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

HELD IN DUBLIN CASTLE  
ON FRIDAY, 22ND JUNE 2018 - DAY 95

95

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1 THE HEARING RESUMED, AS FOLLOWS, ON FRIDAY, 22ND JUNE,  
2 2018:

3  
4 MS. LEADER: The first witness this morning, sir, is  
5 Mr. Tom Brady. Mr. Brady has made two statements, one 09:03  
6 is in volume 27 at page 7546 and the second one is in  
7 volume 28 at 7770.

8 MR. FANNING: Chairman, just for the record, Mr. Brady  
9 is a retired journalist with Independent News & Media  
10 and we are happy that he would be dealt with under the 09:03  
11 existing grant of representation.

12  
13 MR. TOM BRADY, HAVING BEEN SWORN, WAS DIRECTLY EXAMINED  
14 BY MS. LEADER:

15 1 Q. MS. LEADER: Mr. Brady, I understand you worked with 09:03  
16 Independent News & Media from 1989 as the security  
17 editor up to the date you retired in November 2014?

18 A. That's correct, Chairman.

19 2 Q. And I wonder, just generally, could you outline your 09:04  
20 career as a journalist to the Tribunal.

21 A. I entered national journalism in 1972, joined the Irish  
22 Press Group. I was appointed security correspondent in  
23 '73. I worked in the security area until 1985 when I  
24 became, I switched over to the news desk and became  
25 deputy news editor. I became news editor in 1987. I 09:04  
26 joined the Independent in '89 as security editor for  
27 the group and I remained in that position until  
28 November '14 when I left the Independent and I took a  
29 contract which allowed me to work from home and just do

1 a few stories a week.

2 3 Q. Right. Now, just generally, do you know former  
3 Commissioner Callinan?

4 A. Do I know him?

5 4 Q. Yes. 09:05

6 A. Yes, I do, yes.

7 5 Q. And former Commissioner O'Sullivan?

8 A. Yes, I do, Chairman.

9 6 Q. And Superintendent David Taylor?

10 A. Yes, I do. 09:05

11 7 Q. And do you know them in the context of your work over  
12 the years as a security editor, is that correct?

13 A. Yes.

14 8 Q. Now, you'll be aware that Professor Kenny gave evidence  
15 to the Tribunal that he approached two journalists at a 09:05  
16 committee hearing in the Dáil as he was interested in  
17 understanding where security correspondents were coming  
18 from in relation to matters connected with Sergeant  
19 McCabe and, in particular, the matter of the  
20 disappearance of a computer and the disciplinary 09:05  
21 proceedings in relation to that. And he has told the  
22 Tribunal that he approached these two security  
23 correspondents to sound out their views on that, and  
24 what he said to the Tribunal, and this is at page 120  
25 of the transcript on day 84, that they responded -- and 09:06  
26 that will come up in front of you, Mr. Brady, now, it  
27 may be of assistance to you.

28 A. Thanks.

29 9 Q. It's page 120. And the answer starts at line 12. What



1 he says is:

2  
3 "They responded, I think perhaps because they thought I  
4 was a bit naive at large, by telling me did I not know  
5 that McCabe was under investigation for alleged child 09:06  
6 abuse and that the gardaí were full of this and I  
7 should talk to the gardaí up there."

8  
9 He felt he was being told to cop on really, that this  
10 person was somebody who shouldn't be taken at face 09:07  
11 value. And later on he clarifies that at page 121,  
12 that he thought these people were probably trying to  
13 put him straight in relation to Sergeant McCabe and  
14 that these people were well-motivated. Now, you  
15 understand that he has subsequently identified you as 09:07  
16 one of the security correspondents that he spoke to and  
17 he has nominated a particular date in relation to that  
18 meeting, that being a date in February 2014, the 19th  
19 February 2014.

20 A. Yes. 09:07

21 10 Q. And I wonder could you give your response to that,  
22 please.

23 A. Chairman, I wasn't at that committee meeting on the  
24 19th February 2014. When I read his statement I  
25 checked it out, I hadn't recalled being there or ever 09:08  
26 being at a meeting of that particular committee, the  
27 Public Services Oversight and Petitions Committee, I  
28 think it was, and I established that on that particular  
29 day I had been working on a murder, and I looked at the

1 PDF of the paper on the next day and that particular  
2 meeting was covered by two other journalists from the  
3 Irish Independent.

4 11 Q. All right.

5 A. Sorry, if you want to talk generally about the 09:08  
6 conversation, it never took place. I never had a  
7 conversation with him in the presence of the other  
8 journalist that was mentioned. And I don't recall  
9 having any conversation with him outside any meeting of  
10 a Dáil committee. 09:08

11 12 Q. All right. Now, the other journalist that was named  
12 was Mr. Reynolds, so do you think there was ever an  
13 occasion that you were in Mr. Kenny's company with  
14 Mr. Reynolds?

15 A. I don't believe so, no, no. 09:09

16 13 Q. Okay. Do you think it's a possibility or are you  
17 certain that you weren't?

18 A. It's quite possible I might have been with Paul  
19 Reynolds and Colum Kenny was passing by and said hello  
20 and I would have said hello back, but I don't ever 09:09  
21 remember seeing him being at any meeting in Leinster  
22 House. I was there very few meetings, I was only there  
23 three or four of those Dáil committee meetings in my  
24 life.

25 14 Q. Right. Now, I think in your second statement, you do 09:09  
26 recall speaking about Sergeant McCabe on one occasion  
27 and I wonder could you tell the Tribunal about that,  
28 please.

29 A. Yes. I know Colum Kenny reasonably well, and the

1 reason is that I know his wife, his wife was a friend  
2 of my sister's, and I'd run into him on an odd  
3 occasion, the last time I think I met him was outside  
4 Trinity College, we certainly didn't discuss anything  
5 there, just said hello. The previous time I met him at 09:09  
6 a funeral which I offered my condolences to him and we  
7 certainly didn't discuss it there. The only time I can  
8 think that when the issue came up was at a pensions  
9 protest meeting in the Alexander Hotel in November  
10 2016, and I was at that meeting, I was one of those who 09:10  
11 was going to be affected by what had happened our  
12 pensions, which had fallen dramatically because of poor  
13 investments. I was very wound up about my pension at  
14 that, Colum Kenny turned up at the meeting, I am not  
15 exactly sure why he was there, possibly just to observe 09:10  
16 proceedings, I had a discussion with him, most of that  
17 discussion centred on the pensions and then we went on  
18 to talk about my career, had I retired, what I was  
19 doing then. I told him and he mentioned Sergeant  
20 McCabe, he said something about either had contacted 09:10  
21 him or was going to contact him. I said I'd written  
22 nothing about Sergeant McCabe from a personal  
23 viewpoint, that any stories I did was to do with the  
24 fallout from what Sergeant McCabe had said and the  
25 various stories that arose from it. On a personal 09:11  
26 basis, I had written nothing other than at one stage I  
27 checked out a rumour about sexual abuse allegations  
28 made against him, and I established that that was  
29 historic, that had taken place in 2006 and that it had

1           been fully investigated with the Gardaí, a file to the  
2           DPP and the DPP rejected it all. And that was as much  
3           as I knew about it and I didn't do anything else in  
4           connection with that or in connection with Sergeant  
5           McCabe, whom I have never spoken to either in person or 09:11  
6           I have never phoned.

7   15   Q.   All right. And in relation to the rumour that you  
8           checked out, when do you think you heard that rumour?

9           A.   I think I heard it first probably 2013. I have in my  
10          statement late 2012 or 2013, I think it's probably more 09:12  
11          likely into 2013. It was in connection with somebody  
12          said to me did you ever see a story about Sergeant  
13          McCabe and sexual abuse allegations in the newspaper  
14          and I said I hadn't. And I said what was the basis for  
15          it and he said he didn't know, he was just asking me if 09:12  
16          I knew about it. And that was it. And I didn't think  
17          about it again, did nothing about it for months  
18          afterwards. When there was a rumour starting to gain  
19          currency then about the abuse allegations, a couple of  
20          people mentioned to me and I decided I'd better see if 09:12  
21          there was any background to it and I rang somebody who  
22          gave me the facts and that was the end of it and I took  
23          no further interest in it.

24   16   Q.   All right. And in relation to the first person you  
25           heard it from, was that person a guard? 09:12

26          A.   No, I'm not certain who it was but it was probably a  
27          journalist.

28   17   Q.   All right. And can you rule out assistant  
29           commissioner -- sorry, Commissioner Callinan, Deputy

1 Commissioner O'Sullivan or Superintendent Taylor as the  
2 people who originally told you about it?

3 A. I can rule out any member of An Garda Síochána, past or  
4 present.

5 18 Q. All right. And in relation to the second time you 09:13  
6 heard it again, do you know who you heard it from? It  
7 was a number of months later, as I understand it?

8 A. Again, I'm not certain, it could have been a journalist  
9 just asking me did I know anything about it.

10 19 Q. All right. And when you checked it out, do you wish to 09:13  
11 identify the person who you checked it out with?

12 A. I have a difficulty there, not anything to do with  
13 privilege, but I can't remember. It would have been a  
14 senior member of An Garda Síochána, I mean, I would  
15 speak to quite a few over the course of my work during 09:13  
16 the week and it was somebody that I was going to ring  
17 about something else anyway, so I mentioned it.

18 20 Q. All right. And when you did check it out, the  
19 information that was forthcoming was that there was  
20 nothing in it, am I correct in that? 09:14

21 A. Yeah, that he is what it amounted to, yeah. I was  
22 given the facts and the person said is that okay and I  
23 said yes, I have no further interest, it's of no  
24 relevance to what I'm doing.

25 21 Q. And when you say you were given the facts, what facts 09:14  
26 were you given when you checked it out?

27 A. What I said to you earlier was, that it was historic,  
28 that it related to 2006, that it had been fully  
29 investigated, a file to the DPP, and the DPP had

1 dismissed it. That was it.

2 22 Q. All right. At any stage were you told that the  
3 complainant was the daughter of a member of An Garda  
4 Síochána?

5 A. No, I only learned of that later on, I think. I don't 09:14  
6 know whether it appeared in the newspaper or what but  
7 no, I didn't ask any more, I didn't care.

8 23 Q. Okay. And were you at any stage pointed towards Cavan  
9 in relation to the matter?

10 A. No, because I made it clear I was quite happy what I 09:15  
11 had been given, I wasn't seeking any further  
12 information.

13 MS. LEADER: All right. If you'd answer any questions  
14 anybody else might have.

15 09:15

16 THE WITNESS WAS CROSS-EXAMINED BY MR. McDOWELL:

17 24 Q. MR. McDOWELL: Mr. Brady, Michael McDowell is my name,  
18 I am one of the counsel for Sergeant McCabe. You place  
19 that transaction in which you checked out the story  
20 sometime in 2013, is that right? 09:15

21 A. I think so, yeah.

22 25 Q. Yes. In 2014, the newspaper for which you were working  
23 carried a number of stories by Paul Williams that we  
24 have seen in this Tribunal?

25 A. That's correct, yes. 09:15

26 26 Q. I take it you were aware of them?

27 A. Beforehand you mean?

28 27 Q. No, no --

29 A. The article, yes, yes.

1 28 Q. Well, first of all, I mean, were you aware of them  
2 before they were published?

3 A. I was aware just from talk in the newsroom that Paul  
4 Williams was working on some story.

5 29 Q. Yes. And I take it when you say on some story, it was 09:16  
6 this story that he was working on, I take it?

7 A. Yes, but at the time I wasn't sure what exactly it was.

8 30 Q. Were you ever shown the video interview with Ms. D?  
9 A. No, I didn't even hear the phrase Ms. D. I wasn't  
10 brought into it -- 09:16

11 31 Q. She wasn't called Ms. D in those days?  
12 A. Yeah.

13 32 Q. But I mean, did you ever see the video interview?  
14 A. No.

15 33 Q. Were you consulted by any of your editorial staff as to 09:16  
16 whether it was wise to publish such an article, bearing  
17 in mind that you had investigated the matter yourself  
18 and satisfied yourself there was nothing in this?

19 A. No.

20 34 Q. Were you surprised when your newspaper then ran a 09:16  
21 series of articles based on an interview with the woman  
22 we now call Ms. D?

23 A. No, I wasn't surprised. I'd heard the story was being  
24 done.

25 35 Q. Well, what did you think was the public interest in 09:17  
26 that story if you yourself were satisfied there was  
27 nothing in it?

28 A. Well, Paul Williams was doing the story and I had no  
29 involvement in it at all. He consulted with, I

1 presume, with all the editorial executives and there  
2 apparently was some meeting or meetings and they  
3 decided that they it was worthy of publication.

4 36 Q. well, we have heard from Mr. Mallon that in 2014 the 09:17  
5 Ms. D allegation was widely spoken about in the Irish  
6 Independent or in INM at the time, I'm just trying to  
7 work out how you fit into the scene, knowing what you  
8 say you knew about the matter, how a story of that kind  
9 was published in those circumstances?

10 A. well, I wasn't involved at all. Nobody asked me to get 09:18  
11 involved, so I didn't. Paul Williams worked mainly  
12 outside the newspaper, he worked on his own, he worked  
13 on quite a lot of stories, he was working on the Anglo  
14 tapes and I wasn't involved in any of his stories.

15 37 Q. Yeah. I mean, without seeming to flatter you or cajole 09:18  
16 you in any way, I think you had a very strong  
17 reputation as a person who wrote with some degree of  
18 authority on matters to do with security in An Garda  
19 Síochána at the time, would you agree with that?

20 A. well, I have a lot of experience perhaps of this. 09:18

21 38 Q. Yes. And it was generally believed that if you wrote  
22 something, it was well sourced and well regarded as  
23 likely to come from close to the top in An Garda  
24 Síochána rather than relying on station gossip and  
25 things like that? 09:19

26 A. well, my practice was to go as high as I could in  
27 relation to any story, Chairman.

28 39 Q. Yes. And I'm just trying to work out, in those  
29 circumstances, you having checked it out and you having



1 satisfied yourself there was nothing in it, how your  
2 newspaper decided to run a story which is -- which was  
3 trailing a coat, so to speak, for the Ms. D allegation?  
4 A. Well, I don't think there was anything in the story  
5 that conflicted with the little bit of information that 09:19  
6 I had. It didn't suggest that there was something to  
7 the allegation or suggest that --  
8 40 Q. Well, I understood you to say that the DPP had  
9 dismissed it, and that wasn't simply a phrase which  
10 includes was unhappy with the evidence, it's more than 09:20  
11 that; the DPP had said there was effectively nothing in  
12 it?  
13 A. Nothing in it, yeah, no crime.  
14 41 Q. And then how was it newsworthy that an allegation of no  
15 substance was or was not properly investigated? 09:20  
16 A. Well, it wasn't my decision, it was based on whatever  
17 Paul Williams had established from his inquiries and I  
18 was not privy to what exactly he had.  
19 42 Q. Are you surprised that you weren't consulted --  
20 A. No. 09:20  
21 43 Q. -- in relation to the publication of this story?  
22 A. No, Chairman, no.  
23 44 Q. Had you told any of your editorial staff or superiors  
24 or executives --  
25 MR. FANNING: Chairman, just before Mr. McDowell 09:20  
26 proceeds any further with this line of questioning, the  
27 people in Independent News & Media who did have overall  
28 editorial oversight were here and gave evidence to the  
29 Tribunal, Mr. Rae was here and gave evidence, for

1 instance, and he wasn't pursued about any of these  
2 issues by Mr. McDowell. Mr. Brady has given evidence  
3 that he had nothing to do with the decision to publish  
4 so I am not sure how fruitful this line of questioning  
5 is.

09:21

6 CHAIRMAN: It may or may not be fruitful, but the way I  
7 see the line of examination is, unfortunately this is  
8 the fifth journalistic conflict, direct conflict, and I  
9 presume what Mr. McDowell is doing is to establish a  
10 groundwork whereby it may be that what Professor Kenny  
11 said could be true, in the sense that there may have  
12 been an attitude, the attitude could be revealed by a  
13 decision to publish a historic allegation which had  
14 been found not to constitute an offence, even if the  
15 facts were taken at their height, and if there was an  
16 involvement in that publication, that may show an  
17 ill-motivation towards Sergeant McCabe, which may lead  
18 to the kind of comment that Professor Kenny says was  
19 made. Now, it may or may not be fruitful but it's a  
20 perfectly valid line of cross-examination.

09:21

09:22

09:22

21 45 Q. MR. McDOWELL: That summarises the situation fairly  
22 well. So I'm suggesting to you that the decision to  
23 publish the Williams stories, the articles, was in the  
24 circumstances one which revisited an issue which you  
25 had investigated and had found to have no substance  
26 whatsoever in it?

09:22

27 A. Unfortunately, I wasn't privy to all the information  
28 that was there. Obviously all the information that  
29 Paul Williams and perhaps others had gathered would

1 have been considered before a decision was taken. I  
2 was never consulted, I was not asked to any of the  
3 meetings, and without being privy to all the  
4 information that they had, I can't really say.

5 46 Q. Well, is it your view that your conversation with 09:23  
6 Professor Kenny postdated your finding out that there  
7 was no substance in this story at all?

8 A. The only conversation that I had with Colum Kenny in  
9 which Sergeant McCabe's name was mentioned was in  
10 November 2016, so it postdated any of that, Chairman. 09:23

11 47 Q. Yes. And I take it from what you have said that your  
12 account is that you would have told him that you had  
13 inquired into the matter and there was no substance  
14 whatsoever in it?

15 A. That's correct, Chairman. 09:24

16 MR. McDOWELL: I see. Thank you, Mr. Brady.

17 MR. FERRY: No questions.

18 CHAIRMAN: Was there any questions from An Garda  
19 Síochána?

20 MR. MÍCHEÁL O' HIGGINS: No questions, Chairman. 09:24

21 CHAIRMAN: And did you have anything, Mr. Fanning?

22 MR. FANNING: No questions, Chairman.

23 CHAIRMAN: All right.

24 MS. LEADER: Nothing arising.

25 CHAIRMAN: Thank you. 09:24

26

27 THE WITNESS THEN WITHDREW

28

29 MR. MARRINAN: Fergus O'Shea, please. Mr. O'Shea's

1 statement is to be found at 7627 of the materials, sir.

2  
3 MR. FERGUS O' SHEA, HAVING BEEN SWORN, WAS DIRECTLY  
4 EXAMINED BY MR. MARRINAN:

5 48 Q. MR. MARRINAN: Now, I think you were deputy head of 09:25  
6 news in the Irish Sun newspaper in 2014?

7 A. That's correct.

8 49 Q. I think you held that position from 2010 until July of  
9 2017?

10 A. That's correct. 09:25

11 50 Q. I think that you made a statement to the Tribunal on  
12 the 14th of this month arising out of evidence that had  
13 been given to the Tribunal by a journalist who had been  
14 working with the newspaper in 2014, Ms. Eavan Murray,  
15 isn't that right? 09:25

16 A. That's right.

17 51 Q. And that arose in circumstances where it came to your  
18 attention that Ms. Murray was suggesting that you had  
19 sent her to the Ms. D household in March of 2014.

20 A. She suggested that, that's correct. 09:25

21 52 Q. Sorry?

22 A. That is what she suggested in her testimony.

23 53 Q. And you made a statement reacting to that statement  
24 that she had made to the Tribunal, is that right?

25 A. That's right. 09:26

26 54 Q. And if we could just examine that. You say:

27  
28 "My recollections in relation to Eavan Murray's  
29 evidence, albeit without any certainty with regards

1 dates, are as follows. . . "

2

3

Can we take it that you are certain in relation to the  
4 chronology of events but not the exact dates?

5

A. Well, because I don't remember sending her, yeah, I  
6 think we can say that, yes, that is fair enough.

09:26

6

7

55 Q. Because you say:

8

9

"I remember Ms. Murray coming to me and saying there  
10 may have been an allegation which was somewhat unclear  
11 made against Maurice McCabe and that the alleged victim  
12 might be willing to talk to us."

09:26

10

11

12

13

A. Yes.

14

56 Q. Is that your position?

15

A. Yes.

09:26

16

57 Q. And had you heard anything in relation to the Ms. D  
17 allegation or any history as far as Maurice McCabe was  
18 concerned and an alleged sexual assault prior to  
19 Ms. Murray coming to you?

17

18

19

20

A. I have been trying to think about this. If I did it  
21 was just by Ms. Murray, you know, a short time -- you  
22 know, days or weeks prior to that, just that there  
23 might be an allegation and then there was maybe a  
24 follow-up conversation in which she said that, regards  
25 that allegation, the victim might be willing to talk.

09:27

21

22

23

24

25

26

58 Q. All right. But prior to -- you think there is a  
27 possibility that Ms. Murray may have mentioned this to  
28 you prior to the occasion that you are dealing  
29 with here in your statement?

09:27

27

28

29

1 A. Yes, that she mentioned that the victim was willing to  
2 talk, yes.

3 59 Q. Yes. Prior to Ms. Murray drawing it to your attention,  
4 had you heard the allegation from any other quarter?

5 A. No. 09:27

6 60 Q. So Ms. Murray bringing this information to you, it was  
7 completely fresh information that she was bringing?

8 A. Yes.

9 61 Q. You know that that is totally contrary to the evidence  
10 that she has given to the Tribunal where she is 09:28  
11 alleging that you, in fact, were the first one to  
12 mention it and she didn't know anything about this?

13 A. My understanding is she heard it first -- she is  
14 claiming she heard it first from a journalist. She  
15 said in her testimony that she heard the information 09:28  
16 first from a journalist.

17 62 Q. Yes.

18 A. So not from me.

19 63 Q. Right.

20 A. Yeah. 09:28

21 64 Q. So but it was you that suggested that she would go?  
22 A. So she says. I have no recollection of that.

23 65 Q. So what was it that she said to you when she brought  
24 this information to you in the first instance?

25 A. I think it was similar to what I am just saying, there 09:28  
26 might be something about Mr. McCabe in his past, an  
27 allegation.

28 66 Q. An allegation of sexual assault?

29 A. Yeah, involving a minor perhaps. It wasn't quite

1 clear, it was all a bit, you know, it wasn't clear,  
2 and --

3 67 Q. Did you ask her who her source was in relation to this  
4 information?

5 A. No, no. 09:28

6 68 Q. I mean, potentially it was explosive, wasn't it?

7 A. Well potentially, but at the same time, it wasn't  
8 something that I thought realistically we could ever  
9 print, so...

10 69 Q. So I think you indicate in your statement that you -- 09:29  
11 bringing the matter to the editor, Mr. Paul Clarkson,  
12 is that right?

13 A. Yeah, when -- if somebody is going to go on a job like  
14 that, I'd go above my pay grade and see if it was  
15 appropriate and I think our general feeling was that it 09:29  
16 wasn't, well, we -- I mean, we assumed it was coming --  
17 it was originating from gardaí and he was obviously a  
18 whistleblower, so we were a bit wary of it. And then,  
19 on top of that, you know, defamation -- for defamation  
20 reasons there was no reasons -- no way we could ever do 09:29  
21 it, so we just said leave it alone.

22 70 Q. Do you actually have a recollection of discussing this  
23 matter --

24 A. I have a recollection of going into the office and  
25 standing there with Paul Clarkson, yes, and discussing 09:29  
26 it.

27 71 Q. And do you have a recollection that the conversation  
28 went along the lines that Eavan Murray has the  
29 possibility of pursuing a story?

1 A. Yes, that is my recollection.

2 72 Q. All right. You then say that you advised Ms. Murray  
3 not to visit the alleged victim?

4 A. Yeah, based on what I just mentioned, that it wasn't a  
5 doable story and we'd better steer clear. 09:30

6 73 Q. Now, you then go on to a say:  
7  
8 "A short time later, it may have been days or a week, I  
9 have a vague recollection of Ms. Murray going to visit  
10 the complainant in Cavan." 09:30

11 A. As I said, yeah. I mean, I have only had the past week  
12 to consider all this, since she mentioned me here in  
13 evidence, and I just have the vaguest recollection of  
14 her actually going, I don't know how it came to be that  
15 she went, just that it was just another story that 09:30  
16 somebody went on, I don't know.

