [14] - 34:16, 62:1, 85:8, 92:27, 100:29, 101:24, 129:27, 130:6, 134:28, 135:15, 140:14, 142:29, 143:8, 189:15  
**raises** [1] - 44:19  
**ran** [1] - 83:24  
**rank** [4] - 66:13, 154:1, 170:11, 170:27  
**rape** [2] - 97:21, 106:16  
**rather** [5] - 26:13, 43:29, 125:8, 166:7, 175:21  
**rational** [1] - 168:10  
**rationale** [1] - 194:10  
**re** [15] - 8:17, 15:3, 19:7, 26:12, 29:11, 40:8, 59:2, 65:27, 113:23, 115:12, 115:21, 116:2, 122:20, 136:4  
**re-confirmed** [6] - 113:23, 115:12, 115:21, 116:2, 122:20, 136:4  
**reacting** [1] - 184:14  
**read** [49] - 15:7, 15:9, 50:2, 57:11, 74:6, 90:19, 90:22, 91:11, 91:21, 94:18, 97:24, 97:26, 98:1, 98:7, 98:8, 100:6, 100:7, 109:26, 117:11, 120:19, 121:24, 121:27, 124:10, 124:12, 124:15, 124:17, 124:19, 125:6, 125:9, 125:24, 125:28, 126:1, 127:28, 128:1, 128:11, 128:12, 133:8, 137:8, 146:2, 161:5, 161:22, 162:2,

164:1, 166:4, 166:13, 177:29, 179:26, 180:7, 189:23  
**readily** [1] - 49:10  
**reading** [4] - 97:25, 101:11, 102:9, 144:19  
**reads** [1] - 188:5  
**realise** [1] - 50:3  
**realities** [1] - 95:28  
**really** [6] - 28:6, 53:5, 75:3, 89:25, 96:13, 110:5  
**reason** [19] - 26:12, 50:19, 128:7, 128:21, 130:29, 131:11, 131:19, 133:28, 134:5, 135:20, 138:21, 163:6, 172:29, 186:29, 187:13, 187:14, 187:15, 193:6, 194:10  
**reasonably** [1] - 90:28  
**reasons** [8] - 15:15, 28:3, 28:4, 59:20, 85:23, 140:28, 143:3, 186:19  
**reassurance** [1] - 68:3  
**recap** [1] - 136:24  
**receipt** [2] - 87:24, 168:20  
**received** [34] - 5:10, 11:24, 23:27, 29:16, 30:13, 47:6, 47:7, 47:18, 49:8, 57:5, 60:4, 60:14, 63:12, 64:15, 75:21, 76:14, 80:13, 91:28, 97:9, 100:18, 106:12, 115:28, 116:4, 121:12, 124:27, 129:18, 133:6, 133:20, 171:8, 171:25, 174:23, 176:21, 179:3, 186:16  
**receiving** [3] - 12:14, 47:13, 84:28  
**recent** [4] - 18:19, 59:12, 82:27, 87:9  
**recently** [2] - 104:24, 162:3  
**recipient** [1] - 160:8  
**recollect** [2] - 7:21, 177:19  
**recollection** [13] - 10:15, 18:25, 18:26, 42:14, 90:23, 91:9, 100:10, 111:11, 159:18, 174:4, 175:5,

178:19, 189:4  
**recommend** [1] - 151:10  
**recommendations** [4] - 42:21, 84:16, 87:29, 88:29  
**recommended** [2] - 6:4, 143:10  
**reconfirmation** [5] - 47:20, 115:29, 116:3, 116:11, 135:17  
**reconsider** [1] - 150:28  
**reconsidered** [1] - 151:1  
**record** [13] - 15:20, 52:11, 57:18, 58:8, 64:28, 68:5, 89:6, 116:5, 119:20, 154:6, 154:12, 154:15, 175:23  
**recording** [1] - 188:23  
**recordings** [5] - 95:11, 126:2, 126:7, 126:12  
**records** [4] - 17:6, 39:7, 107:22, 147:1  
**recount** [1] - 186:15  
**recounted** [1] - 173:8  
**recourse** [1] - 57:15  
**redeployed** [1] - 133:18  
**redirected** [1] - 180:29  
**redirecting** [1] - 25:2  
**refer** [12] - 24:28, 33:22, 34:20, 61:28, 66:28, 67:2, 67:16, 69:29, 87:17, 144:17, 159:18, 195:18  
**reference** [39] - 5:17, 19:6, 19:15, 24:8, 24:9, 24:19, 32:7, 35:3, 36:10, 40:5, 40:13, 43:4, 43:7, 43:10, 44:13, 49:28, 50:19, 65:11, 65:23, 78:8, 83:12, 85:19, 97:16, 107:6, 118:21, 122:10, 133:13, 144:21, 144:22, 144:29, 146:27, 147:6, 147:16, 159:20, 159:23, 159:24, 176:14, 180:5  
**referenced** [2] - 14:9, 20:5  
**referencing** [1] -

64:29  
**referral** [13] - 67:5, 68:24, 90:15, 90:19, 91:25, 92:10, 92:17, 97:17, 97:19, 98:1, 100:5, 100:15, 100:28  
**referrals** [2] - 105:2, 105:4  
**referred** [5] - 78:7, 85:18, 93:23, 97:21, 159:6  
**referring** [4] - 37:10, 65:13, 92:25, 155:12  
**refers** [9] - 13:6, 25:5, 25:6, 32:21, 43:2, 48:10, 48:19, 89:12, 99:7  
**reflect** [3] - 15:22, 20:21, 85:6  
**reflection** [1] - 195:18  
**reflects** [1] - 76:14  
**reforms** [1] - 35:10  
**refresh** [1] - 132:28  
**refusal** [4] - 24:22, 138:25, 176:28, 178:21  
**refuse** [2] - 11:27, 93:29  
**refused** [2] - 24:24, 180:25  
**regard** [8] - 27:28, 62:8, 83:7, 84:11, 86:7, 88:15, 197:5, 197:10  
**regarded** [2] - 44:10, 149:25  
**regarding** [4] - 40:16, 60:25, 83:14, 160:16  
**regards** [1] - 170:28  
**Regency** [1] - 39:25  
**Regina** [1] - 148:11  
**region** [6] - 98:17, 102:2, 102:28, 104:17, 104:19, 128:17  
**regional** [2] - 106:25  
**REGISTRAR** [1] - 2:4  
**regular** [1] - 30:3  
**regularly** [1] - 29:25  
**regulations** [2] - 160:20, 161:27  
**rehashed** [1] - 106:18  
**rehearse** [3] - 27:15, 86:2, 197:4  
**reiterate** [1] - 129:25  
**rejected** [1] - 159:3  
**relate** [2] - 83:21,

170:1  
**related** [8] - 40:9, 88:24, 127:6, 132:15, 132:25, 137:24, 149:8, 189:15  
**relates** [1] - 145:2  
**relating** [7] - 19:26, 62:2, 105:12, 105:14, 143:18, 184:19  
**relation** [132] - 5:11, 5:15, 5:26, 7:29, 10:13, 11:9, 11:28, 12:13, 12:26, 17:2, 18:23, 19:10, 20:4, 20:12, 20:18, 20:28, 21:13, 21:23, 22:20, 22:26, 23:8, 23:9, 23:15, 23:28, 25:27, 26:25, 30:14, 31:1, 31:8, 31:27, 32:14, 33:23, 34:1, 34:5, 35:18, 36:2, 36:15, 36:16, 36:21, 38:28, 40:26, 40:27, 41:17, 43:3, 43:8, 46:7, 46:9, 46:19, 47:8, 47:14, 47:20, 49:1, 51:4, 53:2, 53:7, 55:16, 57:4, 59:7, 60:3, 60:6, 61:29, 63:6, 63:7, 63:16, 67:9, 67:10, 69:7, 69:8, 71:14, 71:19, 71:25, 72:20, 72:22, 73:28, 74:4, 75:9, 75:10, 76:17, 77:22, 77:27, 78:5, 80:12, 80:18, 83:16, 84:19, 84:26, 85:8, 85:18, 86:1, 86:16, 88:4, 88:10, 89:22, 89:28, 90:12, 90:21, 92:10, 93:13, 94:25, 96:10, 98:12, 101:26, 103:25, 107:6, 107:25, 109:15, 125:11, 127:22, 132:12, 136:11, 136:23, 143:21, 146:14, 147:12, 151:5, 152:3, 155:7, 156:10, 156:24, 158:24, 165:23, 168:27, 169:7, 170:18, 171:4, 173:6, 173:28, 178:9, 179:4, 183:20, 193:8  
**relations** [2] - 39:19, 40:27  
**relationship** [7] - 30:4, 30:5, 30:7,

