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1921, ON 17 FEBRUARY 2017

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

HELD IN DUBLIN CASTLE
ON WEDNESDAY, 24TH JANUARY 2018 - DAY 47

47

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

GWEN MALONE STENOGRAPHY
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1 THE HEARING RESUMED ON WEDNESDAY, 24TH JANUARY 2018,
2 AS FOLLOWS:

3
4 MR. McDOWELL: Chairman, before I continue my
5 cross-examination of Ms. O'Sullivan, I looked at the 10:07
6 transcript yesterday and there was an exchange between
7 yourself and myself in relation to a question I was
8 putting to this witness, and clearly from the
9 transcript it appears that you drew the inference that
10 what I said might constitute a remark about your 10:07
11 impartiality or partiality. I want to assure the
12 Tribunal that that was not intended and that when I
13 said that the witness did not need your assistance, I
14 was not suggesting that you were assisting her in an
15 impartial or other than an impartial way. I want to be 10:07
16 100 percent clear about that, Judge.

17
18 FORMER COMMISSION NÓIRÍN O'SULLIVAN WAS CONTINUED TO BE
19 CROSS-EXAMINED BY MR. McDOWELL:

20 1 Q. MR. McDOWELL: Could I ask you, Ms. O'Sullivan, to look 10:08
21 at volume 4, page 2769.

22 A. I beg your pardon, Mr. McDowell, is it 27 --

23 2 Q. 69, I think?

24 A. Would it be 59, no?

25 3 Q. It's towards the back of volume 4. 10:08

26 A. 2769.

27 4 Q. Very near the end of volume 4.

28 A. Yes, I have that, Chairman.

29 5 Q. And this is a transcript of evidence before the

1 O'Higgins Commission, I just want to get the exact date
2 correctly, on Monday, 7th December 2015, which was
3 after you had been in and out of the Commission
4 yourself?

5 A. Yes, Chairman. 10:09

6 Q. And the evidence was being given by Superintendent
7 Cunningham to Mr. Gillane on that day, and Mr. Gillane,
8 at question 26 said:

9
10 "You can rest assured that we have that material, 10:09
11 indeed we have heard evidence in respect of it and that
12 it will be considered by the judge, particularly in the
13 context in which you have mentioned it today, but also
14 in the specific modules where we have heard evidence.
15 For today's purposes the intention is to keep things 10:10
16 narrow and focused on I know what might seem artificial
17 to you, but I don't want to you think --"

18
19 And he said:

20 10:10
21 "A. It doesn't in one way feel artificial, Judge.
22 Because, Judge, you have been very clear in all of your
23 remarks and you have been very fair in relation to
24 these modules. You have been very clear to everybody
25 that you have given them the opportunity elicit 10:10
26 whatever information they have to assist you in the
27 investigation. I am trying to do exactly that because
28 I have, since my promotion to superintendent, not only
29 been not supported by Sergeant McCabe but I have been

1 undermined at every turn that he could."

2
3 This was a view expressed towards the very end of the
4 O'Higgins Commission by Superintendent Cunningham, that
5 Sergeant McCabe had not only been of no assistance to 10:10
6 him, but that he had undermined him at every turn that
7 he could. Now, had you any reason to believe that
8 Superintendent Cunningham was so hostile to Sergeant
9 McCabe?

10 A. Well, Chairman, I am reading the transcript now and 10:11
11 obviously I wasn't present on the day. As I said from
12 the outset, the interactions between Sergeant McCabe
13 and local Garda management, who would of course have
14 included Superintendent Cunningham, were a matter for
15 the Commission to establish what interactions had taken 10:11
16 place.

17 7 Q. Yes. But then I'm asking you, had you any knowledge
18 that there was bad blood between them to that extent,
19 that Superintendent Cunningham believed that Sergeant
20 McCabe was a man who had tried to, to use his own 10:11
21 words, to undermine him at every turn that he could?

22 A. I had never spoken to Superintendent Cunningham in
23 respect of his view of Sergeant McCabe. And, Chairman,
24 if I may, you know, in approaching the O'Higgins
25 Commission, as I said from the outset, the matters were 10:12
26 to put all of the matters before the Commission and to
27 have all of the witnesses present their in evidence a
28 fair and impartial way, and to have that evidence
29 examined, in the knowledge that everybody was

1 represented by counsel and in the knowledge that was
2 presided -- the Commission proceedings were presided
3 over by the sole Member. And also, Chairman, and
4 Mr. McDowell, I am sure you will appreciate, I gave my
5 instructions, the running of the Commission wasn't for 10:12
6 me to go down and interfere with witnesses who were
7 giving their testimony. The running of the Commission
8 and the questions that were put were left there to the
9 latitude of counsel and the Commission proceedings
10 themselves. 10:12

11 8 Q. I follow your point there, but you see, the point I'm
12 making to you is, you have just said that everybody was
13 represented by counsel. There was one counsel, one
14 senior counsel representing both yourself and
15 Superintendent Cunningham? 10:13

16 A. That's correct, Chairman. Superintendent Cunningham
17 was a member of An Garda Síochána at that time, and
18 still is.

19 9 Q. And that counsel, that counsel was Mr. Smyth, Senior
20 Counsel, isn't that right? 10:13

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

22 10 Q. And in relation to how your instructions would be
23 carried through as respect Sergeant McCabe, there was a
24 single counsel representing you, and you are saying
25 that you wanted to be impartial as between all 10:13
26 witnesses?

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

28 11 Q. And he also represented Superintendent Cunningham, who
29 was vehemently of the view that Sergeant McCabe was a

1 man who was trying to undermine him and destroy his
2 career?

3 A. Well, Chairman, I am not in a position to account for
4 Superintendent Cunningham's experience of Sergeant
5 McCabe. I am reading the transcript and, as I say, I 10:14
6 wasn't there on the day.

7 12 Q. But when it came to the question of a conflict of
8 interest, did you not see that if you were there trying
9 to be the impartial referee, as you claim, and let all
10 of the truth come out, you were using as your 10:14
11 mouthpiece counsel instructed by a man whose view it
12 was that Sergeant McCabe was trying to destroy his
13 career?

14 A. Well, I wouldn't view that Mr. Smyth was my mouthpiece.
15 Mr. Smyth was the senior counsel appointed by the 10:14
16 Attorney General's office to represent the interests of
17 An Garda Síochána, and at that time my advices were
18 that counsel would represent the interests of all
19 members, serving and retired.

20 13 Q. Well, put it this way: I think on a number of 10:14
21 occasions yesterday and the day before, dealing with
22 Ms. Leader and myself, you advanced the view that your
23 counsel was not to be focused on Sergeant McCabe, but
24 was to ask hard questions, I presume, of all people in
25 relation to establishing the truth? 10:15

26 A. That's correct, Chairman. The advices were that
27 certain background matters would have to be put to all
28 of the witnesses and the evidence of all of the
29 witnesses tested.

1 14 Q. I see.

2 A. And on the basis of those advices, they were the

3 instructions I gave.

4 15 Q. And who was going to test Superintendent Cunningham in

5 respect of all of these matters? 10:15

6 A. Well, I presume it was open, my belief would be it was

7 open to everybody to test Superintendent Cunningham's

8 evidence.

9 16 Q. You see, if the suggestion is that Superintendent

10 Cunningham was in the process to have his motivation 10:15

11 and his behaviour challenged, if that is your

12 suggestion, you were relying on somebody else to do it,

13 isn't that right?

14 A. Well, Chairman, at any stage, and as was advised to me

15 by Mr. Ruane, the Head of Legal Affairs, if at any 10:16

16 stage a conflict of interest arose then I would have

17 been advised, I have no doubt, that there was a need to

18 revisit the matter of representation, and that was the

19 understanding on which we entered into the proceedings

20 on. 10:16

21 17 Q. Yes. Well, I am suggesting to you that there was a

22 manifest conflict of interest between your desire to

23 impartially explore all of the circumstances and the

24 interaction of all of the people involved in this

25 matter through a counsel, and the fact that that 10:16

26 counsel was also instructed by somebody who had an

27 extremely hostile attitude to Sergeant McCabe?

28 A. Well, Chairman, the transcripts speak for themselves

29 and the examination of all the witnesses speaks for

1 itself. I can only give the instructions and then I
2 can only await if there are further advices received
3 which would deviate from those, the initial advices,
4 and that didn't happen.

5 18 Q. It seems to be the case that as regards the factual 10:17
6 instructions given to your counsel in relation to the
7 meeting in Mullingar with Superintendent Cunningham,
8 that your counsel was dependent on Superintendent
9 Cunningham?

10 A. That would be correct, Chairman, yes. I didn't give 10:17
11 factual instructions to counsel because I didn't have
12 the factual knowledge to be able to instruct counsel in
13 relation to the interactions that happened.

14 19 Q. Obviously. You weren't there and you couldn't say what
15 happened? 10:17

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

17 20 Q. But it would appear that the instructions that were
18 given to Mr. Smyth and his fellow barristers on this
19 issue, were given by somebody who believed that
20 Sergeant McCabe was intent on destroying his career? 10:18

21 A. Well, Chairman, I was not present at the consultations
22 and I find it very difficult to agree or disagree. I
23 don't know what happened at the consultations with the
24 other witnesses, and I'm not in a position to say what
25 instructions were given or what factual input was made 10:18
26 by other people.

27 21 Q. Well, can we -- can I assume that Superintendent Fergus
28 Healy never indicated to you that there was this depth
29 of hostility towards Sergeant McCabe on the part of

1 Superintendent Cunningham?
2 A. That's correct, Chairman. It was never conveyed to me
3 in that manner.
4 22 Q. I see. And I don't know whether you read the
5 following, what is on the following page, 2770, he went 10:19
6 on to say:
7
8 "I have been met by people who held me in the height of
9 respect and whom I have respected and I have been
10 questioned by them and things have been said to me. 10:19
11 Imagine collecting your 19-year-old daughter at 4:00 in
12 the morning, because I have a people carrier and
13 collect all the kids and bring them home, and a young
14 fellow 17, 19 feeling a bit brave because the drink was
15 in and the wit was out, and he said to me, Noel, were 10:19
16 you in Bailieboro, were you involved in all this stuff
17 in Bailieboro that is going on over there, all this
18 corruption and that? And my daughter is sitting
19 looking over at me and me not answering. My answer has
20 always been the truth will out." 10:20
21
22 And then Mr. Smyth said:
23
24 "Yes."
25 10:20
26 And he said:
27
28 "I am totally --"
29

1 Sorry, Mr. Gillane said "yes". And he said:
2
3 "I am totally depending, absolutely depending and
4 completely depending, because I have never said once to
5 anyone, any civilian, any member of a county council, 10:20
6 any member of JPC, which is a joint policing committee,
7 that I investigated Maurice McCabe for an alleged
8 sexual assault on a nine-year-old child. I have just
9 simply said the truth will out. I am totally,
10 absolutely completely depending on this Commission, 10:20
11 this inquiry, to ensure that the truth will out."
12
13 Now, that suggested very strongly that Superintendent
14 Cunningham was asking the Commission to draw a poor
15 view of Sergeant McCabe as a man who had undermined his 10:21
16 career and was exposing him to public obloquy.
17 A. Well, Chairman, I am reading the transcript but I don't
18 feel that I can account for the evidence of a witness
19 before a commission.
20 23 Q. And what happened then was, counsel said: 10:21
21
22 "Yes, I understand, and I think the Commission
23 understands the tenor of what was said and I don't
24 propose to ask you to elaborate on issues which the
25 Commission may not be able to investigate having regard 10:21
26 to our terms of reference. The essence of what you
27 have said is taken on board and will be evaluated by
28 the Judge in due course."
29

1 This is Superintendent Cunningham:

2
3 "I appreciate that, because Mr. McDowell was extremely
4 clear, extremely clear, when he discussed principles on
5 day 1 or 2, when we were here, the principles of 10:22
6 jurisprudence and the place that motivation has in
7 relation to criminal trials. But the Judge has been
8 equally clear on every occasion that this is not a
9 court, this is an inquiry.

10 Q. You needn't worry about Mr. McDowell. 10:22

11 A. I don't worry about anybody. I only worry about
12 Noel Cunningham."

13
14 I have got to suggest to you that that was not -- that
15 witness was not somebody who ought to have been 10:22
16 co-instructing counsel with you in relation to these
17 matters, if you wanted the matter to be impartially
18 investigated by a single team of counsel?

19 A. Well, Chairman, what I can say is that the advices that
20 I received from the head of legal affairs was that all 10:22
21 members -- as was established practice, that all
22 members would be represented, and that if a conflict
23 arose, at no stage was I informed by anybody that any
24 conflict had arisen at any stage and that there was a
25 necessary -- it was necessary to review the arrangement 10:23
26 and to seek separate representation.

27 24 Q. Thank you. In relation to -- could I ask you now to
28 move to book 6, please?

29 A. Yes, Mr. McDowell.

1 25 Q. And could I ask you to go to page 3346?

2 A. Yes, Chairman, I have that.

3 26 Q. And really it's the following page I suppose is the
4 more relevant one. This is a statement by Ken O'Leary,
5 the former Deputy Secretary in the Department of
6 Justice, and he is due to give evidence here, and he
7 says:

10:24

8
9 "The report issued by the Department on 27th
10 November --"

10:24

11
12 And this is in relation to the recent political
13 controversies.

14
15 "-- headed the "Final Report on Search and Retrieval of
16 Records" indicates that a former senior official has
17 provided information regarding his recollection of a
18 telephone conversation with the Garda Commissioner made
19 to him at this time. The statement goes on to indicate
20 that no written record has been located of the call --
21 of this call."

10:24

10:24

22
23 He says:

24
25 "I believe I am the person referred to in the report.
26 It will be appreciated that the discussion in question
27 took place over two-and-a-half years ago and I do not
28 have a perfect recall of every detail of it. However,
29 I set out here my best recollection of what transpired.

10:25

1 On the afternoon of the 15th May 2015, former
2 Commissioner O'Sullivan contacted me in relation to a
3 matter that had arisen at the O'Higgins Commission that
4 day."

5
6 well, first of all, do you believe it was in the
7 afternoon or at 8:00, 7:00 in the evening, do you have
8 any time -- view on this?

9 A. No, I believe I spoke to Assistant Secretary O'Leary in
10 the afternoon, I believe. I haven't got my phone
11 records here in front of me but I believe sometime
12 after about a quarter past four.

13 27 Q. Yes. And that was after you had re-confirmed your
14 instructions, is that right?

15 A. That would be correct, Chairman, yes.

16 28 Q. Yes. And that he says that you contacted him in
17 relation to a matter which had arisen at the O'Higgins
18 Commission that day, is that your recollection?

19 A. Chairman, I would, as I said, I would have cause to
20 speak to Assistant Secretary O'Leary on a number of
21 different matters and I have no doubt on this day I
22 would have said to him that a matter had arisen at the
23 Commission.

24 29 Q. Well you see, I think there is an important distinction
25 here; you could be talking to him about some security
26 matter and then just pop this in as another item which
27 was on your mind, or you could, as Mr. O'Leary seems to
28 suggest, say that you contacted him in relation to a
29 matter which had arisen at the O'Higgins Commission

1 that day. They are quite different, aren't they?

2 A. Well, not necessarily, Chairman, because obviously

3 there are often times, the nature and the dynamic

4 nature of the job of Garda Commissioner is that you

5 would discuss a number of matters. But on this 10:26

6 occasion, to the best of my recollection -- Assistant

7 Secretary O'Leary was a very experienced member of the

8 Department, I would trust him and talk to him about the

9 most serious and sensitive matters, and on this

10 occasion I have no doubt I would have said to him 10:27

11 that -- because I was surprised that this issue had

12 arisen and that at least twice I had been asked to

13 reconfirm my instructions, and what was on my mind was,

14 was there something going on in the background that I

15 was not aware -- or that I was unaware of and which I 10:27

16 should be aware of, that may have informed my decision

17 in some way, but at this point in time when I spoke to

18 Assistant Secretary O'Leary my decision and my

19 instructions had already been re-confirmed and I was

20 just satisfying myself was there something going on in 10:27

21 the background that I should be aware of.

22 30 Q. You were seeking -- on your account you were seeking

23 reassurance from him, is that right?

24 A. I suppose I was just satisfying myself that there was

25 nothing that I hadn't considered in making my decision. 10:28

26 31 Q. Yes.

27

28 "My understanding from what the then-Commissioner said

29 was that counsel for Sergeant McCabe had reacted

1 strongly to an issue which had arisen at the Commission
2 that somehow related to a previous criminal complaint
3 made against Sergeant McCabe and that counsel for
4 Sergeant McCabe had asked whether the issue was being
5 raised on the instructions of the Commissioner." 10:28

6
7 Could you have said that to him?

8 A. Well, Chairman, I am going again on my phone records
9 and just from my memory, I have read Mr. O'Leary's
10 statement. Some of it, and I know that at a later part 10:28
11 of the statement he says I was on the phone at the same
12 time to Chief Superintendent Healy. That doesn't
13 accord with my memory. But as I say, I would have had
14 a call, I know, with Assistant Secretary O'Leary later
15 that evening as well, and I know certainly in the 10:28
16 following week I would have had several telephone calls
17 with Assistant Secretary O'Leary.

18 32 Q. Yes. And Mr. O'Leary then says:

19
20 "I had no prior knowledge of what evidence An Garda 10:29
21 Síochána intended to or were in a position to present
22 to the Commission or any case they proposed making."
23

24 And he then says:

25 10:29
26 "I can recall being acutely conscious during the
27 conversation of the proper position of the Department
28 in relation to the O'Higgins Commission, and I
29 specifically remember mentioning to the then-Garda

1 Commissioner at an early stage of our discussion that
2 the Department could not become involved or attempt to
3 influence in any way the approach of An Garda Síochána
4 to the Commission which was entirely a matter for her
5 as Garda Commissioner." 10:29

6
7 Could he have said that to you?

8 A. Well, Chairman, that was always my position. I was
9 always well aware that the Department had no role in
10 relation to my position at the Commission -- or sorry, 10:29
11 I beg your pardon, at the Commission or An Garda
12 Síochána's position at the Commission. So he may
13 really have reiterated that, but I knew that from the
14 outset.

15 33 Q. Yes. 10:30

16
17 "The then-Commissioner fully accepted this."
18

19 He says. So obviously he thinks that you did discuss
20 the fact that the Department had no proper role in this 10:30
21 matter.

22 A. That's Mr. O'Leary's recollection, yes, Chairman.

23 34 Q. "It was against that background too that I did not seek
24 any further clarification of what had arisen at the
25 Commission, the conduct of which I was aware was 10:30
26 confidential, or information as to what evidence was
27 intended to present to the Commission or the nature of
28 any legal case to be made."
29

1 And then he says:

2
3 "The focus of our conversation related to the question
4 of evidence and I do not recall it touching on any
5 overall legal strategy, counsel for the Commissioner 10:30
6 might indicate to the Tribunal, as set out in the
7 transcripts which subsequently entered the public
8 domain, and as referred to by counsel for the Tribunal
9 in his opening statement, where counsel for An Garda
10 Síochána made general comments in relation to their 10:31
11 approach to Sergeant McCabe. While clearly accepting
12 that the Department could have no role in determining
13 the Garda position in relation to the Commission, the
14 Commissioner asked me if, based on my experience,
15 anything occurred to me which she might need to be 10:31
16 mindful of in addressing this particular issue with her
17 legal advisors."

18
19 Could that have happened?

20 A. Well, Chairman, as I say, and if I may, Mr. McDowell, I 10:31
21 just see the aide-memoire, Chairman, for the phone
22 calls here, so it might assist us, if I can refer to
23 this. So I note that at 16:16 I make a telephone call
24 to Mr. O'Leary which lasts for three minutes and 35
25 seconds. I don't have another telephone call with 10:31
26 Mr. O'Leary until 21:05 of that evening and I have a
27 telephone call with him for seven minutes and 36
28 seconds. So, Chairman, I can't specifically recall at
29 what stage that these -- Mr. O'Leary's recall or memory

1 is coming from, but I would not dispute that I may have
2 asked Mr. O'Leary if there were other matters -- I was
3 aware that Sergeant McCabe had, if I use the phrase, a
4 separate line open with the Department, he was in
5 communication with the Minister and he was in 10:32
6 communication with the Department in relation to
7 certain matters, as was his legal team. And I suppose
8 what was on my mind was, was there something else going
9 on in parallel that I should be aware of? And that is
10 the context that I would have asked that question in. 10:32

11 35 Q. "To the best of my recollection matters mentioned were
12 the need for sensitivity in relation to the detecting
13 the position of Sergeant McCabe."
14

15 Could you have mentioned that or did he mention that? 10:32

16 A. Well, Assistant Secretary O'Leary would be very much
17 aware of the measures that were in place to support
18 Sergeant McCabe and the ongoing efforts that I was
19 making to support Sergeant McCabe.

20 36 Q. But do you recollect whether the need to protect 10:33
21 Sergeant McCabe was being discussed by you with him at
22 that time?

23 A. Chairman, again, to the best of my memory, and I can
24 only give you my memory, I believe that I would have
25 spoken after the Monday, the 18th, to Assistant 10:33
26 Secretary O'Leary in relation to the issue that had
27 arisen in the workplace in Mullingar, and I also
28 believe that I spoke to Mr. Waters about that and I
29 certainly would have told them of what was going to

1 happen after that, to make sure that the local
2 management supports were in place. But that would have
3 been on the Monday.

4 37 Q. well --

5 A. Or after the Monday.

10:33

6 38 Q. -- we are dealing now as best we can with what happened
7 on the Friday, at sometime on the Friday. And:

8
9 "To the best of my recollection the matters mentioned
10 were the need for sensitivity to protect the position
11 of Sergeant McCabe, the position of other people at the
12 Commission against whom serious allegations had been
13 made, the likely adverse reaction of the Commission to
14 the introduction of matters which it might consider
15 inappropriate, and the overall duty on the Garda
16 Commissioner to assist the Commission in whatever way
17 possible to establish the facts of what the Commission
18 had been asked to investigate."

10:33

10:34

19
20 Do you think that you discussed whether the
21 introduction of this material would be welcomed by the
22 Commission itself?

10:34

23 A. I can't specifically recall that, Chairman, but as I
24 said, I was always very conscious of the proceedings
25 that were going on, the independence and the integrity
26 of the proceedings and that was always a concern, and I
27 can't remember specifically -- I don't have the same,
28 the exact same recall as Assistant Secretary O'Leary
29 but as I say, certainly in terms of some of the issues

10:34

1 it may well have taken place the following week.

2 39 Q. And the next sentence reads:

3

4 "The Commissioner was then going to discuss these
5 matters with her legal advisers and I reiterated that
6 she would have to be guided by the legal advice
7 available to her."

10:34

8

9 Did you indicate to him that you intended to discuss
10 the matter further with your legal advisers?

10:35

11 A. Chairman, I had already taken the advices from the
12 legal advisers. I had already given my instructions,
13 and what I may have said to Mr. O'Leary is that there
14 is the document that was being worked up over the
15 weekend. But as I say, I already had a telephone
16 conversation with Mr. Waters in relation to alerting
17 him to the fact that there was an issue had arisen at
18 the Commission.

10:35

19 40 Q. Because then what he says is:

20

21 "I believe that in the circumstances the Commissioner
22 indicated to the effect that her legal team should
23 maintain their position that afternoon, but that there
24 should be further detailed consultation with her legal
25 team subsequently about the matter."

10:35

26 A. Well, Chairman, the only -- the only thing that I can
27 offer is that, again, my decision and the instructs
28 have been given earlier that day, the only thing I
29 would have been aware of at the 16:16 phone call was

1 the fact that the document -- sorry, it was later,
2 actually, it was at, I would say, 7:00 that the
3 document was going to be worked up over the weekend and
4 that that was a piece of work that was ongoing by the
5 legal team.

10:36

6 41 Q. You see, this is -- I am putting this to you in the
7 context that Ms. Annmarie Ryan was making a request
8 through Chief Superintendent Fergus Healy for an urgent
9 consultation between herself, counsel and yourself, and
10 she says she was led to believe that you were too busy?

10:36

11 A. Well, Chairman, I would never be too busy to have a
12 meeting -- a consultation with counsel, and certainly I
13 heard or read Ms. Ryan's evidence and I know that
14 Ms. Ryan would say, and says, that she made contact
15 with Chief Superintendent Healy later that evening, and
16 also, I believe, on the Saturday evening, and all I can
17 say is, that from my -- to the best -- from my memory
18 and also from my records, there was no attempt made to
19 relay that information to me and to make it an
20 imperative that I would meet with counsel over the
21 weekend.

10:37

10:37

22 42 Q. And Chief Superintendent Healy told the Chairman on day
23 44 of this Tribunal:

24
25 "Well, I suppose Ms. Ryan was pushing for a
26 consultation, yes, and I conveyed that to the
27 Commissioner. At the weekend concerned the
28 Commissioner was unavailable."

10:37

29 A. Well, Chairman, as I said, I know where I was that

1 weekend, and there was never anything that I would be
2 so busy at that I would not make myself available if it
3 had been pressed upon me or if it had been conveyed to
4 me in a manner that counsel or indeed the solicitor to
5 counsel wished to have a meeting or a consultation, I 10:37
6 would have made myself available at any stage.

7 43 Q. Well then, maybe we can explore this question very
8 briefly: Insofar as Chief Superintendent Healy said
9 you were -- told Ms. Ryan that you were available for a
10 consultation because you were busy that weekend, that 10:38
11 was not true?

12 A. Well, Chairman, if I could put it this way, and this
13 isn't me just saying this, I am always busy but there
14 is nothing that I wouldn't -- that I would be doing
15 that I would not make myself available. I'm not sure 10:38
16 where Chief Superintendent Healy got the impression --
17 there was certainly lots of things happening but I am
18 not sure where Chief Superintendent Healy got the
19 impression that I was too busy to make myself available
20 for a consultation, because that would never be the 10:38
21 case.

22 44 Q. I see. Mr. O'Leary says:

23
24 "I also believed I suggested that from her point of
25 view, it might be helpful if it was possible to gain 10:39
26 more time so that she could consider the matters more
27 fully with her legal advisers."

28
29 Did that happen?

1 A. Well, Chairman, all I can say: At the time from the
2 telephone records, I had the conversation with
3 Mr. O'Leary, I had requested Chief Superintendent Healy
4 to see if it was possible to have an adjournment, and
5 the adjournment at that point I knew was not possible. 10:39
6 So at that stage, when I spoke to Mr. O'Leary, I would
7 have known that an adjournment was not possible and
8 that I had to give my instructions more or less
9 immediately, or reconfirm my instructions more or less
10 immediately. 10:39

11 45 Q. "To the best of my recollection --"

12
13 He continues.

14
15 "-- I received a further phone call shortly afterwards 10:39
16 from the then-Commissioner. I think at least for some
17 of the call she was also on the phone to Garda legal --
18 HQ legal officer at the O'Higgins Commission."

19
20 That must be a reference to Superintendent Healy, not 10:39
21 to anybody else, I take it?

22 A. I would presume so, Chairman. But the only -- as I
23 say, the only record I have to go on is the log of the
24 phone calls and I just don't see that sequence of phone
25 calls on the log. 10:40

26 46 Q. "As I understand it, the Commissioner was being advised
27 that her legal representative at the Commission had to
28 respond more or less immediately to the issue which had
29 arisen earlier and the view of her legal team was that

1 in discharging their obligation to the Commission there
2 was a legal duty on her to raise the matters which had
3 arisen. I believe that in the circumstances the
4 Commissioner indicated to the effect that her legal
5 team should maintain their position that afternoon, but 10:40
6 there would be further detailed consultation with her
7 legal team subsequently about the matter."
8

9 Could that have happened?

10 A. Well, Chairman, I can only go on my memory and on the 10:40
11 log of the telephone calls I have, and as I say, the
12 log of calls doesn't just sequence with Mr. O'Leary's
13 recollection. But as I say, over a sequence of phone
14 calls that day and perhaps the following week, I may
15 have recounted some of these circumstances to 10:41
16 Mr. O'Leary, but I can't account for Mr. O'Leary's
17 recollection.

18 47 Q. "Sometime that afternoon, Mr. Michael Flahive,
19 Assistant Secretary, telephoned me to the effect set
20 out in his email of the same day, which had been 10:41
21 disclosed to the Tribunal -- which has been disclosed
22 to the Tribunal. I mentioned to Mr. Flahive that the
23 Garda Commissioner had spoken to me and my
24 understanding was that she was continuing to consult
25 with her legal advisers about the matter. We both 10:41
26 agreed it was clearly not a matter in which the
27 Department or Minister could have any involvement.
28 Equally we agreed that as the office of the Attorney
29 General had been in touched with him, that the Minister

1 should be informed of this fact."

2
3 And then he goes on to say that he didn't alert the
4 Minister on that day.

5
6 You see, Ms. O'Sullivan, if Superintendent Healy's note
7 of what you advised him is taken at face value, and
8 that was that if the matter arose in questioning, it
9 was legitimate for them to pursue the question of
10 Sergeant McCabe's motivation, that's what he noted, if 10:41
11 that note is correct it does suggest that on Friday,
12 15th May 2014 you were still open to changing your mind
13 on this subject and you intended to consider the matter
14 further after the Commission ceased its Friday sitting.

15 A. Well, Chairman, at the stage that the spoke to Chief 10:42
16 Superintendent Healy, I had asked Chief Superintendent
17 Healy to have the advices that we had received
18 committed to writing and to relay them to me. He did
19 that, and on the basis of the -- on the basis of those
20 advices, I re-confirmed my instructions that day. At 10:43
21 any time I would have been open -- if I had received
22 different advices, I would have been open to reviewing
23 my instructions or indeed if anything else came into my
24 knowledge that required me to go back and to revisit
25 something, of course I would have done it, but that 10:43
26 never arose.

27 48 Q. And it never arose, I suggest to you because somehow
28 Ms. Annmarie Ryan's request for an urgent consultation
29 with you was a ball that was dropped; you never heard

1 that she was looking for an urgent consultation with
2 you?

3 A. Well, a consultation didn't take place, Chairman, and I
4 certainly was not left with or given the impression
5 that a consultation was required. As I said, the email 10:44
6 that I received from Chief Superintendent Healy sending
7 me the advices arrived at 19:17 that evening. He had
8 already previously that day relayed them to me over the
9 phone. That came that evening and we subsequently had
10 a telephone conversation, but I was left with the 10:44
11 impression that the work that was to be done over the
12 weekend was the completion and the compilation of the
13 document which Mr. Justice O'Higgins had required to be
14 submitted on the Monday morning.

15 49 Q. You see, I know you are admirably reluctant to ascribe 10:44
16 blame or fault or error to anybody else in this matter,
17 but if Ms. Anmarie Ryan was looking for an urgent
18 consultation with you and if you weren't aware of that,
19 it can only be, can't it, that Superintendent Healy,
20 Chief Superintendent Healy didn't convey that message 10:45
21 to you?

22 A. Well, Chairman, I do know that everybody -- and I have
23 listened and read the evidence, I know that everybody,
24 Chief Superintendent Healy, Ms. Ryan and indeed
25 counsel, were under tremendous pressure that weekend to 10:45
26 have the document prepared for Mr. Justice O'Higgins,
27 and my impression was that that was the work that was
28 going on over the weekend in terms of the completion of
29 that document.

1 50 Q. Yes. Well, I come back to my question again: That if
2 she was -- if her evidence -- and your counsel didn't
3 suggest to her that she was wrong in this, in saying
4 so. If her evidence is correct, that she was seeking
5 an urgent consultation with you, and she reiterated 10:45
6 that several times in her evidence here, the only
7 explanation for you not knowing about it is that Chief
8 Superintendent Healy dropped the ball and didn't convey
9 that request to you?