17 74 Q. Well, is it the position that she needed your  
18 permission to go and to run with the story?

19 A. Well, it could have been. I mean, I was number two on  
20 the news desk, so depending who was working that day, 09:31  
21 it probably would have come from the person above me or  
22 from the editor. I find it hard to believe I would  
23 have made that decision on my own.

24 75 Q. Well, you know her evidence is that you had advised her  
25 that the Independent was planning to run a large 09:31  
26 exclusive with the alleged victim at the time and that  
27 you instructed her to go down?

28 A. Yeah, unfortunately our recollections differ. I mean,  
29 well, first of all, I don't recollect that and if that



1 was heard, it wasn't me that heard it. I would  
2 definitely remember if I heard inside information from  
3 the Irish Independent. As mentioned I think by  
4 previous witness, Paul Williams I think worked very  
5 much on his own, he would have reported to his 09:31  
6 editorial staff. I can't see how I would have got that  
7 information and I would have no problem sharing it here  
8 if I had. I guess there is a possibility that someone  
9 in the office got wind of it and in that way it came up  
10 and then was decided that she went, that is her 09:32  
11 recollection, that is fair enough, but it wasn't  
12 through me.

13 76 Q. If we just have page 7765. This is a statement dated  
14 19th June 2018 from Ms. Murray arising out of being  
15 supplied with a copy of your statement. And if we 09:32  
16 could just look at the issue that she joins with you  
17 here at the end. The last five lines up from the end:

18  
19 "I can tell the Tribunal that I was not told to visit  
20 the alleged victim. I was --" 09:32

21  
22 Sorry

23  
24 "I was not told not to visit the alleged victim."

25 A. Yeah, we have differing recollections on that, 09:32  
26 unfortunately.

27 77 Q. Is your recollection clear in that regard?

28 A. I remember us going in discussing and deciding it was a  
29 story that we shouldn't go near. I remember that quite

1 clearly.

2 78 Q. "Instead I was given directions (a) to establish  
3 contact with the alleged victim, her family, and (b) to  
4 travel to Cavan and interview the alleged victim."  
5 A. So, yeah, as I said, I don't -- certainly she is saying 09:33  
6 they are two separate events -- well, sorry, my memory,  
7 her going and the initial time when we told her not to  
8 go are two separate events. There could have been a  
9 couple of weeks between them for all I know. So I  
10 certainly don't remember sending her, I don't know -- I 09:33  
11 don't remember anything about the Independent story. I  
12 have a vague recollection of her going and that's  
13 pretty much it, we moved on.

14 79 Q. If we go to page 7764, paragraph 3 there she says that  
15 she was off work from the 5th until 13th March of 2014, 09:33  
16 and it arose out of two things:  
17  
18 "I have been assigned to travel to Malawi on 8th March  
19 2014 for a period of ten days to cover the efforts of  
20 Christian aid in attempting to alleviate a drought 09:34  
21 there."  
22  
23 Do you have a recollection of that?  
24 A. Not really, to be honest with you, no.

25 80 Q. Is that something that you would remember? 09:34  
26 A. Not really. I mean, journalists regularly go on trips  
27 like this. I mean, I have been on a few myself, it's  
28 not something --

29 81 Q. So you don't have a recollection of the circumstances?

1 A. I'm sure it's -- she is an honest person, I'm sure  
2 that's the case. When I said days or a week between  
3 the two conversations, it could have been a couple of  
4 weeks, it could have been prior to the 5th March, you  
5 know, when the original conversation took place. I 09:34  
6 actually don't know to be to be honest with you.

7 82 Q. After Eavan Murray had been to the D household, and we  
8 know that she did go to the D household and she was  
9 there for about an hour, did you speak to her after she  
10 had been? 09:34

11 A. I have no recollection of speaking to her.

12 83 Q. You have no recollection at all of speaking to her?

13 A. Honestly, no. It's quite possible I wasn't working.  
14 You know, you are either on a morning shift, afternoon  
15 shift, evening shift. If I was on the late shift the 09:35  
16 night before, there is a chance I wasn't on the  
17 following morning, it could have just been somebody  
18 else on the news desk, she rang it in, it was left,  
19 move on.

20 84 Q. Well, I suppose from this point of view, this was a 09:35  
21 potentially very big story, isn't that right?

22 A. Absolutely, yeah.

23 85 Q. And I know there would be issues in relation to  
24 potential libel actions if it were published?

25 A. Hmm. 09:35

26 86 Q. And you had discussed that with Mr. Clarkson. But  
27 nevertheless, if there was substance to the story it  
28 was potentially a very big story?

29 A. If there was any way you could -- yeah, if there was

1 substance and if it was accurate, yes, absolutely.  
2 87 Q. And one might think that you would recall these events  
3 in terms of Ms. Murray's interaction with you as she  
4 alleges?

5 A. Well, I've told you what I recall. 09:36

6 MR. MARRINAN: Yes. All right. Okay. would you  
7 answer any questions, please.

8 MR. McDOWELL: No questions, Chairman.

9 CHAIRMAN: Mr. Ferry?

10

09:36

11 THE WITNESS WAS CROSS-EXAMINED BY MR. FERRY:

12 88 Q. MR. FERRY: Good morning, I am John Ferry for  
13 Superintendent David Taylor. So, the evidence as has  
14 been pointed out to you, is different from Ms. Murray  
15 in her account of how she came into possession of the  
16 knowledge of the Sergeant McCabe allegation in early  
17 2014?

09:36

18 A. Sorry, just, I never said -- I don't know how she  
19 came --

20 89 Q. No, but when she was before the Tribunal, she  
21 attributed her state of knowledge to yourself in that  
22 she said that she had heard, she thinks, from you in  
23 the Sun newsroom, and what I just want to ask you is:  
24 Are you saying that there was no knowledge in the Sun  
25 newsroom in early 2014 of the Sergeant McCabe story?

09:36

26 A. I can't speak for the entire newsroom.

27 90 Q. Yes. Well, for yourself as -- you were the editor, is  
28 that correct?

29 A. No, no, I was number two on the news desk, deputy head

09:37

1 of news.

2 91 Q. Deputy head of news?

3 A. Yes.

4 92 Q. Yes. But in your point of view, as deputy head of news  
5 in the newsroom, had you any knowledge of a Sergeant 09:37  
6 McCabe story in early 2014?

7 A. If I did, it was -- yeah, it was around that time when  
8 Eavan had mentioned it to me.

9 93 Q. Yes. But prior to Eavan mentioning it to you?

10 A. No. 09:37

11 94 Q. Because we have had evidence only yesterday that this  
12 story about Sergeant McCabe, that it was being peddled  
13 in newsrooms around Dublin and certainly from  
14 Ms. Murray's evidence to the Tribunal, she was giving  
15 evidence that it was in the newsroom, in your newsroom, 09:38  
16 at that time, and that she had only recently started  
17 employment, I think, with the Sun shortly before 2014,  
18 and that it was in the newsroom?

19 A. That's -- I guess it's possible. But I can't think of  
20 anybody else who would have come across the 09:38  
21 information. I know our crime editor, Stephen Breen,  
22 never spoke about it, it wasn't something that came up  
23 through him. And there was -- everybody else sort of  
24 had their areas. I can't see, you know -- I mean, it's  
25 possible, absolutely, but I am just saying, I mean, 09:38  
26 it's possible the people in the newsroom knew about it  
27 but I don't remember hearing about it from anybody  
28 else.

29 95 Q. And was your job one that journalists would be

1 reporting back to you on a daily basis?

2 A. Yes.

3 96 Q. Because it appears from evidence before the Tribunal  
4 that it was in a number of newsrooms, that at least the  
5 story was there, where it was coming from may be a 09:39  
6 different matter.

7 A. But I mean, that's around the same time we are talking  
8 about so --

9 97 Q. Yes.

10 A. -- clearly if I had been told it was in the newsroom, I 09:39  
11 mean, did I mention it to somebody else? I don't know.  
12 Did I speak to somebody else on the news desk? Quite  
13 possibly. I certainly spoke to the editor. So yes, it  
14 was in the newsroom around that time.

15 98 Q. Yeah. And Ms. Murray, as Mr. Marrinan has pointed out, 09:39  
16 gave a different version of how she became aware of the  
17 case and how she was directed or discussed how she  
18 would go to Cavan. So she attributes you as being the  
19 source of the information, you are giving a different  
20 version. But you did say that you have a vague 09:39  
21 recollection of her going and that is pretty much it  
22 and we moved on?

23 A. Yeah, I can only -- as I mentioned, I can only assume I  
24 wasn't working the next day and a decision was taken by  
25 somebody else. 09:39

26 99 Q. Okay.

27 A. Yeah.

28 100 Q. Well, maybe you are not the person, but I mean if there  
29 was a relatively new journalist in the newsroom and



1 only when something is printed that it becomes  
2 defamatory.

3 MR. FERRY: Yes. Thank you.

4 MR. GILLANE: No questions, Chairman.

5 CHAIRMAN: Thank you very much. 09:41

6 MR. MÍCHEÁL O' HIGGINS: We have no questions, Chairman.

7 MR. McCULLOUGH: A couple of questions.

8

9 THE WITNESS WAS CROSS-EXAMINED BY MR. McCULLOUGH:

10 104 Q. MR. McCULLOUGH: Mr. O'Shea, it's been put to you a 09:41  
11 couple of times now that Ms. Murray said when she gave  
12 evidence that you were the person who first told her  
13 about this story.

14 A. I am sorry, no, that is -- she is saying I am the first  
15 person who said. 09:42

16 105 Q. No, she didn't say that. I think you have read her  
17 evidence, isn't that right?

18 A. Yes.

19 106 Q. And she didn't suggest it was you who first told her  
20 about this story, you are conscious of that? 09:42

21 A. That I wasn't the first, yeah, of course.

22 107 Q. And Ms. Murray has never said that you were the person.  
23 A. Of course.

24 108 Q. So I think that the main point of distinction between  
25 you is, Ms. Murray says that the first time you and her 09:42  
26 discussed her going to see the D family was on the  
27 evening before she went when you sent her and, as far  
28 as you are concerned, you believe there was an earlier  
29 occasion when she came to you saying there may have



1           been an allegation against Mr. McCabe and the alleged  
2           victim may be willing to talk?

3           A.    That is my recollection.

4 109 Q.    All right.  These events all occurred now four years  
5           ago, isn't that right? 09:43

6           A.    That's correct.

7 110 Q.    Can you tell us when you were first asked about your  
8           memory of these events?

9           A.    Last week, yeah.

10 111 Q.    Just last week? 09:43

11          A.    Yeah.

12 112 Q.    All right.  And between 2014 and 2018 you'd never had  
13          occasion to get your thoughts in order about what  
14          occurred in relation to this occasion?

15          A.    No. 09:43

16 113 Q.    I take it you are a busy person, or you were at the  
17          time a very busy person?

18          A.    I am not in journalism any more, but yes.

19 114 Q.    Sure.  But at the time in the role that you fulfilled  
20          at the time you were presumably very busy directing 09:43  
21          journalists what to do, organising news stories and so  
22          on?

23          A.    Absolutely.  Constantly different stories all the time,  
24          you know.

25 115 Q.    And for that purpose you would have had discussions 09:43  
26          every day with journalists about what they should do  
27          and should pursue by way of a story?

28          A.    Absolutely, yeah.

29 116 Q.    All right.  And I take it, it's hard to remember any

1 individual occasion from the large mass of detail that  
2 you may have on your mind about what occurred and  
3 didn't occur?

4 A. That's fair enough, yes.

5 117 Q. All right. Is it possible that there is just a 09:44  
6 confusion here; you know Ms. Murray says that when she  
7 came back -- sorry, when she had visited the D family  
8 she then had a conversation with you in which you told  
9 her there was nothing here and she was just to come  
10 back? 09:44

11 A. I think her evidence said that she said there was  
12 nothing here and there was nothing printable.

13 118 Q. Exactly.

14 A. Yeah. It's possible, yeah, I just don't remember it,  
15 to be honest with you. 09:44

16 119 Q. All right. But is it possible that you are confusing  
17 that occasion with the earlier occasion of which you  
18 now give evidence on, in which she came to you and said  
19 as you say?

20 A. No, because I distinctly remember, and it's one of the 09:44  
21 only things I am quite clear on, going into the  
22 editor's office to discuss the situation.

23 120 Q. Yes. I can imagine you discussed it with the editor.

24 A. Yeah.

25 121 Q. I just wonder how clear you can be when that occurred, 09:44  
26 when did you make the decision that there was nothing  
27 in this story that merited the pursuit?

28 A. The first time that I heard that the victim may be  
29 willing to talk.

1 122 Q. Sure. And the only point between you and Ms. Murray is  
2 she says there was just the one occasion that --  
3 A. Sorry, say that again.

4 123 Q. She says there was just the one occasion that you told  
5 her to visit? 09:45  
6 A. Hmm.

7 124 Q. She says she did visit and she had a conversation, she  
8 believes, with you, just after that. Is it possible  
9 that you are confusing that occasion, of which she  
10 gives evidence, with the earlier occasion of which 09:45  
11 you've told us today?  
12 A. Over the passage of time lots of things are possible  
13 but it's not my recollection, that's all I can say.

14 125 Q. All right. And then I think in your statement you say  
15 that -- you refer to her evidence, and you say: 09:45  
16  
17 "Her evidence at the Tribunal is that I sent her, while  
18 I have no recollection of that, it's possible."  
19 A. Absolutely, yeah.

20 126 Q. All right. And it's possible I take it because it was 09:46  
21 one of your jobs to direct journalists where to go?  
22 A. Hence I said it's possible, yeah.

23 127 Q. Yes. And I think you have told us it's unlikely  
24 Ms. Murray would just go up to Cavan without getting a  
25 direction from somebody in the newsroom who was in 09:46  
26 charge of her movements?  
27 A. It's unlikely. I mean, journalists do often do work on  
28 their own and then once they have their information  
29 will bring it to the news desk, but if she was rostered

1 to be in that day then we'd -- then we'd have to  
2 know -- we'd generally have an idea where she is or  
3 what she is up to.

4 128 Q. So in principle, the account she gives of being told to  
5 go up to Cavan to conduct an interview is a credible 09:46  
6 one, that's an account of the sort of thing that  
7 happens in a newsroom?

8 A. I mean, told her or agreed with or given permission to  
9 go, all the same.

10 129 Q. Yes. All right. And then I think the only other point 09:46  
11 of difference between you and I'm not sure that it is  
12 really a big point of difference between you is, she  
13 believes that you told her this in the context of your  
14 knowledge of the impending story that Mr. Williams was  
15 writing? 09:47

16 A. Yeah, that one, I have been quite clear, I definitely  
17 didn't hear that, no, about the Indo. And if I heard  
18 it, it was -- if what she is saying is true, it was  
19 somebody else in the newsroom maybe that heard it but  
20 it wasn't me -- 09:47

21 130 Q. All right.

22 A. -- that garnered that information.

23 131 Q. That may be a point of difference between you --

24 A. Yeah.

25 132 Q. -- but just have a look at your statement, about three 09:47  
26 paragraphs from the end, you say:  
27  
28 "I do not recall how it came to be that Ms. Murray was  
29 sent to Cavan but in theory it's something we might do

1 if we thought that another newspaper was planning a big  
2 story and we didn't want to get left behind."

3 A. Yes, yes.

4 133 Q. All right. So?

5 A. I guess the idea is that, well, we don't know a lot 09:47  
6 about it, we have already talked about it and we  
7 decided it wasn't legally possible to do this story,  
8 and we go, well, if another paper is going to do it  
9 maybe there is something we have missed, maybe there is  
10 something we don't know about, better to have as much 09:48  
11 information as possible.

12 134 Q. All right. And that again is the sort of thing that  
13 you can easily see happening in a newsroom?

14 A. Yeah, it could happen, yeah.

15 MR. McCULLOUGH: Okay. That's fine. Thank you very 09:48  
16 much.

17

18 THE WITNESS WAS RE-EXAMINED BY MR. MARRINAN:

19 135 Q. MR. MARRINAN: Just one matter to clarify that, because 09:48  
20 the real point of issue between the two of you is to  
21 how this kicked off, do you understand?

22 A. Yes, I do.

23 136 Q. And I think it was pretty clear when I was examining  
24 you in the first instance --

25 A. Absolutely. 09:48

26 137 Q. -- that that was it. And it's the third line of your  
27 statement to the Tribunal at page 7627, where you say:  
28  
29 "I remember Ms. Murray coming to me and saying there

1 may have been an allegation which was somewhat unclear  
2 made against Maurice McCabe and that the alleged victim  
3 might be willing to talk to us."  
4  
5 And then you consulting with Mr. Clarkson? 09:48  
6 A. That's correct.  
7 138 Q. And I focused on whether or not you had heard anything  
8 in relation to Maurice McCabe, prior to that, and you  
9 said that you hadn't?  
10 A. I'm not 100 percent, but if I had it was in a similar 09:49  
11 conversation --  
12 139 Q. With --  
13 A. -- with Ms. Murray.  
14 140 Q. -- with Eavan Murray?  
15 A. Yeah. 09:49  
16 141 Q. So I mean the thrust of your evidence is at variance  
17 with the thrust of her evidence and in fairness to her,  
18 I mean, is there a possibility that she could be  
19 correct, that in fact you had initiated her going up --  
20 A. Well, it's not my recollection, it was Ms. Murray who 09:49  
21 was more interested in this story than anyone else in  
22 the newsroom.  
23 MR. MARRINAN: Okay. Thank you very much.  
24  
25 THE WITNESS THEN WITHDREW 09:49  
26  
27 MR. McGUINESS: The next witness, Chairman, is  
28 Mr. Robert Cox.  
29 MR. KEALEY: Mr. Chairman, Robert Cox is an editorial

1 executive with Associate Newspapers. I haven't  
2 formally applied for representation before for Mr. Cox,  
3 but subject to your approval if he could be covered by  
4 the existing representation on behalf of the newspaper.

5 CHAIRMAN: Yes, Mr. Kealey.

09:50

6  
7 MR. ROBERT COX, HAVING BEEN SWORN, WAS DIRECTLY  
8 EXAMINED BY MR. MCGUINNESS:

9 142 Q. MR. MCGUINNESS: Mr. Cox's statement is to be found in  
10 volume 28 at page 7713. Mr. Cox, you work for the  
11 Irish Mail on Sunday, is that correct?

09:50

12 A. Yes.

13 143 Q. And what position do you hold there now?

14 A. I am currently the deputy editor of news.

15 144 Q. Yes. And prior to that, when were you appointed to  
16 that?

09:50

17 A. So I started in May, at the start of May 2013, I was  
18 the deputy news editor. In May, I think, 2014, I  
19 became the news editor, and then last year, October --  
20 September/October last year, I became deputy editor.

09:51

21 145 Q. Yes. But in the year 2013 into '14, you were the  
22 deputy news editor?

23 A. Deputy news editor, yes.

24 146 Q. And I think you've clarified in your statement, or  
25 confirmed it, that you have never met or spoken with  
26 either former Commissioner Callinan or Commissioner  
27 O'Sullivan or Superintendent Taylor and you have never  
28 been negatively briefed by any of them within the terms  
29 of reference?

09:51

1 A. Absolutely. I have never to Commissioner Callinan, I  
2 have never spoken to Commissioner O'Sullivan, I am  
3 pretty confident that I have never spoken to  
4 Superintendent Taylor but there was a year when I was  
5 working in The Star from 2012 to 2013 when he was in 09:51  
6 the Press Office, I might have had occasion to speak to  
7 him, I don't remember an occasion but I just don't want  
8 to be, you know, definitive. I am pretty certain that  
9 I never spoke to him. I certainly absolutely never  
10 spoke to any -- either of the three of them about 09:51  
11 issues currently --

12 147 Q. Now, in your position as deputy news editor towards the  
13 end of 2013, you were covering in the newspaper the  
14 penalty points issue, obviously?

15 A. The penalty points issue was an issue throughout 2013 09:52  
16 and towards the end of it, yeah.

17 148 Q. Yes. And you knew of Mr. Wilson, but I don't think you  
18 knew of, yourself of Sergeant McCabe's identity.

19 A. There was a knowledge of two of Garda whistleblowers  
20 but my recollection, my memory of it is, that Garda 09:52  
21 Wilson was very much leading the charge in relation to  
22 the whistleblowing element of it on the penalty points.  
23 As far as I understand it he was doing, let's say, the  
24 front work and Sergeant McCabe was perhaps providing  
25 some support to Garda Wilson in relation to gathering 09:52  
26 information. And my recollection is that Sergeant  
27 McCabe's name was not widely out there. I mean, it  
28 might have been known but it wasn't being reported  
29 every day.



1 149 Q. Yes.

2 A. Whereas Garda Wilson's was.

3 150 Q. Yes. And had you heard of any allegation that had been  
4 made at that time against Sergeant McCabe?

5 A. No, not in 2013, no. 09:53

6 151 Q. Okay. Now, Debbie McCann I think was your crime  
7 reporter and she wasn't really covering the story of  
8 Sergeant McCabe, is that right?

9 A. She did bits and pieces, so I know there is -- like,  
10 there was a story at one stage with Alan Shatter and 09:53  
11 Mick Wallace and what he said on Prime Time, so stuff  
12 like that she might have covered because she'd had  
13 sources on it.

14 152 Q. Yes.

15 A. But generally speaking, the penalty points issue was a 09:53  
16 political issue and was being dealt with in a political  
17 arena, so we covered it from the political side of  
18 things.

19 153 Q. Yes. Obviously a large part of the discussion was  
20 whether gardaí at different levels had improperly 09:53  
21 exercised their discretion or perhaps corruptly  
22 exercised it, but I think at one of the news  
23 conferences Ms. McCann chimed in with her experience of  
24 gardaí exercising their discretion in relation to her,  
25 is that right? 09:53

26 A. Yes, yes.

27 154 Q. And she gave the circumstances --

28 A. She did.

29 155 Q. -- freely. And I'm not sure whether she was either

1 making a case in relation to it in any sense but she  
2 had been the beneficiary of an exercise of discretion  
3 in relation to her circumstances?  
4 A. She had written into a local superintendent when she  
5 was five kilometres or miles, I am not sure, kilometres 09:54  
6 I assume, over a speed limit and she was making the  
7 point that it was a van and if a garda had have been  
8 there they could have exercised discretion and that the  
9 system allows for a member of the public to write in  
10 and state circumstances. 09:54  
11 156 Q. Yes. And this was at one of your internal news  
12 conferences?  
13 A. Yeah.  
14 157 Q. And can you recollect who was there?  
15 A. I can't recollect specifically. We have a news 09:54  
16 conference every week. Over the course of my five  
17 years, we have had maybe 200, 250 news conferences.  
18 158 Q. Yes. And can I take it that, you know, journalists on  
19 the paper, they'd be expected to be aware and up to  
20 date with what issues were being discussed in the 09:55  
21 newsroom?  
22 A. Yes, I mean, generally speaking you hope that your  
23 journalists are informed about the thing, but everyone  
24 has their own beat, you know, so they kind of keep to  
25 their own beat as well. We are all news hounds so the 09:55  
26 topic of the day would be discussed usually.  
27 159 Q. Yes. But am I correct in saying that sometime in early  
28 2014 Debbie McCann came to you with a story about  
29 Sergeant McCabe?

1 A. Not a story, no.

2 160 Q. Not a story, but what did she recount to you?

3 A. She had said that she was hearing things in relation --

4 she has described it as murmurings, that there was

5 something more and it involved potentially an 09:55

6 allegation, but at that stage she didn't know what the

7 allegation was and she didn't know any details of the

8 allegation. And I said to her, well, you know, which

9 is my general practice, I'd like to know more before I

10 dismiss this or I'd like to know more before we 09:56

11 continue. And I asked her to do that, to find out.

12 161 Q. And can you recollect the approximate timeframe of

13 that?

