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SEANAD ÉIREANN ON 16 FEBRUARY 2017

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

HELD IN DUBLIN CASTLE
ON MONDAY, 29TH JANUARY 2018 - DAY 50

50

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

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1 THE HEARING RESUMED ON MONDAY, 29TH JANUARY 2018,
2 AS FOLLOWS:

3
4 MR. MARRINAN: Sorry, sir, the first witness this
5 morning is Paula Monks, please. 10:02

6
7 MS. PAULA MONKS, HAVING BEEN SWORN, WAS DIRECTLY
8 EXAMINED BY MR. MARRINAN:

9 MR. MARRINAN: Ms. Monks' statement is to be found at
10 page 3468 of the Tribunal's books. 10:02

11 1 Q. Now, I think that you are a clerical officer in the
12 Department of Justice and Equality, isn't that right?

13 A. That's correct, yeah.

14 2 Q. And you have been there since 2009, up until December
15 of 2015? 10:03

16 A. I have been in the Secretary General's office since
17 2009, in the Department of Justice since 2004.

18 3 Q. Oh, very good.

19 A. Yeah.

20 4 Q. Now, working in the Secretary General's office, you had 10:03
21 a number of duties, isn't that so?

22 A. I did.

23 5 Q. I think first of all, you had diary management of the
24 Secretary General's diary, you were involved in opening
25 post and ensuring the Secretary General was made aware 10:03
26 of any correspondence deemed necessary, and scanning
27 correspondence to the appropriate divisions as
28 required?

29 A. That's correct.

1 6 Q. Is that right? You were also involved in coordinating
2 international business trips, circulating memos that
3 are sent from other departments to the Department for
4 observations?
5 A. That's correct. 10:04
6 7 Q. Is that right? And then to arrange for invoices to be
7 paid, the Government decisions were shown to the
8 Secretary General and to assist the private secretary
9 in the day-to-day organisation of parliamentary
10 questions, is that right? 10:04
11 A. That's correct.
12 8 Q. You were also involved in assisting the private
13 secretary in the daily running of the office?
14 A. I was, yeah.
15 9 Q. Now, I think that on a daily basis, an email comes in 10:04
16 to the Secretary General's office for the Secretary
17 General's attention; what happens to the email?
18 A. When it comes in?
19 10 Q. Yes.
20 A. Normally what happens is, it's the responsibility of 10:04
21 the private secretary to the Secretary General to show
22 that to him or her of the day. I would only be cc'ed
23 on that group in the absence of the private secretary
24 or if he was otherwise engaged. So it would be the
25 responsibility of the private secretary. 10:04
26 11 Q. And I think you are aware that we are concerned about
27 two emails in particular?
28 A. I am, yeah.
29 12 Q. And if they could be just put up on the screen now at

1 page 3470. who was the Secretary General at this time?

2 A. It was Noel Waters.

3 13 Q. Noel Waters. We have already heard from Mr. Waters.
4 If you look there first of all at the bottom one, it's
5 dated 15th May of 2015, at 16:57, and it's an email 10:05
6 from Michael Flahive to Christopher Quattrociochi, and
7 it's copied to the, you see there, Secretary General's
8 office?

9 A. Yeah.

10 14 Q. Is that in fact you? It would go to you, is that 10:05
11 right?

12 A. That would be me and a number of other people as well.

13 15 Q. Right. And we also see that it's copied to
14 Mr. O'Leary, who was at that time the Deputy Secretary
15 General, is that right? 10:06

16 A. I can't recall if he was the deputy at the time.

17 16 Q. All right.

18 A. Yeah.

19 17 Q. And also to Martin Power, is that so?

20 A. Martin Power, yeah. 10:06

21 18 Q. And the subject is "Commission of Investigation". I am
22 not going to open it because it's already been opened
23 to the Tribunal, sir. Do you have any recollection of
24 having received that?

25 A. I don't, no. 10:06

26 19 Q. You don't. But in the normal course of events you
27 would draw that to the Secretary General's attention,
28 would you?

29 A. If the private secretary wasn't in the office, but on

1 28 Q. Thank you very much. Would you answer any questions,
2 please?

3

4

MR. McDOWELL: I have no questions.

5

10:08

6

THE WITNESS THEN WITHDREW

7

8

MR. MARRINAN: Thank you. The next witness is Ken

9

O'Leary, please. His statement, sir, is to be found at
page 3347 of the material.

10

10:08

11

12

MR. KEN O'LEARY, HAVING BEEN SWORN, WAS DIRECTLY

13

EXAMINED BY MR. MARRINAN:

14

29 Q. MR. MARRINAN: Now, Mr. O'Leary, I think you are a

15

former official of the Department of Justice and

10:08

16

Equality, and you were appointed Deputy Secretary of

17

the Department of Justice and Equality on 27th of April

18

of 2015, is that right?

19

A. That's correct.

20

30 Q. I think that that was after a very long and

10:09

21

distinguished career in the Department of Justice and

22

Equality. I think in your time as Assistant Secretary

23

in charge of Crime and Security Directorate, you were

24

responsible for directing, in collaboration with other

25

State actors, the State domestic and international

10:09

26

counter-terrorism policies, isn't that right?

27

A. I was indeed.

28

31 Q. And also its gangland crime responses, is that right?

29

A. Yes.

1 32 Q. As well as having deep engagement with political and
2 demilitarisation aspects of the Peace Process?
3 A. Yes.
4 33 Q. So you have an extremely long and distinguished career.
5 You are retired now, is that right? 10:09
6 A. I retired in June last career.
7 34 Q. Yes. And you are here to give evidence primarily in
8 relation to a telephone conversation that you had with
9 the former Commissioner, Nóirín O'Sullivan, on 15th May
10 of 2015. But perhaps we could just explore some of the 10:10
11 background circumstances at the time and your knowledge
12 of particular matters. First of all, in relation to
13 Sergeant Maurice McCabe, what did you know of Sergeant
14 Maurice McCabe at that time?
15 A. It might be helpful to explain before the end of April 10:10
16 2015, when I became Deputy Secretary, I had no
17 responsibility in relation to the Garda or policing
18 divisions.
19 35 Q. Yes.
20 A. And it was the Garda divisions that dealt with Garda 10:11
21 accountability matters and in particular issues in
22 relation to Sergeant McCabe. Now, I would have been
23 involved from time to time when, do you know, various
24 controversies were ranging, not just in relation to
25 Sergeant McCabe, but other matters, and I would have 10:11
26 had some involvement in relation to that. But, in
27 relation to, say, for example, the establishment of the
28 O'Higgins Commission, I hadn't been directly involved
29 in that work.

1 36 Q. Right. But in terms of, I suppose, the fact that he
2 had been involved in many of the central issues that
3 involved the Department of Justice and Equality in 2014
4 and 2015, either directly or indirectly, and I'm
5 thinking of the retirement of the former Commissioner 10:12
6 Martin Callinan and also the resignation of the former
7 Minister, Mr. Alan Shatter?

8 A. Again, I mean, I would have had knowledge of what was
9 going on generally in relation to those matters. As
10 you know, the former Commissioner, Martin Callinan, his 10:12
11 retirement at the time, and this was all looked at by
12 Mr. Justice Finlay, this was all directed related to
13 issues about a taping system in Garda stations rather
14 than --

15 37 Q. Yes, in Bandon Garda station. 10:12

16 A. -- rather than Sergeant McCabe issues. So of course, I
17 mean, they were in the background simultaneously.

18 38 Q. Yes. Well, he was fairly prominent in terms of --

19 A. That is certainly the case.

20 39 Q. -- of his public profile and vis-á-vis his dealings 10:13
21 with the Garda Commissioner, former Garda Commissioner?

22 A. I mean, there were two issues that were live at the
23 time: One was the penalty points issue --

24 40 Q. Yes.

25 A. -- and the other were complaints about what happened in 10:13
26 Bailieboro in the mid-2000s.

27 41 Q. And in a general way, without being specific about it,
28 were you aware that there were procedures that were put
29 in place by the former Commissioner, Nóirín O'Sullivan,

1 who was Commissioner at the time of course, to assist
2 Sergeant McCabe?

3 A. I was in a general way.

4 42 Q. Yes. I think these might have been matters that were
5 dealt with by a colleague, Mr. Flahive, Michael 10:13
6 Flahive, is that right?

7 A. Yes. As I say, at that particular time, I mean, look,
8 we have a management board in the Department, we talk
9 about things, so you'd pick up what is going on, but at
10 the early -- after Nóirín O'Sullivan became 10:14
11 Commissioner and she was trying to address workplace
12 issues in relation to Sergeant McCabe, I didn't have a
13 direct involvement but would have known generally that
14 that was the case.

15 43 Q. And in terms of him writing to the Minister, had he met 10:14
16 the Minister, Sergeant McCabe, at that stage?

17 A. I know he met the Minister with the Secretary General
18 of the Department, but I am not sure when that was.

19 44 Q. Well, would it be fair to say that perhaps the attitude
20 of the Department was reflected by the attitude of the 10:14
21 Garda Commissioner at the time, was to support Maurice
22 McCabe as a whistleblower?

23 A. I mean, the view of the Department was that procedures
24 had to be in place to protect people who were reporting
25 wrongdoing. 10:15

26 45 Q. Yes. But did this relate at that time in particular to
27 Maurice McCabe?

28 A. Sergeant McCabe would of course have been by far the
29 most high profile person.

1 46 Q. Yes.

2 A. Other people labelling themselves whistleblowers, I
3 think that was live there or thereabouts or thereafter.

4 47 Q. Yes. And then vis-á-vis your, not just your but the
5 Department's, relationship with the Garda Commissioner, 10:15
6 how would you categorise that? And just before you
7 answer the question, because there is a matter
8 concerning you, you have probably read -- either read
9 the transcripts or you have seen reporting of the
10 matter, there is, for example, a letter, but I don't 10:15
11 really want to go into the details of and open up, that
12 appears on first blush to have been written by you as a
13 draft to be sent by the Garda Commissioner to the
14 Department of Justice, and we also have a letter from,
15 or an email from the former Commissioner directly to 10:16
16 the Minister for Justice, including what appears again
17 on the face of it, it's not characterised by her as
18 being a draft speech but it appears to have been a
19 draft speech because it's in the first person; you are
20 aware of those documents? 10:16

21 A. Oh, very much so.

22 48 Q. Yes, yes. So, I mean, there may be absolutely nothing
23 wrong with this, but what is the relationship between,
24 for instance, you and the Garda Commissioner at that
25 time? 10:16

26 A. I mean, the relationship -- I mean, I can very much
27 deal with the specific documents you are referring to,
28 but in general terms, the Department is responsible for
29 the maintenance of public safety. The main agency that

1 carries out that work is the Garda Síochána. So there
2 is an inevitably close and intensive relationship
3 because we have a common objective. The Guards, in
4 turn, are also accountable to the Minister --

5 49 Q. Yes.

10:17

6 A. -- which informs the relationship.

7 50 Q. Yes.

8 A. In relation to the two items you mention, there was
9 great controversy after Judge O'Higgins' report was
10 published, when transcripts were leaked and the version 10:17
11 of a particular story was put about, involving tapes
12 and so on, and that led to, as I say, a lot of
13 controversy. Our view in the Department, and we had a
14 clear view of the matter, was that Judge O'Higgins had
15 been there, it was a matter for Judge O'Higgins to 10:18
16 report what he wished to report, that there was nothing
17 in his report that called the position of the Garda
18 Commissioner into question in any way.

19 51 Q. Yes.

20 A. And we were left with a situation where public concerns 10:18
21 were arising on the basis of, I think, three pages of
22 what went on at the O'Higgins Commission.

23 52 Q. Yes.

24 A. And a story about what happened at the O'Higgins
25 Commission. And our view was, as I say, that didn't 10:18
26 call into question at all the position of the Garda
27 Commissioner, and yet, she was publically being
28 traduced said in circumstances where, of its nature,
29 she couldn't defend herself.

1 53 Q. Sorry, just before you go on. You say "our view" --
2 A. The Department's view.

3 54 Q. -- is that a view, that is a view that is held by
4 senior officials in the Department of Justice, but is
5 that also the view that is communicated to the Minister 10:19
6 of the time?
7 A. I think so. We had intensive discussions with the
8 Minister at the time.

9 55 Q. And then you would, therefore, be advised by the
10 Minister that that was her view? 10:19
11 A. Certainly. But the other side of it was, while we felt
12 we had to rely on and indeed defend Judge O'Higgins's
13 report --

14 56 Q. Yes.
15 A. -- we felt that any jeopardy to the Commissioner's 10:19
16 position was both wrong and not in the public interest.
17 By the same token, the Minister still had to deal with
18 the political reality of the concerns that had been
19 raised. And without going through all that week, I
20 know this exchange of letters might look a bit odd. In 10:20
21 reality, what was involved was, at the end of that week
22 of controversy, the following Wednesday, I think, there
23 was to be a debate on the O'Higgins Report in the Dáil
24 and it was important that -- we were trying to bring
25 this controversy to an end -- it was important that the 10:20
26 Minister, in her speech, could say the Commissioner has
27 done her best within the constraints that applied to
28 respond to these matters. There had been a series of
29 exchanges, there was a meeting on the previous Friday

1 that the Minister and the Commissioner were at, and the
2 understanding after that was that the Department and
3 the Guards would continue to engage in relation to what
4 was going to happen in the Dáil. Now, I took the view,
5 I think it was on the Sunday, that a lot of what had 10:21
6 gone on of its nature was circular because we couldn't
7 ask the Commissioner what happened at the Commission
8 because the proceedings were confidential. There was
9 an issue about her legal advice and so on. So I took
10 the view, just to move the process along, that I would 10:21
11 commit some material to paper. And essentially what it
12 was, was a stream of consciousness based on what had
13 gone on that week, just as a starting point to move the
14 process forward. Time wasn't on our side, and given
15 the nature of the controversy that had taken place, 10:22
16 what was -- the Minister was going to circulate, I
17 thought, at the time, the letter to accompany her
18 speech in the Dáil. As it happens, she circulated a
19 speech based on that letter, but it was not a draft in
20 the normal sense of what we thought the Commissioner 10:22
21 would say. We could have done it in another way and it
22 may not have looked as strange and sent a note to the
23 Commissioner saying, look, based on our discussions,
24 these are the sort of points that might be made.

25 57 Q. Yes. 10:22

26 A. But I think it's clear from the correspondence that we
27 said to the Commissioner, look, this is entirely a
28 matter for yourself --

29 58 Q. No, at the end of the day she has given evidence in

1 relation to this, she says it's her letter and of
2 course she signed off on it. But the curious aspect of
3 it is that the input in the letter, it's effectively in
4 the first instance drafted by yourself, isn't that
5 right? 10:23

6 A. As I say, there was a draft that I think I did up on
7 the Sunday --

8 59 Q. Yes.

9 A. -- in terms of what was going to happen.

10 60 Q. It shared -- again, I am not going to open these 10:23
11 because they have already been opened to the Chairman
12 and there is no need to go through them all, and you
13 have seen them and so we all know what we are talking
14 about. But they are shared by you with Noel Waters,
15 for example, isn't that right, for his consideration 10:23
16 and for his, if he has any suggestions that could go
17 into the letter? It's also shared with, I think it's
18 Patrick Forsyth, is that right?

19 A. He was the Head of Corporate Affairs in the Department.
20 He had just joined. It's sort of a support office for 10:24
21 the Secretary General's office.

22 61 Q. So. And that is sent back. I think there is about 15
23 drafts in total, that they go back and forth to Garda
24 Headquarters and then they come back and I think that
25 Terry Prone had some input as well in relation -- 10:24
26 A. Other than the documents, I have no idea --

27 62 Q. So there is a large number of input, people have input
28 into what is obviously going to be quite an important
29 letter setting out the Garda Commissioner's stall in

1 relation to the O'Higgins Commission, isn't that right?

2 A. Yeah. Like, it might be helpful to say, we weren't, as
3 far as I was concerned anyway, disinterested observers
4 in the whole thing. We felt that we had to rely on the
5 O'Higgins Report, that nothing in that called into 10:25
6 question the position of the Garda Commissioner, that
7 it was extremely difficult for the Garda Commissioner,
8 if not impossible, to respond effectively to the leaks
9 that had taken place, and we were working closely
10 together -- 10:25

11 63 Q. Yes.

12 A. -- to try and resolve, from the Minister's point of
13 view, or Tánaiste, as she was then, the public concerns
14 that had arisen. The only way of doing that was that
15 something was produced that reached a standard, not 10:25
16 that, do you know, everyone would find acceptable, but
17 a reasonable account in very difficult circumstances
18 because of the constraints which applied.

19 64 Q. But in any event, I mean, a commentator might say that
20 you know, that the Department was acting hand in glove 10:25
21 with the Commissioner at the time?

22 A. And so it was, for the very good reason that we had to
23 take a public interest view in relation to all these
24 matters and our view was that the public interest was
25 not going to be served in any way by the Commissioner's 10:26
26 position being put in jeopardy at that time.

27 65 Q. Yes. But you will appreciate that we are probably
28 hearing about this relationship as it existed at the
29 time between the Department and the Garda Commissioner

1 for the first time, because it's not evident and
2 apparent to members of the public to know that there is
3 this closeness and degree of closeness between the
4 Garda Commissioner and Department -- officials in the
5 Department of Justice and indeed the Minister, do you
6 understand? 10:26

7 A. Well, I mean, there is two points I'd make: Like, our
8 contribution, I mean, if any of the material that week
9 looked as if we were very supportive of the Garda
10 Commissioner, that's because we were very supportive. 10:27

11 66 Q. Yes.

12 A. And it wasn't because of loyalty or whatever. It was
13 because we took the view that there was no proper basis
14 for questioning the Commissioner's position. But there
15 was a danger because of the political feverish climate 10:27
16 going on at the time, if people had looked at previous
17 things that had happened during the course of Garda
18 controversies they could go anywhere. And frankly, we
19 also thought there was a danger that the Commissioner,
20 given the way she was being pilloried in public and the 10:27
21 very difficult position that was in, there was
22 obviously a danger that a sensible person might say,
23 look, I am not putting up with this any more. And the
24 implications for us of having to find a new
25 Commissioner and the disruption that would have been 10:28
26 caused, as I say our view of the public interest was
27 that anything we could do to support the Commissioner,
28 we would do, because we thought that was in the
29 interests of the leadership of the Guards, and the

1 public interest. So as I say, it wasn't all friends
2 helping each other out; it was a clear view of where we
3 thought the public interest lay. If --I mean, if the
4 O'Higgins Commission report said the Commissioner
5 inappropriately relied on strategies to do down 10:28
6 Sergeant McCabe, well then we would have had to deal
7 with that in an entirely different way.

8 67 Q. Yes. So I mean, would it be fair to summarise your
9 position in relation to this, that you may well have
10 been hand in glove with the Commissioner in relation to 10:28
11 this issue at the time, not because you had a cosy
12 relationship but because the Department had taken a
13 view arising out of the O'Higgins Commission that the
14 Commissioner was in fact correct in her approach and
15 there was no question that she was going to resign? 10:29

16 A. It's not that we were taking a view the Commissioner
17 was correct in what happened at the O'Higgins
18 Commission, because we had absolutely no information
19 except for one detail, we may be coming to. What we
20 were doing was relying on Judge O'Higgins's report and 10:29
21 there was nothing in that that questioned in any way
22 the approach of the Garda Commissioner on our reading
23 of it. The hand in glove phrase, do you know, if you
24 don't mind me saying so, it is a bit pejorative. Like,
25 we were working closely with the Garda Commissioner in 10:29
26 the situation which arose to achieve the objectives we
27 thought were best in the public interest.

28 68 Q. Yes. But so closely that you thought it appropriate
29 and not out of order to send a draft letter to the

1 Commissioner for her consideration to send back to the
2 Department and also that the Garda Commissioner could
3 contact the Minister directly with what, on the face of
4 it, appears to be a draft speech expressing confidence
5 in her?

10:30

6 A. In relation to, you know, what is called a draft
7 letter, I have tried to explain the background to that,
8 if it had been written, headed instead 'points that you
9 might take into account in the light of our
10 discussions', I don't think anyone would find that
11 objectionable and maybe that is what I should have
12 done.

10:30

13 69 Q. I know. But that is not the way it's written, it's
14 written in the first person, as indeed the speech is
15 written in the first person.

10:30

16 A. Well, I mean, frankly, like, that is a question of form
17 rather than substance in relation to what was going on.

18 70 Q. Well, I think if it had become -- either the letter or
19 the speech had become bestsellers, there might have
20 been a quarrel in relation to copyright and royalties,
21 but anyway.

10:31

22 A. I am sure we would have donated to charity in those
23 circumstances. In relation to the Commissioner
24 providing material to the Minister, we weren't, as a
25 Department, directly involved in that. At the time
26 there was some communications between the Tánaiste,
27 sorry, as she was then, and the Commissioner, and I
28 mean, I would have the simple view that the
29 Commissioner and the Minister of the day are entitled

10:31

1 to communicate.

2 71 Q. No, absolutely.

3 A. The fact that something was done in bullet-point form,
4 that might arise at Leaders' Questions, again I think
5 it's a question of form rather than substance. 10:32

6 72 Q. Yes, yeah. So in effect what you are saying in terms
7 of, a decision is made and if you can help the
8 Commissioner in those circumstances by identifying
9 facts that would be helpful to go into a letter or
10 alternatively, if she can identify matters that she 10:32
11 thinks ought -- the Minister ought to raise in a speech
12 that is expressing confidence in her, that it's quite
13 in order to assist. At the end of the day, it's her
14 letter, it's the Minister's speech, and that is the
15 point. 10:32

16 A. I mean, that would be my strong view, given the very,
17 very, very difficult circumstances that were being
18 addressed.

19 73 Q. So can I take it that a lot of the communication that
20 might take place between, for instance, yourself and 10:32
21 the former Garda Commissioner, Nóirín O'Sullivan, a lot
22 of the communication might be informal?

23 A. No more informal than any working relationship I had
24 with anyone else.

25 74 Q. Well -- 10:33

26 A. Like, on a given year I'd say, because of the crime and
27 security responsibilities in particular, that I
28 probably would be talking to the Garda Commissioner a
29 couple of hundred times.

1 75 Q. But there wouldn't be a record of those conversations?
2 A. Only to the extent that if matters arose from them that
3 were being advanced.
4 76 Q. Well, that is what I am coming to. I mean, there isn't
5 a record of those -- of many of the conversations that 10:33
6 you would have with the Garda Commissioner?
7 A. No, and I mean, that was simply a product of pressure
8 of time.
9 77 Q. Well, is it, or is it that there is a degree of
10 informality? There is nothing wrong with that, it 10:33
11 might be encouraged. But you see, one of the problems
12 that we have in relation to this matter, and I will
13 come now shortly to the phone call that you had with
14 the Garda Commissioner, but there was a spark at the
15 O'Higgins Commission that ignited a series of events 10:34
16 that took place, all within approximately an hour, all
17 right. And on the one hand you had Mr. McDowell, who
18 raised an issue in relation to whether or not the Garda
19 Commissioner was instructing her counsel to challenge
20 Sergeant McCabe's motivation. And that was, Annmarie 10:34
21 Ryan in the Chief State Solicitor's Office was there
22 present for that and she made a note in relation to it,
23 but she thought the matter so significant that she
24 contacted Michael Dreehan in the Attorney General's
25 office, and he was equally concerned about the 10:35
26 information that was being imparted to him and he duly
27 noted the matter and, again, referred it on to his
28 superior, Richard Barrett, who was the Deputy Director
29 in the Attorney General's office. He took on board

1 what had been said to him, noted it, sent some internal
2 emails that are privileged, and then he contacted
3 Mr. Michael Flahive, and Mr. Flahive, in your
4 Department, duly noted what Mr. Barrett had to say in
5 relation to the matter. So within a very short time, 10:35
6 the Department, through the Chief State Solicitor's
7 Office -- again I should add there that Annmarie also
8 contacted her superior, I think it's Paul Fleming. The
9 Chief State Solicitor's Office become aware of it and
10 the Attorney General's office become aware of it, and 10:36
11 coming into your Department, Mr. Flahive notes what has
12 transpired, and then emails the private secretary,
13 Mr. Quattrociochi, and there is a chain of emails,
14 there are notes in relation to all this of what
15 transpired, do you understand? 10:36

16 A. I do.

17 78 Q. And that is what one would imagine in an official
18 situation, that's well-documented. But on the other
19 hand, on the other side, we have the former
20 Commissioner contacting Mr. Waters and phoning him. We 10:36
21 have no recollection on the part of the Commissioner in
22 relation to that call, and Noel Waters has no memory of
23 it either. It's right in the middle of what is going
24 on at that time. It's undocumented. There is no
25 record of it. We wouldn't have been aware of it had we 10:37
26 not had the telephone records. And then she phones you
27 and apparently there is a discussion that I will come
28 to in relation to matters that arose at the O'Higgins
29 Commission, and there is no record of that. And again,

1 the only information we have is a statement that you
2 provided to us just December gone, when the telephone
3 records were available to us. And then you then
4 contact Mr. Flahive and there is no record of that
5 communication, and Mr. Flahive has advised us that you 10:37
6 did call him, but in the email that he sends to the
7 Minister's private secretary, there is no mention of
8 his conversation with you or that you imparted an
9 additional piece of information, which we will come to.
10 So, on the one hand, everything seems to be 10:38
11 well-documented, people have a recall of what took
12 place, it seems to have been done officially, but on
13 the other hand, we have a lack of recall, no notes, no
14 documentation, no emails and no reference to this
15 having occurred in any of the emails. Do you see 10:38
16 what --
17 A. I see exactly the point you are making.
18 79 Q. Yes.
19 A. I mean, all I can say is that if there was an
20 expectation on us generally that we would record all 10:38
21 telephone calls with the Garda Commissioner and all
22 telephone calls with each other, that we just wouldn't
23 be getting work done. I am not disputing its
24 necessity; I am just talking about the real world in
25 which we operate. 10:38
26 80 Q. Yes. I can understand that. But nevertheless,
27 anything to do with Sergeant Maurice McCabe had been
28 fairly controversial.
29 A. Do you know, anything to do with international

1 terrorism, anything to do with crime, anything to do
2 with -- I mean, there is a whole range of things we
3 deal with to try and prevent them becoming problems.
4 As I say, of course, sitting here now, with the
5 Tribunal established to deal with this matter, I would 10:39
6 have loved to have written down a verbatim account of
7 everything that happened that afternoon. I don't
8 think, to be honest with you, it would have been on my
9 mind that afternoon that these calls would be subject
10 to a tribunal looking at what was happening at a 10:39
11 commission of investigation.

12 81 Q. No, indeed. So if we just come to the call on the
13 afternoon of the 15th May of 2015. What is your
14 recollection of the call?

15 A. Could I just explain something in advance of that, in 10:39
16 the light of what has happened at the Commission and
17 the Commissioner's phone records? They show one phone
18 call, I think, at 16:16, that the Commissioner had with
19 me for three-and-a-half minutes. I think there were
20 two phone calls -- 10:40

21 82 Q. Yes.

22 A. -- that afternoon.

23 83 Q. I was going to ask you about that. Did you phone her
24 back?

25 A. I just don't know. I'd say the likely explanation, 10:40
26 while I said in my statement to the Tribunal that the
27 Commissioner contacted me, I think the likeliest
28 explanation is I had been on to the Commissioner and
29 this was mentioned. But I'm clear, for whatever

1 reason, that there were two phone calls in the period
2 from this becoming an issue at the Commission and, do
3 you know, when the issue ended that afternoon.

4 84 Q. well, just tell us, just tell us in the first instance
5 what your recollection of the phone call is, the first 10:40
6 phone call?

7 A. The first phone call, the Commissioner mentioned to me
8 that a dispute had arisen at the Commission.

9 85 Q. well, first of all, do you recall where you were? Were
10 you in the Department? 10:41

11 A. Oh, I was in my own office, in 94 Stephen's Green.

12 86 Q. And you took a call from the Commissioner, was it on
13 your mobile?

14 A. Or I had been talking to the Commissioner and this was
15 mentioned. 10:41

16 87 Q. well now, now, just before -- let's deal with that, all
17 right. You know, this matter arose last week, I
18 expressed some concern to the Chairman that if anybody
19 was going to change their position in relation to
20 anything that they should put it in writing and provide 10:41
21 a statement to the Tribunal. You provided a statement
22 to the Tribunal on the 6th December of 2017 in which
23 you said you received a phone call from the
24 Commissioner arising out of a matter that had arisen at
25 the O'Higgins Commission, isn't that right? 10:41

26 A. Yes.

27 88 Q. Now, are you changing that?

28 A. I'm changing it to the extent that I think it may have
29 been that I had been on the telephone to the

1 Commissioner or the Commissioner had another phone,
2 that isn't included in the records.

3 89 Q. Right. well, wouldn't it have been an absolutely
4 extraordinary coincidence, extraordinary coincidence,
5 that in the short period of time, the Commissioner 10:42
6 having contacted Noel Waters and then been in contact
7 with you, that you just happened to ring the
8 Commissioner about something entirely different? Is
9 that what you are telling us?

10 A. I'm telling you, I mean, when I did the statement for 10:42
11 the Commission, I had -- I had the benefit of no
12 records, no documents. I tried to recall as best I
13 could to be helpful to the Tribunal my belief about
14 what happened that afternoon. If I got it wrong in
15 terms of the contact being initiated one way or another 10:43
16 way, I very much regret that. But as I say, it was in
17 the context of trying to set out the best recollection
18 I had of what happened. I can't really comment on the,
19 you know, the likelihood or level of coincidence or
20 whatever of a phone call to -- between Noel Waters and 10:43
21 the Commissioner, that I know nothing about and the
22 fact that I was talking to the Commissioner.

23 90 Q. All right. well, let's hear what you have to say in
24 relation to the content of the phone call.

25 A. As I say, she mentioned to me that a dispute had arisen 10:43
26 in the Commission.

27 91 Q. What did the dispute relate to?

28 A. That Mr. McDowell had objected very strongly to a
29 question counsel had put to a witness.

1 92 Q. And do you recall what that question concerned?
2 A. No. But my understanding was that the question related
3 in some way to matters following the -- what is called
4 now the Ms. D case.

5 93 Q. Right. And so therefore, the witness in question is -- 10:44
6 sorry, question is to a witness but it concerns
7 Sergeant Maurice McCabe, is that right?
8 A. As I say, now, I mean, I can't pretend to have a
9 verbatim recollection --

10 94 Q. No. 10:44
11 A. -- but my understanding was that the question related
12 in some way to something in the aftermath of the Ms. D
13 case.