30:12, 62:10, 83:9  
**relative** [1] - 29:12  
**relatively** [2] - 24:12, 180:13  
**relay** [1] - 105:20  
**relayed** [3] - 121:18, 186:17, 192:7  
**relaying** [1] - 116:10  
**release** [5] - 29:18, 62:23, 139:4, 177:15, 178:11  
**released** [7] - 28:29, 41:20, 41:25, 41:28, 41:29, 42:4, 177:18  
**releases** [2] - 29:26, 29:29  
**relevance** [1] - 92:4  
**relevant** [9] - 85:17, 89:10, 109:18, 110:27, 110:29, 140:9, 142:6, 169:8, 185:9  
**reluctant** [2] - 57:13, 85:23  
**rely** [2] - 52:23, 54:26  
**relying** [1] - 170:7  
**remain** [4] - 10:19, 28:7, 43:14, 134:14  
**remained** [5] - 100:14, 100:15, 105:27, 131:7, 181:11  
**remember** [40] - 5:13, 5:26, 7:19, 7:27, 8:26, 8:27, 12:1, 12:2, 13:6, 13:22, 13:23, 13:24, 13:25, 14:10, 15:6, 15:10, 16:6, 16:7, 16:11, 16:15, 31:5, 31:6, 33:9, 34:8, 34:14, 58:18, 58:20, 58:22, 60:9, 66:7, 89:18, 89:19, 90:27, 95:20, 124:13, 125:2, 125:27, 125:29, 145:17, 148:23  
**remembered** [1] - 91:9  
**reminded** [2] - 20:14, 129:14  
**remit** [1] - 116:8  
**renewal** [3] - 43:2, 88:2, 88:5  
**reopened** [1] - 55:26  
**repeat** [2] - 143:3, 152:13  
**repeating** [1] - 188:24  
**reply** [6] - 31:17, 32:2, 32:4, 35:18,

35:20  
**Report** [5] - 17:27, 27:16, 61:29, 88:4, 163:19  
**report** [49] - 20:6, 22:27, 22:29, 23:3, 28:20, 28:28, 29:13, 29:18, 32:26, 32:27, 35:4, 37:2, 38:19, 38:20, 38:28, 39:17, 40:8, 40:10, 41:1, 43:14, 45:3, 45:6, 55:12, 55:14, 55:23, 62:2, 70:2, 73:3, 73:5, 73:11, 73:14, 75:9, 82:22, 84:8, 84:15, 85:28, 87:24, 87:26, 88:1, 97:9, 97:12, 106:11, 128:16, 134:5, 159:6, 159:27, 160:8, 168:20  
**reportage** [3] - 56:20, 67:15, 87:9  
**reported** [6] - 57:20, 93:28, 94:6, 95:9, 95:12, 95:26  
**reporting** [3] - 30:4, 30:5, 104:1  
**reports** [5] - 23:5, 95:14, 95:16, 95:17, 131:4  
**represent** [1] - 46:6  
**representation** [1] - 170:10  
**representatives** [3] - 84:6, 88:16, 129:28  
**represented** [6] - 66:4, 66:11, 74:27, 153:23, 153:24, 154:2  
**representing** [7] - 10:26, 55:1, 66:7, 83:15, 84:27, 150:3, 171:19  
**reputation** [2] - 45:20, 81:11  
**reputational** [2] - 155:9, 156:26  
**request** [5] - 52:11, 67:16, 120:23, 129:12, 133:18  
**requested** [4] - 6:3, 47:25, 87:16, 141:26  
**required** [10] - 6:22, 81:10, 118:3, 118:24, 121:14, 123:14, 136:7, 139:6, 143:15, 145:23  
**requirement** [5] - 73:11, 83:5, 118:22, 122:4, 190:13

**requirements** [3] - 82:1, 84:12, 103:8  
**resign** [10] - 155:10, 155:13, 155:17, 155:25, 156:1, 156:15, 156:19, 156:27, 157:14, 161:3  
**resigned** [7] - 128:5, 130:3, 157:17, 157:20, 158:18, 173:20, 192:12  
**resolute** [1] - 196:28  
**RESOLUTIONS** [1] - 1:5  
**resolve** [1] - 87:13  
**resolved** [3] - 119:19, 131:27, 191:26  
**Resource** [1] - 6:27  
**resources** [1] - 104:10  
**respect** [16] - 31:24, 43:28, 48:29, 57:19, 58:12, 71:24, 84:24, 107:2, 114:9, 114:13, 115:27, 131:21, 132:6, 166:25, 175:20, 185:8  
**respond** [3] - 45:19, 144:23, 146:16  
**responded** [1] - 64:29  
**response** [6] - 38:13, 38:14, 44:8, 65:27, 129:1, 165:29  
**responsibility** [3] - 44:21, 163:27, 181:9  
**rest** [2] - 55:27, 191:6  
**rested** [2] - 124:28, 137:16  
**restrict** [1] - 85:7  
**restrictions** [1] - 79:11  
**result** [10] - 6:22, 7:9, 131:8, 137:29, 148:10, 166:20, 168:23, 169:13, 181:19, 196:10  
**resulted** [2] - 60:27, 104:11  
**resumed** [1] - 188:19  
**RESUMED** [3] - 5:1, 97:1, 154:26  
**resumption** [1] - 113:16  
**retire** [1] - 158:9  
**retired** [9] - 38:4, 66:13, 153:29, 157:28, 158:5, 158:7,

158:15, 158:29,  
170:11  
**retrieval** [1] - 103:9  
**retrospect** [2] -  
107:1, 191:4  
**return** [2] - 42:9,  
42:16  
**reveal** [1] - 12:17  
**revealed** [1] - 59:19  
**reverted** [1] - 78:29  
**Review** [1] - 103:17  
**revisit** [1] - 148:22  
**revisited** [3] - 131:6,  
154:3, 172:2  
**Richard** [1] - 95:18  
**rightly** [6] - 27:2,  
27:3, 95:24, 136:7,  
137:27, 167:10  
**rights** [12] - 10:22,  
11:21, 13:26, 13:27,  
55:8, 94:20, 146:15,  
146:21, 146:22,  
146:24, 152:21, 195:7  
**rise** [3] - 149:1,  
154:24, 177:2  
**risk** [5] - 84:1,  
101:27, 102:4,  
102:13, 103:4  
**ROAD** [1] - 2:25  
**robbed** [1] - 55:27  
**ROGERS** [1] - 2:22  
**role** [2] - 41:8, 176:6  
**RONAN** [1] - 3:4  
**room** [2] - 95:20,  
112:25  
**Rooney** [3] - 24:24,  
93:23, 180:25  
**routine** [1] - 9:15  
**RTÉ** [1] - 23:6  
**Ruane** [4] - 58:21,  
79:2, 144:2, 172:1  
**rule** [2] - 62:7, 83:6  
**ruled** [9] - 125:22,  
137:14, 142:7, 142:9,  
161:8, 189:19,  
190:15, 191:26,  
191:28  
**rules** [1] - 145:23  
**ruling** [5] - 6:10,  
124:27, 125:10,  
140:16, 189:24  
**run** [1] - 191:6  
**running** [2] - 133:24,  
194:5  
**rush** [1] - 79:27  
**Ryan** [16] - 5:28,  
10:3, 13:1, 117:6,  
117:29, 118:15,  
120:10, 121:7,  
121:16, 121:21,

122:12, 123:16,  
123:20, 123:21,  
157:2, 157:8  
**Ryan's** [11] - 9:28,  
11:25, 14:26, 16:14,  
117:11, 118:9,  
118:25, 120:22,  
121:24, 123:11