14 A. My recollection, you have already spoken about Garda

15 Wilson and my memory of knowing who Sergeant McCabe was 09:56

16 and it was very much subsequent to the disgusting

17 remark. Commissioner Callinan, once he said disgusting

18 it became a whole different ball game in a certain

19 respect because there was -- any allegations or

20 anything that was in the ether, was now, had kind of -- 09:56

21 it hadn't surfaced but there was some reason behind

22 that disgusting remark and anybody who was following

23 the story kind of was wondering what was behind it.

24 162 Q. All right. And so, it's certainly after late January

25 2014? 09:56

26 A. Yeah. I think, I'm not sure how closely Sergeant

27 McCabe then subsequently made a PAC thing, but it was

28 between that period -- it was not between that period

29 of time but it was around that period of time.

1 163 Q. And did Ms. McCann say what she had heard or where  
2 she'd heard it from, do you recollect?

3 A. No, we didn't discuss -- she just -- she just spoke  
4 about having been informed or having heard of it.

5 164 Q. Yes. Well, you appear to have suggested, you know, can 09:57  
6 you find out more about it --

7 A. Yes.

8 165 Q. -- and maybe come back to you. And did she come back  
9 to you then?

10 A. Yes, she did. As I say, she did come back to me 09:57  
11 eventually. Now, this might be a matter, it's not like  
12 the next day or whatever, there was a period of weeks,  
13 is my recollection. So the story, we were continuing  
14 to cover the story on an ongoing basis and eventually  
15 Debbie came back to me with details. 09:57

16 166 Q. Yes. And what details did she come back with?

17 A. She came back with, that there had been an allegation,  
18 the allegation was of child sex abuse, that the person  
19 was a minor at the time of the abuse, that it was  
20 historic, and that the DPP had chosen -- had decided 09:58  
21 not to press charges.

22 167 Q. Yes. But was it clear to you and did she make it clear  
23 that the allegation related to an alleged sexual  
24 assault?

25 A. It was child -- I would say child abuse, you know I 09:58  
26 would assume that there was some sexual element to it  
27 but I don't know that she knew the specifics of what it  
28 was and I don't think she was telling me the specifics  
29 of what it was.

1 168 Q. But do you think she couched it in those terms, child  
2 abuse?  
3 A. Definitely we knew the person, let's say the  
4 complainant who now turns out to be Ms. D, was a child  
5 at the time. 09:58

6 169 Q. And did she know the name or the address or --  
7 A. At that stage, I had asked her to go and find out the  
8 information. I think she had the name of the family,  
9 and I think she knew that it was involving a colleague,  
10 but the address, no, she didn't at that stage have the 09:59  
11 address.

12 170 Q. Okay. Did she give you any indication as to where  
13 she'd been able to firm up this information or get it  
14 from or --  
15 A. She said -- I'm not -- to be honest, I can't be sure. 09:59  
16 I know now that I know it was from a variety of  
17 sources. I don't know if then I knew it was from a  
18 variety of sources. I would assume, however, having  
19 worked with Debbie, that it would have been from more  
20 than one source. 09:59

21 171 Q. Okay. All right. And I think you've obviously  
22 outlined in the statement that you were primarily only  
23 interested in stories that you could actually publish  
24 and you were saying this to Ms. McCann and telling her  
25 to exercise some degree of caution, is that right? But 09:59  
26 you did decide to authorise her to go up, is that  
27 right?  
28 A. Well, we decided as a newspaper to authorise it, we  
29 went through the proper procedures. Debbie at that

1 stage asked would it -- did we think it was worth  
2 sending her up at that stage. I formed the view that I  
3 thought that it was. I still hold that view, that I  
4 thought it was. I did that in consultation with Conor,  
5 Conor made the final decision, he was happy for us to 10:00  
6 go up on that basis.

7 172 Q. Yes. And obviously you knew that she was going to, as  
8 it were, appear on the doorstep?

9 A. Yeah.

10 173 Q. And I suppose you wouldn't necessarily know how that 10:00  
11 might work out, obviously?

12 A. No. You never know what happens on a doorstep, and I  
13 think that's -- you know, you trust people to be  
14 discreet, you trust people to be sensitive, you know,  
15 Debbie would have a reputation of discretion and 10:00  
16 sensitivity in that regard. We trusted her to do the  
17 right thing on the doorstep.

18 174 Q. Yes. And I suppose the expectation or perhaps the hope  
19 might be that she would be able to secure an interview?

20 A. I don't recall that being the expectation. To be 10:01  
21 honest, I recall it very much a case of go up and find  
22 out what you can find out. There's a number of  
23 different ways from a doorstep that you find out  
24 information. One of the ways would have been to secure  
25 an interview. 10:01

26 175 Q. Yes.

27 A. But you know, it happens that they will give you an  
28 interview straight away but it's not necessarily the  
29 only way --

1 176 Q. No, indeed not. But obviously the purpose of going to  
2 the doorstep is to knock on the door and speak to  
3 people in the hopes that they will speak to you?  
4 A. People with more knowledge than you have and glean that  
5 information, yes. 10:01  
6 177 Q. Yes.  
7 A. I mean, for example, I didn't know when we were sending  
8 her up that she would have knocked on the D house and  
9 Mr. or Mrs. D would have said actually that's all in  
10 the past, there was a mistake there and we are now 10:01  
11 happy to, you know, clarify that. And we could have  
12 used that information to subsequently deal with the  
13 story in a totally different way.  
14 178 Q. Yes. You did have some discussion with your leading  
15 newsman, Mr. Newman, is it? 10:02  
16 A. Meehan.  
17 179 Q. Mr. Meehan?  
18 A. James Meehan. He is a picture editor.  
19 180 Q. -- about possibly sending up a photographer?  
20 A. So, he would be in control of the newspaper's 10:02  
21 photographers. So he would assign them directly. So I  
22 wouldn't necessarily assign photographers. I might  
23 suggest that we need one and he would agree with that.  
24 Me and him had a conversation subsequent to my  
25 conversation with Debbie and, as part of the process 10:02  
26 with talking with Conor, I know Conor said that he  
27 wasn't aware in relation to whether he had agreed to do  
28 the photographer or made the decision, effectively  
29 Conor had agreed to do the doorstep and then me and

1 James decided or made an initial decision that he then  
2 subsequently confirmed not to send a photographer up.

3 181 Q. Okay. So there was three of you involved in that  
4 really, which led to the decision --

5 A. Not perhaps all at the same time but yes, over the 10:03  
6 course of it, yeah.

7 182 Q. Of course. So obviously there is a little to-ing and  
8 fro-ing then with Mr. O'Donnell. There was no secret  
9 about the decision and presumably you had --

10 A. We work very much as a team. I mean, it's not -- we 10:03  
11 expect that within that team things are kept  
12 confidential in any case, so, you know, we are bound by  
13 the confidentiality of our -- you know, we don't expect  
14 people to be telling tales out of school, outside of  
15 the newsroom, if you know what I mean. 10:03

16 183 Q. Yes.

17 A. So other newspapers wouldn't find out if, you know, our  
18 news team members knew about it.

19 184 Q. But obviously you told Ms. McCann that you weren't  
20 now -- or not going to send a photographer? 10:03

21 A. Yeah, I mean, the decision to send a photographer or  
22 not, you know, happens any doorstep, and for any number  
23 of different reasons and in this particular instance we  
24 just believed that if there were to be a story, none of  
25 us particularly saw what the story was going to be, but 10:04  
26 if there was going to be a story there would be another  
27 opportunity to get a photographer.

28 185 Q. Yes. Of course. Now, you knew obviously Ms. O'Reilly  
29 as well?



1 A. Mm-hmm.

2 186 Q. And she worked there?

3 A. She worked with me, yeah.

4 187 Q. And she was -- she went to Cavan, isn't that right?

5 A. She did. 10:04

6 188 Q. And spoke to Mr. Wilson?

7 A. Yeah.

8 189 Q. And then she went to Mr. McCabe's house?

9 A. Yeah.

10 190 Q. And I think you've seen phone records and texts this 10:04  
11 morning and I think they have enabled you to --

12 A. They have. In my statement I say that I had a  
13 conversation with her on the phone at the same time,  
14 and I say it sticks in my memory because I was  
15 surprised that she was up in Cavan. And thanks to 10:04  
16 Alison's record-keeping, I now can -- I have a better  
17 understanding of that. So I accept that perhaps we  
18 didn't speak on the phone and we may have spoken the  
19 next day. I certainly accept that she got approval.

20 191 Q. Yes. 10:05

21 A. I don't believe that I knew she had approval at that  
22 stage, but I don't remember particularly. I certainly,  
23 when I was given the statement, which is only last  
24 week, would definitely have believed that she hadn't  
25 approval but I am perfectly happy to accept now that 10:05  
26 she had approval from Aidan.

27 192 Q. That is Mr. Corkery?

28 A. Aidan Corkery. Yes. Now, the only thing I would say,  
29 is that the surprise that she was up there, I still

1 remember that distinctly.

2 193 Q. Okay. In any event, Ms. McCann -- have you a  
3 recollection of Ms. McCann phoning you --

4 A. Mm-hmm.

5 194 Q. -- on the day that she was up there? 10:05

6 A. Yeah.

7 195 Q. Is that right?

8 A. And I could have spoken with -- with Debbie, I could  
9 have spoken once or twice or perhaps even three times.  
10 It would not be unusual to have a quick conversation to 10:05  
11 get the details of what -- for me to pass it on to  
12 Conor and then to ring book and loop back in terms of,  
13 you know, okay, you can head home, or okay, Conor has  
14 absolutely confirmed that we are not doing anything on  
15 that, you know. 10:06

16 196 Q. Yes.

17 A. So I have said it as one conversation but it may have  
18 been one or two conversations, but in a quick period of  
19 time over that day.

20 197 Q. Yes. You appear to have a recollection of Ms. McCann 10:06  
21 describing how Mrs. D reacted and the level of upset  
22 that she was experiencing?

23 A. I mean, the reason you put people on doors and you  
24 have -- you know, is because they will glean  
25 information. And I think that I asked Debbie to 10:06  
26 explain -- so our process would be for her to tell me  
27 exactly what happened, not to interpret it for me, but  
28 to tell me exactly what happened. And I asked her to  
29 tell me exactly what happened and she said that she had

1           briefly, only a had a brief conversation with Ms. D,  
2           that Ms. D has mentioned the radio --  
3 198 Q.     with Mrs. D?  
4           A.     Mrs. D, sorry. She never spoke with Ms. D, sorry.  
5           with Mrs. D, the mother, for want of a -- I'll use -- 10:07  
6           if that is okay?  
7 199 Q.     Yes.  
8           A.     So she spoke with the mother, who was on the door, and  
9           she says that the mother mentioned that it was very  
10          hard to listen to the radio and indicated that Sergeant 10:07  
11          McCabe's name had been on the news.  
12 200 Q.     Yes.  
13          A.     But that was pretty much it.  
14 201 Q.     Did you speak to Ms. McCann after she came back?  
15          A.     When you say "she came back"? 10:07  
16 202 Q.     Back, physically back as opposed to on the phone.  
17          A.     Well, if it's the 28th February, that was a Friday,  
18          Debbie's memory is that it was a Friday as well, the  
19          next day would be Saturday, would be the -- when we go  
20          to print, and most of the reporters would be in the 10:07  
21          newsroom. So I would have spoken to her in the course  
22          of maybe general conversation.  
23 203 Q.     Yes. She appears to have been sort of moved, in a  
24          sense, by Mrs. D's conveying, in however it was  
25          conveyed, of the upset or trauma that her daughter had 10:07  
26          had, and she appeared to have perhaps taken the view  
27          that Ms. D had been very badly affected by what she  
28          alleged Sergeant McCabe had done to her, did you get a  
29          sense of that?

1 A. The sense I got was, and, I mean, again, this is a  
2 process --

3 204 Q. Yes.

4 A. -- you send someone up on a doorstep, they speak to  
5 somebody. It's something that we are aware of in 10:08  
6 journalism, because it's confirmation by us or sourced  
7 by us, if someone talks to you, you will naturally  
8 empathise with them because it's only by talking to  
9 people that people will get stories. Usually reporters  
10 will suffer for -- more than editors, and that is why 10:08  
11 you put editors in place, to have -- that kind of  
12 thing. I got the impression from Debbie that she  
13 believed that the mother believed her daughter. That  
14 was the only impression I got.

15 205 Q. All right. Okay. All right. In any event, you also 10:08  
16 spoke to Ms. O'Reilly after she came back, and I think  
17 you are happy to confirm that wasn't on the phone? You  
18 see Ms. O'Reilly has produced her phone records?

19 A. I have seen the phone records. I am not saying that it  
20 definitely didn't happen on the phone, but it would 10:09  
21 make sense, because, again, Friday and Saturday, it  
22 would make sense, Alison would have been probably in  
23 the newspaper office on the Saturday, and if -- you  
24 know, I wasn't aware that she was up there, I was  
25 surprised, which is why it stuck in my memory. 10:09

26 206 Q. Yes.

27 A. But I may have only had the conversation with her  
28 subsequently, because if Aidan was in charge of Alison  
29 that week, we shared a team and we'd divide the team in

1 two, then it would be normal for Alison to be reporting  
2 back to Aidan. And the text messages - I fully accept  
3 that Aidan, for example, when presented with the  
4 opportunity to talk to Maurice McCabe, you know, said  
5 go for it. 10:09

6 207 Q. And she may well have presumed that yourself and Aidan  
7 knew who had sent who where?

8 A. She could well have -- I may well have -- I don't have  
9 a strong recollection that I knew. You know, as I  
10 said, last week, if I had known last week, I would have 10:09  
11 said it last week, but I have --

12 208 Q. All right. Okay. And did Ms. McCann ever report to  
13 you that she had subsequently found out more  
14 information about the story?

15 A. Subsequent to her attendance at the D house? 10:10

16 209 Q. Yes.

17 A. No. Quite quickly after that she went on maternity  
18 leave, I think within two or three weeks.

19 210 Q. Yes. And she never reported to you that she had ever  
20 spoken to Ms. D? 10:10

21 A. She absolutely -- the story she told me immediately --  
22 in the immediate aftermath, she told me, she told  
23 another member of our team and then on the Saturday she  
24 probably -- it probably would have been discussed in  
25 the office. I mean, it was quite clear that she had 10:10  
26 made an approach and that approach had not been  
27 successful, and at any stage when this issue was  
28 raised, it was clear that we were not in the business  
29 of publishing allegations, we were in the business of

1 publishing verifiable stories.

2 211 Q. Did she ever mention Superintendent Taylor to you?

3 A. No -- sorry, in this context or --

4 212 Q. Yes.

5 A. In this context, no. 10:11

6 213 Q. All right.

7 A. I mean, obviously he was the Press Officer, so, like --

8 214 Q. Did she ever tell you that she had had some part of the  
9 information she'd received confirmed by the Garda Press  
10 Office? 10:11

11 A. I never -- I never knew her sources for the  
12 information. I trust Debbie McCann and I trust her  
13 ability to gather the information and I trust that she  
14 understands, when she is providing the information,  
15 that information is the truth. 10:11

16 215 Q. All right.

17 A. Are facts, I mean -- not the truth. Are factual.

18 MR. McGUINESS: All right. Okay. Thank you, Mr. Cox.  
19 Will you answer any questions anyone else may have.

20 MR. McDOWELL: No questions, Chairman. 10:11

21 MR. DIGNAM: No questions, Chairman.

22 MR. DOYLE: Chairman, Declan Doyle. I appear for  
23 Alison O'Reilly.

24

25 THE WITNESS WAS CROSS-EXAMINED BY MR. DOYLE: 10:12

26

27 216 Q. MR. DOYLE: Mr. Cox, you made the statement to the  
28 Tribunal on the 15th June --

29 A. Yeah.

1 217 Q. -- last week. You were receiving legal advice, I take  
2 it, were you; Mr. Kealey, from the Mail's legal team?  
3 A. Yes.

4 218 Q. And the circumstances in which you made the statement  
5 and the legal obligations regarding truthfulness of the 10:12  
6 statement, presumably were explained to you, is that  
7 right?  
8 A. I don't think they needed to be explained to me. I  
9 mean, I understand that, when I am talking to a  
10 tribunal, I should be telling the truth, and that is 10:12  
11 what I endeavoured to do.

12 219 Q. Yes. And you made a number of factual assertions,  
13 which you have withdrawn this morning, isn't that  
14 right?  
15 A. There are -- there is a couple of things in my 10:12  
16 statement that, upon production of the records and  
17 on -- of the text messages, have helped all of our  
18 recollections.

19 220 Q. Yes. I mean, it's not just helped your recollection;  
20 the reason I'm asking you this is that Ms. O'Reilly's 10:13  
21 credibility and truthfulness surrounding a lot of these  
22 matters about her trip to Cavan and so on, was very  
23 seriously challenged by your newspaper, the Mail, isn't  
24 that right?  
25 A. Sorry -- 10:13

26 221 Q. It was put to her that she was not telling the truth  
27 about a lot of the circumstances around these events,  
28 by the Mail; you are aware of that?  
29 A. Yes, around these events. But I don't know

1 particularly around the trip to Cavan. I think I am  
2 the only person who said that she hadn't been approved  
3 to go up there.

4 222 Q. Yes.

5 A. And I have just clarified that I am perfectly happy to 10:13  
6 accept that she had been approved. I just was unaware  
7 of it at the time that I made the statement.

8 223 Q. Yes. I mean, to be blunt about it, paragraph 14 of  
9 your statement, which is at 7715:  
10  
11 "The next morning --" 10:13  
12  
13 I mean, it's full of detail, Mr. Cox.  
14  
15 "The next morning I took a phone call from Alison 10:14  
16 O'Reilly."  
17  
18 wrong, isn't that right? That's wrong?  
19 A. My recollection at the time last week was that I took a  
20 phone call. There are no records to show that we had a 10:14  
21 phone call, so I am happy to accept that it probably  
22 happened the next day.

23 224 Q. That's wrong. I mean, you said it -- you confidently  
24 asserted it last week, and it's wrong, isn't that  
25 right? 10:14

26 A. I'm happy to accept that it's not what happened.

27 225 Q. "She informed me she was in Cavan and had been speaking  
28 with John Wilson, whom she was now following to Maurice  
29 McCabe's house."



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Wrong again, isn't that right? The evidence -- the truth of the matter is that she was driven to Maurice McCabe's house by Mr. Wilson, she didn't follow him. That's wrong again, yes?

10:14

A. I am happy to accept that it's not correct, yes.

226 Q. "And this is why it sticks in my memory."

I am curious of how you say something stuck in your memory and you explain why it stuck in your memory, when, in fact, it never happened?

10:15

A. Well, you see, the surprise is what I'm talking about there. Sorry --

"I found this unusual as I would not have been -- unusual for me to approve such a trip knowing that Debbie was on her way to Cavan also."

10:15

That is still my opinion. It's still my opinion that it would be unusual to send one reporter up to talk to one side of a story and another reporter up to speak to another side of the story, on the same day.

10:15

227 Q. "Alison was seeking permission to speak with Sergeant McCabe."

10:15

That clearly is, she was seeking that permission from you, isn't that right? That is what you said last week.

A. Absolutely, that is what I said last week, she did seek

1 permission, so, I mean, what has happened here is a  
2 conflation of what I knew then and what I thought I  
3 knew last week, but the general principle of her  
4 seeking permission is correct.

5 228 Q. Alison was seeking permission from you - the words 10:16  
6 aren't there - to speak with Sergeant McCabe. This is  
7 all your recollection of the phone call with --

8 A. The paragraph is quite clear.

9 229 Q. Sorry, can you just let me finish the question. This 10:16  
10 is all your recollection of the phone call with Alison  
11 O'Reilly, which never happened?

12 A. Yes, but the conversation, the conversation in relation  
13 to her seeking permission or talking about that, I  
14 don't know that that conversation ever happened. I  
15 don't know that I wasn't aware -- what I'm saying is, I 10:16  
16 don't know that I wasn't aware that she went up. All I  
17 know is that, last week, I was of the opinion, and I  
18 believed it - not just based on my memory, I had made  
19 some checks - that she hadn't been approved.

20 230 Q. Well, you are referring in your statement to the 10:16  
21 Tribunal in minute detail to a conversation which never  
22 happened, and what I'm saying to you is that you are  
23 using the minute detail as evidence of the accuracy of  
24 your recollection, and I'm just -- I am trying to  
25 inquire from you how can that happen? 10:17

26 A. The detail, the detail that I am using to verify or to  
27 suggest that this is why it sticks in my memory, that  
28 detail is her being in Cavan on the same day. I  
29 believe now that she was in Cavan on the same day, I

1 believe now that it was unusual. It was not something  
2 that I would have approved had I known about it.

3 231 Q. The detail goes on:

4  
5 "She asked if she could raise it with Sergeant McCabe." 10:17

6  
7 I mean, that didn't happen. There was a text exchange  
8 in which she informed Mr. Corkery that she was now  
9 going out to see Maurice McCabe, and Mr. Corkery texted  
10 her back and said, wow, go for it. So your statement 10:17  
11 to the Tribunal saying that she asked you - the word  
12 isn't spoken - if she could raise it with Sergeant  
13 McCabe, that never happened either, isn't that right?

14 A. As I say, it seems to me that there has been a  
15 conflation in my recollection, for which I apologise, 10:18  
16 Chairman.

17 232 Q. And you go on to say:

18  
19 "I told Ms. O'Reilly to speak with Sergeant McCabe  
20 using her own discretion but to be attuned to the 10:18  
21 sensitive nature of the inquiry and to avoid causing  
22 any upset."

23  
24 I mean, that is quite a confection, I suggest to you,  
25 isn't it? 10:18

26 A. Not really. That is what we would say. I mean, that's  
27 what -- that's what you would say, that is what I would  
28 have said and that's my understanding of my attitude  
29 towards -- this is not a situation in isolation. The

1 question of going to Maurice McCabe with the  
2 allegations was an issue that had been considered.

3 233 Q. Yes.

4 A. And that would have been my opinion. I am not entirely  
5 sure that, in my memory, I wasn't speaking to Aidan 10:18  
6 when I said that and that I was part of the  
7 conversation when Aidan sent the thing, I don't know, I  
8 don't remember. If I could remember better, I would  
9 happily tell you.

10 234 Q. But you were aware when you made this statement that 10:19  
11 Ms. O'Reilly was being accused by your newspaper of  
12 being untruthful to the Tribunal, isn't that right?

13 A. Yes.

14 235 Q. And did it -- did that affect your judgment when you  
15 made all these untruthful statements? 10:19

16 A. No, it didn't. I was trying -- I had been asked for a  
17 statement, I was trying to provide my recollection of  
18 the situation as it happened.

19 236 Q. Can I move on to paragraph 18 of your statement.

20 A. Mm-hmm. 10:19

21 237 Q. Which is further down 7715:  
22  
23 "I never told Alison that Conor O'Donnell thought that  
24 Garda Wilson was mad, as was alleged. I never formed  
25 that view, nor did Conor O'Donnell, to my knowledge." 10:19  
26  
27 You have seen the exchange of texts between  
28 Mr. Corkery --  
29 A. Yes.