10 A. Well, Chairman, I wouldn't use the analogy of drop the 10:46
11 ball. The fact is the message wasn't conveyed in the
12 manner in which Ms. Ryan emphasised in her evidence.

13 51 Q. But you see, Chief Superintendent Healy has given
14 evidence here to the Chairman that he did convey that
15 request to you and that you indicated that you were 10:46
16 busy, that you were unavailable?

17 A. Well, Chairman, all I can say is, I wouldn't never be
18 too busy and I have gone through in detail all of my
19 itinerary for that weekend and I was certainly here and
20 available all over that weekend and all day Monday, I 10:46
21 was available. Again what I have done is, I have gone
22 back over all of the telephone records and I received
23 no communication from anybody over that weekend to
24 suggest that there was any requirement, including,
25 indeed, and I heard Mr. Ruane's evidence as well -- 10:46
26 read it, rather, about the interaction between himself,
27 Ms. Ryan and Chief Superintendent Healy on that
28 evening. That interaction was never conveyed to me
29 either. So, that's, Chairman, probably as far as I can

1 put the matter.

2 52 Q. I see. But I mean, it does appear that Mr. O'Leary was
3 left with a very strong impression that you were going
4 to consider the matter further in consultation with
5 your lawyers? 10:47

6 A. The only thing I can offer, Chairman, is: At the 16:16
7 phone call it may well be the case that I said to
8 Assistant Secretary O'Leary that the issue had arisen,
9 that the matter, we were waiting -- or that the Judge
10 had directed, either then or later that night that the 10:47
11 Judge had directed the document to be prepared over the
12 weekend and that's -- I can't recall any further than
13 that, Mr. McDowell.

14 53 Q. Well, there is another possibility, and that is that
15 Ms. Ryan is correct in her recollection and that Chief 10:48
16 Superintendent Healy is correct in his recollection,
17 that he conveyed the request to you and that you
18 indicated that you were too busy to deal with it?

19 A. Well, Chairman, as I say, I would never be too busy, if
20 I received a request to have a consultation with 10:48
21 counsel, I would never, ever be too busy. And several
22 counsel have worked with me over the years, I am never
23 too busy to have a consultation with counsel.

24 54 Q. I see. Well, could it be that once you had their, what
25 was referred to as a letter of comfort, saying what 10:48
26 counsel's advice to you was in broad outline, that you
27 decided that you did not want to have any further
28 involvement in giving them instructions on this matter?

29 A. Not at all, Chairman. I was -- the advices I had

1 received, I was very confident and happy to give the
2 instructions on the basis of those advices. I gave
3 those instructions, and if at any stage I had been
4 asked to revisit those advices or further advices had
5 arrived from counsel, I would have also been very happy 10:49
6 to instruct in relation to those advices -- any new
7 advices.

8 55 Q. I see. Mr. Flahive made a statement in this matter, we
9 know, isn't that right?

10 A. That's correct, Chairman, yes. 10:49

11 56 Q. And his statement deals with his dealings with
12 Mr. Barrett in the Attorney General's office?

13 A. That's correct, Chairman. Sorry, Mr. McDowell what
14 page is that at, please?

15 57 Q. That is at page 3336. 10:49

16 A. Yes, Chairman, I have that.

17 58 Q. And in the course of that statement, he refers to an
18 email that he sent to a number of people in the
19 Department of Justice, including the Minister's private
20 secretary, Mr. Waters, Mr. O'Leary and Mr. Power that 10:50
21 afternoon, isn't that right?

22 A. Sorry, I'm just -- I take --

23 59 Q. I will bring you to 3343 and you will see the next of
24 it there.

25 A. Thank you, yes. 10:50

26 60 Q. And in the second-last paragraph he says:

27

28 "Probably the Garda Síochána are raising the matter on
29 the basis that they could argue and Sergeant McCabe

1 would deny that it is possibly relevant to motivation."

2
3 Now, he was of the view that the allegation that had
4 been made against Sergeant McCabe had been raised at
5 the hearing, and whether that is a fair or -- whether 10:51
6 that is a fair or unfair resumé of what had happened,
7 he says:

8
9 "Probably the Garda Síochána are raising the matter on
10 the basis that they could argue and Sergeant McCabe 10:51
11 would deny that it's potentially relevant to
12 motivation. Richard advised me that counsel for
13 Sergeant McCabe objected to the issue being raised and
14 asked whether the Garda Commissioner had authorised
15 this approach. Richard also told me that the Garda 10:51
16 Commissioner's authorisation had been confirmed."

17
18 And then he says:

19
20 "Although I understand separately that this may be 10:51
21 subject to any further legal advice."

22
23 Now, the term "separately" there suggests that he had,
24 from some other source, and we will find out from him
25 when he gives evidence, been told that you were going 10:51
26 to -- that this was subject to further legal advice,
27 and that all -- in effect, what I am suggesting to you
28 is, that he understood that you had established a
29 holding position for that afternoon and the matter was

1 to be reconsidered.

2 A. No, Chairman, I re-confirmed my instructions, as I was
3 asked to do. I re-confirmed my instructions during the
4 adjournment that afternoon, and from my memory, the
5 instructions were actually re-confirmed twice, if I'm 10:52
6 not mistaken.

7 61 Q. I see. So can I suggest to you that a number of people
8 who dealt with you that afternoon were under the
9 impression that you were open to reconsidering this
10 matter and taking further legal advice on it? 10:52

11 A. Well, Chairman, I would always be willing to take
12 further legal advice if it was made available to me,
13 but in these circumstances, it was not made available
14 to me, the advices remained the advices, the
15 instructions that I gave remained the instructions that 10:53
16 I gave, and nobody ever approached me and said to me
17 there are further advices that are being conveyed.

18 62 Q. Well, you see, that is what switches the spotlight to
19 what Ms. Ryan was seeking to do, which was to get --
20 have a consultation with you on this very subject? 10:53

21 A. Well, Chairman, I accept Ms. Ryan's evidence. As I
22 say, the desire of Ms. Ryan to have a consultation was
23 never conveyed to me either verbally or in writing by
24 anybody, either on the Friday or over that weekend.

25 63 Q. Now, you mentioned a few moments past that you raised 10:53
26 on the following Monday, I believe, with Mr. O'Leary
27 and Mr. Waters the reaction of Sergeant McCabe which
28 had led to his resignation of his position in
29 Mullingar. Can you tell us about that? what

1 discussion did you have with those two gentlemen in
2 relation to that?

3 A. Yes, Chairman. So what had happened was, as
4 Mr. McDowell had outlined yesterday, on 18th May, that
5 evening, I received a communication to say that 10:54
6 Sergeant McCabe had indicated to his line manager,
7 Superintendent Donal Murray in Mullingar that he
8 intended to step down as sergeant in charge of the
9 traffic unit but that he was willing to stay on as a
10 member of the traffic unit. He also indicated to 10:54
11 Superintendent Murray that the reason that he was going
12 to step down was that he felt he was under threat from
13 Nóirín O'Sullivan and that if anything was to happen,
14 that he would be -- or we would, I believe, An Garda
15 Síochána, would come down on him look a ton of bricks. 10:55

16 64 Q. Yes.

17 A. I was concerned about that. The first person I made
18 contact with was Chief Superintendent Healy to alert
19 him to the fact that this -- this -- I won't call it an
20 incident, but that this interaction had taken place. 10:55
21 And I then made contact, from my memory, with
22 Mr. Waters, to let him know also. And my concern was,
23 again, the fact that it was -- I suppose the prominence
24 and the profile that Sergeant McCabe had at that time,
25 if this was to become a matter of public, it now had 10:55
26 gone into the line management in Mullingar, who were
27 not involved at the Commission of Investigation, but if
28 this matter was to become public, the prominence and
29 the profile and the, I suppose the storm, both

1 political and public storm that it could create, I felt
2 it was necessary for Mr. Waters to be made aware of it.
3 And I know that I certainly subsequent that, but I
4 can't just recall specifically when, also spoke to
5 Mr. O'Leary in relation to the matter and I would have 10:56
6 reassured both Mr. Waters and Mr. O'Leary of the
7 support mechanisms that were in place and that I had
8 implemented for Sergeant McCabe to ensure that local
9 management, and I know that they were read into
10 evidence, I believe, yesterday, or the day before, and 10:56
11 to make sure that they were aware what was going on and
12 that support meshing mechanisms were in place.

13 65 Q. We will come back to the support mechanisms issue in a
14 moment, but are you saying that neither you nor Chief
15 Superintendent Healy, nor Mr. Waters, nor Mr. O'Leary 10:56
16 asked anybody, especially yourself, what had happened
17 on the previous Friday and that day to bring about this
18 reaction?

19 A. Well, again, Chair, the circumstances, and that he is
20 going back to Mr. O'Leary's note, I can only -- and I 10:57
21 don't want to presume on behalf of Mr. O'Leary, but I
22 can only imagine the synopsis of the events as they had
23 occurred. That the fact that the legal argument had
24 arisen, that Mr. Justice O'Higgins had required that
25 the facts would be set out or a document would be 10:57
26 prepared setting out the case, and that that was
27 prepared and sent down, that the Judge had ruled on the
28 matters and, thereafter, that Sergeant McCabe had
29 indicated to his management. And the fact was that, as

1 I said from the outset, that basically the facts had to
2 be put before the Commission and we were in the hands
3 of the sole Member as to his ruling on that matter, but
4 that the fact was around testing the evidence of
5 Sergeant McCabe in respect -- not just of Sergeant 10:58
6 McCabe but of all of the members, in respect of the
7 facts that were before the Commission.

8 66 Q. I appreciate that, and you have said that on a number
9 of occasions and I am not trying to cut you off but I
10 am asking you a different question. Here you have 10:58
11 something which you were concerned might come out in
12 the public domain, that he had suddenly resigned his
13 position, and you linked it in your own mind to what
14 had happened that day and the previous Friday at the
15 Commission of Investigation, isn't that right? 10:58

16 A. Well, I knew that Sergeant McCabe was a witness at the
17 Commission, and yes, but where I was at a loss,
18 Mr. McDowell, was to understand where Sergeant
19 McCabe -- how he felt and my concern was how he felt he
20 was under threat from me. 10:59

21 67 Q. Yes, exactly. And he might have, if I may put it to
22 you, he might have, in that context he might have --
23 you might have said to yourself, what is in this letter
24 that has been served on him today? what is it -- what
25 is it that he is taking offence at? what implication 10:59
26 has been put in writing that he is saying, I have no
27 longer trust in the Commissioner?

28 A. Well, it wasn't that he had no longer trust in me,
29 Chairman, he actually -- what he relayed to

1 Superintendent Murray was that he felt under threat, he
2 believed he was under threat from me personally.

3 68 Q. Yes. Well, then, I am asking you why it was that
4 nobody said, would you show me the letter? What is it
5 that this man is, let's use a common term, freaking out 10:59
6 about on that day?

7 A. But, Chairman, the letter had been submitted, as was
8 requested to be done, to Judge O'Higgins and Judge
9 O'Higgins had ruled on the letter by the close of
10 Commission business that day, and there matters rested. 11:00
11 He had ruled in terms of the motivation. And I accept
12 that the error in the letter, the "to" and "against",
13 that is absolutely understood now and it may not have
14 been as obvious on that particular day.

15 69 Q. I am asking a different question. You didn't know 11:00
16 about the "to" and "against" until 24th June?

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

18 70 Q. So why is it -- so forget that, and let's not talk
19 about the "to" and "against". Why is it that nobody
20 said, what happened on Friday evening and this morning 11:00
21 when we delivered that letter that has produced this
22 reaction in Sergeant McCabe?

23 A. Well, again, Chairman, my understanding from Chief
24 Superintendent Healy was that the only thing that --
25 because that was my call to Chief Superintendent Healy 11:00
26 that evening to check and see what has transpired, is
27 there something that happened that we should know
28 about, and his view at that time and his assessment of
29 that day was that the motivation issue had been ruled

1 upon by Mr. Justice O'Higgins. And, as I said, it was
2 unclear as to precisely what element of that Sergeant
3 McCabe felt made him under threat.

4 71 Q. Sorry, maybe we are missing each other or maybe I am
5 not making myself clear. I'm asking you why it was 11:01
6 that you didn't ask anybody what could have brought
7 about this reaction in Sergeant McCabe?

8 A. Well, I did, Chairman, I asked Chief Superintendent
9 Healy. That was the purpose of my call to Chief
10 Superintendent Healy that evening, to (a) alert him to 11:01
11 the fact that this interaction had happened with
12 Superintendent Murray, to see was there anything that
13 we needed to be aware of or was there anything more
14 that we could do for Sergeant McCabe, because I was
15 conscious he was due before the Commission the 11:01
16 following day again.

17 72 Q. Yes. Did you -- weren't you even curious yourself as
18 to what was going on in Sergeant McCabe's head?

19 A. Well, Chairman, you know, it's very difficult to try to
20 figure out what is going on in other people's heads. 11:02
21 And certainly from my perspective, I can't try to
22 second-guess or to preempt what is happening in
23 somebody else's head. I just have to deal with the
24 facts and find out the facts.

25 73 Q. Yes. Well, I mean, a letter had been sent on your 11:02
26 personal authority to Sergeant McCabe and to the
27 Commission saying what issues would be -- issues of
28 fact would be raised with a view to challenging his
29 motivation. And you are saying -- and subsequent to

1 the receipt of that letter Sergeant McCabe tenders his
2 resignation from the position of sergeant in charge of
3 the traffic unit in Mullingar, and you are -- I am
4 putting it to you that you have an extraordinary lack
5 of curiosity as to what your lawyers have put in a 11:02
6 letter sent on your authority to this man and to the
7 Commission which had provoked that reaction?

8 A. Well, Chairman, I haven't got a curious lack of
9 curiosity. I asked Chief Superintendent Healy. He
10 relayed to me what had happened that day and that the 11:03
11 issue of motivation had been raised, I was aware of
12 that on the previous Friday, and that the document had
13 been submitted and that the Judge had made a ruling on
14 it that the issue of motivation was peripheral. And he
15 relayed those facts to me, and I accepted those facts. 11:03

16 74 Q. Well, in the circumstances then, it never occurred to
17 you to say, can I see the letter you sent?

18 A. Not at that time, Chairman, because the letter was part
19 of the proceedings before the Commission.

20 75 Q. And on that account, that the Judge had -- Mr. Justice 11:03
21 O'Higgins had said that the ruling -- that the question
22 of -- issue of motivation was peripheral, you have a
23 sergeant in charge resigning his position; surely you
24 must have thought this is a gross overreaction and a
25 completely inexplicable act on the part of Sergeant 11:04
26 McCabe?

27 A. Well, what I was very surprised at, was that Sergeant
28 McCabe felt that he was under threat and conveyed to
29 his superintendent that he was under threat from me

1 personally and that it had been indicated -- or that he
2 indicated to him that he felt if he was to continue as
3 sergeant in charge, that he would -- we, and I am
4 presuming that Garda management, would come down on him
5 like a ton of bricks. And I just could not make the 11:04
6 connection.

7 76 Q. Yes. And you weren't being told at that time that
8 Mr. Smyth had said that he was going to be challenging
9 Sergeant McCabe's integrity throughout the Tribunal or
10 the Commission? 11:04

11 A. No, Chairman --

12 77 Q. You weren't aware of that?

13 A. I wasn't aware of that at that time.

14 78 Q. And you weren't told that his credit -- that
15 Mr. Justice O'Higgins believed that the submission that 11:05
16 was being put to him was that he was someone whose word
17 should not be accepted?

18 A. No, Chairman.

19 79 Q. You weren't aware of that?

20 A. No, Chairman. What I was aware of, as I said, what I 11:05
21 was aware of -- and again, Mr. McDowell, maybe if I can
22 put it like this: I was aware of the advices I had
23 received, I was aware of the instructions that I had
24 given and I wasn't aware of the questions that were
25 asked or I wasn't aware of the detail of the questions 11:05
26 that were being asked in the Commission.

27 80 Q. Yes. And you weren't aware that -- and Chief
28 Superintendent Healy was not conveying to you that
29 Mr. Smyth had launched an attack on his integrity, his

1 creditworthiness and his motivation?

2 A. Well, Chairman, I don't believe there was an attack
3 launched on Sergeant McCabe. I don't believe there was
4 an attack launched on anybody. I believe there was a
5 legal argument that had arisen and there was lots of 11:06
6 interaction and lots of words used, but I was not aware
7 of all of the words that were used at that time and by
8 the parties that they were used by.

9 81 Q. I see. And again, you didn't ask what had happened,
10 what had been said? 11:06

11 A. I did ask what had happened on that day and what had
12 happened in terms of the letter that had been presented
13 that morning.

14 82 Q. And you were told that motivation had been raised, that
15 the Judge had held that it was peripheral and had made 11:06
16 a ruling to that effect?

17 A. Yes, Chairman.

18 83 Q. And no more?

19 A. That was the general -- yes, that was the thrust of
20 what was told to me. 11:06

21 84 Q. Could it be, Ms. O'Sullivan, that you were being
22 starved of information and kept in the dark about what
23 had happened?

24 A. Chairman, I think Chief Superintendent Healy, as the
25 liaison officer, was giving me his assessment of 11:06
26 matters as they unfolded.

27 85 Q. Well, nobody sent you the letter, nobody told you about
28 the integrity issue, nobody told you about the attack
29 on his credibility. None of these things happened.

1 And nobody told you the content of the letter and here
2 this man reacts very strongly to what happened and you
3 don't ask about any of those issues?

4 A. Well, Chairman, the reaction of Sergeant McCabe, what I
5 was trying to establish in my own mind was, what had 11:07
6 happened that made him react like this; was it
7 something outside of the Commission of Investigation?
8 Did something else happen in his workplace in
9 Mullingar.

10 86 Q. Well, are you serious about that now? Did you think, 11:07
11 did you think that it was something that had happened
12 in Mullingar that had caused him, when he was in
13 Dublin, to resign his position? He was attending the
14 Commission, so I mean, are you seriously saying that
15 you felt it was possible that something in Mullingar 11:07
16 had triggered this reaction?

17 A. Well, Chairman, I go back to the piece, it's a very
18 serious situation to have a sergeant believe that he is
19 under threat from the Commissioner of the Guards, but
20 in this case from me personally, and I was not able to 11:08
21 establish in my own mind what would have given Sergeant
22 McCabe to believe that that was the case, and I wanted
23 to make sure he was reassured, as I did in the
24 following days, that that was not the case and that
25 everybody in management was there to support him, 11:08
26 including myself.

27 87 Q. You have just said that you were not able in your own
28 mind to -- I just want -- I don't want to misquote you,
29 that you were not able in your own mind to work out why

1 it was that he was behaving in this manner?

2 A. well, why he had said that he was under threat --

3 88 Q. Yes.

4 A. -- from me personally.

5 89 Q. why didn't you ask any questions of any of the people 11:08
6 at the Commission to find out what had happened?

7 A. well, Mr. McDowell, I did, I asked Chief Superintendent
8 Healy.

9 90 Q. And he told you that the Judge made a ruling that
10 motivation was peripheral and that was it? 11:09

11 A. Yes, yes, Chairman, it was -- it was that the ruling
12 had been made by the Judge and that the limits had been
13 placed on the issues surrounding motivation that could
14 actually be advanced in the --

15 91 Q. And what did you understand the issues around 11:09
16 motivation to be?

17 A. That basically, that -- that -- there had been
18 limitations placed by Mr. Justice O'Higgins around the
19 matters that could be put -- advanced before the
20 Commission. 11:09

21 92 Q. So as to exclude what?

22 A. Chairman, I can't exactly recall now but certainly it
23 was the -- there was certain limitations put on the
24 issues that were to be advanced.

25 93 Q. And Sergeant McCabe was attending the Commission, isn't 11:09
26 that right?

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

28 94 Q. On a daily basis?

29 A. Yes, Chairman.

1 95 Q. As he was required to do?

2 A. Yes.

3 96 Q. What did you mean by saying that you were concerned to
4 put in supports in Mullingar to support Sergeant McCabe
5 at this point? What do you mean by that language? 11:10

6 A. Because, Chairman, what Sergeant McCabe had indicated
7 was that he had to step down in his role as the
8 sergeant in charge in the traffic unit in Mullingar.
9 Now, as you say, Mr. McDowell, he was attending every
10 day at the Commission, so, again, I wanted to make sure 11:10
11 that nothing was taking place in Mullingar, because, as
12 you know, we were working through a number of issues in
13 the workplace in Mullingar with Sergeant McCabe, his
14 local management had been directed by me to make sure
15 that he was supported in every way possible, and 11:10
16 separately, the employee assistance service was
17 supporting Sergeant McCabe and ensuring that any
18 welfare supports that he or his family needed were in
19 place. So what I was trying to do -- Sergeant McCabe
20 chose to go to his superintendent Mullingar and 11:10
21 Sergeant McCabe chose to raise these matters with his
22 superintendent in Mullingar and link it to his work
23 lace in Mullingar, so that's what I mean.

24 97 Q. He didn't link it to his workplace in Mullingar, he
25 linked it to you personally? 11:11

26 A. Yes, Mr. McDowell, but he also indicated that he felt
27 he had to step down from his position in the traffic
28 unit in Mullingar.

29 98 Q. Because of his view of you?

1 A. Well, Chairman, I accept that's Sergeant McCabe's view
2 of me, but I certainly didn't feel that I had done
3 anything which would amount to a threat to Sergeant
4 McCabe in his role as a sergeant in charge of traffic
5 in Mullingar. 11:11

6 99 Q. And in that context, you simply asked no questions of
7 your counsel, your solicitor or Chief Superintendent
8 Healy as to what had been done in your name on the
9 Friday and Sunday -- or Monday?

10 A. I did ask Chief Superintendent Healy. 11:11

11 100 Q. What had been done in your name?

12 A. I asked him what had transpired that -- was there
13 anything that had transpired at the Commission of
14 Investigation which would link to this -- to Sergeant
15 McCabe's intention to step down as the sergeant in 11:12
16 charge of traffic.

17 101 Q. And he chose not to tell you that Mr. Smyth had said
18 that he would be attacking -- or questioning his
19 integrity the whole way through the Commission, he
20 chose not to tell you that because he was there when it 11:12
21 was said?

22 A. Well, Chairman, I can only tell you what was said to
23 me, and it was around the issues of the motivation and
24 the ruling around the motivation that had happened on
25 the Monday. 11:12

26 102 Q. You see, I see what you are saying, you are saying you
27 were ignorant of these events at the Commission?

28 A. No, I am not saying I was ignorant of those events.

29 103 Q. Well, you didn't know -- let's be very clear, you did

1 not know that your counsel had informed the Commission,
2 the Chairman of the Commission that he intended to
3 challenge Sergeant McCabe's integrity throughout the
4 Commission in every module and that he intended to
5 challenge his credibility throughout the module and 11:13
6 that he intended to run the case that he was motivated
7 in making his complaints the subject matter of the
8 Commission's investigation by the fact that he had been
9 refused the DPP's directions to be given to the D
10 family. Those are the facts, Ms. O'Sullivan, those are 11:13
11 the facts. And none of that, you are saying, was
12 conveyed to you?

13 A. Chairman, I was always aware of the facts. The advices
14 I received and my understanding of the factual
15 background matters that were to be put to Sergeant 11:13
16 McCabe were always in relation to the interactions that
17 happened between himself and Garda management on his
18 failure or refusal by Garda management to give him the
19 DPP's directions. I was always aware of that. I was
20 always aware that those matters were going to be put, 11:14
21 it was the intention to put those matters before the
22 Commission, I was always aware of that, and that was
23 the basis on which I gave the instructions; that
24 basically it would be necessary to put those matters
25 before the Commission in order that the Commission 11:14
26 could get an understanding of what led Sergeant McCabe
27 to believe there was corruption and malpractice and
28 what evidence was going to be tested to support -- or
29 would be tested to support the basis for those beliefs.

1 104 Q. You see, we know that on the 4th October, Mr. Smyth,
2 when invited by the Chairman to say are you still
3 impugning Sergeant McCabe's integrity, 4th of November,
4 rather, we know that on that day, you at least at that
5 stage, you became aware that he had, he had impugned 11:15
6 his integrity?
7 A. Yes, Chairman, yes.

8 105 Q. Did you know before that, that he had impugned his
9 integrity?
10 A. Chairman, I don't ever recall the words being relayed 11:15
11 to me, but that would not be unusual because once
12 instructions are given, the questions and -- and,
13 Mr. McDowell, you know this better than I -- the
14 questions and the words that lawyers used are for the
15 lawyers themselves. It's not for the client. And I 11:15
16 never -- the words, the precise words and the precise
17 questions that were put throughout the proceedings of
18 the Commission, they were the words and the questions
19 that the lawyers used and that was the latitude that
20 the lawyers had. 11:15

21 106 Q. Well, did it come as a complete shock to you on 4th
22 November that Mr. Smyth had told the Chairman of the
23 Commission that he was going to challenge the integrity
24 of Sergeant McCabe the whole way through the
25 Commission, did that come as a surprise to you that 11:16
26 morning sitting at the back of the Commission?
27 A. Well, Chairman, I had certainly never instructed that
28 Sergeant McCabe's integrity would be challenged.

29 107 Q. We know you have said that. I have asked you a

1 different question: Did it come as a surprise to you
2 that he had done so?

3 A. Well, Chairman, I heard the argument -- or not the
4 argument. I heard Mr. Gillane's intervention on day
5 29, I was there, I don't believe for all of it, I came 11:16
6 in, in the course of it and I was at the back of the
7 room, yes.

8 108 Q. Now, would you answer the question? Did it come as a
9 surprise to you on 4th November 2015 that Sergeant
10 McCabe -- that your counsel had told the Chairman of 11:16
11 the Commission that his instructions were to challenge
12 the integrity of Sergeant McCabe the whole way through
13 in every module? Did that come as a surprise to you?

14 A. Well, Chairman, I wasn't aware that those words had
15 been used and on that day I became aware that the 11:17
16 integrity was actually corrected, and to be -- before
17 the Commission on that day, and Mr. Smyth outlined that
18 integrity was his mistake and there was also the issue
19 of malice was clarified.

20 109 Q. So are you saying that you never knew until the moment 11:17
21 Mr. Smyth withdrew his use of the term "integrity" that
22 he had actually ever mentioned the subject?

23 A. Well I knew, Chairman, that the argument had arisen
24 and, as I said, there was a heated exchange and a lot
25 of words were used on day 2. I was aware that on day 11:17
26 3, as far as I was aware and as far as I was informed,
27 the matter had then been put to bed. And on day 29,
28 then, the matter was clarified in full. So, on day 2
29 there was, I will call it legal interaction, a lot of

1 words were used, and a lot of -- there was a lot of
2 interaction between a number of parties on day 2, on
3 day 3, the Judge ruled, and made his ruling, and in my
4 mind, there the matter rested until day 29.

5 110 Q. I see. Well, on the 3rd November, we have seen the 11:18
6 notes of the meeting, the question of would the
7 Commissioner withdraw was written down in Chief
8 Superintendent Healy's note of the occasion. This is a
9 discussion as to -- this is a discussion between
10 yourself and counsel about the whole question of 11:18
11 motivation and the whole -- and the likelihood that you
12 might be asked about it the following day.

13 A. Sorry, Mr. McDowell, what page is that, please?

14 111 Q. I will find it for you.
15 CHAIRMAN: 2667. 11:19

16 MR. MCDOWELL: Thank you, Chairman. I think that is to
17 be found in Volume 4, if you are looking for it.

18 A. Yes. Yes, Chairman, I have that.

19 112 Q. I think that's Annmarie Ryan's note, in fact, isn't
20 that right? 11:20

21 A. It's Ms. Ryan's note, is it? Yes, that's correct.

22 MR. MCGUINNESS: 3944.

23 MR. MCDOWELL: It's 3945, Judge.

24 MR. MCGUINNESS: 44.

25 MR. MCDOWELL: 44. It's in Volume 7, Judge. 11:20

26 A. Yes, thank you, Mr. McDowell, I have that.

27 113 Q. And we have "would the Commissioner consider
28 withdrawing?" written there. Could I ask you, do you
29 recall the question of you withdrawing anything being

1 discussed at that meeting?

2 A. No, Chairman, because I had never instructed that
3 any -- and I see the words that are written here, "mala
4 fides or bad faith" would be put forward against
5 Sergeant McCabe. 11:21

6 114 Q. Well, you know from the extracts I read you yesterday
7 that the Commissioner -- or sorry, the Chairman of the
8 Commission believed that -- believed a number of
9 things: That you had instructed counsel to challenge
10 the integrity of Sergeant McCabe in every module; that 11:21
11 you had instructed counsel to establish that Sergeant
12 McCabe was a person whose word could not be accepted;
13 and thirdly, that you had instructed counsel to put it
14 to him that he was motivated -- that he was improperly
15 motivated. 11:22

16 A. I heard you read that to me yesterday, Mr. McDowell,
17 yes.

18 115 Q. That was the impression that Mr. Justice O'Higgins had
19 of what your counsel was doing, isn't that right?

20 A. Yes, I heard -- and I read the transcript, yes, 11:22
21 Chairman.

22 116 Q. And Mr. Justice O'Higgins listened carefully to
23 everything that your counsel was saying and I'm
24 suggesting to you that those words - "would the
25 Commissioner consider withdrawing?" - can hardly have 11:22
26 appeared in a note of that meeting unless there was a
27 discussion about withdrawing some of the imputations
28 against Sergeant McCabe?

29 A. Well, Chairman, I note from this note, it's a note of a

1 meeting or a consultation meeting on 3rd November, I
2 see my name on the top of it but what I can tell you
3 is, I have no recollection of being asked to withdraw
4 anything, because I had never instructed that these
5 matters would be put to Sergeant McCabe. 11:23

6 117 Q. You see, within 24 hours of this meeting, Mr. Smyth is
7 saying that it was an error on his part to say to the
8 Commissioner -- or to the Chairman of the Commission,
9 that he would be challenging the integrity of Sergeant
10 McCabe in every module? 11:23

11 A. Yes, Chairman, that's correct, I know that.

12 118 Q. And he did it straight up when he was asked by
13 Mr. Justice O'Higgins, before you gave evidence, as a
14 preliminary matter that morning?

15 A. Yes, that's correct, Chairman. 11:23

16 119 Q. Are you saying it's coincidence that there is a note of
17 a meeting the previous day with you discussing the
18 question of good faith and bad faith and the like and
19 that the words "would the Commissioner consider
20 withdrawing?" appears in the note of that meeting? 11:24

21 A. Well, Chairman, I can't account for this note. It's
22 Chief Superintendent Healy's note. But what I can say
23 it was never put to me would I withdraw because I was
24 never instructed in the first place that bad faith
25 would be put against Sergeant McCabe. 11:24

26 120 Q. No, but your counsel had.

27 A. But nobody asked me, Mr. McDowell, did I want to
28 withdraw this. I don't recall that.

29 121 Q. The presumption is that when a barrister puts a point

1 to a witness and is asked to check and reconfirm that
2 these are his instructions from his client, that he is
3 doing it on his client's instructions, isn't that
4 right?

5 A. Yes, Chairman, but I also see the issue that had been 11:24
6 instructed on was in relation to motivation.

7 122 Q. That's what you gave the instructions on?

