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1921, ON 17 FEBRUARY 2017, AS AMENDED ON 7 DECEMBER 2018

CHAIRMAN OF DIVISION (P): MR. JUSTICE SEAN RYAN,
FORMER PRESIDENT OF THE COURT OF APPEAL

HELD IN DUBLIN CASTLE
ON FRIDAY, 6TH MARCH 2020 - DAY 149

149

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

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1 THE HEARING RESUMED, AS FOLLOWS, ON FRIDAY, 6TH MARCH
2 2020:

3
4 MR. MCGUINNESS: Mr. Fanning, please.

5 CHAIRMAN: Good morning, assistant commissioner. Thank 10:32
6 you.

7 THE WITNESS: Good morning, Chairman.

8
9 FORMER ASSISTANT COMMISSIONER FINTAN FANNING CONTINUED
10 TO BE DIRECTLY-EXAMINED BY MR. MCGUINNESS, AS FOLLOWS: 10:32

11
12 1 Q. MR. MCGUINNESS: when the Tribunal rose yesterday, we
13 had been just looking at the minutes of the meeting of
14 the 3rd October. I am not going to take you back into
15 them, but Mr. Barrett had mentioned at one stage that 10:32
16 there was a handwritten letter from Garda Keogh. Had
17 you seen that at that point in time, can you recall?

18 A. No, the only handwritten letter I'm aware of from Garda
19 Keogh was the September '15 letter that I got from him.

20 2 Q. Yes, okay. One thing that was clear, though, was that 10:33
21 there was an action plan set out on an action sheet as
22 a result of that and you received that, I think?

23 A. That's correct.

24 3 Q. Either that day or perhaps the next day?

25 A. The next day. 10:33

26 4 Q. If we look at perhaps page 10120. I think number 4
27 there:

28
29 "A visit to Garda Keogh is to take place and he is be

1 verbally informed of the case conference held today and
2 what is being proposed."

3
4 Inspector McCarthy was to undertake that. He was your
5 officer manager, you've told us. But I think you wrote 10:33
6 a letter or sanctioned a letter for Inspector McCarthy
7 to bring down, was it hand-delivered?

8 A. Yes.

9 5 Q. Perhaps we will look at that. 6895. It refers to our
10 phone conversation yesterday. Had he been updated, in 10:34
11 fact, over the phone after the meeting?

12 A. I don't know. The letter was probably sent out after
13 but it may well have been that Inspector McCarthy may
14 have, I don't know.

15 6 Q. Yes. He says: 10:34

16
17 "I refer to our phone conversation yesterday and our
18 discussion regarding the outcome of a meeting held at
19 Garda HQ on 3rd October 2017 concerning ongoing matters
20 and I wish to update you accordingly." 10:34

21
22 So what Inspector McCarthy was doing was in accordance
23 with the wishes of the meeting, isn't that correct?

24 A. Yes.

25 7 Q. He is reciting there his attendance at the meeting and 10:34
26 who was there. Then that he was asked by his executive
27 director.

28
29 "That I was to contact you and update you on the

1 outcome of the meeting. It was agreed that all further
2 communication with you and your legal representative
3 come through the office of the deputy director human
4 resources and people development Garda HQ. It was also
5 agreed that an assistant commissioner would be
6 appointed to conduct an investigation into these
7 matters."

10:35

8
9 So, certainly from Garda Keogh's point of view that
10 would appear to be progress being reported to him,
11 isn't that correct?

10:35

12 A. It may well, yes.

13 8 Q. Yes. You, in a letter to the executive director, at
14 page 6986, noted what was to happen. You record in the
15 final paragraph that:

10:35

16
17 "Inspector McCarthy spoke with him on the afternoon of
18 the 3rd and also corresponded in writing to him and
19 apprised him of the outcome of the meeting."

20 A. Yes.

10:36

21 9 Q. From the point of view of Garda Keogh's position, he
22 had been made aware of the policy the previous year, he
23 had been given a copy of the policy, and he had given a
24 statement which related to a complaint. He certainly
25 could have expected an appointment in relation to his
26 complaint of bullying and harassment?

10:36

27 A. Yes.

28 10 Q. There's no mention in the letter or, it would appear,
29 in the discussion with Garda Keogh, that there was a

1 debate going on that it should be an appointment of an
2 officer to investigate a more comprehensive set of
3 issues. Is there any reason for that, do you know?
4 A. No, I'm not aware of any reason, other than that the
5 decision hadn't been made. 10:37
6 11 Q. Yes. I think you had cause to ask the executive
7 director whether an appointment had been made and
8 whether action had been taken in relation to the issue
9 of sick leave, isn't that correct?
10 A. The issue -- no, I think the issue of sick leave is one 10:37
11 of the items that came up. I wouldn't have raised it,
12 but it was at that meeting on the 3rd October and it
13 concerned the classification of his sickness.
14 12 Q. Yes.
15 A. But, I mean, it wouldn't be something I would be 10:37
16 directly involved in. I think the issue was that it
17 somebody else raised and that was for somebody else to
18 action.
19 13 Q. Yes. Well, you do write, at page 6897, to the
20 executive director, asking if action number 7 arising 10:37
21 from the meeting in relation to the chief
22 superintendent in westmeath could be expedited. Is
23 that the issue about the two superintendents or the
24 relationship between the superintendents?
25 A. Yes, the relationship between them. They were both 10:38
26 very -- the highest integrity and everything else.
27 14 Q. You say in your statement at the top of page 6454, that
28 on the 10th October Inspector McCarthy of your office
29 met with Garda Keogh at his home in Tullamore. Can you

1 just help us as to the reason for that?

2 A. If I could see the --

3 15 Q. Yes.

4 A. Sorry, which?

5 16 Q. It's at the top of your statement, at page 6454. The 10:38
6 fourth and fifth line in.

7 A.

8 "On the 10th October Inspector McCarthy met with Garda
9 Keogh at his home in Tullamore. On the 17th I wrote to
10 the executive director." 10:38

11

12 It must have been one of the follow up actions. The
13 meeting was on the 3rd October. So whether there was
14 another letter to be collected or whatever.

15 17 Q. Yes. Can you recall what that would have been in 10:38
16 relation to?

17 A. I can't, no.

18 18 Q. In any event, Mr. Barrett replied to Mr. Cullen's
19 letter that had been referenced at the meeting. Could
20 I ask you just to look at that, at page 3590. This was 10:39
21 Mr. Cullen's letter which had enclosed Garda Keogh's
22 handwritten statement, which raised, I think, nine
23 different issues. The first related to the payroll
24 there, about whether he was going to be taken off the
25 payroll. If we turn on to the next page then, it 10:39
26 addresses all of the issues there in chronological
27 order. And he says as follows:

28

29 "1. I have undertaken the specific action of assessing

1 how best to proceed with respect to item 1. I expect
2 to have reached a conclusion on this before the end of
3 October and it will be communicated to you directly. I
4 will set out the process to be followed and the
5 personnel assigned. "

10:40

6
7 That was the investigation, the appointment of an
8 investigator, isn't that right?