14 95 Q. And were you familiar with the -- not with the actual 10:44
15 circumstances obviously of the Ms. D case but the fact
16 that the Ms. D case had been considered by the
17 Independent Review Mechanism?
18 A. I had just a passing knowledge in relation to that. I
19 knew at one stage, Michael Flahive mentioned to me
20 that there was an issue as to whether that, the 10:45
21 handling by the guards of the Ms. D case --

22 96 Q. Yes.
23 A. -- might be subject to a commission of investigation.

24 97 Q. That it would be included in the terms of reference?
25 A. Either separately or included in the terms of 10:45
26 reference. But as I say, the only reason I think it
27 was mentioned to me at the time was with the background
28 of the IRM and why it was established.

29 98 Q. Yes.

1 A. It would be a very strange outcome if the only one of
2 300 cases dealt with the handling of the Ms. D case.

3 99 Q. Indeed, yes. So, just the Commissioner is advising you
4 of this issue that has arisen at the O'Higgins
5 Commission? 10:46

6 A. Yeah.

7 100 Q. what else did she say to you?

8 A. what I recall is -- I think the context of her call
9 was, she felt that this matter might get in the public
10 domain and that we should be alerted to it. And I 10:46
11 think, you know, she was generally concerned as to, do
12 you know, a serious row having arisen at the Commission
13 as to where it all might go.

14 101 Q. was she tapping into your wealth of experience by
15 asking your advice as to -- 10:46

16 A. well, I think -- no, I don't think so. what happened
17 then was, I thought just so any misunderstandings could
18 be avoided, that I had better say to her that the
19 Department couldn't become in any way involved in what
20 approach she was taking at the Commission. That that 10:47
21 was her responsibility and we couldn't become involved
22 or try to influence that. And she fully accepted that.
23 Now, I think she took the opportunity to, just based on
24 my experience, to say to me, I forget the exact words,
25 but look, are there issues I need to be mindful of in 10:47
26 dealing with this?

27 102 Q. Yes.

28 A. And as I set out in my statement, the issues and -- it
29 might be helpful to explain, I don't think I even knew

1 at the time that the O'Higgins Commission had
2 commenced. So just on a colleague to colleague basis,
3 if I could put it like that, I just mentioned issues
4 that struck me. The obvious one, which the
5 Commissioner was clearly aware of, was the
6 sensitivities in relation to the position of Sergeant
7 McCabe.

10:48

8 103 Q. Yes. Well, I think that in your statement, and it may
9 be of assistance to you, we are not here to catch you
10 out or to trick you or trip you up in any way, at 3348,
11 you might find it of assistance, you say in the top of
12 the paragraph there:

10:48

13
14 "while clearly accepting the Department could have no
15 role in determining the Garda position in relation to
16 the Commission, the Commissioner asked me if based on
17 my experience anything occurred to me which she might
18 need to be mindful of in addressing this particular
19 issue with her legal advisers. I suggested that she
20 should have to be guided by her legal advice in these
21 matters, but against the background that the Department
22 was not in a position to express any views on the
23 position of An Garda Síochána at the Commission, there
24 was a discussion of factors which she might need to be
25 mindful of in the context of discussions with her legal
26 advisors."

10:48

10:48

10:49

27 A. Yes.

28 104 Q. All right. So, it would appear from that that, you
29 know, that she was looking for some assistance and

1 advice from you?

2 A. I think the better way of phrasing it is she was
3 looking for -- she thought that I might be able to say
4 things that might assure her or reassure her that she
5 was taking into account whatever she needed to take 10:49
6 into account.

7 105 Q. Maybe she was just using you as a sounding board --

8 A. I think so.

9 106 Q. -- effectively. Okay. But you had made it clear that
10 her that you couldn't make the decision for her? 10:49

11 A. Oh, it wasn't just -- I mean, as a matter of principle,
12 I don't believe the Department could properly be
13 involved. Like, the Guards and ourselves could
14 cooperate in lots of things, we couldn't cooperate in
15 circumstances where a commission of investigation had 10:50
16 been established which was a statutory process, we
17 couldn't start involving ourselves then in what case
18 the Gardaí were going to make to the Commission.

19 107 Q. And you then go on to say:
20 10:50

21 "To the best of my recollection matters mentioned were
22 the need for sensitivity in relation to protecting the
23 position of Sergeant McCabe."
24

25 That was the first matter that you thought that she 10:50
26 should put into the melting-pot, as it were, isn't that
27 right?

28 A. As I say, I mean, I should say I can't say how long the
29 conversation went on but it was a brief conversation

1 that would have lasted no more than a few minutes. And
2 I just, having been asked were there any issues that
3 came to my mind, the issue that came to my mind was the
4 obvious one of the sensitivity in relation to Sergeant
5 McCabe. And other issues that came into my mind were, 10:51
6 there was the issue of other people at the Tribunal, if
7 there were matters that were relevant to people finding
8 whether or not -- finding the veracity of what was
9 alleged against other people, that was something that
10 had to be taken into account. 10:51

11 108 Q. Yes.

12 A. The other matter was - and like, these were general
13 points that, in my view, would apply to any Commission.
14 - that if a commission had been established to deal
15 with the facts of a situation, that there was a general 10:51
16 duty on the Garda Commissioner to cooperate as much as
17 possible with the Commission. And I also made the
18 point that if inappropriate material or matters were
19 raised at the Commission, the chances are the
20 Commission would take a very dim view of that and 10:52
21 report accordingly.

22 109 Q. There might be a negative reaction by the Commission --
23 by the Commissioner?

24 A. Obviously.

25 110 Q. Sorry, Mr. Justice O'Higgins in this instance here. 10:52
26 You then go on to say:

27
28 "The Commissioner was then going to discuss these
29 matters with her legal advisers."

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She told you that, is that right?

A. Well, I mean, that was my understanding; that there was some ongoing contact in relation to what was happening.

111 Q. And you reiterated the view that she should be guided by the legal advice that was available to her at the time, is that right? 10:52

A. Well, I mean, I took the view that if I had been in her position that there were a lot of potentially competing interests in a complex area at issue, and I mean what I would have done was relied on whatever legal advice was available to me. 10:53

112 Q. Did she seem unsure at the time of what course she was going to take?

A. As I say, I wasn't -- it's hard to explain this. I mean, I wasn't having a detailed discussion with the Commissioner as to where she was in all of this. She was dealing with it. She had asked me in relation -- whether I thought there were any issues, and I felt -- even though I had made it clear the Department couldn't be involved in it, I felt it wasn't unreasonable colleague-to-colleague to mention particular issues that struck me on the spot. But I wasn't getting into engaging, if I can put it like this, with the Commissioner as to what she was going to do about any of these things. That was her statutory responsibility. 10:53

113 Q. I know. But the question I asked you was: Did she appear unsure about her decision?

1 A. I don't think I could characterise it like that. I
2 think she was in the centre of dealing with it. I
3 think she was -- as I think I was saying, she phoned me
4 in the context of the row that he was erupted, and I
5 think she may have been concerned as to what all this 10:54
6 meant and where it was going. But I really can't put
7 myself in her mind as to what view she was taking in
8 relation to all of this.

9 114 Q. Well, you see, the reason I ask you that is because you
10 go on in your statement to say: 10:54
11
12 "I suggested that from her point of view it might be
13 helpful if it was possible to gain more time so she
14 could consider the matters more fully with her legal
15 advisers." 10:54

16 A. That was probably more my concern necessarily than
17 hers. It just struck me and, I mean, it's something
18 that arises in a lot of contexts, if a difficult,
19 complex situation arises, that more time is always
20 beneficial. 10:55

21 115 Q. So the impression you got was that she was making a
22 difficult and complex decision in relation to the
23 matter and in the circumstances she ought to see if she
24 could get more time to discuss the matter with her
25 legal advisers, is that it? 10:55

26 A. That would be broadly the case.

27 116 Q. And so, you then go on -- that was the end of the phone
28 call, and at that juncture, as far as you were
29 concerned, the Commissioner was --

1 A. She was continuing to deal with the matter. I wasn't,
2 to be honest, sure whether I would hear any outcome
3 from it.

4 117 Q. And was there anything else discussed during the course
5 of that conversation? 10:56

6 A. Not that I can recall. Sorry, I should say, I don't
7 have a recall of every word that was said.

8 118 Q. But this is the topic that she was discussing?

9 A. That was. Now, I couldn't say something else wasn't
10 mentioned that might be relevant to security, or 10:56
11 whatever.

12 119 Q. Okay. And then you go on to say:
13
14 "To the best of my recollection I received a further
15 call shortly afterwards from the Garda Commissioner 10:56
16 and I think for at least some of that call that she was
17 on to HQ legal officer at the O'Higgins Commission ."
18
19 That is in fact not Ken Ruane who held that position,
20 but she was in fact in contact with Chief 10:56
21 Superintendent Fergus Healy. This was your
22 recollection. You have now looked at the phone
23 records. There was a second conversation with the
24 Commissioner, is that right?

25 A. There was. Now, I mean, in the light of the phone 10:57
26 records -- sorry, I may have mislabelled people, I knew
27 it was Fergus Healy rather than Ken Ruane.

28 120 Q. Yes.

29 A. But in the light of the phone records, I think it could

1 have been in either of the two calls, I have a
2 recollection at one stage that it was I was interrupted
3 when I think the Commissioner was talking to Fergus
4 Healy. And frankly, the reason I have the recollection
5 is, while I was happy to, do you know, offer abstract 10:57
6 advice, if advice isn't too strong word, in relation to
7 commissions and so on, I recall being -- I will put it
8 this way: I did not see a role for myself, either for
9 the Department or even me personally, in getting into
10 the nitty-gritty of what was going on at the 10:58
11 Commission. I'm not suggesting the Commissioner was
12 trying to do that. But, as I say, the reason I think
13 she phoned -- she was on the phone to Fergus Healy for
14 some of the call was, I can remember getting slightly
15 concerned just from my own point of view as to not, as 10:58
16 I say, becoming involved in the specifics of what was
17 going on.

18 121 Q. Yes. So your position that you maintained during the
19 course of the two conversations was look, this isn't
20 really a matter the Department, I will give you the 10:58
21 benefit of my wisdom but I don't really want to know
22 the nitty-gritty and all the details, is that it?

23 A. That is not an unreasonable characterisation. As I
24 say, the Department could not be involved. I was asked
25 as a colleague if there were any issues that I thought 10:59
26 she should have in her mind, and I felt it wasn't
27 unreasonable, though I make no great claims for them,
28 to mention what I thought at the time.

29 122 Q. So what you then go on to say in your statement is:

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"I understand if the Commissioner was -- I understood it the Commissioner was being advised that her legal representatives at the Commission had to respond more or less immediately to the issue which had arisen earlier and the view of her legal team was that in discharging her obligation to the Commission there was a legal duty on her to raise matters which had arisen. I believe in the circumstances, the Commissioner indicated to the effect that her legal team should maintain their position that afternoon, but there would be further detailed consultation with her legal team subsequently about the matter."

10:59

10:59

A. That was my understanding --

123 Q. That was your understanding --

11:00

A. -- from the situation.

124 Q. -- from the manner in which you left it. So is it that there were two conversations in a relatively short period of time, and you are not sure the exact sequence but the purport and thrust of both conversations were along the lines you have told the Chairman, is that right?

11:00

A. Exactly.

125 Q. We know that you had a conversation with her later on that evening shortly after 9 o'clock, from the telephone records, but that is not part of the these sequence of calls, is it?

11:00

A. Honestly, I mean, I can't say at this remove what that phone call was about, but it's not part of that

1 sequence of phone calls, no. As I say, that was my
2 best recollection in relation to the issues in
3 question. The phone call that night, I don't know what
4 it related to.

5 126 Q. So you didn't discuss the matter with Mr. Waters, did 11:01
6 you?

7 A. I don't know. Em, I certainly don't recall discussing
8 it with him. And I know that afternoon, I think he
9 gave evidence that he was down at INIS Headquarters but
10 I just can't say whether that day or some other day I 11:01
11 mentioned it to Mr. Waters or not.

12 127 Q. Is it likely that you would have discussed the matter
13 with him?

14 A. Again, I can't say.

15 128 Q. All right. Okay. Now, I think that sometime that 11:01
16 afternoon Mr. Flahive, who is the assistant secretary,
17 telephoned you in relation to an email that he had
18 received?

19 A. He did indeed. Now, I think it would have been after
20 the two phone calls that I had with the Garda 11:02
21 Commissioner.

22 129 Q. Yes.

23 A. And he --

24 130 Q. Just tell us what --

25 A. He mentioned to me his understanding from the Attorney 11:02
26 General's office. I mentioned to him the Commissioner
27 had also mentioned the matters to me. I had been
28 contemplating doing an email for the Minister in
29 relation to the issue that had arisen at the

1 Commission, but I can recall reflecting on, do you
2 know, what I could or should say. The Minister, in my
3 view, could have had no role in relation to the Garda
4 case at the Commission, and contacts between the
5 Commissioner and the Minister about the Commission, 11:03
6 once it was going on, I was a bit uneasy about. But
7 while I was thinking of what I might say to the
8 Minister, Michael Flahive was on to me. His
9 information had come from the Attorney General's
10 office, and it seemed to me that was, for want of a 11:03
11 better phrase, a legitimate route for the Minister to
12 get the information. And we agreed that he'd write an
13 email setting out the conversations that he had or
14 conversation that he had with Richard Barrett in the
15 Attorney's office. 11:03

16 131 Q. From your conversation that you had with Mr. Flahive,
17 was it clear to you that the questions that were being
18 asked at the O'Higgins Commission went to the
19 motivation of Sergeant McCabe in making his complaints?

20 A. I can't recall in the discussion I had with the 11:04
21 Commissioner that -- like, what I am sure of, there was
22 no discussion of the general legal approach that was
23 being taken in relation to motivation and credibility.
24 As I understand it now from what happened at the
25 Commission, after the question was raised Mr. McDowell 11:04
26 made the point that if these matters were going to be
27 raised, he needed notice of them. And there was a
28 discussion then that went on to, I think, counsel for
29 the Gardaí talking about motivation and credibility and

1 so on. I had no knowledge of any of that at the time.

2 132 Q. I beg your pardon. An email was sent to you shortly
3 after -- was copied to you very shortly after that
4 discussion with Mr. Flahive, isn't that right?

5 A. Yes. 11:05

6 133 Q. And if we could just have page 3483 up on the screen,
7 please. This is -- yes, this is an email from
8 Mr. Flahive to Mr. Quattrociochi, and it's:
9

10 "Chris, could you pass this on to the Minister for 11:06
11 information, please."
12

13 I can't actually read that. Yes.

14

15 "I took a call this afternoon from Richard Barrett in 11:06
16 relation to the O'Higgins Commission of Investigation
17 (which is investigating the matters identified by the
18 Guerin Report). The O'Higgins Commission has started
19 hearings and the Garda Commissioner are represented by
20 counsel, as is Sergeant McCabe (in this case Michael 11:06
21 McDowell SC). Richard wanted to let me know that
22 counsel for the Garda Síochána has raised as an issue
23 in the hearings an allegation made against Sergeant
24 McCabe which was one of the cases examined by the IRM.
25 The allegation had been that a serious criminal 11:07
26 complaint against Sergeant McCabe (which he always
27 denied) has not been properly investigated by the Garda
28 Síochána. The IRM found that an investigation file on
29 the case had in fact been submitted to the DPP, who had

1 directed no prosecution, and the IRM, which because of
2 the seriousness of the allegation, had been considering
3 whether to recommend its inclusion in the O'Higgins
4 terms of reference, in the end recommended no further
5 action by the Minister. Presumably, the Garda Síochána 11:07
6 are raising the matter on the basis they could argue
7 (and Sergeant McCabe would deny) that it is potentially
8 relevant to motivation. Richard advised me that
9 counsel for Sergeant McCabe objected to this issue
10 being raised and asked whether the Garda Commissioner 11:08
11 had authorised this approach. Richard also told me
12 that the Garda Commissioner's authorisation had been
13 confirmed (although I understand separately that this
14 may be subject to further legal advice)."

15
16 You are the source of that information, is that right?

17 A. As I say, my understanding after the telephone call
18 with -- the second telephone call with the Commissioner
19 is that there was further engagement going on between
20 the Commissioner and her legal team. I am not saying 11:08
21 necessarily personally, but that there was -- that
22 matters had arisen that continued to be the subject of
23 engagement.

24 134 Q. Mr. Flahive has made a statement to us in which he says
25 that this information came from you, and it's 11:09
26 included -- even though he doesn't indicate in the
27 email it came from you, but this information came from
28 you that the Commissioner was --
29 "Although I understand separately that this may be the

1 subject of any further legal advice..." that that was
2 as a result of the conversation he had with you.

3 A. And my understanding would have been that, as I say,
4 there was further legal engagement going on.

5 135 Q. "Richard and I agreed that this is a matter for the 11:09
6 Garda Commissioner, who is being legally advised, and
7 that neither the Attorney nor the Minister has a
8 function relating to the evidence a party to the
9 Commission of Investigation may adduce."

10 11:09
11 That email makes no reference to the conversation that
12 you had with Mr. Flahive, does it?

13 A. With the Commissioner?

14 136 Q. No, that you had -- sorry, the conversation that you 11:10
15 had with Mr. Flahive about your telephone call with the
16 Commissioner?

17 A. No.

18 137 Q. No.

19 A. But as I say, the substantive point that the Minister 11:10
20 needed to be alerted about was particularly in the
21 light of the fact that the Attorney's office had been
22 in touch with us, is set out in Mr. Flahive's email.

23 138 Q. Yeah, but it's a little bit more than that, because on 11:10
24 the one hand you are advised through the channels that
25 I've indicated to you from Anmarie Ryan to Mr. Dreehan
26 to Mr. Barrett and then to Mr. Flahive, through the
27 official channels, and that's referenced in the email
28 and the conversation that Mr. Flahive had with
29 Mr. Barrett, but then there is this informal discussion

1 that you had with the Garda Commissioner, and that is
2 not referenced --

3 A. No --

4 139 Q. -- by Mr. Flahive, when he is effectively drawing the
5 Minister's attention to this, all right? 11:11

6 A. Yeah, but as I say, I had been thinking of what to say
7 to the Minister in relation to it, and I had some
8 concerns that the Commissioner and the Minister should
9 not have engagement in relation to what was happening
10 at a commission of investigation, that the Minister had 11:11
11 established. And as the substance had been advised to
12 us by the Attorney General's office, which didn't give
13 rise in my mind to any potential difficulties, that
14 that was the best way of the Minister being advised
15 about the matter. 11:11

16 140 Q. In any event, there is no written record in the
17 Department of your telephone call, or the fact that
18 there was a telephone call from the Garda Commissioner
19 to yourself, isn't that right?

20 A. That's right. 11:12

21 141 Q. Yes. And when Mr. Flahive perhaps had an opportunity,
22 and it's perhaps a matter for him but when he had the
23 opportunity to alert the Minister to the fact that the
24 Garda Commissioner had in fact phoned you to discuss
25 the matter, he chose not to do so, that's right? 11:12

26 A. Well, obviously he didn't.

27 142 Q. Yes. So I mean, did you separately advise the Minister
28 or -- I know you had been considering actually writing
29 to the Minister, but did you --

1 A. I had, and in what terms. But as I say, I had an
2 uneasiness about the whole thing. But I felt, when
3 Michael Flahive said to me that the Attorney had
4 brought -- or the Attorney General's office had brought
5 this to attention, I thought that was the legitimate, 11:12
6 correct way for the Minister to be advised.

7 143 Q. Well, is it your evidence that it was common case
8 between the Attorney General's office and the
9 Department that the Minister couldn't intervene in
10 relation to this matter, is that right? 11:13

11 A. Very much so.

12 144 Q. Yes. But nevertheless, a view was taken that the
13 Minister should be advised of the development, is that
14 right?

15 A. Simply because, if the Attorneys felt it right to 11:13
16 advise us of the development, we would have felt it
17 right to advise the Minister.

18 145 Q. But in any event, you were happy that Mr. Flahive was
19 taking the steps to advise the Minister, so you didn't
20 do so. At the time did it occur to you that perhaps 11:13
21 that the issue that you were really considering here
22 was that, privately, or publicly, the Garda
23 Commissioner was supporting Sergeant Maurice McCabe and
24 making public statements to that effect and, in fact,
25 had placed him on a Professional Standards Unit, and 11:14
26 then privately, in private at the O'Higgins Commission,
27 there was to be, as Mr. Flahive has identified in his
28 email, an attack on his motivation that was somehow
29 linked to a sexual assault case for many years prior;

1 did it concern you that that is what was going on here?
2 A. But I have explained my discussion with the Garda
3 Commissioner. There was certainly an issue in relation
4 to sensitivity in relation to Sergeant McCabe. In
5 relation to the Commission, it was the Commissioner's 11:15
6 statutory decision in relation to, in consultation with
7 her legal advisers, what approach to take. All I know
8 about that approach was that a particular question had
9 been raised and Mr. Flahive mentioned motivation, but
10 there were no -- and I would have known that, do you 11:15
11 know, Sergeant McCabe was legally represented at the
12 Commission, that Judge O'Higgins was going to look
13 after the rights of everyone at it, but what would have
14 informed me -- as I say, I wasn't in a position that
15 afternoon to make a hugely detailed analysis of what 11:15
16 was going on in the sense that I had virtually no
17 information whatsoever, but the reality was, and I was
18 clear in my mind about this, that the Minister could
19 not establish a commission of investigation and then
20 become involved in the case anyone was making at that 11:16
21 Commission of Investigation.
22 146 Q. Well, of course not, in a formal way.
23 A. Even an informal way.
24 147 Q. Well, we have discussed the informal communications
25 that might have existed between the Department and 11:16
26 between the Minister and the Garda Commissioner, okay.
27 So, there may have been an issue that arose that wasn't
28 strictly -- couldn't be resolved or wasn't causing any
29 sort of embarrassment from a legal perspective, but

1 from a political perspective it might be causing a
2 little bit of embarrassment or had the potential to
3 cause some embarrassment. Would there have been
4 anything wrong for the Minister to speak with the Garda
5 Commissioner and ask her for her reasoning for adopting 11:17
6 what on the face of it may appear, and I underline may
7 appear, to be a double standard?

8 A. I mean, there's two points I would make about that. I
9 mean, of course there were political sensitivities
10 about this, but expediency doesn't make what is wrong 11:17
11 right because it's politically expedient. And if you
12 look at the practical terms, if you accept that it just
13 wasn't proper for the Minister to try and interfere
14 with the Commission she had established herself, like
15 how would that conversation go in practical terms? 11:17
16 She'd say to the Commissioner, look, I am worried about
17 this, the Commissioner would say I have legal advice.

18 148 Q. Well --

19 A. Is that the Minister then meant to say, well, get other
20 legal advice? You couldn't overlook the fact, too, 11:18
21 that everyone at the Commission of Investigation had
22 the same rights. The Minister couldn't be in the
23 business of deciding the balance of that. And it all
24 boiled down -- like, we wouldn't have had any
25 knowledge, nor would the Minister, of whether there was 11:18
26 evidence, of what the evidence was, whether there was
27 evidence that would act, for example, to exonerate
28 people. I mean, just if you look at it as a matter of
29 political expediency, we can't, as a department, as I

1 say, advise that suddenly becomes something -- that's
2 wrong, suddenly becomes right. But any of this would
3 involve, if it was to be meaningful, the Minister
4 making judgements in relation to, say, for example, the
5 quality of evidence that was to be presented at the 11:19
6 O'Higgins Commission, involve herself in -- this was
7 the Commissioner's statutory responsibility, not the
8 Minister's, not the Department's.

9 149 Q. But it didn't stop the Commissioner from seeking
10 informally advice from you? 11:19

11 A. What she asked me about, and what I said was not
12 directional in any way, was that if there are issues --
13 and one of the issues that was mentioned was the
14 sensitivities of the position of Sergeant McCabe in
15 relation to Sergeant McCabe. 11:19

16 150 Q. No, no, but I am just pointing out to you that the
17 distinction that you are drawing doesn't in fact exist,
18 because the Commissioner was consulting with you about
19 matters that had occurred in private at the O'Higgins
20 Commission, isn't that right? 11:20

21 A. She mentioned, as I say, that there had been -- that
22 Mr. McDowell had reacted very strongly to a particular
23 question that had been put. I'm not sure if she
24 mentioned the precise terms of the question, but as I
25 say, I understood it to relate in some way to matters 11:20
26 that followed from the Ms. D case.

27 151 Q. She discussed matters with you that had arisen at the
28 O'Higgins Commission in private, isn't that right?

29 A. She mentioned one particular issue.

1 152 Q. That had occurred in private, and she was happy to
2 discuss it with you --

3 A. Yeah, but I mean delighted to discuss it with her.

4 153 Q. I know that. But on an informal basis, she was happy
5 to discuss it with you, isn't that right? 11:20

6 A. As I say, the purpose of her call, as I saw it, was to
7 alert to us a particular thing. What she then went on
8 to discuss with me wasn't the ins and outs of any
9 decision she was going to make; it was asking me if any
10 matters occurred to me that she should take into 11:21
11 account. And the issues that came into my head,
12 including the position of Sergeant McCabe and the
13 efforts that were being made to resolve his workplace
14 difficulties, were one of the things I said what I
15 couldn't do and I don't believe the Minister could do, 11:21
16 particularly with our state of knowledge or state of
17 absence of knowledge, and given that there was a
18 statutory process in place, to interfere with whatever
19 the Commissioner was going to do.

20 154 Q. You see, there could be -- one interpretation in terms 11:21
21 of your discussion with Mr. Flahive and how this matter
22 was to be dealt with, and that Mr. Flahive plumbed for
23 what could be regarded as the legitimate route, namely
24 by reference to his conversation with Mr. Barrett,
25 because it was well-documented, and that you would keep 11:22
26 stymie in relation to your call with the Commissioner,
27 do you understand?

28 A. Yeah.

29 155 Q. Yes. Was that the decision that had been made?

1 A. No, as I say, it was a fast moving situation. I took
2 the view when Mr. Flahive spoke to me that the proper
3 route for the Minister to be informed of this was for
4 him to outline the phone call he had with Richard
5 Barrett. As I say, I don't know if there hadn't been 11:23
6 that intervention, for want of a better word, what
7 precisely I would have said to the Minister. What I
8 knew was, informing her this way didn't cause any
9 difficulties.

10 156 Q. Yeah. But in either instance you'll appreciate, 11:23
11 whether you adopt the Michael Flahive approach of
12 advising of his phone call with the Attorney General's
13 office, the Minister hasn't been advised of the fact
14 that the Commissioner has phoned you in relation to the
15 selfsame matter? 11:23

16 A. And as I say, my reservation was that the Minister,
17 having established the Commission, that contacts
18 between the Commissioner and the Minister about what
19 was happening at the Commission, even through me, I
20 just had reservations. Now, I hadn't resolved that 11:24
21 when the phone call from Mr. Flahive came and we agreed
22 that he would write an email to the Minister.

23 157 Q. After this, if we just move on now from the 15th May,
24 but in the following week, that was a Friday, the
25 following week did you have an opportunity at any time 11:24
26 to mention to the Minister that you had got this phone
27 call from --

28 A. No, as I say, I -- I had -- that Friday afternoon, I
29 was reflecting on what properly could be said to the

1 Minister, with the reservations I had. That was
2 addressed, the issue of substance to be put to the
3 Minister was as set out in Michael Flahive's email. It
4 didn't arise subsequently that I felt there was a need
5 or would be appropriate to say, by the way, I got a 11:25
6 phone call about that.

7 158 Q. Okay. If we could just then -- is there anything else
8 you want to say about the 15th May and what transpired
9 at that time?

10 A. No. 11:25

11 159 Q. If we could move on then to the following year, to
12 Saturday 4th July -- no, sorry, for the following two
13 months later, the 4th July of 2015. I think that you
14 received a query or you were advised of a query by the
15 Garda Commissioner, is that right? 11:25

16 A. Yeah.

17 160 Q. Will you just tell us about that.

18 A. It was a Saturday evening and the Commissioner told me,
19 I don't have a very specific recollection at all, I am
20 relying on the email I did, that there was a query 11:26
21 from, I understood it initially to be from Colm Ó
22 Mongáin from the This Week programme, and it related
23 to -- as I understood it when I wrote the email at any
24 rate, it related to the strategy being followed by the
25 Garda Commissioner at the O'Higgins Commission. 11:26

26 161 Q. All right. If we could --

27 A. And to the position of Sergeant McCabe in relation to
28 his unhappiness, I think, in Mullingar.

29 162 Q. Okay.

1 A. Now, it may be helpful to explain, the Minister was due
2 on the This Week programme on the Sunday on a range of
3 other issues, but the query from John Burke, as it
4 transpired, I think he mentioned in his email that the
5 programme was going to run with that story the 11:27
6 following day, which is when the Minister would be on
7 the programme. So I just set out to alert the Minister
8 of that and some lines that might be taken in relation
9 to it.

10 163 Q. If we could have page 3484 up on the screen, please. 11:27
11 This is your email, it's sent to the Minister, it's
12 copied to -- it's also sent to Marion Mannion. What
13 was her --

14 A. She was one of the Minister's special advisers.

15 164 Q. And William Lavelle? 11:27

16 A. Again, one of the advisers.

17 165 Q. And then we have Noel Waters and then Dale Sunderland?
18 A. He was the Department's Head of Communications, I
19 think.

20 166 Q. Yes. And we have already heard from Fiona O'Sullivan, 11:28
21 and then to Michael Flahive and Christopher
22 Quattrociocchi. I can't say that name.
23

24 "Good evening, Minister
25 The Garda Commissioner phoned me to let me know that 11:28
26 they had received queries from Colm Ó Mongáin about
27 Sergeant McCabe. They were asked was it the case that
28 Sergeant McCabe was looking to be taken out of the
29 traffic unit in Mullingar and was it the Garda

1 Commissioner who had instructed counsel to adopt an
2 aggressive stance towards Sergeant McCabe at the
3 O'Higgins Commission. The Gardaí are not commenting.
4

5 I understand that some weeks ago Sergeant McCabe 11:28
6 indicated to his authorities in Mullingar that he no
7 longer wanted to stay in his post in the traffic unit.
8 Apparently he blamed the Commissioner for this, though
9 he said he could not be more specific as he was bound
10 by confidentiality. This coincided with the hearings 11:29
11 of the O'Higgins Commission (where these hearings are
12 being held in private and there is a prohibition on
13 disclosing evidence by them).
14

15 Sergeant McCabe remains in the post at the traffic 11:29
16 unit, though in practice his time recently has been
17 taken up giving evidence to the Commission."
18

19 If I could just stop there for a moment. Were you
20 linking, as you appear to be doing in that paragraph, 11:29
21 the fact that Sergeant McCabe no longer wanted to stay
22 in the post in the traffic unit with what had occurred
23 to him at the O'Higgins Commission?