## S

**safe** [3] - 128:23,  
130:17, 134:7  
**safety** [2] - 101:13,  
101:19  
**sake** [1] - 36:23  
**saloon** [1] - 78:7  
**SAME** [5] - 98:22,  
110:8, 117:17,  
120:15, 144:14  
**sands** [1] - 51:24  
**sat** [1] - 70:21  
**satisfaction** [2] -  
24:14, 180:15  
**satisfactorily** [1] -  
25:18  
**satisfied** [1] - 160:26  
**Saturday** [2] -  
118:10, 122:23  
**save** [1] - 112:25  
**saw** [9] - 14:13,  
14:19, 16:28, 26:4,  
81:9, 99:15, 143:8,  
182:8, 186:18  
**SC** [13] - 2:6, 2:6,  
2:9, 2:10, 2:15, 2:15,  
2:16, 2:22, 3:1, 3:2,  
3:10, 66:3, 66:4  
**schedule** [1] -  
109:28  
**scheduled** [3] - 6:25,  
8:15, 67:29  
**screen** [3] - 32:19,  
108:9, 109:26  
**scroll** [1] - 8:22  
**scrutiny** [1] - 153:25  
**SEAN** [1] - 2:11  
**Seanad** [1] - 47:1  
**SEANAD** [1] - 1:6  
**second** [11] - 9:20,  
14:24, 53:25, 72:14,  
73:21, 81:18, 90:11,  
94:17, 123:11,  
147:21, 155:23  
**secondly** [5] - 52:9,  
115:26, 117:8, 148:1,  
183:20  
**secretary** [6] - 62:20,  
64:1, 76:20, 76:26,

90:17, 95:19  
**Secretary** [5] -  
28:24, 36:25, 68:13,  
82:18, 82:20  
**Section** [1] - 31:26  
**section** [15] - 8:25,  
25:23, 31:20, 32:7,  
32:21, 35:4, 36:10,  
41:12, 43:10, 56:1,  
65:1, 67:5, 67:17,  
84:19, 177:27  
**security** [2] - 34:12,  
194:7  
**see** [114] - 5:28,  
12:29, 14:28, 15:26,  
16:14, 21:5, 21:8,  
23:11, 23:15, 23:18,  
23:21, 23:22, 23:25,  
26:2, 27:26, 32:19,  
35:17, 35:26, 36:17,  
38:11, 39:11, 39:29,  
40:11, 40:13, 42:7,  
45:24, 45:26, 47:4,  
47:5, 47:10, 47:17,  
48:7, 49:25, 51:18,  
51:19, 52:2, 52:17,  
58:23, 59:17, 61:16,  
61:26, 63:15, 66:26,  
67:19, 68:28, 69:5,  
71:17, 72:6, 74:13,  
74:19, 76:9, 76:24,  
78:20, 79:13, 79:17,  
79:21, 80:5, 81:2,  
86:10, 91:4, 98:3,  
99:4, 99:6, 99:16,  
100:3, 100:14, 101:4,  
101:28, 105:24,  
107:17, 114:16,  
115:20, 116:9,  
117:24, 118:14,  
119:1, 119:28,  
120:18, 122:7,  
123:23, 124:29,  
125:2, 125:4, 125:24,  
126:12, 126:16,  
127:18, 128:3,  
131:25, 132:11,  
133:2, 139:1, 141:8,  
144:20, 144:28,  
147:21, 159:25,  
167:4, 172:5, 173:29,  
174:26, 175:12,  
175:20, 175:27,  
177:6, 178:25,  
181:22, 184:4,  
184:10, 186:24,  
188:22, 191:15  
**seeing** [1] - 14:10  
**seek** [7] - 6:4, 42:29,  
67:21, 85:2, 89:1,

135:17, 180:21  
**seeking** [2] - 6:13,  
145:14  
**seem** [7] - 28:1,  
60:29, 68:21, 80:10,  
98:11, 108:9, 166:13  
**selective** [3] - 45:17,  
83:20, 83:22  
**seminar** [1] - 33:15  
**send** [4] - 29:25,  
70:11, 76:13, 93:2  
**sending** [4] - 54:11,  
75:12, 89:17, 89:21  
**sends** [1] - 80:15  
**senior** [11] - 28:4,  
55:10, 59:7, 60:26,  
66:12, 87:10, 142:26,  
146:14, 170:26,  
171:20, 176:26  
**sense** [8] - 9:10,  
11:5, 26:14, 68:9,  
74:23, 75:6, 111:27,  
162:13  
**sensitive** [3] - 23:28,  
34:10, 179:4  
**sensitively** [1] -  
85:22  
**sent** [31] - 14:14,  
29:8, 47:19, 47:27,  
56:7, 57:2, 57:6, 57:7,  
58:24, 69:20, 70:6,  
72:15, 73:22, 75:13,  
75:16, 75:27, 80:2,  
81:2, 81:6, 81:7,  
90:11, 90:20, 91:17,  
97:15, 100:11,  
103:16, 105:27,  
139:1, 144:26,  
156:16, 164:2  
**sentence** [1] -  
179:29  
**separate** [1] - 37:13  
**separately** [3] - 6:24,  
12:24, 92:26  
**September** [1] - 5:13  
**sequence** [1] - 81:21  
**sergeant** [14] -  
87:12, 98:11, 127:11,  
128:20, 130:12,  
131:7, 132:26,  
133:14, 133:26,  
134:6, 134:15,  
134:16, 149:15,  
184:22  
**Sergeant** [302] -  
5:16, 5:25, 10:9,  
10:20, 11:7, 11:8,  
11:28, 12:4, 13:26,  
15:2, 15:13, 15:15,  
16:10, 17:22, 18:3,

18:10, 18:23, 20:8,  
21:15, 23:9, 23:12,  
23:23, 23:29, 24:11,  
24:13, 24:24, 25:6,  
25:17, 25:27, 26:11,  
26:23, 27:1, 27:7,  
27:11, 27:28, 28:1,  
28:8, 28:11, 28:14,  
28:15, 34:29, 35:9,  
41:17, 42:8, 44:6,  
44:10, 50:7, 50:12,  
50:15, 55:2, 55:10,  
55:19, 55:23, 60:20,  
60:21, 60:24, 61:6,  
61:8, 61:10, 61:13,  
65:15, 85:12, 85:26,  
86:14, 91:29, 92:3,  
92:6, 92:12, 92:20,  
93:2, 93:20, 93:24,  
94:9, 94:23, 96:1,  
97:20, 98:9, 99:25,  
100:2, 101:25, 102:4,  
102:12, 103:4,  
103:18, 103:19,  
104:6, 104:15,  
104:19, 104:25,  
105:11, 105:12,  
105:13, 105:16,  
105:26, 107:1, 108:3,  
109:2, 109:15,  
109:16, 109:21,  
110:10, 110:26,  
111:2, 111:10, 112:3,  
112:13, 112:20,  
113:4, 113:28,  
114:19, 115:4,  
115:25, 116:17,  
116:24, 116:27,  
119:4, 119:12,  
126:13, 126:17,  
127:6, 127:20,  
127:26, 128:5,  
128:19, 128:25,  
129:4, 129:7, 129:13,  
129:19, 129:26,  
130:6, 130:11,  
130:13, 130:20,  
130:24, 130:27,  
130:29, 132:3,  
132:13, 133:13,  
133:18, 133:20,  
133:23, 133:25,  
133:29, 134:3,  
134:11, 134:14,  
134:23, 134:28,  
134:29, 135:16,  
135:23, 136:9,  
136:12, 136:27,  
136:29, 137:19,  
137:24, 137:25,  
138:2, 138:5, 138:12,

138:19, 138:22,  
139:5, 139:22,  
139:28, 140:15,  
140:25, 141:14,  
141:22, 142:6,  
142:17, 142:19,  
142:22, 143:8,  
143:12, 145:22,  
146:5, 146:13,  
146:22, 147:11,  
147:19, 147:29,  
148:11, 148:19,  
148:23, 148:26,  
149:1, 149:22,  
149:25, 150:21,  
150:22, 151:9,  
151:12, 151:16,  
151:23, 151:29,  
152:21, 155:8,  
155:26, 156:14,  
156:19, 157:22,  
158:10, 158:19,  
159:14, 160:6,  
160:13, 160:23,  
160:26, 161:6,  
161:12, 161:19,  
161:21, 161:24,  
162:20, 163:18,  
163:21, 163:24,  
164:5, 164:22,  
164:24, 165:7, 166:6,  
166:12, 166:23,  
167:10, 168:24,  
169:19, 171:22,  
172:9, 172:15,  
172:16, 172:21,  
172:29, 173:20,  
173:23, 174:18,  
174:27, 175:12,  
175:29, 176:8,  
176:17, 176:25,  
176:28, 177:7,  
177:14, 177:17,  
177:28, 178:20,  
178:23, 179:5,  
179:26, 180:6, 180:9,  
180:12, 180:14,  
180:21, 180:25,  
181:4, 181:11,  
181:26, 182:26,  
183:1, 186:19,  
186:25, 187:5,  
187:22, 189:9, 190:9,  
190:18, 190:28,  
191:7, 192:9, 192:16,  
192:17, 192:20,  
192:23, 193:16,  
193:24, 193:27,  
194:11, 194:23,  
194:27, 195:3,  
195:11, 195:22,