9
10 "With respect to the bullying and harassment complaint,
11 I am to advise that there has been extensive
12 correspondence from Garda HRM section seeking
13 clarification from Garda Keogh as to who specifically
14 he was naming as the subject of his complaint. We are
15 now aware both from correspondence and the telephone
16 conversation who that individual is. We will proceed
17 accordingly.

10:40

10:40

18
19 3. The matters relating to how the Policing Authority
20 proceed in the circumstances outlined is for them to
21 decide. I have today written to the CEO and of the
22 Policing Authority and raised that question with them.
23 My letter is attached. "

10:40

24
25 Is that a matter that you had discussed with
26 Mr. Barrett at any stage?

10:40

27 A. No.

28 19 Q. "4. I have written to the office of the Garda
29 Commissioner and to the office of the head of legal

1 services to address the matters set out. This office
2 has had no sight of the correspondence to date but we
3 have now requested it. Our expectation is that it will
4 form part of the comprehensive file which will be made
5 available to the individual or team to be appointed
6 under 1 to review matters. 10:41

7
8 5. In the matter of pay, our telephone call and
9 primary point at the top of this correspondence refers. 10:41

10
11 6. Our intention is that the matters to be established
12 under 1 above will address the issues comprehensively
13 and diminish the need for intervention of the Tánaiste. 10:41

14
15 7. I wish to assure you and your client that it is to 10:41
16 this office that those charged with the management of
17 protected disclosures report. I have huge confidence
18 in the professionalism of the office holder. Chief
19 Superintendent McLoughlin has met with Garda Keogh in
20 his capacity as protected disclosure manager and this 10:41
21 relationship continues in effect."

22
23 Then he summarises a number of points.

24
25 "Firstly, we are committed to addressing the issues put 10:42
26 forth by Garda Keogh, your client. You can be assured
27 that I remain available to you and commitment to action
28 given will be actioned.

1 Secondly, at a meeting at this office last week it was
2 agreed that a regular contact from the employment
3 assistance service would be supplemented by a visit, as
4 has happened in the past, to your client from Inspector
5 McCarthy. This will take place shortly.

10:42

6
7 Finally, this office is now assuming coordinate
8 responsibility for the matters at issue and we will
9 seek to progress the issue transparently and with all
10 due élan."

10:42

11
12 So, that certainly addresses the issues raised by Garda
13 Keogh. The only item provided there with that letter
14 was the letter that Mr. Barrett had written to the
15 Policing Authority. That's to be seen at 12477. It's
16 addressed to the chief executive and it quotes, in the
17 piece in italics there, a question that Garda Keogh had
18 raised in his correspondence.

10:42

19
20 "Have the Policing Authority considered such a scenario
21 whereby (I cannot say for sure this has happened) a
22 complaint is made against a senior officer who is going
23 for promotion and happens to be favoured by Garda
24 management. Garda management delay commencing the
25 investigation including serving notice disciplinary or
26 otherwise on the senior officer candidate, whereby
27 should the Policing Authority ask the candidate to
28 disclose such disciplinary information he/she could
29 answer none in good faith. In the meantime the actual

10:43

10:43

1 complaint is withheld/lost by Garda management to
2 facilitate their choice of candidate being promoted.
3 Is this possible?"

4
5 It then concludes:

10:44

6
7 "This office is now seeking to deal with all the
8 matters relating to Garda Keogh and I would be most
9 grateful if you would ensure I am copied on any reply
10 you might send or have already sent to Mr. Cullen."

10:44

11
12 CHAIRMAN: Just go down so I can see the number of
13 that.

14 MR. McGUI NNESS: That's at page 12477.

15 CHAIRMAN: Sorry, thanks very much. 12477.

10:44

16 MR. McGUI NNESS: Yes.

17 CHAIRMAN: Thank you.

18 20 Q. MR. McGUI NNESS: Outside of the meeting of the 3rd
19 October, was that an issue ever raised with you between
20 the 3rd October and the 23rd, the next meeting?

10:44

21 A. In relation to?

22 21 Q. In relation to the effect of the investigation of the
23 bullying and harassment complaint vis-à-vis the
24 promotion?

25 A. No. No, there was no discussion with me.
26 Superintendent Murray --

10:45

27 CHAIRMAN: Just scroll up a tiny bit, Peter, so I can
28 see the other part. Thank you very much.

29 22 Q. MR. McGUI NNESS: was that matter raised in any way,

1 shape or form at the meeting on the 23rd October?

2 A. No.

3 23 Q. I think prior to that meeting you e-mailed Mr. Nugent a
4 number of files on the 20th October, isn't that
5 correct, and a pie chart? 10:45

6 A. I recall getting a meeting request to go to a meeting.

7 24 Q. Yes.

8 A. My office -- I would have made sure that all the
9 information was made available to the CAO.

10 25 Q. Yes. In any event, a meeting took place on the 23rd. 10:45
11 We have a number of different sets of minutes of that.
12 Can I direct you to one which we believe is prepared by
13 Garda Gallagher, at page 10175. This recites the
14 parties who are there. It identifies there are eight
15 sort of issues. 10:46

16

17 "HR welfare strand. 2. PD now in public domain: "

18

19 Investigations that were referred to there.

20 10:46

21 "FOI request, data protection, treatment of members
22 absence, litigation possible, Tribunal, GSOC
23 involvement. "

24

25 And there is various contributions recorded then on the 10:46
26 next four or five pages. On page 10176, you refer to
27 John Scanlan taking the statement there, a four-page
28 statement, supplemental, 20 pages from the solicitor.
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You're recorded there as saying:

"What he is alleging is much wider than bullying."

Mr. Nugent is questioned:

10:47

"Has he made bullying complaint?"

And you answer:

10:47

"Yes."

Mr. Nugent, on the next page, is quoted as saying:

"Can we proceed with bullying?"

10:47

And you are recorded as saying:

"I cannot make a decision."

10:47

Is that right?

A. Yes, I couldn't make a decision as to who to appoint because it had to be an assistant commissioner. I knew at that stage that the people concerned were chief superintendents and superintendents and, indeed, he had mentioned something about the Commissioner as well.

26 Q. Yes. Mr. Nugent, down the page, seems to be querying:

"Nobody has been tasked to investigate bullying?"

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There's Mr. Barrett suggesting apparently:

"Break it up into areas we can deal with it. Solicitor is specific about bullying. There is a policy issue." 10:48

You're recorded at the bottom of the page there referring to:

"Harassment. Exclusion. He says that management didn't prosecute people. It's much bigger than bullying and harassment." 10:48

Ms. Hassett appears to be recorded as saying:

"At face value there is a bullying and harassment case." 10:48

Mr. Nugent is recorded as saying:

"He is saying publicly bullying and harassment. He is also saying publicly we are not investigating that. Can we say we have sufficient to investigate bullying, yes or no?" 10:48

You seem to say:

"You are the decision-maker in this."

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Mr. Nugent again seems to repeat:

"He has said it publicly and has complained to the Commissioner. Do we need to consider that he has specific allegations?"