24 A. I was trying provide material to the Minister in
25 relation to the two aspects that had been raised and 11:30
26 that was to deal with the question about Sergeant
27 McCabe on the basis of what the Commissioner told me.
28 Certainly, I had understood or was under the impression
29 that there had been a link between what had happened at

1 the Commission and what was happening in Mullingar, but
2 I knew no more details than I would have set out in my
3 email.

4 167 Q. All right.

5 A. Sorry, just to explain, I think that would have been 11:30
6 based on the conversation I had that Saturday with the
7 Commissioner rather than background information that I
8 was already aware of.

9 168 Q. Well, then it would appear that the Commissioner was
10 linking the two of them on the basis of what she 11:30
11 informed you at the time.

12 A. Well, I mean, I can only at this remove make from the
13 email, what the email says

14 169 Q. "If these matters are raised with you, you could say
15 both the Garda Commissioner and myself had made it 11:31
16 clear that Sergeant McCabe is a valued member of the
17 force. I think it is a matter of public record that at
18 various times he has raised various concerns regarding
19 his position in the force. I know that there has been
20 an ongoing process in attempting to address those 11:31
21 concerns. I, of course, have made it clear, including
22 to Sergeant McCabe himself when I met him, that it
23 would not be acceptable if anyone in the force were to
24 be disadvantaged in any way by bringing wrongdoing to
25 light. 11:31
26

27 I am glad too that the legal regime in relation to
28 whistleblowers has been changed fundamentally by the
29 Protected Disclosures Act, so there are now proper

1 procedures in place to deal with matters brought to
2 light by whistleblowers.

3
4 As to Sergeant McCabe's present situation, I have to be
5 conscious that he, no more and no less than any serving 11:32
6 member of the force, is entitled to confidentiality in
7 his dealings with the Garda authorities, so it would
8 not be appropriate for me to comment publicly in any
9 way on those dealings. In particular, I think it would
10 be very unfair to Sergeant McCabe for me to do so. 11:32

11
12 I have to be conscious too that at present various
13 matters raised by Sergeant McCabe about policing in
14 Cavan-Monaghan are being dealt with by a commission of
15 investigation under Justice Kevin O'Higgins and it 11:32
16 would be wrong of anyone to make public comment which
17 might interfere with or attempt to influence those
18 proceedings in any way. That Commission clearly has to
19 be let take its course."

20
21 And then you sign off on that. And then if we could
22 just have page 3486, just for completeness. This is a
23 letter again sent by you to the same persons as the
24 last one, and it's:

25
26 "Minister

27 I was wrong to say that Sergeant McCabe's queries...
28 from Colm Ó Mongáin. You will see from the queries and
29 response below that they came from John Burke, an

1 investigative reporter with This week."

2

3 And then you go on to say what the Garda response is in
4 relation to that, isn't that right?

5

11:33

6 Now I think I have already dealt in a general way with
7 your dealings with the Garda Commissioner, and we spoke
8 about the draft letter and also the emails that
9 transpired, I am not going to bring you through those
10 in, 2016, and the response to the publication of the
11 O'Higgins Commission report. But is there anything you
12 would like to say in relation to that aspect, because I
13 don't want to cut an avenue off that you might have
14 something to say in relation to the material that has
15 been already produced to the Tribunal?

11:33

11:34

16 A. No, as I say, I mean, I have tried to explain as best I
17 can the context in which we were operating. The one
18 thing I would like to say is, in relation to those
19 emails where there is a reference to the aggressive
20 strategy or an aggressive strategy; what I was doing
21 there was describing my understanding of the press
22 query, not any understanding of what strategy was being
23 followed at the Commission.

11:34

24 170 Q. Just finally, Mr. O'Leary, the Tribunal that is now
25 looking into these matters was established on the 17th
26 February of last year and the Chairman made a public
27 statement at the commencement of it, calling for
28 assistance and information in relation to the various
29 modules and the module that we are currently looking

11:35

1 into was one of those, obviously, and again, counsel
2 for the Tribunal made an opening statement in June of
3 this year, and I think you read that, isn't that right?
4 A. I would have, at some stage.
5 171 Q. Yes. And I just want to ask you, because I have to ask 11:35
6 you the question, why you didn't provide a statement or
7 information to the Tribunal until December of last
8 year?
9 A. I mean, when the Tribunal was established and there was
10 an initial opening statement, I certainly wasn't 11:36
11 conscious of the significance that those matters were
12 going to give rise to.
13 172 Q. Well, you were aware of the fact that in the middle of
14 the O'Higgins Commission and when this row developed
15 between counsel on behalf of Sergeant Maurice McCabe 11:36
16 and the Garda Commissioner legal team, that you had
17 been consulted by the Commissioner?
18 A. Well, I mean, I had two brief telephone calls on a
19 Friday afternoon. I mean, all I can say is, if you
20 looked at the terms of reference of the Tribunal at the 11:36
21 time, the Department wasn't even mentioned. Now, I
22 know of course -- were mentioned, but just the
23 significance, that do you know, the issue subsequently
24 got would not have been apparent to me at the time. I
25 mean, the long and the short of it is, it just did not 11:37
26 strike me at the time that it was necessary for me to
27 make a statement to the Tribunal. If that has
28 inconvenienced the Tribunal in any way, I regret that.
29 MR. MARRINAN: Thank you. Would you answer any

1 questions?

2

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

4 173 Q. MR. MCDOWELL: Good morning, Mr. O'Leary.

5 A. Good morning.

11:37

6 174 Q. Just a few questions really only for you. Do I
7 understand that the telephone conversations, plural,
8 that you described having with the Commissioner on
9 Friday, 15th May were conversations which you thought
10 was a colleague-to-colleague discussion in which she
11 was bouncing off you the issues that she was dealing
12 with at the time?

11:38

13 A. Yes.

14 175 Q. And do I also understand that she -- you did not
15 believe that she was seeking formal advice on this
16 matter from the Department of Justice?

11:38

17 A. Oh, I certainly didn't, or, do you know, even informal
18 advice in the sense of specifically what should I do.

19 176 Q. Yes.

20 A. It was a sounding board for issues that she might have
21 regard to.

11:38

22 177 Q. So instead of saying what should I do, she was putting
23 a slightly different -- she was making a slightly
24 different phone call; I am in this position, have you
25 any comments on my position? That kind of a
26 colleague-to-colleague discussion, is it?

11:38

27 A. Well, it's something like that. As I say, you know,
28 quite what mind the Commissioner was in at the time,
29 she was dealing with this issue --

1 178 Q. Yes.

2 A. -- and she saw fit, while she was talking to me, to ask
3 me if there were any issues, do you know, that I felt
4 she should be mindful of. And I mentioned what I
5 thought she -- which, do you know, I am not suggesting 11:39
6 for a moment was some comprehensive analysis of the
7 whole thing.

8 179 Q. Yes. Well, if, and this is a hypothetical, I know, but
9 if Mr. Barrett in the Attorney General's office hadn't
10 lifted the phone to Mr. Flahive, would you have 11:39
11 regarded that phone -- that pair of phone conversations
12 you had with the Commissioner as being something which
13 you could just park, so to speak?

14 A. I mean, I don't know. As I was saying earlier,
15 Mr. McDowell, I was thinking about what I could 11:40
16 properly say to the Minister in relation to the whole
17 thing.

18 180 Q. Yes.

19 A. I felt that was resolved by the Attorney General's
20 office. 11:40

21 181 Q. Yes.

22 A. To try and continue that thought process, which
23 essentially I suspended because I didn't think it was
24 necessary any more at this stage -- I mean, I think I
25 would have been concerned that, do you know, if, for 11:40
26 example, there was public attention paid to what
27 happened --

28 182 Q. Yes.

29 A. -- on the 15th, that it would be nice if there was some

1 advance warning to the --

2 183 Q. Yes.

3 A. -- Minister, as it would have been at the time. On the
4 other hand, as I say, I thought the Minister should not
5 really have any involvement whatsoever with what was 11:41
6 happening at the Commission. How I would have
7 reconciled those in the end, I just don't know.

8 184 Q. I mean, on the one hand it would be nice to know if a
9 hullabaloo had developed at the time about it. On the
10 other hand, it would be even nicer to be able to say I 11:41
11 have no idea what you are talking about, this is a
12 private matter for the Commission, and I'm utterly
13 unaware of it. From the Minister's point of view
14 either was an attractive --

15 A. Well, I mean, I just make the general point that if you 11:41
16 look at the trouble the two emails we did do caused, a
17 third one mightn't have been very helpful.

18 185 Q. And that is the point I am making. There was a sense
19 in which to inform the Minister of these matters was to
20 give her information which was not useful to her or 11:41
21 might not be useful to her at a later stage, is that
22 the point you are making?

23 A. I think it's not so much that it mightn't be useful to
24 her, but to give information that there is nothing you
25 could about doesn't necessarily put a Minister in a 11:42
26 very good position. But as I say, how that would have
27 worked out in the end without the Attorney's letter,
28 I'm not sure.

29 186 Q. I see. And you also mentioned that you were fairly

1 clear there were two phone calls on that day, and that
2 if only one was showing up on the records, it might
3 have been either that you phoned her or, alternatively,
4 that she had another mobile phone, is that right?

5 A. I am not suggesting that. It's just, like, there would 11:42
6 have been people in Garda Headquarters that would have
7 my phone on their phone and if she was one phone and
8 she asked someone get Ken, or whatever, like that could
9 happen.

10 187 Q. Yes. I see. So what you are saying is, 11:43
11 notwithstanding the situation in relation to phone
12 records you are fairly clear in your own mind there
13 were two conversations at that time?

14 A. I am. Now, I mean, it's now two-and-a-half years later 11:43
15 that I was trying to recall it, but I did, when I was
16 asked by the Tribunal to make a statement, I made as
17 intense an effort as I could to set out my
18 understanding of what happened that day.

19 188 Q. And then you had a conversation with Mr. Flahive in 11:43
20 which he tells you about Mr. Barrett's call and you
21 tell him about the Commissioner's call to you, is that
22 right?

23 A. I mentioned that the Commissioner had been on to me.

24 189 Q. Yes. And Mr. Flahive says that when he put in his 11:43
25 email to the Minister all that he understood
26 separately, that there might be further legal
27 consideration given to what was happening, that came
28 from you?

29 A. That would have been based from me, on my understanding

1 at the time, which was that there was going to be
2 continued legal engagements about whatever had arisen
3 at the Commission that afternoon.

4 190 Q. I take it you'd agree with the following proposition:
5 That the Commissioner, in her colleague-to-colleague 11:44
6 discussion with you, was raising issues which she'd
7 better have been discussing with her legal advisers?

8 A. I really don't --

9 191 Q. You don't want to say that --

10 A. -- know that that would be a matter for me to make 11:44
11 assumptions about.

12 192 Q. Well, there were issues which you thought should weigh
13 in her mind, the ones you have mentioned, isn't that
14 right?

15 A. As I say, they were issues that I felt, just having 11:44
16 been asked the question that afternoon, were issues
17 that were relevant to any consideration in these
18 matters.

19 193 Q. And I'm suggesting to you, just simply, that these were
20 issues which were more proper for her to raise with her 11:45
21 legal advisers in considering what she wanted to do,
22 than with you?

23 A. I mean, I am not talking about the -- as I say, I think
24 she took the opportunity thinking I may have something
25 that might be helpful in her dealing with these 11:45
26 matters. If the question is, were these matters she'd
27 be expected to heavily rely on legal advice in relation
28 to --

29 194 Q. Yes.

1 A. -- I would have thought in relation to any commission
2 that legal advice is very important.

3 195 Q. Yes. And just then can we move on to the July, John
4 Byrne's inquiry --

5 A. John Burke. 11:46

6 196 Q. John Burke inquiry from RTÉ. Just, can you enlighten
7 us as to whether the Department knew that Sergeant
8 McCabe had, on Monday 18th May, resigned his position
9 as head of the traffic unit in Mullingar before that
10 inquiry was made from RTÉ, or was it news to the 11:46
11 Department that day?

12 A. I can't speak the Department in the sense that there
13 were other people this may have been raised with,
14 but --

15 197 Q. But for yourself then? 11:46

16 A. Certainly I think at this remove the specifics of that
17 were news to me --

18 198 Q. Yes.

19 A. -- that two months later. Now, as I say, there could
20 have been other contacts with the Department and other 11:46
21 people following the 15th May, but I have no
22 recollection of it.

23 199 Q. I see. And can you just assist the Tribunal as to
24 whether, when that query came from the Garda press
25 spokesperson to the Commissioner's office and then to 11:47
26 you, did you discuss it with the Minister at the time?

27 A. I can't -- what I said in my statement was -- like, the
28 context of the emails was that the Minister was on the
29 This Week programme the next day.

1 200 Q. Yes.

2 A. The This Week programme said they were running with the
3 story. It would have been awkward, to put it mildly,
4 if there had been leaks from the Commission proceedings
5 that were going to be broadcast, and it was a question 11:47
6 of giving the Minister suggested lines to use if that
7 happened. Because of the range of my responsibilities,
8 it wouldn't be unusual for the Minister to talk to me
9 before doing an interview but I just can't recall
10 whether that happened at the time. 11:48

11 201 Q. And I think it's the case that nothing came of it in
12 relation to the radio interview she did that day, isn't
13 that right?

14 A. No, it wasn't -- as it happened the This Week programme
15 didn't run with the story. 11:48

16 202 Q. I see. And she was never asked about it, as far as you
17 know?

18 A. No.

19 203 Q. I see. But when you were apprised of it, you said, I
20 think in your evidence, that you understood there was a 11:48
21 link between this resignation by Sergeant McCabe and
22 what had transpired at the Tribunal?

23 A. I mean, I am relying on the email.

24 204 Q. Yes.

25 A. But I think the email is written in the sense that you 11:49
26 know, if A and B happened at the same time that there
27 is a link.

28 205 Q. You don't have to be Einstein to see a connection
29 between the two, is that what you are saying?

1 A. Yes.

2 206 Q. Yes. And of course maybe you are not the person to put
3 this question, but if the Department was aware that
4 Sergeant McCabe had resigned this position further back
5 towards May, you are saying that you were -- you have 11:49
6 no knowledge of any departmental awareness of it?

7 A. I just don't have any recollection of it, but at the
8 time I wasn't particularly closely involved with the --
9 if I can put it like this, the workplace issues in
10 relation to Sergeant McCabe. 11:49

11 MR. McDOWELL: Thanks very much, Mr. O'Leary.

12

13 THE WITNESS WAS CROSS-EXAMINED BY MR. DIGNAM:

14 207 Q. MR. DIGNAM: Mr. O'Leary, my name is Conor Dignam. I
15 appear on behalf of An Garda Síochána, including former 11:50
16 Commissioner O'Sullivan and I just wanted to ask you a
17 few questions. I don't think there is any real dispute
18 between us and I just want to ask you questions more
19 from the point of view of clarification than anything
20 else. I think you were probably here during Ms. 11:50
21 O'Sullivan evidence last week?

22 A. I read the transcripts.

23 208 Q. And you will have seen then from the transcripts that
24 she doesn't have a specific memory of the call or calls
25 on that Friday afternoon, and she is relying on the 11:50
26 phone records to give her evidence to the Tribunal. I
27 think I am right in saying, Mr. O'Leary, that you have
28 no notes of those phone contacts on the 15th of May?

29 A. That's right.

1 209 Q. Yes. And I think you very fairly say in your statement
2 to the Tribunal on page 3347 that you do not have
3 perfect recall of every detail of the contact with
4 Ms. O'Sullivan, and on page 3348 you enter a caveat
5 that it's to the best of your recollection, which is 11:51
6 perfectly understandable. You say then that, in your
7 evidence today, that you could have been talking to the
8 Commissioner about other matters, including I think you
9 say crime and security matters, in those phone
10 conversations, is that your -- 11:51

11 A. I mean, it's possible.

12 210 Q. Yes.

13 A. Because as I say, I don't have a precise recollection
14 of the calls.

15 211 Q. Yes. And I will come back just in a moment to the 11:51
16 number of calls and when they occurred. But you
17 suggested I think in your statement on page 3348 in
18 relation to what you identify as being the first call,
19 that it may be helpful for the former Commissioner to
20 gain more time to consider the matters more fully with 11:52
21 her legal advisors. Did you know at the time that, in
22 fact, the issue of getting more time had been explored
23 by the solicitor from the Chief State Solicitor's
24 Office, who was down in the Commission?

25 A. No. As I say, in relation to it, I made a series of 11:52
26 points to the Commissioner just in response to saying,
27 look, is there anything you think I should keep in
28 mind? I don't think there was any response. We
29 weren't engaging in detail on what exactly the

1 Commissioner was going to do. So, I am not the expert
2 on what was happening elsewhere at that time.

3 212 Q. Yes. No, I understand that. And I think you explained
4 to the Tribunal that when there is a difficult decision
5 to be made, sometimes more time can be useful or can be 11:52
6 beneficial and that is why you suggested that?

7 A. As I say, it was a general point.

8 213 Q. You say then, in your evidence you said that your
9 understanding after your conversation or conversations
10 was that there would be further engagement with the 11:53
11 Commissioner's legal team. And I think in your
12 statement what you say is that, at the bottom of the
13 first main paragraph on page 3348, you say that the
14 Commissioner was then going to be --

15 11:53

16 "...was then going to discuss these matters with her
17 legal advisers and I think I reiterated the view that
18 she would have to be guided by the legal advice
19 available to her. I also believe I suggested that from
20 her point of view it might be helpful if it was 11:53
21 possible to gain more time so she could consider the
22 matters more fully with her legal advisers."

23

24 And then, at the bottom of the following paragraph you
25 say that: 11:53

26

27 "I believe that in the circumstances the Commissioner
28 indicated to the effect that her legal team should
29 maintain their position that afternoon but that there

1 would be further detailed consultation with her legal
2 team subsequently about the matter."

3
4 That is what you said in your statement. I think in
5 your evidence today you say that, you put it in terms 11:54
6 that there would be further engagement with the legal
7 team after the afternoon of the 15th May.

8 A. As I say, my understanding -- and I am not sure they
9 are inconsistent but I appreciate the point, my
10 understanding was that matters were going to proceed at 11:54
11 the -- the Commissioner had to proceed that afternoon
12 in the light of whatever the status quo was and that
13 matters would continue to be the subject of engagement
14 with the Garda legal team.

15 214 Q. Yes. No, no, and I wasn't suggesting they were 11:54
16 inconsistent, Mr. O'Leary, but I am not sure whether
17 you were aware at the time, and that you may have
18 become aware since, that in fact the legal team had
19 been directed by Mr. Justice O'Higgins to put a written
20 notification into the -- 11:55

21 A. No, I hadn't, and I mean, I appreciate that -- like, my
22 understanding was further legal engagement was taking
23 place. What had actually happened at the Commission
24 other than, for want of a better phrase, other than the
25 time the row started, I had no knowledge at all of 11:55
26 that.

27 215 Q. Yes. So to the extent that there was reference to
28 further consultation or engagement with the legal team,
29 do you accept that that could have been a reference to

1 that job of work that had to be done over the weekend?

2 A. It could. As I say, I mean, these conversations were
3 very hurried, the Commissioner knew what was going on,
4 I hadn't much of an idea of what was going on. So, as
5 I say, my understanding was that issues would continue 11:55
6 to be engagement, advice, whatever.

7 216 Q. Yes. The former Commissioner, Ms. O'Sullivan, has
8 given evidence that in asking as to whether there
9 should be anything that she should be aware of when she
10 was in touch with the Department on the 15th, that she 11:56
11 would have been asking about any of the contacts
12 between the Department and Sergeant McCabe that may be
13 relevant to her consideration on the afternoon of the
14 15th. would that be consistent with your memory?

15 A. Again, I don't have a perfect recollection of the call 11:56
16 and I mean, I had no -- I read the Commissioner's
17 evidence, I have no particular issues with it. You
18 know, she is in a far better position than me to -- in
19 relation to where she was coming from. They were
20 hurried phone calls. She was in the centre of dealing 11:57
21 with the situation. I was sort of a peripheral
22 creature in relation to the whole thing.

23 217 Q. And then just finally, in relation to the number of
24 calls or when the calls took place, Mr. O'Leary, in
25 your statement you don't put a time on any of the calls 11:57
26 and I think you say that you hadn't got access to the
27 records at that stage. It's understandable that you
28 wouldn't put a specific time on the calls. The
29 Commissioner, as I say, has no specific memory of the

1 calls but relying on her phone records, they disclose
2 that there was a telephone contact between you and the
3 Commissioner at 16:16 on the afternoon of the 15th and
4 another one at 21:05 on the evening or night-time of
5 the 15th but no other contacts. And, em, I have to put 11:57
6 it to that you that that is consistent with there being
7 that contact at 16:16 and no contact until, either
8 before that or until 21:05, on the evening of the 15th.
9 Could it simply be that you are mistaken in your memory
10 that there were two in the afternoon of the 15th? 11:58

11 A. Look, all I can say is, my best recollection is there
12 were two calls in the period. I mentioned that. I
13 mean, I acknowledge two-and-a-half years later, that --
14 and without any records, there are difficulties. All I
15 can say is my best recollection is that two phone 11:58
16 calls, hurried phone calls, took place within the
17 timeframe I mentioned.

18 218 Q. Yes. That is very fair, Mr. O'Leary. And you may not
19 be aware of this but the former Commissioner has given
20 details of her telephone devices that she was using in 11:58
21 the relevant period, including her landline, the
22 landline records in the Commissioner's office, which
23 show incoming and outgoing calls to extensions other
24 than hers also, extensions within the Commissioner's
25 office. I think you probably know that she has taken 11:59
26 the exceptional step of waiving privilege to place all
27 relevant matters before the Tribunal, but none of those
28 disclose a second call, either before or after the call
29 at 16:16?

1 A. Well, as I say, I offered possible explanations earlier
2 as to being mistaken as to whether it was an outgoing
3 or incoming call, but I really can't put the matter
4 further.

5 MR. DIGNAM: Thank you, Mr. O'Leary.

11:59

6

7 THE WITNESS WAS EXAMINED BY MR. MCCANN:

8 219 Q. MR. MCCANN: Just one or two questions, Mr. O'Leary.
9 The hand in glove metaphor, I can't recall whether it
10 was Mr. Marrinan's words or your words --

11:59

11 A. They were Mr. Marrinan's words, I can assure you.

12 220 Q. I think he certainly took it up, I think they actually
13 may have been your words originally. But as regards
14 the metaphor, you are describing there the relationship
15 in respect of a particular engagement after the
16 publication of the O'Higgins Commission, isn't that
17 right, or that metaphor might arise?

12:00

18 A. I am in the circumstances where, as I say, there is --
19 I am sure the Tribunal doesn't want me to rehearse it
20 again.

12:00

21 221 Q. No.

22 A. There were very specific and very unusual and very
23 important issues at play.

24 222 Q. Yes. And then would that metaphor apply in any way in
25 respect of the overall engagement of the Department in
26 relation to the O'Higgins Commission?

12:00

27 A. No, we had no -- I mean, I think the only thing we had
28 heard about the O'Higgins Commission during the course
29 of its proceedings, is about an account of what

1 happened when a particular question was raised.

2 223 Q. Yes.

3 A. We had no further engagement, because it wouldn't have
4 been appropriate.

5 224 Q. Yes. And then just taking up from something which 12:01
6 Mr. McGuinness put on the record last week, and that is
7 the need to look at matters from the perspective of the
8 time when they occurred, and just taking that point on
9 board, and then taking Mr. Marrinan's question where he
10 described the phone call between the Commissioner and 12:01
11 Mr. Noel waters as taking place right in the middle of
12 what is going on, can you assist the Tribunal in
13 addressing what was going on at 15: -- I can't find it
14 now, yes, at 15:26 on the 15th May 2015? What was
15 going in Mr. waters' world? What was going on in your 12:01
16 world that afternoon?

17 A. I mean, again, like from this remove to reconstruct
18 what happened at half three -- what I will say is,
19 there is extensive engagement, because there has to be,
20 between the Guards and ourselves in relation to a whole 12:02
21 range of issues. Like, this wasn't a slow Friday
22 afternoon waiting for the Commissioner to phone about
23 something that happened in the O'Higgins Commission.
24 Like, there would have been a lot of balls in the air
25 because there always are. I know matters were 12:02
26 mentioned about security and Prince Charles, etcetera,
27 etcetera, but there's just constant engagement because
28 of the relationship between the Department and the
29 Guards that arises from the functions they fulfil.

1 225 Q. Yes. Thank you very much.

2

3

THE WITNESS WAS RE-EXAMINED BY MR. MARRINAN:

4

5 226 Q. MR. MARRINAN: Just one matter arising out of a 12:02

6 question that was asked by Mr. Dignam, and you said

7 that you had read the Garda Commissioner's evidence

8 that she had given to the Tribunal and you said you had

9 no issue in relation to it. The Garda Commissioner

10 doesn't have a recollection of this call -- or calls 12:03

11 that she made to you. You have a clear recollection in

12 relation to the conversations that you had with her,

13 isn't that right?

14 A. I -- my best recollection is as I set out. When I was

15 saying I have no issue with the Commissioner, it's -- I 12:03

16 was conscious that she has no specific recollection of

17 the calls. And two-and-a-half years later, when she

18 was in the middle of dealing with these things, I mean,

19 that is just the way it is.

20 227 Q. Well, what you are saying is that you have no problem 12:03

21 in excusing her lack of recollection in relation to the

22 matter because of the circumstances she found herself

23 in. But I am more concerned about the evidence that

24 you have given to the Chairman in relation to your

25 recall of these conversations and the statement that 12:03

26 you provided to the Tribunal. I am sure that when you

27 were making the statement to the Tribunal, you did your

28 best to recall your conversations with the

29 Commissioner, is that right?

1 A. Yes.

2 228 Q. And at that stage you had the benefit of the email, or
3 did you, that Mr. Flahive had sent on?

4 A. Yes.

5 229 Q. Yes. So you included all details in that statement. 12:04
6 Nowhere in the statement is there any reference to any
7 conversation involving a royal visit or otherwise, sure
8 there is not?

9 A. In relation to which?

10 230 Q. The statement that you made and your conversation? 12:04

11 A. Yes, I mean, I am not saying that I had any
12 conversations about the royal visit. It was in answer
13 to counsel, I was simply saying a lot of things go on.

14 231 Q. Yes. But you have no recollection of having a
15 conversation -- during the course of that conversation, 12:05
16 discussing the royal visit?

17 A. I am sorry, I am just not sure what I said that this is
18 leading from.

19 232 Q. No, I am just asking you the question: During the
20 course of those two conversations, do you have any 12:05
21 recollection of discussing the royal visit?

22 A. No.

23 233 Q. No. Thank you very much.
24 MR. MCDOWELL: Just one point for the witness.
25
26 MR. KEN O'LEARY WAS FURTHER CROSS-EXAMINED BY
27 MR. MCDOWELL:
28

29 234 Q. MR. MCDOWELL: You do accept that Mr. Flahive has

1 recorded that you and he spoke after your phone call
2 with the Commissioner?

3 A. Oh, very much so.

4 235 Q. You accept that?

5 A. Yeah. 12:05

6 236 Q. And that he says that the business about further
7 consultation with the legal team arises out of that
8 conversation?

9 A. Oh, yes.

10 237 Q. So it's hardly likely -- well, sorry, I am suggesting 12:05
11 to you that, apart from the points that are being made
12 by the Garda Commissioner's counsel to you, it's hardly
13 likely that both of you invented this or both of you
14 are mistaken in your recollection that there was a call
15 from the Commissioner to you? 12:06

16 A. Oh, sorry, I mean, I don't think anyone has any doubt
17 about one call, because it's in the records. It's the
18 second call that --

19 238 Q. Yes.

20 A. -- isn't on any records. 12:06

21 239 Q. The other point is, that there was a discussion about
22 her taking further legal advice. That could hardly be
23 something that both of you just conjured up out of thin
24 air? That is the point I am putting to you.

25 A. As I say, my understanding, which I would have passed 12:06
26 on to Mr. Flahive, is that there was going to be
27 further legal engagement, which I would always assume
28 includes --

29 240 Q. Yes.

1 A. -- do you know, legal advice as it arises.

2 241 Q. And it must follow from that that you did discuss what
3 was going on at the Commission, with the Commissioner?
4 A. In the sense that I have outlined.

5 242 Q. Yes. And therefore, the suggestion that is being put 12:07
6 to you that you could have been talking about anything,
7 royal visits or whatever, cannot be correct?
8 A. As I say, I may have missed out on something.

9 243 Q. I am not trying to pressurise you. I am just asking
10 you to agree with the propositions that unless the 12:07
11 Commissioner's counsel are suggesting to you that your
12 memory is just flawed and that she didn't discuss these
13 matters with you or may not have discussed these
14 matters with you, your clear recollection is that you
15 did discuss the matters with her? 12:07
16 A. Oh, as I say, my best recollection - I mean, I will put
17 it no more strongly than this - there is no reason for
18 me to imagine these conversations.

19 244 Q. Yes. And if there was, you would have to get
20 Mr. Flahive in on the imagination business as well? 12:07
21 CHAIRMAN: Mr. McDowell, I actually think I do take the
22 point. And as for references to what have been called,
23 colourfully, royal visits, fine. If that is something
24 people want to float, that is grand, but I am not
25 interested in them. 12:08
26 MR. McDOWELL: I know it's not now the time for
27 submissions, but I am making the point that it's a bit
28 ridiculous to ask this witness to say that he could be
29 confused about whether he had such a conversation, when

1 he is very clear about it and when Mr. Flahive is also
2 very clear about it.

3 CHAIRMAN: Well, it's a question going to credibility,
4 Mr. McDowell, and it's a perfectly legitimate question.
5 I have no problem with the question. 12:08

6 MR. DIGNAM: Thank you, Chairman, but --

7 CHAIRMAN: If I am telling you I have no problem with
8 the question --

9 MR. DIGNAM: No, I just want to make clear, Chairman,
10 just for the purpose of the Tribunal, it's not being 12:08
11 suggested that Ms. O'Sullivan did not have a
12 conversation with Mr. O'Leary about what happened in
13 the Commission in the afternoon of the 15th May, and I
14 take exception or object to Mr. McDowell's suggesting
15 that that is what I was putting to the witness. 12:08

16 CHAIRMAN: Well, I think we are having a weird moment,
17 because even on the transcript, after the name
18 "Mr. McDowell", "(ridiculous)" appears, and I don't
19 think anybody ever said that. I actually think it's
20 time to move on from this. 12:09

21

22 MR. KEN O'LEARY WAS THEN QUESTIONED BY THE CHAIRMAN:

23

24 245 Q. CHAIRMAN: I just wanted to ask you a couple of things,
25 if you don't mind, arising out of what has been asked 12:09
26 already. You said vis-á-vis the Garda commissioner,
27 was it this one in particular or every Garda
28 commissioner, you would have had literally hundreds of
29 phone calls a year?