195:26, 196:4, 196:8,  
196:19, 196:25,  
197:1, 197:2  
**serious** [18] - 11:18,  
14:1, 27:18, 34:9,  
53:6, 91:20, 93:13,  
143:9, 143:14,  
143:27, 143:28,  
146:8, 151:27,  
162:11, 162:16,  
164:22, 181:17  
**seriously** [3] -  
152:11, 158:17, 162:9  
**seriousness** [1] -  
86:8  
**servant** [2] - 38:1,  
41:7  
**serve** [1] - 163:1  
**served** [7] - 163:10,  
163:14, 163:20,  
164:28, 166:18,  
167:15, 168:21  
**serves** [1] - 163:14  
**service** [10] - 42:28,  
44:7, 44:26, 88:12,  
88:15, 121:2, 129:12,  
163:23, 166:7, 167:11  
**serviced** [1] - 163:4  
**SERVICES** [1] - 1:30  
**Services** [1] - 1:25  
**services** [2] - 101:2,  
129:11  
**servicing** [2] - 11:4,  
103:8  
**servings** [3] - 66:13,  
153:29, 170:11  
**sessions** [1] - 32:23  
**set** [15] - 13:3, 17:9,  
19:9, 54:2, 55:26,  
57:18, 85:19, 85:28,  
93:12, 106:3, 124:28,  
136:8, 139:29,  
143:11, 173:23  
**sets** [2] - 59:10,  
86:26  
**setting** [6] - 13:10,  
35:5, 36:14, 56:17,  
145:15, 196:28  
**settle** [1] - 185:24  
**seven** [2] - 78:21,  
101:20  
**several** [4] - 33:20,  
34:1, 71:15, 72:19  
**severe** [2] - 25:19,  
93:2  
**sexual** [9] - 49:29,  
50:16, 50:20, 60:21,  
148:2, 165:27, 168:2,  
170:18, 185:28  
**sexually** [1] - 50:7

**SGT** [1] - 2:9  
**shall** [1] - 84:21  
**SHANE** [1] - 2:15  
**shape** [1] - 144:18  
**share** [3] - 29:28,  
46:15, 91:3  
**shared** [4] - 29:28,  
37:16, 70:10, 90:4  
**sharing** [3] - 38:7,  
56:3, 70:25  
**Sheridan** [2] -  
100:27, 101:18  
**shibboleth** [1] -  
179:22  
**Shields** [1] - 169:8  
**SHIP** [2] - 2:19, 3:14  
**shocked** [1] - 192:10  
**shoes** [2] - 152:16,  
152:19  
**shootings** [1] - 39:25  
**short** [5] - 76:3,  
123:9, 160:22, 182:21  
**SHORT** [1] - 154:26  
**shortcomings** [8] -  
17:28, 27:2, 27:17,  
27:18, 82:23, 137:27,  
163:9, 167:11  
**shorten** [1] - 157:16  
**shorter** [1] - 77:3  
**shorthand** [1] -  
179:20  
**shortly** [4] - 23:7,  
38:6, 80:11, 125:26  
**show** [3] - 144:12,  
178:28, 194:11  
**shows** [1] - 101:29  
**shred** [1] - 164:21  
**sic** [2] - 161:6,  
184:12  
**sickness** [1] - 180:10  
**sides** [1] - 153:11  
**sign** [2] - 42:17,  
168:3  
**sign-off** [1] - 42:17  
**signed** [2] - 75:18,  
75:29  
**significant** [8] -  
25:21, 31:7, 72:9,  
140:21, 193:14,  
193:15, 194:8  
**similar** [2] - 6:9,  
30:11  
**simple** [3] - 111:5,  
111:6, 132:2  
**simply** [5] - 51:20,  
86:3, 111:13, 178:7,  
181:6  
**simultaneously** [1] -  
41:26  
**sincere** [1] - 196:20

**single** [3] - 37:9,  
69:3  
**sit** [2] - 96:9, 197:14  
**sitting** [2] - 107:16,  
184:7  
**sittings** [1] - 50:11  
**situation** [13] -  
37:22, 53:3, 57:26,  
61:5, 63:5, 94:28,  
95:1, 141:1, 152:22,  
168:13, 191:2,  
191:14, 192:7  
**six** [3] - 101:20,  
103:2, 103:3  
**slightest** [1] - 190:2  
**slightly** [3] - 15:21,  
34:3, 80:5  
**small** [1] - 170:7  
**SMYTH** [2] - 3:1,  
187:14  
**Smyth** [32] - 5:10,  
7:4, 10:4, 21:13,  
21:21, 21:24, 21:26,  
113:21, 114:2,  
115:17, 151:11,  
172:6, 173:25,  
174:16, 174:29,  
175:3, 184:18, 185:2,  
185:13, 186:11,  
186:25, 187:9,  
188:25, 188:26,  
189:1, 189:6, 189:7,  
189:25, 190:5,  
195:22, 195:24, 196:5  
**social** [1] - 101:1  
**soft** [1] - 193:19  
**Sole** [1] - 84:4  
**SOLE** [2] - 1:12, 2:2  
**SOLICITOR** [1] - 2:7  
**solicitor** [9] - 105:12,  
118:3, 122:14,  
122:15, 135:15,  
144:27, 177:29,  
179:26  
**Solicitor's** [1] - 20:4  
**SOLICITOR'S** [2] -  
2:18, 3:12  
**SOLICITORS** [1] -  
2:24  
**solution** [1] - 88:14  
**sometimes** [4] -  
26:25, 104:13, 181:27  
**somewhat** [1] -  
179:28  
**somewhere** [1] -  
176:2  
**sorry** [78] - 5:21,  
15:9, 21:24, 23:14,  
23:19, 29:2, 32:16,  
34:26, 35:18, 35:26,

36:13, 37:13, 39:2,  
42:27, 48:20, 48:22,  
54:22, 58:24, 59:15,  
60:16, 61:22, 67:7,  
71:21, 72:3, 73:28,  
74:7, 74:8, 75:5,  
77:25, 79:27, 89:14,  
91:11, 93:22, 93:29,  
95:4, 97:15, 98:25,  
98:26, 108:16,  
108:22, 109:25,  
111:18, 117:11,  
117:21, 118:6,  
120:17, 122:8,  
124:19, 125:15,  
126:23, 127:2,  
127:28, 131:25,  
132:22, 135:19,  
141:12, 143:7,  
145:12, 149:7,  
153:14, 154:8,  
154:10, 156:12,  
159:7, 160:16,  
161:15, 164:23,  
165:2, 177:23,  
177:24, 183:12,  
183:13, 189:8, 190:1,  
190:6, 193:13, 195:19  
**sort** [2] - 28:3, 184:9  
**sought** [10] - 22:14,  
73:3, 87:10, 117:8,  
117:9, 122:20,  
122:27, 135:24,  
145:24, 177:15  
**source** [1] - 85:25  
**sources** [1] - 83:28  
**space** [1] - 182:21  
**SPEAKER** [3] -  
154:6, 154:11, 154:23  
**speaking** [6] - 35:11,  
64:11, 65:24, 76:16,  
121:10, 183:15  
**speaks** [1] - 188:28  
**specific** [19] - 7:10,  
8:2, 24:16, 34:1,  
34:15, 49:28, 60:24,  
69:8, 76:20, 129:10,  
137:26, 146:14,  
148:4, 148:14,  
159:19, 159:24,  
165:15, 171:3, 180:17  
**specifically** [19] -  
8:9, 8:27, 24:26,  
48:10, 53:8, 60:6,  
73:4, 89:19, 90:24,  
90:27, 98:15, 126:10,  
132:25, 145:18,  
159:6, 165:3, 165:19,  
176:8, 180:27  
**specifics** [3] - 34:8,