10:48

Mr. Barrett says:

"We have identified an individual complained of bullying. We need to act. Various other strands are ongoing. Bullying is something we have an obligation under."

10:48

Chief Superintendent McLoughlin appears to be saying:

"We need to bottom out bullying."

10:49

You say:

"We need to appoint an AC."

10:49

And it proceeds on in that, but one of the sort of more dominant notes, as it were, is Mr. Nugent's view that there should be somebody appointed because the complaints are out there, he has made the complaint, he is now making it a public issue and it should be got on with really, isn't that right?

10:49

A. Yes.

27 Q. What was the conclusion of the meeting as far as you

1 understood it,? was there an agreed conclusion in
2 relation to any particular course?

3 A. No, my recollection was that it was coming back to the
4 default position, that I was going to have to appoint
5 an assistant commissioner, but the decision hadn't been 10:49
6 made, the Byrne/McGinn model hadn't been ruled out
7 completely. But I was expecting a decision to be made
8 very soon afterwards. I mean, I was conscious at the
9 meeting that the policy I was working under was
10 about -- there was elements that there was 10:50
11 confidentiality guaranteed. So, the view I had was to
12 move it along, kind of get an assistant commissioner
13 made available to me and then I'd make the decision
14 whether it was Byrne/McGinn or whether it was bullying,
15 obviously the default position. 10:50

16 28 Q. Yes. You e-mailed Mr. Nugent afterwards, on the 24th,
17 if we could look at page 10188. And you say:
18
19 "Since yesterday we have been reflecting on those
20 discussions and here are my views. 10:50
21
22 Normally there would not be a meeting of this nature at
23 this level about a B&H matter, which is in the main
24 confidential. I spent five and a half years as policy
25 owner and nearly nine as assistant commissioner, I have 10:51
26 never been at a meeting of this nature, in relating to
27 bullying and harassment process of individual garda. I
28 didn't get the agenda but it may be no harm to have it
29 clear and especially the minutes. I guess it may arise

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why we met and discussed the matters we did."

You go on to refer to your pie chart. You refer to Chief Superintendent Scanlan taking the statements. You refer to your role under the bullying and harassment. You say then:

10:51

"I don't know what a fact-finding is. It is not provided for in the process."

10:51

was that really the kernel of the meeting of the 23rd; that an assistant commissioner would be appointed to scope it as a fact-finding issue, rather than simply confine it to bullying?

A. I don't know, because there was no decision communicated to me about what the role was, so I was back at the default position. No, certainly leaving the meeting, I was of the view that we were heading down the default position.

10:51

29 Q. Yes.

10:52

A. You know, the big concern I had was that I had worked under the policy and there's certain confidentiality, and that is the point I was making there, that I didn't want to expose myself about the confidentiality part.

30 Q. Yes. You go on to say there in that middle paragraph:

10:52

"I don't know what a fact-finding is. It is not provided for in the process. I certainly would not recommend it. Normally a fact-finding is concerned to

1 establish facts in the absence of some facts, for
2 example, discipline, if there is a report, but some
3 information deficit, there is a requirement for a
4 fact-finding to aid the decision-maker to base his/her
5 decision. In discipline there is strict time limits 10:52
6 given as guidelines by the courts, it's 6 to 8 weeks.
7 In this case I have made the decision some months ago."
8

9 So I am not quite clear what decision you are referring
10 to there. 10:52

11 A. The decision was that once Chief Superintendent Scanlan
12 had provided me with both documents, I made the
13 decision that it met the criteria for the default
14 position, which is the bullying policy. The bullying
15 policy requires me to do things, it requires me to seek 10:53
16 to see if I am conflicted and I wrote to the process
17 owner about that.

18 31 Q. Yes.

19 A. And I also suggested that he consider the Byrne/McGinn
20 model because of the scope and width of the 10:53
21 allegations.

22 32 Q. Yes. But am I not right in suggesting to you that if
23 you had made that decision that it met the criteria for
24 default position, that you should have then proceeded
25 to appoint someone or seek a nomination of someone? 10:53

26 A. But that was the purpose of sending in my report, was
27 the next stage in the process. So once I had reached a
28 decision, the next stage in the process was I had to
29 check whether or not I was conflicted. If I was

1 conflicted, then I would have been out. Then my view
2 was that there was wider issues in the bullying and
3 harassment and in line with the precedent, I asked to
4 consider the Byrne/McGinn model. And that's where
5 it's. And then the third thing is, I couldn't appoint 10:53
6 one of peers, now that I knew it was the ranks of the
7 people involved, I couldn't appoint one of my peers.
8 It was for the policy owner to nominate one of them and
9 then I could make the formal appointment.

10 33 Q. You continue on there: 10:54

11
12 "The bullying and harassment sets out the process. A
13 complaint is made and this activates the process or
14 not. In the case at hand, Garda Keogh has his
15 solicitor and has made two statements, so there are 10:54
16 more than enough grounds in my opinion and that is my
17 decision. I just don't want it to get it lost in the
18 process, the seriousness of the allegations. When you
19 consider all the other matters, excluding the protected
20 disclosure and the confidential recipient processes, 10:54
21 there is a lot of serious concern."
22

23 You see, you appear to be saying there, correct me if I
24 am wrong, that the process should have started because
25 there were complaints which had been made. And you 10:54
26 don't appear to be adopting the Byrne/McGinn sort of
27 argument there. Did this represent a change of view on
28 your part?

29 A. I had articulated the Byrne/McGinn argument to be

1 considered from the very start.

2 34 Q. Yes.

3 A. And my position didn't change.

4 35 Q. And you don't see anything in this as a change from
5 that position? 10:55

6 A. No, but I know my position didn't change. It was for
7 the policy maker.

8 36 Q. Right. Okay. You go on to say:

9

10 "There have been a few peculiar matters with this file 10:55
11 to date. The fact-finding, yesterday's meetings and
12 the striking one for me is that when I appointed Chief
13 Superintendent Scanlan to meet Garda Keogh, Garda Keogh
14 told him that he had been told chief superintendent G
15 Roche would be dealing with the matter. This is 10:55
16 peculiar insofar as, as Garda Keogh had not made a
17 complaint, there could have been no appointment.

18

19 It may be prudent to advise Garda Keogh of the meeting
20 so there is a full understanding, lest we be viewed as 10:55
21 taking an alternative position to him as protected
22 discloser."

23

24 what did you mean by that last phrase?

25 A. They were my reflections on the matter. I was aware 10:56
26 that Garda Keogh made a protected disclosure and that I
27 felt he should communicate with so that he wasn't
28 being treated any different.

29 37 Q. In any event, subsequently you got, on the 25th, a

1 reply from Assistant Commissioner Ó Cualáin on the
2 matter, isn't that correct? I think he advised you
3 that because of a perception or a concern about his
4 prior involvement in matters, Mr. Nugent was to be the
5 person whom you should report to or was the appropriate 10:56
6 person to address issues to?