1 A. I mean, I started dealing directly with the guards in
2 the year 2000, and the intensity of contacts, I mean,
3 it can fluctuate depending on what was happening, but
4 there wouldn't have been anything unusual about the
5 number of contacts. 12:09

6 246 Q. CHAIRMAN: And were you -- look, it happens that people
7 working together become close, in the sense become kind
8 of friendly or you like the person and you get on with
9 them. Was it the case that you and Nóirín O'Sullivan
10 were on a kind of friendly or chatty basis with each 12:09
11 other?

12 A. I mean, we wouldn't socialise together, or anything
13 like that.

14 247 Q. CHAIRMAN: No, no, no. I don't mean --

15 A. Like, I think most people try and maintain civil, 12:10
16 decent human relationships with who they work.

17 248 Q. CHAIRMAN: No, I think we all appreciate that,
18 Mr. O'Leary, but sometimes you get on with some people
19 a bit better than other people, that is the point, and
20 sometimes those people would tend to lean on you a bit 12:10
21 as opposed to the people you don't get along with?

22 A. I take -- all I can say is, I mean, I would have
23 regarded myself as having a good and close
24 relationship -- working relationship, sorry, with
25 Commissioner O'Sullivan. 12:10

26 249 Q. CHAIRMAN: And would it be the same with her
27 predecessor, Commissioner Callinan, or would it have
28 been slightly more distant?

29 A. I -- I mean, I find it very hard to make that

1 judgement. As I say, I mean, I try and maintain good
2 working relationships with people and --

3 250 Q. CHAIRMAN: Yes, all right. Well, that's grand.
4 Listen, the only other thing I wanted to ask you about
5 was this. I mean, you will appreciate that public 12:11
6 controversy that blew up before Christmas. Now, I
7 don't want to refer to that, because one of the things
8 I am trying to do is not to follow the media in
9 relation to anything, though obviously I have great
10 respect for their work. But let's say the following is 12:11
11 the case: What if the Garda Commissioner had rung you
12 up and said: what we are proposing to do is we are
13 proposing to challenge Maurice McCabe on the basis that
14 he sexually abused a child, knowing that the matter had
15 been investigated thoroughly, knowing that the DPP had 12:11
16 ruled on the matter, knowing there was no prosecution,
17 knowing that the DPP had said even if there was no
18 issues as to credibility, what had happened wasn't a
19 sexual assault and wasn't even an assault at all, would
20 you have brought that to the attention of the Minister 12:12
21 and said, look, Minister, something alarming is going
22 to happen here and we need to do something about it?

23 A. I think so, in the sense that, like, that would have
24 transcended -- it would have been such a very egregious
25 thing to do. I mean, if I had got a phone call from 12:12
26 the Garda Commissioner saying, look, we are going to
27 use the Ms. D allegation to undermine Maurice McCabe,
28 as I say that would have transcended any issues in
29 relation to the Commission. I mean, that would be

1 alerting us that we had a problem with the Garda
2 Commissioner. Now, I have to say in relation to the
3 Garda Commissioner O'Sullivan in any discussion she
4 ever had with me in relation to Sergeant McCabe, there
5 wasn't the slightest doubt in my mind that she was
6 trying her best to resolve the issues that had arisen.

12:13

7 251 Q. CHAIRMAN: Okay. And I take it if that information,
8 the question we have just discussed, had come from any
9 other source, that also would have transcended matters;
10 you would have brought it to the attention of the
11 Minister and suggested certain action?

12:13

12 A. Yeah. Now, what action, I'm not sure, but I think it
13 would have -- it wouldn't have been action in relation
14 to what was happening at the Commission, as it were; it
15 would have raised a wider issue of confidence.

12:13

16 252 Q. CHAIRMAN: Yes. No, I understand what you are saying.
17 Thank you, Mr. O'Leary.

18
19 THE WITNESS THEN WITHDREW

20
21 CHAIRMAN: I know we have another witness, but just
22 something was mentioned to me this morning and I just
23 feel I need to say something. Again, as I say, I am
24 trying not to follow the media on this issue, but
25 respecting their work and their entitlement obviously
26 to call me to account. But there has been some mention
27 in relation to a Twitter account by the Tribunal in
28 somewhat bizarre circumstances. I just want to make it
29 clear, I don't have a Twitter account, the Tribunal

12:13

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doesn't have a Twitter account. The Tribunal isn't, to use the correct verb, tweeting anybody on anything. So that is that.

MR. MCGUINNESS: Thank you, Chairman. The next witness is Mr. Michael Dreehan.

12:14

1 MR. MICHAEL DREELAN, HAVING BEEN SWORN, WAS DIRECTLY
2 EXAMINED BY MR. MCGUINNESS:

3
4 MR. MCGUINNESS: Mr. Dreelan's statement is to be found
5 at page 3327 of the Tribunal's papers. 12:14

6 253 Q. Mr. Dreelan, I think in May of 2015 you were in
7 position as one of the advisory counsel in the office
8 of the Attorney General?

9 A. I was indeed.

10 254 Q. And how long had you served in that position at that 12:15
11 time?

12 A. I joined the Attorney General's office in 2006.
13 However, at the end of 2006 to the end of 2011 I was
14 seconded to the Department of Transport, so I had been
15 back from the start of 2012 and I remained there until 12:15
16 September 2016, when I returned -- sorry, 2015, when I
17 returned again to the Department of Transport -- sorry,
18 2016 I returned to the Department of Transport again.

19 255 Q. And I think that is an arrangement that is not unusual;
20 advisory counsel from the Attorney's office are often 12:15
21 embedded in departments?

22 A. Absolutely.

23 256 Q. While still remaining part of the staff of the Attorney
24 General's office?

25 A. Well, we are seconded from the office of the Attorney 12:15
26 General, so we are no longer advisory counsel or advice
27 is not the advice of the Attorney while we are
28 seconded. We are paid by the Department, but we can
29 return to the office. And it's a secondment project.

1 recollection of the events of that day. I don't
2 believe that it would be inaccurate in any material
3 respect.

4 262 Q. Yes. Well, can you tell the Tribunal what occurred?

5 A. Well, I received a call from Ms. Ryan and it was 12:17
6 informing me for the first time of what had been
7 referred to this morning of the -- as the Ms. D
8 allegations, and, additionally, that the Commission had
9 adjourned briefly to confirm that the Commissioner had
10 instructed the line as to motivation to be -- that they 12:18
11 were express instructions from the Commissioner, and I
12 was -- I was informed of this.

13 263 Q. Yes. May I just pause there and ask you a number of
14 questions. Firstly about your knowledge of the Ms. D
15 allegation, the original file, had you any prior 12:18
16 involvement or knowledge in connection with that?

17 A. Absolutely zero.

18 264 Q. And you had no involvement or knowledge of that issue,
19 either in terms of the IRM examination of it or its
20 inclusion in the terms of reference? 12:18

21 A. None.

22 265 Q. Okay. And were you aware that it hadn't been included
23 in the terms of reference?

24 A. It was something totally new. I had no knowledge
25 whatsoever of it. 12:19

26 266 Q. Okay. And when she described to you that an issue had
27 arisen in connection with that in relation to Sergeant
28 McCabe's motivation and credibility, how did she
29 explain that to you as having arisen?

1 A. Well, what -- if I can stress that this was new and
2 significant information in two respects: firstly, the
3 fact of Ms. D, and secondly, the fact that it was to be
4 relevant to a line which, that afternoon, was to be
5 progressed at the Commission. 12:19

6 267 Q. Yes.

7 A. So, I suppose, the scenario which the Chairman set out
8 earlier, my first concern was to ensure that that
9 wasn't in any way the line which was being advanced,
10 and, you know, again, I wasn't -- I am fairly certain I 12:20
11 wouldn't have been taking any contemporaneous note
12 while I was on the phone, or any meaningful one, to
13 Ms. Ryan, but it was to establish that it was something
14 other than that, and the word which is very clear to me
15 is "motivation", so the explanation was that Ms. D 12:20
16 was -- that the allegations had been investigated and,
17 without any disrespect to any party in it, were found
18 in law and in fact to have been, you know, utterly
19 unfounded, and that the question was something else.

20 268 Q. Yes. Well, what did you understand the line to be 12:20
21 taken was, or how was it described to you?

22 A. Well, I understood it, that the effect of the
23 investigation, and I say that in its broadest sense,
24 the investigation, the prosecutorial process, even
25 though ultimately there was no indictment drawn, 12:21
26 et cetera, but that that had been devastating and had
27 had a very profound impact on Sergeant McCabe, and
28 that, arising from that, that there was an issue
29 that -- the thesis, as I understand it, was that that

1 had caused a change in Sergeant McCabe's behaviour or
2 in his relationship with the force and had led in some
3 way to what has transpired today.

4 269 Q. And was that expressed to you as being potentially
5 relevant to his complaints or the nature of the 12:21
6 complaints or their credibility or --

7 A. That is a level of detail that I wouldn't have access
8 to. I don't believe so. I don't think I had a very
9 long conversation with Ms. Ryan.

10 270 Q. Yes. So would it be fair to say Ms. Ryan didn't inform 12:22
11 you of any particular events or personnel or --

12 A. I don't believe so. I say in my statement that this
13 was an inactive file, or something of that nature, and
14 that is very much the case. I wasn't familiar with the
15 detail. The Attorney's office was not directing. An 12:22
16 Garda Síochána needed legal representation at the
17 Tribunal, and that had come through the office; the
18 Attorney had nominated counsel. I, in fact, hadn't
19 been present when the nomination was sought and hadn't
20 sought the nomination, so I am not absolutely sure when 12:22
21 the contact with Ms. Ryan commenced. I don't think
22 that was my first phone call, but I didn't have a lot
23 of detail, and I wasn't looking for a lot of detail
24 because the Attorney's office wasn't directing and I
25 didn't want information that I -- 12:22

26 271 Q. Didn't need, I suppose?

27 A. Well, I didn't need, that I couldn't use, that there
28 was no -- that I had no function in respect of.

29 272 Q. All right. Well, I mean, were you clear in your own

1 mind that Ms. Ryan wasn't seeking any directions or
2 seeking advice from you? Was it keeping you in the
3 loop, as it were?
4 A. I think that is fair to say.
5 273 Q. Yes. 12:23
6 A. She was keeping me in the loop lest I would want to do
7 something.
8 274 Q. Yes. But did she mention that the Commissioner had
9 been asked to reconfirm instructions in this regard and
10 was seeking instructions, counsel was seeking those 12:23
11 instructions from the Commissioner?
12 A. Yes, my recollection is that Ms. Ryan was clear that
13 instructions of some sort had been furnished and that
14 they were being firmed up on, I think, but certainly
15 that there was sanction in place for the line. 12:23
16 275 Q. Yes. Could I ask to you look at page 3766.
17 A. Should I await the screen?
18 276 Q. And this is a handwritten note. And just if we go down
19 to the end of the page, it records there.
20 12:24
21 "Fergus --"
22
23 That is Chief Superintendent Healy.
24
25 "-- made numerous calls directly to Commissioner. It 12:24
26 appears she consulted with others, perhaps Minister. I
27 phoned Michael Dreelan in AGO and informed him of this
28 event."
29

1 Do you recollect being informed of what consultations
2 the Minister or the Commissioner might be having with
3 anyone?

4 A. Certainly not the Minister.

5 277 Q. All right. 12:24

6 A. My understanding was that senior Garda management had
7 sanctioned the line of questioning.

8 278 Q. All right. Okay. And did you understand that to be
9 the Commissioner, or not, at that time?

10 A. I don't believe that I would have got -- or would have 12:24
11 concerned myself with that level of detail, that I
12 wouldn't have questioned the Garda line of instruction
13 on that. My recollection is, senior Garda management
14 had sanctioned the line.

15 279 Q. I think you do say in your statement that you 12:25
16 considered the information that Ms. Ryan had given to
17 you to be of the highest importance, and it seems to
18 have caused you to consult with Mr. Barrett, is that
19 correct?

20 A. Yes. 12:25

21 280 Q. Now, I don't want to go into any details of any advice
22 or view that Mr. Barrett expressed within the
23 Attorney's office, but did you inform him of the
24 information you had received?

25 A. Yes. As we mentioned a moment ago, the Ms. D issue was 12:25
26 entirely new to me, and I was also aware, however, that
27 the office was not directing An Garda in relation to
28 its -- in relation to the Commission. However, as I
29 say, I thought this was important, and very important,

1 information, so I wanted to ensure that my view, which
2 was that notwithstanding the importance of the matter,
3 that it was not -- not something which should cause the
4 Attorney's office to try to intervene. I mean, I am
5 not sure how the office could have intervened. But I 12:26
6 wanted to discuss that with a colleague. I was also,
7 however, very mindful of the fact that the allegations,
8 in and of themselves, were not something which should
9 be circulated, and, even within the office, I didn't
10 want to inform a colleague who wasn't aware of it. So 12:26
11 initially I wanted to establish that Mr. Barrett knew
12 about the allegations, and then once I was happy that
13 once he obviously did, I was very happy that we were
14 able to discuss the matter. And I don't know if you
15 want to get into that discussion? 12:26

16 281 Q. No, no. But can you recollect whether Ms. Ryan had
17 mentioned any prospect of a judicial review or the
18 matter going public; was that something that had been
19 conveyed to you?

20 A. I think that may have been mentioned. 12:27

21 282 Q. All right.

22 A. Yes, that has a ring of truth to it, although I don't
23 have a direct recollection of that being the case.

24 283 Q. All right. Okay. It appears that Ms. Ryan and/or
25 counsel were asked to provide counsel's advices in 12:27
26 writing, and these were apparently forwarded to you,
27 and perhaps could I ask you to look at page 689 of our
28 documents, which should be on screen. That appears to
29 have been forwarded on to you slightly later. It was

1 originally apparently sent at 15:29, although there
2 were copies of it available. Do you recall getting
3 that in the afternoon of the 15th?

4 A. I recall getting some email communication from
5 Ms. Ryan. However, at that stage I had -- I can also 12:27
6 recall that by the time that came in, I had confirmed
7 with my colleague my opinion that this was not a matter
8 where the office should attempt to sway or, in the very
9 short time available, should attempt to intervene in
10 some way. So this information, and I haven't read it 12:28
11 again, but I do recall getting this. This, I did not
12 consider in the same careful way that I considered the
13 initial information which Ms. Ryan had conveyed over
14 the telephone.

15 284 Q. All right. But did you appreciate this was counsel's 12:28
16 advices to the Commissioner being forwarded to you?

17 A. I believe I did, yes.

18 285 Q. And perhaps if we just go to the top of that page. As
19 I understand what you are saying, that you had, in
20 conjunction with Mr. Barrett, reached the view that you 12:28
21 have just expressed, prior to receiving this?

22 A. That is my recollection, that this was somewhat
23 secondary by the time I received it. Now, it may have
24 been -- I wonder did I receive it at 16:33? It may
25 have been that I was away from my desk. The Attorney's 12:29
26 office is very careful in terms of security, so we
27 don't carry, or certainly at that time didn't carry
28 devices to retrieve our emails everywhere, but
29 certainly I can recall that when I read a subsequent

1 somewhat more formal communication, that my
2 decision-making process, effectively, or the office's,
3 had already been completed.

4 286 Q. Yes. Ms. Ryan has provided us with another note, which
5 has been typed, and if I could ask you to look at page 12:29
6 3783, and that will appear on the screen in a moment.

7 A. Thank you.

8 287 Q. And that records the matter from her point of view.
9 Were you aware that the Commissioner was -- or Ms. Ryan
10 was seeking an adjournment of the Commission hearing? 12:30

11 A. Again, that rings a bell. What I can recall is that it
12 wasn't possible to put off the decision in this regard.

13 288 Q. All right. Your reference there for the first time --
14 in the middle there it says:
15
16 "During this time I telephoned Michael Dreehan, AGO,
17 and informed him of the above."
18
19 So that seems to be the first set of events. She then
20 refers to counsel's advice, and then she refers to 12:30
21 sending it on to you there:
22
23 "I immediately had counsel's advices sent to Michael
24 Dreehan."
25
26 And if we scroll down. She says:
27
28 "I followed this up by further telephone call to
29 Michael Dreehan."

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Do you recall her discussing the advices on the phone with you or just filling you in?

A. Well, I can recall that Annmarie Ryan and I had more than one conversation on that day.

12:31

289 Q. Yes.

A. I don't recall the detail of the further conversation. To an extent, once the office was clear, that, notwithstanding that this was important information and significant, that it was not changing its position, the conversations became, you know, somewhat to one side. There was nothing I was going to do in respect of what Annmarie was telling me.

12:31

CHAIRMAN: Mr. McGuinness, is this an appropriate time to break?

12:31

MR. MCGUINNESS: Very good, Chairman.

THE HEARING ADJOURNED FOR LUNCH

1 THE HEARING RESUMED AS FOLLOWS AFTER LUNCH:

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290 Q. MR. MCGUINNESS: Mr. Dreelan, just before lunch you were, I think, saying, in effect, that once you were satisfied that, from the point of view of the Attorney's office not having to, as to were, do anything, there was no change in the position of the Attorney's office, no need to intervene or give any directions, that it was of lesser concern, is that a reflection of what you were thinking?

13:30

A. Yes. So I was acutely conscious that I was only receiving a snippet of the detail in a very quick telephone conversation.

13:30

291 Q. Yes.

A. And if it was the case that the Attorney's office would try to make some intervention, then would I need to become very familiar with all of the details very quickly. But once it was decided, and accepted, that -- as seems, I would suggest, the correct course now, that it wasn't for the Attorney to do so --

13:30

13:31

292 Q. Yes.

A. -- then the detail of the matter ceased to be of central relevance.

293 Q. Yes. Well, obviously that was the net outcome. No role was seen for the Attorney's office, no directions were to be given, isn't that correct?

13:31

A. Yes.

294 Q. You do, however, record in your statement that you were very concerned that the office ensure that all

1 appropriate parties were aware of the proposed approach
2 of An Garda Síochána so as to be able to make any
3 relevant observations. And who had you got in mind in
4 that respect?

5 A. Well, I really, I suppose, directly had the Attorney in 13:31
6 mind, but, on a wider scheme, certainly the Department
7 in mind, and how far into the Department I would
8 stretch, I wouldn't like to surmise, because I would be
9 surmising.

10 295 Q. Yes. 13:32

11 A. But certainly, events have occurred in the past, where
12 information certainly was claimed not to have been
13 disseminated as freely as it should have been.

14 296 Q. Or as quickly?

15 A. Or as quickly, indeed. And although I, as an advisory 13:32
16 counsel, couldn't see anything for the Attorney to do,
17 it mightn't be the case that somebody else with more
18 experience, more detail, a wider view, a narrower view,
19 who knows what, might not see a different action.

20 297 Q. Yes. 13:32

21 A. And therefore, what was foremost in my mind -- well, I
22 don't know about foremost, but -- yes, really,
23 foremost, because I couldn't see a role for the
24 Attorney's office with almost no detail and an
25 impossibly short time-line, was to make sure that the 13:32
26 information flowed appropriately and didn't stay with
27 me at my desk, and that if somebody else had a
28 different view, that they would have been in a position
29 to make some observation.

1 298 Q. Yeah. It's just in terms of the sequence of your
2 statement, you detail -- perhaps we should look at it,
3 in fairness to you, at page 3328, in the middle of the
4 page. In the third-last paragraph of the page you
5 start the sentence --

13:33

6 A. I don't have it, but I'm familiar with it, and it's a
7 short statement.

8 299 Q. I'll just read it out and you'll know -- you'll see it
9 when it comes up:

10

13:33

11 "I consider this information to be of the highest
12 importance and notwithstanding the hands-off approach
13 of the office on the file, it's a matter which the
14 Attorney General personally should be aware of, lest
15 she wished to make any intervention."

13:33

16

17 It's at 3328.

18 A. I'm very familiar with my statement.

19 300 Q. Yes. Can we get that on screen. In any event, in the
20 next paragraph you go on to detailing, bringing it to
21 Mr. Barrett's attention?

13:34

22 A. Yes.

23 301 Q. And then, having done that, you record in the second
24 sentence there:

25

13:34

26 "While I could not see any appropriate role... I was
27 very concerned that the office would ensure that all
28 appropriate parties..."

29

1 That appears to be, as it were, the end result of the
2 reasoning that it was necessary to ensure all
3 appropriate parties were aware of it. Is that
4 something that you had any function in, or did you
5 leave that to Mr. Barrett? 13:34

6 A. My recollection is that Mr. Barrett looked after the
7 onward communication.

8 302 Q. Yeah. Were you present with him when he phoned -- made
9 the phone call to Mr. Flahive?

10 A. No, I don't -- I don't believe I was. 13:35

11 303 Q. All right.

12 A. I think it's unlikely that I was because, well I would
13 have wanted to speak to Annmarie. I couldn't say that
14 for certain. I think it most unlikely.

15 304 Q. Yes. 13:35

16 A. And then as to other -- as I say, I haven't, as I'm
17 outside the Attorney's office, I haven't consulted my
18 file. I suspect I would have done either a memo or
19 something of that nature --

20 305 Q. Yes. 13:35

21 A. -- for the Attorney's attention.

22 306 Q. All right. May the Tribunal take it that you had no
23 direct communication with either the Commissioner or
24 any officer on her behalf?

25 A. Oh, no. 13:35

26 307 Q. Or with anyone in the Department?

27 A. No, I certainly don't believe so. I worked quite
28 closely on other matters with Fergus Healy.

29 308 Q. Yes.

1 A. I don't believe --

2 309 Q. But this afternoon?

3 A. No. It was all Annmarie. I don't believe so. I mean,

4 it's --

5 310 Q. In any event, Ms. Ryan, at her note, which I'd ask to 13:35

6 go back on the screen, at 3783, at the end of that note

7 she talks about following up the advices:

8

9 "I followed this up by further telephone call to

10 Michael Dreelan." 13:36

11

12 And then:

13

14 "I further phoned Michael Dreelan at 5:55 and then gave

15 him full details of events." 13:36

16

17 Do you recollect being filled in on the outcome of the

18 day?

19 A. I recollect that I had a few conversations with

20 Annmarie. I don't have precise recollections of them. 13:36

21 311 Q. Yes.

22 A. As I say, and perhaps very goal-orientated or

23 stove-piped, when I wasn't -- I didn't have a broad

24 understanding of what was going on.

25 312 Q. All right. 13:36

26 A. When it wasn't clear that I was going to have -- when

27 it was clear to me that I wouldn't have to attempt to

28 understand the nuance of what was a fairly combative

29 process, I pulled back a little bit, so I don't have a

1 direct recollection in the way that I do of receiving
2 significant information from Annmarie prior to having
3 made that decision and then subsequently, you know, had
4 it confirmed --

5 313 Q. Yes.

13:37

6 A. -- with the senior officer.

7 314 Q. We've seen from your statement that you were anxious to
8 ensure all appropriate parties were aware so that they
9 would be able to make any relevant observations. What
10 did you have in mind in the way of relevant

13:37

11 observations on what the Commissioner might be doing?
12 A. I was just mindful of instances in the past where, for
13 example, the office-holder doesn't get the information
14 or some relevant party doesn't get the information and,
15 later on, when matters are assessed, the office has
16 been found wanting or perhaps it has been suggested
17 that it might have been better had information got to
18 the directly concerned, you know,
19 constitutionally-appointed office-holders.

13:37

20 315 Q. To the ministers?

13:38

21 A. Well, I'm really thinking of the Attorney, in
22 particular --

23 316 Q. Yes.

24 A. -- in terms of my office, but -- my office, from which
25 I am seconded. But also, of course, the Department. I
26 think once it goes into the Department, it's for the
27 Department to make the call in relation to the
28 Minister.

13:38

29 317 Q. Yes. I mean, obviously the previous year had been

1 preceded by controversy over whether the Secretary
2 General had brought something to the Minister's
3 attention, isn't that right, in terms of the report --
4 A. Yes, yes.
5 318 Q. -- of Commissioner Callinan to -- 13:38
6 A. I'm not sure how much of all that had been in May
7 2015 -- I've thought about that. I'm not sure how much
8 of that would have been in my mind, that in the public
9 domain --
10 319 Q. Yes. 13:38
11 A. -- I haven't gone back to see what would I have known
12 then that I now know. But certainly, as an ongoing
13 theme within the office, former Director General, Liam
14 O'Daly, was always very, very keen to make sure did the
15 Department know, did the relevant people know, did the 13:39
16 Attorney know --
17 320 Q. Yes.
18 A. -- to make sure that information flowed freely, that we
19 weren't simply sitting around making legal assessments,
20 but that we were ensuring that the correct people had 13:39
21 the correct information.
22 321 Q. Well, I mean, obviously leaving aside the Fennelly
23 Commission, which was ongoing at this period, is that
24 correct?
25 A. I'm just not sure -- 13:39
26 322 Q. Yes.
27 A. -- at that stage.
28 323 Q. But leaving aside that, Commissioner Callinan had
29 resigned in March of 2014.

1 A. Mm-hmm.

2 324 Q. And the Minister had subsequently resigned - I'm not
3 suggesting they're linked - but the controversy was
4 because the Secretary General hadn't brought, or had
5 delayed in some way, apparently, in bringing a 13:39
6 Commissioner's letter to the attention of the Minister,
7 isn't that right?

8 A. That's certainly my recollection now, yes.

9 325 Q. And would you, in your concern here, would you have
10 expected the Commissioner's concerns or any concern 13:39
11 about the Commissioner to be brought to the attention
12 of the Minister herself?

13 A. My attention was much more narrow than that, or my
14 focus was narrow. The Department, I felt, would need
15 to know at the appropriate level. Whether that would 13:40
16 involve the Minister, I think would be a matter for the
17 Department, once they were getting it at an
18 appropriately senior level. And as I said in my
19 statement --

20 326 Q. Yes. 13:40

21 A. -- and I haven't reviewed my file, but I would be very
22 surprised if the matter wasn't brought to the
23 Attorney's attention.

24 327 Q. Yes.

25 A. That was my focus. 13:40

26 328 Q. All right. Obviously you probably heard Mr. O'Leary's
27 evidence this morning. He apparently decided in a
28 deliberate fashion that the Commissioner's phone call
29 to him would not be brought to the attention of the

1 Minister, and he discussed with Mr. Flahive the way the
2 legitimate route in which he thought the concerns about
3 what had happened at the Commission would be brought to
4 the Minister. Had you any particular -- had you given
5 any particular thought as to who would be informed or 13:41
6 who should be informed in order to make any appropriate
7 observations on the matter?

8 A. No. I say the Department, it would have to be the
9 Department at a senior level.

10 329 Q. Yes. But certainly Mr. O'Daly's concerns was that 13:41
11 everyone -- in his practice as Director General, was
12 that people should know what they perhaps ought to know
13 or be told about as soon as possible, and the relevant
14 personnel, relevant parties, including office-holders,
15 if need be? 13:41

16 A. Well, and there may be two lines constrained there.

17 330 Q. Yes.

18 A. When I say office-holder, I'm really thinking of the
19 Attorney.

20 331 Q. Yes. 13:41

21 A. In the case of the Attorney General's office.

22 332 Q. Yes.

23 A. That the Attorney is entitled to --

24 333 Q. Of course.

25 A. -- be informed of information that is important to him 13:41
26 or her --

27 334 Q. Yes.

28 A. -- at an appropriate time.

29 335 Q. Of course.

1 A. And then, beyond that, I don't think in terms of
2 office-holders. So perhaps I was a little lax in my
3 language there. When I say office-holder, I really
4 mean the Attorney.

5 336 Q. Okay. Anyway, leaving the parsing of that aside about 13:42
6 the concern to make appropriate parties aware, did you
7 know that Mr. Barrett was going to phone the
8 Department?

9 A. I imagine I knew he was doing that, absolutely. I
10 think we worked very closely at it. 13:42

11 337 Q. Yes.

12 A. I have no distinct recollection of being informed that
13 that was the case. But I know that I had a series of
14 things that I wanted done; I imagine the Department
15 being informed was one of them and the Attorney being 13:42
16 informed was the other, and I felt very comfortable
17 that they were done, that the decision had been made,
18 that it had been conveyed, that it had been approved,
19 that it was, you know, upon recollection, that it was
20 the correct and only thing to do. So, on that basis, 13:43
21 that I wouldn't have been happy if the Department was
22 not informed.

23 338 Q. Yes. And do you recollect speaking with Mr. Barrett
24 afterwards, after he made his phone call to
25 Mr. Flahive, or learning that it had been done? 13:43

26 A. I have no specific recollection of that.

27 339 Q. All right. Well, just going then to the next issue,
28 the last -- it would appear the last apparent phone
29 call on this day is recorded there by Ms. Ryan:

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"I further phoned Michael Dreelan, AGO, at 5:55 and again gave him full detail of events."

Do you recollect being told about the drafting of a letter over the weekend, or any detail about that? 13:43

A. No, I have no recollection of that.

340 Q. You didn't receive the letter yourself in the office, did you?

A. I don't believe so. 13:43

341 Q. Yes.

A. But as I say, my focus, when I wasn't going to take any action --

342 Q. Yes.

A. -- or give any direction on the matter, my focus would have drifted from it. 13:44

343 Q. And just turning then to the last document I want to ask you to comment on, at page 692, this is Ms. Ryan's notes on emails in respect of privilege, in respect of which privilege has been claimed, and I think you had forwarded on or she had been cc'd with emails, sort of thanking her for bringing it to the attention of the office. Do you remember that? 13:44

A. That sounds entirely possible.

344 Q. All right. well, just to go back down to the bottom then. what she has noted on this is: 13:44

"I telephoned FH --"

1 That is Fergus Healy.

2

3

"-- and informed him of AGO's comments. Not
4 directions -- not directing Commissioner's decision.
5 Line of questioning may have some validity. Political 13:45
6 dynamite! He'll brief Commissioner. I'll circulate
7 draft letter once I get it from counsel."

8

9 Now, do you recollect conveying those three
10 bullet-points to her? 13:45

11 A. I don't, but they would not be an unfair summation of
12 my thinking at that time, if it came from me, so it's
13 entirely possible.

14 345 Q. All right. And, I mean, there's no evidence that
15 Mr. Barrett spoke to Ms. Ryan from either of them on 13:45
16 the afternoon?

17 A. Oh, I imagine that the communication with Ms. Ryan was
18 me.

19 346 Q. Yes. Do you recall Ms. Ryan expressing any view such
20 as recorded there, political dynamite, or the 13:45
21 consequences of what was happening at the Commission
22 with you?

23 A. As I said in the statement, I thought this information
24 was important and significant. You know, I don't
25 recall a statement like political dynamite, but this 13:46
26 was sensitive and significant and important, and I
27 think certainly Mr. Barrett, myself and Ms. Ryan were
28 all acutely aware that this was, you know, a sensitive
29 matter.