148:23, 166:19  
**speculate** [4] - 18:6,  
20:21, 150:9, 152:7  
**speculating** [1] -  
152:4  
**speech** [5] - 28:28,  
29:18, 52:17, 52:19,  
56:10  
**speeches** [1] - 38:8  
**speed** [1] - 48:5  
**spoken** [7] - 33:20,  
34:9, 34:13, 34:21,  
93:3, 118:26, 194:18  
**Sreenan** [2] - 169:10,  
169:28  
**SREENAN** [9] - 3:2,  
168:27, 169:2, 169:4,  
169:6, 169:11,  
169:19, 169:22,  
169:29  
**staff** [4] - 77:17,  
77:18, 78:28  
**stage** [29] - 6:8, 6:12,  
14:21, 14:23, 16:25,  
21:22, 22:14, 26:5,  
45:1, 48:3, 48:20,  
52:15, 55:17, 57:16,  
59:18, 66:1, 66:19,  
68:13, 70:14, 71:18,  
71:23, 85:11, 112:2,  
121:5, 146:2, 171:27,  
181:20, 185:13,  
196:21  
**stages** [2] - 6:21,  
100:2  
**stance** [3] - 46:6,  
46:11, 87:3  
**stand** [7] - 43:29,  
70:16, 111:6, 132:14,  
162:27, 168:14,  
188:17  
**standards** [1] - 26:13  
**standing** [2] - 15:28,  
110:13  
**start** [2] - 27:5, 38:3  
**started** [4] - 31:7,  
31:15, 39:24, 50:5  
**starts** [1] - 188:8  
**state** [8] - 37:12,  
52:12, 56:4, 56:14,  
100:28, 158:8,  
179:26, 190:24  
**State** [6] - 20:4,  
30:11, 35:14, 39:23,  
177:29  
**STATE** [2] - 2:18,  
3:12  
**statement** [42] -  
36:20, 38:18, 38:19,  
38:28, 40:7, 41:20,  
41:22, 41:25, 41:27,  
41:28, 42:1, 42:11,  
42:14, 42:18, 43:23,  
45:10, 52:7, 52:20,  
53:13, 53:17, 53:19,  
54:17, 54:19, 54:23,  
56:11, 56:17, 58:24,  
59:2, 59:10, 59:16,  
80:26, 81:18, 83:12,  
89:2, 94:18, 94:20,  
122:12, 122:16,  
144:6, 144:16, 174:1,  
174:6  
**statements** [6] -  
29:26, 29:28, 37:16,  
47:2, 144:12, 185:11  
**states** [3] - 128:19,  
128:23, 134:22  
**stating** [2] - 134:4,  
160:8  
**station** [4] - 10:3,  
178:13, 178:16,  
180:18  
**Station** [1] - 133:19  
**statutory** [4] - 41:9,  
62:8, 83:7, 85:17  
**stenographers** [1] -  
197:11  
**stenographic** [1] -  
1:27  
**STENOGRAPHY** [1]  
- 1:30  
**stenography** [1] -  
1:25  
**step** [4] - 37:6,  
37:25, 123:9, 146:9  
**steps** [2] - 35:5, 87:7  
**stick** [1] - 165:23  
**still** [8] - 16:27,  
17:29, 78:16, 96:12,  
192:14, 192:16,  
192:23, 192:26  
**stood** [2] - 40:21,  
51:1  
**stop** [1] - 147:21  
**storm** [3] - 31:8,  
32:14, 57:24  
**story** [2] - 36:3,  
40:14  
**straight** [2] - 57:18,  
58:8  
**straightaway** [1] -  
178:4  
**strain** [4] - 25:19,  
45:5, 86:21, 159:11  
**street** [1] - 164:9  
**STREET** [3] - 2:19,  
3:5, 3:14  
**stress** [1] - 105:5  
**stressful** [1] - 180:9  
**strict** [1] - 66:19  
**strictly** [1] - 78:11  
**strike** [3] - 10:25,  
62:26, 153:22  
**strongly** [3] - 41:5,  
45:15, 55:15  
**struck** [1] - 62:29  
**structure** [1] - 77:29  
**structures** [2] -  
163:22, 193:15  
**stymieing** [1] - 181:6  
**subject** [3] - 84:7,  
137:20, 177:6  
**submission** [11] -  
30:27, 155:13,  
155:23, 156:12,  
156:16, 162:26,  
166:11, 168:10,  
178:26, 188:23,  
188:27  
**submissions** [20] -  
14:11, 14:20, 14:23,  
23:8, 23:11, 23:14,  
23:22, 23:28, 25:27,  
26:3, 26:6, 26:18,  
28:1, 28:6, 84:6,  
141:28, 170:1, 170:3,  
172:8, 179:4  
**submitted** [1] -  
157:15  
**subsequent** [4] -  
5:10, 9:19, 108:11,  
121:12  
**subsequently** [8] -  
20:6, 67:6, 81:18,  
131:6, 135:27,  
137:17, 187:27,  
187:29  
**subsisted** [3] -  
160:12, 161:6, 161:29  
**substance** [1] - 32:2  
**succeed** [1] - 119:11  
**suffering** [3] - 25:20,  
162:24, 164:18  
**suggest** [12] - 28:1,  
54:16, 55:18, 68:21,  
111:24, 123:18,  
138:9, 138:12,  
142:27, 144:5, 158:2,  
171:22  
**suggested** [17] -  
73:13, 73:16, 97:20,  
111:20, 112:11,  
112:12, 116:26,  
127:19, 127:20,  
138:20, 140:26,  
141:22, 143:13,  
148:25, 184:22,  
184:23, 195:21  
**suggesting** [20] -  
17:5, 26:10, 27:27,  
34:23, 73:6, 89:23,  
105:18, 115:8,  
148:19, 150:20,  
151:8, 153:1, 158:17,  
161:2, 161:16, 163:7,  
164:20, 172:5, 190:1  
**suggestion** [15] -  
16:8, 20:27, 48:28,  
49:3, 72:29, 87:9,  
112:3, 112:13,  
116:27, 116:29,  
119:13, 138:16,  
139:28, 181:23  
**suggestions** [6] -  
19:28, 38:15, 38:17,  
48:11, 48:14, 49:11  
**suggests** [1] - 166:1  
**suits** [1] - 96:6  
**Sullivan** [1] - 74:13  
**sum** [1] - 143:23  
**summarise** [2] -  
24:1, 179:6  
**summation** [2] -  
26:19, 105:24  
**sums** [1] - 191:13  
**Sunday** [7] - 35:16,  
36:6, 69:6, 72:4,  
121:5, 122:23, 123:10  
**superintendent** [13]  
- 65:15, 66:13, 78:28,  
99:22, 105:8, 106:29,  
127:7, 130:8, 149:15,  
154:1, 170:11, 170:27  
**Superintendent** [154]  
- 5:14, 7:11, 7:16,  
7:22, 7:25, 8:21, 8:24,  
9:11, 9:16, 9:18, 10:5,  
15:19, 17:1, 18:5,  
18:16, 18:18, 20:10,  
24:22, 24:23, 47:17,  
47:19, 47:23, 48:2,  
48:5, 49:7, 57:3,  
58:14, 58:21, 67:11,  
71:18, 71:22, 71:27,  
90:22, 90:25, 91:11,  
92:7, 92:11, 93:20,  
93:23, 97:26, 97:29,  
99:9, 100:17, 100:27,  
101:18, 101:24,  
106:1, 106:12,  
107:22, 108:1,  
108:29, 109:14,  
110:7, 110:16,  
110:20, 111:12,  
112:8, 112:12,  
114:22, 115:2, 115:9,  
116:12, 116:14,  
118:21, 118:26,  
118:27, 119:2, 119:7,  
119:8, 119:16,  
119:24, 120:7,  
120:21, 121:11,  
121:20, 121:27,  
122:23, 123:19,  
123:24, 124:22,  
125:29, 127:21,  
127:25, 128:19,  
129:5, 129:14, 130:7,  
131:12, 131:19,  
132:5, 134:9, 135:16,  
135:21, 136:26,  
137:2, 138:18,  
138:27, 139:23,  
140:3, 140:19,  
140:23, 140:27,  
141:23, 141:25,  
141:26, 159:3,  
159:15, 160:5,  
160:28, 161:19,  
168:29, 169:6,  
169:17, 169:26,  
172:15, 173:27,  
174:11, 174:14,  
175:6, 175:8, 175:18,  
175:26, 175:28,  
176:5, 180:23,  
180:24, 181:3, 181:5,  
181:7, 182:14,  
186:29, 187:1,  
187:15, 187:16,  
187:18, 187:19,  
187:26, 187:28,  
187:29, 188:10,  
188:21, 190:3,  
190:11, 190:21,  
190:26, 190:29,  
191:19, 191:22,  
191:24, 192:6  
**superintendent's** [1]  
- 181:11  
**superintendents** [2]  
- 193:23  
**superiors** [1] - 128:7  
**supervision** [1] -  
88:5  
**support** [14] - 18:11,  
88:6, 111:4, 129:10,  
129:11, 129:20,  
138:2, 183:2, 186:21,  
193:16, 193:24,  
194:11, 196:16, 197:1  
**supported** [6] -  
44:20, 117:2, 153:11,  
163:28, 177:5, 196:22  
**supports** [5] - 34:28,  
35:8, 71:23, 193:7,  
196:25  
**suppose** [23] - 8:29,  
22:2, 26:9, 30:3,