7 A. Yes.

8 38 Q. I think you wrote to Mr. Nugent on the 1st November.
9 If you look at page 6905. I am sorry, that is not a
10 very good copy of that. But in your statement you say 10:57
11 that you outlined your concerns in relation to not
12 having received an acknowledgment of the issue that you
13 raised in relation to Garda Keogh. Presumably they're
14 the issues raised in the e-mail of the 24th that we
15 just looked at? 10:57

16 A. My reflections, yes.

17 39 Q. Yes.

18 A. After the meeting, my reflections.

19 40 Q. Yes. I think the chief administrative officer replied
20 to you on the 2nd. If we look at page 6909, there is a 10:57
21 two-page letter there dated the 2nd November.
22 Mr. Nugent dealt with this in his evidence yesterday.
23 He sets out the course of action there, including
24 referring in the first instance to Assistant
25 Commissioner McPartlin being tasked with a piece of 10:58
26 work. You, I think we will see, reply to him in
27 relation to what that meant, etcetera, isn't that
28 right? At the top of page 6910, he makes it clear he
29 doesn't share your views on the need to inform Garda

1 keogh of the holding of the meeting, particularly legal
2 issues, to include the ongoing litigation on behalf of
3 Garda Keogh were discussed at such meetings would take
4 place in legally privileged context. Now, presumably
5 you never intended to or you never did, in fact, 10:59
6 disclose to Garda Keogh anything in the nature of a
7 legally privileged matter through Inspector McCarthy or
8 otherwise; isn't that right?

9 A. I'm sorry, I don't understand the question.

10 41 Q. He seems to be saying that he doesn't agree with your 10:59
11 views on the need to inform Garda Keogh, by reference
12 to the fact that there are legally privileged matters,
13 but when you tasked Inspector McCarthy either to speak
14 to Garda Keogh or to deliver him anything, you were
15 never going to do that? 10:59

16 A. No, the only tasking of Inspector McCarthy was to
17 deliver the letters, you know, the envelopes after
18 whatever decisions were made right throughout the
19 process, make sure he got a copy of the letter.

20 42 Q. Yes. 10:59

21 A. I never tasked him to talk to him or anything.

22 43 Q. Yes. In any event, you reply to Mr. Nugent on the 6th, 11:00
23 isn't that correct? If we look at an e-mail there,
24 starting at the bottom of 6911. You refer to the code
25 of ethics there and a duty to speak up. And you say in
26 the third line:

27
28 "As the decision-maker, the non-provision of the
29 identity of AC to me so I can progress the complaint

1 under the policy and ultimately to progress the
2 investigation. "

3

4 Is that referring to what Mr. Barrett was meant to have
5 done by that time?

11:00

6 A. Sorry, I am just reading the e-mail.

7 44 Q. Yes.

8 A. So, for to continue with the policy I needed an
9 assistant commissioner nominated for me to appoint to
10 investigate the matters.

11:01

11 45 Q. Yes. On the next page you refer to this mention of
12 Assistant Commissioner McPartlin being tasked with a
13 piece of work and you say there in the middle
14 paragraph, if we go down a bit further, you see that
15 sentence starting, "your minute of the 2nd". You say
16 you're awaiting the identity of the assistant
17 commissioner. So is that the only thing that was --
18 was that the principal thing that was concerning you at
19 that point in time; not having a nomination?

11:01

20 A. Yeah, because I needed to move on with the next stage
21 of the process. In fairness to everybody.

11:01

22 46 Q. Yes. Well, Mr. Nugent reverted to you and he said you:

23

24 "You raise some important issues here."

25

11:02

26 It's in the middle of 6911. Then you reply that you
27 are just anxious to get the next stage of the process
28 up and running, you have obligations under the Policy,
29 isn't that right? I think you then met Mr. Barrett on

1 the 9th November, isn't that correct?

2 A. Yes, things moved on and we had a meeting then very
3 soon afterwards.

4 47 Q. I think at a meeting he nominated Assistant
5 Commissioner Finn, isn't that correct? 11:02

6 A. Yeah, I just don't -- yeah, and that's where he ended
7 up, that Assistant Commissioner Finn was made available
8 to me and then I made an appointment, having followed
9 the process.

10 48 Q. Yes. I think you had obviously identified the members 11:02
11 concerned in the complaint and you had written out to
12 them on the 9th November, isn't that correct?

13 A. That's correct. From the Scanlan reports, that was the
14 information for me to make the decision.

15 49 Q. Yes. 11:03

16 A. And I identified the names out of that.

17 50 Q. Yes. I think in order to facilitate that, you had
18 instructed Inspector McCarthy to hand deliver a letter
19 to Garda Keogh on the 9th as well, isn't that correct?

20 A. The same notice goes out to all the parties. I think 11:03
21 it was five gardaí, subject of the process, and then he
22 was the other party to it, and then the envelope went
23 out to him.

24 51 Q. Yes, and he excluded mediation there and then and
25 confirmed that? 11:03

26 A. Yeah. Well, I sent out the letter, giving him the
27 option, to all the parties, they get the same letter,
28 and the option in it is for any one of those parties
29 to -- for all parties to consider mediation and

1 hopefully resolve the issue, or the other alternative
2 is that if one doesn't accept it then it falls to being
3 a full investigation.

4 52 Q. Yes. So if Garda Keogh, as it were, got it first, I
5 mean was it hand-delivered to the others? 11:03

6 A. E-mailed. By e-mail I'd say. The minute I got the
7 word about the assistant commissioner, like I got the
8 paperwork out, in fairness to the people, I got it by
9 e-mail, probably by hard copy as well I suspect. But I
10 made sure they got it by e-mail. I think Garda Keogh 11:04
11 might have been out sick at the time or something and
12 that was the reason that we were making sure it was
13 hand delivered and then there was no dispute.

14 53 Q. I may have mistaken matters, I think your meeting with
15 Mr. Barrett and his nomination of Assistant 11:04
16 Commissioner Finn was on the 15th?

17 A. Yeah, but it would have postdated that, the event,
18 because had they all agreed to mediation there would
19 have been no need for an appointment.

20 54 Q. Yes. But as I understand what are you telling me, the 11:04
21 fact that one person, whether it be the complainant or
22 the others, once one person rejects the mediation, it
23 just can't go --

24 A. It defaults into --

25 55 Q. -- and has to go to full investigation? 11:04

26 A. Exactly.

27 56 Q. So the moment Garda Keogh got it and if he confirmed in
28 writing immediately to Inspector McCarthy, that was it,
29 it was set for a full investigation, isn't that right?

1 A. Yes.

2 57 Q. I think you appointed Assistant Commissioner Finn, we
3 don't need to look at that letter of appointment. But
4 you subsequently received an e-mail from him on the 7th
5 December, isn't that correct? 11:05

6 A. Can I see it, please?

7 58 Q. Yes. If we look at page 6943?