1 347 Q. Okay. Leaving aside the explosive nature of it,
2 obviously it had the potential to be a political issue,
3 perhaps; you saw that, I take it?
4 A. Well, political and personal to the individuals
5 involved. 13:46

6 348 Q. Yes.
7 A. Drilling right down into the detail.

8 349 Q. Yes.
9 A. And legal. I mean, I didn't dissect my thinking in
10 relation to it. 13:46

11 350 Q. Yes. Okay. But as occurred between yourself and
12 Mr. Barrett --
13 A. Or separate my thinking, I suppose I should say.

14 351 Q. Yes. But looking at, sort of, the triangle of concern,
15 yourself, the Attorney, Mr. Barrett, and the desire 13:47
16 that somebody should tell the Department, did you have
17 an expectation yourself that the Minister would be
18 informed?
19 A. Em, I certainly have no recollection of that. I would
20 have felt that it was important that the Department 13:47
21 would be informed, more particularly that it would be
22 escalated up the line within my own office --

23 352 Q. Yes.
24 A. -- as a primary concern, and then --

25 353 Q. It's a matter for the Department as to what the 13:47
26 Minister should know or not know?
27 A. Yes. And I stress again that, I mean, this was
28 happening at speed.

29 354 Q. Yes, of course.

1 A. And was quite significant.

2 355 Q. Right. We know at a later stage Ms. Ryan offered to
3 send you the Module 1 submissions, and I think you
4 declined those; that's correct?

5 A. I don't know if I cast my eye on them or not. 13:48

6 356 Q. Yes.

7 A. Ms. Ryan was not looking for directions. There is a
8 system -- there's a very formal system within the
9 Attorney General's office. Neither orally informally
10 nor on our very formal system was Ms. Ryan looking for 13:48
11 directions.

12 357 Q. That's something -- there's an acronym for that, I
13 think?

14 A. ACME, yes.

15 358 Q. ACME. 13:48

16 A. And I don't know, I don't believe she looked for
17 directions.

18 359 Q. Yes.

19 A. Because if she had, I would need to read them carefully
20 and give directions. I was not in a position to do 13:48
21 that. If I cast my eye on them, I know I didn't want
22 to be in the position that I had been on the 15th
23 again, which was with something significant happening
24 and not a lot of background detail.

25 360 Q. And no function, as you saw it? 13:48

26 A. Well, even having to second-guess whether or not I had
27 a function in a very short period of time with only
28 very recent access to significant facts.

29 361 Q. All right. Thank you, Mr. Dreelan.

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MR. MICHAEL DREELAN WAS CROSS-EXAMINED BY MR. MCDOWELL:

362 Q. MR. MCDOWELL: Good afternoon, Mr. Dreelan.

A. Good afternoon.

13:49

363 Q. When you made your statement on this, on the 1st December, for the Tribunal's purposes, you had limited access to materials, is that right?

A. That's correct.

364 Q. And you were largely dependent, therefore, I take it, on recollection, was that right?

13:49

A. And still am, save that I've read the opening statement in full.

365 Q. Yes.

A. And then I have read the transcripts of some witnesses where they were referring a lot to me.

13:49

366 Q. Yes. And could I bring you to page 3328 of book 6. If I could bring you to the third paragraph, you say in that:

"When Ms. Ryan informed me that allegations of assault against Sergeant McCabe had been investigated -- "

13:50

Sorry.

A. I think I have the wrong document. Is that my statement?

13:50

367 Q. 3328, yes. I'm waiting for your statement. Now do we have it now? Yes. It's the third paragraph there.

1 "When Ms. Ryan informed me that allegations of assault
2 against Sergeant McCabe had been investigated by
3 AGS -- "

4

5 That is An Garda Síochána, isn't that right?

13:51

6 A. Yes.

7 368 Q. " -- I was of course surprised. My recollection is
8 that Ms. Ryan was very clear that these had been fully
9 investigated and were groundless, but that the process
10 of investigation into the allegations had been
11 devastating for Sergeant McCabe."

13:51

12

13 And then you say:

14

15 "I may be mistaken but I was informed the complainant's
16 father..."

13:51

17

18 We needn't deal with that. First of all, she was
19 informing you for the very first time that the D
20 allegation had been made against Sergeant McCabe and
21 had been investigated, isn't that right?

13:51

22 A. Mm-hmm.

23 369 Q. And you, for your part, had never heard of this before?

24 A. No.

25 370 Q. You were acting as legal adviser in relation to some
26 aspects of this Commission of Investigation, is that
27 right?

13:51

28 A. Well, it was rather limited.

29 371 Q. Housekeeping kind of aspects, is it?

1 A. I couldn't deny that.

2 372 Q. Yes.

3 A. An Garda needed representation.

4 373 Q. Yes.

5 A. The nomination had been made while I was out of the 13:52
6 office, with the file assigned to me, and when I was
7 out of the office one day the nomination was made
8 because it was urgent. At some point, Annmarie
9 telephoned me because she was aware that I was the
10 advisory counsel on the file. 13:52

11 374 Q. Yeah.

12 A. And then, of course, I became aware and established
13 that, you know, rather obviously, look, when one looks
14 at it carefully, that the office and Minister would not
15 be directing An Garda in their handling of it. 13:52

16 375 Q. Yes. So you weren't involved in advisory work in
17 relation to the fixing of the terms of reference?

18 A. Ah, no.

19 376 Q. At all?

20 A. No. This was -- I say that the file was somewhat 13:53
21 inactive.

22 377 Q. Yes.

23 A. This is was a file which, you know, I suppose
24 housekeeping is a very, very fair term for it. It
25 ended up not being entirely housekeeping. 13:53

26 378 Q. At the time it looked like that to you?

27 A. Absolutely, absolutely.

28 379 Q. Yes. So it came as a bit of a bolt out of the blue
29 when she rang you up and told you that An Garda

1 Síochána had investigated allegations of assault
2 against Sergeant McCabe, this was something which was
3 wholly different from any knowledge you had on the
4 matter?

5 A. That was wholly different, yes. 13:53

6 380 Q. And you then go on to say:

7
8 "My recollection is that Ms. Ryan was very clear that
9 these had been fully investigated and were groundless."
10

13:53

11 That was what she imparted to you, obviously, because
12 you didn't know anything about it.

13 A. Yes.

14 381 Q. "But that the process of investigation into the
15 allegations had been devastating for Sergeant McCabe."
16

13:54

17 Can you indicate, as best you can, how she conveyed
18 that to you?

19 A. I certainly can't put words -- you know, recall the
20 words that she used, but my understanding was, as I've
21 laid out there, that it was the investigative process.
22 The whole being on the other side of a Garda
23 transaction and, indeed, you know a prosecutorial
24 assessment, that that had been, as I say, devastating,
25 and I think that is the best word that conveys what I
26 took from that. Now, subsequently I've read the
27 opening statement, obviously, and I have more
28 information, so I'm aware now that Annmarie may have
29 been trying to -- may have conveyed precisely what the

13:54

1 problem was to me, but I was simply getting too much
2 information, I don't know if that was the case, but I
3 had understood that it was the fact that others within
4 the force for which he cared so much were now making
5 decisions as to whether or not he was a person with 13:55
6 some culpability or not and that the full process of
7 State against him, or in relation to him, I should say,
8 that what that meant on the ground had been
9 devastating. That was my understanding.

10 382 Q. I think you then continue in the next paragraph: 13:55

11
12 "I understand the An Garda Síochána thesis proposed to
13 be shortly advanced at the O'Higgins Commission was
14 that Sergeant McCabe deeply resented the suspicion of
15 colleagues and the investigative process into the 13:55
16 allegations."

17
18 That's based on what you were told, isn't that right?

19 A. Yes, that's my understanding.

20 383 Q. And then you say: 13:56

21
22 "I was informed that An Garda Síochána would put it to
23 Sergeant McCabe that he was motivated to raise the
24 issues before the O'Higgins Commission by a sense of
25 having been treated unjustly." 13:56

26
27 And again, that's what Ms. Ryan told you, I take it?

28 A. Yes, that's as best I can recollect what Ms. Ryan told
29 me.

1 384 Q. So that the thesis was that he was motivated to raise
2 the issues which were before the O'Higgins Commission
3 by a sense of having been treated unjustly by An Garda
4 Síochána?

5 A. Or that that was part of his motivation, yes, that that 13:56
6 was some part of his motivation.

7 385 Q. And then you say:
8
9 "I was informed that this approach had Garda
10 management's sanction but that the AGO --" 13:56
11
12 That is the Attorney General's office.
13
14 " -- was being informed, lest it wished to make any
15 observations." 13:56
16 A. Yes.

17 386 Q. So that was the kernel of why you thought you were
18 being given this information that afternoon?

19 A. Yes.

20 387 Q. Does the Attorney General's office want to make any 13:57
21 observations on the thesis that Sergeant McCabe had
22 raised all these issues which were before the
23 Commission out of a sense of being unjustly treated?

24 A. I don't think it would have been all the issues.

25 388 Q. Or sorry -- 13:57
26 A. But some issues.

27 389 Q. The issues, you said. Yes.
28 A. Yes.

29 390 Q. And you then say:

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"I considered this information to be of the highest importance and notwithstanding the hands-off approach of the office on the file was a matter which the Attorney General personally should be made aware of, lest she wished to make any intervention."

13:57

I don't want to pry too much into anything that is privileged, but "notwithstanding the hands-off approach of the office on the file," was that apparent to you, that there was a hands-off approach?

13:58

A. Yes, so I wasn't present when the nomination of counsel was made.

391 Q. Yes.

A. And my recollection is that, at some point thereafter, Annmarie Ryan telephoned me in relation to what was going on, and it must have been in the preparatory work for the Commission's commencement.

13:58

392 Q. Yes.

A. And that I was initially somewhat surprised because the file would have landed on my desk, I wasn't there, gone to a colleague nomination and been returned to our registry. So my recollection is that I found out, first of all, somewhat surprised, a call from Annmarie Ryan, giving me information, not looking for any direction and a sort of a casual and informal chat about a difficult situation.

13:58

393 Q. Was this prior to the 15th May?

A. I think it must have been, because I wasn't surprised

1 to be hearing from Annmarie. So there were two
2 surprising things on the 15th: one, the fact of the
3 Ms. D allegations, and secondly, that they were about
4 to become in some way part of the Garda thesis. But I
5 wasn't surprised to be getting the call at all from
6 Annmarie. 13:59

7 394 Q. Yes.

8 A. But earlier, I had been surprised. And at that point,
9 I don't believe I had looked after a file, a
10 representation file, a housekeeping file, as you have 13:59
11 described it, or one with the potential or the
12 likelihood of being a housekeeping file, of this sort
13 before. So I had to establish was this a case that I
14 now needed to -- I knew a colleague of mine had the
15 file for the actual establishment of the Commission 13:59
16 itself. What was my relationship with him? Did I have
17 any relationship? What was I to do? Etcetera. So I
18 had established all that, and that that was a hands-off
19 approach, because, as it was described by Mr. O'Leary
20 this morning, it would be inappropriate for the 14:00
21 Minister or the Attorney as a member -- or somebody who
22 sits with the same Government, to direct the Garda
23 Commissioner in that regard.

24 395 Q. I don't want to build too much on what is just a
25 comment in your statement, but you said: 14:00

26
27 "I considered this information to be of the highest
28 importance and notwithstanding the hands-off approach
29 of the office on the file, was a matter which the

1 Attorney General personally should be made aware of,
2 lest she wished to make any intervention."
3
4 So clearly, had you a sense from the file before the
5 15th -- 14:00
6 A. Yes.
7 396 Q. -- that this was something that the AG's office was not
8 going to be involved in on a hands-on basis, put it
9 that way?
10 A. As regards the Garda -- 14:00
11 397 Q. Yes.
12 A. -- element, or the representation of An Garda -- the
13 counsel had been nominated.
14 398 Q. Yes.
15 A. They were in place, they were assisting the 14:00
16 Commissioner and whatever other members. And the
17 Attorney's office would take a hands-off approach, yes.
18 399 Q. You then say:
19
20 "I believe that I was first informed of both matters, 14:01
21 i.e. the allegations and proposed approach of An Garda
22 Síochána, on the same occasion, which appears, from the
23 material you've furnished me, to be the 15th May 2015."
24
25 And then you say that you went to your group leader, 14:01
26 Richard Barrett, who was the deputy head of the office,
27 is that right, at the time?
28 A. Yes, I wonder subsequently, having read Richard's
29 transcripts, he wasn't a group leader at that time, but

1 he had been close to that time if he wasn't at that
2 time.

3 400 Q. He was somebody up the ladder, if we can use that
4 phrase?

5 A. Yes, yes. 14:01

6 401 Q. And you told him about what Ms. Ryan had told you, is
7 that right?

8 A. Having first established in a, you know, in a careful
9 fashion that he was aware of the underlying issue.

10 402 Q. Yes. And he was -- he appeared to be aware of it? 14:01

11 A. He was. He was, absolutely.

12 403 Q. Therefore, you didn't have to go back over that, I take
13 it?

14 A. Well, I wouldn't have been able to have him assist
15 me -- 14:02

16 404 Q. Yes.

17 A. -- if he hadn't.

18 405 Q. Yes, yes. Now, could I ask in relation to the number
19 of times on which Annmarie Ryan contacted you on that
20 day, it appears to have been either two or three times, 14:02
21 would that be roughly right?

22 A. Yes. We had a number of conversations. I must have
23 called her back --

24 406 Q. Yes.

25 A. -- to let her know what the position was, because I 14:02
26 certainly wanted to run it up the line.

27 407 Q. Yes. When you telephoned -- when she notes, at page
28 692, that she telephoned Fergus Healy and informed him
29 of AGO's comments, these were comments which were

1 coming through you, is that right?

2 A. Oh, I should think so, yes.

3 408 Q. And the first one was that you weren't directing, and I
4 presume that is giving directions in relation to what
5 the Commissioner, how she ran her case, is that right? 14:03

6 A. Yes. Because the office does have a directing role in
7 respect of quite a lot of state litigation.

8 409 Q. And then the next bullet-point you have there is:
9
10 "Commissioner's decision." 14:03
11

12 In other words, that it was for her to make up her mind
13 on whether she wanted to pursue this line of
14 questioning?

15 A. That was certainly my information, or my understanding. 14:03
16 I have no direct recollection of saying this, but it is
17 a very fair summation of my thinking at the time.

18 410 Q. Yes. And the third one is that the line of
19 questioning, I presume that is, it's QU, may have some
20 validity? 14:03

21 A. Yes.

22 411 Q. would you have said that?

23 A. I think certainly that was my view, that it wasn't
24 outlandish in the way that, for example, the Chairman
25 presented some outlandish proposals this morning. 14:04

26 412 Q. Yes. Had you any personal idea of the format of the
27 O'Higgins Commission?

28 A. Unless at a very, very basic level.

29 413 Q. I mean, for instance, would you have known that when

1 this was being put to -- or Superintendent Rooney was
2 being brought to this topic --

3 A. No.

4 414 Q. -- that there were lay witnesses, their solicitors,
5 maybe 40 or 50 people watching this process? 14:04

6 A. No is the answer to that. I don't know if you want
7 to -- it sounds like there's a follow-on. But, no, I
8 didn't have that level of knowledge at all, or I don't
9 believe I did.

10 415 Q. Bearing in mind that you were taken aback by being 14:04
11 informed about the D assault allegation, would you have
12 thought differently about the matter if you had known
13 that lay people, their lawyers, were going to be
14 witness to this matter being raised?

15 A. I think the ventilation of that matter was a concern of 14:05
16 mine and that I took it that however private an
17 investigation might be, there would have been a risk of
18 something like -- of there being some emanation from
19 it, so that was a concern.

20 416 Q. Yes. 14:05

21 A. Whether at report stage or any particular place. So,
22 no, I didn't know that there were, you know, and I
23 still don't really, how many people were in the room or
24 how secure it was, but it would absolutely have been a
25 concern of mine that was being -- 14:05

26 417 Q. But you were aware - I mean, some of us know, for
27 instance, that Mr. Justice Birmingham conducted the
28 Dean Lyons Commission on an entirely different model;
29 it was, as I call it, a dining-room-table type of

1 investigation.

2 A. Right.

3 418 Q. And likewise, Mr. Justice Fennelly had engaged in a
4 similar process, where witnesses came in one-by-one and
5 things were put to them. You were aware, though, that 14:06
6 at least from the fact that it was rather
7 adversarial --

8 A. Yes.

9 419 Q. -- the interchange between counsel, that this was not a
10 private investigation in the Fennelly/Birmingham/Judge 14:06
11 Yvonne Murphy, Dublin Archdiocese, model, this was
12 something different?

13 A. I wouldn't have thought about it in those forensic and
14 categorical terms, but I certainly was aware of the
15 fact that it was quite adversarial, that there were 14:06
16 teams involved. And certainly, the fact that this was
17 being ventilated at all was something which was of
18 concern to me. That's why it became somewhat
19 important, or one of the reasons why it came somewhat
20 important; it was a consideration in my mind whether or 14:07
21 not that would cause me to attempt to engage with the
22 detail.

23 420 Q. Yes.

24 A. And in some way intervene.

25 421 Q. And just one other thing. You said, though you've no
26 clear recollection of it, that perhaps Ms. Ryan also 14:07
27 imparted to you her concern that the matter might get
28 into the public domain via a judicial review, isn't
29 that right?

1 A. That has a ring of truth to it. I don't have a direct
2 recollection of that, but it rings a bell, yes.

3 422 Q. And from that point of view, you felt it all the more
4 appropriate that everybody who should know about this
5 event was informed about it and that you didn't keep it 14:07
6 just on your desk?

7 A. I wasn't, as I said, you know, separating my thoughts
8 into neat compartments, judicial review. I felt that,
9 taken as a whole, the information which Ms. Ryan
10 conveyed to me was important and significant and 14:08
11 deserved a moment of pause in relation to the State's
12 position, the central State's, the Attorney's office
13 position on this file. That pause and reconsideration
14 was taken.

15 423 Q. Yes. 14:08

16 A. And I felt that that was appropriate to do so. It was
17 serious enough and significant enough to merit that
18 pause.

19 424 Q. Certainly, and this is the last question, it would have
20 been wrong for you just simply to listen to Ms. Ryan 14:08
21 and say, well, that's interesting, but I'm doing
22 nothing about it?

23 A. Because Ms. Ryan called me, and I don't know how many
24 time she called me, not terribly often --

25 425 Q. Yes. 14:08

26 A. -- and there were situations where it was very clear to
27 me that that was the response. So this was not -- and
28 this was, I think, the only situation where she didn't
29 come to me maybe directly, she did at some point come

1 in ACME, but where I felt there was a need to take a
2 pause.

3 MR. MCDOWELL: Thanks very much, Mr. Dreehan.

4 MR. DIGNAM: No questions.

5 MR. MCCANN: No questions, Chairman. Thank you. 14:09

6 MR. MCGUINNESS: Thank you, Mr. Dreehan.

7

8 THE WITNESS THEN WITHDREW

9

10 MS. LEADER: The next witness, sir, is Michael Flahive. 14:09
11 His statement is at page 3336 of Volume 6 of the
12 materials.

13

14 MR. MICHAEL FLAHIVE, HAVING BEEN SWORN, WAS DIRECTLY
15 EXAMINED BY MS. LEADER: 14:09

16

17 426 Q. MS. LEADER: Mr. Flahive, I understand in May 2015 you
18 were an Assistant Secretary in the Department of
19 Justice and Equality?

20 A. That's correct. 14:10

21 427 Q. And I think you had particular responsibility over the
22 Policing Division, is that correct?

23 A. That's correct.

24 428 Q. I wonder could you outline what that actually means
25 insofar as what you did with regard to heading up the
26 Policing Division? 14:10

27 A. Well, the Policing Division was responsible for the
28 organisation, the law relating to the Garda Síochána;
29 for example, we were instrumental in drafting, with

1 colleagues, the Garda Síochána Act 2005 and in
2 regulations under it. So we were responsible for how
3 the force was regulated and for what you might call
4 logistical aspects of it; in other words, recruitment,
5 financing, ICT, and essentially every organisational
6 aspect. 14:11

7 429 Q. Now, I think following on Mr. Guerin's report in May
8 2014, you had an involvement with two particular
9 things, those being the setting up of the O'Higgins
10 Commission and also the Independent Review Mechanism? 14:11

11 A. That's correct.

12 430 Q. If we could first of all take the Independent Review
13 Mechanism.

14 A. Yes.

15 431 Q. As I understand it, this was set up following
16 Mr. Guerin's report, is that correct? 14:11

17 A. That is correct.

18 432 Q. And why was it set up?

19 A. It was set up because at the time, in that first
20 quarter of 2014, there were many, many Garda
21 controversies, as we all know. There was obviously the
22 controversy surrounding Sergeant McCabe, that was
23 probably first and foremost in our minds, but there
24 were many other things as well. There were other
25 allegations of Garda misconduct, and they had come in
26 to the Department and they'd also come into the office
27 of the Taoiseach as well. So we were conscious that,
28 clearly the issues raised by Sergeant McCabe had to be
29 addressed, and they had, in particular, arisen because, 14:12

1 in February 2014, Micheál Martin, the leader of the
2 opposition -- of Fianna Fáil, had handed over to the
3 Taoiseach a dossier of documents and that led to
4 getting Séan Guerin to review those documents and those
5 concerns. And as I say, we were conscious that we were 14:12
6 going to have to face up to those, but also, we had to
7 find some mechanism to deal with all the other
8 allegations that were coming out, both in the Dáil and
9 in the media. Like, at that point in time, I'd say
10 barely a week went back -- in fact, sometimes barely a 14:12
11 day went by when there wasn't some fresh Garda
12 allegation being raised on the floor of the House.

13 433 Q. Okay. And I think the model that the Independent
14 Review Mechanism followed was, seven barristers were
15 appointed in all, two senior counsel and five junior 14:13
16 counsel, and they were to review each of the
17 allegations of Garda misconduct?

18 A. That's correct.

19 434 Q. And report back to the Minister?

20 A. That's correct. And it was made clear that this was to 14:13
21 be a paper exercise, that they were simply to look at
22 the papers that were on hand. Now, there was some
23 criticism of that, in that, almost by definition, it
24 was, if you like, a one-sided examination, because, in
25 many cases, what the counsel had in front of them was a 14:13
26 letter or an email or some documentation from the
27 complainant. And the counsel were not to interview
28 people, they were not to conduct any investigation
29 themselves. So essentially what we had was, we had

1 eventually 320 cases, and there were effectively calls
2 for commissions of investigation into some or many of
3 them, which clearly wasn't practical. So really, what
4 the IRM amounted to was a triage of the outstanding
5 complaints, to see which of them would merit further 14:14
6 examination. And, in that, we gave some guidance to
7 counsel. Now, we made it clear it was up to them as to
8 what their final recommendation was. But in cases
9 where they were going to recommend further action --
10 and I should pause here and say that in the vast 14:14
11 majority of cases they recommended no further action; I
12 would say, from memory, in over 90% of cases they
13 recommended no further action, because in many, many
14 cases they were dealing with people who had been true
15 due process; they had been, for example, to GSOC, 14:14
16 that's the Garda Ombudsman Commission, or they had been
17 to court, or they had been to some other forum, and
18 they were disappointed, perhaps legitimately from their
19 point of view, but they were disappointed with the
20 outcome, but they had been through due process. But in 14:15
21 those cases where counsel were going to recommend
22 further action, there was an expectation that they
23 would make -- that they would avail of the existing
24 statutory possibilities. So, kind of, in escalating
25 scale, they could, for example, recommend that the 14:15
26 Minister might refer a case to GSOC, and she had
27 legislative power to do that. They could recommend
28 that the Minister establish an inquiry under section 42
29 of the Garda Síochána Act 2005. That is a fairly

1 light-touch statutory inquiry; people don't give
2 evidence on oath. But in more serious cases, it was
3 acknowledged that they could, if they felt it
4 appropriate, recommend that a case be referred to a
5 commission of investigation. So, just to be clear, 14:16
6 what happened was that Séan Guerin reported on the 6th
7 May 2014.

8 435 Q. Yes.

9 A. A week later, the Cabinet considered that report and
10 came to a number of decisions. One decision was to 14:16
11 establish a commission of investigation along the lines
12 recommended by Mr. Guerin, albeit that the terms of
13 reference were to be settled later on, and they also
14 decided to establish the Independent Review Mechanism
15 with counsel. 14:16

16 436 Q. Okay.

17 A. So it was a formal Cabinet decision.

18 437 Q. So in relation to the Independent Review Mechanism, one
19 of the cases they considered was the Ms. D complaint,
20 is that correct? 14:16

21 A. That's correct. What happened was that on the 30th
22 April 2014, Micheál Martin, the leader of Fianna Fáil,
23 transmitted to the Taoiseach an email, I think it was,
24 that he had received from Ms. D, wherein, I think -- I
25 think Ms. D, in fact, copied to Micheál Martin an email 14:17
26 that she had previously sent to Séan Guerin, and she
27 had heard that Séan Guerin was looking at cases of
28 alleged Garda misconduct and malpractice and she asked
29 him to take her complaint on board; that is to say, her

1 complaint that her original allegation had not been
2 properly investigated. Séan Guerin explained that that
3 did not come within his terms of reference. And as I
4 say, she contacted Micheál Martin, who passed this on
5 to the Taoiseach. That was on 30th April 2014. Now, 14:17
6 whether or not there is any question of that ever
7 happening, is moot, because on 6th May Séan Guerin
8 reported. We in the Department of Justice got that
9 letter from the office of the Taoiseach on the 7th May.
10 So there was no question of re-opening Séan Guerin's 14:18
11 review. That moment had passed. So, therefore, we now
12 had a situation where we had this complaint by Ms. D,
13 which effectively became one of the many complaints we
14 had on hand, and therefore it became one of the
15 complaints to go into the IRM process. 14:18

16 438 Q. Okay. It was dealt with in the IRM process, that's
17 correct, isn't it?

18 A. That's correct.

19 439 Q. Was it considered for inclusion in a commission of
20 investigation or the O'Higgins Commission of 14:18
21 Investigation?

22 A. One of the issues we discussed with counsel was that,
23 as I've said, that in what we thought would be very
24 rare cases, very serious cases, where they thought
25 something was so serious that it might warrant 14:19
26 examination by a commission of investigation, we were
27 conscious that, at the same time, we were in the
28 process of setting up what would be the O'Higgins
29 Commission of Investigation, and therefore it was an

1 option open to counsel, not only to recommend that a
2 case would go to a commission of investigation but that
3 it could go to the O'Higgins -- what would be the
4 O'Higgins Commission of investigation. Now, counsel
5 understood that, but they made clear that, in their 14:19
6 view, they would only recommend a case for inclusion in
7 the O'Higgins terms of reference if there was some
8 thread connecting such a case to the O'Higgins remit,
9 by way of location, Garda station, Garda district,
10 Garda division or personnel. They wouldn't simply 14:19
11 pluck a case out of context, so to speak, and recommend
12 it go into the O'Higgins remit. So that was an option
13 open to them. So that posed a choice for us, in that
14 here we had a Government decision to establish what
15 would be the O'Higgins Commission of Investigation, but 14:20
16 we also had this IRM process in parallel. And we
17 sent -- I should explain that as part of the, at times,
18 frenetic activity in responding to all the Garda
19 pressures, that, in April 2014, the Government had
20 established a Cabinet Committee on Justice Reform, and 14:20
21 therefore all Garda matters went to Cabinet through
22 that Cabinet Committee. So in late July we sent a
23 paper to the Cabinet Committee outlining where we were
24 on developing the terms of reference for what would be
25 the O'Higgins Commission of Investigation and also 14:20
26 explaining that there was this parallel process that
27 possibly could yield a case to be included in that.
28 Now, we had no particular case in mind, I should
29 emphasise that.

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we had got legal advice to make clear that we couldn't, and we had thought of this, we couldn't establish the Guerin -- sorry, the O'Higgins Commission of investigation and add in some kind of open-ended additional term of reference, you know, to the effect that he could also look at any case subsequently referred to, to him by the Minister. The Commissions of Investigation Act requires specificity. So we couldn't do that. So the choice, therefore, was that we either went ahead and established the O'Higgins Commission of Investigation, this is in the summer of 2014, and then if there were any recommendations from the IRM in the autumn for any case to go to a commission of investigation, we would have to set up another commission of investigation, or we could hold on until the autumn, establishing the O'Higgins Commission of Investigation, to see if the IRM would produce any cases. So, in July, late July 2014, the Cabinet Committee agreed that position. So then, over the summer, counsel for the IRM continued their work. In October, we got a paper from them, essentially saying that they had narrowed down -- sorry, could I pause here and say that --

14:21

14:21

14:21

14:22

440 Q.

Yes.

14:22

A.

-- we asked them to try and kind of focus, first of all, on sifting through all their cases, to see would there, in fact, be any cases that looked so serious that they might warrant a referral to a commission of

1 investigation, because we didn't want to hold on for
2 too long. So they got back to us, and I think it was
3 in October they gave us a paper saying they had
4 narrowed it down to two possible cases that might
5 warrant a referral. One of those has no connection 14:22
6 whatsoever to these proceedings, and it dropped away;
7 ultimately they decided not to pursue it as a
8 recommendation for a commission of investigation. So
9 that left just one case that they thought might fit in,
10 and that was the case of Ms. D's complaint. And they 14:23
11 sent us a paper in which they -- and it was a
12 thoughtful paper, it set out the pros and cons. Going
13 back to my earlier point, essentially what they had in
14 front of them was Ms. D's complaint, so -- and, you
15 know, on its own, that is a very serious matter, 14:23
16 clearly. They recognise, however, that its inclusion
17 in what would be the O'Higgins terms of reference could
18 be very problematical, that it could make Sergeant
19 McCabe feel that he is being actually victimised rather
20 than vindicated and it could have an overall adverse 14:24
21 impact on the Commission itself. Their provisional
22 conclusion in this report in October was that, prima
23 facie, it would be a good fit with the O'Higgins
24 Commission of Investigation, but that they recommended
25 that the Minister and the Attorney General should 14:24
26 discuss the matter with whoever is going to be the
27 Chair, who of course turned out to be Judge O'Higgins,
28 to see if he or she would agree with that. So this
29 proposition seemed to me to be very problematical. I

1 fully shared their concerns about the possible adverse
2 impacts and I was looking at it from a wider
3 perspective as well, not just a legal perspective. I
4 fully appreciated that this would be very, very
5 controversial. For this IRM process to have looked at 14:25
6 320 cases and to have picked out just one case to go to
7 the O'Higgins Commission of Investigation, after that
8 one case to be this case, would have been
9 controversial, and, rightly or wrongly, fairly or
10 unfairly, it would have been seen as having the effect 14:25
11 of putting Sergeant McCabe on the back foot, if I can
12 put it like that, in the Commission of Investigation.