1 238 Q. -- and Ms. O'Reilly. I am just struggling to find the  
2 page in the Tribunal's papers at which those texts come  
3 up. Can you tell me -- page 7801, sorry.  
4 Unfortunately, my copy, paper copy is obliterated, but  
5 it's at 7801. Unfortunately -- we can hand around 10:20  
6 legible copies. Do you have one, Mr. Cox?  
7 A. I have a legible copy, yeah, I do.  
8 239 Q. Well, the text that I am referring to is:  
9  
10 "Okay, he thinks Wilson is a bit mad though, so I 10:20  
11 wouldn't be too confident."  
12 A. Yeah.  
13 240 Q. Now, that is a text from Mr. Corkery to Ms. O'Reilly.  
14 A. Yeah.  
15 241 Q. And the "he" who thinks Wilson is a bit mad is Conor 10:21  
16 O'Donnell, do you see that from the text above it?  
17 A. Yeah, I see it.  
18 242 Q. "Will you try Conor on the John Wilson statement for  
19 Sunday because it comes off the back of today's  
20 report." 10:21  
21  
22 The context isn't terribly important. But here are two  
23 people; Mr. Corkery, who is your close colleague, isn't  
24 that right?  
25 A. Yes. 10:21  
26 243 Q. And Ms. O'Reilly, who is your journalist?  
27 A. Mm-hmm.  
28 244 Q. And they both know it's a given, the tone of those  
29 texts, I suggest to you, that Conor O'Donnell thinks



1 was saying it. All I know is, Conor never said it to  
2 me and I never formed a view that he was anything. And  
3 this is a side point: The story that they are talking  
4 about on the 12th March was published on the 16th  
5 March. 10:23

6 246 Q. The tone of your statement at paragraph 18 is that: I  
7 don't know where this notion about people thinking  
8 Mr. Wilson is a bit mad came out of.

9 A. The tone --

10 247 Q. If you look at it. I never told Alison that Conor 10:23  
11 O'Donnell thought --

12 A. Sorry, just a second. My screen is gone off. Thank  
13 you.

14 248 Q. Sorry, bottom of page 7715, please, at paragraph 18.  
15 Forgive me if I am giving it unfair inflection, but: 10:24  
16 I never told Alison that Conor O'Donnell thought that  
17 Garda Wilson was mad, as she has alleged. I never  
18 formed that view, nor did Conor O'Donnell, to my  
19 knowledge.

20 A. Yeah. 10:24

21 249 Q. I am suggesting that the tone of that is that this is  
22 all complete news to you -- any suggestion that there  
23 was a view that Mr. Wilson was a bit mad, that the tone  
24 of paragraph 18 of your statement is that is all  
25 complete news to you? 10:24

26 A. First of all, I don't see where you are getting the  
27 tone from. That is a straight up denial of something  
28 that was put to me.

29 250 Q. All right.

1 A. I never told Alison that Conor O'Donnell thought Garda  
2 Wilson was mad. I am saying that now, I never said  
3 that. I never formed the view that Conor thought Garda  
4 Wilson was mad. I am saying that now. And I am also  
5 saying that, to the best of my knowledge, to the best 10:24  
6 of my knowledge, Conor did not believe that. But I am  
7 not Conor and I'm not Aidan, and I am not party to that  
8 text exchange, but I don't see a tone there. You seem  
9 to be inferring a tone; it's not coming from me.

10 251 Q. All right. well, I apologise if I unfairly inferred a 10:25  
11 tone. But you have asserted there that, to the best of  
12 your knowledge or to your knowledge, you never knew  
13 that Conor O'Donnell had a view that Mr. Wilson was a  
14 bit mad?

15 A. As already said, the story that Alison and Aidan were 10:25  
16 talking about in this text exchange was published on  
17 the following Saturday. I would suggest to you that if  
18 the editor of the Irish Mail on Sunday thought someone  
19 was a bit mad, he would not be publishing a story, the  
20 source of which looks very likely to have been a 10:25  
21 protection -- protected disclosure from that person.

22 252 Q. well, are you surprised at the text exchange between  
23 Ms. O'Reilly then, perhaps if I could put it that way,  
24 in which it is -- it was clearly common knowledge  
25 between Ms. O'Reilly and Mr. Corkery that Conor 10:25  
26 O'Donnell has a view that Mr. Wilson is a bit mad, does  
27 that surprise you?

28 A. Surprise, it doesn't -- I don't have an opinion in  
29 relation to -- there are a number of different ways or



1 reasons why an editor, a news editor, would speak to a  
2 reporter or would text a reporter, different elements  
3 of it. I can go into that if you'd like, but, you  
4 know, there are any number of different reasons why  
5 people communicate to people in different ways. 10:26

6 253 Q. That's not what I'm getting at, and I think you know  
7 that, Mr. Cox.

8 A. I am happy to answer your questions. If you ask me a  
9 straight question, I am happy to answer them,  
10 absolutely happy to answer them. 10:26

11 254 Q. Here are two people in that text exchange with whom you  
12 work very closely, and they both state, as a matter of  
13 fact, that, well, certainly Conor O'Donnell thinks  
14 Wilson is a bit mad, and you deny all knowledge of this  
15 about Conor O'Donnell's view. Are you surprised by the 10:26  
16 fact that your two close colleagues know this about  
17 Conor O'Donnell?

18 A. I'm not a party to the text message. I don't think you  
19 can say that they know this about Conor O'Donnell. I  
20 don't know whether this was asked of Conor O'Donnell 10:27  
21 when he was sitting up here. You know, as far as I  
22 understand it, it wasn't. I certainly don't recall it,  
23 being here, I was sitting in the gallery. I am not a  
24 party to that text message, and my surprise or lack or  
25 -- of reaction to it, I don't see the relevance. 10:27

26 255 Q. Can I just refer you then to paragraph 10 of your  
27 statement, please, which is on 7714:  
28  
29 "I formed the view then, and I hold it still, that

1 seeking further information on this issue, which was  
2 one of significant public interest, was worth the  
3 resources we subsequently diverted to it, namely  
4 sending Debbie up to the doorstep. I also believe,  
5 both generally and in this specific instance, that by 10:27  
6 going directly to a party involved, the newspaper could  
7 not be accused of spreading any allegation around."

8 A. Yes.

9 256 Q. Who did you think would be accusing the newspaper of  
10 spreading allegations around? 10:28

11 A. I was speaking generally when I said that, but, I mean,  
12 in a situation -- in a particular context like a  
13 hypothetical version of what we are talking about here,  
14 Maurice McCabe was a person of significant public  
15 interest, he was a person who would continue to be an 10:28  
16 issue of public interest. If Maurice McCabe decided  
17 that the newspaper was in some way spreading rumours  
18 around without going to him directly in relation to it,  
19 that would be an issue of concern, in relation to how  
20 we would manage the story on an ongoing basis. But not 10:28  
21 only Maurice McCabe, it could have been anybody; like,  
22 it could have been people who were, you know, within  
23 the guards, or anybody, I mean. Ultimately, it's  
24 generally our principle to go straight to source.  
25 Especially the more sensitive, the more difficult an 10:28  
26 allegation or a situation, we tend to go straight to  
27 source, because trying to firm it up from different  
28 sources can have the effect of spreading it around, and  
29 we are cognisant of that.

1 257 Q. But you were trying to possibly work up a story, or  
2 your journalists were trying to assemble information  
3 that may or may not give rise to a story?

4 A. We were trying to gather information.

5 258 Q. I am still not understanding, and forgive me, why you 10:29  
6 would be concerned about a newspaper being accused of  
7 spreading any allegations around. I mean, you either  
8 publish a story which is not defamatory or you don't.  
9 A newspaper being accused of spreading false  
10 allegations -- 10:29

11 A. Somebody can take an opinion against us even covering  
12 the story and, on that basis, we need to be careful  
13 that they don't believe we are doing it for any  
14 malicious intent. It would be, I would have thought,  
15 self-evident that you would go straight to source, is a 10:30  
16 more responsible way of doing something, than going  
17 around the houses telling everybody up in Cavan about  
18 an allegation that we don't know necessarily people  
19 know about. If we are the first people to tell  
20 somebody about that allegation, you know, we could 10:30  
21 potentially be spreading an allegation that, at that  
22 stage, the only information we had about it was that  
23 the DPP had decided not to press charges.

24 MR. DOYLE: Thank you very much.

25 10:30

26 THE WITNESS WAS EXAMINED BY MR. KEALEY:

27

28 259 Q. MR. KEALEY: Mr. Cox, you know me, I am Michael Kealey,  
29 I am your solicitor before the Tribunal. I am going to

1 ask you a small number of questions. Mr. Doyle has  
2 asked you a number of issues arising from paragraph 14  
3 of your statement in relation to the question of your  
4 interaction with Ms. O'Reilly after she had travelled  
5 to Cavan, you recall that? 10:31

6 A. Yes.

7 260 Q. And Mr. Doyle can correct me if I am wrong, but he has  
8 characterised certain of what you've said is untruths,  
9 these were a series of untruths that you had stated to  
10 the Tribunal, and you were told about the importance of 10:31  
11 giving truthful evidence to the Tribunal, isn't that  
12 correct?

13 A. Yes.

14 261 Q. And I wonder could we possibly return to Alison  
15 O'Reilly's statement, please, which was received by the 10:31  
16 Tribunal on the 9th June 2017, and you will find that  
17 on page 3831 of the Tribunal's materials. And if we  
18 just go to paragraph E here, which is on the screen  
19 now. At the time that you were making your recent  
20 statement to the Tribunal, you were aware of this 10:31  
21 statement, were you?

22 A. Yes, it was the specific context in which I was making  
23 the statement.

24 262 Q. And you were also aware of the evidence Alison O'Reilly  
25 gave to the Tribunal, I believe you were here for that 10:32  
26 evidence?

27 A. Yes.

28 263 Q. Could we turn, please, then, to paragraph E and I think  
29 just read the first number of sentences of that

1 statement. And this starts, and this is Alison  
2 O'Reilly stating it:

3  
4 "I asked my news editor, Robert Cox, if I could go and  
5 have a meeting with John Wilson in Cavan just to see if 10:32  
6 he had anything we could print. Despite the attacks on  
7 their credibility, I thought the information they had  
8 brought to light was worthy of further investigation by  
9 our newspaper, which has also sought to highlight  
10 malpractice by the State. Robert Cox told me that 10:32  
11 Irish Mail on Sunday editor, Conor O'Donnell, thought  
12 that John Wilson was mad and to be careful of him but  
13 that I could go."

14  
15 And then she goes on to indicate the nature of 10:32  
16 interaction with Mr. Wilson and Mr. McCabe, isn't that  
17 correct?

18 A. Yes.

19 264 Q. So is it the case that, even though it has been  
20 indicated to you that you had told a number of untruths 10:32  
21 to the Tribunal, that, looking at this, it was  
22 certainly Ms. O'Reilly's understanding that she had  
23 spoken to you about these matters when she made her  
24 statement to the Tribunal?

25 A. I think it's very clear. I mean, me and Alison had a 10:33  
26 recollection, the recollection has been informed by the  
27 text messages. I think there is a different  
28 recollection now. I'm trying my best to tell the  
29 thing. When I made that statement last week, I

1 believed it to be true.

2 265 Q. Yes.

3 A. I was responding to this statement. You know, Alison  
4 believed it to be true, for us to have been the two  
5 people who were talking. It turns out, because of the 10:33  
6 vagaries of our memories and of the system that we had  
7 in place, Aidan was involved. I mean, it doesn't  
8 really impact the overall principles of the situation.

9 266 Q. And you are not indicating that in relation to this  
10 particular issue before this Tribunal, that Alison 10:33  
11 O'Reilly, when she made that statement, was telling  
12 untruths?

13 A. No, I am perfectly happy to accept that she has  
14 misreclected it? I mean --

15 267 Q. And you are saying that, notwithstanding the fact that 10:33  
16 it's been alleged that you've been telling untruths to  
17 this Tribunal?

18 A. Yes, absolutely. I mean, the point here is that she  
19 says that I say that I thought Conor thought John  
20 Wilson was mad, in this conversation. I mean, if this 10:34  
21 conversation didn't happen, then I could definitively  
22 not have said that I thought Conor thought John Wilson  
23 was mad. So it's quite obvious there has been a  
24 conflation, I think it's -- well, sorry, it's not my  
25 position. I think, from my situation, it looks like 10:34  
26 there has been a conflation.

27 MR. KEALEY: Thank you. I have no further questions.

28 MR. MCGUINNESS: Nothing further, Chairman. Thank you,  
29 Mr. Cox.

1 CHAIRMAN: Thank you.

2

3

THE WITNESS THEN WITHDREW

4

5 MR. MCGUINNESS: Chairperson, I know you are anxious to 10:35  
6 start the submissions and I think the appropriate  
7 course of action is for you to invite the parties to  
8 make their position clear on the issue, having regard  
9 to the points that you have indicated you would like to  
10 hear them on. 10:35

11 CHAIRMAN: well, the points that I have indicated are  
12 obviously indicative only and people can make whatever  
13 submissions to me they feel are potentially ones that  
14 will achieve the result that they wish to see.

15

10:36

16 We have come to the end now of all evidence which the  
17 Tribunal has been able to gather, including three  
18 occasions where the Tribunal has publicly called for  
19 any further information relevant to the terms of  
20 reference to be proffered to it and for any relevant 10:36  
21 witness to come forward. It doesn't seem to be likely  
22 that there is going to be any great breakthrough at  
23 this point. Vis-à-vis the 700 contacts within the  
24 Garda Press Office, it is pointless to call every one  
25 of those 700 and it's also pointless to call the 50 10:37  
26 journalists, of which the twelve now named by  
27 Superintendent Taylor as having been negatively briefed  
28 by him against Sergeant McCabe, to give evidence, on  
29 the basis that there would be nothing whatsoever to put

1 to them. It has been bad enough to simply put the bald  
2 nature of the claim made by Superintendent Taylor to  
3 those who have been, in fact, called, and we have  
4 called all of those twelve. In addition to that, we  
5 have written to every senior officer in Garda Síochána 10:37  
6 and we have written to every editor, we have written to  
7 a large number of journalists. That correspondence has  
8 been opened in the course of examination by counsel, by  
9 Mr. McGuinness, by Mr. Marrinan and by Ms. Leader. The  
10 net effect of it is very simple: The Tribunal has been 10:38  
11 attempting to roll a very large stone, it seems to me,  
12 up a very large mountain like Croagh Patrick, and, if  
13 we haven't succeeded fully, I think at this point it  
14 might be fair to say that we have done our very best  
15 and that what we have done is reasonable. 10:38

16  
17 Now, I think we now come to the issue as to whether  
18 this Tribunal ought to refer anyone to the High Court.  
19 The first thing to do is to identify who is in the  
20 order sought from the parties by the Tribunal to be 10:38  
21 sent to the High Court; the second thing is to identify  
22 why; and the third thing is to address why journalistic  
23 privilege does not apply and to identify the potential  
24 outcome of any such reference to the High Court, why  
25 that would help, whether any issue of futility might 10:39  
26 arise and whether the Tribunal has a discretion. So  
27 that seems to me to be perfectly clear. So given that  
28 that is the situation, I have nothing more to say. I  
29 am here to listen.



1  
2 SUBMISSION BY MR. McDOWELL:

3  
4 MR. McDOWELL: Chairman, I think it's fairly obvious  
5 that the Tribunal has made every reasonable effort to 10:39  
6 inquire into whether or not there was negative briefing  
7 of journalists, whatever that means, and I will come  
8 back to that in a moment, by Superintendent Taylor or  
9 by senior members of An Garda Síochána or by the two  
10 former Commissioners, and I accept that the Tribunal 10:40  
11 has made every reasonable effort to explore these  
12 matters.

13  
14 On a number of occasions, a number of journalist  
15 witnesses have refused to answer the very simple 10:40  
16 question as to whether Superintendent Taylor off the  
17 record discussed with them Sergeant McCabe or the  
18 allegations made in relation to Sergeant McCabe.

19  
20 As the Tribunal is aware, Superintendent Taylor has 10:40  
21 waived any privilege or right of confidentiality that  
22 he might have in respect of the area of journalistic  
23 privilege, in respect of such conversations. It's my  
24 submission that, in those circumstances, the  
25 journalists who have refused to answer the questions 10:41  
26 properly put to them as to whether they did have such  
27 discussions with Superintendent Taylor, do not have any  
28 stateable journalistic privilege which would justify  
29 such a refusal. And even looking at the Becker case,

1 which the Tribunal is aware of, in the ECHR, although  
2 it is the case that a waiver by the source may not be  
3 in every circumstance a complete basis to exclude  
4 journalistic privilege, it's clear from that decision  
5 that the questioning of a journalist in those 10:42  
6 circumstances could be illicit, by reason of  
7 journalistic privilege, because it might expose the  
8 journalist to revealing other sources or other  
9 confidential sources for their information.

10 10:43  
11 But here we are not dealing with that, Chairman. Here,  
12 we are dealing with a fairly straightforward question:  
13 Did Superintendent Taylor discuss Sergeant McCabe off  
14 the record with journalists? And the answer that  
15 you've received from a number of them is that they 10:43  
16 refused to answer that question on the basis of  
17 journalistic privilege. No basis has been advanced and  
18 there's no evidential basis for you to conclude that  
19 answering the simple question as to whether they had  
20 such discussions with Superintendent Taylor could 10:44  
21 expose other confidential sources or compromise their  
22 journalistic privilege in some other way. On the  
23 contrary, it seems to me, and this is a matter for you,  
24 Chairman, that an absolute refusal to answer this  
25 question -- or these questions, is being asserted as a 10:44  
26 principle in itself, utterly without any factual or  
27 legal basis, and I'm submitting to you that you should  
28 rule that there is no privilege in these -- which would  
29 justify such refusal to answer the simple questions

1           that arise here.

2  
3           Now, the second point that I want to submit to you,  
4           Chairman, is that if there is no journalistic  
5           privilege, the ordinary rule that the invocation of 10:45  
6           privilege does not permit a court or tribunal to draw  
7           an adverse inference or to draw an inference from the  
8           refusal to answer, doesn't apply. Now, I can make that  
9           point -- repeat that point perhaps more clearly. If  
10          there is no privilege, there is no rule against drawing 10:45  
11          inferences from a refusal to answer a question. And  
12          it's my submission that if a journalist is asked: Did  
13          you or did you not have off-the-record conversations  
14          with Superintendent Taylor concerning Sergeant McCabe?,  
15          and if a journalist refuses to answer that question on 10:46  
16          the basis of a purported invocation of privilege, which  
17          doesn't exist, this Tribunal is entitled to draw  
18          whatever inference is apposite from a failure to answer  
19          that question. And to put that more concretely: If  
20          Superintendent Taylor did discuss Sergeant McCabe off 10:46  
21          the record with any of the journalists who have refused  
22          to answer such questions, invoking privilege on their  
23          part to refuse to give a clear answer to the Tribunal,  
24          suggests prima facie that there were such discussions.  
25          If there weren't such discussions, a simple statement 10:47  
26          that there were no such discussions would not  
27          compromise any journalist's privilege and wouldn't  
28          compromise any confidential relationship with any other  
29          party whatsoever.

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Now, the next point that I just want to make in this context to you, sir, is that insofar as Superintendent Taylor has asserted that he had off-the-record negative briefing-type conversations with journalists, and insofar as that is an important primary issue of fact for this Tribunal to determine, Superintendent Taylor, whatever the frailties of his evidence, is entitled to have corroboration of that assertion on his part from any journalists to whom he spoke off the record about Sergeant McCabe, and no journalist is entitled to withhold evidence which would or would not corroborate his assertion on the grounds of some superior claim of privilege on their part.

Likewise, the public, and I include in that my client, Sergeant McCabe, is entitled to have the truth or otherwise of Superintendent Taylor's assertion that he negatively briefed journalists, he is entitled -- the public is entitled, and so is my client, to have it tested here, and if there is a refusal on the part of a small number of people to either confirm or deny his allegation, it's -- it's wrong, morally, legally and in terms of the function of this Tribunal, it's wrong in terms of what you yourself, Chairman, have spoken about the patriotic duty to comply with the rules of the Tribunal and its procedures and to give evidence, truthful evidence on central issues.

1 So I'm asking you, Chairman, to do the following:

2  
3 To rule as a matter of law that, in the case of those  
4 refusals, there was no journalistic privilege and no  
5 factual basis on which the refusal to answer the 10:50  
6 questions could be justified. And I'm asking you then  
7 to -- having decided that there is no privilege, to  
8 draw -- to draw inferences as you consider fair and  
9 just from the failure to answer those questions, and to  
10 consider, in respect of each of them, why a refusal to 10:51  
11 answer the question would have occurred here in this  
12 Tribunal if there hadn't been some form of  
13 off-the-record conversation between the journalists in  
14 question and Superintendent Taylor.

15  
16 I am not asking the Tribunal to refer any particular 10:51  
17 witness to the High Court or to refer a question as to  
18 their behaviour to the High Court for adjudication,  
19 because, to use the European law phrase, in my  
20 submission it's acte clair that there is no operative 10:52  
21 journalistic privilege here, and it would serve no  
22 useful purpose to delay the completion of this  
23 Tribunal's proceedings and the publication of its  
24 findings by having a lengthy and, in my respectful  
25 submission, utterly futile discussion of these matters 10:52  
26 in the courts at various levels, possibly involving  
27 appeals and the like.

28  
29 So what I can summarise my position, I think, Chairman,

1 is to say the following:

2  
3 That the Tribunal should rule that there is no  
4 privilege at issue here in the light of the waivers  
5 which -- of which the Tribunal has been apprised. That 10:53  
6 the Tribunal, in the absence of any journalistic  
7 privilege, is not merely entitled to but almost bound  
8 to draw whatever inference is reasonable from the  
9 refusal to answer the questions. And that there is no  
10 need to refer these matters to the courts, because it's 10:53  
11 so blindingly obviously that journalistic privilege is  
12 not involved that there is no reason why the Tribunal  
13 should be delayed or frustrated by having -- by  
14 allowing lengthy court procedures to debate what is, in  
15 effect, a non-issue and one which can serve no useful 10:54  
16 purpose here except to delay the outcome of the -- the  
17 ultimate outcome of this Tribunal.

18  
19 So that is my basic position. And I just want to say  
20 one other thing: Throughout the Tribunal's hearings in 10:54  
21 respect of this module, the phrase 'negative briefing'  
22 has been used by different witnesses and by counsel in  
23 different ways. It is clear that a number of  
24 journalists who have come before you have come to the  
25 conclusion that if they hear a rumour that Sergeant 10:55  
26 McCabe was the subject of an allegation of sexual abuse  
27 of a historic kind, that if they contact An Garda  
28 Síochána and Superintendent Taylor, or anybody else,  
29 and ask the question as to whether this is -- this is

1 true in the sense that there were such allegations and  
2 that they were investigated and the like, those  
3 journalists have -- a number of journalists have  
4 suggested to you that that is not negative briefing.  
5 Now, 'negative briefing' is not a term of art, but, in 10:55  
6 my respectful submission, An Garda Síochána has no  
7 function in confirming the facts sought by those  
8 journalists concerning my client in the circumstances  
9 that arose here, and it was highly improper of An Garda  
10 Síochána to do so, and it was likely to damage, as it 10:56  
11 did in the case of Mr. Williams' articles, my client,  
12 and therefore, that such information furnished amounts  
13 to negative briefing. In layman's terms, it was  
14 briefing on facts which were damaging and designed to  
15 damage and likely to damage Sergeant McCabe in the 10:57  
16 public eye if these matters were published.

17  
18 So I just would ask the Tribunal, in addition to the  
19 submissions I have made and the suggestions I have made  
20 to the Tribunal as to how it should approach the 10:57  
21 journalists who refuse to answer these questions, to  
22 bear in mind that the refusal dealt with this issue of  
23 negative briefing and that different journalists put  
24 entirely different constructs on that phrase.

25  
26 And I don't think I can be of any further assistance to  
27 the --

28 CHAIRMAN: Thank you very much, Mr. McDowell. It's  
29 just the last point that you make seems to me is really

1 ultimately for submissions perhaps later on, if we get  
2 to that point, either next year or this year.

3 MR. McDOWELL: It is. But it's just, Chairman --

4 CHAIRMAN: No, it's a fair point to raise,  
5 Mr. McDowell. I was just going to say that the terms 10:58  
6 of reference say whether the two Commissioners were  
7 encouraging David Taylor to contact the media to brief  
8 them, that Sergeant McCabe was motivated by malice and  
9 revenge and to encourage them to write negatively about  
10 Sergeant McCabe, that his complaints had no substance, 10:58  
11 that they had been investigated and that he was driven  
12 by agendas, and also to direct journalists' attention  
13 to an allegation of criminal misconduct made against  
14 Sergeant McCabe. Now, there is clearly a problem  
15 arising there, but I think that is perhaps better 10:58  
16 addressed later on. I am making no ruling at this  
17 point on that.