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

9 123 Q. And you say that -- and I'm putting it to you that your
10 counsel had put different things before the Tribunal -- 11:24
11 before the Commission and the Chairman had concluded
12 that he was challenging the integrity, motivation, good
13 faith and proper -- and improper motivation on the
14 part -- sorry, and credibility, on the part of Sergeant
15 McCabe? 11:25

16 A. But, Chairman, I can only tell you what my instructions
17 were based on the advices that I had received.

18 124 Q. Well, I am just wondering why the words "would the
19 Commissioner consider withdrawing?" -- even if the
20 situation was at that stage that counsel had wildly 11:25
21 exceeded his brief and had misinformed the Commission
22 as to the extent of his instructions, even if that were
23 the case, it would have to be withdrawn, wouldn't it?

24 A. Well, Chairman, it would have to be corrected, yes.

25 125 Q. Yes. And withdrawn, insofar as he had said it? He had 11:25
26 said it.

27 A. Chairman, I just can't account for this note because
28 it's not my note and I don't know what was in the mind
29 of the person writing it.

1 126 Q. But it's a note of a meeting you participated in?
2 A. I attended the meeting, yes, Chairman. I may not have
3 attended all of the meeting, but yes, I attended the
4 meeting.
5 127 Q. And you had previously considered claiming privilege in 11:26
6 respect of all these matters if they arose, so you had?
7 A. Well, Chairman, the indication I had was all the way
8 back to day 2, that there was an opportunity -- or that
9 I may be required to go down and explain the
10 instructions that I had given. I was always willing to 11:26
11 do that. On day 29 --
12 CHAIRMAN: But, Mr. McDowell, no one can be criticised
13 for standing by a privilege which the law has given
14 them.
15 MR. MCDOWELL: I am not criticising her. 11:26
16 128 Q. I am merely saying that the issue was discussed in your
17 presence, what your instructions were, you knew that
18 that was a live issue?
19 CHAIRMAN: We know about it to some extent from two
20 different notes that have been made by two different 11:26
21 people. And just, in relation to how the matter arose,
22 that was something that puzzled me because Mr. Justice
23 O'Higgins sat that morning and said "Before we commence
24 there is one matter I would like a bit of assistance
25 on, Mr. Smyth, concerning the integrity of Sergeant 11:27
26 McCabe, and his mala fides or bona fides in relation to
27 making his complaints." So the Judge raised it. Now,
28 the reason I say that I am puzzled is: I don't know
29 was there any interaction between you and Mr. Smyth,

1 for example, prior to that time. No, but I am not
2 asking you, because again that is privileged. But I
3 just tend to wonder was there something else going on,
4 because it's like an iceberg, you see the tip of it and
5 you don't know what is going on under the surface. 11:27

6 MR. MCDOWELL: I think it was put to a previous
7 witness, Judge, that the solicitor for the Tribunal had
8 warned the representative of Seán Costello & Company
9 that the only matters that could be raised with the
10 Commissioner were part 5 matters, or Module 5 matters 11:27
11 or whatever they were, and that the terms of reference
12 had been recirculated to emphasise that point.

13 CHAIRMAN: Yes, no, no, I think I do know that. I
14 mean, I think the whole transcript is before me,
15 effectively, certain parts are being emphasised by 11:28
16 people. I know certain issues arose, for instance,
17 whether legal advice had been given in bad faith to the
18 Gardaí, for instance, that was another issue that was
19 out there.

20 MR. MCDOWELL: Well, I am not criticising the -- 11:28

21 CHAIRMAN: No, but I mean -- I just think the point is:
22 If there is a privilege and it's been waived, that's
23 fine. But if there is a privilege then it's not me
24 that gives it, it's the law that gives it and I have to
25 abide by it. That's it. 11:28

26 MR. MCDOWELL: Absolutely, Judge.

27 CHAIRMAN: We are ad idem on it. That is grand.

28 MR. MCDOWELL: This witness has waived her privilege in
29 respect of what she said to her lawyers at this time.

1 And I am not suggesting that it was wrong or improper
2 for somebody to explore the question of pleading
3 privilege if she were cross-examined as to her
4 instructions, I am not suggesting there is something
5 underhand about doing that. 11:29

6 CHAIRMAN: That's fine. It seems we are going off down
7 a side canal here.

8 129 Q. MR. MCDOWELL: What I am suggesting to you is --
9 CHAIRMAN: You might as well --

10 130 Q. MR. MCDOWELL: -- she apprehend that her instructions 11:29
11 would be the subject of discussion when she appeared as
12 a witness on the 4th November, isn't that right?

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

14 131 Q. Yes. And I have got to suggest to you that it is 11:29
15 simply unsatisfactory to say that you can't explain why
16 the words "would the Commissioner consider
17 withdrawing?" appear in a note of a meeting which took
18 place 12 or 16 hours beforehand, if that was not
19 discussed?

20 A. Well, Chairman, I may not have been there for that part 11:29
21 of the meeting, I just don't know. Because Ms. Ryan's
22 note is actually slightly different than this note. So
23 these are notes of people that were at the meeting, and
24 my experience is everybody at a meeting takes a
25 different note. So I'm not even sure what time this 11:29
26 meeting started and what time I entered the meeting.
27 Was there discussion before that? I don't know. But
28 what I can tell you is: It was never put to me to
29 withdraw something because, for example -- or, for a

1 fact, I had never instructed it in the first place.
2 132 Q. I see. I think we have probably exhausted the issue,
3 and I think I will leave it at that, Ms. O'Sullivan.
4 A. Thank you, Chairman.

5 11:30

6 MR. MCCANN: Yes, thanks. I wonder in terms of the
7 order, would it be -- if it's me or Mr. Sreenan?

8 CHAIRMAN: Well, I just see you there. I personally
9 don't mind. It's the usual thing that the person
10 appearing on behalf of the witness who may be
11 criticised should go last, apart from counsel for the
12 Tribunal.

13 MR. MCCANN: Yes, I follow that.

14

15 THE WITNESS WAS CROSS-EXAMINED BY MR. MCCANN: 11:30

16 133 Q. MR. MCCANN: Ms. O'Sullivan, I think you can see me
17 here. Patrick McCann, for the Department of Justice
18 and for a number of its current officials and some
19 former officials and for the former Minister,
20 Ms. Fitzgerald, TD. You have that aide-memoire in
21 front of you, I think, by coincidence, and it's only an
22 aide-memoire, but I just want to discuss one or two of
23 the phone calls with you. If we take the phone call at
24 15:23, that is the phone call from your mobile to Chief
25 Superintendent Healy, that is the first phone call on
26 the afternoon of the 15th? 11:31

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

28 134 Q. Yes. And would I be right in -- and your recollection
29 of that phone call, among other things, is that you

1 asked for legal advice, written legal advice, isn't
2 that right?

3 A. That's correct, Chairman. From my memory of that phone
4 call I asked for, could the -- firstly, could I asked
5 could an adjournment be sought, and secondly, for the 11:32
6 advices to be committed to writing.

7 135 Q. Yes. And again, it may be a matter for counsel but
8 it's possible that the preparation of written advice
9 for you was already in hand because it came to hand
10 within a matter of minutes, so that task might have 11:32
11 already started. But am I right in thinking that
12 you're being told in this phone call that a problem has
13 arisen and you are absorbing that, and then you have
14 asked for two things to be done, for an adjournment and
15 you have asked for legal advice to be prepared, and 11:32
16 that this call, could we describe it as a holding call
17 or a call where the issue is parked until you have got
18 legal advice? would that be a fair description of it
19 or would that --

20 A. Yes, Chairman, that would have been my view at that 11:32
21 time, I was of the belief that perhaps an adjournment
22 would be obtained.

23 136 Q. Yes. And then I think the next phone call you make is
24 at 15:26, it's there on the page as well, and it's to
25 Mr. Waters, isn't that right? 11:33
26

27 137 Q. And just to put things in context, because I think in
28 your evidence you said it over a number of different
29 places, but if I'm correct, you are obviously the

1 Commissioner of the Guards at the time and in the week
2 of the 18th May 2015, Prince Charles, the heir to the
3 British throne was visiting Ireland, isn't that
4 correct?

5 A. That's correct, Chairman. Every day was a busy day, 11:33
6 but that two weeks from the previous week, so from the
7 11th all the way through to the 23rd, was a
8 particularly busy week from both a policing and
9 security perspective. We had the visit of Prince
10 Charles which was due to take place from 19th to 21st 11:33
11 May. In the lead-up to that there was a very sensitive
12 and significant security operation which
13 necessitated --

14 CHAIRMAN: You can take it I am aware of all of that.

15 A. Yes, thank you, Chairman, yes. 11:33

16 138 Q. MR. MCCANN: And there are just two further things,
17 there were a number of arrests, wasn't that correct,
18 and there were seizures relating to guns or
19 explosives -- there were seizures that day on Friday
20 the 15th, isn't that right? 11:34

21 A. Yes, Chairman. There were very significant arrests in
22 the days preceding that and a number of very
23 significant seizures.

24 139 Q. And you had the interactions with the DPP as discussed
25 as well, in your -- 11:34

26 A. Not me personally, but there would have been ongoing
27 interactions with the Director, yes.

28 140 Q. And I think the following day, on the Saturday, was
29 this something that was also in your mind when you made

1 the telephone call to Mr. Waters, that there was a
2 memorial service the next day for the families of the
3 88 members of An Garda Síochána killed in the line of
4 duty, isn't that right?

5 A. That's correct, Chairman, yes. 11:34

6 141 Q. And then the final thing that might have been in your
7 mind, I don't know whether it was or it wasn't, maybe
8 you could assist the Tribunal, is that on the Monday,
9 that is the Monday the 18th, that there was the
10 publication of the legislation on establishing a police 11:34
11 authority, was that --

12 A. Yes, that's correct, Chairman. The establishment of
13 the Policing Authority and the -- it was ongoing for a
14 number of months before that, but, yes, it was to come
15 to fruition as such. 11:35

16 142 Q. And therefore, is it likely that, as well as mentioning
17 the fact of the developments at the Tribunal, that they
18 would have occupied the majority of your phone call
19 with Mr. Waters, those matters?

20 A. Yes, Chairman. As I say, when I looked at my telephone 11:35
21 records, what prompted my memory about the telephone
22 call with Mr. Waters, was actually the -- I call them
23 the security related matters because I do remember
24 speaking to him specifically in relation to those.

25 143 Q. Yes. And I think it would have been Mr. Waters' first 11:35
26 time at that memorial event, his first time as
27 Secretary General?

28 A. That would be correct, Chairman, yes. He would have
29 been Acting Secretary General at that time, from my

1 memory, and it would have been his first occasion to be
2 present.

3 144 Q. Very good. And I think I conceded, probably
4 incorrectly, when I was discussing this with Chief
5 Superintendent Healy, I said to him that the reference 11:36
6 to calling the Department referred to calling the
7 Department of Justice, I think it was to the Department
8 of Justice, but when you said you were going to call
9 the Department, it didn't necessarily mean that you
10 were going to call the Department in relation to the 11:36
11 developments at the Tribunal, it could have been that
12 the next phone call on your list of things to do was to
13 call the Department?

14 A. Well, Chairman, as I say, I know that when Chief
15 Superintendent Healy was trying to contact me, that 11:36
16 morning I recall I was at a meeting with the President
17 of the District Court. Coming back from that meeting I
18 remember going immediately into a security briefing,
19 and leaving the security briefing, I would have come
20 out immediately to take the calls from -- or to return 11:36
21 a call to Chief Superintendent Healy.

22 145 Q. Yes. And I think then if we just look at the
23 aide-memoire again, you will see that counsel,
24 Mr. Byrne, emailed at 15:29, counsel's advice just
25 before the Commission resumes, it is on page 1. So you 11:37
26 see "Commission resumes" and just above that in the
27 aide-memoire, Ms. O'Sullivan, you see 15:29 Mr. Byrne
28 emailed counsel's advice, do you see that there?

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

1 146 Q. And I think then that your decision to reconfirm, to
2 reconfirm your instructions, if we can put it like
3 that, that that would have occurred before -- it would
4 have occurred in one of the five telephone calls with
5 Chief Superintendent Healy, the last one being on the 11:37
6 next page, at 16:13?

7 A. That would be correct, Chairman, yes.

8 147 Q. And therefore, if the timeline is correct and if the
9 aide-memoire is correct, by the time you spoke to
10 Mr. O'Leary, the decision to reconfirm your 11:37
11 instructions had already been taken, isn't that right?

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

13 148 Q. Yes. And arising out of all of that, would you agree
14 with me that no official from the Department of
15 Justice, nor the Minister, advised or was consulted by 11:38
16 you in relation to formulating the legal strategy, the
17 legal strategy adopted by you, the Commissioner, that
18 would be on the 14th May 2015, the previous night?

19 A. I would absolutely agree with that, Chairman. I was
20 very much aware the Department have absolutely no role 11:38
21 in it, and at no stage did I consult with them in
22 relation to the approach to be taken.

23 149 Q. So it's not with any official and not with the
24 Minister?

25 A. No, that's correct, Chairman. 11:38

26 150 Q. And then similarly --

27 CHAIRMAN: Sorry, Mr. McCann, which phone call are you
28 referring to when you say phone call to Mr. O'Leary?

29 MR. MCCANN: Yes, sorry, Judge. Do you see there Judge

1 at page 2, I don't know whether you have the
2 aide-memoire, you see at 16:13 there is a phone call
3 from the Commissioner's landline to Chief
4 Superintendent Healy, lasting two minutes 54 seconds,
5 described as the fifth conversation. That is the fifth 11:38
6 and final phone conversation between the
7 then-Commissioner and Chief Superintendent Healy, and
8 you will see that -- yes, so that is the final
9 interaction there. And therefore, the phone call with
10 Mr. O'Leary at 16:16, again if the aide-memoire is 11:39
11 correct and if the telephone records are correct, that
12 occurs after the Commissioner has re-confirmed her
13 instructions and has had her last engagement with Chief
14 Superintendent Healy.

15 CHAIRMAN: So your case is that nobody from Justice was 11:39
16 influencing that decision?

17 MR. MCCANN: Yes. And couldn't have. If the timeline
18 is right they couldn't have, on that day.

19 151 Q. And then just to turn to, again, a similar to the
20 question I was asking earlier and to a similar general 11:39
21 question, Ms. O'Sullivan, would you agree with me that
22 in relation to how the legal strategy was put into
23 effect day-by-day, your legal strategy, at the
24 Commission, that similarly, you weren't being advised
25 or being -- or consulting with the Department as 11:39
26 regards the implementation of a legal strategy?

27 A. That would be correct, Chairman, yes.

28 152 Q. Nor with the Minister?

29 A. No.

1 153 Q. And then turning to the debate you were having with
2 Mr. McDowell as regards, if I might put it, use neutral
3 language, the clarification that occurred with the
4 Commission in November 2015, that is the withdrawal of
5 the word "integrity" and the clarification about that, 11:40
6 similarly the Department, no official in the
7 Department, nor the Minister, was involved in any such
8 clarification?

9 A. No, Chairman. No, they certainly were not.

10 154 Q. Yes. And then if we just look at the telephone calls 11:40
11 with Mr. Waters and -- sorry, the telephone call with
12 Mr. Waters, as far as we know on 15th of May and the
13 telephone calls with Mr. O'Leary, and it would appear
14 there is one at 16:16 and then a further one at 21:05,
15 are you satisfied that the -- are you satisfied that in 11:40
16 neither of those phone calls were you seeking advice or
17 being consulted or consulting with the Department in
18 relation to your legal strategy?

19 A. No, I wasn't seeking advice or consulting the
20 Department, but I may have said to both Mr. Waters -- I 11:41
21 would have said to Mr. Waters and Mr. O'Leary about the
22 events that had transpired.

23 155 Q. Yes, yes.

24 A. Yes.

25 156 Q. And then just to wrap up our dialogue, Ms. O'Sullivan, 11:41
26 if you were to put yourself back to that day, Friday,
27 15th May 2015, and thinking about what were the
28 important things, if you were asked on that day what
29 were the important matters you were dealing with that

1 day, it would have been, would you agree with me, it
2 was the security matter was the important matter, maybe
3 the memorial second, perhaps the developments in the
4 Tribunal third? Or, what ranking would you give them?
5 A. If I just take a snapshot of that day and leading into 11:41
6 that weekend and the following week; the Commission
7 that was ongoing was very important, that had been set
8 up, there was the imminent security threat to the
9 forthcoming visit, the memorial service was very
10 important and I was also dealing in that week with very 11:42
11 sensitive security matters around another institution
12 of the State as well.
13 157 Q. Yes. And thus, your recollection and thus your
14 recollection of the content of your telephone calls
15 with Mr. Waters and Mr. O'Leary is consistent with what 11:42
16 were your pressing concerns that day?
17 A. Yes, that would be correct, Chairman. And if I could
18 maybe, Mr. McCann, clarify something, I know Ms. Leader
19 asked me yesterday were these matters that could be
20 delegated, but as the Head of Security it's not a 11:42
21 delegated function. So, while I would have no
22 operational role it would be my responsibility to keep
23 the Department fully informed of developments as they
24 were transpiring.
25 158 Q. Thank you. 11:42
26 A. Thank you.
27 159 Q. Thank you.
28
29 MR. SREENAN: I don't wish to ask any questions of the

1 former Commissioner.

2 CHAIRMAN: Yes, Mr. Sreenan, in terms of the
3 intervention you made mentioning a particular matter,
4 again it would be appreciated that the transcript is
5 here before me, I am entitled to read it. It may be 11:43
6 that rather than leaving a matter such as you mentioned
7 stand, that at some stage if I am to pay any attention
8 to it at all you will come back to it, but perhaps
9 through Mr. Smyth or whatever, in terms of justifying
10 particular submissions, if they are justified, I don't 11:43
11 know.

12 MR. SREENAN: Yes, Chairman, I think the appropriate
13 time for me to do that perhaps is, as you suggest, in
14 the course of questioning.

15 CHAIRMAN: No, no, please, I wish people wouldn't take 11:43
16 me up like that. I am not suggesting anything at all.
17 You can do whatever you want. But all I am saying is
18 something was mentioned yesterday and you are saying
19 you have no questions. That's fine, thank you very
20 much for that, but I take it the matter isn't being 11:43
21 left?

22 MR. SREENAN: No, it's not.

23 CHAIRMAN: Having mentioned it, you will return to it?

24 MR. SREENAN: I will return to it.

25 CHAIRMAN: Yes. You will appreciate again, 11:43
26 Mr. Sreenan, that if it's not returned to, there is no
27 evidence on it, it's merely a question or an
28 intervention that you have made. I can't rely on it,
29 you appreciate that?

1 MR. SREENAN: Yes, I appreciate that, Chairman, and I
2 will return to it.

3 CHAIRMAN: All right. Well, I am not asking you to
4 return to it, Mr. Sreenan. It's a question of, you
5 mentioned it but if it's not returned to, it's nothing. 11:44

6 MR. SREENAN: Oh, I understand that, Chairman.

7 CHAIRMAN: All right. Thank you very much,
8 Mr. Sreenan.

9

10 THE WITNESS WAS EXAMINED BY MR. MURPHY: 11:44

11 160 Q. MR. MURPHY: Thank you, Chairman. Ms. O'Sullivan, I
12 wonder if you could take up book number 1, please.

13 A. Yes.

14 161 Q. Could you please open it at page 51.

15 A. Yes, Chairman, I have that. 11:44

16 162 Q. And I think you are familiar with the terms of
17 reference which are shown in this document, and on the
18 14th and 15th of May what the Commission was dealing
19 with was 1(a), (j) and (k)?

20 A. Yes, that's correct, Chairman. 11:45

21 163 Q. And (j) and (k) deal with the investigation by An Garda
22 Síochána and the Minister for Justice and Equality and
23 the Department of complaints made by Sergeant McCabe in
24 relation to matters at (a) to (i). And (k) deals with
25 "the investigation by An Garda Síochána and the Garda 11:45
26 Síochána Ombudsman Commission of Garda disciplinary
27 issues arising out of the above matters".

28 A. Yes, that's correct.

29 164 Q. Can I ask you to turn forward please to page 116 in the

1 same book? This is the document that Sergeant McCabe's
2 legal team copied for the assistance of the parties,
3 but it's on page 116 and this is entitled "Statement of
4 Facts", you may recall this was referred to yesterday?
5 A. Yes. 11:45
6 165 Q. Could I ask you to turn forward to page 122.
7 A. Yes, Chairman, I have it.
8 166 Q. And at paragraph 30, I think it says:
9
10 "In January 2009 in a document entitled 'Brief Proven 11:45
11 Facts Pertaining to My Complaint' given to Chief
12 Superintendent McGinn, Sergeant McCabe complained,
13 amongst other things, of the failure of supervising
14 Gardaí to properly handle the complaint in relation to
15 a failure to -- hijacking, false imprisonment and 11:46
16 sexual assault."
17 A. Yes, Chairman, that's correct.
18 167 Q. And I think if you then turn forward, please, to --
19 CHAIRMAN: So that's the statement of facts. Every
20 tribunal obviously has a different way of going about 11:46
21 things, but the statement of facts was essentially, if
22 you like, a guide point or a map for people.
23 MR. MURPHY: Yes.
24 CHAIRMAN: Yes. And the vast majority of it is
25 concerned obviously with the Kingscourt incident. 11:46
26 MR. MURPHY: It is.
27 CHAIRMAN: But then paragraph 30 --
28 MR. MURPHY: Refers to the brief --
29 CHAIRMAN: -- refers to the Brief Proven Facts, and

1 then the disciplinary investigation then comes into
2 that --
3 MR. MURPHY: Yes.
4 CHAIRMAN: -- as well. And then the written complaint
5 by Sergeant McCabe in relation to the matter. 11:46
6 MR. MURPHY: Yes.
7 168 Q. And in support of that, I think again there is no need,
8 Ms. O'Sullivan, to traverse this again, but we have
9 seen this 'Brief Proven Facts' document before, and it
10 contains a reference to the Kingscourt incident at the 11:47
11 second bullet-point and then it also says "Supporting
12 corruption" --
13 CHAIRMAN: But I think you -- I am sorry, Mr. Murphy,
14 you are just going a wee bit fast for me. I beg your
15 pardon. If you want to put that to the witness, you 11:47
16 are more than welcome to, but, sorry, I can't take it
17 in otherwise.
18 MR. MURPHY: Could I have page 4739, please.
19 CHAIRMAN: And just tell me, if you wouldn't mind, what
20 the document is. 11:47
21 MR. MURPHY: This is the document 'Brief Proven Facts',
22 which Mr. McCabe prepared.
23 A. 4739, Mr. Murphy, is that correct?
24 169 Q. Yes, yes.
25 A. Yes, I have that. 11:47
26 170 Q. And you will see that this is entitled:
27
28 "Brief Proven Facts pertaining to my complaint."
29

1 And it says:
2
3 "I brought several issues to the superintendent. He
4 ignored every one of them. I eventually brought them
5 all in writing to him. I had a two-hour meeting with 11:48
6 the superintendent about the issues. The
7 superintendent admitted that all the issues existed. I
8 was victimised, bullied and ridiculed for highlighting
9 the issues, forced to resign my position due to lack of
10 standards, accountability, duty to public and 11:48
11 management support. Acceded to immediately by
12 superintendent."
13
14 Then in the second bullet-point:
15
16 "Failed to investigate hijacking, false imprisonment
17 and sexual assault."
18
19 Do you see that?
20 A. Yes, Chairman, I see that. 11:48
21 171 Q. And that refers to Kingscourt?
22 A. Yes, Chairman, that would be correct.
23 172 Q. Then moving down the bullet-points, please. I think at
24 bullet-points number 6:
25
26 "Supporting corruption to save themselves."
27 A. Yes, Chairman.
28 173 Q. Then just turning over the top of the next page, the
29 first bullet-point says:

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"Misrepresenting and reporting inaccurate facts to higher authority."

A. Yes, Chairman.

174 Q. And the next bullet-point says:

11:48

"Allowing certain members to go unaccountable and unsupervised."

A. That's correct, Chairman, yes.

175 Q. And it then says:

11:48

"Having reported all and more of the above issues, was then subjected to the following: targeted by very senior officers."

11:49

And then "further complaints".

A. Yes, Chairman, that's correct.

176 Q. So again, that is a document that is at -- referred to at paragraph 30 as a document that was going to be taken into consideration in Module 1?

11:49

A. Yes, Chairman.

177 Q. Now, I think insofar as the position was concerned on that day, you were also aware, were you not, of the fact that, in 2012, Mr. McCabe had written to Mr. Oliver Connolly, the Confidential Recipient, and had sent him a letter in January 2012?

11:49

A. Yes, Chairman, I was aware of that.

178 Q. And I wonder if I could ask the screen to be changed to page 2511. I wonder if you could scroll down, please.

1 Further down.

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

3 179 Q. Yes. I think there is a reference there at 222 to a
4 letter in relation to the Confidential Recipient?

5 A. Yes, Chairman, that's correct. 11:50

6 CHAIRMAN: Is this, I am sorry, Mr. Murphy, is this the
7 same thing? This says the 7th February, February 2012.

8 MR. MURPHY: So, in fact, I am going to move on,
9 Chairman, yes. The one I am referring to first is
10 slightly above that. Perhaps I could ask you to scroll 11:50
11 it down, please.

12 CHAIRMAN: Which number is it there?

13 MR. MURPHY: It's number 216.

14 CHAIRMAN: 23 January, yes.

15 MR. MURPHY: Yes. And then can I ask you to scroll 11:50
16 down again, please.

17 180 Q. And number 224, it says:
18
19 "An email from Maurice McCabe to Confidential Recipient
20 Connolly attaching a report dated 9th May 2012." 11:51

21 A. Yes, Chairman, I see that.

22 181 Q. And, Chairman, I wonder if I could just circulate to
23 the parties a copy of that document. It isn't in the
24 core bundle in the Tribunal, but it was before the
25 Commission. 11:51

26 CHAIRMAN: Yes, just give us a minute then, Mr. Murphy,
27 please.

28 MR. MCGUINNESS: Chairman, I am not objecting to this,
29 but Mr. Murphy should know our rules of procedure,

1 which require parties to draw the attention of the
2 Tribunal to other documents that they would wish the
3 Tribunal to consider. Now, I don't know how many other
4 documents he may attempt to pull out of his bag, but we
5 would prefer to have advance notice. 11:51

6 MR. MURPHY: That is the only one.

7 CHAIRMAN: Yes. Mr. McGuinness, the attitude that I
8 take is this: I think everyone should try their best,
9 the rules are there to serve the interests of getting
10 to the bottom of things. And there is a deviation from 11:51
11 those, I agree with you, but just let's see if it
12 causes trouble or it's necessary in any way to deal
13 with it separately. So maybe you would just be so kind
14 as to give me the dates again, Mr. Murphy, and the
15 names of the documents, because at this point they are 11:52
16 not familiar.

17 MR. McDOWELL: Chairman, I have an objection to this,
18 and I will tell you briefly what it is.

19 CHAIRMAN: Yes.

20 MR. McDOWELL: This document was circulated by the 11:52
21 Commission in respect of Module 5.

22 CHAIRMAN: Which was Module 5 now? What was that
23 about?

24 MR. McDOWELL: Module 5 was the administration --

25 CHAIRMAN: Was that Cafolla's cafe, was it? 11:52

26 MR. McDOWELL: The administration -- yes, called
27 management module, it was called management module. It
28 was not on the table and had not been circulated to any
29 of the parties at the time that -- when Sergeant

1 McCabe -- sorry, on 15th May, and it cannot be relevant
2 to what Mr. Smyth said on that day because it hadn't
3 yet been circulated.

4 CHAIRMAN: All right. But everything that is in this
5 correspondence or emails, or whatever it may be, had 11:53
6 happened prior to the O'Higgins Commission starting?
7 MR. MCDOWELL: Yes. And -- no --

8 CHAIRMAN: No, I am just asking that.

9 MR. MCDOWELL: No, no -- it went in a very modular
10 form, as this Tribunal is doing as well, and these 11:53
11 documents cannot have been before the Commission on the
12 day that -- on 15th of May, or even up to June, these
13 documents were not in existence at that time.

14 MR. MURPHY: Chairman, perhaps I can just address the
15 objection. 11:53

16 MR. MCDOWELL: Or, sorry, they were not before the
17 Commission at that time. And therefore, to ask this
18 witness about them in relation to her instructions to
19 counsel on the 15th May, seems to be misconceived.

20 MR. MURPHY: Chairman, can I just -- 11:53

21 CHAIRMAN: Sorry, yes, Mr. Murphy, okay, what would
22 concern me is, it's happened in other cases in the
23 past, with one disastrously that I can think of, let's
24 not mention any names, but keeping a focus on this is
25 hard by times. But if this is not before the 11:54
26 Commission, how does it become relevant? I mean, there
27 is a general background, I appreciate that, of
28 complaints being made of investigations, further
29 investigations, affirmations, complaint to the

1 Minister, complaint about Commissioner, I know all of
2 that, and it does seem to go upwards like Croagh
3 Patrick, but how is this relevant?
4 MR. MURPHY: Certainly, Chairman, I will explain. I am
5 not saying this was circulated in Module 1, but 11:54
6 questions have been asked about the overall
7 instructions given by the Commissioner and, in
8 particular, questions were asked about the overall
9 submissions made as late as February 2016 by
10 Mr. McDowell. In that regard, by that time, this 11:54
11 document had, in fact, been served on all the parties
12 and was part of the assessment of the Commission, so
13 insofar as -- there has been a line of questions. I am
14 not going to put to this witness that this was known to
15 her on the first day, but I am going to put it to her 11:55
16 that this was a document that was served on the Gardaí
17 in the course of the Commission itself. Secondly, its
18 materiality --
19 CHAIRMAN: Can I just ask, is there any doubt about
20 that? 11:55
21 MR. MURPHY: No.
22 CHAIRMAN: Well, it was served in the context of --
23 appreciating that, look, I actually hate the word
24 'modules' because it makes it seem as if we are not
25 actually getting through things, but let's just say, if 11:55
26 there are modules, that doesn't mean that the overall
27 issue is being ignored or the overall thrust of what
28 needs to be investigated is not being investigated.
29 MR. MURPHY: Yes, Chairman.

1 CHAIRMAN: So this was, therefore, brought in in the
2 context of what, Mr. Murphy?

3 MR. MURPHY: This was brought in in the context of
4 Module 5, and also, thereafter, it formed part of the
5 Commission's assessment, and, when the Commission came 11:55
6 to assess matters in the round at the end of its
7 hearings, this was a matter that was addressed. But
8 it's important for this reason, Chairman: it comes
9 from Sergeant McCabe. It's relevant also to a line of
10 questioning adopted by My Friend to a number of 11:55
11 witnesses, that Sergeant McCabe wasn't complaining of
12 anybody in the course of the Commission itself, but
13 insofar as part of what -- how he characterised his
14 complaint, that is what the Commission was looking into
15 in relation to the allegations of corruption. So it's 11:56
16 part of a chain of communication between Mr. McCabe and
17 the Minister prior to the setting up of the Commission,
18 and then it shows what Mr. McCabe characterised his
19 complaint as being --

20 MR. MCDOWELL: Chairman, as I understand it, we are 11:56
21 inquiring, well, firstly, in relation to what happened
22 and why it happened and why instructions were given on
23 the 13th, 14th and 15th of May to counsel to pursue a
24 particular line, and Mr. Murphy is now asking the
25 court -- or, sorry, the Tribunal, to look at 11:56
26 documentation that was served in, I think, October --
27 in the autumn of that year, with a view to establishing
28 that, somehow, Sergeant McCabe's cross-examination in
29 respect of the Kingscourt module could be altered on

1 that day. And we've heard, and, I mean, Mr. Murphy has
2 put these propositions to Superintendent Healy as well,
3 but -- or Chief Superintendent Healy, but it would be
4 misleading, in my respectful submission, to invite this
5 witness to say that this was -- this was in -- this was 11:57
6 in consideration by the Commission of Investigation in
7 May of 2015.