8 A. Yes.

9 59 Q. There was an attachment to it. I think you wrote back
10 to him, if we look at page 6942. You didn't open the 11:05
11 attachment, isn't that correct? It starts off:
12
13 "Give me a shout.
14
15 I don't want to open the attachment, if there is a 11:05
16 review I'll have to come to it with clean hands."
17
18 You then say:
19
20 "On the earlier mail, I have no role whatsoever in the 11:06
21 grievance procedure. It would be up to Garda Keogh to
22 utilise the policy if he wishes. It's set out in the
23 Code and I am not aware of any procedure to transfer it
24 across from bullying and harassment to a grievance
25 process. 11:06
26
27 I am of the view if there is an issue about the policy
28 then you go back to HRPD as it is HRPD who owns and
29 monitors the policy, etcetera. My role is very narrow

1 in the process.

2

3 My sense is you investigate all the issues Garda Keogh
4 raises. I'm not sure you can arbitrarily determine
5 something is not bullying and then progress to 11:06
6 determine it is a grievance process. Similarly, if
7 there is some similar allegation then it has to be
8 visited.

9

10 My sense is that you investigate on the basis of 11:06
11 contents of Garda Keogh's issues and then decide
12 whether the conduct amounts to bullying and harassment
13 or victimisation, or if it fails to meet the criteria.

14

15 Once you are finished then you send your parties the 11:06
16 output etcetera.

17

18 If any of the parties are dissatisfied, then they can
19 ask me to review the file. It is for that reason I
20 don't have any prior involvement." 11:07

21

22 The reference there to criminal allegation, was it your
23 view that if Garda Keogh's complaints involved a
24 criminal allegation they should be investigated as such
25 under the bullying policy? 11:07

26

A. No, the bullying policy sets out specifically that
27 during the course of investigation, which Assistant
28 Commissioner Finn would be looking at, that should
29 something come to his attention that it may be a

1 criminal matter, then he has to deal with it or cause
2 it to be dealt with. So I have no view about it, it's
3 the Policy that says that.

4 60 Q. CHAIRMAN: Does that mean that it's dealt with
5 separately, assistant commissioner? 11:07

6 A. Yes, the view is that if something was criminal then
7 the policy would stop, you investigate the matter --

8 61 Q. CHAIRMAN: It deals with the criminal thing, that gets
9 priority.

10 A. Yes. 11:07

11 62 Q. CHAIRMAN: Yes or no, whatever, and he comes back to
12 the bullying.

13 A. Yeah.

14 CHAIRMAN: Okay.

15 A. So that it has the effect of suspending the bullying. 11:07

16 63 Q. CHAIRMAN: I understand.

17 A. Before he goes to the DPP, he deals --

18 64 Q. CHAIRMAN: He deals with it as a separate matter?

19 A. Absolutely.

20 65 Q. CHAIRMAN: Or sends it to somebody else to deal with
21 it? 11:07

22 A. Absolutely.

23 CHAIRMAN: Okay, thank you very much.

24 66 Q. MR. McGUINESS: I think you subsequently got a written
25 report from Assistant Commissioner Finn relating to 11:08
26 having met Garda Keogh. If we look at page 6945. He
27 makes it clear that he has to clarify a number of
28 matters with his solicitor, and really makes it clear
29 that he won't be in a position to complete it within

1 the timeframe set out. That probably wasn't a surprise
2 to you?

3 A. No. I got the report.

4 67 Q. Yes. You replied him on the 16th, if we look at page
5 6944. You make it clear in the last substantive 11:08
6 paragraph, in the last two lines, last three lines:
7
8 "I will not be addressing any of the investigative
9 parts as in the event of an application for review I
10 will have come to it as a stranger. I don't have sight 11:09
11 of his letter, but have had the non-investigative
12 issues identified; for example, meetings with CAO and
13 the file being lost, etcetera."
14
15 Your reference to the file being lost there, what was 11:09
16 your view of that assertion? Because it had been made
17 by Garda Keogh in a letter.

18 A. That's correct. I think my recollection is that letter
19 came in but I didn't read it because -- for those
20 reasons, but I asked somebody independent in the office 11:09
21 to look at it and there was some issue about it being
22 lost. I mean, I was satisfied there was nothing lost.

23 68 Q. Yes.

24 A. From my side.

25 69 Q. Yes. 11:09

26 A. I couldn't speak for anybody else.

27 70 Q. Yes.

28 A. I'm not aware anything is lost. Anything I was asked
29 for from Garda Headquarters, I sent up, I made sure

1 that the information was there. Then it was over to
2 Assistant Commissioner Finn to conduct the
3 investigation and I wasn't going to interfere in that
4 investigation, good, bad or indifferent.

5 71 Q. Is it correct then that you had no further 11:10
6 communication with Assistant Commissioner Finn about
7 it?

8 A. Maybe occasional reminders, I would have thought, but
9 I'm not sure.

10 72 Q. Yes. 11:10

11 A. You know, there is a 28-day -- you know, I mean
12 appreciating that there was complexities in it, but I
13 didn't have detail of the complexities and it was in
14 the interests of the five gardaí who were the subject
15 of it and with Garda Keogh that the matter, you know, 11:10
16 be concluded as efficiently as possible.

17 73 Q. Yes.

18 A. That was for Assistant Commissioner Finn.

19 74 Q. In the events that happened, I think the report of the 11:10
20 investigation never came to you and you had no function
21 in reviewing it at all, isn't that right?

22 A. Yes.

23 75 Q. Similarly in relation to Assistant Commissioner 11:10
24 McMahon's investigation and discipline issue, that
25 never came to you?

26 A. I have no knowledge of that.

27 76 Q. No knowledge of that. And insofar as the issue of
28 Superintendent Murray's promotion is concerned, did he
29 ever raise that with you directly?

1 A. No, he never asked me anything.

2 77 Q. The Tribunal has heard a great deal of evidence
3 concerning his position vis-à-vis his promotion
4 application and the twists and turns, as it were, that
5 it took. But were you never consulted by the chief 11:11
6 superintendent about that or by Superintendent Murray
7 himself?

8 A. I had no role in that process whatsoever.

9 78 Q. You had no interactions with any of the other parties
10 who had a role in that, Assistant Commissioner Ó 11:11
11 Cualáin?

12 A. No.

13 79 Q. Or Assistant Commissioner Finn?

14 A. No. Because nobody -- I had no role in the process.

15 80 Q. I think you forwarded a report to the Commissioner on 11:12
16 21st December 2017, a comprehensive sort of overview of
17 your interactions vis-à-vis the bullying and harassment
18 issue, isn't that correct?

19 A. Yes, and all matters.

20 81 Q. All matters. 11:12

21 A. Yes.

22 82 Q. Okay. I think you furnished the Tribunal with a
23 statement in January of this year, commenting on a
24 number of points relating to Superintendent Murray's
25 statement and assertions in his notes about what other 11:12
26 people said, isn't that correct?

27 A. Yes, I made a statement, yes.

28 83 Q. I don't intend to ask you about any of those, but
29 obviously you understand that it would appear that

1 Superintendent Murray and also Superintendent Minnock
2 were simply keeping notes of what other people were
3 telling them about what other people had said, isn't
4 that correct?

5 A. That may be the case. 11:12

6 84 Q. Thank you, assistant commissioner.