18 MR. McDOWELL: I completely agree it's really proper  
19 for later submission.

20 CHAIRMAN: Yes. No, it's fair to tell me now what you 10:58  
21 think.

22 MR. McDOWELL: The only reason that I raised it now  
23 was, that on a number of occasions some of the  
24 journalists who refused to answer the question that was  
25 put to them, it was put to them in terms of simply the 10:59  
26 phrase 'negative briefing', and I just want to make  
27 that clear, Chairman.

28 CHAIRMAN: well, it's correct in certainly to the  
29 dialogue, that's for sure. So why don't we just go



1 around like that. And I think, Mr. McGuinness, you are  
2 going to address me last, is that right? It may be you  
3 are very brief but --

4 MR. MCGUINNESS: Very briefly.

5 CHAIRMAN: Yes, thank you. Just on the right  
6 principles.

7 So, Mr. Ferry, basically what do you want done and why?  
8

9 SUBMISSION BY MR. MR. FERRY:

10  
11 MR. FERRY: well, following Mr. McDowell's submissions,  
12 I can be shorter than I had intended and I can adopt  
13 most of what Mr. McDowell has opened and submitted to  
14 you, sir. And the first point is that no privilege has  
15 been identified. I think that is a factor here, that  
16 the journalists appear to be taking an absolutist  
17 position, that there is simply a principle being  
18 adopted that journalistic privilege applies. However,  
19 it has not been narrowed down or applied to the facts  
20 in the case, other than saying that they cannot answer  
21 questions because of journalistic privilege, and  
22 therefore, I say that the interests of Superintendent  
23 Taylor would outweigh any claim of journalistic  
24 privilege that has been raised, in circumstances where  
25 there is no specific reason given for journalistic  
26 privilege. For example, they have just raised that  
27 there may be an issue of identifying a source, but that  
28 hasn't been fleshed out by any journalist to any great  
29 extent. In the course of the evidence, there was even

1 reference to the entire population being a potential  
2 source. And in relation to identifying sources in the  
3 normal course of events, an article would have been  
4 published and the inquiry would be being conducted into  
5 what led to an article being published. But the 11:01  
6 journalists haven't even said, well, I published an  
7 article as a result of this source. And as against  
8 that, the source has identified himself, so  
9 Superintendent Taylor has come forward, he has  
10 identified himself as being someone who was briefing 11:01  
11 journalists negatively in relation to Sergeant McCabe  
12 and he has provided a waiver. And in those  
13 circumstances, I would say that the matters as raised,  
14 limited as they are by journalists, is simply adopting  
15 a position that, no matter what the circumstances, they 11:02  
16 would rely on journalistic privilege. It was put to  
17 them examples such as in the case of murder, if they  
18 had information that could be an alibi, that even in  
19 those circumstances they were unable to narrow down  
20 what their instructions were. 11:02

21  
22 So therefore, I say that, in this case, the Tribunal is  
23 obviously looking into matters that have been raised by  
24 my client by way of a protected disclosure and, in that  
25 regard, his evidence had been clearly that he 11:02  
26 negatively briefed journalists in relation to Sergeant  
27 McCabe, and those journalists where the issue of  
28 privilege arises, have failed, in my respectful  
29 submission, to identify any grounds that could be

1 justified for claiming journalistic privilege. So in  
2 relation to Mr. McDowell's first submission, I would  
3 also adopt that, that there is no journalistic  
4 privilege applying in this case.

11:03

5  
6 And likewise, in circumstances where I submit that that  
7 is the situation, likewise I would be saying that in  
8 circumstances where Superintendent Taylor has put  
9 evidence before the Tribunal that he was negatively  
10 briefing in relation to Sergeant McCabe and his 11:03  
11 motivations and his revenge against the guards, that  
12 that is the evidence that the Court has and should  
13 therefore draw an inference from the refusal of  
14 journalists to provide answers to straightforward  
15 questions in relation to whether or not they were 11:03  
16 negatively briefed. And some journalists have  
17 expressly refused to answer that question, others have  
18 answered it.

19  
20 In relation to Superintendent Taylor, he has come 11:03  
21 before the Tribunal, he has a right in relation to any  
22 claim that journalists might raise, they would be  
23 relying on Article 10 of the European Convention on  
24 Human Rights. However, that can be limited, it's not  
25 an unlimited freedom of the press, and it can be 11:04  
26 limited under paragraph 2 of the Article where it says  
27 that "the exercise of these freedoms may be subject to  
28 such formalities, conditions, restrictions as described  
29 by law," and then it says "are necessary in a

1 democratic society", and it goes on to refer to "for  
2 the protection of the reputation or rights of others."

3  
4 So, in my respectful submission, Superintendent  
5 Taylor's -- and in the questioning of journalists, the 11:04  
6 Tribunal lawyers very clearly and fairly put it to the  
7 journalists that their failure to provide answers was  
8 unfair to Superintendent Taylor and that he was being  
9 exposed, that if he was telling the truth and if they  
10 had information, that they were exposing him and 11:04  
11 leaving him on his own, and I respectfully submit that  
12 his right to protection for his reputation trumps any  
13 rights that journalists may be trying -- attempting to  
14 rely on. I say that in circumstances where the  
15 journalists have not been specific. If a journalist 11:05  
16 had raised something specific and said, for example, I  
17 published an article on such a date and I'm not going  
18 to talk about my source, I have to protect my source,  
19 it might be a different argument. But this is most  
20 unusual, where we're not referring to an article, 11:05  
21 journalists are coming before the Tribunal as  
22 witnesses; however, because of their occupation as a  
23 journalist, they are saying, well, I am a source, and I  
24 cannot -- or, sorry, I am a journalist and I cannot  
25 reveal my sources. But the source that they are 11:05  
26 referring to has waived any right to privilege. And  
27 the other two potential parties, the former  
28 Commissioners, have also waived their right to  
29 privilege. So therefore, I say that the right to the

1 protection of Superintendent Taylor's reputation trumps  
2 the claim of journalistic privilege in those  
3 circumstances where they have not been specific.  
4

5 And as Mr. McDowell has also outlined, I would also 11:06  
6 adopt that same submission in relation to, that  
7 Superintendent Taylor is entitled to have corroboration  
8 of his version of events from the journalists. And  
9 their refusal to answer, I would say an inference  
10 should be drawn from that, that he has spoken to them 11:06  
11 and he has briefed them negatively. And also in  
12 circumstances to why the Tribunal should proceed in  
13 this way, I would submit it is because of the high  
14 public interest in the Tribunal reaching an outcome  
15 based on evidence produced before it, and again, that 11:06  
16 that public interest outweighs any interest that  
17 journalists have raised in relation to journalistic  
18 privilege, that it is a matter of utmost gravity. It  
19 applies to the police force and to how policing has  
20 been conducted in the State. It's of the utmost 11:07  
21 gravity. Again, if a journalist had raised something  
22 specific to you, sir, it might be a more detailed  
23 submission that would be required, but when they have  
24 simply said, I am a journalist and therefore I cannot  
25 answer questions, I say the public interest also 11:07  
26 outweighs that right to privilege or claim of privilege  
27 that has been raised.

28 CHAIRMAN: So, Mr. Ferry, are you asking me to refer  
29 anyone to the High Court?

1 MR. FERRY: No, similar to Mr. McDowell, I would be  
2 submitting that in circumstances where they have  
3 been -- and I have gone through the transcripts, where  
4 both the Tribunal lawyers and you, sir, had, in great  
5 detail, questioned the journalists in relation to this 11:07  
6 specific aspect, that I would submit, in circumstances  
7 where Superintendent Taylor has said what he has said  
8 and where they have been offered the opportunity, that  
9 you should find the journalistic privilege does not  
10 apply and therefore an inference be drawn that 11:08  
11 Superintendent Taylor's evidence is the only evidence  
12 you have in relation to his interactions with those  
13 particular journalists and that his version is the  
14 version that should be accepted and an inference should  
15 be drawn in support of that. 11:08  
16 CHAIRMAN: Thank you very much, Mr. Ferry. Sorry, I  
17 beg your pardon.  
18 MR. FERRY: well, I suppose that I would make the one  
19 additional submission, that in the event that the  
20 Tribunal finds that it's not in a position to draw such 11:08  
21 an inference, then I would submit that Superintendent  
22 Taylor is entitled to have all avenues exhausted to  
23 investigate if the journalists are in a position to  
24 assist the Tribunal any further.  
25 CHAIRMAN: It's no disrespect, Mr. Ferry, but does that 11:09  
26 mean you're putting an each-way bet on this? I mean, I  
27 kind of need to be asked. In other words, if I am not  
28 prepared to draw an inference, which is, you know, a  
29 bizarre way favourable to your client, that he was

1 doing something extremely wrong, that in those  
2 circumstances I should then refer the matter to the  
3 High Court, but my difficulty is that before making any  
4 finding of fact, and this is actually a serious matter,  
5 because, as of this morning, I think we have seven, for 11:09  
6 instance, journalists contradicting each other, but  
7 that's the tip of the iceberg in terms of  
8 contradictions between witnesses, I really have to hear  
9 submissions from people before I can make up my mind as  
10 to whether people may not be telling the truth, for 11:09  
11 instance, and as to, for instance, what inferences can  
12 be drawn from facts which I feel, having heard  
13 submissions and read matters again, are established as  
14 a matter of probability. So I am not sure about the  
15 each-way bet, Mr. Ferry. I think now is the time to 11:10  
16 tell me that you do or don't want me to go to the High  
17 Court. I think any question as to inference or any  
18 question as to fact-finding has to be left to the later  
19 stage, be it next week or next year.

20 MR. FERRY: well, I would submit that the question of 11:10  
21 inference is a matter that can be addressed at this  
22 stage by you, Chairman, that you can adopt a position  
23 on whether or not you're going to draw an inference or  
24 not. And in circumstances where you find that you  
25 cannot draw an inference, then in those circumstances 11:10  
26 Superintendent Taylor would be entitled to have all  
27 remedies exhausted and, in those circumstances, the  
28 matter would have to be referred, because I would  
29 submit that it would be unfair to proceed and to take a

1 negative view of the refusal of journalists to  
2 cooperate as against Superintendent Taylor.

3 CHAIRMAN: So that would mean you are asking me, on  
4 behalf of Superintendent Taylor, to refer any  
5 journalist who has adopted privilege in circumstances 11:11  
6 where that journalist looks likely to have information  
7 that could assist in supporting the case that he has  
8 made before the Tribunal to the High Court?

9 MR. FERRY: Yes, but not as my first option. My first  
10 submission is that the Tribunal would accept that 11:11  
11 journalistic privilege does not apply and therefore  
12 draw an inference from the refusal of journalists to  
13 cooperate.

14 CHAIRMAN: All right.

15 MR. FERRY: And only having carried out that function 11:11  
16 as the Chairman, in the event of the Tribunal not  
17 adopting such an inference, that then the matter would  
18 be referred, in the interest of fairness to  
19 Superintendent Taylor.

20 CHAIRMAN: Very well. Thank you very much, Mr. Ferry. 11:12

21 MR. FERRY: Thank you.

22

23 SUBMISSION BY MR. GILLANE:

24

25 MR. GILLANE: Yes, Chairman, just very briefly, you 11:12  
26 have heard, I think, from six witnesses that I  
27 represent, and obviously your assessment of that  
28 evidence will come in due course. It seems on a review  
29 of the evidence that a submission from me on privilege



1 doesn't appear to arise in the sense that the relevant  
2 witnesses have answered the questions put to them by  
3 all parties in respect of the terms of reference.  
4 CHAIRMAN: well, that seems to me to be correct,  
5 Mr. Gillane. Just going through the terms of 11:12  
6 reference, if I could just detain you for a moment.  
7 MR. GILLANE: Yes.  
8 CHAIRMAN: I mean, what RTÉ was most involved with is  
9 clearly terms of reference (k).  
10 MR. GILLANE: Yes. 11:12  
11 CHAIRMAN: And that is whether Commissioner O'Sullivan  
12 created briefing material in Garda Headquarters and  
13 then attempted to influence or influenced the  
14 broadcasts on RTÉ in relation to the leaked account of  
15 the O'Higgins Commission report. Now, the evidence is 11:13  
16 there that Paul Williams [sic] says he didn't talk to  
17 Commissioner O'Sullivan, the evidence is that  
18 Mr. Barrett says that he didn't say to Maurice McCabe  
19 that the relevant material would have been prepared in  
20 block 1 or the front block, or whatever you want to 11:13  
21 call it, and Paul Williams [sic] has claimed privilege  
22 in relation to the source of his information which he  
23 said was exclusively copies, leaked by, it seems  
24 probable, An Garda Síochána, but there could indeed be  
25 other sources to him; namely, being the unpublished 11:13  
26 O'Higgins Commission Report which had then been sent to  
27 the Department of Justice and to the parties.  
28 MR. GILLANE: Yes.  
29 CHAIRMAN: So nobody seems to be asking me to refer

1 Mr. Reynolds to the High Court, and it would seem  
2 futile to do that if I am satisfied -- and I can't be  
3 satisfied now, I have to hear submissions that his  
4 evidence is honest.

5 MR. GILLANE: Yes. 11:14

6 CHAIRMAN: And that Mr. Barrett is either correct in  
7 his evidence or was shooting the breeze in what he said  
8 to Sergeant McCabe.

9 MR. GILLANE: Yes. And of specific relevance I think  
10 in relation to (k) in the context of the waiver and why 11:14  
11 I am not making a submission is that, in this specific  
12 terms of reference, former Commissioner O'Sullivan has  
13 explicitly denied any involvement and Mr. Reynolds has  
14 also explicitly denied any involvement by former  
15 Commissioner O'Sullivan in relation to his script. So, 11:14  
16 in those circumstances, I don't think a submission  
17 arises.

18 CHAIRMAN: And are you asking me to refer any other  
19 journalist to the High Court?

20 MR. GILLANE: No, Chairman. 11:14

21  
22 SUBMISSION BY MR. ENGLISH:

23  
24 MR. ENGLISH: Good morning, Mr. Chairman. My name is  
25 Shane English and I appear for the Irish Examiner and 11:14  
26 Mick Clifford, former editor Tim Vaughan, Cormac  
27 O'Keefe, Juno McEnroe and Daniel McConnell. And I  
28 would like an opportunity to address the issue in  
29 relation to journalistic privilege on their behalf. I

1 should say I do have a speaking note which complies  
2 with the terms of the Tribunal and I am happy to hand  
3 that now out or later.

4 CHAIRMAN: Yes, please do, Mr. English. Indeed, it may  
5 save time if you would like to -- 11:15

6 MR. ENGLISH: My solicitor will hand that out now. But  
7 I suppose what I want to say is the following,  
8 Mr. Chairman:

9  
10 Superintendent Taylor claims to have negatively briefed 11:15  
11 Mr. O'Keefe, Mr. McEnroe, Mr. O'Connell, as part of a  
12 campaign against Sergeant McCabe. On Day 75 of the  
13 Tribunal, at page 97, in a cross-examination by  
14 Mr. McDowell, Superintendent Taylor indicated that  
15 those briefings were confidential, off the record and 11:15  
16 not for publication. Each of my clients was questioned  
17 by the Tribunal and they indicated that they were not  
18 willing to confirm or deny Superintendent Taylor's  
19 allegations. They say that the basis of that refusal  
20 is their journalistic privilege. That is said in the 11:15  
21 full knowledge that the Tribunal has confirmed that  
22 Superintendent Taylor has waived his right to privilege  
23 in 2017. My clients submit that, irrespective of that  
24 waiver, they will not confirm or deny Superintendent  
25 Taylor's allegations. The privilege they claim, 11:16  
26 Mr. Chairman, is claimed on the basis of a number of  
27 relevant legal principles. In the first instance, I  
28 refer to the Constitution of this country and, in  
29 particular, Article 46.1. There is also freedom of

1 expression, rights as enshrined in Article 10 of the  
2 European Convention on Human Rights. There are  
3 numerous cases in both this jurisdiction and other  
4 jurisdictions and the jurisprudence of the European  
5 Court of Human Rights in which I would also seek to  
6 rely.

11:16

7  
8 I submit that, in the context of this Tribunal, that  
9 journalistic privilege arises in my clients' situation  
10 prima facie. Any source that gives a confidential  
11 off-the-record briefing to a person in their capacity  
12 as a journalist, in my respectful submission the  
13 journalist is entitled to claim journalistic privilege  
14 in that regard. I believe that they are entitled to  
15 invoke this privilege where they believe that answering  
16 the Tribunal's questions could lead to the  
17 identification of any source. I say that my clients  
18 expressly instruct me to tell this Tribunal some of the  
19 reasons why they have invoked that privilege. Some of  
20 the reasons why they have invoked that privilege are:  
21 they wish to preserve the free flow of information to  
22 them, in their capacity as journalists; they believe  
23 that identifying a source will have a chilling effect  
24 on the free flow of information to them; they believe  
25 that there is a pressing social good in not revealing a  
26 source; they believe that it is essential to the rights  
27 of freedom of expression; they believe that it is a  
28 basic condition for a free press; they believe that  
29 their failure to do so will deter other potential

11:16

11:17

11:17

11:17

1 sources coming to them; they believe that their failure  
2 to do so will undermine their ability to provide  
3 accurate and reliable information in any of their  
4 publications; and in a real and substantial way, they  
5 believe that in revealing their sources will be a risk 11:18  
6 to their livelihood, Mr. Chairman.

7  
8 On Day 88, Mr. Chairman, of the transcript of the 8th  
9 June, on page 226, you asked people who were invoking  
10 that privilege to address six issues. And I would just 11:18  
11 briefly like to address each of those six now in turn.

12  
13 In relation to the application of journalistic  
14 privilege, I say that it clearly applies to my clients.

15 CHAIRMAN: Maybe you would just help me as you go 11:18  
16 along, Mr. English, as to what page you are on.

17 MR. ENGLISH: well, in fact --

18 CHAIRMAN: I know you're skipping around, but if you  
19 have a point and you're referring to it and it's on a  
20 particular page, it would help. 11:19

21 MR. ENGLISH: I certainly will, I certainly will.  
22 Thank you, Chairman. What I am saying is that in  
23 relation to your question about application, it clearly  
24 applies to my clients, that they say that if they  
25 answer certain questions asked by the Tribunal, that 11:19  
26 that may lead to the identification of sources obtained  
27 in their work as journalists.

28  
29 If one accepts, in my respectful submission,

1 Superintendent Taylor at face value, any information  
2 imparted by him was done so confidentially to  
3 practising journalists. That's the definition of a  
4 confidential source. And in my respectful submission,  
5 it does not follow because a source waives privilege, 11:19  
6 that the privilege is pierced and no longer applies.  
7

8 And could I briefly, and I don't want to --  
9 Mr. Chairman, I'm not going to be reciting great tracts  
10 of case law, but there are two small tracts that I 11:19  
11 would like to recite. And one of them is the decision  
12 which has already been opened to you, I think, by  
13 Mr. McDowell in Becker v. Norway, and more particularly  
14 to the minority decision of the Supreme Court of  
15 Norway, and I quote -- I won't go into the facts of 11:20  
16 Becker because I think we're all familiar with that,  
17 but I quote:

18  
19 "In the present case, Mr. X stated that he was the  
20 source. A situation where someone claimed to be the 11:20  
21 source is to be considered in the same way as where the  
22 source consented to disclosure of his or her identity.  
23 A person might incorrectly claim to be the source so  
24 that the actual source might be identified by a process  
25 of elimination. And even if it were true that the 11:20  
26 person was the source, it would erode journalists'  
27 right to source protection should the person who was  
28 the source be able to cancel the journalists' right.  
29 In addition, journalists often have several sources."

1  
2 And if I can pause there for a moment. In the evidence  
3 of Mr. Vaughan, the then-editor of the newspaper, he  
4 indicated that it was a house rule in the Irish  
5 Examiner that there would be at least two sources to 11:21  
6 any story. And if I can continue with the quote:

7  
8 "If a journalist can be ordered to describe his or her  
9 contact with the person who claimed to be the source,  
10 his or her contact with other sources might also be 11:21  
11 revealed. Equally, a combination of someone claiming  
12 to be the source and other evidence confirming this,  
13 should not lead to source protection being removed.  
14 Effective source protection was necessary in order to  
15 ensure free communication of information and opinion. 11:21  
16 It should not be permissible for press journalists to  
17 confirm or deny that a person claiming to be the source  
18 was in fact the source, even where there was weighty  
19 evidence to that effect. As mentioned above, it was  
20 not the source but society's interest in free 11:21  
21 communication of news and opinions which was to be  
22 protected."

23  
24 In reality, Mr. Chairman, in my respectful submission,  
25 confirming or denying an alleged source is highly 11:22  
26 problematic. And I think this might address some of  
27 the concerns indicated by Mr. McDowell and Mr. Ferry.  
28 It's not a simple question, as has been indicated to  
29 this Tribunal. If you say that someone is not a

1 source, you then potentially lead to the identification  
2 of an actual source. Even if a person who is claiming  
3 to be a source, it doesn't necessarily follow that  
4 there isn't a second or a third or other sources for  
5 any particular information. You then get into 11:22  
6 effectively the situation where there will inevitably  
7 be follow-up questions. For example, in this case, is  
8 Superintendent Taylor the source for this bit or for  
9 this bit? That potentially leads to massive problems  
10 for journalists in relation to revealing other sources. 11:22

11  
12 If I could deal with the second issue, which was the  
13 relevance. In my respectful submission, the  
14 information that the Tribunal seeks to get from the  
15 journalists whom I represent, it may well be relevant, 11:23  
16 but the question is much broader than that. It's not  
17 is it just simply relevant or desirable, it is whether  
18 or not it is necessary.

19  
20 And that brings me, I think, on to, Mr. Chairman, your 11:23  
21 third point, which is necessity.

22  
23 And I say to you, in my respectful submission, this is  
24 the simple -- this is simply the most crucial issue.  
25 It is clear from the jurisprudence that, in certain 11:23  
26 limited circumstances, and they are very limited  
27 circumstances, in my respectful submission, a court can  
28 pierce journalistic privilege if the information is  
29 necessary to a matter of public importance. However, I



1 say that it should only be pierced in very limited  
2 circumstances, and those circumstances must be -- must  
3 show essential and necessary reason to pierce. In  
4 Becker v. Norway, the European Court of Human Rights,  
5 the decision on whether the journalists' evidence was 11:24  
6 necessary turned on the assessment of the need for  
7 Ms. Becker's evidence during the criminal trial of  
8 Mr. X for market manipulation. So that was the test.  
9 The Court held that Ms. Becker's refusal to disclose  
10 did not hinder the investigation or prosecution of 11:24  
11 Mr. X. In my respectful submission, Mr. Chairman, the  
12 Tribunal would have to conclude that the journalistic  
13 privilege assertion of my clients should be pierced  
14 because the answers to your proposed questions were  
15 essential for you to carry out your work. Essential. 11:24  
16 Effectively, I believe, in my respectful submission,  
17 that you, Mr. Chairman, would have to come to the  
18 conclusion that you could not decide, that you could  
19 not decide the issues before you without the answers to  
20 those questions. In my respectful submission, 11:25  
21 Mr. Chairman, this is not a sustainable position.

22  
23 'Essential and necessary' means something which is  
24 absolutely needed. The Tribunal has heard a  
25 considerable amount of evidence, over 90 days now. The 11:25  
26 Tribunal has direct evidence and has the direct  
27 evidence of Superintendent Taylor, of Sergeant McCabe.  
28 It also has an abundance of additional direct,  
29 indirect, tangential and circumstantial evidence from

1 which it can draw its own conclusions. It may be  
2 helpful, Mr. Chairman, it may even be desirable to have  
3 further evidence of my clients, but in my respectful  
4 submission it cannot be contended that it is necessary  
5 or essential.