13
14 So if I could pause here just for a moment and just
15 explain one point: that even though counsel, from the 14:25
16 start, were advised that they simply had to work with
17 what they had, there was an important proviso, and we
18 did make clear that they could ask the Department for
19 additional -- to try to get additional information, if
20 that was possible and if they thought it was advisable. 14:25
21 So given that there was this provisional recommendation
22 that would have such profound consequences,
23 potentially, it seemed to me, it seemed obvious to me
24 that we should make every effort to make sure that any
25 such recommendation was, in fact, based on the widest 14:26
26 possible information. So I asked counsel if it would
27 be useful, if we could arrange it, if they could have
28 sight of the Garda investigation file, making it clear
29 it was their call. They responded to me by saying

1 that, in all the circumstances, it being such an
2 exceptional case, it would be useful. We made
3 arrangements with the Garda Síochána for counsel to see
4 the Garda investigation file in the Ms. D case, and
5 quite quickly afterwards they responded by saying that 14:26
6 they examined the file, they saw that the Gardaí had
7 investigated it, that Sergeant McCabe had been
8 interviewed under caution, he had given a statement,
9 the matter -- all relevant people had been interviewed,
10 the file had gone to the DPP, who had directed no 14:27
11 prosecution, as has been recommended by the file
12 itself, and the counsel's conclusion -- the IRM's
13 counsel's conclusion was that the Minister should take
14 no further action. So, once that advice was in, the
15 way was clear to establish the O'Higgins Commission. 14:27
16 Again, we reported back to the Cabinet Committee.
17 There was some to-ing and fro-ing between myself and
18 Richard Barrett in the Attorney's office about
19 fine-tuning the terms of reference. They were almost
20 verbatim as recommended by Séan Guerin, with just three 14:27
21 small technical differences. And we proceeded on that
22 basis.

23 441 Q. Okay. So am I correct in saying that prior to the
24 Independent Review Mechanism having sight of the Garda
25 investigation file, all they had was Ms. D's complaints 14:28
26 in relation to her view of matters?

27 A. That's correct.

28 442 Q. They simply had a statement from Ms. D before that?

29 A. Essentially. That's my recollection, essentially,

1 to motivation. Now, I didn't understand -- I now
2 understand, of course, that the aspect of the Ms. D
3 allegation that had been raised was the DPP's decision
4 in relation to it. I didn't appreciate that subtlety
5 arising from my phone call, the phone call I received. 14:30
6 But just to make it absolutely clear, I didn't for one
7 second think that anyone, the Commissioner or anyone
8 else, was raising the Ms. D allegation as a matter of
9 substance. In other words, I didn't for one second
10 think that anyone was, as it were, re-accusing Sergeant 14:30
11 McCabe of any wrongdoing, because I was fully aware of
12 the Ms. D allegation from the IRM process, I was fully
13 aware of the Garda investigation that had gone to the
14 DPP, that there was no prosecution, so I knew that the
15 matter was closed. So that would have, as it were, 14:30
16 reinforced what Richard was telling me about the issue
17 of motivation being the focus.

18 449 Q. Okay. Did Mr. Barrett say anything to you? Did he
19 tell you why he was telephoning you?

20 A. I can't remember the exact details. 14:30

21 450 Q. Yes.

22 A. But clearly -- I mean, certainly the sense I got was
23 that he appreciated that this was a significant
24 development, and I've read -- of course I've heard the
25 evidence, and so on, and I know that one concern was 14:31
26 that there might have been a judicial review taken, and
27 that detail I cannot recall. But certainly I think
28 it's fair to say that Richard would have appreciated
29 that this was a very significant development because it

1 was a very sensitive matter.

2 451 Q. And did he say anything in relation to your role, that
3 you now had this piece of information and what you were
4 supposed to do with it, or was he suggesting to you
5 that you should do anything with this piece of 14:31
6 information?

7 A. No. My recollection, insofar as I can recall, and as I
8 say I really have quite a sketchy recall of exactly
9 what we discussed, but I think what I put in my email
10 is a fair summary, that we agreed that -- and this 14:31
11 certainly was my view, most certainly my view, that the
12 Minister and the Department had no role in relation to
13 this. That it was important to know, and I think
14 Richard was quite right to phone me, it was important
15 to know what was happening, but this matter, whatever 14:32
16 it was, and I wasn't completely clear on what the point
17 was, even in relation to motivation, I wasn't quite
18 sure where that argument was going, but it was being
19 raised at a private hearing of the O'Higgins
20 Commission. There was a distinguished judge presiding 14:32
21 over the hearing who would ensure fair play for all,
22 everyone was represented, and I was quite clear in my
23 mind that the Minister could have no role in it.

24 452 Q. I think you also spoke to the last witness -- or the
25 second-last witness, Mr. O'Leary? 14:32

26 A. That's correct.

27 453 Q. Could you tell the Tribunal what your memory of that
28 telephone conversation is?

29 A. Certainly. Although, once again, I do have to enter

1 the caveat, I can't remember the fine details of that
2 conversation. But I do remember my colleague, Ken,
3 saying that he had been speaking to the Commissioner,
4 who essentially had also told him that a row had broken
5 out at the O'Higgins Commission of Investigation that 14:33
6 day, and I have a general recollection that Ken told me
7 that he had taken the position that the Department
8 couldn't get involved in it, but that the Commissioner
9 had said something to him along the lines that she
10 would be continuing to talk to her legal team, 14:33
11 something to that effect. And that was the basis for
12 me including in brackets in my email that I understood
13 separately that the Commissioner may be taking legal
14 advice.

15 454 Q. Was there any sense at this stage, Mr. Flahive, that 14:33
16 the Department now had a problem to resolve insofar as
17 you've had phone calls from two separate sources, one
18 of them being the Attorney's office and the other being
19 from the Commissioner of An Garda Síochána, to say that
20 something had happened at the O'Higgins Commission, 14:34
21 which everybody agreed was sensitive, to put it at its
22 mildest, so was there any sense, in having had two
23 telephone calls, that there was now a problem
24 developing with regard to the O'Higgins Commission?

25 A. Oh, certainly, I had a sense that there was a problem 14:34
26 at the O'Higgins Commission. It was a significant
27 development. I felt I had to advise the Minister and
28 senior colleagues of it. As it happened, I had quite
29 recently at that stage given evidence myself at the

1 Fennelly Commission of Investigation where certain
2 issues had arisen, coincidentally, in relation to a
3 phone call I had received from the office of the
4 Attorney General, and the question had arisen as to who
5 I told. And, more generally, there had been issues 14:35
6 raised at that Commission about the recording of
7 information received, and so on. So I was very clear
8 that there was no question of me keeping this
9 information to myself. It was important for me to
10 advise people of what was happening, but at the same 14:35
11 time I was very clear in my mind - in fact, I still
12 am - that it would not have been proper, even if
13 possible, for the Minister to intervene in the matter.
14 455 Q. Okay. Well, if we can go back to what Mr. O'Leary said
15 this morning. I may be paraphrasing his words now, but 14:35
16 he said he felt a little bit uneasy about what the
17 Commissioner had told him or his conversation with the
18 Minister and going up the line with it, so as to speak,
19 is my understanding of what Mr. O'Leary said this
20 morning. 14:36
21 A. Mm-hmm.
22 456 Q. So was there a discussion between the two of you about
23 what you would do with this piece of information?
24 A. I'm sure there was. I can't remember the detail of it,
25 but I'm quite clear that -- and certainly, it would 14:36
26 have been agreed that I was going to tell the Minister
27 and the Secretary General what I had heard from the
28 office of the Attorney General. That's certain. In
29 fact, I would have done it anyway, because, as I say, I

1 had had reason to appreciate the importance of making
2 sure that everyone was told what they should be told.
3 So, yeah, it would have been -- certainly, Ken would
4 have been left with the understanding that I was
5 emailing the Minister, I have no doubt about that. 14:37

6 457 Q. Was there any suggestion that the conversation between
7 the Commissioner and Mr. O'Leary not be recorded in any
8 way whatsoever, be taken out of the story, so to speak?

9 A. I've no recollection of that. Like, certainly I wasn't
10 hiding anything in that regard. That line, albeit I 14:37
11 didn't attribute it to anyone, I did put in that line
12 in brackets which referenced the information I had got
13 from my colleague, Ken. So it simply was a matter, I
14 think, of me conveying the information that I had
15 received in my phone call, and that really was about 14:37
16 the size of it.

17 458 Q. Well, we know Mr. O'Leary told us this morning that he
18 was thinking about what he should do about the
19 information that he had received from the Garda
20 Commissioner. 14:37

21 A. Mm-hmm.

22 459 Q. And separately, you received more or less the same
23 information from Mr. Barrett. So the way of conveying
24 it up the line, so to speak, seemed to be that the
25 conversation with Mr. Barrett, to you, and thereafter 14:38
26 it would be sent via the Minister's private secretary
27 to the Minister?

28 A. Mm-hmm.

29 460 Q. But was there any suggestion that the conversation

1 between the Commissioner, whose decision it was, in
2 relation to the D allegation, and so forth, her
3 conversation with Mr. O'Leary, was there any sense that
4 there was something wrong with this insofar as it
5 wasn't in any way recorded or committed to writing? 14:38

6 A. No, I didn't get that sense. I certainly got a sense
7 that my colleague, Ken, was a little uneasy about even
8 discussing the matter, whereas it's entirely different
9 for myself to have a conversation with Richard Barrett.
10 So certainly, I did get that sense, that Ken had not 14:39
11 been anxious to get involved in any way, and I
12 completely understand his position. But in terms of my
13 email going up to the private secretary and other
14 people, I was conveying what I knew from my
15 conversation, and it really was as simple as that. 14:39

16 461 Q. And when you were speaking to Mr. Barrett, was there
17 any sense in your own head, look, this is something
18 which we've actually considered and decided not to make
19 part of the O'Higgins Commission and now here it is
20 again? was there any sense of alarm at that or 14:39
21 uncomfortableness, or anything of that nature?

22 A. Well, I can't recall the exact details. But I would
23 make the point that I think, first of all, there is a
24 difference in that what we had been, well, close to
25 contemplating, or what we might have had to 14:40
26 contemplate, if I put it like that, was including the
27 Ms. D complaint in a term of reference for Judge
28 O'Higgins, but that wouldn't necessarily have been a
29 public step. Obviously the terms of reference would

1 have gone before the Dáil and the Seanad, they would
2 have been published, it would have been a public
3 matter, and clearly, albeit the hearings were in
4 private, Judge O'Higgins would have had to report on
5 that in his final report. So again, that would have 14:40
6 been a public matter of a very -- on a very sensitive
7 issue, clearly. Whereas what was happening here,
8 however problematical, was of a different nature; it
9 was a private hearing, it was being raised and objected
10 to and being dealt with. So I just make that point, 14:41
11 that I think I would have had a sense that we're
12 talking about two obviously related things but
13 different things. So I'm not sure I had the sense, if
14 this is what you are suggesting, that this was being
15 introduced by the back door, so to speak. 14:41

16 462 Q. Yes.

17 A. I think that phrase has been used before. I don't
18 think I did. But I think it was -- we both recognised
19 it was a very sensitive matter, there's no question
20 about that. 14:41

21 463 Q. Right. Well, if we just turn to your email, it's at
22 page 3340 of the materials. We see it's from you to
23 Mr. Quattrociochi, I think that's the way it's
24 pronounced?

25 A. That's very correct, yes. 14:41

26 464 Q. I spoke to him. You also cc it to the Secretary
27 General's office, Mr. O'Leary and Mr. Power?

28 A. Yes.

29 465 Q. "Chris, could you pass this on to the Minister for

1 information, please.

2
3 I took a call this afternoon from Richard Barrett in
4 relation to the O'Higgins Commission of Investigation
5 which is investigating the matters identified by the 14:42
6 Guerin Report. The O'Higgins Commission had started
7 hearings and the Garda Síochána are represented by
8 counsel, as is Sergeant McCabe, in this case Michael
9 McDowell, Senior Counsel. Richard wanted to let me
10 know that counsel for the Garda Síochána has raised an 14:42
11 issue in the hearings, an allegation made against
12 Sergeant McCabe which was one of the cases examined by
13 the IRM. The allegation had been that a serious
14 criminal complaint against Sergeant McCabe, which he
15 has always denied, had not properly been investigated 14:42
16 by the Garda Síochána. The IRM found that an
17 investigation file on the case had in fact been
18 submitted to the DPP, who had directed no prosecution,
19 and the IRM, which because of the seriousness of the
20 allegation, had been considering whether to recommend 14:43
21 its inclusion in the O'Higgins terms of reference, in
22 the end recommended no further action by the Minister.

23
24 Presumably the Garda Síochána are raising the matter on
25 the basis they could argue and Sergeant McCabe would 14:43
26 deny that it is potentially relevant to motivation.
27 Richard advised me that counsel for Sergeant McCabe
28 objected to the issue being raised and asked whether
29 the Garda Commissioner had authorised this approach.

1 Richard also told me that the Garda Commissioner's
2 authorisation had been confirmed, although I understand
3 separately that this may be subject to any further
4 legal advice.

14:43

6 Richard and I agree that this is a matter for the Garda
7 Commissioner, who is being legally advised, and that
8 neither the Attorney nor the Minister has a function
9 relating to the evidence a party to the Commission of
10 Investigation may adduce.

14:43

12 Regards,
13 Michael."

14 A. Yes.

15 466 Q. That is your email?

14:44

16 A. Yes.

17 467 Q. Now, if we can just go back to the very --

18 Mr. Quattrociochi is the Minister's private secretary
19 and the line of communication to the Minister, is that
20 correct?

14:44

21 A. That's correct. Sometimes I and colleagues might email
22 the Minister direct, but more normally it would be
23 through the private secretary, because that would be a
24 better way of guaranteeing that the Minister would see
25 it.

14:44

26 468 Q. Okay. So this was the most reliable way to get the
27 Minister's attention, is that correct?

28 A. Yes, because there was a tried and trusted practice of
29 the private secretary following up any forwarding of

1 emails by printing off emails and showing them to the
2 minister. So it's the same system, by the way, that
3 applied with the sec gen office, collective address;
4 the point there was to make sure that the secretary
5 general would see an email.

14:45

6 469 Q. Then you say:

7
8 "I took a call this afternoon from Richard Barrett in
9 relation to the O'Higgins Commission of Investigation
10 which is investigating the matters identified by the
11 Guerin Report."

14:45

12
13 Was there any particular reason you explained that it
14 was investigating the matters identified by the Guerin
15 Report?

14:45

16 A. No, it's just explanatory.

17 470 Q. Explanatory. All right. You then say:

18
19 "The O'Higgins Commission started hearings and the
20 Garda Síochána are represented by counsel, as is
21 Sergeant McCabe McCabe, in this case Michael McDowell,
22 Senior Counsel."

14:45

23
24 Would you expect that people would understand that the
25 matters being investigated by the O'Higgins Commission
26 had its origins in a complaint made by Sergeant McCabe?

14:45

27 A. Oh, absolutely.

28 471 Q. Yes.

29 A. Oh, absolutely.

1 472 Q. And that sets the scene for that sentence, is that it?

2 A. Oh, yeah. I mean, everyone there would have -- well,
3 all the major players there would have known that the
4 Guerin Report related to allegations made by Sergeant
5 McCabe.

14:46

6 473 Q. "Richard wanted to let me know that counsel for the
7 Garda Síochána has raised an issue in the hearings, an
8 allegation made against Sergeant McCabe, which was one
9 of the cases examined by the IRM."

10

14:46

11 Now, if we can just look at that and see that what you
12 are saying there, it seems to me, is that the Garda
13 Síochána had raised an issue in the hearings, an
14 allegation made by Sergeant McCabe, is that what you
15 understood at that time?

14:46

16 A. Made against Sergeant McCabe?

17 474 Q. Yes.

18 A. Yes.

19 475 Q. Yes, an allegation made against Sergeant McCabe?

20 A. I understood that the issue of the Ms. D allegation had
21 been raised.

14:46

22 476 Q. Okay.

23 A. As I say, I now understand that the aspect of it that
24 was raised was the decision of the DPP in relation to
25 it. I didn't quite know what aspect was raised. I was
26 simply saying that the issue of Ms. D's allegation had
27 been raised.

14:46

28 477 Q. Okay. And you're explaining then that that was one of
29 the cases examined by the IRM?

1 A. Yes.

2 478 Q. You continue on there. Now, surely the Minister who
3 was getting this would immediately know that the issue
4 at the hearings of an allegation made against Sergeant
5 McCabe was specifically excluded at the end of the day 14:47
6 by the IRM for inclusion in the O'Higgins Commission?

7 A. The Minister would have been aware of that, as would we
8 all, at a senior level.

9 479 Q. So that sentence conveys that, that something on a
10 departmental level, if I can put it that way, or a 14:47
11 political level, was being raised at the O'Higgins
12 Commission which the politicians had decided shouldn't
13 be included in the O'Higgins Commission?

14 A. Well, perhaps if I could explain it in this way --

15 480 Q. Certainly. 14:47

16 A. -- and if you just bear with me for a moment, just to
17 explain that the reason I described it in that way is
18 that I didn't want to, and I think I refer to this in
19 my statement, I didn't want to explicitly refer to the
20 phrase "an allegation of sexual assault", because even 14:48
21 though this was a very limited email circulation at a
22 high level, emails, as we all know, can just get -- be
23 forwarded on sometimes by mistake, sometimes without
24 thought, and they can escape into a wider circulation,
25 and this is too sensitive a matter, in my view, to use 14:48
26 explicit language in relation to it. So that's why I
27 used the description of this being one of the cases
28 examined by the IRM, and I went on in the next sentence
29 to explain what that allegation had been. And in doing

1 so, I accept that I am talking about two allegations:
2 the allegation made by -- sorry, against Sergeant
3 McCabe, and then the matter that was examined by the
4 IRM. But in terms of the point you're putting to me, I
5 would go back to what I said a few moments ago, that 14:49
6 certainly from my perspective, I think there was, and
7 is, a difference between what, if you like, had been
8 decided, which is to accept the recommendation of IRM
9 counsel --

10 481 Q. Yes. 14:49

11 A. -- not to include Ms. D's complaint in the terms of
12 reference of the Commission of Investigation, which
13 would have been a public listing of this issue and
14 requiring a public report on this issue, and it being
15 raised as an issue somehow connected with motivation at 14:49
16 a private hearing. So I completely accept, obviously,
17 that they are related, but I'm just making the point
18 that I don't think it is quite the same thing. But
19 certainly the whole point of my using that kind of
20 language was designed to be discreet, on the one hand, 14:49
21 but still be understandable by the people to whom I was
22 addressing the email.

23 482 Q. Okay. If we look at maybe the last sentence of that
24 paragraph:

25 14:50
26 "The IRM found that an investigation file in the case
27 had in fact been submitted to the DPP who had directed
28 no prosecution and the IRM, which, because of the
29 seriousness of the allegation, had been considering

1 whether to recommend its inclusion in the O'Higgins
2 term of reference, in the end recommended no further
3 action by the Minister."
4

5 So I suppose what I am suggesting to you really, 14:50
6 Mr. Flahive, is that this paragraph is very clear in
7 what it is saying in one way, insofar as saying that
8 there is an investigation into an allegation made
9 against Sergeant McCabe; it, the IRM, found it had been
10 properly investigated, the DPP said no further action 14:50
11 should be taken, and we didn't include it in the
12 O'Higgins Commission. So one of the meanings that
13 could be taken from this paragraph is that something
14 which should be consigned to the history books was now
15 appearing in the O'Higgins Commission, and one way of 14:51
16 looking at that paragraph is a very carefully drafted
17 paragraph to make sure that that is what is being
18 conveyed upwards to the Minister?

19 A. Well, I was drafting it to be absolutely clear what the
20 case was about. 14:51

21 483 Q. Yes.

22 A. Because I wasn't -- I wasn't naming the case, I wasn't
23 specifying that it was to do with the allegation of
24 sexual assault, so I had to try and make it
25 understandable that this was, in fact, the case. But 14:51
26 one of the issues was, and this is a core issue, we
27 didn't have -- I didn't have and we didn't have the
28 facts. We didn't know exactly what was being raised.
29 I knew that the issue of the allegation, or some aspect

1 of the issue had been raised, and that, as I go on to
2 say, that there was some connection with motivation,
3 but we didn't know exactly what was being said, we
4 didn't know what the legal advice was, we didn't know
5 what the evidence, if any, was. I certainly didn't
6 know where the motivation argument was going; you know,
7 whether it was going to be that, for example, Sergeant
8 McCabe was in some way resentful, or something like
9 that. That doesn't necessarily go to credibility. So
10 we didn't know what had been said, what was being
11 argued or where it was going. So we didn't -- I
12 certainly didn't conclude that it was anything like the
13 same issue that had been faced by us.

14:52

14:52

14 484 Q. Okay. And, in fairness, you go on in the next
15 paragraph to say:

14:52

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

14:52

20
21 Then you say:

22
23 "Richard advised me that counsel for Sergeant McCabe
24 objected to the issue being raised and asked whether
25 the Garda Commissioner had authorised this approach.
26 Richard also told me that the Garda Commissioner's
27 authorisation had been confirmed, although I understand
28 separately that this may be subject to further legal
29 advice."

14:53

1 A. Yes.

2 485 Q. Now, if we can just look at your understanding
3 separately and where that came from and perhaps you
4 could explain that.

5 A. The words in brackets? 14:53

6 486 Q. Yes.

7 A. That flows from my conversation with my colleague, Ken
8 O'Leary, and, as I was saying, while I can't recall his
9 exact words, the sense I got from my colleague, Ken,
10 was that even though he hadn't got into a detailed 14:53
11 examination with the Garda Commissioner in his phone
12 call, that the Commissioner had said something to the
13 effect or something along the lines that she would be
14 engaging with her lawyers or discussing the matter
15 further with her lawyers, and that was my attempt at 14:54
16 summarising that.

17 487 Q. Okay.

18 A. It's as simple as that.

19 488 Q. And then the final paragraph:
20 14:54

21 "Agreeing that it is a matter for the Garda
22 Commissioner who is being legally advised and that
23 neither the Attorney nor the Minister has a function
24 relating to the evidence a party to a commission of
25 investigation may adduce." 14:54

26

27 Now, just in relation to that, was there any discussion
28 as to somebody on the Minister's behalf going in to the
29 Commission of Investigation and putting it on the

1 record that the D allegation was not part of the terms
2 of reference, although it had been considered prior to
3 settling the terms of reference?

4 A. Any discussion between myself and Richard or more
5 generally --

14:54

6 489 Q. Or yourself and Mr. O'Leary, or yourself indeed and
7 anybody else?

8 A. Well, that is easily answered. The answer is no, there
9 was no discussion.

10 490 Q. Yes.

14:55

11 A. And my position and my advice was very clear. Now, it
12 was open to anyone else to disagree with me, but my
13 position was, and still is very clear: we weren't
14 party at that stage to the O'Higgins Commission of
15 investigation. We were involved in a different module
16 that was considered later on - in fact, I myself gave
17 evidence at it. And at that stage we were represented
18 by counsel. But at this stage we weren't involved and,
19 as I say, we didn't know the facts, we didn't know
20 exactly what was being argued. But as I say, I did
21 know that it was being presided over by a distinguished
22 judge. Sergeant McCabe was ably represented by senior
23 counsel, who did object to this. So the system was in
24 place to handle it. And I regarded the Commission of
25 Investigation as a body that simply could not be
26 interfered with in that way, and that the Minister
27 could not intervene. And I know it has been suggested
28 as well by commentators that perhaps you could have,
29 somehow, separately, or in some kind of parallel

14:55

14:55

14:55

1 process, asked the Commissioner, you know, what was she
2 doing, and maybe challenged what she was doing. I
3 equally think that that would have been inappropriate.
4 491 Q. well, I suppose maybe if I just explore that slightly.
5 You have this information and it is now with you, 14:56
6 regardless of the fact that maybe you thought you'd be
7 better off not knowing about it. You have it from two
8 different sources: you have it from the Commissioner
9 and you have it from the Attorney's office. So one of,
10 perhaps, the cleanest or neatest way in setting the 14:56
11 Department's position on the record would have been
12 simply to go into the Commission of Investigation,
13 through counsel correctly instructed by solicitor, and
14 say to the Commission of Investigation that the terms
15 of reference had been carefully considered and the 14:57
16 matter in relation to the D investigation was
17 specifically excluded from the terms of reference, and
18 leave it at that.
19 A. well, as I say, we weren't aware of what was going on
20 in any detail -- 14:57
21 492 Q. Yes.
22 A. -- at the O'Higgins Commission of Investigation. So
23 what we had decided in terms of the Department, but
24 ultimately the Minister, in accepting the
25 recommendation of counsel not to refer the D allegation 14:57
26 to the Commission of Investigation, that was a decision
27 on that matter. But it isn't necessarily the same
28 thing for this to be raised at the Commission. In
29 other words, as I understand it, not that I did have a

1 very clear understanding of the facts at all, but it
2 wasn't the same issue that was being raised in the same
3 way. Obviously it's very closely related, but we
4 simply didn't know what the facts were, we didn't know
5 what the advice was, we didn't have details of the 14:58
6 legal debate that was going on in the Commission. And
7 I firmly believed - as I say, it was open to people to
8 disagree with me - I firmly believed that it would not
9 be appropriate for the Minister to intervene, even if
10 it were possible. 14:58

11 493 Q. Yes. Well, if you didn't know all of the facts,
12 perhaps it made it more important that you consider
13 going into the Commission and setting out what the
14 terms of reference is, if there was any possibility of
15 them -- the Commission's work being derailed, whether 14:58
16 it be considering something it shouldn't be considering
17 or whether it be that matters of a confidential nature
18 would end up in the High Court in a judicial review?

19 A. Well, if something was being raised that wasn't
20 relevant to the terms of reference, it'd be a matter 14:59
21 for Judge O'Higgins to stop that in its tracks. That
22 was one of the points of having such a judge in charge
23 of this Commission. The 2004 Act does not require a
24 judge to be a chairperson. We, here, had a
25 distinguished judge who I was absolutely confident 14:59
26 would ensure that extraneous matters were not
27 permitted. So if anyone objected, and of course there
28 was an objection, that something was being raised that
29 was outside the terms of reference and was not

1 relevant, then I was confident that was there checks
2 and balances in place to deal with that.

3 494 Q. Okay. Thanks. I think you received an email from
4 Mr. Quattrociochi at 17:05, and that's at page 3341,
5 notifying you that he'd flagged the matter to the 15:00
6 Minister?

7 A. That's correct.

8 495 Q. Did you yourself speak to the Minister about it at any
9 time?

10 A. No. 15:00

11 496 Q. And are you aware that anybody spoke to the Minister
12 about it at any time?

13 A. To the best of my recollection, I heard nothing back in
14 relation to my email.

15 497 Q. Except other emails? 15:00

16 A. Except, sorry, of course, the other emails. But there
17 was no subsequent conversations, that is what I meant.

18 498 Q. All right. Now, Mr. O'Leary emailed you at five
19 o'clock in relation to the matter. That's at page 3342
20 of the materials. What he says is: 15:01
21
22 "That's grand, Michael. Thanks."
23

24 Did you understand that to be confirmation that the
25 email you had sent to the Minister met with his 15:01
26 approval?

27 A. No. I took that to mean, more or less, just thank you,
28 that's fine. There was nothing more to it than that.

29 499 Q. Well, I suppose you'd discussed the matter with him

1 earlier on and he was your direct superior, is that
2 correct?

3 A. He was, yes.

4 500 Q. Yes.

5 A. And, yes, he was noting the fact that I had indeed 15:01
6 emailed the Minister's private secretary and the
7 Secretary General. So he was, in effect, noting that
8 with approval.

9 501 Q. Okay. Then we have an email from Mr. Griffin to you on
10 18th May, which is at page 3348, and that says: 15:01
11
12 "Michael, noted by Acting Secretary General, Denis."

13 A. Yes.

14 502 Q. Who is Mr. Griffin, if you could explain that?

15 A. Denis Griffin is the -- was the private secretary to 15:02
16 the Secretary General.

17 503 Q. Okay.

18 A. And the purpose --

19 504 Q. 3343. Sorry. Yes.

20 A. And the purpose of emailing the collective address sec 15:02
21 gen office, which includes -- or included Denis
22 Griffin, and it also included three other officials,
23 was to have the private secretary ensure, a bit like
24 the private secretary to the Minister, to have Denis
25 Griffin ensure that the Secretary General would see the 15:02
26 email, and that could be achieved by forwarding on that
27 email and just asking him had he seen it or actually
28 handing him a printed copy. The reason there's a
29 collective address with three other people in it is

1 that if the private secretary, Denis Griffin, isn't
2 there for a particular reason, perhaps he might be out
3 sick or on leave for some reason, somebody else would
4 step into the gap and do that job. In the event, Denis
5 Griffin was there and he did carry out that task, so, 15:03
6 in fact, the other officials had nothing to do
7 whatsoever.

8 505 Q. In fact, the Acting General Secretary was Mr. Waters at
9 that stage?

10 A. That's correct. 15:03

11 506 Q. Did you speak to Mr. Waters about the matter?

12 A. No.

13 507 Q. We have an email at page 3344 of the materials from
14 Mr. Quattrociochi to you and it's dated 25th May 2015.
15 what he says is: 15:03

16

17 "Michael, the Minister has noted the below."

18

19 Is that a standard answer?

20 A. Yes, it is. 15:03

21 508 Q. Yes. What do you take from that, if it's a standard
22 answer? Does it mean anything in particular?

23 A. It means that the Minister had read and understood the
24 communication.

25 509 Q. Okay. 15:03

26 CHAIRMAN: Was that the first, if you like, bounce of
27 the ball backwards? There was nothing on the 15th or
28 18th, was there?

29 MS. LEADER: Not from the Minister.

1 CHAIRMAN: Not from the Minister. But from
2 Mr. Quattrociochi?
3 MS. LEADER: Yes.
4 510 Q. So I'm correct in saying that nobody, except
5 Mr. Quattrociochi, spoke to the Minister about the 15:04
6 communication from the Commissioner of An Garda
7 Síochána?
8 A. Spoke to the Minister?
9 511 Q. Spoke to the Minister about the communication from the
10 Commissioner of An Garda Síochána? 15:04
11 A. Sorry, which communication?
12 512 Q. The Friday evening communication, the phone call to
13 Mr. O'Leary?
14 A. Oh, sorry, I'm not aware of any --
15 513 Q. From the Commission, on the Friday afternoon? 15:04
16 A. To my colleague Ken O'Leary?
17 514 Q. Yes.
18 A. Yes. And you're asking me was that --
19 515 Q. To your knowledge, did anybody speak to the Minister
20 about that? 15:05
21 A. I have no knowledge of that, no. As far as I know, no.
22 516 Q. Did you speak to the Minister about that?
23 A. I did not.
24 517 Q. Was there any particular reason that you didn't speak
25 to the Minister about that? 15:05
26 A. Well, I had sent my email to the Minister and to the
27 Acting Secretary General, copying in a few colleagues,
28 and I believe that my message was self-contained. It
29 contained advice that, as I say, people were free to

1 disagree with, although I firmly believed in it, and
2 still do, and, as it happens, nobody, apart from these
3 emails effectively noting what I was saying, nobody
4 sought a substantive discussion on the matter.