7 A. Thank you, Chairman.

8

9 END OF EXAMINATION

10

11:13

11 CHAIRMAN: Now, Mr. Kelly.

12

13 FORMER ASSISTANT COMMISSIONER FINTAN FANNING WAS

14 CROSS-EXAMINED BY MR. KELLY, AS FOLLOWS:

15

11:13

16 85 Q. MR. KELLY: Good morning?

17 A. Good morning.

18 86 Q. My name is Matthias Kelly, I am asking questions on
19 behalf of Garda Keogh. If we can just go back to one
20 document you've looked at just a moment ago, I think it 11:13
21 was is 6944, it's still up on the screen I think, and
22 the reference to the file being lost there. Can you
23 understand how from Nick Keogh's point of view, given
24 when the complaint was made and when the decision was
25 ultimately made to appoint someone to investigate it, 11:13
26 that such a conclusion could be reached on his side, as
27 it were?

28 A. It was a long time.

29 87 Q. Yes.

1 A. But I can't speak about what impact it had on Garda
2 Keogh.

3 88 Q. Of course. But you could see how someone could
4 reasonably say, well, look, I've made this complaint
5 way back in March and here we are at November, it's 11:14
6 been lost in the interim, and now found presumably. I
7 am not asking -- but you can see it objectively, can
8 you?

9 A. Well, it was a long period of time, so...

10 89 Q. Yes. Can you be shown and can we have up on the 11:14
11 screen, page 6884, please? Just have a look at that,
12 please, if you would. You will see it is dated 1st
13 September 2017. Do you recognise that letter?

14 A. Yes.

15 90 Q. Yeah. That's to the executive director. You say in 11:14
16 the penultimate paragraph there:
17
18 "You will recall in my correspondence dated 24th May
19 2017, that I recommended a full investigation into
20 these matters and also that any delay should be kept to 11:15
21 a minimum."
22

23 That's quite right, it was of course your view at that
24 time, isn't it, and was throughout? Sorry, you will
25 have to speak because it doesn't pick up a nod of the 11:15
26 head.

27 A. I'm sorry, can you repeat the question, sorry.

28 91 Q. That was your view way back in May and remained your
29 view throughout, namely delay should be kept to a

1 minimum?

2 A. Yeah, for everybody's sake, yes.

3 92 Q. And what you were concerned about was because of (a)
4 the wider allegations made as you saw it, consideration
5 should be given to the Byrne/McGinn model; is that 11:15
6 right?

7 A. Yes.

8 93 Q. (b) you this being made by someone who had made a
9 protected disclosure, is that right?

10 A. Yes, I'm aware of that, yes. 11:16

11 94 Q. And thirdly, the need to just simply crack on with it
12 and get it done. Is that a fair summary?

13 A. Yes, it's important to get it done in time.

14 95 Q. Yeah. I want you to have a look, if you would please,
15 at a document, it's at 6787, if it could be called up 11:16
16 on the screen. You may recall it, just whilst it's
17 being called up, this is, I think, December 2017. It's
18 a very detailed, I think, 13-page report that you had
19 made, do you remember that?

20 A. Yes. 11:16

21 96 Q. Yeah. I just want to look at a couple of aspects in
22 that, if I may. You say in the second paragraph, you
23 have logically, if I may say so, set out section 1. In
24 second paragraph you say that you have recorded --
25 provided a very brief view of the issues in Athlone as 11:17
26 you had outlined in the meeting organised by Mr. Nugent
27 on 23rd October 2017.

28

29 "You are aware that I was concerned with some issues at

1 that meeting and having advised the CAO. "

2

3 That's Mr. Nugent, isn't it?

4

5 "Who advised me that could not get involved and revert 11:17

6 to the CAO. "

7

8 This is a letter to the Commissioner, isn't that right?

9 A. Yes.

10 97 Q. Yeah, a report to the Commissioner. You then go on to 11:17

11 say:

12

13 "I am not sure that it's in the best response and

14 perhaps you could reconsider asking me to deal with

15 Mr. Nugent. It's open to you to appoint an alternative 11:17

16 who does not have prior involvement. "

17

18 Is that a reference to you or to Mr. Nugent?

19 A. To me. That the Commissioner felt that I was too

20 involved in other things, that I could be -- I had no 11:17

21 objection to somebody else standing in and making

22 decisions. That is what ultimately happened.

23 98 Q. what you then go on to say is:

24

25 "Ultimately we need to do the right thing to ensure 11:18

26 Garda Keogh's issues are fully investigated within

27 process. "

28

29 That, I take it, to be a fair summation of what you

1 were saying throughout this process?

2 A. Yeah, we need to follow the process. Yes.

3 99 Q. There's not much point having a process if you don't
4 follow it, is that right?

5 A. Yes. Unless there's exceptions. 11:18

6 100 Q. And here, you were concerned to fully investigate all
7 of it but to do so as quickly as was reasonable and
8 consistent with a fair investigation, is that right?

9 A. That's correct.

10 101 Q. Yeah. Go over to -- if we could go down to page 6793. 11:18
11 We will just look at that, the date where we are at
12 here in the report. It's 24th October 2017. It's an
13 e-mail addressed to Joe Nugent from you. You then set
14 out your issues there. We've looked at that briefly,
15 the original. You say over the page. Just continue. 11:19
16 If Mr. Kavanagh continues down. Yeah, just there to
17 the top.

18

19 "Reference to fact-finding - it is not provided for in
20 the process and the fact that I would not recommend 11:19
21 it."

22

23 This is a criticism of the minutes, isn't it?

24 A. I think --

25 102 Q. You had raised these concerns? 11:19

26 A. I think it's a statement of fact.

27 103 Q. Yes.

28 A. Is that one, the default position, two, the
29 Byrne/McGinn and this may be a third one. You know, I

1 wouldn't recommend the third one, I'd either go for one
2 of the other two.

3 104 Q. Yes, I see. And you're pointing out there also the
4 bullying and harassment process in relation to that
5 Garda Keogh has made two statements of complaint which 11:20
6 actually activated the process?

7 A. Yes.

8 105 Q. On 24th October 2017, you sent a text to the
9 Commissioner:
10
11 "I am very concerned about a meeting Joe Nugent chaired 11:20
12 yesterday about Nick Keogh and the bullying and
13 harassment that I am dealing with. He said he was
14 chairing, but there was no agenda."
15
16 Is that right? 11:20

17 A. Yeah, I didn't receive an agenda.

18 106 Q. "Bullying and harassment is a confidential process.
19 There are protected disclosure issues. Now the
20 decision to conduct a fact-finding into my work, which 11:20
21 is not provided for in any procedure and undermines the
22 process I am involved in to the detriment of me and the
23 protected discloser. It is hard to know where to go
24 with this."
25
26 You would agree, I take it from that, that this delay 11:20
27 was causing detriment to Nick Keogh?

28 A. Well, I mean, there's a risk it was. And that was the
29 point I was pointing out to the Commissioner. These

1 were my views, these are my reflections.

2 107 Q. Yes, of course.