11:26

6  
7 You asked us to address the issue of futility. In my  
8 respectful submission, Mr. Chairman, it would be futile  
9 to recall my clients and direct them to answer further  
10 questions in which they have already claimed privilege.  
11 Each of these journalists have come to this decision  
12 independently. Their firm instructions are that they  
13 intend to stand over that position. They hold this  
14 position, notwithstanding the regard for the work of  
15 this Tribunal but because they believe they have to.  
16 This isn't about grandstanding, or anything like that.  
17 This goes to the very nature of their livelihood and of  
18 the greater good of society and a free and democratic  
19 society with an open press.

11:26

11:26

20  
21 In relation to the issue of discretion, which was point  
22 number five, Mr. Chairman, the Tribunal certainly has  
23 discretion and can exercise a discretion and can seek  
24 to recall these witnesses and can even direct them to  
25 answer certain questions. If this Tribunal is against  
26 me in my submissions and if this Tribunal reaches the  
27 conclusion that it is necessary and essential for its  
28 work that my clients answer the question posed by the  
29 Tribunal, then my respectful submission is that the

11:26

11:27

1 procedure is that you should recall or indeed must  
2 recall them. If they refuse to answer the questions  
3 when put to them again, which my instructions are if it  
4 is likely to reveal a source they will, then under  
5 Section 4 of the Tribunals of Inquiry (Evidence) 11:27  
6 (Amendment) Act 1997 you have the authority to apply in  
7 a summary manner to the High Court directing them.

8  
9 Following a full hearing, including a further argument  
10 and debate on journalistic privilege, and in my 11:28  
11 respectful submission where the Tribunal would be  
12 required as a matter of law to set out in detail why  
13 they say the answers to the specific questions are  
14 necessary or essential, it is then a matter for the  
15 High Court to direct or not to direct or to say that my 11:28  
16 clients were entitled to invoke journalistic privilege.

17  
18 In conclusion, Mr. Chairman, Mr. O'Keefe, Mr. McEnroe  
19 and Mr. McConnell have, in my respectful submission,  
20 appropriately invoked their lawful entitlement to 11:28  
21 journalistic privilege. In my respectful submission,  
22 this privilege applies even where an alleged source has  
23 waived their rights. There is a significant public  
24 interest in maintaining journalistic privilege, and if  
25 I may briefly refer to the case of Goodwin v. UK, 11:29  
26 European Courts of Human Rights of the 11th July  
27 2002 --

28 CHAIRMAN: Mr. English, you can take it I know that  
29 quotation practically by heart.

1 MR. ENGLISH: May it please you, Mr. Chairman.  
2 Finally, therefore, in my respectful submission, the  
3 information is not necessary or essential and any  
4 attempt to compel my clients to answer the questions  
5 risks their long-term future and their livelihood, and 11:29  
6 that is their very real and honestly-held belief,  
7 Mr. Chairman.  
8 CHAIRMAN: Mr. English, thank you for that submission,  
9 and in particular the written argument, which is - I'm  
10 not saying I agree with it - admirably concise and 11:29  
11 logical. Thank you.  
12  
13 SUBMISSION BY MR. FREEMAN:  
14  
15 MR. FREEMAN: Yes, Chairman. John Freeman for 11:29  
16 Independent News & Media. The Tribunal, Chairman, has  
17 heard evidence from six INM witnesses, both journalists  
18 and editors, and has received statements from a number  
19 of other journalists and editors within the group, and  
20 no INM witness has refused to answer a question of the 11:30  
21 type described by Mr. McDowell or Mr. Ferry.  
22 CHAIRMAN: I think that is probably right, isn't it?  
23 MR. FREEMAN: May it please you. So no submission on  
24 behalf of the INM interests arises.  
25 CHAIRMAN: Do you want to add anything or agree with 11:30  
26 anyone who has said anything so far?  
27 MR. FREEMAN: No, Chairman.  
28 MR. TOM MURPHY: Chairman, my name is Tom Murphy --  
29 MR. DOYLE: Chairman, I don't have a submission to make

1 on behalf of Ms. O'Reilly.

2 CHAIRMAN: No, I am sorry, I was trying to go around  
3 the room in a clockwise direction, and forgive me for  
4 doing it that way or for not saying 'good morning',  
5 which I highly disapprove of, but let's carry on.

11:30

6

7 SUBMISSION BY MR. TOM MURPHY:

8

9 MR. TOM MURPHY: Chairman, my name is Tom Murphy. I  
10 have been instructed by Michael Kealey on behalf of  
11 journalists who work in the Irish Daily Mail and the  
12 Irish Mail on Sunday, and, just for the purposes of  
13 completeness, their names are Debbie McCann, Robert  
14 Cox, Sebastian Hamilton and Conor O'Donnell. And  
15 thankfully for your sake and for everyone else's sake,  
16 Mr. English seems to have covered all of the points  
17 that I was going to make, which would mean that my  
18 submissions would be relatively short in the area.

11:30

11:31

19

20 I think -- first of all, I would like to address the  
21 issue of whether the privilege applies. I think it's  
22 my respectful submission that it cannot but apply,  
23 there cannot be circumstances within, having regard to  
24 the evidence that you have heard, particularly the  
25 evidence of Superintendent Taylor, that the questions  
26 that were being asked of my clients in particular were  
27 questions that go to the very core of journalistic  
28 activity and, as such, their refusal to answer the  
29 question was proper and was based on the premise that

11:31

11:31

1 any answer would identify or may tend to identify a  
2 source for the information, the confidential source.  
3 And I think, Chairman, that it's hard to actually  
4 dispute on that.

5  
6 And I just raise the issue that Mr. McDowell has raised  
7 with respect to whether or not Superintendent Taylor is  
8 entitled to corroboration. That, in my respectful  
9 submission, would actually run completely contrary to  
10 what the European Court held in Becker, where it was

11 found that actually a journalist was entitled to  
12 withhold answers to those questions in circumstances  
13 where they didn't corroborate what the witness was  
14 saying. And I would like to touch on the point with

15 regard to why my clients are claiming privilege. They  
16 are claiming privilege for the exact-same reasons that  
17 Mr. English's clients are claiming privilege. It's not  
18 for the interests of grandstanding or anything like  
19 that. They actually hold these principles extremely

20 close to their professional integrity. They are  
21 matters that they have deep respect for and deep regard  
22 for, and that is many of the reasons why they actually  
23 engage in the profession of journalism, is because they

24 have such high respect for the integrities that goes  
25 with journalism and the respect that they have to give  
26 to sources and also the high regard in which the  
27 profession of journalism is held. And just, if I can  
28 direct you to both the Constitution and Article 10 of  
29 the European Convention on Human Rights. Now, as I

1 say, this issue has been covered, but I think  
2 simpliciter that is indicative of the high role that  
3 journalism plays within society.  
4

5 If I can touch on the points that you have specifically 11:33  
6 asked that we touch on, Chairman. I think the  
7 application in this particular instance, I think, is, I  
8 said, fairly straightforward with regard to the  
9 evidence that you have received. With regard to  
10 relevance, it is probably the case that some of the 11:33  
11 answers that my clients could have given may well be  
12 relevant to issues that are before this Tribunal.  
13 Whether or not they are necessary, as Mr. English has  
14 raised, I would contend, respectfully, that it's not  
15 necessary for my clients to have answered the questions 11:34  
16 that you sought. It may well be desirable, but it's  
17 not essential.  
18

19 And when it comes to your discretion, my respectful  
20 submission is, Chairman, that you have a balancing 11:34  
21 exercise to conduct and, respectfully, it's not an  
22 exercise, or it's not a balance where everything is  
23 equal. So whatever ingredients go into the balancing  
24 exercise, respectfully I suggest that the findings of  
25 the European Court of Human Rights, as well as findings 11:34  
26 of the Supreme Court of Ireland and the High Court, and  
27 specifically I refer to the cases of Mahon v. Keena,  
28 Walsh, the decision of Mr. Justice O'Neill, and  
29 furthermore, the decision of Mr. Justice Hogan in the

1 case of Cornec v. Morrice, where specifically in that  
2 instance, Chairman, the source was readily identifiable  
3 to both the journalist and the court. And even in that  
4 particular case, it was found that there was no  
5 obligation upon the journalist to answer the questions, 11:35  
6 because, as previously pointed out, they go to the  
7 core, the very core of journalistic activity. In my  
8 respectful submission, significant weight should be  
9 given to that. And the findings of the European Court  
10 of Human Rights, which have said that not only must you 11:35  
11 find that there is a special -- that any interference  
12 with Article 10, and make no mistake about it,  
13 Chairman, it is our position that even a finding that  
14 privilege does not apply or any further finding that  
15 any adverse inferences can be drawn from the refusal to 11:35  
16 answer the question, that that would be, in our  
17 respectful submission, an interference with the  
18 journalists' advice as provided for under Article 10.1  
19 of the European Convention on Human Rights. So any  
20 interference with those rights, Chairman, can only be 11:36  
21 justified by an overriding requirement in the public  
22 interest and therefore necessary in a democratic  
23 society, and respectfully, Chairman, I suggest that  
24 those particular set of circumstances do not arise  
25 here, given the significant amount of other material 11:36  
26 that the Tribunal has taken specifically from  
27 Superintendent Taylor and former Commissioners Callinan  
28 and O'Sullivan  
29 CHAIRMAN: Thank you very much, Mr. Murphy, for that.



1 MR. LEHANE: Sorry, Mr. Chairman, just very briefly on  
2 behalf of Anne Harris. Having regard to the  
3 evidence --

4 CHAIRMAN: Mr. Lehane, can I take you in about two  
5 minutes, if you wouldn't mind. I just need to take a 11:36  
6 break for a minute and perhaps others do as well. But  
7 it is literally two minutes, if that is okay.

8

9 AFTER A SHORT ADJOURNMENT THE HEARING RESUMED  
10 AS FOLLOWS: 11:42

11

12 CHAIRMAN: And, Mr. Murphy, you're not asking me to  
13 refer any other journalist to the High Court?

14 MR. TOM MURPHY: Thank you, Chairman. Certainly not.  
15 And I would happily engage in a discussion about what 11:42  
16 it is you need to do going forward, but in my  
17 respectful submission I would adopt what Mr. English  
18 has said and that any specific questions that  
19 journalists need to answer should be communicated to  
20 the journalists and they would have to be brought back 11:42  
21 here, I think, for the purposes of finding out whether  
22 they are or not going to do that. But it is -- the  
23 extent of the instructions I have at the moment is that  
24 the assertions of privilege are unlikely to change,  
25 Chairman. 11:43

26 CHAIRMAN: Very good. So, Mr. Lehane, would you just  
27 mind reminding me and everybody else, please, your --

28

29 SUBMISSION BY MR. LEHANE:

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MR. LEHANE: Yes, Chairman. My name is Darren Lehane, and I appear on behalf of Ms. Anne Harris. Chairman, all I was going to say was that having regard to Ms. Harris's evidence which you have heard and the terms of reference of this Tribunal and the position of some of the other parties here, I don't think the issue of privilege arises in relation to Ms. Harris such as would make it necessary for me to make a submission to you in relation to --

11:43  
11:43

CHAIRMAN: Yes, I don't think anything arose in relation to her.

MR. LEHANE: No. She answered all the questions that she was asked in relation to identifying people.

CHAIRMAN: well, there might have been one or two things, but nothing that was material to anything I am inquiring into.

11:43

MR. LEHANE: No. And specifically she confirmed, I think, in answer to inquiries that she had made on foot of a story she had heard from a freelance journalist, she confirms that the information that she got when she was checking out that story specifically did not come from Superintendent Taylor, Commissioner Callinan or Commissioner O'Sullivan, so it doesn't arise.

11:44

CHAIRMAN: Yes.

11:44

SUBMISSION BY MR. DOYLE:

MR. DOYLE: On behalf of Ms. Alison O'Reilly, I would

1 make a similar submission. In our respectful  
2 submission, Ms. O'Reilly has completely cooperated with  
3 the Tribunal and has answered all questions put to her  
4 and, in those circumstances, I do not propose to  
5 address the issue of journalistic privilege. 11:44

6 CHAIRMAN: Thanks, Mr. Doyle.

7  
8 SUBMISSION BY MR. FITZGERALD:

9  
10 MR. FITZGERALD: Chairman, John Fitzgerald on behalf of 11:44  
11 An Garda Síochána. I have also prepared, almost  
12 completely in compliance with your direction, a  
13 speaking note. I am afraid it goes very slightly over  
14 the maximum set, but only very slightly. And perhaps  
15 if that could be circulated. I propose to speak to it 11:44  
16 rather than speak from it. But in general terms, I  
17 suppose by way of brief introduction, and this isn't  
18 contained in the speaking note, having heard the  
19 submissions of the various other parties, we're in  
20 agreement with them that no order is now required from 11:45  
21 the High Court or sending any journalists to the High  
22 Court in respect of their refusal to answer any  
23 questions. Insofar as the rationale for that is set  
24 out in the speaking note, it is one that is to some  
25 extent on all fours with the arguments put forward by 11:45  
26 Mr. McDowell and Mr. Ferry and perhaps to a greater  
27 extent it is for the very contrary reasons.

28  
29 The speaking note addresses, I think, all of the issues

1 that you asked us to address, but I suppose it's  
2 primarily directed towards the issues of relevance,  
3 necessity and futility. And our position would be that  
4 we don't believe in the particular circumstances in  
5 which the privilege was invoked in this case that it 11:46  
6 was properly invoked or that it was correctly invoked  
7 as a matter of law. However, we agree with the various  
8 submissions that have been made that that is not the  
9 end of the issue. We believe there is a wider issue to  
10 be considered, and namely, whether, simply because the 11:46  
11 source is identified or identifiable, whether that is  
12 the end of the matter, or whether a balancing test must  
13 be carried out. We think the law is clear that a  
14 balancing test must be carried out. And contrary,  
15 directly contrary to the submissions made by Mr. Ferry 11:46  
16 and Mr. McDowell, we say there is no basis on which the  
17 Court could or should raise an inference from the  
18 failure to answer questions, that something was said,  
19 as seems to be the suggestion put forward particularly  
20 by Mr. McDowell. 11:47

21  
22 Insofar as you suggested to Mr. Ferry, Chairman, that  
23 that might be characterised as an each-way bet, I  
24 suppose equally again for precisely the opposite  
25 reasons, it reflects our position. But I suppose, 11:47  
26 insofar as there is a test of necessity, under the law,  
27 and we say there is, we say that that is what that test  
28 necessity implies; that necessity can only properly be  
29 judged in the context of findings on the overall

1 context and the overall facts surrounding the questions  
2 which are not asked.

3  
4 I propose to move now to the speaking note, and I begun  
5 with the law. The Court, I think, is well familiar 11:47  
6 with the case of Goodwin, I'm not going to read from  
7 it, but it does state an important principle and that  
8 is why it is there. And in particular it does say at  
9 paragraph 4:

10  
11 "The necessity for any expression of freedom of  
12 expression must be convincingly established."

13  
14 We go on to say that the journalistic privilege is not  
15 the property of a journalist or the source; it is, in 11:48  
16 fact, a public interest, it reflects a public interest.  
17 And there's a number of cases which make clear, and we  
18 have quoted passages, which I'm not going to read from,  
19 Kevin O'Kelly, Mahon v. Keena, to suggest that, if  
20 there is a conflict, no public interest is absolute, if 11:48  
21 there is a conflict it must be balanced and it must be  
22 balanced not by a journalist, by the courts.

23  
24 We've also quoted at some greater length two cases to  
25 which Mr. Murphy, I think, briefly referred; namely, 11:48  
26 Walsh v. News Group Newspapers and Cornec v. Morrice.  
27 I think the court is familiar with them. In both cases  
28 again, I suppose there was that situation whereby a  
29 source was either identified or identifiable, and in

1 each case the High Court went in a different direction  
2 on whether or not the privilege applied. And we say,  
3 and we have set out the factual background to those  
4 cases, which I'm not going to detain the Court with now  
5 because they're in the speaking note, but we say the 11:49  
6 importance of the outcome in those cases is dictated  
7 very much by the context, that the facts meant  
8 everything. That in one case, it was significant why  
9 the privilege was required, based on certain factors  
10 which were set out in the case, which are based 11:49  
11 themselves in the factual circumstances, and in the  
12 other, the opposite factual circumstances applied;  
13 namely issues such as the conduct of the sources, and I  
14 suppose, in particular, the relevance of the answers to  
15 the questions and the identification of the sources to 11:50  
16 the issue that the Court had to determine in each case.  
17

18 So we say that this effectively reflects the outcome in  
19 Becker, which the Court is well familiar with, and  
20 again I don't propose to detain the Court with it, but 11:50  
21 at paragraph 19 of the submissions, on page 8, we have  
22 summarised the principles which we say arise from the  
23 various cases, and that is that there is, of course,  
24 journalistic privilege is recognised, it's not  
25 absolute, it has to be balanced and balanced by the 11:50  
26 Court, and that in carrying out that balancing test the  
27 Court carries out what was referred to in Becker as a  
28 proportionality assessment in order to determine if the  
29 necessity to do so had been, in the language of

1 Goodwin, convincingly established. where the source is  
2 known, the privilege might still apply to the content  
3 of what they said to a journalist, but that this was a  
4 factor in the overall proportionality assessment, as  
5 was the conduct of the source and any other journalist. 11:51

6  
7 The devil, therefore, we say, very much is in the  
8 detail as everything depends on the context. And the  
9 greater part, I suppose, of our submissions, or  
10 certainly the remainder of our submissions, are 11:51  
11 therefore devoted to that context.

12  
13 Both -- in this regard, I suppose, I speak particularly  
14 on behalf of former Commissioners Callinan and  
15 O'Sullivan. They waived their journalistic privilege 11:51  
16 in the hope that journalists would feel free to  
17 disclose any conversations they've had with them and  
18 particularly to deny that any such conversations within  
19 the terms of reference had occurred, and indeed the  
20 expectation that, if the journalists did speak, that 11:51  
21 they would give the lie to the allegations that had  
22 been so publicly and repeatedly made against them.

23  
24 They are concerned, therefore, that in the absence of  
25 those answers, that the Court might feel inclined to 11:52  
26 accept in particular Mr. McDowell's invitation to infer  
27 from those refusals to answer the questions, that  
28 conversations must have existed and that those  
29 conversations must have involved some element of

1 negative briefing. We say that this, I suppose,  
2 demonstrates our broader point that, really, this can  
3 only be assessed in the context of the overall findings  
4 and is, I suppose, contingent on the Tribunal's final  
5 findings on the facts. We say, and I suppose we do 11:52  
6 point to the fact that when this was put specifically  
7 to Ms. McCann, that her refusal to answer, and we  
8 referred to this in paragraph 21, Day 88 at page 164,  
9 the reference is in the speaking note, when she was  
10 asked, well, doesn't your refusal to answer strongly 11:53  
11 imply that the conversation took place, she said no,  
12 she absolutely did not want that inference to be taken.  
13 So we say that the Tribunal in its opening statement  
14 made some comments, which we will expand on in our  
15 final submissions, whenever they will be, but one of 11:53  
16 the comments that the Tribunal made was that it would  
17 look for evidence, it would look for supporting  
18 evidence and it wouldn't leap to conclusions. Well, we  
19 say that is precisely what the Tribunal has been  
20 invited to do by Mr. McDowell, by saying that you can 11:53  
21 take a refusal to answer questions as an indication  
22 that something happened.

23  
24 Insofar as there is a context for this within the  
25 overall facts, we say the Tribunal should also 11:54  
26 consider, well, what evidence is there in broader  
27 terms -- in order to determine the test of necessity,  
28 what evidence is there to support Superintendent  
29 Taylor's allegations of negative briefings. Well, of



1 course, as we will expand on in our final submissions,  
2 Superintendent Taylor's account is utterly devoid of  
3 supporting evidence. There's no, as one might have  
4 expected, electronic or documentary evidence, such as  
5 he initially implied in the course of his judicial 11:54  
6 review proceedings might have been available. That has  
7 been resiled from. And I suppose more importantly in  
8 the present context, there is nothing by way of  
9 supporting detail, by way of date or context, in terms  
10 of the conversations that he alleges were had with 11:54  
11 certain journalists, which might have provided a basis  
12 for An Garda Síochána to seek to look behind or to  
13 question or pin down in some respects those accounts.

14  
15 It is of significance that one of the few details 11:55  
16 Superintendent Taylor did provide, albeit more than six  
17 months after his initial protected disclosure, was a  
18 list of what was initially nine journalists, which some  
19 five months later became eleven, and then we say,  
20 extraordinarily, yesterday, became twelve journalists, 11:55  
21 who he says he negatively briefed. Insofar as this  
22 might have provided an opportunity to An Garda  
23 Síochána, and indeed the Tribunal, to test the veracity  
24 of Superintendent Taylor's account, I suppose we would  
25 simply observe that the Court has heard I think that 11:55  
26 even that number of twelve, even if they had all  
27 claimed privilege, or even if they had all supported  
28 his account, we would perhaps be here making  
29 submissions about the fact that the Tribunal heard

1 evidence earlier on from the people in the Garda Press  
2 Office, on Day 70, that there was a pool of more than  
3 600 journalists. Of that pool of more than 600, the  
4 maximum that Superintendent Taylor was ever able to  
5 nominate was twelve. Of that twelve, and we have set 11:56  
6 them out effectively in table form at paragraph 26 of  
7 our submission, eight have denied -- sorry, I should  
8 say, first of all, none have supported his account,  
9 eight have denied his account. In respect of the  
10 remaining four, again, as I say, for the sake of 11:56  
11 emphasis, they haven't supported his account but they  
12 have claimed privilege. Of those four, three were from  
13 the Examiner and the fourth was Ms. McCann. In respect  
14 of the Examiner witnesses, Mr. McEnroe -- we have set  
15 out in some detail by reference to either their 11:57  
16 statements or in particular the references to the  
17 transcripts, what, in fact, they said, and we say that  
18 when the claim of privilege is subjected to any degree  
19 of scrutiny, it becomes clear that neither Mr. McEnroe,  
20 nor, for that matter, Mr. McConnell, could have 11:57  
21 circumstantially been negatively briefed by  
22 Ms. O'Sullivan, Mr. Callinan or indeed Superintendent  
23 Taylor.

24 CHAIRMAN: Just tell me why you say that, if you  
25 wouldn't mind, Mr. Fitzgerald. 11:57

26 MR. FITZGERALD: Yes. Well, in fact, I was going to  
27 read through that, if you wouldn't mind.

28 CHAIRMAN: Sorry, Mr. Fitzgerald, yes.

29 MR. FITZGERALD: Because Mr. McEnroe, and this is from

1 paragraph 28 of the speaking note, Mr. McEnroe  
2 confirmed in his evidence that he had never been  
3 negatively briefed by former Commissioners Callinan or  
4 O'Sullivan. He said he first became aware of the  
5 sexual allegations against Sergeant McCabe after July 11:58  
6 2014 following Superintendent Taylor's departure from  
7 the Press Office. While it perhaps leaves open the  
8 possibility that Superintendent Taylor negatively  
9 briefed Mr. McEnroe against Sergeant McCabe about  
10 something other than the sexual allegation during his 11:58  
11 time as Press Officer, it should be emphasised that in  
12 his evidence to the Tribunal Superintendent Taylor's  
13 allegation was that what he had discussed with him was,  
14 in fact, the sexual allegation and nothing else, and he  
15 also said that it had occurred around the time of 11:58  
16 Commissioner Callinan's appearance before the PAC in  
17 January 2014. The best of Mr. McEnroe's recollection  
18 about that time was that, at the time of Sergeant  
19 McCabe's appearance before the PAC, somebody raised a  
20 question-mark or a doubt around Sergeant McCabe which 11:58  
21 was, he said, quite curt but gossipy in nature. He  
22 also agreed that it was not to the extent -- he was  
23 questioned about this by Mr. Whelan, following the  
24 terms of reference, that it was not -- that what he had  
25 heard was not to the extent that Sergeant McCabe's 11:59  
26 complaints had no substance at all or that the gardaí  
27 had investigated his complaints and had no substance.  
28 We say, therefore, as I say, as I said by way of  
29 general introduction to these portions of the speaking

1 note, there's nothing in that that could substantiate  
2 the inference that the Tribunal has been invited to  
3 draw from the invocation of privilege.  
4

5 Mr. McConnell, he also said that his first knowledge of 11:59  
6 the Ms. D allegation was from journalistic chatter and  
7 that this was around the time of the PAC meeting in  
8 January 2014, which related in general terms to his  
9 credibility. Importantly, he said that he never met  
10 Martin Callinan and that his interactions with Nóirín 11:59  
11 O'Sullivan were limited to meet-and-greet situations,  
12 which he described as follows:

13  
14 "I met her a small number of occasions and they were  
15 primarily walking in and walking out of Oireachtas 11:59  
16 committees, a shake of the hands, that would be it  
17 really."  
18

19 In relation to Superintendent Taylor, he said his  
20 contacts were very limited, to something very run of 12:00  
21 the mill in terms of Garda matters. While he refused  
22 to confirm or deny or to go further, again we say,  
23 similar to Mr. McEnroe, that couldn't support the  
24 inference that the Tribunal is being invited to draw.  
25

26 Mr. O'Keefe, for his part, said that he thought he had 12:00  
27 first heard an allegation of sexual abuse in or about  
28 February 2014 and that he had heard it from other  
29 journalists. When asked if he had ever heard the

1 allegation from someone other than a journalist, he  
2 claims privilege on the grounds that this might  
3 identity a source. He similarly refused to confirm  
4 whether he had ever been negatively briefed by  
5 Superintendent Taylor or former Commissioners Callinan 12:00  
6 and O'Sullivan, notwithstanding the fact that the  
7 Tribunal was interested only in them as sources and  
8 that all had waived their privilege.