8 CHAIRMAN: All right. Well, I think the right thing
9 for me to do is to return to the book that I mentioned
10 earlier on, that is to say Professor Cross's book, 11:58
11 which I have a great deal of time for, which was
12 written by -- with a barrister called Ms. Wilkins, and
13 just to return to that, it says:

14
15 "Cross-examination as to credit, as its name implies, 11:58
16 will be designed to suggest that the witness is not the
17 kind of person whose evidence can be regarded as
18 trustworthy. A similar type of cross-examination,
19 sometimes called cross-examination to credibility, will
20 be designed to show that there are reasons for 11:58
21 believing that the witness may be mistaken."

22
23 And then further on down it said:

24
25 "Leading questions may be put in cross-examination. 11:58
26 Cross-examination to credit may include questions to
27 suggest the witness has made statements inconsistent
28 with his testimony, that he has a criminal record, is
29 biased, has been guilty of disreputable conduct or such

1 as to suggest that he is a liar, but the judge, in his
2 discretion, is entitled to disallow questions in
3 cross-examination as to credit, and it is contrary to
4 professional etiquette for an advocate to put
5 disparaging questions to a witness unless his 11:59
6 instructions give him reasonable grounds for supposing
7 that they are justified."
8

9 Now, as to what is justified or is not, given the term
10 of reference, that is what I am looking at, and if 11:59
11 this -- if the Commissioner says this is part of the
12 justification, I have to take it into account, I don't
13 have any option. So, therefore, I think we should
14 continue, but I actually really do believe, Mr. Murphy,
15 and I don't mean to act in a schoolmasterish fashion in 11:59
16 this regard, that we should have been told about this
17 and I should be in a position to put it on the monitors
18 for those who are observing me to make sure that I am
19 doing this job properly.

20 MR. MURPHY: Yes, Judge. I am sorry, Judge. 11:59

21 MR. MCDOWELL: Chairman, the one point that I would add
22 to that: The Cross and Wilkins analysis that you
23 circulated deals with cross-examination of a witness as
24 to credit, and you are bound by the answers, you can't
25 have a collateral inquiry. But what was happening here 12:00
26 was not -- on Friday 15th, was not cross-examination of
27 Sergeant McCabe on that issue; it was examination of
28 former Chief Superintendent Rooney in relation to
29 Sergeant McCabe's motivation.

1 CHAIRMAN: Yes, it was. And indeed, then,
2 unfortunately, we went on to the stage where the actual
3 question was put.
4 MR. McDOWELL: At a later stage.
5 CHAIRMAN: Didn't you -- yes, it was, I know, but that 12:00
6 is all wrapped up in it.
7 MR. McDOWELL: And this Tribunal will see that it was
8 perfectly legitimate to wonder why evidence in -- or
9 witnesses were being cross-examined as to Sergeant
10 McCabe, other than Sergeant McCabe, with a view to 12:00
11 introducing all of this material without the -- without
12 the consent -- which is designed to discredit Sergeant
13 McCabe, without the consent of the Commission and
14 without any prior notice.
15 CHAIRMAN: No, I do take the point that 12:01
16 cross-examination as to credit is final. Sometimes
17 these things get mixed up, sometimes it's mixed up in
18 the wrong. I think it's always a bad idea to go
19 outside the laws of evidence, but a tribunal isn't
20 bound by them, otherwise I would imagine that all of 12:01
21 these documents that we have seen, certainly many of
22 them, would never be admissible in a court case. Look,
23 I think the right thing to do is for me to rise. I am
24 sorry, Ms. O'Sullivan, to ask you to come back after an
25 hour's break. But if you wouldn't mind lodging the 12:01
26 documents and we will get them on the system so that we
27 can do this thing properly. If there is anything
28 else --
29 MR. MURPHY: No, Judge, that is the only one.

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CHAIRMAN: well, if there was anything else, could I just ask other parties in the event that that is the case, please, would you mind sending them in and then we can --

MR. MCDOWELL: Judge, in ease of this witness, the contents of the documents speak for themselves. There is no point in putting them to this witness if she didn't take them into consideration.

12:01

CHAIRMAN: All right. well, look, I think the right thing to do is to put them on the screen. I am sorry to ask you to come back, but let's do it the right way if we are to do it at all.

12:02

THE HEARING ADJOURNED FOR LUNCH

12:49

1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 CHAIRMAN: Mr. Murphy, I think we have sorted our
4 technical problems now.

5 MR. MURPHY: I am most grateful. Thank you, Chairman. 13:09

6 182 Q. Now, Ms. O'Sullivan, I think that a previous witness
7 has been -- has given evidence, I should say, in
8 relation to a letter that was sent by Mr. Oliver
9 Connolly, the Confidential Recipient, to the Minister
10 for Justice on the 23rd January 2012 and which attached 13:09
11 to it a letter of the 23rd January 2012 from Sergeant
12 Maurice McCabe. And that document is at 4364, please.

13 A. Sorry, I had it earlier. I need to find it again.

14 CHAIRMAN: It should be at the very end of volume 8.

15 A. Yes. Sorry, Chairman. Yes, Chairman, I have that now. 13:10

16 183 Q. MR. MURPHY: At 4364 we have a letter from Mr. Connolly
17 to the Minister for Justice, and he is indicating that
18 -- in the final paragraph, he says:

19
20 "In accordance with procedures set down in the Garda 13:10
21 Síochána (Confidential Reporting of Corruption or
22 Malpractice) Regulations -- "

23 CHAIRMAN: Sorry, Mr. Kavanagh, is it on the screen?
24 It is. Yes, okay. Eventually.

25 184 Q. MR. MURPHY: If I can begin there again, Mr. Connolly 13:10
26 said:

27
28 "Dear Minister,
29

1 In accordance with the procedures set down in the Garda
2 Síochána (Confidential Reporting of Corruption or
3 Malpractice) Regulations of 2007, I enclose the
4 confidential report which I received at 4:15pm today in
5 relation to a complaint against Commissioner Martin 13:11
6 Callinan made under the Charter of the Garda Síochána
7 (Confidential Reporting of Corruption or Malpractice)
8 Regulations of 2007."

9
10 And it indicates the statutory provision. Then he says 13:11
11 in the final paragraph:

12
13 "I am obliged, as Confidential Recipient, to bring this
14 report to your personal attention and I am also obliged
15 to protect the identity of the confidential reporter 13:11
16 subject to those specific circumstances as provided for
17 under regulation 9, and, accordingly, I have redacted
18 the relevant personal details on the face of the
19 report."

20
21 Turning, please, to the next page, page 4367 -- 13:11

22 A. Yes, Chairman.

23 185 Q. -- I think there is a letter addressed to Mr. Connolly
24 from Sergeant McCabe, and in the first and second
25 paragraphs he deals with general matters between him 13:11
26 and Mr. Connolly in terms of communications, but if I
27 can ask you to move to the middle of the page, where
28 there he says:

1 "Superintendent Clancy was the superintendent in charge
2 of Bailieboro Garda district from July 2007 to March
3 2008, approximately. He then returned to Monaghan
4 where he took up as superintendent at the Monaghan
5 district. I list a few of the matters of which I have 13:12
6 got concerns."
7

8 You will see a series of bullet-points move through
9 that page and over to the next page containing various
10 complaints. 13:12

11 A. Yes, Chairman, I see that.

12 186 Q. And they are to deal with investigations?

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

14 187 Q. And can I ask you just to turn over to the next page
15 and what should be, I think, the second marked 13:12
16 bullet-point. Do you see a sentence beginning "In late
17 2007"?

18 A. Yes, Chairman, have I that.

19 188 Q. And it says:

20 13:12
21 "In late 2007, he --" that is Superintendent
22 Clancy "-- failed to look for an investigation file
23 into a serious case of hijacking, false imprisonment,
24 assault and sexual assault of two females. Three
25 months after the incident a probationer guard returned 13:12
26 to the injured party, gave her €150 and told her she
27 had no case. He allowed the garda to falsely update
28 records. 'All parties resolved their differences
29 together' was the quotation and no investigation was

1 ever carried out."

2 A. Yes, Chairman, I see that.

3 189 Q. And I think that refers to the Kingscourt incident?

4 A. That's correct, Chairman.

5 190 Q. The balance of the complaints on that page deal with 13:13
6 other incidents, but you will see, again, a succession
7 of bullet-points over that page and into the next page,
8 page 4367.

9 A. Yes, Chairman.

10 191 Q. And at the end of the list of the complaints, I think 13:13
11 we have a paragraph at the very end of the page where
12 he said:

13

14 "The above are only a few of a catalogue of failures
15 solving Superintendent Clancy. These incidents, along 13:13
16 with many more relating to him, were investigated by
17 Assistant Commissioner Derek Byrne, and Byrne, despite
18 upholding the serious ones, came to a decision that the
19 complaints against Superintendent Clancy were not
20 substantiated in any way and he made no adverse 13:13

21 findings against Clancy. Alarminglly, Commissioner
22 Callinan and Deputy Commissioner Rice agreed with
23 Byrne. However, it may be the case that Derek Byrne
24 hid evidence, material and certain findings from his
25 superiors because he was the commissioner in charge of 13:13
26 the region at the time of the wrongdoing and received a
27 bonus."

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29 He goes on to say:

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"I find it hard to understand that the Commissioner of An Garda Síochána has rewarded Superintendent Clancy and placed him on promotion list for the rank of chief superintendent. One of the incidents alone is enough to question Superintendent Clancy's suitability for his present rank, let alone promotion. It sent out a message to the force that if you ignore your duty, are grossly negligent and cover up, you will be deemed suitable for promotion, and it is my honest belief and opinion that Superintendent Clancy should not be promoted until all matters involved in his management in the Bailieboro and Monaghan districts are independently examined."

And then I think if you go down to the end of the page, please, to the last paragraph, Sergeant McCabe proceeds to say:

"I now wish to make a complaint against Commissioner Martin Callinan and I make it under the Charter of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations of 2007. Garda Code 9.10(i)(d) states:

'Promotion lists list the most suitable eligible superintendents in the service'.

It is my belief that Commissioner Callinan should have

1 known of the malpractice, some of which is listed
2 above, and has made such a serious error of
3 judgment --" sorry, "has made a serious error of
4 judgment by placing Superintendent Clancy on a
5 promotion list. The evidence is clear, and it is 13:15
6 corruption, as defined in An Garda Síochána's Charter
7 on Confidential Reporting. Gardaí engaged in
8 falsifying records, erasing official records, erasing
9 reported incidents, destroying official records,
10 altering official records, covering up serious 13:15
11 investigations, gross dereliction of duty on a massive
12 scale, and it appears that the Commissioner was or is
13 aware of all of it. It also questions the whole Pulse
14 system, when Gardaí can erase, alter, destroy,
15 etcetera, any record or information without any 13:15
16 accountability or sanction."

17
18 And then turning over to the next page, top of the
19 first paragraph, he says:

20 13:15
21 "I would also like to make a complaint against
22 Assistant Commissioner Derek Byrne. He failed to
23 uncover and report serious derelictions of duty,
24 falsification of Garda records and serious incidents
25 not being investigated. He failed to deal with and 13:16
26 report innocent persons listed on the Pulse system as
27 suspects and criminals and he apparently met with Chief
28 Superintendent Rooney on 24/6/2011, despite being
29 removed from the investigation for alleged assault and

1 gave C. Rooney's findings which were approved by
2 Commissioner Callinan, findings which cover up serious
3 corruption senior Garda management found were false,
4 whatsoever... both Superintendent Clancy and
5 Superintendent Cunningham. They found that I was the
6 problem and found me to blame for incidents where other
7 sergeants were in charge and found me to blame for
8 incidents that happened when I was stationed in
9 Mullingar."

13:16

10
11 And then two paragraphs down, he says:

13:16

12
13 "I'm available at any time if you or anyone else needs
14 to talk to me. I say, again, Commissioner Callinan may
15 not have been given all of the evidence in my
16 complaints and he may have been misled by the
17 investigation team. The evidence is shocking."

13:16

18
19 And I think then at the end, in the final paragraph, he
20 says:

13:17

21
22 "Mr. Connolly, I just ask that my identity should
23 remain secret at this time. I am fearful this
24 allegation will have reprisals. It is very hard to
25 take, seeing that the intimidation and victimisation is
26 from serving members of An Garda Síochána who appear to
27 have the support of certain top Garda management."

13:17

28
29 Now, just pausing there for a moment, Commissioner. I

1 think in terms of the structure, as it were, of those
2 complaints made by Sergeant McCabe, was that he
3 complained about incidents at the ground level, as it
4 were, in Bailieboro, then moved up to the middle ranks,
5 to Superintendent Clancy, Superintendent Rooney and 13:17
6 Superintendent Cunningham, and then moved up to
7 Assistant Commissioner Byrne and then also imputed
8 Commissioner Callinan in what he perceived to be and
9 alleged to be corruption, is that correct?

10 A. Yes, Chairman, that is correct. 13:17

11 192 Q. And I think you have given evidence yesterday in
12 relation to how seriously An Garda Síochána would take
13 any allegation of corruption against a serving officer?

14 A. Yes, Chairman. An allegation of corruption is
15 probably -- is not probably, it is the most serious and 13:18
16 the gravest allegation you can make against a member of
17 An Garda Síochána who has sworn to serve the people of
18 the country, and it is taken with the utmost
19 seriousness by all members of An Garda Síochána.

20 193 Q. Could I ask us now to move, please, to document 4843. 13:18

21 A. Yes, Chairman, I have that. Thank you.

22 194 Q. And this document, Ms. O'Sullivan, is an email sent on
23 9th May 2012, at 11:48, from Sergeant McCabe to Oliver
24 Connolly, who was involved in the previous
25 correspondence, in the last letter? 13:18

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

27 195 Q. And it's marked "Private and Confidential", and it
28 says:
29

1 "Dear Oliver,

2
3 I refer to the above and to my previous complaint made
4 to you on 23rd January 2012. I attach a report
5 addressed to you and I would ask that the report be 13:18
6 given to the Justice Minister, Alan Shatter, without
7 any changes. I have no issue with my identity being
8 known by him." The actions or -- "His actions in
9 relation to my allegations are disappointing, by virtue
10 of the fact that he went back to the Commissioner to 13:19
11 ask him to account on his own complaint, is alarming.
12 He has dented the whole whistleblowing charter,
13 resulting in no garda being able in confidence to make
14 honest complaint against the Commissioner or assistant
15 commissioner. By his actions, the legislation is 13:19
16 flawed. You are also frustrated with the inactions of
17 the Commissioner to deal with complaints, when the
18 evidence fully supports the complaints, and, on a
19 personal note, I thank you for doing your best for me.
20 I am still being targeted and harassed for making my 13:19
21 complaint. And the latest revelation showed further
22 corruption and cover-up. A colleague who supported me
23 has now been served with disciplinary proceedings
24 solely because he was supportive of me and reported
25 wrongdoing. what will it take until Minister Alan 13:19
26 Shatter realises he is dealing with serious corruption?
27 Does he want my 500-plus corruption incidents or what?
28 Regards,
29 Maurice McCabe."

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

2 196 Q. I think attached to this email is a letter, and this
3 letter is marked "Private and Confidential". It has
4 Sergeant McCabe's address at the top, and then says:

5
6 "Re: Recent complaint made to you regarding
7 allegations of corruption and malpractice.

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9 Dear Oliver,

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I refer to the above and previous correspondence. On
the 23rd January 2012 I made a complaint to you against
Assistant Commissioner Derek Byrne and Garda
Commissioner. The complaint was for the Minister for
Justice, Alan Shatter. On foot of this complaint, the
Minister took the following action: The Minister for
Justice caused a report to be sought from the Garda
Commissioner. The Garda Commissioner reported back
saying that the allegations were extensively
investigated, thoroughly examined and investigated by
Assistant Commissioner Derek Byrne and Chief
Superintendent Terry McGinn. He goes on to say that no
evidence of malpractice or corruption was discovered.
The Commissioner then states that the investigation
carried out by Assistant Commissioner Derek Byrne was
reviewed by Deputy Commissioner Rice, who concluded
that the investigation was conducted in a proper
manner. The Commissioner then advises that, having
regard to the outcome of the investigation and review,

1 there was no evidence of corruption or malpractice on
2 the part of Superintendent Michael Clancy or Assistant
3 Commissioner Byrne. No mention is made concerning the
4 complaint put against the Commissioner herself.

13:21

5
6 The above version of events is incorrect. We, my legal
7 team and I, have not been informed that the
8 investigation is over and completed. The investigation
9 was taken over by Deputy Commissioner Rice in November
10 2010 to investigate the issues and complete any
11 outstanding matters, not to review, as outlined by the
12 Commissioner. Deputy Commissioner Rice met with me and
13 my solicitor in November 2010, and he hasn't met or
14 spoken to us since that day. He has not told us that
15 the investigation is over, he has not given us the
16 outcome of his investigation, and there are still a
17 number of serious matters still ongoing.

13:21

13:21

18
19 I made a complaint to the Minister against Assistant
20 Commissioner Derek Byrne and against the Garda
21 Commissioner. I made the complaint under the
22 Confidential Reporting of Corruption. I was guarded,
23 however, with Commissioner Callinan, because he may not
24 have been showed the evidence of corruption. When the
25 Minister received my complaint, you sought a report
26 from the person I complained of, the Commissioner. By
27 doing this, it is my opinion that he has put the whole
28 confidential reporting system into question. How can
29 any member of An Garda Síochána make a complaint

13:21

13:22

1 against a senior Garda officer or the Commissioner when
2 the result is asking that particular officer in
3 question to investigate himself? It is my belief that
4 the Minister acted in an inappropriate way. It was
5 wrong of him to request a report from the persons I 13:22
6 complain about, it defies logic and it's not fair and
7 it's not in keeping with natural justice and fair
8 procedure. He should at least have requested to see
9 the evidence on file. His actions are in total
10 contrast in his speech at the Morris Tribunal in 2008, 13:22
11 'matters were brushed under the carpet for five years',
12 and again in his speech in the Legal Services
13 Regulation Bill on 23rd February 2012, nemo iudex in
14 causa - no one should be a judge in his or her own
15 cause. I ask what level malpractice or corruption has 13:23
16 to be alleged against an assistant commissioner or
17 Commissioner before he will take serious cognisance of
18 it and not seek a report from the Commissioner.

19
20 The corruption I reported is at the highest level and 13:23
21 it has been covered up. The Garda Commissioner has
22 avenues open to him if I am making or have made
23 allegations, reports or any statements which are false
24 and misleading. As stated above, he may not be aware
25 of the malpractice, but Assistant Commissioner Derek 13:23
26 Byrne is fully aware of it. Assistant commissioner
27 Byrne was the regional commissioner in charge of the
28 area at the time of the malpractice and he was tasked
29 with investigating the allegations. He covered up the

1 malpractice, and I can prove it. Each and every
2 allegation I have made is backed up with documentary
3 evidence, victims' evidence and accounts. It is
4 peculiar that Assistant Commissioner Derek Byrne and
5 retired Chief Superintendent Colm Rooney are the only 13:23
6 two persons who are holding the party line of 'no
7 evidence' and 'thorough investigation'. Every other
8 Garda officer has described the corruption as
9 'shocking'.

10
11 I state once again the evidence relates to corruption 13:24
12 as defined under the Confidential Reporting Charter,
13 perverting the course of justice and attempting to
14 pervert the course of justice on a massive scale. I
15 simply ask for the Minister or his officials to take a 13:24
16 look at the evidence and the investigation files and
17 they will see what occurred in Cavan-Monaghan.
18 Minister Shatter has been fed false misleading
19 information and I can make a sworn statement or
20 affidavit to that effect if they so wish. My 13:24
21 allegations are of serious corruption, malpractice,
22 gross dereliction of duty and perverting the course of
23 justice, and it involves senior Garda management and it
24 involves cover-up by senior Garda management. I simply
25 ask for a meeting with the Minister and his officials 13:24
26 and they will see for themselves that each and every
27 one of my allegations are true.

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29 Regards,

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Maurice McCabe."

A. Yes, Chairman.

197 Q. Can I ask you, Commissioner, in terms of the offences referred to there, perverting the course of justice or attempting to pervert the course of justice on a massive scale, from the point of view of An Garda Síochána, how serious is that allegation? 13:24

A. They are very serious criminal allegations, Chairman.

198 Q. And insofar as those matters are concerned, when you gave your instructions in relation to the approach to be adopted towards testing the evidence, you understood at that stage, did you not, that the allegations in overall terms were ones which involved corruption and malpractice? 13:25

A. Yes, Chairman. Basically, the allegations of corruption and malpractice had subsisted in the public and political mind and dogged the organisation for a number of years, and, as I stated in my evidence, when the O'Higgins Commission was established I very welcomed it as an opportunity to get to the truth of the matter because these matters had prevailed in the public mind for a very long time and were causing serious impact, negative impact on public confidence in An Garda Síochána. 13:25

199 Q. And just while we are dealing with this particular point, I wonder if I could ask if we could have page 4370, please. Chairman, I think this is a copy of the report of the O'Higgins Commission, which I think is 13:26

1 not on the screen but is in copy form. It has been
2 referred to previously.

3 A. Sorry, Mr. Murphy, what volume is that, please?

4 MS. LEADER: I think the position is, it's not in paper
5 format, sir, but it's on the system, the O'Higgins 13:26
6 Commission report.

7 CHAIRMAN: well, I have here a copy, and there is a
8 copy up in my office too. It is around, but maybe you
9 would just refer to the particular paragraph number
10 within the report. 13:27

11 MR. MURPHY: Yes, Judge, I will.

12 200 Q. In the course of the O'Higgins report, if I can refer
13 you, Chairman, to paragraph --

14 CHAIRMAN: No, you're asking the witness a question
15 so -- 13:27

16 MR. MURPHY: I beg your pardon.

17 CHAIRMAN: -- leave me out of it, thanks.

18 201 Q. MR. MURPHY: Do you have a copy?

19 A. No, it doesn't appear to be here, Chairman.

20 CHAIRMAN: Do we have another copy? We will get 13:27
21 another copy. It's on the system somewhere.

22 MR. MURPHY: Apparently so, yes.

23 A. But, Chairman, I'm happy -- if Mr. Murphy wishes to
24 read it to me, I'm happy to follow it.

25 CHAIRMAN: Okay. 13:27

26 MR. MURPHY: Thank you, Chairman.

27 202 Q. In the course of the report at paragraph 13.84, which
28 is at page 3 00, Mr. Justice O'Higgins said this, and
29 this is obviously at the conclusion of the O'Higgins

1 investigation, he says, having reflected the fact that
2 there was a complaint made against Assistant
3 Commissioner Byrne, he says:

4
5 "In evidence to the Commission, Sergeant McCabe 13:28
6 withdrew all allegations of impropriety of any type
7 against Assistant Commissioner Byrne in the matters
8 with which this Commission is concerned. This is in
9 contrast to the position he adopted concerning the
10 former Commissioner (see paragraph 13.88). Sergeant 13:28
11 McCabe's only subsisting complaints against Assistant
12 Commissioner Byrne are in relation to the quality of
13 the Byrne/McGinn report and these complaints have been
14 addressed by the Commission in its examination of the
15 various individual incidents." 13:28

16
17 Could I ask you then to turn forward to paragraph
18 13.88, Chairman. At paragraph 13.88 it says:

19
20 "The complaint of corruption against the Commissioner 13:28
21 was 'placing Superintendent Clancy on a promotion
22 list'. Sergeant McCabe told the Commission he was
23 'guarded' in his complaints against the Commission by
24 stating in his report to the Confidential Recipient
25 that 'Commissioner Callinan may not have been given all 13:29
26 the evidence in my complaints and he may have been
27 misled in the investigation team'."

28
29 Then Mr. Justice O'Higgins says:

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"This does not alter the fact that a complaint of corruption subsisted. Sergeant McCabe maintained in his evidence to the Commission it was his belief that the Commissioner has 'an influence in promotions'. He did not withdraw his allegation against Commissioner, despite being invited to do so."

13:29

And the following exchange occurred, and this is a question I think being asked by the Commission:

13:29

"Q. Just a couple of questions very briefly, just to confirm on behalf of Commissioner Callinan that the complaint that you made against him in your letter to the recipient on the 23rd January 2012, you accept that this was without foundation now, is that correct?"

13:29

CHAIRMAN: It's 302 is what is being looked at.

MR. MURPHY: Yes.

A. Thank you, Chairman. Yes.

203 Q. Do you see the quotation, Ms. O'Sullivan, at the top of the page?

13:29

A. Yes, I have that.

204 Q. The answer is:

"No, I'm not saying that, Mr. Smyth. I have spoken about it here. I was guarded in relation to that. He may not have known the full facts."

13:29

At paragraph 13.89, Mr. Justice O'Higgins said:

1
2 "It must be stated clearly and unambiguously that there
3 is not a scintilla of evidence to support an allegation
4 of any type of corruption against the former
5 Commissioner."

13:30

6
7 And the next paragraph:

8
9 "In the context of any such grave allegations, the
10 former Commissioner is entitled to have his reputation
11 vindicated in the matters now under consideration. Any
12 aspersions cast on the integrity of the former
13 Commissioner were unfounded and were deeply hurtful.
14 The former Commissioner, Mr. Callinan, was not
15 responsible in any way for placing Superintendent
16 Clancy on a promotion list. He had no power to do so."

13:30

13:30

17
18 Now, I think you're familiar with that passage from the
19 report. But can I ask you to go back to 2015. In May
20 2015, you were aware that allegations were being made
21 against Commissioner Callinan, against Assistant
22 Commissioner Byrne, against Chief Superintendent
23 Clancy, against Superintendent Rooney and Cunningham.
24 Did you take those allegations seriously?

13:30

25 A. Yes, Chairman, I took them very, very seriously, as I
26 say, on a number of fronts. One was the impact on
27 public confidence in An Garda Síochána, but also the
28 vindication of the rights of the individuals and their
29 right to natural justice and fair procedure, to have

13:30

1 those matters fully tested and to be able to explore
2 all of the evidence that was there to support those
3 very serious allegations.

4 205 Q. And were the five senior officers who were the subject
5 of those complaints, were they persons who denied any 13:31
6 corruption on their part?

7 A. Yes, they were vehemently denying any corruption or any
8 malpractice on their part and they were very anxious to
9 have their accounts heard in a fair and balanced way
10 before the Commission. 13:31

11 206 Q. I think you've said yesterday that you considered the
12 Commission to be suitable, an ideal vehicle to try and
13 resolve these very complicated issues which had
14 developed over a number of years within An Garda
15 Síochána? 13:31

16 A. Yes, Chairman, and it was a huge dilemma for me at the
17 time, because the Commission had been established and
18 it provided, in my opinion, an opportunity, once and
19 for all, to have these matters heard fully, tested
20 fully and impartially and objectively by the Sole 13:32
21 Member.

22 207 Q. And insofar as your legal team had been briefed in
23 relation to the allegations that had been made and you
24 had taken advice from them, did the advice that you
25 were given and which you effectively adopted on the 13:32
26 14th and re-confirmed on the 15th in relation to
27 testing the evidence, did that advice take into account
28 the fact that these were serious allegations of
29 corruption and malpractice?

1 A. Yes, Chairman, it absolutely did. All of the incidents
2 were individual incidents, but my understanding of what
3 had transpired in the intervening years was, all of
4 these individual incidents combined in some way to
5 indicate -- or for Sergeant McCabe to conclude that 13:32
6 there was corruption and malpractice. There were
7 elements of each of the individual incidents and Garda
8 management's either omission or commission in relation
9 to the investigation and the taking serious of those
10 incidents. 13:32

11 208 Q. Yes. And did you rely upon that legal advice when
12 giving the instructions you gave on 14th and 15th May?

13 A. Yes, Chairman. The legal advice, as I have outlined,
14 was there. I considered the legal advice and I gave my
15 instructions on the basis of the advices I received. 13:33

16 209 Q. I think in the course of yesterday you also made
17 reference in one of your answers to the fact that,
18 after you gave that instruction, that the supports
19 available to Sergeant McCabe in Mullingar in relation
20 to HR issues continued. Can I ask you to briefly 13:33
21 outline to the Chairman what do you mean by that?

22 A. Yes, Chairman. As I outlined yesterday, there were
23 extensive support mechanisms had been put in place for
24 Sergeant McCabe. I was dealing with Sergeant McCabe on
25 three fronts: I was dealing with him as an employee in 13:33
26 Mullingar; I was dealing with him as a protected
27 discloser, ensuring that he was afforded every
28 protection, as was his right; and also, I was dealing
29 with him now as a witness at the Commission. And I was

1 absolutely committed to making sure that Sergeant
2 McCabe remained supported throughout that. And there
3 was an opportunity for me to be able to ensure that
4 that continued throughout 2015, into 2016, and right up
5 to 2017, and that entailed appointing the then, or now 13:34
6 Deputy Commissioner Twomey to actually make sure that
7 all of the approaches were coordinated. And I outlined
8 yesterday, Chairman, I'm happy to do it again, all of
9 the external supports that we also had in place to
10 ensure that we were leaving no stone unturned, so to 13:34
11 speak, and that everything that we possibly could do
12 for Sergeant McCabe, was being done.

13 210 Q. This morning you were asked a question about the fact
14 that Sergeant McCabe had indicated after the weekend,
15 following 15th May, that he was concerned about 13:34
16 returning to work, and you've told the Chairman this
17 morning how you sought to address those issues and to
18 try and inquire what the position and problem was, but,
19 apart from all of that, how soon after that did
20 Sergeant McCabe return to work? 13:34

21 A. Sergeant McCabe actually -- by the -- that was on the
22 15th -- I beg your pardon, Chairman, on the 18th May,
23 and actually I think it was by April -- I beg your
24 pardon, June, Sergeant McCabe had indicated to his
25 chief superintendent that he was happy to continue on 13:35
26 as the sergeant in charge of the traffic unit in
27 Mullingar. Subsequently, after the publication of the
28 O'Higgins report, Sergeant McCabe actually went -- was
29 absent from work due to sickness.

1 211 Q. Yes. But, in essence, I think you're indicating that
2 the supports that were put in place for him before 15th
3 May continued in place after 15th May?

4 A. Yes, and even after Sergeant McCabe had gone -- was
5 absent from work, those supports continued, and, in 13:35
6 fact, were intensified, so to speak, insofar as there
7 was regular contact maintained with Sergeant McCabe by
8 a number of people that had been nominated to support
9 him. And also, Chairman, it might be -- as I mentioned
10 yesterday, one of the mechanisms that we had put in 13:35
11 place, Sergeant McCabe had indicated that there were
12 other issues going on in his workplace in Mullingar.
13 He'd also linked some of those issues to his ongoing
14 protection as a protected discloser, and I had allowed
15 Sergeant McCabe the latitude of nominating a person to 13:36
16 investigate those. Sergeant McCabe nominated Chief
17 Superintendent Barry O'Brien, who was then attached to
18 the Mayo division. Chief Superintendent O'Brien's
19 investigation in relation to those matters continued
20 all throughout '15, and he presented his findings to 13:36
21 Sergeant McCabe later that year.

22 212 Q. And were all of the personnel you assigned to those
23 tasks different to the people you assigned to deal with
24 the O'Higgins Commission?