36:23, 36:27, 37:10,  
37:20, 38:5, 46:18,  
48:25, 68:21, 90:28,  
91:26, 120:10, 146:9,  
151:20, 155:15,  
155:17, 165:25,  
166:4, 178:7, 178:16  
**supposed** [2] -  
156:18, 177:7  
**SUPREME** [2] - 1:13,  
2:3  
**surprise** [4] - 102:5,  
102:11, 117:7, 192:4  
**surprised** [4] -  
104:28, 136:2, 190:3,  
192:9  
**surprising** [3] -  
20:17, 105:18, 105:22  
**surround** [1] - 62:4  
**surrounding** [2] -  
128:28, 138:29  
**suspect** [1] - 101:25  
**suspect's** [1] - 101:2  
**suspected** [1] - 99:9  
**swiftly** [1] - 84:15  
**Séan** [1] - 104:5  
**Sióchána** [95] -  
10:26, 11:13, 11:16,  
11:17, 11:20, 16:24,  
26:15, 27:13, 28:5,  
28:18, 29:13, 30:9,  
31:23, 31:24, 32:4,  
34:10, 34:11, 36:26,  
36:29, 38:1, 41:8,  
42:20, 42:27, 43:5,  
43:26, 44:6, 44:19,  
54:13, 55:1, 55:11,  
58:26, 66:12, 76:4,  
81:12, 82:23, 83:15,  
84:1, 84:27, 85:2,  
85:9, 85:15, 86:6,  
86:23, 87:17, 87:18,  
88:13, 88:19, 88:27,  
89:1, 92:20, 92:22,  
93:14, 101:1, 101:19,  
102:22, 107:11,  
110:25, 114:25,  
129:1, 142:12,  
143:26, 146:11,  
147:9, 148:10,  
149:23, 150:2,  
152:17, 152:23,  
152:24, 152:25,  
152:27, 152:28,  
153:19, 153:20,  
158:29, 162:22,  
162:29, 163:4, 163:5,  
163:15, 163:27,  
164:12, 165:12,  
166:18, 167:15,

167:25, 168:22,  
170:8, 171:20, 173:2,  
189:27, 194:6, 195:6,  
196:27  
**Sióchána's** [2] -  
85:11, 88:1

## T

**tacking** [1] - 75:25  
**tactics** [1] - 66:4  
**Taoiseach** [1] -  
146:28  
**tape** [4] - 67:12,  
95:11, 154:15, 154:20  
**tapes** [2] - 36:6,  
95:19  
**targeting** [2] - 25:5,  
181:3  
**task** [2] - 86:9,  
182:19  
**TDs** [1] - 59:26  
**team** [30] - 9:21,  
12:4, 22:18, 52:10,  
55:1, 55:18, 56:4,  
76:2, 83:14, 84:27,  
85:11, 85:15, 88:22,  
113:5, 115:2, 115:13,  
119:18, 129:21,  
135:14, 143:12,  
144:1, 153:23,  
160:11, 170:26,  
175:3, 182:13,  
182:17, 182:18,  
182:21, 182:25  
**telephone** [3] -  
92:14, 118:18, 134:3  
**template** [1] - 81:18  
**ten** [6] - 78:21,  
80:11, 80:15, 81:3,  
83:24  
**ten-hour** [1] - 83:24  
**tenable** [1] - 156:4  
**term** [5] - 49:27,  
50:18, 92:5, 144:22,  
147:16  
**terms** [50] - 9:3,  
9:16, 10:29, 11:2,  
16:23, 19:28, 20:1,  
27:9, 27:16, 27:19,  
27:20, 31:13, 33:12,  
33:27, 34:18, 34:22,  
37:16, 38:23, 40:5,  
40:25, 45:13, 53:6,  
54:22, 68:24, 74:24,  
75:26, 76:6, 79:6,  
84:28, 85:19, 103:11,  
107:6, 111:18,  
112:29, 138:3, 143:6,

144:21, 144:29,  
146:27, 147:6,  
155:18, 171:1,  
171:27, 174:23,  
176:14, 178:5, 183:4,  
183:19, 189:17,  
193:15  
**Terry** [1] - 106:12  
**test** [3] - 86:12,  
153:10, 183:3  
**tested** [11] - 27:8,  
27:14, 27:27, 27:29,  
55:11, 112:1, 112:10,  
117:3, 171:14, 177:4  
**testified** [1] - 123:25  
**testing** [3] - 26:28,  
33:28, 138:3  
**text** [4] - 32:13,  
38:17, 52:17, 133:20  
**THE** [12] - 1:4, 1:8,  
1:9, 1:12, 2:3, 2:6,  
2:15, 5:1, 96:17, 97:1,  
154:26, 197:19  
**the..** [2] - 154:6,  
154:13  
**themselves** [12] -  
74:26, 92:23, 93:1,  
93:6, 94:28, 96:2,  
122:22, 124:1,  
171:21, 171:23,  
175:22, 182:19  
**THEN** [1] - 197:19  
**then-private-**  
**secretary** [1] - 90:17  
**thereafter** [13] -  
21:18, 21:28, 24:14,  
136:6, 140:17, 177:1,  
177:5, 177:16,  
178:24, 180:15,  
183:8, 189:20, 191:27  
**therefore** [6] -  
124:28, 125:12,  
126:23, 145:21,  
168:10, 175:27  
**thereon** [1] - 68:23  
**thinking** [4] - 17:19,  
100:3, 125:24, 170:6  
**thinks** [1] - 194:9  
**third** [1] - 54:22  
**Thomas** [1] - 133:3  
**thoroughly** [2] -  
111:15, 176:14  
**thoughts** [2] - 9:13,  
73:27  
**thousands** [1] -  
83:25  
**thread** [2] - 51:18,  
51:19  
**threat** [13] - 22:2,  
22:5, 22:11, 104:26,

128:22, 130:15,  
130:16, 131:1,  
132:17, 133:29,  
135:6, 192:24, 192:27  
**threatened** [1] -  
39:26  
**three** [14] - 32:12,  
32:20, 39:27, 83:23,  
99:28, 104:13,  
173:20, 173:22,  
174:26, 174:29,  
189:1, 193:22, 197:7,  
197:8  
**three-line** [1] - 197:7  
**throughout** [10] -  
26:20, 31:21, 31:29,  
161:7, 161:29, 172:3,  
193:17, 193:26,  
196:17, 196:19  
**thrust** [4] - 141:17,  
151:18, 192:21,  
195:28  
**tick** [1] - 75:25  
**tick-tacking** [1] -  
75:25  
**TO** [1] - 5:6  
**to"** [1] - 131:24  
**to-ing** [1] - 70:13  
**today** [6] - 39:16,  
96:9, 128:27, 162:28,  
185:3, 197:14  
**together** [4] - 69:4,  
70:22, 136:21, 137:29  
**toll** [4] - 155:8,  
156:26, 157:5, 157:7  
**tomorrow** [2] -  
134:13, 197:12  
**ton** [6] - 128:24,  
130:19, 132:21,  
134:8, 135:8, 192:25  
**tone** [1] - 196:29  
**took** [15] - 8:26, 10:2,  
21:29, 30:27, 56:28,  
58:6, 60:15, 90:10,  
115:16, 153:5,  
168:23, 173:7, 178:3,  
184:11, 197:5  
**top** [6] - 12:29, 39:5,  
99:5, 100:25, 144:29,  
196:29  
**topic** [2] - 76:1,  
174:15  
**touch** [1] - 62:20  
**touching** [1] - 129:29  
**towards** [3] - 35:9,  
37:29, 44:25  
**traffic** [15] - 127:9,  
127:12, 128:6,  
128:20, 130:12,  
131:2, 131:8, 132:20,