9  
10 Under questioning from the Chairman, he said he could 12:00  
11 not recollect if he had ever spoken to Martin Callinan  
12 and, if so, very, very rarely; that any conversation he  
13 had with him while he was Commissioner could have been  
14 an official briefing or was in the context of an  
15 official event. With regard to Ms. O'Sullivan, he said 12:01  
16 that his dealings with her were standard professional  
17 relations with a commissioner. Importantly, he  
18 couldn't say if he'd first heard of the rumours about  
19 Sergeant McCabe prior to the retirement of Commissioner  
20 Callinan on the 24th March 2014, obviously the 12:01  
21 timeframe the Tribunal is tasked to investigate.

22  
23 In the circumstances, you may remember, Chairman, that  
24 I was asking Mr. McConnell certain questions, and I  
25 think you intervened to say it wasn't conceivable, 12:01  
26 given the overall tenor of his evidence, that he had  
27 been briefed negatively either by Mr. Callinan or  
28 Ms. O'Sullivan. In those circumstances, the only  
29 remaining strand, if you like, of Mr. McConnell's

1 evidence that could support the inference is the  
2 evidence of -- or is the possibility that he had been  
3 negatively briefed by Superintendent Taylor.  
4

5 And very finally, I deal with the evidence of 12:01  
6 Ms. McCann. She said early in her evidence on Day 88,  
7 and this is at page 71 of the transcript:

8  
9 "I have no evidence of any campaign to malign Sergeant  
10 McCabe. I wasn't briefed negatively by any member of 12:02  
11 An Garda Síochána in relation to Sergeant McCabe."  
12

13 She said that in about February 2014 she heard  
14 murmurings in relation to Sergeant McCabe to the effect  
15 that there had been an allegation in the past. While 12:02  
16 simultaneously claiming privilege over whether or not  
17 she spoke to Superintendent Taylor about the  
18 allegation, she stated that she had never thought of  
19 contacting the Garda Press Office directly. She said  
20 in relation to a matter, that she wouldn't really 12:02  
21 expect the Garda Press Officer to confirm details. It  
22 was put to her by you, Chairman, that the only logical  
23 conclusion to draw from her evidence was that she had  
24 never been negatively briefed, and was that, when she  
25 had heard the rumours to which she had referred, any 12:02  
26 conversation she had with Superintendent Taylor could  
27 not have involved him confirming them. However, in  
28 answer to a request to confirm it was the case, she  
29 invoked journalistic privilege. For the same reason

1 she also --

2 CHAIRMAN: Yes. And again, Mr. Fitzgerald, I don't  
3 think inferences should be drawn as to what is in my  
4 mind from a question put.

5 MR. FITZGERALD: Sorry. 12:03

6 CHAIRMAN: No, it's not a pejorative comment in any  
7 way. You're entitled to make these points. But the  
8 thing did go on and there was a lot of twists and  
9 turns.

10 MR. FITZGERALD: Sorry, I wasn't seeking to present 12:03  
11 them as concluded views obviously, but I should say --

12 CHAIRMAN: No, no, no, I know that. Just, I don't want  
13 to mislead you, that is all.

14 MR. FITZGERALD: well, I am grateful for that  
15 clarification. I should say they are certainly 12:03  
16 observations that for the purposes of these, this  
17 written submission -- or oral submission, that we  
18 certainly would adopt.

19

20 She was also asked about her -- the issue of the phone 12:03  
21 call to Superintendent Taylor, and she claimed  
22 privilege over that.

23

24 Importantly, we say, from the point of view of our  
25 client, she confirmed she hadn't been in communication 12:03  
26 with either Ms. O'Sullivan or Mr. Callinan at any stage  
27 during the period covered by the terms of reference and  
28 that in any conversation she had with them that  
29 Sergeant McCabe hadn't been discussed.

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So by way of summary of our position, we say that should the Tribunal consider drawing an adverse inference to our clients from the invocation of privilege, the journalists should be ordered to disclose their sources, and the powers which Mr. English has referred the Court to as contained in Section 4 of the 1997 Act would apply. We say, in any event, that the grounds for that order would be supported by the fact that we don't believe, in fact, that the privilege was properly invoked in this case, given the factual background. They were simply being asked to confirm or deny contact with a source whose identity was known, who'd waived privilege. And we say that the claim seems to have been based more on abstract concerns about press freedom rather than any real concerns for those parties, in particular our clients, who may benefit or may have benefited from a simple denial on their part that the alleged grievance took place. However, while we believe their version that the claim of privilege is misconceived, we don't necessarily believe that it follows - in fact, we don't believe that it does follow, that the test for necessity is satisfied. The case law opened earlier requires a broader inquiry, and we say that in the overall context of proportionality assessment, the Tribunal might consider the following four points, which are at paragraph 41 of our written note: that Superintendent Taylor is himself, we will be

12:04

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12:05



1 submitting, is a witness wholly lacking in credibility,  
2 he is the only source of this, direct source of this  
3 evidence. There is a complete absence of documentary  
4 or electronic evidence to support his claim. Save for  
5 the names of twelve journalists, there's a complete 12:05  
6 absence of supporting detail. Of those twelve  
7 journalists, none supported his claims, and eight  
8 directly contradicted him. Of the four remaining  
9 journalists, there are only two whose claims of  
10 privilege might be considered to be relevant. So when 12:06  
11 one comes, I suppose, and starts from the number of  
12 600, or so, who might have been in a position to  
13 support Superintendent Taylor's account, we are down,  
14 it would seem, to two, and even in respect of one of  
15 those, his invocation of privilege doesn't appear to 12:06  
16 affect former Commissioners Callinan or O'Sullivan.  
17 CHAIRMAN: So the two are?  
18 MR. FITZGERALD: Cormac O'Keefe and Debbie McCann.  
19 CHAIRMAN: Yes.  
20 MR. FITZGERALD: In all of those circumstances, while 12:06  
21 we regret the position taken by the journalists and we  
22 believe it is mistaken in law, that indeed was the  
23 purpose in which we waived privilege at the start, we  
24 don't believe there is sufficient weight in any  
25 evidence that they might give to outweigh the general 12:06  
26 public interest in the confidentiality of journalistic  
27 sources. Thank you, Chairman.  
28 MR. FITZGERALD: That is very helpful. Thank you,  
29 Mr. Fitzgerald.

1 MR. ENGLISH: Sorry, Chairman, I wonder if I could just  
2 clarify. I am sorry to have to come back in, I'd hoped  
3 I wouldn't have to --

4 CHAIRMAN: No.

5 MR. ENGLISH: Just in relation to the speaking note 12:06  
6 that Mr. Fitzgerald refers the Tribunal to, and in  
7 particular in relation to Mr. McEnroe, Mr. O'Keefe and  
8 Mr. McConnell, at paragraph 28 in relation to Mr. Juno  
9 McEnroe, the speaking note says:

10  
11 "At the outset, it should be emphasised that 12:07  
12 Mr. McEnroe confirmed in his evidence that he had never  
13 been negatively briefed by former Commissioners  
14 Callinan or O'Sullivan."

15  
16 Can I ask the Tribunal -- this is, in fact, in relation 12:07  
17 to a reply on Day 94 at page 26 of the evidence at  
18 question 92, and, for the sake of clarity, I think it  
19 is important on behalf of my client that I set out what  
20 the question was. The question was, at question 92:

21  
22 "Okay. So can the Tribunal take it that former 12:07  
23 Commissioner Callinan, former Commissioner O'Sullivan  
24 did not in any way draw your attention to the  
25 allegations of criminal misconduct, and I am  
26 specifically referring here to the allegations made by  
27 Ms. D?

28 A. Yes, you can. Yes, you can."

29

1 But there is a difference between that and -- in my  
2 respectful submission, and a slight difference between  
3 what is at paragraph 28. I should also say for the  
4 sake of completeness in relation to my clients, that  
5 they are firmly of the view that no inferences should 12:08  
6 be drawn from anything that they said or did not say to  
7 the Tribunal.

8 CHAIRMAN: Yes.

9 MR. ENGLISH: Thank you, Mr. Chairman.

10 CHAIRMAN: Thank you, Mr. English. There's also the 12:08  
11 letter, of course, of April 2017 where he said he  
12 believes he has no information of relevance to the  
13 terms of reference.

14 MR. ENGLISH: That's correct, Chairman, and indeed, I  
15 am glad you raised that issue. 12:08

16 CHAIRMAN: Well, I am not sure it is worth debating  
17 now, Mr. English.

18 MR. ENGLISH: I don't wish to debate it, but I should,  
19 in the interests of my client, point out that his  
20 answer in cross-examination was very clear that that 12:08  
21 was an error, and I just wanted to mention that for the  
22 record.

23 CHAIRMAN: Yes. And I am still puzzled as to what kind  
24 of an error. Look, we can discuss that whenever we  
25 need to discuss it. 12:08

26 MR. ENGLISH: Thank you, Mr. Chairman.

27 CHAIRMAN: But I am really puzzled about that.

28 Mr. McGuinness, did you want to say anything just by  
29 way perhaps of keeping me right?

1 MR. MCGUINNESS: well, just in terms of the overall  
2 context in which you, Chairman, have to decide this.  
3 And you've heard from Mr. McDowell who thinks, on his  
4 client's behalf, that it is not necessary for you to  
5 require the journalists to provide the answers and take 12:09  
6 action against them in the High Court, should they do  
7 so. Mr. Ferry has a different position on behalf of  
8 Superintendent Taylor, he wants you to draw an  
9 inference, and, if you're not going to draw the  
10 inference, you should require disclosure. The 12:09  
11 Commissioner's team have, as it were, the mirror  
12 opposite of Mr. Ferry's position: that if you are  
13 going to draw an inference that's adverse, you should  
14 require them to disclose sources. And Mr. English on  
15 behalf of the papers - the Irish Examiner, that is - 12:09  
16 suggested that you can't draw any inference from the  
17 failure to confirm or deny any issue relating to  
18 sources. So that is, as it were, the stance adopted by  
19 the parties.

20  
21 In relation to Mr. English's clients, it's perhaps 12:10  
22 unfortunate that they have evinced an intention, if  
23 called back, if the Tribunal does decide to recall them  
24 and direct them to answer the questions, that they have  
25 evinced an intention to commit an offence in the 12:10  
26 course -- in the face of the Tribunal.

27 CHAIRMAN: well, yes --

28 MR. MCGUINNESS: Rather than cooperate.

29 CHAIRMAN: Sure, Mr. McGuinness. Look, it would only

1 be an offence in the event that the privilege weren't  
2 invoked --

3 MR. MCGUINNESS: Yes.

4 CHAIRMAN: -- correctly.

5 MR. MCGUINNESS: And I did want to draw that to the 12:10  
6 attention of you, Chairman. That the purpose of  
7 tribunals is to inquire into facts and allegations and  
8 to report thereon, making such recommendations and  
9 findings as appear appropriate. And in order to do  
10 that, Chairman, the tribunals have been invested with 12:10  
11 powers under the Tribunals of Inquiry (Evidence) Act  
12 1921-2004 as amended. And Section 1 of the Tribunals  
13 of Inquiry (Evidence) Act of 1921 provides that:

14  
15 "A tribunal has power to enforce the attendance of a 12:11  
16 witness and to examine them on oath, affirmation or  
17 otherwise."

18  
19 Section 1(2) of the Act as amended provides that:

20 12:11  
21 "It is a criminal offence to refuse to answer a  
22 question to which a tribunal may legally require an  
23 answer."

24  
25 And in that context, obviously section 1(3) of the Act 12:11  
26 provides that:

27  
28 "A witness before any such tribunal shall be entitled  
29 to the same immunities and privileges as if he were a

1 witness before the High Court or the court of session."

2  
3 So the contest that is required to be decided by you,  
4 Chairman: Can you legally require an answer of the  
5 journalists or can they and are they entitled to invoke 12:12  
6 and rely on a claim of journalistic privilege properly  
7 made or not? Obviously, in that context, Section 4 of  
8 the Tribunals of Inquiry (Evidence) Act provides that:

9  
10 "A tribunal may make such orders as it considers 12:12  
11 necessary for the purposes of its functions."

12  
13 So the necessity test is not merely a part of the  
14 overall balancing exercise as laid down in the  
15 decisions of the Court of Human Rights such as Becker, 12:12  
16 but it's also an element of the exercise of your  
17 statutory powers; is it necessary for you to require  
18 the witnesses to give answers? Can you legally require  
19 the answers to the questions at issue here? Obviously  
20 in the context of any question of enforcement of those, 12:13  
21 a tribunal isn't, and has never been, given the powers  
22 give effect to its orders, to execute them in a legally  
23 binding way. And Section 4 of the Tribunals of Inquiry  
24 (Evidence) Act 1997 provides that:

25  
26 "Where a person fails or refuses to comply with an  
27 order of the tribunal, the High Court may, on  
28 application to it in a summary manner by the tribunal,  
29 order the person to comply with the order and make such

1 order as it considers necessary and just to enable the  
2 order to have full effect."

3  
4 So the procedures as referred to, as envisaged in the  
5 submissions that you have heard, would require 12:13  
6 obviously an adjudication by you on the issue, and  
7 should the issue be determined adversely to the claim  
8 of privilege, those journalists in respect of whom you  
9 have determined that their evidence is necessary, would  
10 have to be recalled and the question or questions or 12:14  
11 series of questions relevant to the issue to be  
12 determined would have to be put to them. And if, in  
13 those circumstances, there were then a refusal to  
14 comply with an order or the several orders that might  
15 be made by the Tribunal, it would be necessary in those 12:14  
16 circumstances to consider invoking section 4 of the  
17 1997 Act.

18  
19 I think it is appropriate, Chairman, to refer to the  
20 very specific purpose of this Tribunal in the context 12:14  
21 of those statutory powers, and it's necessary, I think,  
22 to just refer in passing to the resolution of both  
23 Houses of Oireachtas passed in this matter, which  
24 recited that:

25  
26 "Bearing in mind the serious public concern about 12:15  
27 allegations that senior members of An Garda Síochána  
28 sought to discredit Sergeant Maurice McCabe because of  
29 complaints he made about the performance of An Garda

1 Síochána, noting that a public inquiry is the most  
2 appropriate way to investigate these serious  
3 allegations so as to ensure public confidence in An  
4 Garda Síochána and to respond to the public disquiet  
5 caused by these allegations, resolves that it is 12:15  
6 expedient that a tribunal be established under the  
7 Tribunals of Inquiry (Evidence) Act to inquire urgently  
8 into the following definite matters of urgent public  
9 importance. "

10  
11 And thereafter, Chairman, the terms of reference are  
12 set out in the respective resolutions and contained in  
13 the instrument appointing you. I don't intend to refer  
14 to them at all in full, other than to note that  
15 obviously terms (a) and (b) focus on this issue of 12:15  
16 contacting the media to brief journalists negatively,  
17 to draw journalists' attention to the allegation of  
18 criminal misconduct, and term of reference (h), which  
19 is to investigate contacts between members of An Garda  
20 Síochána and media and broadcasting personnel, 12:16  
21 etcetera.

22  
23 So it's in that context that the Oireachtas have  
24 invested you with the powers and the necessary powers  
25 to inquire, as you must, into those matters as fully as 12:16  
26 is possible under the law.

27  
28 In terms of the functions of An Garda Síochána that are  
29 relevant to it, it is, I think, appropriate to bear in



1 mind the provisions of the Garda Síochána Act of 2007  
2 and the objectives of that as set out in section 7,  
3 which says:

4  
5 "The functions of the Garda Síochána is to provide 12:17  
6 policing and security services for the State, with the  
7 objective:

- 8  
9 (a) preserving peace and public order;  
10 (b) protecting life and property; 12:17  
11 (c) vindicating the human rights of each individual;  
12 (d) protecting the security of the State;  
13 (e) preventing crime;  
14 (f) bringing criminals to justice, including by  
15 detecting and investigating crime; 12:17  
16 (g) regulating and controlling road traffic and  
17 improving road safety."

18  
19 So that is the very specific objectives for the which  
20 the Garda Síochána ought to stride, but you, Chairman, 12:17  
21 are empowered and required to pass judgment, as it  
22 were, on the actions of both the Commissioner, the  
23 former Commissioner at the time and the former Deputy  
24 Commissioner, and other guards who are implicated in  
25 the terms of reference, with a view to allaying public 12:17  
26 disquiet, with a view to urgently inquiring, with a  
27 view to, if possible, restoring public confidence in An  
28 Garda Síochána, and central to that is the inquiry into  
29 what Superintendent Taylor was instructed to do or not,

1 what he actually did and what evidence there is to  
2 support his claims about what he says he actually did.  
3 And that's the very broad description of the context,  
4 Chairman, in which this dispute, as it were, arises  
5 that you must adjudicate upon. 12:18

6  
7 The balancing test, which is at the forefront of any  
8 decision in this regard, obviously has to have regard  
9 to that public interest of the Tribunal. And I have  
10 referred to it at some length in the terms which I have 12:18  
11 to emphasise the fact that it is a public interest  
12 which, in my submission, necessarily must be considered  
13 to be superior in a hierarchy of interests, superior to  
14 those of the private rights of any individual that is  
15 under consideration here. And the private rights that 12:19  
16 are within that, the scope of your consideration, are  
17 obviously the journalists' rights as individuals in  
18 pursuit of their livelihood, entitled to engage in  
19 their lawful pursuit of their profession in the  
20 traditional way, with the protection of sources. There 12:19  
21 is obviously also a public interest dimension to their  
22 work, because going from the individual to the general  
23 they are exercising, as it were, through their papers  
24 and editors and journals and publications obviously a  
25 very important objective, the freedom of the press, a 12:20  
26 free public press, holding institutions to account. So  
27 it's a journalistic privilege which is invoked in these  
28 circumstances which on its face might be seen to have a  
29 prima facie validity to it. You of course, Chairman,

1 then have to consider the private rights of  
2 Superintendent Taylor to his reputation, to the extent  
3 to which that can be vindicated, the extent to which  
4 necessary inquiries must be made to see can that  
5 reasonably be vindicated by inquiring as fully as may 12:20  
6 be possible into his claim of briefing journalists.  
7 The counterclaim of the journalists are of course  
8 related to their own particular exercise of their  
9 profession, the chilling effect or cooling effect that  
10 it may have on sources, the overall possibility of the 12:21  
11 dilution of the relationship of journalist and source  
12 as a whole, quite apart from Superintendent Taylor.  
13 The waivers that have been executed are of course of  
14 some relevance and I am not suggesting, Chairman, and  
15 the case law doesn't suggest that the waivers or the 12:21  
16 identification by a source of himself as a source is  
17 determinative or dispositive of the issue; the Becker  
18 case, whilst it regards it as an important factor  
19 doesn't regard it as the determining factor.

20  
21 So Chairman, the Commissioners, retired obviously at  
22 this stage, have a significant interest in determining  
23 and having the Tribunal determine whether they have  
24 been falsely accused of the wrongdoing, exposing  
25 perhaps, on their view, whether they have been 12:22  
26 completely, in their own way, smeared by the  
27 allegations. And those interests, competing interests  
28 to some degree of the Commissioners and Superintendent  
29 Taylor, and of course of Sergeant McCabe in

1 establishing whether such a campaign existed, was it in  
2 fact directed by the Commissioners and executed with  
3 the knowledge alleged against Commissioner O'Sullivan  
4 and executed by Superintendent Taylor as the Garda  
5 Press Officer, did that occur and can evidence be 12:22  
6 definitively established as to whether it occurred, all  
7 of these conflicting rights have to be put into the  
8 balance. And you, Chairman, must in the context of  
9 your own assessment of the public need, the urgency to  
10 report on the matter, must make a determination as to 12:23  
11 whether it is necessary for you to take the step or the  
12 steps that are envisaged  
13 CHAIRMAN: Yes. So let's suppose it was necessary,  
14 Mr. McGuinness, then what is the question in relation  
15 to: what is the issue? Where can I go wrong in 12:23  
16 relation to discretion?  
17 MR. MCGUINNESS: Well, I think, Chairman, I suppose  
18 some of the parties are suggesting that you should  
19 engage in fact-finding at this stage --  
20 CHAIRMAN: Yes. 12:23  
21 MR. MCGUINNESS: -- to enable you to properly make the  
22 decision as to whether you need to go further and I  
23 think there is some logic in that. There is, I think,  
24 logic in suggesting that you do have to consider the  
25 issue of inferences on one view. On one view, would it 12:24  
26 assist you, Chairman, to take even a provisional view  
27 at this stage as to whether you could draw inferences,  
28 in order to enable you to make a proper decision on the  
29 issue of source protection or otherwise? It's a matter

1 for you obviously, Chairman.

2 CHAIRMAN: Sure. Mr. McGuinness, I think the problem  
3 with that, and it really, really is a problem, is that  
4 there has been so much material, there has been so much  
5 evidence, that if I were to do that on a provisional 12:24  
6 basis I could very easily then reverse myself on full  
7 consideration.

8 MR. MCGUINNESS: Yes.

9 CHAIRMAN: That is a problem.

10 MR. MCGUINNESS: I think the difficulty obviously that 12:24  
11 some of the parties might see is that you have to make  
12 a decision at this stage, and everyone understands  
13 that, and everyone understands that this is the  
14 necessary sequence of events --

15 CHAIRMAN: Yes. 12:24

16 MR. MCGUINNESS: -- which you have to take and take  
17 obviously on an appropriate basis. I, Chairman, am not  
18 going to make any submissions on the facts.