25 A. Oh, yes, Chairman, they were all different people. 13:36

26 213 Q. Just moving forward then into the period of June and
27 July, as the Commission's hearings progressed, I think
28 you became aware of the fact that, piece by piece, the
29 case of alleged corruption which was being made by

1 Mr. McCabe, had begun to crumble away?

2 A. Yes, that's correct, Chairman. I was informed of the
3 developments as they progressed, by Chief
4 Superintendent Healy.

5 214 Q. And this happened sort of incrementally, piece by 13:36
6 piece?

7 A. Yes, Chairman, throughout the modules.

8 215 Q. And during that time the evidence was being tested by
9 your legal team and other of the legal teams?

10 A. Yes, that's correct, Chairman, it was being tested by 13:37
11 the legal representatives of those represented at the
12 Commission.

13 216 Q. I think you were shown yesterday a letter. I wonder
14 could we please have page 2024. This is a letter from
15 Mr. Smyth in July 2015. It's 2024. In paper terms, 13:37
16 Ms. O'Sullivan, it's volume 3, page 2024. I wonder if
17 you could please scroll down to the second page.

18 A. Yes, Chairman, I have that.

19 217 Q. Great. I'm sorry, I beg your pardon, could I cause 13:37
20 trouble by asking if the matter could go back just to
21 the bottom of the first page. Thank you. Mr. Smyth,
22 in the first page, which has been opened to you
23 already, was talking about the way in which the process
24 had continued. But do you see at the bottom of page
25 2024, Mr. Smyth says: 13:38
26

27 "I asked Sergeant McCabe --"

28

29 If you please scroll down.

1 " -- to withdraw the statement and he refused to do so.
2 Judge O'Higgins intervened and asked
3 Superintendent McCabe to consider whether the
4 allegations against Superintendent Clancy were harsh.
5 Despite this intervention, Sergeant McCabe again 13:38
6 refused to withdraw the allegation and stated it was a
7 matter for the Commission as to whether or not the
8 statement was harsh.

9
10 In the assault in the Cootehill module, he --" 13:38

11
12 Sergeant McCabe.

13
14 "-- made allegations against Superintendent Noel
15 Cunningham and Superintendent Michael Clancy that they 13:38
16 presided over gross dereliction of duty of members in
17 their charge. I asked Sergeant McCabe to name the
18 members who were guilty of gross dereliction of duty
19 under the command of Superintendent Michael Clancy, as
20 he then was, and Superintendent Noel Cunningham. 13:38

21 Sergeant McCabe indicated he wasn't making complaints
22 against the ordinary rank and file members, but his
23 allegations related entirely to management; namely,
24 Superintendent Clancy in this instance. He, in fact,
25 withdrew the allegation against Superintendent 13:39
26 Cunningham and personally apologised to Superintendent
27 Cunningham before he took to the witness box to give
28 his evidence."
29

1 And then:

2

3 "In addition, on page 2 of his statement at tab 68, he
4 alleged that the investigation and subsequent court
5 case relating to Mary Lynch's ordeal was 'disgrace, a 13:39
6 cover-up and wrong'. And again, I asked him to
7 withdraw his allegations against Superintendent Clancy,
8 and he agreed to withdraw the allegation of 'cover-up'.
9 In the previous modules, he accepted that his overt
10 criticism of senior management was 'harsh or a bit 13:39
11 harsh'."

12

13 So are these examples of the type of withdrawal of
14 allegations that were made known to you at various
15 stages over the course of June/July? 13:39

16 A. Yes, Chairman. Throughout the various modules, there
17 were either withdrawals of some of the allegations or
18 partial withdrawals, and this is a representation of
19 how that unfolded.

20 218 Q. So by the time it came to the date in November where 13:39
21 you were giving evidence, about which you testified
22 earlier today, were you aware that a number of
23 allegations, in addition to those in June/July, had
24 been withdrawn?

25 A. Yes, Chairman, I was. 13:40

26 219 Q. And I think during the course of that time, I think
27 superintendent Fergus Healy was acting as your liaison
28 officer in relation to communications from the
29 Tribunal's process?

1 A. Yes, Chairman, Chief Superintendent Healy was the
2 liaison officer throughout the proceedings.

3 220 Q. I think, again, Mr. McDowell asked you on several
4 occasions today whether you were saying he somehow
5 dropped the ball. I think your position is clear, that 13:40
6 you don't believe he dropped the ball and he worked
7 extremely hard in a very difficult assignment?

8 A. Yes, Chairman, I think all of the people, Chief
9 Superintendent Healy, the legal time and Ms. Ryan, were
10 working in very pressurised environment, and I don't 13:40
11 accept that he dropped the ball. I think he gave me
12 assessments of the modules as they transpired.

13 221 Q. Now, I think in terms of the period when you arrived on
14 day 29 to give evidence, you have been asked a number
15 of questions in relation to what took place. I wonder 13:40
16 if could you be shown, please, page 3512, and that is
17 contained in volume 7.

18 A. Yes, Mr. Murphy, I have that.

19 222 Q. And I think this is the part of day 29, which the
20 Chairman has seen part of before and which was 13:41
21 discussed again this morning, but just to be clear, I
22 think that when the Judge said at page 9, that is page
23 3512, please. You see it, please, at line 21?

24 A. Yes, Mr. Murphy, I have that.

25 223 Q. I think here at the outset of the day, Mr. Justice 13:41
26 O'Higgins said:
27
28 "The clarification that I am seeking from you is your
29 instructions to challenge the integrity of Sergeant

1 McCabe."

2

3 And Mr. Smyth's response was:

4

5 "My instructions are contained at his motivation and 13:41
6 his credibility only.

7 MR. JUSTICE O'HIGGINS: well, okay. So this
8 clarification I'm seeking from you, his motivation is
9 being challenged. His integrity is not now being
10 challenged. If I form the impression because you said 13:42
11 my instructions are to challenge the integrity that
12 was --"

13

14 And Mr. Smyth says, the third line:

15

16 "That was an error." 13:42

17

18 The Court then asked a variety of questions in relation
19 to that, and at line 16 Mr. Smyth confirmed, this is at
20 page 3513, and he said, and I quote: 13:42

21

22 "That is an error on my part."

23

24 And then the Judge said:

25

26 "well, that's the clarification that I sought. So the
27 position now is that his motive is under attack, his
28 credibility is under attack from the Commissioner, but
29 not his integrity?" 13:42

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And Mr. Smyth says:

"Just to be clear about it, the credibility insofar as he made allegations of corruption and malpractice is under attack. There is no question about that."

13:42

So I think on page 3513, and you're present at the time, Mr. Smyth acknowledged that any references to integrity were erroneous on his part.

13:42

A. Yes, Chairman, that's correct.

224 Q. And the Judge moved on from that and without any further comment.

A. Yes, Chairman. The matter, as I saw it, was then settled, and the Judge, and indeed Mr. Gillane, later summed up on behalf of all of the parties.

13:43

225 Q. Now, I think that you have given evidence earlier in relation to your interaction with the Department of Justice in 2016 in relation to the preparation of a letter, and I wonder if you could be shown, please, document 4763. I think that may be in your book 8, but I'm not sure.

13:43

A. It's 9. I'm mixing up my volumes. 4793 [sic], Mr. Murphy, yes?

226 Q. Yes.

13:43

A. Yes, I have it here.

227 Q. In fact, I should ask one supplementary, if I might, just before I get to that. I think vis-à-vis the day you attended at the Commission to give evidence, can

1 you confirm that you weren't asked any questions about
2 your instructions, by the Commission or by anybody
3 else?

4 A. Yes, Chairman, I appeared to give evidence that day. I
5 was cross-examined -- I gave my evidence, I was 13:44
6 cross-examined and indeed questioned by the sole
7 Member, and nobody put any matters to me, either in
8 cross-examination or in direct examination, about my
9 approach or about any of the instructions or the
10 advices that I had received from counsel. 13:44

11 228 Q. Was it the case that any questions the Commission asked
12 on that day were directed towards Mr. Smyth?

13 A. Yes, Chairman, that is correct.

14 229 Q. Now, just returning, if we could, to this letter.
15 You've given a lot of evidence about the way in which 13:44
16 this letter came to be finalised, and you're familiar
17 with its terms?

18 A. Yes, Chairman, I am.

19 230 Q. And again, evidence -- you've given evidence about how
20 the letter was put together. And can I ask you, that 13:44
21 after all of the careful reflection and the exchange of
22 various drafts, did this letter reflect your views?

23 A. Absolutely, Chairman, yes, it did. There were a number
24 of drafts that were shared between parties. I would
25 have edited all of those various drafts, considered all 13:45
26 of the inputs from all of the various people, including
27 some independent legal advices that we had received,
28 and the final letter that was forwarded to the Tánaiste
29 was my letter, which was compiled by me and with my

1 facts and my view of the matters that needed to be put
2 forward.

3 231 Q. And again, it's been suggested that, somehow, for you
4 to interact with the Department of Justice in this type
5 of exercise was unusual or strange. Can I ask you to 13:45
6 comment on that?

7 A. No, Chairman. As I say, not just between the
8 Department of Justice and An Garda Síochána, but in my
9 experience from working with senior colleagues right
10 across the public service, it would not be unusual for 13:45
11 various Government departments and State agencies to
12 work in this way. The relationship in particular
13 between An Garda Síochána and the Department of
14 Justice, by necessity, is a very, very close
15 relationship, and we would regularly interact with each 13:46
16 other on matters relating to policing, to State
17 security, but also in relation to organisational issues
18 that would arise from time to time.

19 232 Q. Moving forward, if I might, to deal with another issue
20 that you were asked about over the course of the last 13:46
21 two days, which was the leaking of transcripts
22 following the publication of the report. I think
23 you've given evidence that this triggered a sort of
24 blizzard of press queries, and then that, in turn,
25 created a blizzard of parliamentary questions. 13:46

26 A. That's correct, Chairman. I described it yesterday,
27 the only word I can think to describe it is a vortex.

28 233 Q. Yes. Well, in the centre of that vortex I think you
29 found yourself being placed, with questions being

1 raised about your stewardship as Commissioner of An
2 Garda Síochána?

3 A. Yes, Chairman. And it was even more serious than that.
4 It began an immediate call and baying for my
5 resignation; for the Minister, whether or not that she 13:46
6 had confidence in me. And something that I have never
7 experienced in 36 years of policing, or 35 years as it
8 was at that time, was opinion polls and -- being run on
9 national TV and media outlets as to whether or not
10 people felt that I should resign because of the 13:47
11 position that had been portrayed in -- indeed in some
12 media outlets and by some -- in the Dáil and in the
13 Seanad.

14 234 Q. Yes. And is it fair to say that the focus of most of
15 these leaked extracts seem to relate either to your 13:47
16 instructions or to Superintendent Cunningham and
17 Sergeant Martin?

18 A. Yes, the issues became conflated, Chairman, and there
19 was the linking of my instructions to counsel and, in
20 particular, an allegation that I instructed that 13:47
21 Sergeant McCabe's integrity should be attacked and that
22 he should be attacked for acting out of malice,
23 particularly in relation to the incidents of poor
24 policing and the shortcomings in investigations, which
25 was never the case. Those issues were then -- my 13:48
26 instructions were then conflated with what became, I
27 suppose it became the truth, even though it was a
28 distorted untruth in terms of the evidence that was to
29 be given by particularly Superintendent Cunningham and

1 the sergeant who accompanied him to the meeting in
2 Mullingar.

3 235 Q. And I think if we could have document 4751, please.

4 A. Yes, Chairman.

5 CHAIRMAN: Mr. Murphy, it's not within the terms of
6 reference that I should look into who was doing the
7 leaking.

13:48

8 MR. MURPHY: Oh, no.

9 CHAIRMAN: But I don't know if any inference is
10 being --

13:48

11 MR. MURPHY: No.

12 CHAIRMAN: -- placed or directed in any particular
13 direction in that regard.

14 MR. MURPHY: No, Chairman, I am simply listing the
15 evidence, which I think the Chair has heard earlier, in
16 relation to the impact on the parties.

13:49

17 CHAIRMAN: Yes. No, I get that. But, I mean, the
18 attitude I take is very simple; Section 11 of the
19 Commission of Inquiries Act 2004 says that the right
20 thing -- or is it 2008? Anyway, whatever year it is, I
21 have written it down, says that -- it's 2004,
22 Commissions of Investigation Act 2004 -- should be
23 private, well they should be private.

13:49

24 MR. MURPHY: May it please the Chair, I will move on.

25 CHAIRMAN: And, I mean, you know, even sitting as a
26 Judge, people read out a small extract from a case, I
27 always insist on people reading out the headnote as
28 well because you never know where it is going to lead
29 you. I am sure journalists are aware that they can be

13:49

1 very easily tricked by this kind of thing.

2 236 Q. MR. MURPHY: Finally on that point, I think you can
3 confirm that for Sergeant Martin, for example, or
4 Superintendent Cunningham, this had the effect of
5 having their names in the public domain, it had the 13:49
6 transfer to the Garda Síochána Ombudsman investigation,
7 all of this occurred at great speed?

8 A. At great speed, Chairman. Superintendent Cunningham
9 and Sergeant Martin were -- not alone were they named
10 in certain media outlets, but they were also -- both of 13:50
11 their names were put into the public domain under Dáil
12 privilege.

13 CHAIRMAN: I'm sorry for interrupting, Mr. Murphy, but
14 I'm utterly puzzled as to how Sergeant Martin could be
15 dragged into this, as she was simply a note-taker, had 13:50
16 taken a correct note, a note which in fact contradicted
17 the famous letter of the 18th May, and had never even
18 given evidence there. That's one thing. But surely
19 it's compounding it by sending her off to GSOC to be
20 investigated. 13:50

21 A. Well, Chairman --

22 CHAIRMAN: I mean, did you have a quiet word with her
23 after all of this was over?

24 A. No, Chairman, I didn't. The reason that the matter was
25 sent to GSOC, such public disquiet had resulted, as a 13:50
26 result of the naming of both of the members, and I
27 absolutely agree with your point of view, at no stage
28 was there any suggestion that Sergeant Martin was going
29 to give any evidence other than as the person who

1 accompanied Superintendent Cunningham to the meeting.
2 But such was the public disquiet and the concern and
3 the facts that were reported in the media, in order to
4 dispel any public disquiet, misplaced or otherwise,
5 about the actions of both Superintendent Cunningham and 13:51
6 Sergeant Martin, I felt it was -- the appropriate thing
7 to do was to have the matter independently
8 investigated. Unfortunately, because of the
9 prohibitions on Section 11 of the Act, the only way I
10 felt that this matter could be put to bed was for the 13:51
11 full transcripts to -- or the matter to be put to
12 right, was for the transcripts in the O'Higgins
13 Commission, which would quite clearly show the facts as
14 they were, and that the only objective place that this
15 could be done was by referring the matter -- having the 13:51
16 Minister refer the matter as an issue of -- as a
17 Section 102 referral, in the public interest, to GSOC,
18 because there were a number of media outlets naming
19 both of the members. As I say, they were both named
20 under privilege. And the public opinion and the 13:52
21 public -- the facts out there, were that Sergeant
22 Martin in some way was implicated in intended
23 wrongdoing against Sergeant McCabe and at the
24 Commission of Investigation.
25 CHAIRMAN: Surely the answer to that would have just 13:52
26 been to release her note. I mean, I have read her
27 note. Her note doesn't say what was attributed to her
28 at all. I mean, it shows, as far as I can see, she was
29 just taking down what happened, and what she was taking

1 down as happening was, in fact, what Sergeant McCabe
2 later said, not what anybody else later allegedly
3 mistakenly said.

4 MS. LEADER: Just to be clear in relation to that note,
5 it's actually Superintendent Cunningham wrote the note 13:52
6 and Sergeant Martin witnessed his signature to the
7 note.

8 CHAIRMAN: And they are both the same.

9 MS. LEADER: Yes.

10 A. Yes. 13:53

11 MR. MURPHY: Yes. Thank you for that helpful
12 intervention, Ms. Leader.

13 237 Q. In terms of, from that point in particular, I think the
14 position was that both Superintendent Cunningham and
15 Sergeant Martin found themselves in the same frame, as 13:53
16 it were, in terms of this public belief that the
17 Minister referred to. And just to help finalise that
18 point, can I ask you to be shown page 4751, please?

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

20 238 Q. And I think what was referred to in the third 13:53
21 paragraph, the Minister said in the course of a speech
22 of his:

23

24 "Further action is being taken in relation to the
25 public belief that the two members of the force 13:53
26 misrepresented a meeting with Sergeant McCabe and were
27 proven to have done so by a recording he made."
28

29 That is what I think you described as the public

1 narrative that suddenly formed because of the way in
2 which the leaks were conducted?

3 A. Yes, Chairman. And again, just to explain, it was
4 repeated so often that it actually became a public
5 truth and the public believed that this was the case, 13:53
6 and certainly a number of political representatives and
7 a number of media outlets, it was repeated so often
8 that this became the truth and this was the matter that
9 had to be dealt with.

10 239 Q. But it wasn't true, was it? 13:54

11 A. Oh, no, it was absolutely untrue, Chairman.

12 240 Q. Moving back, as I can now, to just the dilemma that you
13 mentioned in terms of giving instructions, can I ask
14 you, based on what you knew and understood on the 14th
15 and 15th May and based upon the legal advice that you 13:54
16 relied upon at that time, did you honestly believe that
17 you were making a legitimate decision to test
18 appropriately the evidence which was being put forward
19 by Sergeant McCabe in support of his allegations of
20 corruption and malpractice? 13:54

21 A. Yes, Chairman, I felt that I had absolutely no other
22 choice if I was to get to the truth of the matters and
23 to vindicate the rights of all of the individuals of
24 whom allegations had been made against and also in the
25 interests of the organisation and restoring public 13:54
26 confidence.

27 MR. MURPHY: Thank you. Those are my questions,
28 Chairman.

29 MS. LEADER: I don't think anybody else has any

1 questions.

2

3 FORMER COMMISSIONER NÓIRÍN O'SULLIVAN WAS RE-EXAMINED

4 BY MS. LEADER:

5

13:54

6 241 Q. MS. LEADER: Just if we could go back to your diary or
7 your e-diary. In relation to your instructions to
8 counsel, I think the position is that you didn't meet
9 with counsel until the 21st May, when you met with
10 Mr. Smyth, is that correct?

13:55

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

12 242 Q. And that meeting has been described as a meet-and-greet
13 type of meeting?

14 A. I would describe it as a courtesy -- from what I can
15 remember of it, a courtesy meeting.

13:55

16 243 Q. And I wonder if you could refer yourself to page 4354
17 of the materials, which is your e-diary for the 21st
18 May.

19 A. Sorry, Ms. Leader, what volume is that?

20 244 Q. I think it's volume 8. If we could just scroll down
21 just -- yes, thank you.

13:55

22 A. I can do it from the screen.

23 245 Q. Yes.

24 A. Yes.

25 246 Q. It would appear you had a meeting in relation to an
26 unconnected matter with Chief Superintendent Healy at
27 four o'clock, which was to last half an hour, and
28 immediately thereafter he was to meet with you with
29 Mr. Smyth, is that correct?

13:55

1 A. That's what the diary entry says, Chairman, yes.

2 247 Q. I wonder is there any way of establishing when that
3 meeting was scheduled, Ms. O'Sullivan?

4 A. I can have it checked in my former office, Chair. But
5 maybe if I can assist the Chairman. 13:56

6 248 Q. Yes.

7 A. I have looked at other matters that were going on on
8 that particular day, and I note from -- again from my
9 telephone records, that there were a number of
10 telephone calls that I had to make and take that day, 13:56
11 and I have gone through all of those, Chairman, in
12 order to assist the Tribunal and I note that a number
13 of those were in relation to some sensitive security
14 matters relating to another institution of the State.
15 But I can make inquiries to see when this meeting was 13:56
16 scheduled.

17 249 Q. Yes. I suppose what I am really asking you is, was
18 that meeting scheduled in view of what happened on 15th
19 and the following Monday and in view of Ms. Ryan's
20 appeals for a meeting to be scheduled? 13:57

21 A. No, I don't believe so, Chairman, because if it were,
22 we would have -- the solicitor would be there and all
23 of the legal team would be there. It appears to me, if
24 it's scheduled at the end of another unrelated meeting
25 I was having with Chief Superintendent Healy, it was an 13:57
26 opportunity to bring Mr. Smyth by way of introduction.

27 250 Q. Now, in relation to the running of the Commission of
28 inquiry, Mr. Justice O'Higgins' Commission, and your
29 giving of instructions in relation to the matter, it

1 wouldn't appear for all of the documentation that the
2 Tribunal has, that you in any way committed your
3 instructions to writing or your dealings with Chief
4 Superintendent Healy at any stage during the run-up to
5 the Commission of Inquiry, the running of the 13:57
6 Commission of Inquiry or the immediate aftermath, save
7 insofar as there were various interactions with the
8 Department of Justice in relation to the speech, is
9 that correct?

10 A. Yes, that would be correct, Chairman. 13:58

11 251 Q. Now, I think, and you will correct me if I am wrong,
12 that your evidence to the Tribunal has been that you
13 understand how Sergeant McCabe reacted to his
14 questioning in the Tribunal, is that correct?

15 A. I can understand, from a human perspective, how 13:58
16 Sergeant McCabe may have viewed the proceedings before
17 the Commission.

18 252 Q. Yes. And as I understand it, that reaction, insofar as
19 the matters you had authorised, which was that his
20 dealings post-D investigation with senior Garda 13:58
21 management, that they should be opened up before the
22 Commission of Inquiry, that you'll understand how that
23 in itself would have changed Sergeant McCabe's attitude
24 to you, am I correct in saying that?

25 A. Do you mean, Ms. Leader, before the O'Higgins 13:59
26 Commission or --

27 253 Q. Around the time you were deciding what your strategy
28 should be with regard to Sergeant McCabe at the
29 Commission?

1 A. Well, the approach that was taken, as I said, was the
2 legal advices were that it would be necessary to put
3 certain matters and those certain matters were the
4 interactions between Sergeant McCabe and Garda
5 management arising out of his failure to obtain the 13:59
6 DPP's directions, and then the evidence -- or, sorry,
7 and how his behaviour, his attitude had changed.

8 254 Q. Yes.

9 A. And then to look at what evidence did he have to
10 support his belief that there was allegations of 13:59
11 corruption and malpractice. Is that --

12 255 Q. Yes. Did you know, when you were giving those
13 instructions, that Sergeant McCabe's attitude towards
14 you personally would change?

15 A. Well, Chairman, I was -- 13:59

16 256 Q. You couldn't have known obviously, but did you predict
17 a situation?

18 A. I anticipated, Chairman, that, given my interactions,
19 my own personal interactions with Sergeant McCabe, that
20 it may be viewed in a certain way. But again, if you 14:00
21 put yourself in my shoes, I was faced with this dilemma
22 where I had to get to the bottom of the allegations
23 that were being made, I had to make sure that they were
24 fairly tested and impartially and objectively tested in
25 the Commission of Investigation and I had to balance my 14:00
26 concerns for Sergeant McCabe and his attitude towards
27 me with my concerns for the organisation as a whole and
28 particularly for the individuals who these allegations
29 were made against.

1 257 Q. why didn't you simply explain to Sergeant McCabe, or
2 have it explained on your behalf, that this strategy
3 was going to be adopted at the Commission, prior to it
4 actually being put into place?

5 A. Because, Chairman, Sergeant McCabe was a central 14:00
6 witness at the Commission, and, no more than all of the
7 other witnesses at the Commission, I didn't interfere
8 with any of the witnesses that were going to be before
9 the Commission because I wanted to make sure that it
10 was objective and impartial, and I didn't interfere nor 14:01
11 speak to any of the witnesses that were to give
12 evidence before the Commission, including Sergeant
13 McCabe.

14 258 Q. Well, surely it could have simply been said to Sergeant
15 McCabe, look, we have to -- look, Sergeant, we have to 14:01
16 inquire into what caused all these complaints to be
17 made in the first place and the issue of the DPP's
18 directions, and simply left at that. Was any thought
19 given to warning Sergeant McCabe that this was to
20 happen? 14:01

21 A. Well, Chairman, I would have thought that Sergeant
22 McCabe's role at the Commission would have been
23 explained to him by his legal advisers. I was aware
24 that he was represented by independent legal advisers,
25 and I didn't feel it was my -- that I should interfere 14:01
26 with whatever advices he was getting from his legal
27 team.

28 259 Q. Well, as I understand it, it had been conveyed to
29 Sergeant McCabe that his interactions with Garda

1 management wouldn't be examined before the Tribunal --
2 before the Commission?

3 A. Well, again, Chairman, I don't want to comment on any
4 advices that Sergeant McCabe got from his legal
5 advisers, but from my perspective and the perspective 14:02
6 of An Garda Síochána, Sergeant McCabe appeared to me
7 that he was going to be a central witness at the
8 Commission of Investigation and, as is outlined in the
9 correspondence that we have had from 2012 and indeed in
10 Guerin, Sergeant McCabe had a lot of evidence and facts 14:02
11 to put before the Commission, so I would not like to
12 interfere in any way with any witness, no more than
13 this Tribunal, I wouldn't seek to interfere with any
14 witness.

15 MS. LEADER: Thank you very much. 14:02

16 A. Thank you, Ms. Leader. Thank you, Chairman.

17 MR. McDOWELL: Judge, there is one point that I forgot
18 to put.

19 CHAIRMAN: All right.

20 14:02

21 FORMER COMMISSIONER NÓIRÍN O'SULLIVAN WAS FURTHER
22 CROSS-EXAMINED BY MR. McDOWELL:

23

24 260 Q. MR. McDOWELL: Were you aware, Ms. O'Sullivan, that
25 Chief Superintendent Rooney had circularised the entire 14:03
26 Cavan-Monaghan division with a notice to be posted in
27 every station concerning the Byrne/McGinn report
28 outcome as he understood it?

29 A. Chairman, I believe I may have read something about

1 that, and I can't remember precisely where, but I may
2 have read something about that, but I don't know if
3 it's in the documentation that I've read for the
4 Tribunal.

5 261 Q. You see, on the 6th July 2011, Superintendent Clancy 14:03
6 forwarded a document to every sergeant in charge of
7 Monaghan district, the sergeant in charge of the crime
8 section and the sergeant in charge of D/Branch drugs,
9 and it was headed:

10
11 "Allegations made by Sergeant Maurice McCabe, 14:04
12 Bailieboro Garda Station. Correspondence dated 4th
13 July 2011 from divisional officer is forwarded for your
14 information", signed "MP Clancy".

15
16 Maybe the witness should be shown this. 14:04

17 CHAIRMAN: Are you mixing up names? Are you saying
18 Cunningham instead of Clancy?

19 MR. McDOWELL: Clancy.

20 CHAIRMAN: You said Cunningham. 14:04

21 MR. McDOWELL: Sorry, did I say Cunningham?

22 CHAIRMAN: Yes.

23 MR. MURPHY: Chairman, I wonder if Mr. McDowell could
24 clarify, is this something that is being raised in
25 civil proceedings? 14:04

26 MR. McDOWELL: Yes. And the reason I want to deal with
27 it is now here. It has been circulated, I understand.

28 MS. LEADER: It has. It's at page 4858. It's just
29 been circulated.

1 [SAME HANDED].

2 A. Thank you.

3 CHAIRMAN: It's here. So it's here, yes.

4 A. Yes, I have that now, Mr. McDowell.

5 262 Q. MR. MCDOWELL: And this was Superintendent Cunningham 14:05
6 sending this document out to everybody, every sergeant
7 in Monaghan district?

8 CHAIRMAN: Are you right by saying that --

9 MR. MCDOWELL: Sorry, I keep saying Cunningham.
10 Clancy, sorry. 14:05

11 CHAIRMAN: And the stenographer has corrected you.

12 263 Q. MR. MCDOWELL: And what was attached to it was a
13 document coming from the chief superintendent's office
14 of Cavan-Monaghan division dated the 4th July 2011, do
15 you see that? 14:05

16 A. Yes, Chairman, I see that.

17 264 Q. And it's headed -- and it was addressed to the
18 superintendent in Bailieboro, and it's headed:
19
20 "Re allegations made by Sergeant Maurice McCabe, 14:05
21 Bailieboro Garda Station."
22

23 And it reads:
24
25 "On the 24th June 2011, I had a meeting with Assistant 14:05
26 Commissioner Derek Byrne, National Support Services,
27 Garda Headquarters, of Monaghan Garda Station. He
28 informed me that he had completed his investigation
29 into the complaints made by Sergeant Maurice McCabe.

1 The findings of the investigation were approved by the
2 Garda Commissioner."

3
4 Can I stop there. And factually, do you believe that
5 he had, in fact, completed a report which had been
6 approved by the Garda Commissioner? 14:06

7 A. I don't know, Chairman.

8 265 Q. I see. Well, we will read on:

9
10 "The investigation concluded that there were no 14:06
11 systemic failures identified in the management and
12 administration of Bailieboro Garda district. A number
13 of minor procedural issues were identified. On further
14 investigation at local level, no evidence was found to
15 substantiate the alleged breach of procedures. The 14:06
16 assistant commissioner further concluded that there was
17 no criminal conduct identified on the part of any
18 member of the district force. I would like to
19 congratulate all members who served in Bailieboro
20 district during the period in question. In particular, 14:07
21 I wish to thank Sergeant Gavigan, who provided
22 leadership, enthusiasm and commitment in steering the
23 station party through the crisis that had occurred.

24
25 The findings of the assistant commissioner vindicate 14:07
26 the high standards and professionalism of the district
27 force in Bailieboro. I appreciate the manner in which
28 the members of the district participated in the
29 investigation, were open and truthful in their account

1 of events surrounding the allegations. I hope that the
2 members and their family can now put this difficult
3 period behind them and continue to serve the public and
4 their colleagues in an efficient manner. Please inform
5 all concerned."

14:07

6
7 You've seen that before, have you?

8 A. Chairman, I believe I read it in these papers.

9 266 Q. And I believe -- I also believe that in the run-up to
10 the commencement of the Commission of Investigation,
11 libel proceedings concerning that document were sought
12 and furnished to the counsel who you had appointed?

14:08

13 CHAIRMAN: I'm sorry, that sentence doesn't make sense.

14 MR. MCDOWELL: Well, sorry, libel proceedings, the
15 papers in libel proceedings were furnished to the
16 barristers who were conducting the case on your behalf,
17 by Sergeant McCabe. Sergeant McCabe had sued --

14:08

18 CHAIRMAN: Right, Sergeant McCabe, so defamation
19 proceedings?

20 MR. MCDOWELL: Yes.

14:08

21 CHAIRMAN: Okay.

22 MR. MCDOWELL: And they are live.

23 CHAIRMAN: And that was part of the briefing material
24 for counsel?

25 MR. MCDOWELL: Yes.

14:08

26 CHAIRMAN: Okay, right. I get the question.

27 A. Yes.

28 267 Q. MR. MCDOWELL: And these papers were sought and
29 provided for counsel, isn't that right?

1 A. Chairman, that may well be the case. Perhaps one of
2 the other parties provided them, I'm not aware of that.

3 268 Q. Now, you've heard about, and I don't want to go through
4 all the detail again, but you've heard here that there
5 were very serious problems wrong with Bailieboro and 14:09
6 seriously wrong things had happened there, isn't that
7 right?

8 A. There were most certainly shortcomings in terms of
9 investigation and incidents in Bailieboro district,
10 yes. 14:09

11 269 Q. There were very poor incidents of bad policing -- very
12 many -- sorry, there were very serious incidences of
13 bad policing?