5 518 Q. You see, at one level your email was telling the 15:05
6 Minister about something which you have described as
7 sensitive and also which generated emails in her
8 direction and also a conversation that you had with Ken
9 O'Leary, yet you're telling the Minister that she has
10 no function in relation to the matter, and I wonder if 15:06
11 you could tell us why you were telling her you had no
12 function in relation to the matter and why you didn't
13 speak to her about it?

14 A. Well, I believed that this, as I said, was a matter
15 about which we weren't clear, we didn't have the facts, 15:06
16 but it was a matter being raised within the Commission
17 of Investigation. Clearly it was a controversy; like,
18 by definition, it was being strongly objected to by
19 counsel for Sergeant McCabe, and that legal debate was
20 going on within the Commission. It was being presided 15:06
21 over, as I said, by a distinguished judge. The
22 Commissioner herself had legal advice and was going to
23 continue to have legal advice. The Minister was not a
24 party to the Commission. And I personally didn't see
25 any basis for the Minister to make an intervention, and 15:07
26 that was my advice. So, from my perspective, there was
27 no further action possible in that direction at that
28 time.

29 519 Q. I think you were also copied into an email that was

1 opened by Mr. O'Leary this morning in relation to a
2 press query in July of 2015?

3 A. That's correct. I remember it.

4 520 Q. And I don't think you took -- is it correct to say you
5 didn't take any action in relation to that? 15:07

6 A. No, in fact, I do remember getting it. It was a
7 Saturday evening and from my perspective --

8 CHAIRMAN: This is at 3484, is it? I think it is,
9 anyway.

10 MS. LEADER: I don't have a page reference for it. 15:08

11 CHAIRMAN: It's 3484, I believe.

12 MS. LEADER: 3484.

13 A. But I was quite happy that my colleague, Ken O'Leary,
14 had dealt with the matter. He had received this query,
15 he had forwarded advice, a line to take, as we say in 15:08
16 the jargon, to the Minister, in case this arose the
17 following day in a media interview, which in the event
18 it didn't, as I understand it. So I was quite happy
19 that my colleague, Ken O'Leary, had dealt with that and
20 there was no input needed from me. 15:08

21 521 Q. Okay. These weren't matters that you forgot about in
22 the intervening time, between 2015 and this November,
23 is that correct to say? I think you said you
24 remembered getting the email, the July email?

25 A. For some reason, I do remember getting that email, yes. 15:09

26 522 Q. And is there any reason statements -- you didn't make a
27 statement available to the Tribunal until November of
28 this year, or maybe December?

29 A. Well, I clearly made a statement when I was asked to

1 make a statement.

2 523 Q. November.

3 A. And I was very happy to do that. But in relation to my
4 email, and of course my statement flows from my email,
5 I had no involvement in the discovery process. I left 15:09
6 this area, Garda division, or Policing Division, as
7 it's now called, at the end of August 2015, so I simply
8 had no involvement in the discovery process. And I'm
9 not saying that in a critical way, I'm saying that in
10 just a factual and neutral way. And plus, of course, 15:09
11 my email was not my exclusive property; a number of
12 people had it. But I simply did not know what was
13 being discovered to the Tribunal or in what order. I
14 presumed that there was a process underway and in due
15 course I would give a statement, which I did. 15:10

16 524 Q. Okay. Were you aware the Chairman made a -- gave a
17 public address in February of last year, asking for
18 people who had knowledge of the terms of reference to
19 make a statement or tell the Tribunal about it?

20 A. Yes, I was. 15:10

21 525 Q. But you didn't at that time?

22 A. Well, I didn't interpret that as applying in the same
23 way to everyone. I interpreted the process as the
24 Department having itself a process in place, rather
25 than individual officers sending in statements and 15:10
26 disclosing documents. I very much imagined that there
27 would be a central process in the Department which
28 would be discovering documents which would then lead to
29 statements being made. Now, if I was mistaken in that,

1 I regret that, but that was my understanding.

2 526 Q. So you were relying on a request from somebody within
3 the Department?

4 A. I was relying on an official engagement between the
5 Department and this Tribunal to discover documents, and 15:11
6 I sincerely believe that that was the process that was
7 in place.

8 527 Q. Were you aware at any time that the Commissioner sent
9 emails to the Minister's Oireachtas account?

10 A. You mean generally or -- 15:11

11 528 Q. Yes. Emails?

12 A. I don't?

13 529 Q. We've seen emails opened before the Tribunal.

14 A. I have seen those. I don't believe I ever recall
15 seeing that, no. 15:12

16 530 Q. And in relation to Mr. Waters' email address, there
17 seems to be a suggestion that emails which were sent to
18 him didn't get to him because of the insertion of an
19 initial in his email account. Do you have any
20 knowledge of that? 15:12

21 A. I saw the evidence, but I've no knowledge of that.

22 MS. LEADER: Okay. If you would answer any questions,
23 please.

24 A. Thank you. 15:12

25

26 MR. MICHAEL FLAHIVE WAS CROSS-EXAMINED BY MR. McDOWELL:

27

28 531 Q. MR. McDOWELL: Good afternoon, Mr. Flahive.

29 A. Good afternoon.

- 1 532 Q. Could I ask you about, you've said that in the period
2 from 2014 to 2015 a number of things had happened, and
3 one of them was that arising out of the, I suppose
4 we'll put a neutral term, controversy about the
5 Department of Justice, that a Cabinet Committee was 15:13
6 established, a subcommittee of the Cabinet, was it?
7 A. Yes. It was chaired by the Taoiseach. It was
8 established in April 2014.
- 9 533 Q. And I take it the Minister was allowed to attend the
10 Cabinet -- was she Tánaiste at the time? She was, 15:13
11 or --
12 A. She wasn't. I think Joan Burton might have been
13 Tánaiste.
- 14 534 Q. Sorry, yes, so she was Minister --
15 A. And the Minister attended, as did another minister, I 15:13
16 think the Minister for Communications, Marine and
17 Natural Resources, and the Attorney also attended as
18 she would be Cabinet.
- 19 535 Q. I see. So effectively there was kind of a specialist
20 committee established to look at reform of the 15:13
21 Department of Justice, is that right?
22 A. Broadly speaking, that is correct.
- 23 536 Q. And not merely was it concerned with reform, but it was
24 during this post-crisis period, if I may put it that
25 way, there was a de facto situation that all policing 15:13
26 matters went through that subcommittee chaired by the
27 Taoiseach to go on to Cabinet or not to go on to the
28 cabinet as the case might be, is that right?
29 A. That's essentially correct.

1 537 Q. I see. And you were effectively under a kind of a, how
2 would I put it, a governance spotlight, would that be a
3 fair description?
4 A. That would be fair. That would be fair.

5 538 Q. And in that context, a number of things seemed to have 15:14
6 occurred. One, we know that Ms. D had caused a
7 complaint to be made to GSOC, charging that the
8 original Garda investigation into her complaint was
9 totally inadequate?
10 A. Yes. 15:15

11 539 Q. And that was up and running, wasn't it, from, I think
12 it was May or June of 2014?
13 A. I can't remember the exact dates. But around that
14 time, I believe it was.

15 540 Q. And a second thing had happened, and that was that 15:15
16 there had been reference to her allegations in Dáil
17 Éireann itself, isn't that right? Well, maybe I will
18 remind you. On the 19th June, former Minister Shatter
19 publicly called for her allegations to be included in
20 whatever post-Guerin commission of investigation was 15:15
21 established, isn't that right?
22 A. I recall that.

23 541 Q. And thirdly, you tell us that the IRM process had been
24 set up to deal with what was becoming a fairly
25 substantial number of complaints from all over the 15:16
26 place about misinvestigation, is that right?
27 A. That's correct.

28 542 Q. And I didn't quite pick up from you, one way or the
29 other, are we to take it that Sergeant McCabe's case or

1 Ms. D's case got into the IRM process by itself or was
2 it put there by Department?

3 A. Well, it couldn't get in by itself; it had to be put
4 in.

5 543 Q. Yes. 15:16

6 A. So, yes, it was included in all the cases. I should
7 explain that we had at that point a great many cases on
8 hand, and, as soon as the IRM process was announced in
9 principle, a lot more people wrote in. So some people
10 wrote in direct to the Minister, some people wrote in 15:17
11 through their TDs, saying that we have these -- you
12 know, I have this complaint and it hasn't been properly
13 looked at. Some people wrote in through an
14 organisation called 'Justice For All'. So we ended up
15 actually getting more complaints in. And we took a 15:17
16 decision, and this was approved at political level,
17 that we couldn't be seen to be in any way acting as a
18 filter; in other words, we didn't want anyone saying to
19 us, Department of Justice, you know, why did you stop
20 this complaint or that complaint going? So we took a 15:17
21 decision not to act as a filter. And the result was
22 that a very significant number of complaints, 320 in
23 total, I believe, went, and some of them at the lower
24 end of the scale were relatively unimportant. I know
25 every case is important to the person. But that's what 15:17
26 happened.

27 544 Q. Well then just going back to the particular manner in
28 which Ms. D's allegations ended up in the IRM. I just
29 want clarity; was it done as a result of a renewed

1 application by her that it should be done or was it
2 done by the Department on the basis that it was now
3 something on hand, that the Taoiseach had been handed
4 by Deputy Micheál Martin?

5 A. I think it's the latter. That's the best of my
6 recollection.

15:18

7 545 Q. So it was effectively, it was an executive decision to
8 put it into the IRM, is that right?

9 A. I suppose you could call it that. I mean, this was a
10 complaint that we had on hand, we had decided and the
11 Government had decided to put in place a system to deal
12 without standing complaints. This was an outstanding
13 complaint. So it was almost automatic consequent upon
14 the Government decision.

15:18

15 546 Q. Were you yourself conscious of the terms in which
16 Deputy Shatter had addressed the Dáil on the 19th June
17 2014?

15:18

18 A. I can't now recall it, to be honest, but certainly I
19 would have read it at the time, I've no doubt about
20 that.

15:19

21 547 Q. Well, my note of it was that he said:

22
23 "If the statutory inquiry is to be comprehensive, it
24 should include all cases dealt with in Bailieboro Garda
25 Station which had given rise to complaint. There is a
26 matter which has been the subject of articles in the
27 Irish Independent, which included a report of Deputy
28 Martin meeting an individual who alleged that she was
29 the victim of a sexual assault and her complaint was

15:19

1 not included on the Pulse system and did not result in
2 a prosecution. I understand from the newspaper report
3 that Deputy Martin was to provide information on the
4 matter to the Taoiseach and I presume that he has done
5 so. This case should clearly form part of any
6 statutory inquiry."

15:19

7
8 Was the Department alerted to the fact that its former
9 Minister, who is now about six or eight weeks out of
10 office, had made that demand?

15:20

11 A. We weren't alerted in advance. But clearly when he
12 said that, I can't --

13 548 Q. No, sorry, I wasn't suggesting that you were alerted to
14 a speech in advance. No, alerted by his speech to the
15 fact that he was making that demand?

15:20

16 A. Oh, yes, we were aware of that demand, yes.

17 549 Q. Yes.

18 CHAIRMAN: I think Ms. D had met with Minister Shatter.
19 And that has been the evidence so far.

20 MR. MCDOWELL: Shatter at that time, that's right, yes.

15:20

21 CHAIRMAN: And she took a particular view in relation
22 to that and felt that Micheál Martin was more helpful.
23 Now, I have absolutely no view in relation to that
24 whatsoever. But as to whether either of those
25 politicians was aware that the allegation was, in fact,
26 against Sergeant McCabe, is another matter. Because
27 the manner in which it went forward in the Irish
28 Independent was in a way that was neutral. Those who
29 were in the know would know, but those who were not in

15:20

1 the know would not know. I don't know that.

2 MR. McDOWELL: Well, I take it in the Department you

3 knew that this was Ms. D's allegation he was referring

4 to?

5 A. Yes. 15:21

6 550 Q. And that Sergeant McCabe was the object of the

7 complaint?

8 A. Yes.

9 551 Q. Or the investigation into --

10 A. We would have known, yes. 15:21

11 552 Q. Yes. Now, in that context you say that the process of

12 deciding the terms of reference of the O'Higgins

13 Commission commenced?

14 A. That's correct.

15 553 Q. And you started again, just to be quick about it, you 15:21

16 started on the basis of what Séan Guerin, Senior

17 Counsel, had recommended as the starting point for

18 considering the terms of reference, is that right?

19 A. Yes. And it ended up almost being the finishing point

20 -- there were only three minor changes to it. 15:21

21 554 Q. Yes. And you say that, and you've explained it, I

22 don't want to go back over it again, that the IRM

23 process left it open to the team of counsel who are

24 sifting through all of these 320 complaints, to look at

25 those complaints and to suggest various outcomes? 15:22

26 A. That's correct.

27 555 Q. And for those that required further action of a

28 non-commission of investigation type, it was the

29 provision in the Garda Síochána Act which allowed

1 informal lawyer-chaired inquiries under the statute, is
2 that right?

3 A. Yes. And I think there's about five of those which may
4 currently be underway.

5 556 Q. And then you say that of the possible cases that were 15:22
6 being considered for a full commission of
7 investigation, there were two, and one of them which we
8 don't know about and don't care about here today fell
9 away, leaving just one?

10 A. That's correct. 15:22

11 557 Q. And you were then faced with this, I suppose people
12 would say somewhat unusual situation, that in all of
13 the controversy, only one case had popped up which was
14 now a candidate for a commission of investigation, and
15 that happened to be the one about Sergeant McCabe? 15:23

16 A. That is correct.

17 558 Q. Now, you also told us that the provisional view of
18 counsel, of the team of counsel, was that that
19 particular case would dovetail with the Guerin proposed
20 terms of reference, is that right? 15:23

21 A. Yes. I think their phrase was prima facie.

22 559 Q. Yes.

23 A. It might be a good fit.

24 560 Q. Good fit.

25 A. But they are very careful to go on to recognise the 15:23
26 down sides and to say that, in the event of that
27 happening, there would have to be consultation between,
28 on the one hand, the Minister for Justice and the
29 Attorney, on the other hand whoever was going to chair

1 the commission.

2 CHAIRMAN: I think it was simply a geographical fit,
3 isn't that right? They were all Bailieboro-type,
4 Monaghan cases.

5 561 Q. MR. MCDOWELL: Well, I presume it was a seriousness fit 15:24
6 and a geographical fit, is that --

7 A. It had to be serious, by definition, to get to a
8 commission. But counsel, as I said, had made clear
9 that if they were ever going to recommend any case to
10 go to the O'Higgins Commission, there would have to be 15:24
11 a thread, I think that was their phrase, a thread
12 connecting any such case to the remit of Judge
13 O'Higgins by way of location or personnel.

14 562 Q. Can we put a timeframe on this, because it's of some
15 significance. Was -- are we now dealing with late 15:24
16 2014?

17 A. I would have got this paper containing this provisional
18 view in October.

19 563 Q. October, yes.

20 A. And I can't remember the date, I think around 15:25
21 mid-October.

22 564 Q. Yes.

23 A. And then we arranged for IRM counsel to see the Garda
24 investigation file.

25 565 Q. Can I stop you there? Was the decision to arrange for 15:25
26 counsel to be given unusual access to the Garda file in
27 this particular case, was that taken on foot of a
28 consideration at the Cabinet Committee?

29 A. No. I think it was -- I think I proposed it.

1 566 Q. You made that decision?

2 A. I proposed it. I may have discussed it with my
3 Secretary General, but I certainly proposed it.

4 567 Q. So that is departmental decision?

5 A. Essentially, yes. And if I can just pause and go back 15:25
6 to something I said earlier on, that even though
7 counsel were under instructions to simply look at the
8 papers they had, they were told from the start that if
9 they wanted any additional material, they could ask us.
10 So, in other words, I was effectively asking them did 15:26
11 they want to ask us to get this file, and they did.
12 And then just to round off on the dates, I remember it
13 was 11th November when counsel reported back and said
14 no further action.

15 568 Q. That was the 11th November? 15:26

16 A. That's my recollection, yes.

17 569 Q. And can you assist the Tribunal as to whether the --
18 conferring with the proposed Chair of the Commission of
19 Investigation did or did not happen, to your knowledge?

20 A. There was conferring, I understand, between the office 15:26
21 of the Attorney General and the Chair about the terms
22 of reference. But as far as I know, there was no
23 conferring about this because it didn't get to that
24 point.

25 570 Q. You say that it had stopped before then, had it? 15:26

26 A. Yes, that is my understanding.

27 571 Q. The idea had died out before --

28 A. Precisely, precisely.

29 572 Q. -- any such conferring could have taken place?

1 A. That is my understanding. And that, therefore, my
2 understanding is that the conferral or conferring with
3 the Judge was in relation to the fine-tuning of the
4 Séan Guerin recommended terms of reference, and, as I
5 say, there were only three minor changes made to that. 15:27

6 573 Q. So the position then is that, I just want to know from
7 you, was the position then that you had informed the
8 Minister and/or the Cabinet Committee of these events?

9 A. In October, we sent another paper to the Cabinet
10 Committee on Justice Reform, giving them the first 15:27
11 proper draft of the terms of reference for the
12 O'Higgins Commission, but also saying that, as regards
13 the IRM process, there was one -- it had boiled down to
14 one possible case for consideration for inclusion, but
15 that the counsel for the IRM were going to look at an 15:28
16 important file to decide the matter.

17 574 Q. And was the case identified?

18 A. No.

19 575 Q. I see. And was it ever identified?

20 A. To the Cabinet Committee? 15:28

21 576 Q. Yes.

22 A. Not that I'm aware of.

23 577 Q. I see. And so then we know that the Taoiseach made the
24 order establishing the O'Higgins Commission of
25 Investigation in February. I take it that, by that 15:28
26 time, you were quite clear in your mind that there
27 would have been a huge problem for Sergeant McCabe
28 participating in the O'Higgins Commission if he was
29 both quasi defendant on the Ms. D allegation and also

1 somebody was to give evidence of facts in relation to
2 all of the shortcomings of policing that he had
3 alleged, isn't that right?

4 A. I knew it would be both highly controversial generally
5 and also that it would be problematical within the
6 Commission, yes, I appreciated that. 15:29

7 578 Q. And did it ever strike you not merely that it would be
8 highly controversial, but that it would be grossly
9 unfair to him to put him in that position?

10 CHAIRMAN: Mr. McDowell, I appreciate the point you're
11 making. But I think the situation would be, let's
12 suppose the D case was referred, it would be the D
13 investigation. 15:29

14 MR. MCDOWELL: Yes.

15 CHAIRMAN: But the net result of that would, of course,
16 be, that Ms. D would have to say, well, this is what
17 happened to me. 15:29

18 MR. MCDOWELL: Yes.

19 CHAIRMAN: Now, in all the other ten cases which
20 actually did go, nobody challenged that, for instance,
21 the lady on the bus in Kingscourt, that actually did
22 happen to her, so this would have been, as you say,
23 very unfortunate. But in terms of the form of the
24 thing, it would have been the investigation that was
25 referred, as in all the other cases. 15:30

26 MR. MCDOWELL: Theoretically, it could have -- it would
27 have been dealt with exactly like all the other cases.

28 CHAIRMAN: Yes.

29 MR. MCDOWELL: But the man who was going to be asked

1 about his involvement in Lorraine Browne's case, and
2 all the rest of it, would know that Module 3 was where
3 he was going to be on the receiving end, effectively.
4 CHAIRMAN: Yes.
5 MR. MCDOWELL: Of the same business. 15:30
6 CHAIRMAN: No, I think I do get that point. So no
7 matter how it is, in fact, sent in terms of form, the
8 substance of the matter would have been very
9 unfortunate.
10 579 Q. MR. MCDOWELL: And as you pointed out yourself, firstly 15:30
11 it would have come to public knowledge, what case it
12 was that was being investigated?
13 A. Yes.
14 580 Q. Isn't that right?
15 A. Yes. That was my -- one of my concerns, yes. 15:30
16 581 Q. So that, I mean, Sergeant McCabe would have been
17 immediately subjected to public scrutiny in respect of
18 the D allegation because they would have said why are
19 they investigating this matter?
20 A. Well, it would seem to me that it would be difficult, 15:31
21 if not impossible, to examine Ms. D's subsequent
22 complaint without examining the underlying issue and
23 therefore --
24 582 Q. It would have had to have been in the terms of
25 reference? 15:31
26 A. Yes, that was my point, yes.
27 583 Q. And everyone would have said what's module (m) all
28 about?
29 A. Effectively, yes.

1 584 Q. So, in essence, it would have involved opening the
2 whole allegation to public awareness, isn't that right?
3 A. I believe so.

4 585 Q. Even before one day of the Commission had taken place,
5 the public would know that this was what was to happen 15:31
6 at some time during the Commission?
7 A. It would put it in the public domain and then the
8 report would have to deal with it in a public way.

9 586 Q. Yes. I see. Now, when you sought the Garda file in
10 relation to this allegation, did you seek the DPP's 15:32
11 file?
12 A. Well, first of all, I can't actually remember the
13 logistics of this, whether we arranged for the -- I
14 asked for this to be done, and I actually can't
15 remember if we arranged for the Gardaí to bring the 15:32
16 file down to counsel or whether counsel went up to see
17 the file. So I actually don't recall that detail. I
18 certainly don't have any personal recollection. I've
19 obviously heard and seen the evidence since of the
20 expanded explanation by the DPP, and I don't have any 15:32
21 personal recall of that.

22 587 Q. You made the arrangement for this to be done, isn't
23 that right?
24 A. Yes, I asked for it to be done, yes.

25 588 Q. And can you -- by doing so, you were informing at least 15:33
26 some members of An Garda Síochána that the IRM was
27 considering whether or not this particular issue should
28 be one of the terms of reference?
29 A. I presume that, necessarily, that must have been the

1 case, although I didn't personally do it, but it must
2 have been the case. We couldn't simply demand the file
3 and give no explanation.

4 CHAIRMAN: Sorry, Mr. McDowell, just one point where
5 there may be a misunderstanding there. The DPP file, 15:33
6 of course the DPP may note things, but the DPP file is
7 always the Garda file, and I think in terms of the DPP
8 file here, certainly what we got contains the DPP's
9 letter, which makes the Garda file the DPP file.

10 MR. MCDOWELL: That's true. 15:33

11 CHAIRMAN: Yes. And that is what would have gone to
12 counsel, I assume; in other words, the whole thing as
13 it came back --

14 A. The whole thing.

15 CHAIRMAN: -- from the DPP with the letter of the 5th 15:33
16 April.

17 MR. MCDOWELL: The full DPP's direction.

18 A. I believe so, I believe so.

19 CHAIRMAN: So there's nothing missing, in effect. Yes.

20 589 Q. MR. MCDOWELL: But to go back to the other point that 15:34
21 you had moved on to for a second. You assumed that An
22 Garda Síochána would realise that they were being asked
23 to produce this file in the context of a pending
24 decision as to whether there should be a commission of
25 investigation into the Ms. D allegation and how it was 15:34
26 handled?

27 A. I am presuming that. I have no personal knowledge of
28 it. But I just want to be clear that there was
29 absolutely no interaction between the Department and

1 the Garda Síochána about this IRM case or the process.
2 It was exclusively a dialogue between the Department
3 and the IRM counsel.

4 590 Q. Yes, I fully appreciate that. But the whole process
5 there, they're going to Garda Headquarters and they're 15:34
6 being facilitated, was something which was being done
7 in this context because you had requested that it
8 should be done?

9 A. Absolutely.

10 591 Q. Yes. And therefore, unless your surmise is wrong, it 15:35
11 would have been known in An Garda Síochána at the time
12 that it was a live issue as to whether the allegation
13 against Sergeant McCabe and the investigation of it, I
14 should be careful about this, as to whether the
15 investigation of the allegation against Sergeant McCabe 15:35
16 was to be included in the forthcoming Commission of
17 Investigation?

18 A. I don't have any personal knowledge of that. I'm
19 simply, if I can borrow your words, surmising that the
20 Department couldn't demand a file, or request a file 15:35
21 from the Garda Síochána without any explanation, so I
22 imagine it would have been explained that it is needed
23 for a certain purpose. But I don't have any personal
24 knowledge of that.

25 592 Q. And it follows from all of that then that that would 15:35
26 have had happened in October/November time, is that
27 right?

28 A. October.

29 593 Q. October. Because by early November the idea was dead?

1 A. By the 11th November, yes.

2 594 Q. Yes. And who made the decision on the 11th November
3 that it would be excluded?

4 A. Well, on the 11th November we, in the Department, got
5 an email from IRM counsel, who said that they had now 15:36
6 considered the Garda file or the DPP file.

7 595 Q. Yes.

8 A. And they recounted -- they had an analysis of it and
9 they explained that it was now apparent to them that
10 the Gardaí had investigated the matter, that Sergeant 15:36
11 McCabe had been interviewed under caution, and one of
12 the points that had been made by Ms. D, I believe, if I
13 recollect correctly, is that she doubted whether, in
14 fact, he had even been interviewed.

15 596 Q. Yes. 15:37

16 A. That he had been interviewed under caution, had given a
17 statement, file gone to the DPP with a recommendation
18 not to prosecute, and the DPP had agreed, and, on that
19 basis, the counsel concluded that everything seem to
20 have been done properly. 15:37

21 597 Q. Yes.

22 A. Everyone had been interviewed who should have been
23 interviewed. There was nothing there to indicate that
24 this file had been treated in any way out of the
25 ordinary, just because Sergeant McCabe was a garda. 15:37

26 598 Q. Yes.

27 A. And that they recommended no further action, and we
28 accepted that recommendation.

29 599 Q. I see. And did you inform the Minister of that

1 development?

2 A. Yes.

3 600 Q. So the Minister would have been conscious that this was
4 an issue and it was now being finally decided that the
5 O'Higgins Commission would not include this matter? 15:37

6 A. Yes. The Minister would have been aware of this. On
7 the 17th -- I think it was the 17th November, the
8 Minister wrote to her colleague, the Minister for
9 Public Expenditure and Reform, seeking his approval, as
10 she had to, to bring the proposal for the order with 15:38
11 the terms of reference to Cabinet. That's a
12 requirement under the 2004 Act, as you know.

13 601 Q. Yes.

14 A. And in that letter she recounted how she had had to put
15 the finalisation of the terms of reference on hold 15:38
16 pending clarification from the IRM counsel as to
17 whether there might be any extra cases, and she -- in
18 that letter she went on to explain to the Minister for
19 public expenditure and reform that it was now clear
20 that there would be no cases. 15:38

21 602 Q. And that was the leader of the Labour Party, is that
22 right?

23 A. That would have been Brendan Howlin, yeah.

24 603 Q. Yes.

25 A. Yes. 15:38

26 604 Q. Sorry, he was leader, I think.

27 A. Yes.

28 605 Q. Okay. So I understand that. And again, did that
29 letter identify which case we were dealing with?

1 A. No.

2 606 Q. It didn't. So moving on very quickly from there, it
3 would appear that Mr. Justice O'Higgins -- do you
4 believe he was aware of any of this prior manoeuvring
5 as to his terms of reference? 15:39

6 A. I don't know. As I say, I do know that there were
7 discussions between the office of the Attorney General
8 and Judge O'Higgins. But my surmise, if I can use that
9 word again, is that because --

10 607 Q. I'm not suggesting there would have been anything 15:39
11 improper.

12 A. Oh, indeed. But I think because the matter had been
13 disposed of, as it were, it simply didn't arise. But I
14 can't rule out the possibility that he may have been
15 alerted to it. I simply don't know. 15:39

16 608 Q. Because it does appear that throughout the proceedings,
17 I don't know whether you have ever looked at the
18 transcript and his report and everything that happened
19 at it, that he religiously precluded any reference
20 wherever he could to the D allegation, were you aware 15:40
21 of that?

22 A. Em, I don't have a detailed recollection of that. But
23 as I say, I simply don't know if he was alerted to this
24 possibility. I simply don't know.

25 609 Q. The last thing I just want to ask you about is this -- 15:40
26 CHAIRMAN: well, I'm not sure how often it came up,
27 Mr. McDowell.

28 MR. MCDOWELL: Sorry, Judge?

29 CHAIRMAN: I'm not sure how often it actually came up

1 before Mr. Justice O'Higgins. I mean, there is the
2 ruling in relation to credit and credibility, which
3 occurs on the Monday, and then there's the two
4 questions from Mr. Smyth, which is in relation to a
5 particular thing. But of course I'm looking at what 15:40
6 the Garda Commissioner's involvement was, but I didn't
7 see it after that, because we searched very hard.
8 MR. McDOWELL: Well, maybe I'm wrong on that, Chairman.
9 Maybe I'm wrong.

10 610 Q. But I think he was anxious at least until the 24th June 15:40
11 when day 4 of the Commission took place, not to
12 mention -- he used the phrase the matter is delicate or
13 délicat?

14 A. Yes.

15 611 Q. Using a French term in relation to it. So he seemed to 15:41
16 understand what the issue was, without having it to be
17 spelled out to him?

18 CHAIRMAN: I don't know how you are interpreting that,
19 Mr. McDowell, as a reference to the D matter.
20 Seriously, I mean, if you can help me on that, do. But 15:41
21 just because you use the phrase "délicat", doesn't mean
22 that it's a reference to Ms. D. I mean, every judge is
23 anxious to (a) finish a case and (b) try and keep it on
24 the rails. The two things are connected.

25 MR. McDOWELL: Perhaps, Judge. 15:41
26 CHAIRMAN: Yes.

27 MR. McDOWELL: Perhaps. All I can say is, Judge, and
28 this may be a matter for submissions --
29 CHAIRMAN: Yes.

1 MR. MCDOWELL: -- but, I mean, it does appear that he
2 immediately understood what the conversation between
3 Sergeant McCabe and Chief Superintendent Rooney
4 referred to, and described it as a delicate matter. It
5 does appear he did. 15:42

6 612 Q. Now, could I then ask you in relation to how your --

7 CHAIRMAN: Sorry, Mr. McDowell, I'm sorry, I mean, this
8 can be left kind of mysterious. The background, as I
9 understand it, and please correct me if I am wrong, is
10 that Sergeant McCabe had written the letters that has 15:42
11 been referred to a number of occasions. In one of them
12 he says that: In consequence of the allegations made
13 against me and the investigation, everything has
14 changed. I don't trust anybody anymore. So from
15 that -- 15:42

16 MR. MCDOWELL: He must have had some basic
17 understanding of the D allegation.

18 CHAIRMAN: He must have had a very good understanding.
19 He's hardly a fool.

20 MR. MCDOWELL: Yes, exactly, that's the point. 15:42
21 Exactly, that is my point.

22 CHAIRMAN: No, but, I mean, the whole idea that
23 Mr. Justice O'Higgins kind of knew about D and was
24 looking into D, I'm not kind of content to leave that
25 floating out there. I just don't see it on the 15:43
26 transcript at all.