3 A. And, you know, in line with the Policy there was
4 confidentiality issues guarantees and whatever for the
5 member who activated it, and the members the subject of 11:21
6 it.

7 108 Q. Yeah.

8 A. Just to move it on.

9 109 Q. But certainly throughout this process, am I right in
10 saying, that in the addition to the matters that were 11:21
11 already covered, you were aware that of how it would be
12 seen by Nick Keogh, namely putting the complaint in and
13 nothing is being done, is that right?

14 A. Well, in fairness to everybody, the five people the
15 subject of the complaint and the person who raised the 11:21
16 issues, you know, there was an urgent need to get the
17 matter concluded.

18 110 Q. Yes.

19 A. But it had to be thoroughly investigated.

20 111 Q. Yes. 11:21

21 A. That was --

22 112 Q. But there was that period where you were -- there's no
23 need to call up the correspondence and go through it,
24 you have been through it already, where you were
25 pushing, if I may use that word, to get a resolution to 11:22
26 this, that is get someone appointed, get it
27 investigated and get it dealt with, is that right?

28 A. My aim was always to have the matter dealt with
29 promptly.

1 113 Q. Yeah. And you weren't really getting much in the way
2 of an effective response, were you?

3 A. Well, I got the responses, we got the meetings and I
4 got the appointment made.

5 114 Q. Eventually?

11:22

6 A. Yes.

7 115 Q. Thank you very much, Mr. Fanning.

8 A. Thank you.

9

10 END OF EXAMINATION

11:22

11

—

12 CHAIRMAN: Thank you. Now, Mr. O'Higgins.

13 MR. MÍCHEÁL O' HIGGINS: Thank you, Chairman.

14

15 FORMER ASSISTANT COMMISSIONER FINTAN FANNING WAS

11:22

16 CROSS-EXAMINED BY MR. MÍCHEÁL O' HIGGINS, AS FOLLOWS:

17

18 116 Q. MR. MÍCHEÁL O' HIGGINS: Good morning, Mr. Fanning,
19 Micheál O'Higgins for the Garda Commissioner.

20 A. Morning.

11:23

21 117 Q. You were concerned, I think you have told the Chairman,
22 to ensure that Garda Keogh was kept updated, and we are
23 speaking now of the period, say, May of 2017, around
24 that period, that was a concern of yours, wasn't it?

25 A. Yes, that...

11:23

26 118 Q. I think you organised it that Inspector McCarthy
27 visited Garda Keogh on the 22nd May 2017, is that
28 right?

29 A. He would have visited with the letters, yes. If there

1 is a particular one, could I see the record?

2 119 Q. Certainly, yes. We might open page 10051. This is a
3 letter from yourself, Fintan Fanning, assistant
4 commissioner. If we scroll down for a moment we will
5 see the date of it. It is blank May 2017, but I think 11:24
6 we know from the contents of it that it's the 30th May.
7 It's addressed to Garda Nicholas Keogh. So this you
8 yourself writing to him directly, is that right?

9 A. I am just not sure I signed it, but I accept the letter
10 is from my office. 11:24

11 120 Q. Right. And it says, the second line:
12
13 "As it is now 30th May 2017, I am now updating you on
14 the current position.
15 11:24

16 I have noted that Inspector McCarthy visited you on
17 22nd May 2017, where you raised two further issues. I
18 have included those issues along with your statements
19 and forwarded them to executive director, human
20 recourses and development on the 24th May." 11:24

21
22 Then you say the following:
23
24 "The purpose is that I am of the view that these
25 matters merit consideration outside the bullying and 11:24
26 harassment policy. Before proceeding to next steps, I
27 am awaiting his decision and once I have his decision,
28 I will communicate with you further."
29

1 So, would you agree with me that the letter that you
2 have written here or that your office has written to
3 Garda Keogh essentially makes three points. You
4 offered a view the complaints warranted wider
5 consideration outside the bullying and harassment
6 policy, is that right? 11:25

7 A. Yes.

8 121 Q. Secondly, it would appear you weren't going to proceed
9 to the next steps until the decision was made, is that
10 right? 11:25

11 A. In that decision and other decisions, yes.

12 122 Q. And then if we look at the page behind it, 10052, so if
13 Mr. Kavanagh might scroll down to the next page,
14 please. This is a communication from your inspector,
15 Inspector McCarthy to Mr. Barrett, executive director
16 of HR and it's dated, you see in the top right-hand
17 side, it's a little bit faint, but if Mr. Kavanagh
18 might scroll up a small bit, we will see the date of it
19 there, sent on 5th June '17. And it records the
20 following: 11:26

21
22 "Executive director.

23
24 I am directed by assistant commissioner Eastern Region
25 to refer to previous correspondence from this office
26 dated the 24th May. 11:26

27
28 I also refer to the attached correspondence of the 31st
29 May.

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On 1st June '17 Garda Keogh contacted me by phone to confirm that he had received this correspondence dated the 31st May and that he was satisfied with how this matter was progressing and was thankful for the progress report."

11:26

Do you see that there?

A. Yes.

123 Q. This appears to confirm, would you agree with me, that (a) Garda Keogh got your letter; and secondly, he was satisfied with how the matter was progressing?

11:26

A. It's what Inspector McCarthy reports, yeah.

124 Q. And that he was thankful for the update

A. Yes, well, whatever Inspector McCarthy reports there, yes.

11:26

125 Q. Yes. I think, in fact, that is a feature of matters. It is your evidence, isn't it, that you were conscious and mindful of the need that he be updated throughout the process, hence personal visits to his home by your inspector, direct letters from yourself to Garda Keogh yourself, is that right?

11:27

A. Yes. On many occasions the letters were delivered by hand to Garda Keogh's home.

126 Q. I beg your pardon, sorry?

11:27

A. On many occasions Inspector McCarthy delivered the letters by hand to Garda Keogh's home.

127 Q. Yes. Again to ensure that he was updated and kept --

A. Yes, so that he got the letter, you know, in fairness

1 to the man.

2 128 Q. Now, I think it's the case, just to follow on from
3 that, in March of 2018, when Assistant Commissioner
4 Finn was finishing off his report, he came back to you
5 and referred to an issue, a potential issue of delay 11:27
6 that Garda Keogh had raised, do you recall that?

7 A. No. Maybe if you can show me the record, please?

8 129 Q. Certainly. We might look up 10476, please. It should
9 be 10476. If you go to the bottom. There's two
10 communications on it, if you go to the lower one, so if 11:28
11 Mr. Kavanagh will keep going. Thank you. So the first
12 one is an e-mail from Inspector Finn [sic] that we see
13 on the screen there, to yourself of 30th March 2018.
14 And it says:
15
16 "Fintan, just to assist me finish off the Nick Keogh
17 investigation. He makes reference to the delay in
18 investigating his original complaint made to John
19 Scanlan.
20
21 I took a statement from John Scanlan and he confirmed
22 that he took the statement last March and sent it on to
23 you. Can you give me something in relation to the
24 route that it took from Scanlan until I was appointed
25 last November?" 11:29
26
27 Right? So I think this is Assistant Commissioner Finn
28 looking for your input as to what was the position
29 between March and November of '17, isn't that right?