14 A. Yes, nobody is questioning that, Chairman, and that was
15 found -- excuse me, Mr. McDowell -- that was found, and 14:09
16 I was aware of that, in Byrne/McGinn in some instances,
17 in the Guerin Report in others, and then Mr. Justice
18 O'Higgins in his report, and I fully accepted the
19 findings of Mr. Justice O'Higgins. He found likewise.
20 So, yes, that is a fact. 14:09

21 270 Q. But this document suggests the exact opposite, that the
22 Byrne/McGinn report had found nothing to see, isn't
23 that right?

24 A. Well, Chairman, I can't account for this document.
25 MR. MURPHY: Sorry, Chairman. That isn't what the 14:10
26 letter says. I think the question should be put on the
27 basis of what the letter says.
28 MR. McDOWELL: Sorry. But this document suggests --
29 CHAIRMAN: No, but there's a point, Mr. McDowell, and I

1 suppose the point that you're making is this:
2 vis-à-vis the fact that, on the ten incidents, the
3 O'Higgins Commission ultimately found, look, this is a
4 mess. That is what O'Higgins Commission did, in fact,
5 find.

14:10

6 MR. MCDOWELL: Yes.

7 CHAIRMAN: If you put yourself in the position of the
8 person who has brought these things to light, the fact
9 that the chief superintendent, who is the divisional
10 officer, is putting up a notice to all concerned that,
11 in fact, there's nothing wrong, wouldn't exactly make
12 you feel very well supported. I think that is the
13 basic point that Mr. McDowell is making.

14:10

14 271 Q. MR. MCDOWELL: Yes, that is the point I'm coming from.
15 I'm suggesting to you that this --

14:11

16 CHAIRMAN: Well, I got that from the start.

17 272 Q. MR. MCDOWELL: I'm suggesting to you that this, this
18 document, was designed to isolate Sergeant McCabe,
19 belittle him and belittle all the concerns which you
20 say were legitimate concerns?

14:11

21 A. The concerns that Sergeant McCabe brought forward,
22 Mr. McDowell, I have always accepted that they were
23 legitimate concerns.

24 273 Q. Yes. And now I'm asking you about this document. This
25 document was posted in every station in the district
26 and it was designed to invite all the members of the
27 force to think that they had been falsely accused on
28 trumped-up charges by Sergeant McCabe of having low
29 policing standards, isn't that what it says, to a

14:11

1 layman?

2 A. Well, again, Chairman, I'm very conscious that there is
3 ongoing litigation in relation to circumstances
4 surrounding this document.

5 CHAIRMAN: Don't worry about that, don't worry about 14:11
6 that. I mean, if you want to answer the question, then
7 please do. It's not going to make any difference to
8 any jury two years hence, or indeed any judge.

9 A. Yes. Chairman --

10 CHAIRMAN: Now, or in the future. 14:12

11 A. Chairman, I'm not sure -- I take Mr. McDowell's point,
12 but I'm not sure that I can comment on what -- the mind
13 of Chief Superintendent Rooney when he prepared and
14 circulated this minute.

15 274 Q. MR. McDOWELL: well, okay, maybe we will look at it 14:12
16 from this perspective: If you won't comment on the
17 mind of Chief Superintendent Rooney in directing that
18 it be sent to every police station in the area and
19 brought to the attention of every policeman in the
20 area, will you agree with me that, on an ordinary 14:12
21 reading, and I take it you're capable of an ordinary
22 reading, just objective, this was to belittle Sergeant
23 McCabe's complaints and to say that nothing had been
24 found at all in relation to them?

25 A. Well, there's many readings could be taken from it, 14:12
26 Mr. McDowell, and I am capable of reading, thankfully,
27 but --

28 275 Q. I'm not suggesting you can't read.

29 A. Thank you.

1 276 Q. I'm suggesting an ordinary reading of it.

2 A. I can understand the perspective that Sergeant McCabe
3 may have had of this document.

4 277 Q. It's not the sort of --

5 CHAIRMAN: It's not. The document says, look, 14:13
6 vis-à-vis complaints of policing in Bailieboro,
7 Sergeant McCabe has made allegations about how bad
8 everything was, but that had been independently
9 investigated now, whether this is true or not, by Byrne
10 and McGinn, and they found there's nothing. So I hope 14:13
11 everybody can now sleep well at night. That's a
12 paraphrase of it.

13 A. Yes. In the circumstances when these investigations
14 are ongoing, it may not have been the most prudent
15 thing to do, to circulate a document like this, and I 14:13
16 can understand how Sergeant McCabe may have taken a
17 particular view of the document.

18 278 Q. MR. MCDOWELL: Yes. I mean, you can understand how
19 Sergeant McCabe can take a view of it. Can you
20 understand what the ordinary member of An Garda 14:13
21 Síochána who saw it posted up in the station, would
22 think of it?

23 A. As I say, Chairman, it may not be the most prudent
24 thing to circulate at a time when these investigations
25 are ongoing. 14:14

26 279 Q. I see. You see it says:
27
28 "I appreciate the manner in which the members of the
29 district participating in the investigation were open

1 and truthful in their accounts of the events
2 surrounding the allegations. I hope that the members
3 and their families can now put this difficult period
4 behind them and continue to serve the public in an
5 efficient and professional manner." 14:14

6 A. Well, Chairman, I'm finding it very difficult; I have
7 never worked in Bailieboro district, I have never
8 worked in the Cavan-Monaghan division, and I'm finding
9 it very difficult to put myself into the shoes of the
10 author of this document, who perhaps had to balance the 14:14
11 workplace that he was dealing with at that time and get
12 a balance for all of the members. So I'm very
13 reluctant to offer commentary on the purpose or the
14 motivation behind this document, and I think the only
15 person that can do that is the author, and, as I 14:15
16 understand, there may be an opportunity to do that with
17 the litigation that's prevailing.

18 MS. LEADER: Sir, just to be clear, Mr. Rooney has, in
19 fact, submitted a statement to the Tribunal in relation
20 to that particular document. 14:15

21 CHAIRMAN: Yes. And I understand it --

22 MS. LEADER: It hasn't been circulated.

23 CHAIRMAN: Yes, I understand it was Chief
24 Superintendent Rooney who reported as well on the
25 outcome of 624 Pulse records on 9th June 2011 as well. 14:15
26 So it's there. Mr. McDowell, I can read.

27 MR. MCDOWELL: Well, I haven't seen this.

28 CHAIRMAN: Hopefully I'm not an unreasonable man, but
29 you're asking me to take what the reasonable garda

1 would take from that. But what's the point that needs
2 to be --

3 280 Q. MR. MCDOWELL: The point I wanted to raise with this
4 witness was, that if supports were being given to
5 Sergeant McCabe as a whistleblower, this kind of 14:15
6 document effectively pulled all the supports away from
7 him?

8 A. Well, Chairman, if I can be clear. In 2011, this
9 document is July 2011, the supports I am talking about
10 is, the moment that I took up as Acting Interim 14:16
11 Commissioner, I implemented a complete radical change
12 in the attitude towards whistleblowers and I made sure
13 there were supports put in place for Sergeant McCabe
14 and for other individuals who wanted to speak up. So
15 my actions postdate the 2011 document that you've just 14:16
16 shown me, Mr. McDowell.

17 281 Q. Well, we know from answers you gave to me earlier
18 today, that, in large measure, your counsel were
19 depending on Superintendent Cunningham, former Chief
20 Superintendent Rooney and Superintendent Clancy for 14:16
21 their factual instructions?

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

23 282 Q. And I've just got to suggest to you that it wasn't just
24 simply Sergeant McCabe -- sorry, it wasn't just simply
25 Superintendent Cunningham who had an attitude towards 14:17
26 Sergeant McCabe, that the other two gentlemen seem to
27 have had one, as shown in the circulation of this
28 letter?

29 MR. MURPHY: Chairman, I have to object to this

1 question. This is being made in circumstances where
2 the Tribunal has a statement from a person who has been
3 spoken about, it's not been circulated, and this
4 witness is not the person, in my respectful submission,
5 to have to answer this witness. 14:17

6 MR. MCDOWELL: I'm asking this witness about --

7 CHAIRMAN: It's pointed out. But I think I see the
8 point. I think, I suppose it's like reliving
9 something; if this instruction you're saying, whether
10 accurate or not, whether carried out correctly or not, 14:17
11 in relation to credibility and motivation gets wrongly
12 translated, whether that happened or not in an
13 attack -- into an attack on integrity, this is one of a
14 number of things, I suppose, that would be triggered by
15 that, leading to upset in the mind of Sergeant McCabe. 14:18
16 That's as I see the point at the moment.

17 MR. MCDOWELL: Yes. And just one other --

18 CHAIRMAN: How many sets of civil actions are there, in
19 fact?

20 MR. MCDOWELL: There's two -- three of different types, 14:18
21 Judge.

22 CHAIRMAN: There's the --

23 MR. MCDOWELL: This is the only one of this type,
24 Judge.

25 CHAIRMAN: That is the defamation one? 14:18

26 MR. MCDOWELL: Yes.

27 CHAIRMAN: And then there's the Hillgrove Hotel on the
28 11th October 2010, that is a second one?

29 MR. MCDOWELL: Yes.

1 CHAIRMAN: And is -- what is the third one?

2 MR. MCDOWELL: I think there are proceedings in
3 relation to Tusla as well, Judge.

4 CHAIRMAN: Yes. All right.

5 283 Q. MR. MCDOWELL: I'm just putting it to you, I mean 14:18
6 Mr. Murphy was asking you to deal with the suggestions
7 made by Sergeant McCabe that his allegations had been
8 covered up, do you remember that, just shortly ago?
9 Sergeant McCabe had made allegations to the
10 Confidential Recipient to the effect that his original 14:19
11 allegations had been covered up, do you remember that?

12 A. Yes, Chairman, there were a number of documents which
13 were read into the document a few moments ago.

14 284 Q. Yes.

15 A. Alleging cover-up, malpractice and corruption on behalf 14:19
16 of a number of members of An Garda Síochána.

17 285 Q. And I am just asking you, would you agree with me that
18 the complaints that Sergeant McCabe made in relation to
19 policing standards, which you said were valuable and
20 were well-motivated, and all the rest of it, that this 14:19
21 was how they were treated by Superintendent Clancy and
22 Chief Superintendent Rooney at the time?

23 A. Well, Chairman, I can't account for how Chief
24 Superintendent Clancy or Chief Superintendent Rooney
25 dealt with this. What I can account for is how I dealt 14:19
26 with the allegations. The allegations --

27 286 Q. I'm not asking about how you dealt with it. I'm just
28 asking you, would you agree with me that a person might
29 think that Chief Superintendent Rooney and

1 Superintendent Clancy were dismissing in public and to
2 every member of An Garda Síochána, any substance to all
3 of these allegations, and congratulating the rest of
4 the force for having endured a difficult period during
5 which these allegations were being examined? 14:20

6 MR. MURPHY: Chairman, can I object to that question,
7 on the following premise: You've indicated that this
8 process, sir, is not a rehearing of the O'Higgins
9 Commission. With respect to My Friend Mr. McDowell, I
10 think this question is an attempt to re-litigate issues 14:20
11 or reactivate matters which the O'Higgins Commission
12 has dealt with.

13 MR. MCDOWELL: Sorry, this was not dealt with at the
14 O'Higgins Commission at all, not at all, because the
15 O'Higgins Commission ruled this letter out. So I just 14:20
16 want to be clear about that.

17 MR. MURPHY: I say it is not relevant.

18 MR. MCDOWELL: So I am asking --

19 CHAIRMAN: Look, I'm only going to appeal at this
20 point, because otherwise it is pointless, but we have 14:21
21 to come to a stop at some stage --

22 MR. MCDOWELL: Yes.

23 CHAIRMAN: -- in relation to Ms. O'Sullivan, you know.

24 MR. MCDOWELL: I accept that.

25 CHAIRMAN: And we have traversed the desert, the deep 14:21
26 blue sea, the lakes, the mountains.

27 MR. MCDOWELL: Judge, I'm only asking this witness
28 about this letter.

29 CHAIRMAN: No, but the point is actually made well,

1 Mr. McDowell, once you say it, because it's in my head.
2 MR. MCDOWELL: Fair enough.
3 CHAIRMAN: It's in my head. I see exactly what you are
4 saying.
5 MR. MCDOWELL: Yes. 14:21
6 CHAIRMAN: But as to whether --
7 MR. MCDOWELL: And just, I don't want it said that I
8 didn't give the witness an opportunity to deal with
9 that issue.
10 CHAIRMAN: No, let's not go -- well, now, I am not 14:21
11 going to say that. I think -- no, I see the point
12 you're making, I do, I honestly see the point you're
13 making, but I'm not sure how that can be ascribed to --
14 by Commissioner O'Sullivan.
15 MR. MCDOWELL: No, but, I mean, she relied on those 14:21
16 three people to give the factual instructions on the
17 background to Sergeant McCabe to her legal team.
18 CHAIRMAN: Well, that is a different point. And do you
19 think that -- did you feel that in terms of their
20 attitude, if we go through the people involved, Chief 14:22
21 Superintendent Clancy, Superintendent Cunningham, Chief
22 Superintendent Rooney or indeed Commissioner Callinan,
23 that they had an emotional investment in this thing in
24 relation to Maurice McCabe; in other words, that they
25 were reacting to what he was saying against them in 14:22
26 such a way that they couldn't be relied on to be
27 objective and balanced, bearing in mind, Commissioner
28 O'Sullivan, that it's very difficult when you're under
29 attack to, you know, climb onto the top of a mountain

1 and look down on all the facts as if you are not
2 involved, and people really do get caught up. I think
3 that is the basic point being made by Mr. McDowell.

4 MR. McDOWELL: Yes.

5 A. Yes, Chairman, I would agree that all of the 14:22
6 individuals, and not just the senior officers, but I
7 think, also, all of the members in Cavan-Monaghan and
8 members who found themselves embroiled in a lot of
9 these investigations, there was a huge, and I include
10 Sergeant McCabe in this, there was a huge emotional 14:23
11 toll on all of the individuals, and including the
12 people that were trying to manage the proceedings. I
13 certainly remember it was a very emotional time all the
14 way through O'Higgins. And bearing in mind, as
15 Mr. Justice O'Higgins found in his report, the people 14:23
16 that were involved in this at all levels had lived
17 under the strain for a very, very long time and
18 Mr. Justice O'Higgins specifically recognised that in
19 his report and said that he hoped that everybody could
20 put it behind them, and I am paraphrasing now, but get 14:23
21 on with their lives. And certainly from An Garda
22 Síochána's point of view, that's what we were hoping to
23 do.

24
25 FORMER COMMISSIONER NÓIRÍN O'SULLIVAN WAS QUESTIONED BY 14:23
26 THE CHAIRMAN:

27
28 CHAIRMAN: well, I think the point was, did you think
29 that they were too wrapped up in it to be able to -- I

1 mean, you're taking a step back, and I understand why,
2 because what you are saying is, I am representing the
3 force, that is what you are saying, now whether that is
4 a reasonable point of view or not, I want to think
5 about that, but in terms of what is most important in 14:24
6 any case, which is the factual material on the ground,
7 sometimes you can trust people to be very objective and
8 sometimes, frankly, you can't. I think every lawyer
9 would know that, and possibly every policeman would
10 know that. Did you think maybe that they were too 14:24
11 caught up to be, not so much trusted, as to give you an
12 assurance that there was going to be objectivity in
13 relation to whatever they deployed on your behalf or on
14 their own behalf through the same counsel if there was
15 a disagreement between you and them? That is the 14:24
16 point.

17 A. Yes. I think, Chairman, my view was that, throughout
18 the consultations, particularly with counsel and with
19 Chief Superintendent Healy present, if there was any
20 indication that they were being anything other than 14:24
21 objective, I would have expected that I would have been
22 advised differently. But I also take your point in the
23 general term of things and I suppose I have thought
24 about this long and hard with all of the dialogue that
25 there has been, not just at this Tribunal but 14:25
26 generally, and I certainly think that maybe for the
27 future, it's a different model can be used. We
28 followed what was the established model, but maybe
29 there is a different model that can be used for the

1 future.

2 CHAIRMAN: No, but, still, I'm not asking you to
3 condemn Chief Superintendent Rooney or Chief
4 Superintendent Clancy or Superintendent Cunningham or
5 indeed former Commissioner Callinan, but do you think 14:25
6 maybe that they were a bit annoyed about all of this?

7 A. I think they were under enormous emotional toll and I
8 feel -- as I say, the purpose of entering the
9 Commission to put all of the facts and to be able to
10 cross-examine all of the witnesses was that Mr. Justice 14:25
11 O'Higgins could hear it first hand, the perspectives of
12 all of the witnesses that were before the Commission,
13 and would be able to get a balanced view of the
14 perspectives of each of the witnesses.

15 CHAIRMAN: Yes. Well, you see, I didn't mean to ask 14:26
16 you any questions at the end, but it's just as it so
17 happened this way. But if you take the whole human
18 notion of, if you do something wrong to me, well then
19 the gloves are off, if you know what I mean. Now,
20 there were allegations of corruption made against 14:26
21 Assistant Commissioner Byrne, Superintendent Clancy,
22 Assistant Commissioner Cunningham, and I know from
23 reading the evidence, for instance, that Assistant
24 Commissioner Cunningham had a particular point of view,
25 some of it has been read out, but there was others, and 14:26
26 a specific case was mentioned, and that indeed has been
27 mentioned in a submission by Mr. Sreenan. But
28 attacking someone's credibility can be dangerous
29 because then the person become important and the facts

1 become less important. Do you think it might have been
2 possible for you to say, look, I know you're all
3 annoyed about this and I know you feel he's made all
4 kinds of allegations against you, some of which may be
5 unfounded, but if there's proof, after all this is a 14:27
6 judge and there's no point in us going after him or why
7 he made them, surely at the end of the day the whole
8 question is, is there anything to back this up? And if
9 there is not, I think anybody could depend on
10 Mr. Justice O'Higgins to say, look, you can think what 14:27
11 you like, but if there's nothing there, there's nothing
12 there, which is supposed to be the judicial mindset; in
13 other words, that the whole deployment of anything to
14 do with credibility maybe was a bad idea?

15 A. I think, Chairman, the purpose of putting all of the 14:27
16 facts before the Commission was to allow exactly as you
17 say, for Mr. Justice O'Higgins, and there is no doubt
18 that different people had different perspectives and
19 had been affected in different ways, but the whole
20 purpose of it was to allow Mr. Justice O'Higgins to 14:27
21 hear all of the facts and to examine all of the
22 witnesses, to ensure that he, as he did, got to the
23 truth of matters.

24 CHAIRMAN: All right. Thank you very much.

25 A. Thank you very much, Chairman. 14:28

26

27 THE WITNESS THEN WITHDREW

28

29 CHAIRMAN: So that is it. Okay, yes, I beg your

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pardon.

MR. MARRINAN: Yes.

CHAIRMAN: Oh, Mr. Marrinan, I didn't see you for a minute. Okay, it's 2:30 and it's day 47, and I am not sure that this particular module is anything less than important, of course it is important, but there are more important matters ahead, which I would love to get to prior to the longest day of the year, and so as a coloratura foghorn wailing in the wind, which is what I feel myself to be at times, I wonder could we now move on. Thank you. 14:28

MR. MARRINAN: Yes. Thank you. The next witness, sir, is being taken out of turn. He is a relatively short witness, but he has travel arrangements made for tomorrow. Mr. Richard Barrett, please. 14:29

1 MR. RICHARD BARRETT, HAVING BEEN SWORN, WAS DIRECTLY
2 EXAMINED BY MR. MARRINAN AS FOLLOWS:
3

4 MR. MARRINAN: Mr. Barrett's statement of evidence is
5 to be found at page 3331, which is in volume 6, sir. 14:29

6 287 Q. Mr. Barrett, I think the position is that you're Deputy
7 Director -- you're Deputy Director General of the
8 Office of the Attorney General, is that right?

9 A. That's correct. I'm in that position since early in
10 2015. 14:29

11 288 Q. I think from May of 2014 you were the advisory counsel
12 in the group of advisory counsel in the Attorney
13 General's office, is that right?

14 A. Yes, I was dealing with justice matters since
15 approximately May of 2014, and then I was appointed 14:30
16 Director General early the following year, but I
17 continued to deal with some justice matters after that.

18 289 Q. And in that role, you were dealing with criminal
19 justice and Garda matters, is that right?

20 A. Yes, amongst other things, but yeah. 14:30

21 290 Q. And though in early 2015 you were promoted to be Deputy
22 Director General, you kept on an involvement in the
23 criminal justice and Garda matters, is that right?

24 A. Some continuing matters I kept an involvement in.

25 291 Q. I think that you had been involved in the establishment 14:30
26 of the O'Higgins Commission of Investigation from the
27 summer of 2014, is that right?

28 A. Advices on the establishment and the terms of reference
29 and related matters.

1 292 Q. And in that context you'd have been familiar with many
2 of the issues that arose in relation to Sergeant
3 Maurice McCabe?
4 A. Yes, I was aware of the Séan Guerin Report and the
5 preparatory work for the Commission of Investigation. 14:31
6 293 Q. And in terms of the terms of reference that were being
7 drawn up, I think that some consideration was given
8 to including a term of reference to include allegations
9 by a party that we have identified as Ms. D, is that
10 right? 14:31
11 A. I was aware from the Department at the time that the
12 terms of reference were being designed of a suggestion
13 that the Séan Guerin list of topics would be extended
14 to include a reference to the previous criminal file,
15 shall we call it, but that was never pursued. 14:32
16 294 Q. Why was it not pursued?
17 A. I'm not sure. I just -- it was floated as an idea, and
18 then the idea did not continue and instead it kept to
19 the -- it kept almost exactly to the incidents in the
20 Séan Guerin Report. 14:32
21 295 Q. Yes. I think Mr. Guerin had provided a report in early
22 May of 2014, is that right?
23 A. Yes.
24 296 Q. Now, I think that you had also been dealing with other
25 matters, which I'm not going to go into in any sort of
26 detail at all, but you had been dealing with other 14:32
27 matters in relation to Garda McCabe, and your name has
28 been mentioned in dispatches already before the
29 Tribunal, and in particular by Mr. Ruane who caused

1 a -- terms of reference in relation to a programme for
2 work for Mr. Kieran Mulvey in relation to work-related
3 matters regarding Sergeant Maurice McCabe, and these
4 are at page 3718, if they could be put up on the
5 screen. These are the terms of reference. I think
6 that they were sent to you and also to Mr. Flahive in
7 the Department of Justice, is that right?

14:33

8 A. Well, I see them in front of me and I don't quite
9 recognise them. But this is -- the Chairman will
10 understand that the vast majority of my interactions
11 with these matters were in the context of legal advice,
12 which is the business of the Attorney General's office.
13 So whatever involvement I had with these matters, I
14 think, earlier in 2015, were for the purpose of
15 providing legal advice. So I'm sort of constrained in
16 my ability to comment on whatever I was doing on that
17 file, but I do remember conversations in relation to a
18 role for Kieran Mulvey and I think a barrister at the
19 same time.

14:33

14:34

20 297 Q. Indeed. I think if we have page 3716 on the screen,
21 please. You'll see there an email from Mr. Ruane to
22 you, referring to Mr. Barrett, that is Mr. John
23 Barrett, Executive Director of Human Resources and
24 People Development, has asked:

14:34

25
26 "In advance of meeting here --"

14:34

27
28 That was between -- that was a meeting that was to take
29 place between, I think, maybe Mr. O'Daly and Mr. Ruane,

1 but in any event:

2
3 "In advance of meeting here to discuss the above which
4 is scheduled for tomorrow, would it be possible to get
5 a preliminary view or otherwise in relation to the 14:35
6 proposed terms of reference for Mr. Mulvey?"
7

8 And then:

9
10 "I am grateful for your assistance." 14:35
11

12 And that is sent by Mr. Ruane to you. And then if we
13 could go over to page 3715, you'll see that at the
14 bottom there, bottom email, this is from Mr. Michael
15 Flahive of the Department of Justice to Mr. Ken Ruane 14:35
16 dated 11th March 2015:
17

18 "Ken, thanks for copying me the draft terms of
19 reference."
20

21 And then he suggests in the body of that two terms of
22 reference that might be included, and that is copied,
23 you see there, to yourself, on the right-hand side
24 there. And I suppose I'm only introducing that to show
25 that there was communication, as it were, between 14:36
26 Mr. Ruane on the one hand, with the Attorney General's
27 office on the other hand, including the Department of
28 Justice, in relation to matters concerning Maurice
29 McCabe, isn't that right?

1 A. Yes, there were a few interactions of a similar nature.
2 298 Q. And did you see the, I suppose the role of the Attorney
3 General's office as purely that of giving legal advice?
4 A. Yes, certainly. The Attorney General's office was
5 involved in giving legal advice principally to the 14:36
6 Minister and Department, but on specific issues the
7 Gardaí might be involved as well.
8 299 Q. Yes. Now, I think as the Commission of Investigation
9 got underway, a colleague of yours, Mr. David Kelly,
10 dealt with some operational issues of the running of 14:36
11 the Commission, is that right?
12 A. Yes. I think there was a file in relation to the
13 establishment and the logistics and the setting up of
14 that Commission of Investigation, and that was
15 principally one colleague, and somebody else dealt with 14:37
16 the setting-up arrangements in relation to the
17 representation for the Gardaí, because that had to come
18 through the office also.
19 300 Q. I think Michael Dreelan, who is also a colleague of
20 yours, had a separate role, is that right? 14:37
21 A. Yes. He was focused on the -- on ensuring that there
22 was legal representation provided for the Gardaí.
23 301 Q. I think that a solicitor was assigned from the Chief
24 State Solicitor's Office, we know Annmarie Ryan?
25 A. Yes. 14:37
26 302 Q. And she was dealing with Garda management and counsel
27 that had been nominated to appear on behalf of the
28 Garda Commissioner and other named Gardaí, isn't that
29 right?

1 A. Yes, I was aware that Annmarie Ryan had been appointed
2 by the Chief State Solicitor.

3 303 Q. I think it was always the understanding, and is always
4 the understanding in those circumstances, that no legal
5 directions are sought from the Attorney General's
6 office, and its role in relation to this is purely
7 administrative as far as counsel and the Chief State
8 Solicitor's Office is concerned, is that right?

14:38

9 A. That would vary from occasion to occasion. In this
10 particular Commission of Investigation, there was no
11 directing role from the Attorney General's office to
12 the advisory team who were working for the Gardaí.

14:38

13 304 Q. I think that you're aware of the fact that there were
14 some difficulties that arose in relation to
15 interactions between her and the Commission, and,
16 whilst she was advising the Attorney General's office
17 of those matters as matters proceeded, no directions
18 were given by the Attorney General's office and none
19 were sought, is that right?

14:38

20 A. That's correct.

14:39

21 305 Q. Now, if we could turn to the 15th May of 2015 and a
22 conversation that you had, I think it was in the late
23 afternoon of Friday 15th May, with your colleague
24 Mr. Michael Dreehan.

25 A. Yes, Michael Dreehan contacted me either by email or
26 telephone or by calling up to the room to say he had a
27 telephone call from Annmarie Ryan informing him of a
28 dispute that had taken place at the Commission of
29 Investigation. I had a few conversations with Michael,

14:39

1 and later that afternoon I contacted Michael Flahive in
2 the Department.

3 306 Q. And when you say that he contacted you in relation to a
4 dispute at the Commission, did he elaborate on what
5 that was? 14:40

6 A. He explained to me his understanding of the message he
7 had got from Annmarie Ryan.

8 307 Q. And which was?

9 A. Which was that a dispute had taken place at the
10 Commission of Investigation and this was -- it related 14:40
11 to the extent to which the motivation of Sergeant
12 McCabe might be raised, this was connected in some way
13 or other with the previous existence of a criminal file
14 and that this had caused contention at the Commission
15 of Investigation that day. 14:40

16 308 Q. So there were two matters: First of all, that there
17 was an issue in relation to the motivation of Sergeant
18 McCabe, in the first instance?

19 A. Yes.

20 309 Q. Is that right? 14:40

21 A. Yes, that was the origin of the dispute, I understood.

22 310 Q. And that that was linked with a previous criminal
23 investigation in relation to Sergeant McCabe, is that
24 right?

25 A. That there was some connection between how the 14:41
26 motivation arose and the fact that there had been a
27 previous criminal file. I was getting this information
28 at second, if not thirdhand, so the nature of that
29 connection was a little unclear to me.

1 311 Q. Did you link that into the Ms. D allegation that you
2 were familiar with back in 2014 when that as a term of
3 reference was not included?

4 A. Yes, I was aware that there had been a criminal file
5 that went to the DPP and didn't go any further and that 14:41
6 this was the item which might, one way or the other,
7 have been added to the terms of reference, but wasn't.

8 312 Q. I think that you've said in your statement that it was
9 anticipated that the dispute could result in judicial
10 review proceedings by the Gardaí, or indeed by Sergeant 14:42
11 McCabe, is that right?

12 A. That was either mentioned in the discussions I had with
13 Michael Dreelan, and I was concerned that judicial
14 review proceedings or injunction proceedings or some
15 other sort of litigation would disrupt the -- or slow 14:42
16 down the work of the Commission of Investigation.

17 313 Q. Sorry, will you just give me one moment. I'll just
18 pass from that. But as a result of that telephone
19 call, what were your concerns at that time?

20 A. Well, the Commission of Investigation had been 14:43
21 established only very shortly before this, on the basis
22 of the test of the public interest or public concern
23 and that this element of public concern led to a
24 structure of work with a certain expectation of the
25 time line, and that the intervention of judicial review 14:43
26 proceedings, or similar, might disrupt that time line
27 and this would complicate the operation of the
28 Commission of Investigation.

29 314 Q. Sorry, I now have the document to hand that I would

1 just like to draw to your attention. This is a
2 statement made by Michael Dreelan at page 3328, please,
3 if we could have that on the screen.

4 A. What volume is that, I wonder?

5 315 Q. This is in volume 6. 14:43

6 A. Okay.

7 316 Q. 3328.

8 A. Yeah, it's on the screen, actually.

9 317 Q. Yes. This is the statement made by your colleague. If
10 you just look at paragraph 3, when you have it. 14:44

11 A. Yeah, this is "When Ms. Ryan informed me," is it?
12 Yeah.

13 318 Q. Yes.