19 CHAIRMAN: No, I appreciate that, Mr. McGuinness, and  
20 thank you for that. But in relation then to the issue 12:25  
21 of futility, I mean --

22 MR. MCGUINNESS: well, on the issue of futility --

23 CHAIRMAN: -- am I going to gain anything by doing  
24 this?

25 MR. MCGUINNESS: Yes. That is -- 12:25

26 CHAIRMAN: I mean, we have two diametrically opposed  
27 parties. The Garda Síochána says if you are going to  
28 draw an inference then you're going against our rights  
29 and then Superintendent Taylor is saying if you are

1 going to draw the other inference that it never  
2 happened then you are going against my rights.  
3 MR. McGUI NNESS: Yes.  
4 CHAIRMAN: And then we have a situation where both the  
5 Tribunal legal team and myself have asked multiple 12:25  
6 questions of the relevant journalists and am I going to  
7 get anywhere by going to the High Court?  
8 MR. McGUI NNESS: Yes.  
9 CHAIRMAN: I don't mean from the High Court.  
10 MR. McGUI NNESS: Yes. 12:25  
11 CHAIRMAN: I mean am I going to get any further  
12 information?  
13 MR. McGUI NNESS: Yes.  
14 CHAIRMAN: Mr. McDowell thinks not. But have you got  
15 any view or any submission on it? 12:26  
16 MR. McGUI NNESS: well, I suppose I should say this,  
17 Chairman, that I can understand the reluctance perhaps  
18 to make a definitive decision about inferences. So if  
19 inferences are off the table, as it were, both from  
20 Mr. Ferry's side and from the Commissioner's side, they 12:26  
21 are each then saying in a sense, you should try and  
22 require the journalists to disclose the sources and the  
23 content of their conversations with Superintendent  
24 Taylor. whether that can be achieved is, I suppose, an  
25 element of crystal ball gazing. But I suppose one 12:26  
26 should presume against the commission of offences in  
27 this sense, Chairman: That, if you are legally  
28 entitled to require an answer and suppose that is  
29 vindicated by courts, if necessary, if you are legally

1 entitled to require the answer, you should be given the  
2 answer. And you perhaps should consider starting with  
3 the presumption that if you make an order which you  
4 believe to be lawful and in fact turns out to be  
5 lawful, that you will be provided with information, and 12:27  
6 that you should perhaps presume that the journalists  
7 will not commit an offence here or you should perhaps  
8 presume that the journalists will not commit an offence  
9 in the High Court of being in contempt of the High  
10 Court order, otherwise, Chairman, you would run the 12:27  
11 risk perhaps of allowing an improper claim of privilege  
12 to prevail over the exercise of lawful powers and deny  
13 yourself evidence that may be relevant.

14 CHAIRMAN: Right.

15 MR. MCGUINNESS: I think that is all I should say. 12:27

16 CHAIRMAN: Thank you very much, Mr. McGuinness. That  
17 was very helpful. I am conscious of the fact that the  
18 more complicated things become the more likely it is  
19 that an error will be made and therefore it's best to  
20 pare this down to first principles and to relevant 12:28  
21 facts.

22  
23 We do know that on the 20th September 2016  
24 Superintendent David Taylor and Maurice McCabe and  
25 their, in one instance, wife met, and we do know that 12:28  
26 there is a difference as to what was said, particularly  
27 in relation to the relevance of texts or electronic  
28 communications. We know as well that on the 26th  
29 September '16 there was a protected disclosure by

1 Mr. McCabe -- sorry, by Sergeant McCabe, under the  
2 relevant Act to the Minister and we know that that was  
3 followed up four days later by Superintendent Taylor  
4 making his own protected disclosure. And we know that  
5 there the issue in relation to the texts may be either 12:28  
6 starkly in contrast to each other or may be somewhat  
7 elided in the statement of Superintendent Taylor. I  
8 don't need to go into that now. We know as well that  
9 when Superintendent Taylor was asked he supplied the  
10 names of nine journalists initially whom he said he 12:29  
11 negatively briefed. We know that in addition, when the  
12 Tribunal investigators went to him and asked him about  
13 a visit by Debbie McCann and Eavan Murray to the house  
14 of the D family, who are at the centre of this, that he  
15 said oh yes, indeed, I had contact with them as well 12:29  
16 and mentioned the level of contact. Of those two  
17 individuals, who are Eavan Murray and Debbie McCann,  
18 one is claiming privilege in the strongest possible  
19 terms. And that's probably the centre of this.

20  
21 In addition to that, we had three witnesses from the 12:29  
22 Cork Examiner, whose evidence by times by mysterious,  
23 but I am left essentially with Cormac O'Keefe and  
24 trying to read what precisely he is saying. Now, we  
25 know the core of this is the following. At the meeting 12:30  
26 on the 20th September 2016 David Taylor told Maurice  
27 McCabe something that he suspected for a long time,  
28 whether it is true or not I can't say right now, which  
29 was to the effect that he had been instructed as Garda



1 Press Officer by Martin Callinan with the affirmation  
2 of the Deputy Commissioner Nóirín O'Sullivan to make,  
3 say unpleasant things about him to members of the  
4 media. Now there's some debate, and I think it's a  
5 debate we are probably going to have to go back to, as 12:30  
6 to what the term of art which has now arisen in this  
7 Tribunal actually means; namely, negative briefing.  
8 But in essence, what was said in that protected  
9 disclosure by David Taylor is mirrored in the terms of  
10 reference in the sense that the terms of reference 12:31  
11 indicate that I am to inquire into whether he was  
12 tasked to brief the media that Sergeant McCabe was  
13 motivated by malice and revenge, whether he was asked  
14 to encourage them to write negatively about Sergeant  
15 McCabe to the effect that his complaints had no 12:31  
16 substance and the Gardaí had fully investigated them  
17 and found no substance to them, and that therefore he  
18 was driven by agendas and whether he was asked to draw  
19 the attention of members of the media, journalists to  
20 the allegation of criminal misconduct made against 12:31  
21 Sergeant McCabe as being the route cause of his agenda;  
22 namely, revenge against the Gardaí.

23  
24 Now, just looking at that, and then asking myself the  
25 question, what has Superintendent Taylor said that he 12:31  
26 did? well, this is actually important to the  
27 determination of this issue. Because Superintendent  
28 Taylor in asking a question for the very first time in  
29 relation to this matter to Andrew McLindon said,

1 effectively, that all he was asked to do, that all he  
2 ever did, was to say to members of the media that there  
3 had been an investigation, in consequence of an  
4 allegation by a minor, that the matter was  
5 investigated, that the Director of Public Prosecutions 12:32  
6 ruled that there was no case to answer and that in  
7 consequence of that Sergeant McCabe was somewhat  
8 embittered. In, however, his interview with our  
9 investigators Superintendent David Taylor also added  
10 that this was to be done on the base, and I quote, 12:32  
11 "that there was no smoke without fire". Now he has  
12 sought to qualify that and make a reference in that  
13 regard to other matters which may be likely or  
14 unlikely. Now is not the time to construe that. But  
15 in addition to that, one has to also look at the 12:33  
16 question of what is alleged to have been said by  
17 Commissioner Callinan to other individuals. And  
18 without going into the detail of that, it is clear from  
19 the evidence that I have heard, whether it is credible  
20 evidence or incredible evidence or whether it is 12:33  
21 mistaken or not mistaken, that the level of invective  
22 against Sergeant McCabe goes way beyond that to involve  
23 psychiatric and psychological problems, to involve the  
24 abuse of his entire family, the abuses of nieces and  
25 nephews and to the existence as of the time that these 12:33  
26 are alleged to the Gardaí having investigation files in  
27 relation to him which were current at the time of the  
28 Public Accounts Committee hearing and the proposal  
29 which it seems made this entire thing boil up, if

1 indeed it ever did boil up, the Public Accounts  
2 Committee hearings in January 2014 and in particular  
3 the appearance of a serving sergeant in circumstances  
4 where the head officer of the Garda Síochána did not  
5 feel that it was legally right for that officer to 12:34  
6 appear and to discuss matters which were protected by  
7 the Data Protection Acts and for other reasons as well  
8 of discipline. So the nature of the maligning, if it  
9 is true, if there is any credibility to any of that, of  
10 Sergeant McCabe, goes far beyond the question put to 12:34  
11 Andrew McLindon.

12  
13 In addition to that, there may be some evidence which  
14 links Superintendent David Taylor to that, there may be  
15 inferences which may be drawn in that regard and the 12:34  
16 evidence of Philip Boucher-Hayes and any supporting  
17 evidence in that regard may be important.

18  
19 So, that seems to me to be the core issue. Now turning  
20 to the law, and thank you all very much for your 12:35  
21 assistance. It has been immensely helpful.

22  
23 Essentially, the courts uphold a very strange  
24 circumstance where the general principle is the law is  
25 entitled to the evidence of every man and every woman 12:35  
26 but some men and some women may be exempted from giving  
27 evidence if they are, for instance, a lawyer acting as  
28 a lawyer and giving legal advice, in circumstances  
29 perhaps of some form of spiritual counselling, in

1 circumstances of diplomatic communication, but that is  
2 open to a balancing exercise, and the relevant one  
3 here, where journalistic privilege is involved. The  
4 same principles as Wigmore stated continue to apply.  
5 The particular matter to be protected from, and as an 12:36  
6 exception to the law having an entitlement of the  
7 evidence of every man and woman, is, a communication  
8 has to originate in a confidence, confidentiality has  
9 to be essential to the full and satisfactory  
10 maintenance of the relationship, the relationship has 12:36  
11 to be one which in the opinion of the courts ought to  
12 be assiduously fostered and the injury to that  
13 relationship by disclosure of the communication would  
14 be greater than the detriment to the correct disposal  
15 of litigation or, in this instance, to the proper 12:36  
16 finding of fact through every possible available  
17 circumstance by this Tribunal.

18  
19 Now, as is well known, from 1996, the grand chamber of  
20 the European Court of Human Rights stated the principle 12:37  
21 in the Goodwin case. Under the European Court of Human  
22 Rights Act I am obliged, because I'm not a court, I am  
23 simply a public official conducting this Tribunal, to  
24 apply the European Convention on Human Rights and that  
25 indicates that there is a freedom of expression under 12:37  
26 Article 10.1 and that there shouldn't be any  
27 interference by public authority and under 10.2 that  
28 the exercise of those freedoms can be subject to  
29 conditions or restrictions which are necessary in a

1 democratic society, including for maintaining the  
2 authority and impartiality of the judiciary and in  
3 relation to the protection or reputation of the rights  
4 of others. Here the right of others that is involved  
5 is clearly Superintendent Taylor; here, as 12:38  
6 Mr. McGuinness has said, the right involved as well is  
7 the entitlement of the people of Ireland to know  
8 insofar as it is possible through human agency what has  
9 in fact happened.

10  
11 In Goodwin, it was stated that without such protection,  
12 that is to say protection of journalistic sources,  
13 those sources may be deterred from assisting the press  
14 in informing the public on matters of interest, and as  
15 a result their vital public watchdog role can be 12:38  
16 undermined, and that information will dry up, and that  
17 it is necessary to have journalistic privilege in a  
18 democratic society in order to avoid the potentially  
19 chilling effect on the duty of journalists to inform  
20 and to seek out issues which perhaps a corrupt public 12:38  
21 order might wish to conceal and to bring those to light  
22 for the purposes of public debate, which is possible  
23 only in a democratic society.

24  
25 As far as back as the Financial Times case, the courts 12:39  
26 have said that, the European Court of Human Rights has  
27 said that the invocation of journalistic privilege is  
28 not necessarily removed simply by a waiver, because the  
29 invocation of journalistic privilege may still be

1 proper if, despite a waiver, sources might be deterred.  
2 That can happen conceivably in a number of cases where,  
3 for instance, there's a limited number of people and  
4 they're all required to sign a waiver; it could also  
5 happen where there is a collateral agreement with the 12:39  
6 journalist that a limited disclosure would be made but  
7 that the true nature of the disclosure would not be  
8 made by the journalist; and it could also happen, it  
9 seems to me, where someone is saying something in the  
10 context of a waiver that they did a particular thing 12:40  
11 but what they did was, let us say, ten times worse. So  
12 the mere fact of a waiver is not of itself enough.

13  
14 So turning to the particular facts of this case. I  
15 have yet to decide, and I actually do not know, what 12:40  
16 Superintendent Taylor did, if anything. I as yet do  
17 not know what Superintendent Taylor did or did not do  
18 at the behest of Martin Callinan or with the  
19 acquiescence of Nóirín O'Sullivan. I as yet do not  
20 know what the full extent, if he did anything, of what 12:40  
21 he did was. And I as yet am unable to make up my mind  
22 as to the nature, if any, communications that he made  
23 to journalists.

24  
25 Now I am left in a situation where two journalists have 12:41  
26 claimed privilege. One is Cormac O'Keefe, and doing  
27 my very best to try and decide if he has anything to  
28 say to me which could reasonably be regarded as  
29 relevant, I frankly have a doubt in relation to that

1 and the invocation, therefore, of these very serious  
2 measures would in those circumstances not be justified.  
3 In relation to Debbie McCann, the circumstances  
4 concerning her are that she definitely visited the  
5 house of Ms. D, it is claimed by Superintendent Taylor 12:41  
6 in mysterious circumstances that he communicated this  
7 to her. In relation to every occasion on which the  
8 issue of what Superintendent Taylor did or did not do  
9 or did or did not say, she has claimed privilege. Now  
10 I am left in a severe difficulty in relation to that 12:42  
11 evidence and the difficulty is twofold. First of all,  
12 I am not in a position to decide today, and I am not in  
13 a position to decide before hearing final submissions,  
14 as to whether the invocation of privilege was made  
15 honestly. Clearly, for instance, if a person claims to 12:42  
16 have given advice in the context of being a lawyer and  
17 they're not a lawyer, well then legal professional  
18 privilege doesn't arise. Clearly if the nature of the  
19 advice is claimed to be legal advice whereas it is  
20 simply legal assistance, then legal professional 12:42  
21 privilege would not arise. I do not know, furthermore,  
22 whether Debbie McCann might, she made several  
23 references to the protection of her career, be  
24 protecting Superintendent Taylor in relation to a much  
25 more serious form of malignment of Sergeant McCabe than 12:42  
26 that to which he admits, if indeed there was any  
27 malignment at all by Superintendent Taylor of Sergeant  
28 Maurice McCabe.

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1 So, what is the situation that leaves me? Firstly, I  
2 don't know whether the privilege is invoked honestly  
3 and that is not to say that Debbie McCann is dishonest,  
4 and that should please be noted, because it is a  
5 question of saying I can't make my mind up on that 12:43  
6 until I have final submissions, and secondly, and again  
7 I am not making my mind up on this, and that should be  
8 clearly noted, I do not now know in relation to the  
9 evidence of Ms. McCann as to whether there may be an  
10 honest invocation of a residual privilege because what 12:43  
11 Superintendent Taylor has waived is in relation to a  
12 public or surface claim as to what he did, but which  
13 may merely be the tip of an iceberg, whereas much worse  
14 could have happened underneath. I emphasise that I do  
15 not know as to whether anything happened at all and I 12:44  
16 cannot now make up my mind as to this issue as to the  
17 tip of the iceberg. But starkly, this issue does arise  
18 in the context of what Superintendent Taylor put  
19 through his counsel to Andrew McLindon, to what  
20 Superintendent Taylor said vis-à-vis there being no 12:44  
21 smoke without fire in his statement to the Tribunal  
22 investigators and in the context of there being alleged  
23 to be a conspiracy or breathing together in furtherance  
24 of a particular agenda, which may be the case or may  
25 not be the case, between Commissioner Callinan and 12:45  
26 Superintendent Taylor, whereby he has chosen not to  
27 down-play any involvement which he may have in contrast  
28 to the very stark evidence that has been given by other  
29 witnesses in respect of which the Tribunal makes no



1 finding whatsoever.

2  
3 Now there's two other factors. Firstly, there is the  
4 factor of necessity. Whereas I respect the submission  
5 made by counsel for the Tribunal that I should operate 12:45  
6 on the basis that a presumption should be made that no  
7 one will commit an offence, I am not certain that by  
8 invoking journalistic privilege that Debbie McCann is  
9 invoking it in the wrong for the reasons stated.

10 Secondly, I am completely convinced in relation to her 12:46  
11 and in relation to Cormac O'Keefe that even if I refer  
12 the matter to the High Court I won't get any further  
13 information. As may be known by some, when Roger  
14 Casement was put on trial for treason the great Irish  
15 playwright George Bernard Shaw wrote him a speech from 12:46  
16 the dock, one line of which included that "the alter  
17 upon which Irish martyrs are consecrated is the  
18 gallows"; well, it may be, and I don't know whether it  
19 is in relation to Mr. Vaughan, Mr. McEnroe,

20 Mr. McConnell, Mr. Reynolds, Mr. O'Keefe or Debbie 12:46  
21 McCann, as to whether they would take the view that  
22 they wished to be conferred with some form of  
23 martyrdom, I presume not, but what I am convinced of is  
24 that there will be no change because the manner in  
25 which they resisted answering the question indicates to 12:47  
26 me, and this is the second point, that any order that I  
27 might make in that regard would be absolutely futile.  
28 So, therefore, I am not going to refer any journalist  
29 to the High Court and I am not going to go through the

1 procedure that is now applicable.

2  
3 I have something further to add and that is this. That  
4 during the course of the hearings, which I think are  
5 now in their 95th day, I'm not completely sure, I have 12:47  
6 been noting issues which seem to me to be of  
7 importance, and Ms. O'Herlihy has checked through some  
8 of those and vis-à-vis the submissions today I have  
9 also added some things to it. So it seems to me we are  
10 at a stage where we may have some further small amount 12:48  
11 of evidence but also where we need to move to final  
12 submissions, which is perhaps next week, but let's talk  
13 about that when this is done, and in the past I have  
14 indicated, for instance, in relation to prior sections  
15 of work of the Tribunal the questions which parties may 12:48  
16 wish to address, here I have come up with 20 and they  
17 are these, and I am going to state them now so that  
18 people can consider whether they want to put other  
19 matters to me. When a judge goes back into his room or  
20 her room the first thing that is done is to say well, 12:48  
21 what do I have to answer in this case, what do I have  
22 to actually decide.

23  
24 1. what kind of talk, communication or innuendo can  
25 fairly be said to come within the terms of reference? 12:48  
26 what is the full extent of any calumny or detraction  
27 against Maurice McCabe that should be regarded as  
28 proven as a matter of probability?  
29

- 1 2. To what extent are political, journalistic and  
2 Garda rumours or talk necessarily to be considered?  
3
- 4 3. Is there any truth in the protected disclosure of  
5 Superintendent Taylor? Is he a witness whose evidence 12:49  
6 in any respect can be accepted? Should it, as a matter  
7 of prudence, be subject to a corroboration/caution  
8 warning?  
9
- 10 4. Is it possible to tell from a false denial, for 12:49  
11 instance, but not limited to Superintendent Taylor or  
12 to any journalist, that the opposite to an assertion is  
13 in fact the truth?  
14
- 15 5. Is what Superintendent Taylor claims to have been 12:49  
16 done on behalf of Commissioner Callinan an  
17 understatement of the reality of what he in fact did?  
18 Did he do whatever he did at the behest of Commissioner  
19 Callinan or did he do it with the acquiescence or any  
20 knowledge by Deputy Commissioner O'Sullivan? 12:49  
21
- 22 6. To what extent, if at all, is the account of  
23 Maurice McCabe as to what he was told by Superintendent  
24 Taylor reliable and accurate despite any contradiction  
25 by Michelle Taylor and Superintendent Taylor? 12:49  
26
- 27 7. To what extent do Maurice McCabe's reports of  
28 Superintendent Taylor in relation to phones or  
29 electronic devices influence Superintendent Taylor's

1 creditworthiness? Should a preference be made or what  
2 might be the effect of making a preference for Maurice  
3 McCabe's protected disclosure?  
4

5 8. Of what relevance are the allegations of 12:50  
6 Superintendent Taylor as to his phones and the seizures  
7 thereof? That includes all electronic devices.  
8

9 9. Of what relevance are the allegations of  
10 Superintendent Taylor as to Commissioner O'Sullivan, 12:50  
11 Detective Superintendent McGowan, Chief Superintendent  
12 Clerkin and his false High Court application?  
13

14 10. Why were the disciplinary proceedings against  
15 Superintendent Taylor withdrawn and what are the terms 12:50  
16 of that withdrawal and the termination of the High  
17 Court proceedings?  
18

19 11. Is there any inference to be drawn from changes of  
20 phones, loss of computers or phones, or failures to 12:50  
21 remember pin numbers by Commissioner Callinan,  
22 Commissioner O'Sullivan or Superintendent Taylor? Is  
23 there any other phone or computer evidence of  
24 relevance?  
25

26 12. To what extent, if any, can the allegations of 12:51  
27 John McGuinness TD, Philip Boucher-Hayes, Seamus  
28 McCarthy, Comptroller and Auditor General, and John  
29 Deasy TD be relied on, and even though merely guided by

1 the rules of evidence and not bound by them, is this  
2 Tribunal in a position to say that they corroborate or  
3 support each other?  
4

5 13. If these are to be believed or accepted as 12:51  
6 probable, what is the full extent of the allegation of  
7 calumny against Maurice McCabe? Is Superintendent  
8 Taylor reducing his role and if so, does this factor  
9 lessen or completely dissolve his credibility?  
10

11 14. What led to the visits of Debbie McCann, Eavan 12:51  
12 Murray and Paul Williams to the home of Ms. D? In that  
13 regard, has journalistic privilege been properly and  
14 honestly relied on and is there any evidence proffered  
15 by these parties that is reliable? What in truth 12:52  
16 happened? Did the visits have any Garda inspiration?  
17

18 15. To what extent, if any, does the evidence of the D  
19 family members remain relevant?  
20

21 16. To what extent is any incorrect invocation of 12:52  
22 journalistic privilege such as to give rise to any  
23 inference, and if so, what inference does any incorrect  
24 invocation of journalistic privilege give rise to?  
25

26 17. What is the relevance of question 5 as to any 12:52  
27 incorrect or dishonest invocation of journalistic  
28 privilege?  
29

1 18. To what extent do journalistic clashes, seven of  
2 them now today, apart from that between Alison O'Reilly  
3 and Debbie McCann, require to be resolved or even  
4 recorded in a report to the Houses of the Oireachtas?  
5 And if so, why?

12:52

6  
7 19. To what extent does the Tribunal have to report on  
8 or comment on political involvement or the actions of  
9 any individual public representative?

12:52

10  
11 And finally: 20. Going through the terms of  
12 reference, the parties might be so kind as to precisely  
13 and concisely give an answer to what each party regards  
14 as having been supported by probable evidence.

12:53

15  
16 So, that is just an indication of thinking, it is no  
17 more than that. It may help, it may not.

18  
19 Mr. McGuinness, what are we going to do next week? I  
20 think it may be appropriate if people want to move  
21 towards submissions to take Monday off.

12:53

22 MR. MCGUINNESS: well, I think, Chairman, we ourselves  
23 need to review whether there is in fact any other  
24 evidence that we might need to put before you and/or  
25 possibly, possible consideration of the recall of  
26 anyone else. We need to clear those issues one way or  
27 another.

12:53

28 CHAIRMAN: Is anybody else calling for any evidence,  
29 further evidence? I am asking the room now.

1 MR. MCGUINNESS: Not that I am aware of, Chairman.

2 MR. McDOWELL: Not at this moment.

3 CHAIRMAN: Right. Well, no one else is calling for the  
4 recall of any further witness. Well, that is a factor  
5 only, Mr. McGuinness. 12:54

6 MR. MCGUINNESS: Yes. I mean, we do need to decide  
7 this, as it were, otherwise than in public about any  
8 possible necessity to go down those routes.

9 CHAIRMAN: Okay. Was there any further evidence then  
10 beyond what we have heard, Mr. McGuinness? 12:54

11 MR. MCGUINNESS: We have no other witnesses scheduled  
12 as such for next week, so could I suggest, Chairman,  
13 that we adjourn, as it were, sine die but we will  
14 obviously put everyone on notice as to your direction  
15 as to the next possible sitting, and should it 12:54  
16 transpire that there is no other evidence obviously  
17 your intention is to take the submissions as soon as  
18 possible then after that.

19 CHAIRMAN: All right. Well, I think the thing to do  
20 is, I will meet with the Tribunal legal team in the 12:54  
21 Four Courts on Monday morning and if there are, if we  
22 are in a position simply to move to submissions that  
23 would be from Wednesday on.

24 MR. MCGUINNESS: Obviously then, Chairman, the sitting  
25 in relation to tomorrow and the manning of the office 12:55  
26 would appear to be no longer necessary at this stage.

27 CHAIRMAN: It's no longer necessary and thank you very  
28 much for getting through this morning.

29 THE HEARING THEN ADJOURNED TO A DATE TO BE CONFIRMED

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