27 MR. MCDOWELL: What I am saying is that it would appear
28 from the transcript that he was anxious to avoid that
29 obtruding into the proceedings.

1 CHAIRMAN: well, it wasn't the only thing. I mean,
2 then there was the other thing in relation to the
3 unfortunate dangerous driving causing death, I mean he
4 was anxious that wasn't going to intrude either.
5 MR. MCDOWELL: Sorry -- 15:43
6 CHAIRMAN: There was a reference to that through
7 Mr. Sreenan.
8 MR. MCDOWELL: Superintendent Cunningham --
9 CHAIRMAN: There was a reference to that through
10 Mr. Sreenan. 15:43
11 MR. MCDOWELL: I'll come back to that, Judge --
12 CHAIRMAN: No, no, I don't necessarily --
13 MR. MCDOWELL: -- because this witness is going to be
14 totally lost --
15 CHAIRMAN: But, I mean, that was another thing that was 15:43
16 excluded. I mean, there was a number of things that
17 along the way were excluded. But the whole point of it
18 was, I suppose sitting where I'm sitting, was, the
19 judge is looking at the rails and looking at the train
20 and wondering are we going to now take -- are the wrong 15:43
21 points going to be pulled and we are going to end up on
22 the top of the Alps, or something like that.
23 MR. MCDOWELL: Sorry, Judge, I think, really, it would
24 be better if I dealt with that in submissions.
25 CHAIRMAN: Yes. No, if you wish but -- 15:44
26 MR. MCDOWELL: This witness is not --
27 CHAIRMAN: I'm just puzzled, Mr. McDowell, where -- I
28 mean, is there any sense that people were trying to do
29 something kind of nasty in bringing the D case? I just

1 really don't -- I really don't understand that.

2 MR. MCDOWELL: Well, Judge, maybe I will just remind
3 you of this.

4 CHAIRMAN: Yes.

5 MR. MCDOWELL: That when Chief Superintendent Rooney 15:44
6 said on day 2 --

7 CHAIRMAN: Yes.

8 MR. MCDOWELL: -- "it was probably in late 2007.
9 A. Yes, definitely. He came to my office. He was in
10 that state and he demanded of me that I write to the 15:44
11 Director of Public Prosecutions and I challenge a
12 decision that the Director of Public Prosecutions had
13 made in respect of him."

14

15 And Mr. Gillane said - not me, Judge - Mr. Gillane 15:44
16 said:

17

18 "I don't mean to cut across the witness, but I think
19 just in relation to that matter, unless the parties
20 have a different view, I think it is evidence 15:45
21 concerning a matter the Commission isn't directed to
22 investigate. Whether it is relevant or not is a matter
23 for the parties."

24 CHAIRMAN: And that doesn't come as a huge surprise to
25 me, Mr. McDowell. I did read it. But again, it is a 15:45
26 question of the judge attempting to be the train driver
27 and attempting to ensure that the wrong siding isn't
28 gone on. It's not in the terms of reference, the D
29 thing isn't in the terms of reference, and there was

1 other things mentioned as well that weren't in the
2 terms of reference, and that was it.

3 MR. MCDOWELL: The only point I make, Judge, I mean it
4 is a matter which I will deal in submission, that it
5 isn't as if Mr. Gillane wondered what's this about. He 15:45
6 immediately twigged that this was an issue outside the
7 terms of reference as soon as that conversation was
8 mentioned.

9 CHAIRMAN: But again, we have mentioned Einstein
10 earlier on. It didn't take Einstein to reach that 15:45
11 conclusion as there is only ten substantive ones, and
12 it isn't one of them. Similarly, when the unfortunate
13 case of the hit and run and the death came up, he had
14 exactly the same reaction. They are two examples of
15 saying, right, let's keep it to what we are looking at. 15:46
16 But I don't see --

17 MR. MCDOWELL: Judge, I will come back to what
18 Superintendent Cunningham said and did in early
19 December.

20 CHAIRMAN: Yes. 15:46

21 MR. MCDOWELL: And it is qualitatively different from
22 this. Because this was an attempt, as the Tribunal
23 well sees, and I don't claim to be Einstein, but
24 everybody, I think, can well see that this was setting
25 the evidential basis for the motivation argument. 15:46
26 CHAIRMAN: Yes.

27 MR. MCDOWELL: That is what it was about. And as soon
28 as it was mentioned, Mr. Gillane intervened to query
29 its relevance.

1 CHAIRMAN: Well, yes. I mean, things don't happen for
2 no reason. There couldn't have been a sense of hurt if
3 an allegation hadn't been made. There couldn't have
4 been a sense of being investigated by your own
5 colleagues if an allegation hadn't been made. There 15:47
6 couldn't have been a sense of, I suppose, vindication
7 if the DPP hadn't ruled the way the ruling was and
8 there couldn't have been a sense of, well, surely more
9 people should know about this rather than me hearing it
10 from the State solicitor. By the way, Mr. D was never 15:47
11 asked, and it was a question that was on my mind over
12 the weekend, thinking about this matter, Mr. D was
13 never asked, and we didn't think to ask him, as to
14 whether he had a communication with the State solicitor
15 himself. I mean, if Sergeant McCabe had it, it's not 15:47
16 beyond the bounds of possibility that Mr. D already
17 knew himself.

18 MR. MCDOWELL: Judge, I really do think, and I submit
19 to you now, that this is better left for another
20 occasion rather than a dialogue between myself and 15:47
21 yourself now.

22 CHAIRMAN: No, but I am just kind of wondering what
23 phantoms are being conjured up, Mr. McDowell. That is
24 what I worry about.

25 MR. MCDOWELL: I'm not conjuring up anything, Judge. 15:48

26 CHAIRMAN: Pardon?

27 MR. MCDOWELL: I'm not conjuring up anything. I am
28 merely saying that it would appear -- maybe --

29 CHAIRMAN: By the way, I shouldn't have said -- can we

1 take the word out of the transcript. Just Mr. D. It
2 is my fault. Sorry, I beg your pardon, Mr. McDowell.
3 MR. MCDOWELL: I was putting to the witness that there
4 seemed to be a disposition to exclude any reference to
5 the D allegation at the O'Higgins Commission. I don't 15:48
6 think that is in controversy, Judge.
7 CHAIRMAN: No. Well, was that wrong or right?
8 MR. MCDOWELL: Well, now, Judge, the judge is always
9 right, so I start on that basis.
10 CHAIRMAN: It would seem to me that is right. So if 15:48
11 it's right, why is it a problem?
12 MR. MCDOWELL: Sorry, Judge, I actually am getting
13 confused, Judge. But I do want to ask this witness --
14 CHAIRMAN: I am sorry, I didn't mean to engage in any
15 such exercise, Mr. McDowell. 15:48
16 MR. MCDOWELL: I hope I'm not looking irritated. I'm
17 not.
18 CHAIRMAN: No, you are not. Everything is fine. It's
19 just, there have been so many things floated and
20 inferences drawn from so many things, I just don't want 15:49
21 that to happen.
22 MR. MCDOWELL: Yes.
23 CHAIRMAN: It seems to me to be right. The Judge was
24 right to exclude everything except the ten terms of
25 reference and the things that were related to the ten 15:49
26 terms of reference and the things that followed. And
27 it wasn't just D, it was a whole load of other things.
28 But that is logic.
29 613 Q. MR. MCDOWELL: When it came to the Department becoming

1 aware through two channels, one Mr. O'Leary referred to
2 as a somewhat more legitimate channel, the Attorney
3 General talking to you, the Attorney General's office
4 talking to you about the matter and through his direct
5 contact with the Commissioner. I just want to ask you 15:50
6 why it was that nobody, the Secretary General,
7 yourself, Mr. O'Leary and Mr. Power, the Minister, the
8 Minister's adviser, nobody seems ever to have mentioned
9 the matter again, at any level at all, is that what we
10 are to believe? 15:50

11 A. I don't recall any subsequent discussion about my email
12 or the information in it. But what I would say to you
13 in that, is that my email contained the information but
14 also my view that the minister could not intervene in
15 what was going on at the Commission of Investigation. 15:50
16 Now while it was open, as I said before, to others to
17 disagree with my view, it would seem that my view was
18 accepted and shared by the addressees of my email.

19 614 Q. And you were left in the position, it appears from what
20 Mr. Waters told you and from what you knew from 15:51
21 Mr. Barrett you were left in the position of thinking
22 that further legal consideration would be put into the
23 question as to whether that line of territory, whatever
24 it was, would be pursued?

25 A. Well, I'd say -- 15:51
26 MR. McCANN: Mr. O'Leary.

27 615 Q. MR. McDowell: Sorry, Mr. O'Leary, is it?

28 A. -- might be rather than would be. That the
29 Commissioner might be taking further legal advice on

1 this.

2 616 Q. Then we go to the following week, did any of you or did
3 you wonder what had become of the previous Friday's
4 email and the subjects referred to in it? Did it even
5 cross your mind did they plough on or did they stop? 15:52

6 A. Well, what would have crossed my mind is that it was
7 being dealt with within the Commission. So it wouldn't
8 have been in any mind to inquire any further into it
9 proactively. Because one of the messages I was
10 conveying was that this was a matter that whatever it 15:52
11 was, and we weren't quite sure of the facts, that had
12 arisen within the Commission, it was being dealt with
13 within the Commission. I felt the Minister had no
14 function in intervening, even if that was possible. So
15 therefore, it was part of and very much central to my 15:52
16 thinking that this was within the sealed atmosphere of
17 the private hearings of the Commission.

18 617 Q. Now could you tell me, as the senior civil servant in
19 respect, in charge of policing affairs or policing
20 matters in the Department, were you made aware that 15:52
21 Sergeant McCabe had resigned his position as sergeant
22 in charge of the traffic unit in Mullingar on the
23 following Monday?

24 A. I don't recall being aware of it. Now, I say that with
25 some hesitation. Because there was so much information 15:53
26 being transmitted here, there and everywhere, but I
27 honestly don't recall being aware of that.

28 618 Q. Were you aware of the subsequent press query arising
29 apparently out of his resignation which Mr. O'Leary

1 dealt with today?

2 A. Oh, I recall getting -- I recall being copied in on
3 that email in July.

4 619 Q. At that point, did it even strike you to wonder why has
5 Sergeant McCabe resigned his position or to inquire 15:53
6 whether he had or not?

7 A. It didn't. If I recall correctly, and I am open to
8 correction on this, the information in that email
9 didn't tie in the resignation directly with the events
10 of, was it the 18th May, or whenever it was, I don't 15:54
11 think it did. But certainly, I didn't make that
12 connection in my mind. I don't recall making that
13 connection.

14 620 Q. If memory serves me right it says there are two issues,
15 and they are separate issues. One, aggressive 15:54
16 questioning and two --

17 MR. MCCANN: Judge, it would be fair for the witness to
18 have the document before the question is put. It's at
19 various places, 2012 is where it is, where I have it in
20 my hand. It is fairness to the witness to have the 15:54
21 document.

22 CHAIRMAN: It is. We had it this morning. It is 3484.

23 MR. MCCANN: Yes, we did.

24 CHAIRMAN: And it mentions two things. He was asked to
25 be taken out of the traffic unit in Mullingar and the 15:54
26 Garda Commissioner had instructed counsel to adopt an
27 aggressive stands. So the two things were mentioned.

28 MR. McDOWELL: Those were the two things.

29 CHAIRMAN: We had it this morning.

1 621 Q. MR. MCDOWELL: You're aware of that, aren't you?
2 A. I see it there now. As I say, I do recall the email.
3 But I didn't interpret that as linking Sergeant
4 McCabe's indication to any specific occurrence. And
5 also, in relation to the reference to, is it, 15:55
6 aggressive stance, I certainly interpreted that as Ken
7 O'Leary's description of what he understood the media
8 to be saying. I didn't understand that to be Ken
9 O'Leary's personal characterisation.

10 622 Q. And did you at any stage prior to the resignation of 15:55
11 the Tánaiste, Minister Francis Fitzgerald, consider
12 making a statement dealing with these matters to this
13 Tribunal or was it only after she had left that it
14 occurred to you?

15 A. Making a statement in relation to? 15:56

16 623 Q. Your knowledge of what had happened that day at the
17 O'Higgins Commission?

18 A. I'm not clear, Mr. McDowell, a statement to whom?

19 624 Q. Well, it would appear that both yourself and
20 Mr. O'Leary were, I'm going to be kind to you, late in 15:56
21 the day in making statements here?

22 A. To this Tribunal?

23 625 Q. Yes.

24 A. Well, as I've said, I wasn't in any way trying to hold
25 back anything. 15:56

26 626 Q. I'm not accusing you of that, but just wondering was
27 the lateness or was the final decision to make a
28 statement to this Tribunal, was that brought about the
29 fact that she had resigned in publicly known

1 circumstances and then it suddenly occurred to you that
2 you knew a lot more --

3 A. No.

4 627 Q. -- which might be of assistance to the Commission --

5 A. No.

15:57

6 628 Q. -- the Tribunal?

7 A. No my understanding and my recollection is that when
8 this -- I think it was back in November of last year,
9 that my -- first of all my email was, my email of the
10 15th May 2015, was found by staff who are preparing
11 answers to parliamentary questions and they showed it
12 to me.

15:57

13 629 Q. Did that jog your memory?

14 A. Up to that point it wasn't in my memory because --

15 630 Q. That is what I'm driving at. It was the circumstances,
16 the public controversy of relatively recent times that
17 brought all this back to your mind, is that right?

15:57

18 A. Well yes, and when I was shown the email, my email of
19 the 25th May 2015 I immediately recalled it, instantly
20 recalled it. But --

15:57

21 631 Q. I take it at that stage you realised you had something
22 of interest to tell this Tribunal?

23 A. Well, as I say, in relation to this Tribunal I
24 understood that there was a process underway whereby
25 the Department was communicating with this Tribunal, I
26 wasn't clear what they were discovering and in what
27 order and I was perfectly happy to cooperate and make
28 any statements necessary that arose from that. But I
29 just wasn't, I wasn't in control of that process.

15:58

1 632 Q. I see. And in fairness to you, you're saying that you
2 probably thought that if they want me they can come and
3 get me, and I'll make a statement then, is that the --

4 A. Well, my email wasn't a secret, as it were.

5 633 Q. It was forgotten though. 15:58

6 A. Well, but I hadn't known it was forgotten. Like, I was
7 two years or thereabouts, a bit more than two years
8 out --

9 CHAIRMAN: I think we have probably gone over that
10 enough. And actually, they are questions as to credit, 15:58
11 Mr. McDowell, at this point.

12 MR. MCDOWELL: I'm just trying to work out why suddenly
13 this material came out.

14 CHAIRMAN: Look, I mean, I may have my own private
15 feelings about this, but really if I have the material 15:59
16 in front of me -- if the dinner is there I'm going to
17 eat it. It's a pity perhaps it wasn't there earlier,
18 but --

19 MR. MCDOWELL: Thank you.

20 MR. DIGNAM: Chairman, I've about three minutes of 15:59
21 questions, I'm not sure if you want to take them today.

22 CHAIRMAN: I do, yes. If possible.

23 MR. MEEHAN: Chairman, three minutes also.

24

25 THE WITNESS WAS THEN EXAMINED BY MR. DIGNAM 15:59

26 634 Q. MR. DIGNAM: Mr. Flahive, my name is Conor Dignam. I
27 appear on behalf of An Garda Síochána. I just want to
28 ask you about two separate areas. The first is in
29 relation to the independent review mechanism and where

1 the terms of reference ended up. I think the effect of
2 where the terms of reference ended up is a matter for
3 submissions, so I'm not going to trouble you with that.
4 As I understand it, you explained how the independent
5 review mechanism work; how you were left with two cases 15:59
6 which may be candidates for a Commission of
7 Investigation and that ultimately became one case,
8 which was the Ms. D complaint. And I just want to
9 confirm for clarity, that that was Ms. D's complaint
10 about the quality or adequacy of the investigation of 16:00
11 her initial allegation against Sergeant McCabe?
12 A. That's correct.
13 635 Q. It wasn't the substantive allegation which she had made
14 against Sergeant McCabe?
15 A. You're absolutely correct. 16:00
16 636 Q. Yes. And you explained how the Independent Review
17 Mechanism counsel gave, I think you described it as a
18 well reasoned paper as to their thoughts, as to where
19 things stood, the pros and cons?
20 A. That's correct. 16:00
21 637 Q. And included in that was reasons why it should -- why
22 the complaint shouldn't be part of a Commission of
23 Investigation controversy, and the position that might
24 place Sergeant McCabe in, etcetera. But am I correct
25 in saying that that was all superseded by the 16:00
26 Department requesting An Garda Síochána to provide the
27 investigation file, the DPP file, to the Independent
28 Review Mechanism counsel and them concluding that in
29 fact there was nothing left to investigate, because

1 there had been an adequate investigation in the first
2 place?

3 A. That's correct.

4 638 Q. So there was no reason to refer it to a Commission of
5 Investigation because there was no question marks left 16:01
6 over the adequacy of that investigation?

7 A. I agree with that.

8 639 Q. Yes. So can I take it from that, that to the extent
9 that anything was specifically excluded or not included
10 in the terms of reference, it was an inquiry or an 16:01
11 investigation into the adequacy of the Garda
12 investigation into Ms. D's original allegations?

13 A. That's correct.

14 640 Q. In relation to your statement and your email of the
15 15th May 2015, am I correct in saying that your 16:01
16 understanding of what was happening at the Commission
17 that day is based on a conversation which you had with
18 Mr. Barrett of the Attorney General's office?

19 A. That's correct, yes. Essentially, yes.

20 641 Q. And that his understanding was based on a conversation 16:02
21 which he had with Mr. Dreehan of the Attorney General's
22 office?

23 A. As I understand it, yes.

24 642 Q. And Mr. Dreehan's understanding was based on a
25 conversation which he had, or conversations which he 16:02
26 had with Ms. Ryan, the solicitor to An Garda Síochána
27 in the Commission of Investigation?

28 A. As I understand it.

29 643 Q. Yes. So in essence, your understanding at that stage

1 was third- or fourth-hand?

2 A. That's correct.

3 644 Q. And is it fair to say that the contents of your
4 statement and indeed of your email of the 15th May has
5 to be read in that context? 16:02

6 A. Yes. And I accept that my statement or my email
7 referred to the broad issue of the allegation by Ms. G,
8 whereas in fact I now understand that what was being
9 actually raised was the decision of the DPP in relation
10 to it. And I accept that I didn't appreciate that 16:03
11 subtlety.

12 645 Q. You have been very clear in your evidence in relation
13 to that. In relation to your reference in your email
14 of the 15th, this is the bit in practices, the page
15 escapes me, I'm afraid, where you refer to further 16:03
16 advice being taken by the Commissioner?

17 A. That it might be taken, yes.

18 646 Q. Yes?

19 A. That was based on my conversation with Ken O'Leary.

20 647 Q. Yes. I think he gave evidence this morning to explain 16:03
21 that he understood there was to be further engagement
22 and that seems to have then become in your email that
23 further advice may be taken?

24 A. That was the basis for it, yes.

25 648 Q. And then finally, Mr. Flahive, just in relation to your 16:03
26 email, it was put to Mr. O'Leary this morning that you
27 identified in your email that there was an attack on
28 Sergeant McCabe's motivation; (a) is that what you say
29 in your email and (b) is that what you understood was

1 happening? And your email is at page 3483.

2 CHAIRMAN: Well, it says an aggressive stance,
3 Mr. Dignam. No one put it to any of the barristers or
4 indeed to the solicitor, all of whom have given
5 evidence, that they were in any way aggressive towards 16:04
6 Sergeant McCabe. That was never put.

7 MR. DIGNAM: Yes.

8 CHAIRMAN: If that is a case that anybody wants to make
9 they could have made it. They didn't make it.

10 MR. DIGNAM: Thank you. 16:04

11 CHAIRMAN: It was mentioned on occasion that Sergeant
12 McCabe was upset on three or four occasions, but
13 apparently that upset came not when he was being
14 questioned by anyone on behalf of the Garda
15 Commissioner but indeed by counsel on behalf of the 16:04
16 Commission itself. And as I said at the time, anyone
17 who is used to being in court realises that it can be
18 the mention of a subject that gets people upset. It
19 doesn't mean that you are browbeating or yelling at
20 them. 16:05

21 MR. DIGNAM: Thank you.

22 CHAIRMAN: Was there a question you wanted to ask about
23 that?

24 MR. DIGNAM: No, I think that clarifies it, Chairman.
25 I was getting to the point of whether in fact 16:05
26 Mr. Flahive was describing it -- whether his view was
27 that it was an aggressive stance.

28 CHAIRMAN: That's a fair question. Do you want to
29 answer that?

1 A. This is now in the email by Ken O'Leary that was copied
2 to me?

3 649 Q. MR. DIGNAM: I suppose, I should perhaps put two
4 questions to you. Firstly in the email from Ken
5 O'Leary in July -- 16:05

6 A. Yes.

7 650 Q. -- on foot of the request by, who turned out to be
8 Mr. Burke, of RTÉ, there is a reference to an
9 aggressive stance being taken?

10 A. Yes. 16:05

11 651 Q. Was it your view that an aggressive stance was being
12 taken or did you know enough about what was occurring
13 to have an opinion on it?

14 A. I knew nothing about it. And, as I said, my
15 interpretation of that phrase, that sentence in that 16:05
16 email, was that that was Ken O'Leary's description of
17 what was being asserted by the media. It wasn't Ken
18 O'Leary's personal characterisation of what had
19 actually happened.

20 CHAIRMAN: It was the query which came from -- 16:06
21 responsibly came from John Burke --

22 A. That's my understanding.

23 CHAIRMAN: -- of This week who presumably had been told
24 that by somebody.

25 A. That was my understanding. Thank you. 16:06

26 CHAIRMAN: I beg your pardon.

27

28 THE WITNESS WAS THEN CROSS-EXAMINED BY MR. MEEHAN

29 652 Q. MR. MEEHAN: Very briefly, Chairman. As you know,

1 Mr. Flahive, my name is Gerard Meehan, I'm acting for
2 you and the Department. Just very briefly, returning
3 to your famous email I think by now of the 15th May,
4 you say "Chris, can you pass this on to the Minister
5 for information, please?" Can you just explain what 16:06
6 you understood that phrase "for information" to mean in
7 the civil service context?

8 A. In the civil service it's a term of art, which is
9 understood to mean that it is for information and not
10 for action. So, at one level the words mean precisely 16:06
11 what they say, but they have a slightly stronger
12 meaning in terms of civil service language, in that, as
13 I went on to say in an email "I do not think she had
14 any function in relation to intervening in the matter".

15 653 Q. And would that have applied to all the other recipients 16:07
16 as well?

17 A. Yes. It would.

18 654 Q. Okay. Thank you Mr. Flahive.
19 CHAIRMAN: That's it? Ms. Leader, did you have
20 questions in re-examination? 16:07
21

22 THE WITNESS WAS THEN RE-EXAMINED BY MR. LEADER:

23 655 Q. MS. LEADER: Just one question, sir. Mr. Flahive, is
24 there any sense that yourself and Mr. O'Leary regarded
25 the phone call from the Commissioner as a leak from the 16:07
26 Commission and an illegitimate source of information?

27 A. No. I never regarded it as such.

28 656 Q. So was there any deliberate decision made to exclude
29 Mr. O'Leary's source of knowledge from the Minister?

1 A. I was -- well, I was not taking any decision to
2 deliberately exclude it. I was simply forwarding
3 information based on my phone call. Now I did include
4 those words in facts.

5 657 Q. Yes. 16:08

6 A. Because I thought that was relevant, information
7 relevant to what I was saying. But I was simply
8 reporting what I had been told.

9 658 Q. And I take it from your answers to Mr. Meehan, that
10 there was a deliberate decision made between yourself 16:08
11 and Mr. O'Leary not to speak to the Minister about the
12 telephone call?

13 A. About the telephone call from the Commissioner?

14 659 Q. From both the Commissioner.

15 A. And from Richard Barrett? 16:08

16 660 Q. Yes. To speak to the Minister about it.

17 A. I wouldn't characterise it as a decision not to speak
18 to the Minister. We would have been perfectly -- I
19 would have been perfectly happy to speak to the
20 Minister or anyone else if they had sought any 16:08
21 clarification or if they wanted to discuss the matter.
22 But because of what I was saying in my email I wasn't
23 seeking a discussion, because my whole basis was that
24 there was no function for the Minister in intervening
25 in the matter. But if the Minister or anyone else had 16:09
26 any doubts about that or wanted to seek clarification I
27 would have been perfectly happy to discuss it.

28 661 Q. But the Minister didn't actually know about the
29 Commissioner phoning Mr. O'Leary, isn't that correct?

1 She couldn't have, because nobody told her?

2 A. It would appear so, yes.

3 662 Q. Yes. So is there any sense that that information was
4 kept from the Minister on a deliberate basis?

5 A. Well, all I can say is that I wasn't keeping it from 16:09
6 the Minister. I was simply conveying the important
7 message I got from Richard Barrett as best I could,
8 supplementing it with that additional information. But
9 I wasn't consciously hiding anything. I was trying to
10 convey a very full message to the Minister. 16:09

11 663 Q. Thank you very much.

12

13 THE WITNESS WAS THEN QUESTIONED BY THE CHAIRMAN:

14 664 Q. CHAIRMAN: I have two questions, and one is my own
15 sense of confusion as to the dramatis personae and 16:09
16 where they rank. Because someone said I think Ken
17 O'Leary -- you were Ken O'Leary's superior or vice
18 versa?

19 A. No. Ken O'Leary was Deputy Secretary General. I was,
20 and am, Assistant Secretary. So he was superior to me. 16:10

21 665 Q. CHAIRMAN: Okay. Then Noel Waters was obviously the
22 Secretary General?

23 A. Acting, yes.

24 666 Q. CHAIRMAN: Acting, yes. And then John Twomey is who?

25 A. He's a deputy Garda Commissioner? John Twomey? 16:10

26 667 Q. CHAIRMAN: Really. Okay. All right. He hasn't come
27 into it so far. That is not a signal that he is or
28 whatever, but let's not worry about that. And then
29 Denis X Griffin?

1 A. Denis Griffin.

2 668 Q. CHAIRMAN: Just picking up names from emails.

3 A. Denis Griffin was Noel waters' private secretary.

4 669 Q. CHAIRMAN: Yes. And then Christopher Quattrociochi?

5 A. Quattrociochi. 16:10

6 670 Q. CHAIRMAN: Was the private secretary to the Minister?

7 A. Yes, that's correct.

8 671 Q. CHAIRMAN: And therefore the conduit for getting stuff

9 to the Minister?

10 A. That's correct. 16:11

11 672 Q. CHAIRMAN: And whereas you mentioned something about,

12 look, I could email the Minister directly but if I did

13 that wouldn't necessarily mean that it was considered

14 in detail, or there was some sense that if you sent it

15 to the private secretary, the private secretary would 16:11

16 make sure the Minister actually read it, are you saying

17 something like that?

18 A. I am saying that. Like, it did happen that I would

19 email the Minister direct sometimes and she would email

20 me, but there's always the risk that with the huge 16:11

21 number of emails that the Minister would get that

22 something could be overlooked. Whereas if it was given

23 to the private secretary, the private secretary would

24 make sure that it was put in front of the Minister and

25 that it just wasn't overlooked in the avalanche of 16:11

26 material.

27 673 Q. CHAIRMAN: would you not be under an avalanche as well?

28 A. I mean, in the circumstances it is probably the safest

29 way to do it.

1 674 Q. CHAIRMAN: Okay. The other question I want to ask you
2 is: Do you remember the question I asked Ken O'Leary.
3 Look, if in the heel of the hunt you were made aware of
4 the fact that someone was going to deploy, as a weapon
5 against Sergeant McCabe, the actual allegation of child 16:12
6 sexual abuse made by Ms. D, which had been ruled on by
7 the DPP not to be a sexual assault, not to be an
8 assault, even if there was no credibility issues
9 attached to it, I'm paraphrasing what she said on the
10 occasion -- 16:12

11 A. Mm-hmm.

12 675 Q. -- CHAIRMAN: He had told me that, look, if that had
13 happened that would have overwritten everything and it
14 would have gone straight to the Minister. What is your
15 stance on that? 16:12

16 A. Well, first of all, just to be absolutely clear, I
17 didn't for one second imagine that that was being put.

18 676 Q. CHAIRMAN: No, you have told me that. Yes.

19 A. If that had been my understanding, yes, it would have
20 been a significantly different matter. And I would 16:12
21 have thought it necessary to have immediate discussions
22 with the Minister, the Secretary General and probably
23 the Attorney General to see what could be done.

24 677 Q. CHAIRMAN: Yes. Now the other thing I suppose is this:
25 No case has been made here that counsel towards 16:13
26 Sergeant McCabe were in any way aggressive, so that's,
27 in terms of legal procedure, that means it didn't
28 happen. If aggression had, for instance, at that time
29 been brought to your attention, and it wasn't and

1 nobody has made that case here, would that again have
2 been something that you would have regarded as an
3 overriding consideration and perhaps requiring you to
4 act in some way?

5 A. Well, my basic position would still be that the 16:13
6 Commission was under the Chairmanship of a
7 distinguished judge and I would have had every faith in
8 that judge.

9 678 Q. CHAIRMAN: I know all about that.

10 A. So I mean -- 16:13

11 679 Q. CHAIRMAN: But I mean, let's suppose you were told
12 that?

13 A. I would think that would be a matter for the judge. I
14 mean, it's a matter of judgment as to where that line
15 is. 16:14

16 680 Q. CHAIRMAN: Do you think the Minister should have known
17 about it if it had been drawn to your attention as a
18 fact as opposed to a query coming from somebody?

19 A. If that was drawn to my attention, I would probably
20 have included that, yes. Yes, I think would. 16:14

21 681 Q. CHAIRMAN: That is fair enough. Thank you very much.

22
23 So is it ten o'clock in the morning? It is.

24
25 THE WITNESS THEN WITHDREW 16:14

26
27 THE HEARING THEN ADJOURNED UNTIL TUESDAY, 30TH JANUARY
28 2018 AT 10:00AM

29

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