14

15 "When Ms. Ryan informed me that allegations of assault 14:44
16 against Sergeant McCabe had been investigated by An
17 Garda Síochána, I was of course surprised. My
18 recollection is that Ms. Ryan was very clear that these
19 had been fully investigated and were groundless, but
20 that the process of investigation into the allegations 14:44
21 had been devastating to Sergeant McCabe. I may be
22 mistaken, but I recall being informed that the
23 complainant's father was -- "

24

25 And then he identifies the father. 14:44

26 A. Yeah.

27 319 Q. "I understand the guards' thesis proposed to be shortly
28 advanced at the O'Higgins Commission was that Sergeant
29 McCabe deeply resented the suspicion of colleagues and

1 the investigative process into the allegations. I was
2 informed that An Garda Síochána would put it to
3 Sergeant McCabe that he was motivated to raise the
4 issues before the O'Higgins Commission by a sense of
5 having been treated unjustly. I was informed that this 14:45
6 approach had Garda management sanction, but the
7 Attorney General's office was being informed lest it
8 wished to make any observation. I considered this
9 information to be of the highest importance, and,
10 notwithstanding the hands-off approach of the office on 14:45
11 the file, was a matter which the Attorney General
12 personally should be aware of lest she wished to make
13 any intervention. I believe I was first informed of
14 both matters, i.e. the allegations and the proposed
15 approach of An Garda Síochána, on the same occasion, 14:46
16 which appears from the material you have furnished to
17 me to be the 15th May 2015. I sought my group leader,
18 Richard Barrett, and having established that he was
19 aware that allegations had been made against Sergeant
20 McCabe, briefed him fully on my conversation." 14:46

21
22 All right. That seems to be --

23 A. Yes.

24 320 Q. -- his position in relation to that. He goes on to
25 say: 14:46

26
27 "I cannot recall precisely what occurred thereafter.
28 My recollection is that Mr. Barrett dealt with onward
29 communication. While I could not see any appropriate

1 role for the Attorney or her office in the time
2 available, having regard to the importance of this
3 matter and the lessons of previous difficulties, I was
4 very concerned that the office ensure that all
5 appropriate parties were aware of the proposed approach 14:46
6 of An Garda Síochána so as to be able to make any
7 relevant observations. I have no recollection of
8 replying to Ms. Ryan to update her on the position but
9 must have done so."

10
11 It's clear from that that Mr. Dreelan was very
12 concerned by the development at the Commission, isn't
13 that right?

14 A. Yes. He expresses his view there, that it was
15 something which was rightly brought to the attention of 14:47
16 the office.

17 321 Q. And from speaking to him at the time, did you get the
18 sense that he was concerned about this development that
19 had happened at the Commission of Inquiry?

20 A. Yes. I had, I think, perhaps at least two 14:47
21 conversations with him, and they were -- the
22 conversations were along these lines. I had a slightly
23 different angle on it because of my knowledge of the
24 previous allegation, which I think Michael Dreelan had
25 not been aware of. 14:48

26 322 Q. Yes. In terms of then contacting Mr. Flahive in the
27 Department of Justice, what was the need at that time
28 to do that?

29 A. He was the senior official in the Department who I had

1 dealt with in the context of the terms of reference, so
2 he was my interlocutor in relation to that matter, if
3 anything arose. The Commission of Investigation was, I
4 think, in its first few days. I was concerned that if
5 a serious dispute of this nature had broken out so 14:48
6 early with the possibility of litigation arising
7 thereafter, then this perhaps did not bode well for the
8 activities of the Commission of Investigation, and that
9 the Department should be forewarned that there might be
10 complicated litigation which would cause problems for 14:49
11 the Commission.

12 323 Q. Was there any sense of a concern that what was being
13 introduced by the Garda Commissioner at the O'Higgins
14 Commission flew in the face of the decision that had
15 been made to exclude the Ms. D allegation from the 14:49
16 terms of reference of the O'Higgins Commission?

17 A. I was struck by the fact that a decision had been made
18 not to include that matter, and now, perhaps
19 indirectly, it would, if there was litigation, it might
20 get into the public domain. 14:49

21 324 Q. So that was your sole concern in relation to this
22 coming into the public domain?

23 A. Yes, that if there were judicial review proceedings,
24 then instead of the matter being articulated in the
25 confidential context of a Commission of Investigation, 14:50
26 it could end up in affidavits being opened in the High
27 Court.

28 325 Q. It's just, you see, I'm sure you've been following the
29 Tribunal's business and the evidence that's unfolded

1 before the Tribunal?

2 A. I haven't been following the evidence.

3 326 Q. At all?

4 A. On a day-to-day basis.

5 327 Q. It appears that, as soon as this matter was introduced 14:50
6 at the O'Higgins Commission, that it sparked off a
7 series of events involving both the Attorney General's
8 office, the Chief State Solicitor's Office, An Garda
9 Síochána, going from Chief Superintendent Healy to the
10 Garda Commissioner, the Garda Commissioner contacting 14:50
11 the secretary general of the Department of Justice, and
12 also the assistant secretary general of the Department
13 of Justice. All the parties who had been concerned in
14 the establishment of the terms of reference and may
15 have had an input in relation to it, seem to have been 14:51
16 contacted because the Ms. D matter was, it could be
17 said, through the back door, being introduced before
18 the Commission of Inquiry. Do you understand?

19 A. Well, I'm aware from the hearing of the other reports
20 and the other contacts today, that there were contacts 14:51
21 between the Gardaí and the Department during that day.
22 I wasn't aware of those at the time. And they are the
23 relevant parties to be aware of what was going on.

24 328 Q. So, in any event, can you tell us about your
25 conversation then with Mr. Flahive, please? 14:51

26 A. I informed him that there had been a dispute and that I
27 think I expressed the view that if the dispute was not
28 resolved within the confines of the Commission of
29 Investigation, then it could go elsewhere, and that

1 this was something I felt the Department should be
2 aware of.

3 329 Q. If we could have page 3336. It is just a little bit
4 further on from where you are there. This is the
5 statement of Mr. Flahive. 14:52

6 A. Yes.

7 330 Q. Dated 15th May 2015. If we could have it on the
8 screen, please. In the second paragraph:

9
10 "On the 15th May 2015, I sent an email to the 14:52
11 Minister's private secretary and I attach a copy of
12 this email. As it relates, that afternoon I had taken
13 a phone call from Richard Barrett, the Deputy Director
14 General of the office of the Attorney General. Richard
15 told me that at a hearing that day at the O'Higgins 14:53
16 Commission of Investigation, the issue was raised of
17 the allegation of sexual assault that had previously
18 been made against Sergeant McCabe. Richard also told
19 me that counsel for Sergeant McCabe had objected to
20 this being raised and had asked whether the Garda 14:53
21 Commissioner had authorised this, which was confirmed."

22
23 Is that in accordance with your recollection of your
24 telephone conversation with Mr. Flahive?

25 A. These are his words, not mine, so I don't know how I 14:53
26 introduced the nature of the dispute, which I
27 understood had happened that day, but I did point out
28 to him that it was connected in some way with the
29 previous allegation of assault. And I did say the

1 point about, that counsel had asked for confirmation
2 that the Garda Commissioner had authorised this and
3 that there was some contact backwards and forwards
4 about that matter.

5 331 Q. Have you seen the email that was sent by Mr. Flahive 14:54
6 internally within the Department of Justice to
7 Mr. Quattrociochi?

8 A. Yes, yes, I have seen that, yes.

9 332 Q. That's at page 3340.

10 A. Yes. 14:54

11 333 Q. That's not entirely in accordance with the conversation
12 that you had with Mr. Flahive. He seems to have made
13 some assumptions in that, is that right?

14 A. Em, it is -- again, this was his take on a conversation
15 I had based on my conversation with Michael Dreelan, 14:55
16 which was based on a conversation with Annmarie Ryan,
17 so I think maybe the subtlety of the message had been
18 lost in retelling. And I think the IRM reference might
19 have possibly been Michael Flahive's own addition to
20 it. 14:55

21 334 Q. Was that something that you were aware of at the time?

22 A. Em, I was aware of it at some stage, but I'm not sure
23 whether, in time, it was before or after this event. I
24 was aware that there was a Ms. D allegation somewhere
25 in the many files of the Independent Review Mechanism. 14:55

26 335 Q. And in terms of your conversation with Mr. Flahive,
27 were the matters discussed generally? I mean, was
28 there any element of surprise that this matter had been
29 introduced?

1 A. I was surprised that it had arisen. I don't know
2 whether Michael Flahive was surprised.

3 336 Q. Why were you surprised that it had arisen?
4 A. Because the terms of reference of the Commission of
5 Investigation seemed to be very specifically set out in 14:56
6 the list of issues which came from Séan Guerin.

7 CHAIRMAN: Just to be clear from my point of view, the
8 surprise is in relation to anything to do with the D
9 investigation had arisen before the Commission, is that
10 the point? 14:56

11 A. Yes, I was surprised to see that that had come into
12 the -- into discussion in the Commission --

13 CHAIRMAN: In any kind of way?
14 A. -- in any form or other.

15 337 Q. MR. MARRINAN: Well, in a broad sense, I suppose that 14:57
16 you, in March, had been dealing with work-related
17 issues concerning Sergeant McCabe and giving advice in
18 relation to them and the whole structure that was to be
19 put in place by Mr. Kieran Mulvey, isn't that right?

20 A. In March, I was, yes. 14:57

21 338 Q. Yes. So it would appear that the approach by An Garda
22 Síochána, as reflected in that, was one where Sergeant
23 McCabe was regarded as a valued member of An Garda
24 Síochána, isn't that right?

25 A. Em, I can't speak as to why things were being done, but 14:57
26 certainly they were -- the discussions included
27 significant support systems and --

28 339 Q. Well, that was the general mood that was afoot, was it
29 not, and reflected in the procedures that were going to

1 be put in place for Sergeant McCabe?
2 A. Well, certainly the use of Mr. Mulvey was a support --
3 was a support role, as far as I'm aware. I think the
4 other one I was involved in was having an outside
5 counsel doing some sort of review of guidelines. 14:58
6 Perhaps it was part of a larger package. But if I was
7 to discuss that, then I'd be going into the details of
8 the legal advice which was given at that stage, which I
9 can't --
10 340 Q. Which I'm not going to ask you to do. But, in general 14:58
11 terms, you were aware, I suppose, of the fact that
12 Mr. Guerin in his report had given Sergeant McCabe a
13 clean bill of health in terms of his motivation in
14 bringing his allegations into the public domain, isn't
15 that right? 14:59
16 A. Well, yeah, I had read the Séan Guerin Report, yeah.
17 341 Q. So was it in that context in a general way that you
18 were surprised that an apparently hostile approach was
19 being adopted, an aggressive approach was being adopted
20 to Sergeant McCabe at the O'Higgins Commission? 14:59
21 A. I didn't see hostile or aggressive because they weren't
22 words that were used to me or that I used when I was
23 passing it on. I think I saw the word "motivation",
24 that was the context in which I saw it, and I did not
25 know what briefing or instructions were available at 14:59
26 the Commission or to the legal team representing the
27 Gardaí there.
28 342 Q. Now, I think that you were involved in emailing
29 Mr. Dreehan then. If we could have page 743 on the

1 screen, please.

2 A. What volume is that?

3 343 Q. This would be Volume 2.

4 A. Yes. That is a message from me to Michael Dreehan,

5 copied to Annmarie Ryan, isn't that it? Yes. 15:00

6 344 Q. Yes. And will you see the first one is from Michael

7 Dreehan dated 15th May 2015 at 16:37 and it's forwarded

8 "Instructions Re Commission of Investigation":

9

10 "Richard, you will see below joint email from counsel. 15:00

11 CSSO informs me the Commissioner has given the go-ahead

12 for the proposed course of action.

13

14 Many thanks,

15

16 Michael Dreehan." 15:01

17

18 And that -- there was an attachment to that that

19 included, and we see it there at the end of the page,

20 counsel's advices that are addressed to Chief 15:01

21 Superintendent Healy before the Garda Commissioner,

22 isn't that right?

23 A. I see that, yeah.

24 345 Q. And your response to that is at the top there, and it's

25 at 16:43 on the same day to Richard Barrett, copied to 15:01

26 Annmarie Ryan:

27

28 "Very well, it was prudent of Annmarie to bring this

29 development to the attention of the office. It is not

1 proposed to second-guess the advices of counsel below
2 or the decision of the Garda Commissioner."

3

4 Isn't that right?

5 A. Yes.

15:01

6 346 Q. And that was, in fact, the position of the Attorney
7 General's office; you weren't involved in giving any
8 legal advice at that juncture to the Garda
9 Commissioner, isn't that so?

10 A. Yes, we weren't giving any directions and we were not
11 going to intervene in this dispute which had broken
12 out.

15:02

13 347 Q. Now, I think that on Sunday, 5th July, you were
14 forwarded an email, if we could have page 333 on the
15 screen please, and this was an email that you were
16 forwarded. And if you could just confirm that even
17 though it's copied to you, it was marked for your
18 attention and you didn't consult with anybody arising
19 out of that email, isn't that right?

15:02

20 A. Yes, that was sent to me by Michael Dreelan, I think on
21 a Sunday morning, and I can say that I didn't consult
22 with anybody, but I certainly had no contact with the
23 Department or the Gardaí.

15:02

24 MR. MARRINAN: Thank you very much.

25 A. Thank you.

15:03

26

27 MR. RICHARD BARRETT WAS CROSS-EXAMINED BY MR. MCDOWELL:

28

29 348 Q. MR. MCDOWELL: Very briefly, Mr. Barrett, in relation

1 to what -- could I just ask you in relation to
2 paragraph 2 of your witness statement here.

3 A. Yeah.

4 349 Q. And having described your role in the Attorney
5 General's office, you say:

15:03

6
7 "In this role, I dealt with the establishment of the
8 O'Higgins Commission of Investigation from summer 2014
9 and advised on its terms of reference. During that
10 process, a suggestion was made that the terms of
11 reference would expand."

15:03

12
13 Could I stop there and ask you who made that
14 suggestion?

15 A. It was discussed with me by the Department, but I don't
16 know what the moving person behind the idea was. It
17 was -- I was informed in the passive voice: it has
18 been suggested that.

15:04

19 350 Q. I see.

20 A. And I didn't ask where the idea came from.

15:04

21 351 Q. I see. And you eventually said, at the end of the
22 paragraph:

23
24 "It was decided not to expand the terms of reference in
25 that way."

15:04

26 A. Yes, either as part of the -- maybe not in the same
27 conversation, but during the day, that the first time I
28 had heard of the possibility that such an extra heading
29 might be added in. I was told by the Department that

1 that was not going to happen.

2 352 Q. I see. Well, I take it that that wasn't done in one
3 single conversation?

4 A. Em, true. Yes, it might have been mentioned during two
5 or three telephone calls and a telephone call and 15:05
6 another meeting on the topic or -- well, on the topic
7 of the terms of reference.

8 353 Q. I see.

9 A. Yeah. But it was over -- it was either in one day or
10 possibly ran into the next day, but it wasn't a 15:05
11 prolonged discussion.

12 354 Q. I see. And can you be, when you say summer 2014,
13 roughly what time period are you talking about, or is
14 that as rough as we have to accept, is it?

15 A. Oh, I suspect much later, because the Commission of 15:05
16 Investigation opened in May, so I think the discussion
17 about the terms of reference was probably, it could
18 have been late 2014 or --

19 355 Q. I see. So I think the terms of reference were
20 promulgated in February -- or signed by the Taoiseach 15:06
21 in February of 2015?

22 A. All right. Yes.

23 356 Q. Can you recall was it pre-Christmas or post-Christmas
24 that this --

25 A. I could speculate. Maybe it was post-Christmas. Yeah, 15:06
26 I think so, yeah.

27 357 Q. And you were dealing with Mr. Flahive in relation to
28 this, is that right?

29 A. Principally. There might have been other people

1 involved as well, but he seemed to be -- he was the
2 main person I was talking to.

3 358 Q. And can you decide -- or can you tell us, was this a
4 decision which was being made at official level or at
5 ministerial, or whatever? 15:07

6 A. I don't know, actually. No, I was told it was an idea,
7 what would the -- and there was a conversation about
8 the idea --

9 359 Q. Yes.

10 A. -- which I think is legal advice. And then later that 15:07
11 day or perhaps the next day I was told that the idea of
12 increasing the terms of reference was not proceeding.

13 360 Q. And without breaking into your privilege at all, which
14 I fully respect, Mr. Barrett, or the office's
15 privilege, the suggestion that it should be considered 15:07
16 was a departmental one, is that right?

17 A. No. I was told by the Department, but the idea of
18 extending it could have come from some extraneous
19 conversation or discussion to the Department that I
20 wasn't aware of. As I say, I was told that the idea 15:08
21 has been proposed that the terms of reference might
22 expand.

23 361 Q. I see. And can I take it from your use of the phrase
24 "expand" that the terms of reference were, up to that
25 conversation, more or less agreed for Mr. Justice 15:08
26 O'Higgins?

27 A. Yes, I think it was the -- the assumption was that it
28 was the Séan Guerin paragraphs.

29 362 Q. Yes.

1 A. I think perhaps there might have been some additional
2 paragraph in relation to conditions in Bailieboro
3 station. There might have been some modest expansion
4 of the terms of reference. Otherwise it was the Séan
5 Guerin list. 15:08

6 363 Q. I see. And I just wanted to ascertain, if I could,
7 were you involved or would you have been involved in
8 preparation of a memo for Government or would that come
9 near your desk in this context?

10 A. I don't remember whether I saw any memo from Government 15:09
11 in relation to these matters. If I did, it's probably
12 covered by legal advice.

13 364 Q. Yes.

14 A. And I honestly don't remember if I saw any.

15 365 Q. Well, in the ordinary course, I think we had evidence 15:09
16 from, I think, Mr. Waters, that the ordinary course
17 would be that a memo for Government would be prepared,
18 suggesting the terms of reference?

19 A. Yes, that sounds like the usual practice, yeah.

20 366 Q. Yes. And we know that in June, I think it was on the 15:09
21 19th June, it had been suggested in Dáil Éireann by
22 former Commissioner [sic] Shatter that such an
23 extension of the terms of reference proposed by
24 Mr. Guerin should take place?

25 A. June of which year? 15:10

26 367 Q. 19th June of 2014.

27 A. Oh, right. No, I don't remember that.

28 368 Q. You weren't aware of that?

29 A. No, I wasn't.

1 369 Q. And in relation to the possibility that they might be
2 expanded, have you any recollection as to whether this
3 might or might not have come from An Garda Síochána?
4 A. No, I don't, no.
5 370 Q. Well, we will hear from Mr. Flahive, I think, probably 15:10
6 it's fairer to ask him about it.
7 CHAIRMAN: I'm puzzled, Mr. McDowell, because there was
8 a reference earlier on, or a few days ago now, to
9 whether there was discussion about including the Ms. D
10 matter as one of the things. 15:11
11 MR. MCDOWELL: Yes.
12 CHAIRMAN: Is that what you are referring to?
13 MR. MCDOWELL: Yes.
14 CHAIRMAN: I asked --
15 MR. MCDOWELL: There was a reference, Chairman, if I 15:11
16 can help --
17 CHAIRMAN: Yes.
18 MR. MCDOWELL: -- to the IRM process.
19 CHAIRMAN: Yes.
20 371 Q. MR. MCDOWELL: Can I jog your memory on that? Does 15:11
21 that ring any bells with you, that the Independent
22 Review Mechanism, counsel were considering whether to
23 recommend its inclusion in the Commission of
24 Investigation?
25 A. Em, that's possible. Again, the Department would be 15:11
26 closer to that, but that is possible as well, around
27 the same time. It would have been around the same
28 period, I think.
29 CHAIRMAN: I'm just wondering, Mr. McDowell, I'm sorry,

1 obviously you're entitled to continue, but just from
2 the point of view of where we are going. I think that
3 I asked, and in the event that there is any information
4 to suggest that the Ms. D matter was being actively
5 promoted by anybody in terms of coming in, apart from 15:11
6 obviously Ms. D, those supporting Ms. D, and I don't
7 mean that in any underhand way, such as the leader of
8 the opposition had put the dossier in the hands of the
9 Taoiseach, if there was any information to suggest that
10 people wanted to contradict the Independent Review 15:12
11 Mechanism who looked at it and who said, look, this is
12 a perfectly proper investigation, if anything happened
13 after that point I would certainly draw it to your
14 attention if we had any documents and look into it
15 again, yes. 15:12

16 MR. MCDOWELL: It is probably fairer for me to raise
17 this matter with Mr. Flahive, who would know where
18 suggestions were coming from, rather than with this
19 witness, who doesn't seem to recall.

20 CHAIRMAN: No, but, I mean, are you aware, Mr. Barrett, 15:12
21 of any suggestion that the Ms. D matter, even though it
22 was n't included in the first draft of the terms of
23 reference, I suppose came back, jumped out of the bath
24 and said, right, we want this in there and somebody had
25 to contradict it after the terms of reference had been 15:12
26 more or less drafted? I think that is the point.

27 A. No. I think I was aware of one conversation or a short
28 series of conversations I had with the Department about
29 the possibility of putting it in. I wasn't sure where

1 the idea came from. And then the idea evaporated and
2 we continued with the terms of reference.

3 CHAIRMAN: But was that happening at the ordinary time
4 when you were drafting the terms of reference?

5 A. It was, the ordinary time. 15:13

6 CHAIRMAN: As opposed to the terms of reference being
7 drafted or nearly drafted and it coming around again
8 for a second shot, if you like?

9 A. I don't think it came around for a second shot, no.

10 CHAIRMAN: All right. 15:13

11 372 Q. MR. McDOWELL: One final question Mr. Barrett. Could
12 you look at page 2 of the documents in volume 1A,
13 Mr. Barrett. It's beside you there.

14 A. Ah, yes. Yes, what is this - the terms of reference?

15 373 Q. The terms of reference. And you will see that that's 15:13
16 the statutory instrument signed by the Taoiseach under
17 the seal of Government.

18 A. Yeah.

19 374 Q. On the 3rd February.

20 A. Yes, I see that. 15:14

21 375 Q. Does paragraph 2 of that mean anything to you or jog
22 any memory in your mind?

23 A. It was a carry-over from a previous exercise discretion
24 which had been used in a previous commission of
25 investigation. 15:14

26 376 Q. So it's not referable to the D thing at all; it's a
27 standard form kind of injunction to the chairperson --

28 A. It had been used --

29 377 Q. -- to keep a sharp focus, is that it?

1 A. It had been used on at least one occasion before.

2 378 Q. Yes.

3 A. And it's instructions for efficiency and such matters.

4 379 Q. Yes. It doesn't arise out of Ms. D dimension at all?

5 A. No, it was in the original plan for the terms of
6 reference.

7 MR. MCDOWELL: Thanks very much, Mr. Barrett.

8 MR. MCCANN: I just have one question for Mr. Barrett.

9

10 MR. RICHARD BARRETT WAS CROSS-EXAMINED BY MR. MCCANN:

11

12 380 Q. MR. MCCANN: So, Mr. Barrett. Patrick McCann. I'm to

13 your left. I appear for the Department of Justice,
14 present and former officials and the former Minister.

15 I just want to ask you one question arising out of a

16 question that Tribunal counsel asked you, and to note,
17 in asking this question, that Tribunal counsel

18 indicated -- prefaced his question with "it appears",
19 and Mr. Murrinan asked you, he said it appears that

20 developments at the O'Higgins Commission sparked off a
21 series of communications, and that, in part, as a

22 result of developments at the O'Higgins Commission, the
23 Commissioner phoned Mr. Waters and phoned Mr. O'Leary

24 and you were asked a question about that. I just

25 wanted to clarify with you, that you don't know, of

26 your own knowledge, why the Commissioner would have

27 phoned Mr. Waters or Mr. O'Leary or what the contents
28 of this conversation would be, isn't that right?

29 A. That's correct. I wasn't aware of those communications

1 until the recent matters when I've seen some of these
2 documents. Before that, I wasn't aware at all.

3 MR. MCCANN: Thank you very much, Mr. Barrett.

4
5 MR. RICHARD BARRETT WAS CROSS-EXAMINED BY MR. SREENAN:

15:16

6
7 381 Q. MR. SREENAN: Mr. Barrett, just a few questions, if I
8 may. I take it you were aware from the Guerin Report,
9 amongst other sources, that Sergeant McCabe was making
10 serious allegations of corruption and malpractice
11 against senior officers in the Gardaí in the
12 Cavan-Monaghan region?

15:16

13 A. I was aware of the issues investigated in the Guerin
14 Report, yes.

15 382 Q. Yes. And a nomination was sought from the Attorney
16 General's office of counsel to represent the Garda
17 Commissioner and members at or above the rank of
18 superintendent?

15:16

19 A. This is at the Commission of Investigation, you're
20 asking?

15:17

21 383 Q. Yes, at the O'Higgins Commission of Investigation?

22 A. Yes. In normal course, there was a request for
23 nomination of counsel.

24 384 Q. Yes. And would it be the Attorney General herself who
25 would nominate those counsel?

15:17

26 A. Em, yes, usually, yes. Almost invariably, it's the
27 Attorney General individually who would make such
28 nominations.

29 385 Q. And I take it from the nomination having been made,

1 that nothing wrong was seen with nominating a team of
2 counsel to represent the Garda Commissioner and members
3 at or above the rank of superintendent?

4 A. I think, as far as I remember there was a request for
5 the nomination of counsel, and the nomination of 15:17
6 counsel was responded to, and whatever formula was
7 attached to the request would have been carried over
8 into the nomination which followed.

9 386 Q. Right. But, in fact, counsel were, we know, nominated
10 to appear on behalf of the Garda Commissioner and 15:18
11 members at or above the rank of superintendent, they
12 were retained for that purpose. So can we take it from
13 that that nothing was wrong with -- or nothing was seen
14 as being wrong or giving rise to causes for concern
15 with nominating the one counsel team to represent that 15:18
16 category of people before the O'Higgins Commission?

17 A. I don't remember any discussion about that. And it
18 is -- it's a situation which has arisen in many
19 comparable inquiries and investigations, that there
20 will be a sort of a corporate team. 15:18

21 387 Q. Yes. It's not without precedent?

22 A. That's correct.

23 388 Q. And the nomination I think was made on the 30th April
24 of 2015, and the subsequent appointment -- or the
25 subsequent commencement of the Commission of 15:19
26 Investigation then was on the 14th May, some 14 days
27 later, started its hearings?

28 A. Yeah. I can't speak for the dates, but it was fairly
29 soon before the Commission started its work.

1 389 Q. So there was relatively little time for the preparatory
2 work to be done before the first module commenced?
3 A. I think there was -- yeah, might have been a few weeks
4 at most, I think.

5 390 Q. Yes. And if we could bring up document 3336 that 15:19
6 you've been asked to look at already.
7 A. That's Michael Flahive's statement, is it?

8 391 Q. Yes. Well, it seems to be that you were under the
9 impression, and correct me if I am wrong now,
10 Mr. Barrett, that you were under the impression that 15:19
11 the issue that had been raised before the Commission on
12 the 15th May 2015, was the original allegation of
13 sexual assault rather than the separate matter of an
14 attempt to get access to a copy of the DPP's
15 directions, was that a misunderstanding? 15:20
16 A. Well, this is Michael Flahive's document rather than
17 mine.

18 392 Q. Yes, but --
19 A. And I have to say I wasn't aware of the nuance of the
20 DPP's direction issue being central until recent 15:20
21 documents on it, on this subject.

22 393 Q. There seems to have been a misunderstanding either on
23 your part or Mr. Flahive's part, is that correct?
24 A. Yes, yeah, that's true. It was -- the issue was
25 connected with the previous criminal file, but it's 15:20
26 expressed in a broader way there than may have been the
27 reality.

28 MR. SREENAN: Thank you.
29 MR. RICHARD BARRETT WAS CROSS-EXAMINED BY MR. DIGNAM:

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394 Q. MR. DIGNAM: Mr. Barrett, Conor Dignam is my name and I appear on behalf of An Garda Síochána. I just have two very brief areas, two areas that I want to cover very briefly with you. The first is in relation to the line of questioning that Mr. Marrinan put to you about whether you were surprised when you heard about the approach being adopted by An Garda Síochána, and that was on page 147 and 148 of today's transcript, and it was put to you that:

15:21

15:21

"Was it in that context in a general way that you were surprised that an apparent hostile approach was being adopted, an aggressive approach was being adopted to Sergeant McCabe at the O'Higgins Commission?"

15:21

And you replied:

"I didn't say hostile or aggressive because they weren't words that were used to me or that I used when I was passing it on."

15:21

You went on to say:

"I think I saw the word 'motivation', that was the context in which I saw it, and I did not know what briefing or instructions were available at the Commission or to the legal team representing the Gardaí there."

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And is it fair to say, and correct me if I am wrong, Mr. Barrett, my impression is that your main interactions with An Garda Síochána in the early part of 2015 was more on the employment issues, is that right, the Mr. Mulvey issue, the Mr. Kerr issue?

15:22

A. Yes, I had some interaction in, was it March, I think, in relation to the sort of industrial relations side of the dispute, and I had no contact with the Garda Síochána in relation to the terms of reference or the establishment of the Commission.

15:22

395 Q. Yes. Thank you. And then following on from the establishment of the Commission, I take it from that answer that you had no interactions or engagement with the Gardaí in relation to what approach should be taken by them in the forthcoming Commission of Investigation?

15:22

A. No, as far as I am aware there was no contact whatsoever between the office and the Gardaí after the nomination of counsel.

396 Q. Yes. And I think you've said in your evidence to Mr. Marrinan that you had no advisory -- indeed you or the office had no advisory or directive role in relation to the Gardaí's approach once the legal team was appointed?

15:23

A. That's correct. There was no directing role from the Attorney General's office.

15:23

397 Q. And you, I think very fairly, said that you had, and the passage that I read out to you on page 148, that you didn't know what briefing or instructions were

1 available at the Commission or to the legal team
2 representing the Gardaí there?

3 A. That's correct. I wasn't aware of what had gone on in
4 the previous weeks, what material they got, what their
5 instructions were.

15:23

6 398 Q. Yes. And I take it, it's uncontroversial, Mr. Barrett,
7 I take it that once An Garda Síochána nominate a legal
8 team to represent -- sorry, the Attorney General's
9 office nominate a legal team to represent An Garda
10 Síochána, it's a matter for that legal team to provide
11 whatever advice is required to the client, An Garda
12 Síochána in this case?

15:24

13 A. Well, it depends on the file. If it was something
14 which the Attorney General was a defendant or a
15 minister was a defendant, that there might be different
16 circumstances. But in a situation where it is the
17 Gardaí in a separate statutory process, then there
18 would be little or no contact.

15:24

19 399 Q. Yes. And perhaps I should have put the question in
20 those terms, Mr. Barrett. In this case, the team was
21 nominated to An Garda Síochána. The Attorney General's
22 office, as we know from your evidence, had no advisory
23 or directive role in relation to it, so it is a matter
24 for the legal team to provide advice to An Garda
25 Síochána, isn't that right?

15:24

15:24

26 A. Yes. We might have had -- have expected some
27 occasional contact from the Chief State Solicitor's
28 person who is there, because that person is a member of
29 the Attorney General's office, so there would be some

1 professional contact.

2 400 Q. That's right. And I think Ms. Ryan took that view, I
3 think agrees fully with you, and indeed contacted
4 Mr. Dreehan on occasions --

5 A. Yes.

15:25

6 401 Q. -- during the Commission to inform him of various
7 matters which were occurring, and indeed Mr. Dreehan
8 took the view that there was no reason for the office
9 to become involved and I think perhaps discussed that
10 with you?

15:25

11 A. Yes, something in relation to submissions, perhaps, I
12 think.

13 402 Q. So -- and then, finally, Mr. Barrett, in relation to
14 your statement, paragraph 4 of your statement is on
15 page 3331, this is -- you're dealing in paragraph 4
16 with the contacts with -- your conversation, rather,
17 with Mr. Dreehan on the 15th May, and about halfway
18 through that paragraph you say that it was explained
19 that the question of motivation would be linked to an
20 earlier allegation of a criminal offence by Sergeant
21 McCabe. And you were then asked about your contact
22 with Mr. Flahive, which is described in Mr. Flahive's
23 statement to the Tribunal, which is at page 3336, and
24 he says halfway through paragraph -- the second
25 paragraph, page 3336 --

15:25

15:25

15:26

26 A. Yes, yes.

27 403 Q. -- he says:

28

29 "Richard told me that at a hearing that day at the

1 O'Higgins Commission of Investigation, the issue was
2 raised of the allegation of sexual assault that had
3 previously been made against Sergeant McCabe."
4

5 And I think you clarified it to Mr. Marrinan, that they 15:26
6 are his words, not yours, and you appeared more
7 comfortable with saying that it was connected in some
8 way with the previous allegation, the issue that was
9 raised was connected in some way with the previous
10 allegation of assault? 15:27

11 A. That's correct.

12 404 Q. Yes. That is very similar to the language you use in
13 your own statement?