132:26, 133:15,  
133:27, 134:15,  
135:7, 173:21, 192:13  
**trained** [1] - 88:23  
**training** [1] - 88:5  
**transactions** [1] -  
128:5  
**transcript** [20] - 1:26,  
20:25, 21:19, 50:3,  
95:21, 108:8, 117:15,  
124:5, 125:10,  
154:22, 161:11,  
169:24, 173:22,  
183:11, 183:13,  
184:3, 186:25, 188:5,  
188:22, 188:28  
**transcripts** [19] -  
13:17, 13:18, 13:23,  
14:6, 14:8, 17:19,  
21:27, 49:19, 83:23,  
83:25, 95:9, 124:12,  
125:25, 126:1,  
126:20, 128:2, 157:2,  
162:2, 195:17  
**transparency** [2] -  
35:12, 89:1  
**Transparency** [1] -  
88:16  
**transparently** [1] -  
22:8  
**transpired** [19] -  
12:27, 19:18, 26:20,  
41:2, 41:16, 41:18,  
42:12, 45:14, 92:2,  
118:6, 120:27,  
122:29, 124:5, 131:6,  
132:16, 135:20,  
181:19, 181:29, 191:2  
**treated** [2] - 134:20,  
135:1  
**trespass** [2] - 129:2,  
132:12  
**trial** [1] - 122:2  
**tribunal** [2] - 22:7,  
150:18  
**TRIBUNAL** [3] - 1:3,  
2:6, 197:19  
**Tribunal** [30] - 7:6,  
7:9, 14:17, 50:8,  
60:22, 90:18, 92:22,  
93:15, 96:6, 97:20,  
102:20, 103:26,  
107:5, 107:15,  
107:19, 109:29,  
122:4, 122:12,  
132:23, 134:21,  
135:2, 136:25, 139:9,  
145:11, 159:26,  
169:25, 174:6,  
175:14, 175:23, 190:6



**Tribunal's** [1] - 169:9  
**tribunals** [2] - 151:19, 194:25  
**TRIBUNALS** [1] - 1:9  
**tried** [3] - 132:8, 137:22, 138:21  
**troubling** [1] - 25:25  
**true** [4] - 111:23, 134:25, 190:24, 191:2  
**trust** [1] - 43:28  
**truth** [15] - 12:22, 14:3, 46:16, 52:15, 55:5, 55:6, 58:8, 59:21, 61:15, 86:10, 110:21, 110:24, 114:27, 176:7  
**truths** [2] - 57:28, 94:29  
**try** [2] - 166:29, 197:14  
**trying** [3] - 17:29, 108:20, 108:22  
**Tuesday** [2] - 49:18, 190:4  
**TUESDAY** [2] - 1:18, 5:1  
**turn** [11] - 8:11, 12:29, 20:26, 29:15, 35:15, 36:17, 51:26, 63:10, 82:12, 162:23, 164:12  
**turned** [1] - 80:16  
**turning** [2] - 29:15, 168:2  
**turns** [1] - 165:29  
**Tusla** [11] - 90:12, 91:24, 97:10, 97:16, 97:17, 98:4, 100:4, 100:14, 104:23, 105:2, 105:4  
**twenty** [1] - 96:16  
**two** [23] - 7:2, 9:19, 22:18, 37:13, 55:15, 65:7, 87:10, 91:23, 92:19, 92:22, 104:13, 111:21, 115:24, 116:12, 131:26, 134:21, 147:28, 157:19, 165:27, 173:29, 193:21, 193:22, 197:8  
**Twomey** [21] - 58:20, 64:5, 65:4, 68:11, 76:28, 77:21, 78:4, 78:12, 78:19, 78:21, 79:13, 79:22, 80:6, 80:12, 80:15, 80:21, 80:27, 82:3, 87:28, 89:26, 100:1  
**Twomey's** [2] - 78:9,

78:10  
**type** [6] - 7:12, 7:23, 30:11, 67:2, 174:13, 175:9  
**Tánaiste** [40] - 32:26, 36:3, 39:15, 40:15, 40:22, 40:25, 40:29, 41:12, 46:14, 46:19, 46:27, 49:20, 53:4, 56:25, 63:21, 64:11, 64:22, 64:23, 65:27, 66:15, 68:18, 69:28, 70:29, 72:21, 73:2, 73:11, 74:4, 75:10, 75:13, 75:16, 75:23, 77:4, 79:8, 80:2, 81:6, 81:7, 81:14, 81:25, 89:24, 90:5

## U

**ulterior** [1] - 27:12  
**ultimately** [1] - 31:1  
**unacceptable** [3] - 41:10, 44:2, 168:25  
**unavailable** [2] - 120:13, 120:24  
**uncertain** [1] - 183:19  
**uncomfortable** [1] - 152:4  
**uncorrected** [2] - 100:14, 107:12  
**under** [31] - 11:6, 11:11, 21:2, 21:22, 22:2, 22:5, 22:11, 45:5, 45:13, 55:13, 56:1, 65:1, 67:16, 73:19, 86:20, 90:18, 100:19, 128:22, 130:15, 131:1, 132:17, 133:29, 134:19, 135:6, 136:26, 153:25, 159:11, 161:26, 175:28, 192:24, 197:7  
**UNDER** [2] - 1:3, 1:9  
**underestimating** [1] - 141:19  
**underhandedly** [1] - 50:10  
**underlying** [1] - 178:18  
**undermine** [2] - 152:11, 163:15  
**undermined** [2] - 166:12, 166:27  
**underneath** [3] - 17:7, 59:16, 81:25

**understandable** [1] - 72:11  
**understandably** [3] - 28:9, 71:28, 180:9  
**understood** [15] - 115:15, 118:2, 121:9, 141:12, 141:15, 142:5, 174:14, 174:18, 178:2, 178:17, 183:1, 195:16, 195:27, 196:2  
**undertaken** [1] - 82:29  
**unequivocal** [1] - 56:24  
**unfair** [4] - 84:2, 95:2, 123:19, 160:19  
**unfortunate** [2] - 91:15, 94:27  
**unfortunately** [5] - 57:18, 57:19, 65:21, 95:24, 174:10  
**unfounded** [6] - 16:26, 18:28, 27:22, 55:15, 60:22, 86:17  
**uninformed** [1] - 57:27  
**unit** [12] - 127:9, 128:21, 131:2, 132:20, 132:27, 133:27, 134:15, 134:16, 135:7, 173:21, 192:13  
**UNKNOWN** [3] - 154:6, 154:11, 154:23  
**unlawful** [1] - 48:15  
**unless** [5] - 22:25, 150:28, 155:26, 178:2, 188:11  
**unnamed** [1] - 189:26  
**unnecessary** [2] - 162:24, 164:18  
**unpleasantness** [1] - 24:8  
**unprecedented** [4] - 37:5, 37:27, 39:26, 63:2  
**unreasonable** [1] - 86:11  
**unsourced** [1] - 83:26  
**unsupportable** [1] - 25:28  
**unsupported** [4] - 26:26, 86:19, 142:23, 181:28  
**UNTIL** [1] - 197:19  
**untrustworthy** [2] - 193:3, 194:15

**unusual** [10] - 29:22, 34:3, 46:21, 48:19, 62:27, 62:29, 89:20, 105:2, 106:23, 178:16  
**unverified** [1] - 83:26  
**up** [41] - 12:23, 19:4, 24:11, 34:17, 35:11, 35:13, 38:4, 61:22, 75:22, 91:1, 91:17, 93:12, 94:18, 94:23, 103:27, 107:23, 125:13, 126:3, 141:18, 142:1, 142:4, 143:11, 143:22, 143:23, 143:27, 161:15, 161:29, 165:29, 168:2, 176:9, 178:13, 178:16, 180:12, 182:8, 184:20, 186:11, 186:12, 191:9, 191:13, 196:27  
**update** [1] - 9:16  
**updates** [1] - 40:25  
**upheld** [1] - 147:29  
**upholding** [1] - 31:25  
**upset** [3] - 71:28, 175:13, 175:15  
**upward** [1] - 170:27  
**upwards** [1] - 154:1  
**urgent** [1] - 121:17  
**urgently** [1] - 118:16  
**useful** [2] - 62:12, 73:6  
**utterly** [1] - 119:2