14 A. Yes.

15 MR. DIGNAM: Thank you, Mr. Barrett. 15:27

16 CHAIRMAN: Did you have anything else, Mr. Marrinan?

17 MR. MARRINAN: No, nothing arising.

18 CHAIRMAN: Yes. There was something I wanted to ask
19 you, if you don't mind.

20 15:27
21 MR. RICHARD BARRETT WAS QUESTIONED BY THE CHAIRMAN:

22
23 405 Q. CHAIRMAN: Maybe if we just have a look at 745, please,
24 which is the email from Michael Flahive to Christopher
25 Quattrociochi, if I am pronouncing that correct. Just 15:27
26 before we look at that, can I just ask you a couple of
27 basic things. Mr. A is accused of sexual assault, and
28 just take any person, all right. The allegation is,
29 something that happens in a room where nobody else is

1 present, there's no physical injuries. In terms of
2 what is alleged, although I'm appreciating that
3 anything in terms of a sexual assault is very serious,
4 we're on -- if we're on step 1 of the ladder up to step
5 10, if you take the O'Malley book on sentencing 15:28
6 model --

7 A. Okay.

8 406 Q. CHAIRMAN: -- there may not be ten steps there, I think
9 there may be seven or eight, but you know the way he
10 classifies them? 15:28

11 A. Yes, levels of seriousness.

12 407 Q. CHAIRMAN: Yes. Supposing the issue is, are we even on
13 the first step? The whole thing is fully investigated.
14 The Garda report that goes in recommends no prosecution
15 because of issues in relation to credibility, and again 15:28
16 I'm speaking hypothetically now.

17 A. Yes.

18 408 Q. CHAIRMAN: A ruling comes back from the DPP saying,
19 look, even if we don't have issues as to credibility,
20 I'm not going to prosecute because anything that's 15:28
21 described here doesn't even get on to the ladder of
22 assault, never mind sexual assault. So, in those
23 circumstances, what would you feel in relation to
24 Mr. A? would you feel that he has been completely
25 vindicated that the ruling is made and that, therefore, 15:29
26 the matter should be consigned to ancient history?

27 A. Em, well, vindicated in the sense that there will not
28 be a criminal law consequence for it, but the
29 circumstances might have involved, obviously, stress

1 for the people involved and some publicity with other
2 parties, inevitably, because the investigation could
3 involve other people, and that has consequences of its
4 own.

5 409 Q. CHAIRMAN: Yes. And that is to be appreciated. But 15:29
6 let's suppose, now we're going on to the whole notion
7 of cross-examination as to credit, not
8 cross-examination as to credibility, you've heard me
9 going on about this over the past few days, I'm sure?

10 A. Yes. This morning. 15:29

11 410 Q. CHAIRMAN: So cross-examination as to credibility is:
12 Were you wearing your glasses? Did you have a drink
13 before you went out to observe whatever you are
14 supposed to be observing? Etcetera, etcetera. Are you
15 a bit forgetful? Didn't you fall down the stairs the 15:30
16 previous day? - type of stuff. Nothing to do with the
17 person's moral character but to do with their
18 opportunity for observation and recollection. If you
19 go on then to cross-examination as to credit, I take it
20 you would agree, but please disagree with me if you 15:30
21 want to disagree with me, that it would be completely
22 wrong to raise against Mr. A who is giving evidence in
23 a subsequent case of some kind that he had been the
24 subject of an allegation by a child, now a grown-up,
25 that historically he had abused. 15:30

26 A. Em, yes, I agree that it would seem irrelevant and
27 probably wrong to raise the existence of the previous
28 allegation against somebody when in fact it was not
29 proceeding to any criminal investigation.

1 411 Q. CHAIRMAN: Now the difficulty I suppose is this, coming
2 to it slowly but the difficulty is this: Did you
3 actually understand from the reports that were coming
4 to you, as you say, in a dúirt bean liom go ndúirt bean
5 léi, etcetera, kind of a way, that counsel in the 15:31
6 O'Higgins Commission were proposing to put to Sergeant
7 McCabe the matter of credit, namely that he had
8 sexually abused a child, did you actually understand
9 that? Was that you were thinking in consequence of the
10 conversation? 15:31

11 A. No. I thought it was connected with the previous file
12 in such a way that if there was a further articulation
13 of the dispute then the existence of the criminal file
14 would become apparent.

15 412 Q. CHAIRMAN: And then you had mentioned that in the event 15:32
16 that there was a judicial review that then people would
17 swear affidavits and it would all come out into the
18 open in the High Court, so to speak?

19 A. Yes.

20 413 Q. CHAIRMAN: I was just uncertain as to what you were 15:32
21 referring to Mr. Barrett?

22 A. Em --

23 414 Q. CHAIRMAN: What were you worried about? Obviously
24 there is the delay to the Commission.

25 A. Yes. 15:32

26 415 Q. CHAIRMAN: That is a bad idea.

27 A. Yes.

28 416 Q. CHAIRMAN: That it is not going to finish its work,
29 etcetera. But then you mentioned affidavits and stuff

1 coming out in the High Court, what was your problem
2 with that?

3 A. It occurred to me that the inadvertent disclosure of
4 the fact that there had been a criminal file would
5 itself cast aspersions on someone who had been the 15:32
6 subject of that criminal file and that should be
7 avoided because it is an unnecessary slur on their
8 repetition to put into public domain that such an
9 allegation had been made.

10 417 Q. CHAIRMAN: Who were you thinking of protecting in that 15:33
11 regard?

12 A. Em, Sergeant McCabe --

13 418 Q. CHAIRMAN: Yes.

14 A. -- was the person whose reputation might have been
15 affected by it. 15:33

16 419 Q. CHAIRMAN: Yes. Now the last thing I wanted to ask you
17 about, and it arises from questions that you were asked
18 after Mr. Marrinan finished with you, is this: If we
19 then turn to 745 and just look at the paragraph, it has
20 to be read as an entirety really from the point of view 15:33
21 of getting the sense of it, but it says:

22

23 "Richard wanted to let me know --"

24

25 And this is obviously Michael Flahive reporting to 15:33
26 Mr. Quattrociocchi --

27 A. Yeah.

28 420 Q. CHAIRMAN: -- what you had got from Michael Dreelan and
29 then looked at the advices of counsel and then rung him

1 and passed on to him. And he says, okay:

2
3 "Richard wanted to let me know that counsel for the
4 Garda Síochána had raised an issue in the hearings, an
5 allegation made against Sergeant McCabe which is one of 15:33
6 the cases examined by the independent review mechanism.
7 The allegation had been of a serious criminal complaint
8 against Sergeant McCabe which he has always denied, had
9 not been properly investigated. The IRM found the
10 investigation file in the case had in fact been 15:34
11 submitted to the DPP who directed no prosecution and
12 the IRM, because of the seriousness of the allegation,
13 had been considering whether to recommend it but in the
14 end recommended no further action."

15
16 Now one possible reading of that is that this is 15:34
17 something to connect it with the investigation, another
18 possible reading is that this, the point of this is to
19 unfairly raise, and we've gone through the example of
20 Mr. A, the allegation itself. Maybe you'd just help me 15:34
21 as to --

22 A. Well, it was I think -- inevitably looking at the
23 investigation or how something had been investigated
24 was going to bring to light what the thing was which
25 was being investigated. So even if the matter under 15:35
26 investigation was how the Guards dealt with it, then
27 the allegation of substance would be disclosed.

28 421 Q. CHAIRMAN: So, in other words, you can't look at an
29 investigation into something without actually looking

1 at the something that was investigated?

2 A. Yeah. It's an artificial distinction I think.

3 422 Q. CHAIRMAN: Right. But you weren't saying in that, that
4 they're proposing to accuse him of sexual abuse?

5 A. No, I certainly wasn't saying that. 15:35

6 423 Q. CHAIRMAN: If I am taking your answers correctly, and
7 please do correct me if I am wrong, your anxiety was
8 that in the event that this blew up into a judicial
9 review, and obviously there's lots of judicial reviews,
10 that the original allegation would be made public again 15:35
11 and widely discussed, which is not to the benefit of
12 anybody and certainly not to Sergeant McCabe's benefit?

13 A. Yes. It was a combination of that concern and the
14 disruption of the judicial review concern.

15 424 Q. CHAIRMAN: All right. Okay. I've got you now. Then 15:36
16 thank you.

17 MR. MARRINAN: Thank you.

18 A. Thank you.

19

20 THE WITNESS THEN WITHDREW 15:36

21

22 MR. MARRINAN: Sir, there is one matter of concern to
23 you and it's this. Mr. MacCann in his only question
24 that he put to Mr. Barrett referred to a matter that I
25 had referred to in my examination of the witness in 15:36
26 relation to a spark and then a flurry of activity and
27 the Commissioner phoning various people. And it
28 appears that what was actually suggested was that it
29 might have been for some other reason, other than what

1 had transpired at the Commission of Investigation.
2 we've heard evidence from the former Commissioner in
3 relation to her lack of memory in terms of that phone
4 call and indeed the phone call to Mr. Waters. We have
5 also heard from Mr. Waters who has no recollection of 15:37
6 the phone call. However, Mr. McCann's other client who
7 deals with this issue, Mr. Ken O'Leary, has made a very
8 fulsome statement to the Tribunal in which he refers in
9 detail to his conversation with former Commissioner
10 O'Sullivan, not only in the first phone call but the 15:37
11 second phone call. And from the statement, which is
12 set out at page 3347, and made to the Tribunal on the
13 6th December 2017, it's very clear that the phone call
14 only concerned what had transpired at the O'Higgins
15 Commission. Now if Mr. McCann is aware of some 15:37
16 departure on his instructions from that statement the
17 Tribunal would like to have an additional statement if
18 that is the position from Mr. O'Leary before he comes
19 to give evidence.

20 CHAIRMAN: Mr. McCann, do you want to say anything 15:38
21 about that?

22 MR. MCCANN: I was just making an intervention for the
23 purpose of identifying what was the present state of
24 the evidence as I understood it.

25 CHAIRMAN: All right. Well, the present state of the 15:38
26 evidence, as I understand it, is very similar to that
27 of Mr. Murrinan, but of course I'm going to read
28 through matters all over again. As I understand it,
29 certainly the Garda Commissioner has emphasised her

1 lack of memory in relation to this. We do have a lack
2 of memory of Mr. Waters and we do have then another
3 individual from Justice saying it was about the
4 following, and I note that there were questions posed
5 to the Garda Commissioner as to whether, for instance, 15:38
6 immediately after coming off the phone in relation to
7 this matter her next telephone call could have been a
8 routine call in the course of the day. And of course
9 those suggestions can be made, as to whether or not
10 they are tenable in terms of probability is another 15:39
11 matter. And I've also heard reference to security,
12 Prince Charles of Wales, the memorial service and the
13 Commission itself. And of course I will take all of
14 those into account. But certainly Mr. Murrinan is
15 right, that in the event that witnesses from Justice 15:39
16 wish to say something different to what their statement
17 to our investigators, who are very thorough in
18 following through on this matter, have recorded them as
19 saying well, I think we should be furnished with a
20 further and up-to-date statement. But if it's not the 15:39
21 case, it's not the case. But that caveat has now been
22 entered and it will be noted by all parties. Thank
23 you, Mr. Murrinan.

24 MR. MCGUINNESS: Chairman, the next witness is Mr. Colm
25 Smyth. 15:40

26 CHAIRMAN: We've got about 15 minutes.

27 MR. MCGUINNESS: Yes.

28

29 MR. COLM SMYTH, HAVING BEEN SWORN, WAS DIRECTLY

1 EXAMINED BY MR. MCGUINNESS AS FOLLOWS:

- 2 425 Q. MR. MCGUINNESS: Mr. Smyth, I think you were called to
3 the bar in 1978, is that correct?
- 4 A. That's correct Mr. McGuinness.
- 5 426 Q. I think you practiced for some 23 years before you took 15:40
6 silk in 2001, is that correct?
- 7 A. That would be correct.
- 8 427 Q. And you've almost now been in practice for almost 40
9 years?
- 10 A. Next July. 15:40
- 11 428 Q. Continuous practice?
- 12 A. That's the position.
- 13 429 Q. I think am I correct in saying that as a junior counsel
14 you practiced primarily on the Midlands circuit?
- 15 A. Exclusively. 15:41
- 16 430 Q. Exclusively?
- 17 A. Yeah.
- 18 431 Q. And I think Judge O'Higgins was appointed as a circuit
19 judge in the mid 80s and he became the Judge of the
20 Midlands circuit? 15:41
- 21 A. He was. He was, Mr. McGuinness, for about two and a
22 half years.
- 23 432 Q. So, you have practiced under him --
- 24 A. Absolutely.
- 25 433 Q. -- and you would have known him quite well 15:41
26 professionally?
- 27 A. Very well.
- 28 434 Q. I think you obviously had no prior involvement with
29 either the Commissioner or Sergeant McCabe or anyone

1 else before you got a phone call from Ms. Ryan?

2 A. Absolutely none. Other than whatever other member of
3 the public knew about Sergeant McCabe in the news or
4 otherwise. I had no involvement with him.

5 435 Q. Yes? 15:41

6 A. I wasn't applying my mind to it. In fact, I live in
7 Mullingar and I understand the man was actually working
8 in Mullingar, I didn't even know that.

9 436 Q. All right.

10 A. So that is the position. 15:41

11 437 Q. Okay. Had you been following, as a citizen or a reader
12 of the newspapers, any of the controversy, such as it
13 was reported at different stages?

14 A. I have to say, Mr. McGuinness, I wasn't applying my
15 mind to it. 15:42

16 438 Q. Right. In any event, I think you got a phone call from
17 Ms. Ryan, was it on the 1st May, asking you would you
18 accept instructions on behalf of the Commissioner?

19 A. I think it was about the 1st May. And she contacted me
20 and said that there was a matter of a Commission. She 15:42
21 asked me would I be interested. She said that she had
22 difficulty in attaining or getting counsel to act. I
23 expressed that I was less than enthusiastic to get
24 involved, given that the thing, the actual Commission
25 hearing could go on for some time, no one can give a 15:42
26 prognosis as to how long it would take, and I said I
27 would have to consider it in more detail. She
28 prevailed upon me to take up the instruction. I came
29 back and I discussed it again with her some hours later

1 and again she prevailed and I said that I would do it
2 on her behalf then.

3 439 Q. All right.

4 A. I would act.

5 440 Q. And just from the point of view matters, you had no 15:43
6 responsibility for the nomination of junior counsel in
7 the matter?

8 A. No.

9 441 Q. They were separately nominated?

10 A. Absolutely no -- 15:43

11 442 Q. She separately contacted each of those?

12 A. That is correct, Chairman. I had no -- I wouldn't have
13 any role in the appointment of junior counsel.

14 443 Q. I think she confirmed the position by email to you of
15 the 1st May. If we could look at page 4045. 15:43
16 Mr. Smyth, these documents will appear on screen but if
17 you want to have a paper copy, I don't know which you
18 refer?

19 A. I appreciate that. This is fine.

20 444 Q. This is an email then of the 1st May. It's sent to 15:43
21 you, to Mr. MacNamee, Mr. Byrne, it is headed:
22
23 "Re: The Commission
24
25 Dear Counsel 15:43
26 I refer to our telephone conversation. I note that
27 each of you accept instructions to represent An Garda
28 Síochána before the O'Higgins Commission... your
29 acknowledgement to commit for the entire duration which

1 is uncertain at this stage. I attach letter dated 24th
2 April 2015 from the Commission to An Garda Síochána of
3 the rules and procedure of the Commission, to include
4 the terms of reference and guidelines on payment of
5 legal fees.

15:44

6
7 I am arranging to forward each of you this afternoon by
8 courier copy papers to include all correspondence
9 up-to-date between the Commission and the Gardaí
10 together with copy of the Guerin Report. I am
11 presently awaiting to hear from the Gardaí with the
12 discovery document which I will courier to you
13 immediately on receipt. I would hope that we would
14 have an initial consultation with the clients about the
15 middle of next week, subject to us receiving the above
16 documentation.

15:44

15:44

17
18 Regards Annmarie."

19 A. Yeah.

20 445 Q. Now Mr. Smyth, obviously commissions under the 2004 Act
21 which I may be mistaken, might have been introduced by
22 Mr. McDowell, a number of them had taken place, had you
23 represented anyone at one of the previous ones to date?

15:44

24 A. None.

25 446 Q. Okay. In any event, you were obviously aware that
26 commissions were established under the 2014 Act and
27 presumably in the intervening period between this and
28 your first consultation you had regard to the Act?

15:44

29 A. Yes.

1 447 Q. And may I take it that you had regard to the terms of
2 reference obviously that were laid down for the
3 Commission?
4 A. Yes.

5 448 Q. Now it would appear that Ms. Ryan then by courier sent 15:45
6 a letter to you. If we could look at 4046, the next
7 page there, an identical letter I think on her evidence
8 went to each counsel. She now enclosed for your
9 attention the:
10
11 "Copy letter from the Commission to An Garda Síochána,
12 which she had previously referred to; the copy minute
13 of Chief Superintendent Ward dated 27th April 15, with
14 synopsis on the interaction between An Garda Síochána
15 and the Commission; booklets numbered 1, 2 and 3 of 15:45
16 copy correspondence between the Commission and An Garda
17 Síochána; copy of the Guerin Report; draft affidavit
18 verifying documents of Séan Ward in respect of module
19 1; and a copy of the email from Garda Legal Actions
20 dated 1st May 15 with attachments; minute from Chief 15:46
21 Superintendent Healy to Head of Legal Actions; an email
22 from Colm to Commissioner.
23
24 Garda Legal Actions expect to furnish us with all
25 documents relating to Module 1 by next Tuesday, 5th 15:46
26 May. Furthermore we are informed that Chief
27 Superintendent Ward will be swearing his affidavit
28 today and delivering it to the Commission. We will
29 revert immediately once we are in receipt of documents

1 from GLA. We will then arrange a consultation with the
2 client for some day next week to discuss various
3 matters, to include the issue of legal representation
4 for retired members.

5
6 If you have any queries please do not hesitate in
7 contacting the writer herein."

8
9 Now you presumably got those and considered the
10 documentation concerned.

11 A. Yes, that's correct, Mr. McGuinness. And it became
12 quite apparent the difficult task that lay ahead for
13 myself and my two colleagues, Mr. MacNamee and
14 Mr. Byrne. And the main thing, if I might say at this
15 stage, that came to mind was that by the time we met
16 the clients then for a preliminary meeting on the 11th,
17 it was only the 11th May we met them, which was I
18 suppose a meeting to have a consultation and to arrange
19 how we were to kick on from there, the fact of the
20 matter was that I said this was most unsatisfactory
21 from our point of view, we were being asked to take on
22 this, it was extremely -- it looked to be extremely
23 complex and difficult, and what came to mind was that
24 perhaps I should, the first task should be consider
25 tongue in cheek to apply for a short adjournment, so
26 that we could get to grips with the complexities of
27 this. And I know that Annmarie, I should say Ms. Ryan,
28 was of a similar view and she through her good offices
29 tried her best to get an adjournment in the way that

1 she did, I think through Mr. O'Hagan, I think she
2 approached him. I did my best to lay the difficulties
3 I was having at the door of Mr. Gillane.

4 449 Q. Yes?

5 A. But it was made clear that there was no adjournment to 15:48
6 be considered and the matter had to move on. So we had
7 to focus and we had to get on and do the best we could
8 and when we met the people it was on the 11th May, less
9 than 72 hours I suppose. If you take time for sleep
10 it's less than 48 hours and that would be working 15:48
11 around the clock. It was just an impossible task.

12 450 Q. Yes?

13 A. And we had to do the best we could in the
14 circumstances.

15 451 Q. Yes. Now they are obviously very practical 15:48
16 difficulties, but did you react to this letter of
17 instructions and consider that you hadn't really been
18 given any briefing document?

19 A. There was absolutely no briefing document. I mean,
20 this was something that I don't think any of us had 15:49
21 encountered before. We were effectively provided with
22 a core booklet, we had no background information, we
23 were told that this arose out of the Guerin Report.
24 Senior counsel Guerin was mandated by An Taoiseach, or
25 by the government, to review certain matters relating 15:49
26 to this, and he found that there was a case to be
27 answered, I might put it that way, or at least matters
28 had to be investigated more thoroughly by a Commission
29 of Investigation.

1 452 Q. Yes. Well, can I just ask you a couple of questions
2 about this first letter? It doesn't appear that
3 Ms. Ryan at that stage knew that she would be acting
4 for or might be acting for former retired members and
5 you weren't apprised of the identity of anyone else 15:49
6 other than the Commissioner, is that right?

7 A. I think the position was, I think Annmarie Ryan would
8 have made clear to me that we were acting for
9 Commissioner O'Sullivan, as she then was, and that the
10 view that there may be a situation where we will -- 15:50
11 might be representing or may be representing certain
12 senior officers, at the nomination, who might be
13 nominated for representation and we could act for them
14 in that instance, at the consent of the Commissioner,
15 but only insofar as a conflict did not arise. In other 15:50
16 words, if there was a conflict between what we were
17 being told by the Commissioner and what we were being
18 told by the senior officers that then in that event we
19 would have to make that known to the Commissioner, our
20 primary client, and in that event we would have to 15:50
21 advise the other clients that they should seek separate
22 representation.

23 453 Q. Yes?

24 A. That was my understanding of the position.

25 454 Q. Yes? 15:50

26 A. And that in the event of a conflict I had no choice but
27 that I had to continue to act for the Commissioner.

28 455 Q. Yes. If I can just ask you to turn to page 4051. I
29 think, just to get the sequence of events right, this

1 is Mr. O'Hagan at the bottom of this page, on the 6th
2 May writing to Ms. Ryan, thanking her for her contact
3 details, noting that she had been assigned the role of
4 solicitor. He is enquiring if the Chief State
5 Solicitor's Office will also be representing members of 15:51
6 the superintendent grade or higher, he attaches a
7 witness list for Module 1, and he concludes by saying
8 that he will be "emailing bundles of documents later
9 this afternoon". Even by the 6th May you hadn't
10 received the core documents yourself? 15:51

11 A. No. That is true. I think it was a couple of days
12 later perhaps --

13 456 Q. Yes?

14 A. -- that we got them.

15 457 Q. At page 4050, at the bottom there, the previous page 15:52
16 Ms. Ryan forwards this on to Mr. Ruane, Head of Legal
17 Affairs, passing that up the line. And Mr. Ruane
18 replies to her at the top and noted that she had
19 requested the documentation for Module 1 and noted that
20 she wasn't in a position to brief counsel without the 15:52
21 same. And the issue of conflict of interest is
22 addressed there. Had Ms. Ryan pointed that out to you
23 previously or did you become aware of it after that?

24 A. I think -- I can't be certain on that, but around about
25 that time I think I was informed by Annmarie what her 15:53
26 position was in relation to the Commissioner, what her
27 role was in respect of the Commissioner; she was the
28 primary client and in the event of this conflict
29 arising with any other nominated clients that we had to

1 act at all times for the Commissioner.

2 458 Q. Yes?

3 A. And that we had to advise accordingly.

4 459 Q. Ms. Ryan is in a position to write back to Mr. O'Hagan
5 by letter of the 13th May, which was in fact the day 15:53
6 before the Commission, in the following terms, at page
7 4052. It's sent on behalf of the Chief State
8 Solicitor's Office, confirming Ms. Annmarie Ryan's
9 representation and informs the Commission that she will
10 be representing the Commissioner and also that she will 15:53
11 be representing the following witnesses?

12 A. Yes.

13 460 Q. Namely, Catherine Clancy, Colm Rooney, Superintendent
14 Heller, Superintendent Cunningham, Maura Lernihan.
15 Then there is talk about documentary matters, the 15:54
16 affidavit, etcetera.

17 A. Yes.

18 CHAIRMAN: Did the client include Commissioner Callinan
19 as well?

20 MR. MCGUINNESS: Yes. 15:54

21 CHAIRMAN: It did?

22 MR. MCGUINNESS: Yes.

23 461 Q. I think it did come about you represented Commissioner
24 Callinan?

25 A. Oh absolutely. Yeah, that is true. And there were a 15:54
26 number of other people who I recall had fill-in parts,
27 if I might put it that way. There wasn't anything very
28 contentious in what they had to say, but there were
29 quite a number of assistant commissioners beyond that.

1 462 Q. Yes, yes. That was added to?
2 A. But the real substance of the people that we were
3 dealing with was contained in the instructions we would
4 have received from Colm -- I can't say what
5 instructions we received, but Colm Rooney, 15:54
6 Superintendent Cunningham and Michael Clancy, and then
7 of course former Commissioner Callinan, they would have
8 been the people who would have serious charges levelled
9 against them in what I call the proven facts documents
10 that was in the core booklet. 15:54
11 463 Q. Yes. Before proceeding to deal with your series of
12 consultations could I ask you to turn to volume 1, page
13 1, which constitutes the terms of reference of the
14 Commission?
15 A. Yes. 15:55
16 464 Q. I think you'll obviously have seen and must have seen
17 at the time that the Commission was directed to
18 investigate the following matters, and it's set out
19 then (a) to (l) what they were to investigate?
20 A. Yeah. 15:55
21 465 Q. Will you agree with me that the clear interpretation of
22 the terms on their face is that it didn't purport to
23 warrant an investigation into Maurice McCabe as the
24 person who had made the complaints?
25 A. Well, that is certainly revealed in the terms, that's 15:55
26 correct.
27 466 Q. Yes. And at that point in time when you saw the terms
28 of reference did you discuss them with your co-counsel
29 rather to meeting all the witnesses?

1 A. We would have discussed this. Yes, we would.

2 467 Q. And was there a joint view as to what came within the
3 terms of reference or not?

4 A. I can't be certain that there was a joint view, but
5 certainly when you open the core booklet the first 15:56
6 document that sprung out to us is this proven facts
7 document, as it has been headed, complaints of proven
8 facts or whatever it may be, setting out very serious
9 allegations against senior management and our clients
10 who we were nominated to represent. And on any reading 15:56
11 of it, it was very serious. There was allegations of
12 suppression of documentation relating to wrongdoing in
13 Bailieboro; suppression of a document in relation to a
14 senior officer in respect of an inquiry he carried out
15 in relation to wrongdoing; there was supporting of 15:57
16 support for corruption, to save themselves; there was
17 even reference to breach of prisoners' civil and human
18 rights. I mean, this was, on any -- this is the first
19 document that really caused us considerable alarm as to
20 what we were getting into here in relation to this. I 15:57
21 understand what you are saying, Mr. McGuinness, in
22 relation to the terms of reference but it became quite
23 clear to us that our clients had serious issues to
24 address in relation to that particular document.

25 468 Q. Yes? 15:57

26 A. And we were on red alert.

27 469 Q. This is obviously the document authored by --

28 A. Document authored by --

29 470 Q. -- Sergeant McCabe, is that correct?

1 A. -- by Sergeant McCabe.

2 471 Q. And included by the Commission at their choice?

3 A. Absolutely.

4 472 Q. Is that right?

5 A. Absolutely. 15:57

6 473 Q. I mean, I think the procedure was that the Commission
7 would decide and put forward a statement of facts which
8 they thought --

9 A. That's correct.

10 474 Q. -- was relevant and they would then provide a core 15:58
11 booklet --

12 A. That's correct.

13 475 Q. -- identifying the documents and provide the documents?

14 A. And each core booklet would contain an excerpt a
15 statement which had been provided by Sergeant McCabe 15:58
16 and the relevant tract of that statement would be
17 included with the particular module that it referred
18 to, that the extract from the statement referred to.

19 476 Q. All right.

20 A. So, in each core booklet we would have had a section o 15:58
21 an extract from a statement by Sergeant McCabe.

22 477 Q. What legal conclusion did you come to that? I mean,
23 were you regarding Sergeant McCabe as being the
24 complainant in some way in all of these matters?

25 A. Coming to this with -- on looking at the documentation 15:58
26 and considering it, it was quite clear from that proven
27 facts document was that Sergeant McCabe on any reading
28 of it was in the role of an accuser in relation to
29 these men that we were representing.

1 478 Q. Well, obviously in terms of the structure of the
2 Commission of Investigation Act --
3 A. I appreciate that.
4 479 Q. -- and in terms of the rules of procedure, this was
5 always intended to be inquisitorial in nature, rather 15:59
6 than adversarial.
7 A. That's absolutely correct.
8 480 Q. I think the Judge stressed that that was the form and
9 the procedure of the inquiry.
10 A. That is correct. 15:59
11 481 Q. But in substance, are you saying that you regarded it
12 as a different form of inquiry?
13 A. Well, no, I didn't regard it as a different form of
14 inquiry. You see, the position we found ourselves in
15 representing these people who -- from my observation, 15:59
16 because I can't obviously say what they said to me.
17 482 Q. Yes.
18 A. But it was clear from me from my observation that these
19 people were in a very bad way in terms of strain and so
20 on, and anxiety, and they had been labouring under this 15:59
21 since 2008 at least. They had been through a Byrne and
22 McGinn inquiry, they had been through the -- there was
23 the independent review of which they were aware and now
24 there's a case being recommended that this matter is
25 being recommended for a full hearing by way of private 16:00
26 commission. So we were very much concerned for their
27 position. We considered that there was nothing more
28 serious that could be said about a member of An Garda
29 Síochána, other than that he's corrupt or was corrupt.

1 And we were dealing with men who had served the State
2 with some distinction, they had no stain on their
3 character up to this point, we were very concerned at
4 the fact that if any of these allegations had stuck in
5 relation to them that it would have severe consequences 16:00
6 for their -- not only for themselves personally but for
7 their family and that for future generations of that
8 family. There was the risk that they would perhaps be
9 the subject of taunt. A grandchild could be told that
10 'Your grandfather was a corrupt policeman'. And we 16:01
11 were very much aware of their predicament in that
12 respect. And we had to consider that in the light of
13 what we were reading.

14 CHAIRMAN: Mr. McGuinness, it's four o'clock, it's
15 probably a good time to stop I think, unless you are 16:01
16 urging me now to stay.

17 MR. McDOWELL: Chairman, before you rise --

18 CHAIRMAN: Yes.

19 MR. McDOWELL: -- just, it may save some time later.

20 CHAIRMAN: Yes. 16:01

21 MR. McDOWELL: Mr. McGuinness put to the witness that
22 that document was there at our instigation.

23 MR. MCGUINNESS: No.

24 MR. McDOWELL: That's not true.

25 CHAIRMAN: No. I think he said at the instigation of 16:01
26 the Commission.

27 A. Commission.

28 CHAIRMAN: Oh no, he didn't say it was at the
29 instigation of Sergeant McCabe. No, he didn't. Do you

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want to go on?

MR. MCGUINNESS: No. I think, Chairman, you're correct; I said it was there at the choice of the Commission, not Sergeant McCabe.

CHAIRMAN: No. I think that is what I took you down as saying. 16:01

MR. MCGUINNESS: Chairman, we're going to be quite a while longer with the witness.

CHAIRMAN: Thank you very much. Yes, an hour or so.

16:02

THE TRIBUNAL THEN ADJOURNED UNTIL THURSDAY, 25TH
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