## V

**vaginal** [2] - 97:21, 106:16  
**validity** [2] - 17:24, 26:28  
**value** [1] - 102:10  
**valued** [1] - 44:7  
**various** [13] - 11:10, 14:9, 59:26, 67:15, 68:12, 75:20, 75:21, 100:2, 136:21, 139:18, 162:3, 170:9, 177:6  
**veracity** [2] - 17:24, 26:28  
**verbatim** [1] - 1:26  
**version** [13] - 72:14, 73:21, 75:28, 76:13, 77:3, 77:12, 79:18, 80:7, 80:16, 80:17, 89:2, 89:5, 172:20

**versions** [2] - 75:22, 177:6  
**vetter** [2] - 81:23, 81:27  
**via** [4] - 19:7, 93:2, 115:2, 116:11  
**victim** [4] - 88:5, 91:16, 163:13, 168:2  
**victims** [35] - 25:1, 27:19, 42:25, 42:28, 43:3, 151:21, 162:20, 162:23, 163:3, 163:10, 163:12, 163:19, 163:23, 163:28, 164:5, 164:8, 164:15, 164:17, 164:24, 165:8, 165:11, 165:19, 165:21, 166:11, 166:17, 166:19, 167:4, 167:12, 167:14, 167:20, 168:18, 168:21, 168:22, 168:25, 180:27  
**victims'** [1] - 163:23  
**victims..** [1] - 164:13  
**view** [21] - 11:8, 16:23, 28:7, 28:8, 34:29, 35:1, 41:4, 56:24, 71:6, 79:3, 83:18, 91:12, 91:22, 130:27, 138:23, 152:18, 161:20, 161:22, 171:11, 176:22, 196:4  
**viewed** [1] - 171:21  
**views** [2] - 109:15, 186:3  
**vindicate** [1] - 55:8  
**vindicated** [2] - 146:24, 195:7  
**violence** [1] - 60:21  
**volume** [6] - 29:2, 39:4, 63:12, 72:3, 122:8, 183:12  
**Volume** [23] - 5:18, 20:26, 29:3, 29:4, 32:17, 35:17, 35:27, 45:25, 58:24, 61:21, 69:13, 73:29, 74:22, 77:10, 82:13, 122:10, 126:27, 145:6, 145:7, 154:5, 154:9, 155:1, 179:1  
**volumes** [1] - 61:22  
**volunteer** [1] - 112:29  
**volunteered** [1] - 52:12

**vortex** [3] - 31:15,  
37:1, 57:23  
**vulnerable** [1] -  
163:2

---

## W

---

**wait** [1] - 107:14  
**waive** [2] - 12:21,  
48:29  
**waived** [2] - 12:12,  
155:19  
**waiving** [1] - 13:11  
**wall** [2] - 52:27  
**wall-to-wall** [1] -  
52:27  
**WALLACE** [1] - 3:12  
**Walsh** [5] - 90:25,  
92:7, 97:29, 99:22,  
127:2  
**Walsh's** [5] - 90:22,  
91:12, 97:26, 100:18,  
106:2  
**wants** [2] - 22:26,  
110:4  
**WAS** [1] - 97:3  
**waste** [1] - 135:13  
**watching** [1] - 184:7  
**WATERS** [1] - 3:9  
**waters** [1] - 34:27  
**Waters** [5] - 63:23,  
63:24, 68:13, 82:20,  
82:21  
**ways** [1] - 62:13  
**Wednesday** [1] -  
190:4  
**WEDNESDAY** [1] -  
197:19  
**week** [5] - 7:28,  
49:12, 55:4, 62:3,  
64:28  
**weekend** [18] - 37:4,  
41:23, 42:15, 45:8,  
45:15, 56:21, 118:2,  
118:7, 120:12,  
120:24, 120:26,  
121:13, 122:21,  
122:24, 122:25,  
125:3, 125:4, 125:5  
**weigh** [1] - 84:6  
**welcomed** [1] -  
88:19  
**welfare** [2] - 104:7,  
129:10  
**well-made** [1] -  
162:14  
**whatsoever** [1] -  
112:5  
**Wheatley** [1] - 133:4

**whereas** [1] - 179:25  
**whip** [1] - 197:7  
**whistleblowers** [8] -  
16:19, 16:20, 35:1,  
35:9, 82:25, 88:10,  
88:14, 88:24  
**whistleblowers'** [1] -  
82:28  
**whole** [10] - 11:1,  
16:29, 23:15, 50:5,  
56:9, 68:15, 141:9,  
142:28, 152:24  
**wholesome** [1] -  
35:13  
**wholesomely** [1] -  
90:4  
**wholly** [4] - 140:28,  
164:20, 193:8, 193:9  
**widely** [3] - 55:5,  
95:12, 177:9  
**willing** [2] - 181:4,  
190:22  
**wise** [1] - 107:14  
**wish** [11] - 21:7,  
27:14, 56:4, 65:19,  
86:2, 89:27, 129:12,  
129:16, 134:10,  
143:2, 143:3  
**wished** [3] - 31:2,  
127:22, 127:24  
**wishes** [3] - 52:24,  
96:10, 134:14  
**withdraw** [4] - 18:13,  
18:14, 152:8, 160:15  
**withdrawing** [4] -  
16:4, 16:7, 16:8, 17:8  
**withdrawn** [6] -  
16:26, 18:8, 18:10,  
18:27, 25:26, 55:13  
**witness** [6] - 6:26,  
66:16, 110:2, 145:16,  
183:19, 184:19  
**WITNESS** [1] - 4:2  
**witnesses** [16] -  
43:12, 65:2, 84:5,  
136:19, 145:13,  
150:17, 150:18,  
151:8, 151:22,  
153:21, 155:6,  
156:23, 171:10,  
176:24, 183:4, 183:6  
**wonder** [3] - 5:13,  
10:12, 112:15  
**wondered** [1] -  
196:15  
**word** [8] - 55:6,  
93:16, 94:22, 137:13,  
138:24, 142:11,  
167:23, 195:14  
**worded** [1] - 167:9

**words** [6] - 38:21,  
146:28, 158:26,  
168:14, 189:29,  
196:13  
**workings** [1] - 85:1  
**workplace** [2] -  
105:14, 129:21  
**works** [1] - 126:29  
**worry** [1] - 173:29  
**worth** [1] - 84:9  
**write** [2] - 38:19,  
81:10  
**writing** [4] - 38:8,  
61:26, 178:2, 182:3  
**written** [9] - 64:19,  
67:25, 67:27, 102:17,  
135:11, 158:13,  
172:8, 182:9, 182:10  
**wrongly** [1] - 148:20  
**wrote** [3] - 75:28,  
178:4, 187:16

---

## Y

---

**year** [6] - 33:24,  
34:20, 38:4, 39:24,  
70:8, 91:1  
**years** [5] - 31:24,  
36:28, 86:20, 101:20,  
157:19  
**Yes"** [1] - 116:25  
**yesterday** [48] - 5:8,  
6:20, 8:4, 9:1, 10:28,  
11:15, 13:7, 17:27,  
28:9, 35:3, 39:3,  
63:12, 64:15, 88:15,  
102:26, 104:10,  
106:10, 107:18,  
110:11, 110:12,  
110:19, 110:22,  
111:2, 112:5, 114:21,  
116:22, 117:28,  
119:17, 120:28,  
128:10, 128:26,  
130:26, 132:9,  
136:17, 137:22,  
138:22, 142:16,  
143:3, 152:2, 152:14,  
152:28, 153:26,  
162:28, 163:17,  
174:10, 182:12,  
196:28, 197:4  
**yesterday's** [2] -  
39:11, 108:8  
**young** [2] - 169:12,  
185:22  
**yourself** [8] - 23:3,  
69:29, 72:10, 98:13,  
105:28, 135:23,

152:16, 152:19

---

## €

---

**€150** [2] - 166:1,  
168:2

---

## £

---

**£150** [1] - 185:23

---

## É

---

**ÉIREANN** [2] - 1:5,  
1:6

---

## Ó

---

**Ó** [3] - 79:23, 80:7,  
80:12