1 A. That's correct.

2 130 Q. And if Mr. Kavanagh might control up then, we have your
3 response, which is an e-mail from yourself to Assistant
4 Commissioner Finn on the 31st March.

5 11:29

6 "Thanks. I refer to our phone call yesterday. I am
7 glad you report that the investigation is progressing.

8

9 On the specifics, my memory is that Garda Keogh made an
10 original complaint to someone in HRPD. This appears to 11:29
11 have been some months before the file came to me from
12 HRM. There may have been some considerable activity
13 prior to my involvement and I sense it's probably best
14 to approach HRPD regarding that."

15 11:29

16 Then you say:

17

18 "Once the file was received here, I gave the matter
19 very careful consideration. I sought clarification
20 from HRPD as I interpreted that it was neither clear 11:29
21 the nature of the complaint nor the identity of the
22 persons complained of. This was very important as it
23 would determine which policy was to be used."

24

25 Can I ask you, was that your view at the time; from 11:30
26 what you initially received it was neither clear the
27 nature of the complaint nor the identity of those being
28 complained against?

29 A. Yes. When I received correspondence, the initial

1 correspondence, I received it from HRPD, which is the
2 HR section in the Guards. That came down before
3 Christmas I think of '17, and when I read it, I
4 couldn't identify -- it was telling me to appoint
5 somebody, but when I read the Policy and compared the 11:30
6 information I had, there was a deficit in the
7 information I had. Because I didn't know -- I knew who
8 the complainant was but I didn't know who was being
9 complained of, what ranks the people being complained
10 of were and what was the alleged conduct that was being 11:30
11 complained of.

12 131 Q. Yes.

13 A. So I had two gaps. So on the basis of that then I
14 corresponded back.

15 132 Q. Yes. And your e-mail continues: 11:31

16
17 "I outlined an approach which involved Chief
18 Superintendent Scanlan. This was approved. As a
19 result of considering Chief Superintendent Scanlan's
20 two reports, I commenced a process. This process led 11:31
21 to your appointment."

22 A. Yes.

23 133 Q. That's how you filled him in, in summary form?

24 A. Yes.

25 134 Q. Then if we look at the last line of the same e-mail, if 11:31
26 Mr. Kavanagh would just scroll down, you say:

27

28 "You can feel free to contact Inspector McCarthy at my
29 office to clarify any admin issues etcetera. If you do

1 so, can you please advise Garda Keogh. "

2

3

So, just moving the matter on then, I think it's the case that Inspector McCarthy provided subsequently a detailed chronology to Assistant Commissioner Finn and that was presumably done at your request, was it? 11:31

4

5

6

7

A. No. The last sentence reads:

8

9

"If you do so. "

10

11:31

11

That is if he to contact Jimmy McCarthy, Inspector McCarthy.

12

13

14

"If you do so, can you please Garda Keogh that your investigation includes the enquiry at the regional office, but not of me, so there is no potential misunderstandings by him. " 11:32

15

16

17

18

135 Q. My question is, on foot of this process -- just to assist you, if we have document 10478, which is two pages on actually. This is a communication from Inspector McCarthy to Assistant Commissioner Finn of the 3rd April. It outlines in rather exhaustive terms the many steps taken I think on your watch relating to Garda Keogh's bullying and harassment complaint. And it seems to cover the period across from December 2016 right through to November '17; isn't that right? 11:32

19

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27

A. Yes.

28

136 Q. Do you see it there? There is particular emphasis or perhaps outlining of particular steps taken during the

29

1 period March to October of 2017 within this detail and
2 chronology?

3 A. Yes.

4 137 Q. Isn't that right? All right. And again -- well, can I
5 ask you this: were you aware -- have you been keeping 11:33
6 abreast of the transcripts of the Tribunal?

7 A. No.

8 138 Q. You haven't?

9 A. No, no, I haven't. I just came in to give my evidence.

10 139 Q. All right. 11:33

11 A. I read some of the transcripts, sorry, but I haven't
12 been reading them in detail or reading them every day
13 or anything like that, no.

14 140 Q. Yes. Well, are you aware that Garda Keogh accepts when
15 the correspondence I've just opened up, namely what I 11:33
16 term the chronology from Inspector McCarthy, outlining
17 the various steps taken on your watch, he accepts that
18 there was no unjustifiable delay with respect to that
19 period. Are you aware of that?

20 A. Yes. Well, I am now, yes, but I know there was no 11:33
21 delay on my side like.

22 141 Q. He accepted that the chronology prepared by Inspector
23 McCarthy showed that a lot of detailed consideration
24 had taken place of what were complicated matters?

25 A. Yes. 11:34

26 142 Q. He also expressly accepted that insofar as there was
27 any delay over the period, he accepted the reasons for
28 it and he expressly accepted that it did not constitute
29 targeting. Were you aware of that?

1 A. No. But I mean -- no, I wasn't aware about his view of
2 what the targeting was.

3 143 Q. Just for the record, we needn't go to it but just for
4 the Mr. Chairman's point of view, his acceptance of
5 those various matters that I have read out is to be 11:34
6 found on Day 109, page 106 and 107. That's 5th
7 November '19 transcript. Now, can I ask you about a
8 separate matter, Mr. Fanning, and that is going back to
9 the meeting that you had with Mr. Nugent and others in
10 October of 2017. And specifically could I ask you to 11:34
11 look at a document at page 10245. There is an Irish
12 Independent article of 13th September '17, written
13 under the byline of Niall O'Connor. It relates to --it
14 is headed up:
15
16 "Row erupts over whistleblower's bullying claims." 11:35
17
18 Can I ask you, have you seen this document before?

19 A. Yes.

20 144 Q. Or did you read this article? 11:35
21 A. Yes.

22 145 Q. When did you see the article?
23 A. I can't recall. Probably in the newspapers and
24 probably in the documentation from the Tribunal that I
25 received. 11:35

26 146 Q. Well, do you take the Irish Independent?
27 A. Do I? Sorry?

28 147 Q. CHAIRMAN: Do you read the Irish Independent?
29 A. Yes.

1 148 Q. CHAIRMAN: You are being rather formal. Do you take
2 the Times? No, I take the Telegraph. I am sorry,
3 Mr. O'Higgins. He means do you read it?
4 A. Yes, I do read the Irish Independent.

5 149 Q. MR. MÍCHEÁL O' HIGGINS: Did you read this one, this 11:36
6 article?
7 A. Well, I've read it, I'm aware of what's in it, yes.

8 150 Q. At the time, it's dated 13th November 2017, did you
9 read --
10 A. I cannot recall whether I read it that day or not. 11:36

11 151 Q. But around the period, you feel you read it, do you?
12 A. Well, I'm aware of the contents of it now, so I'm not
13 sure whether it was from reading it back then or
14 reading it in the intervening period.

15 152 Q. What I am wondering is, at the time do you recall, I 11:36
16 mean it's reasonably newsworthy, I wouldn't say it is
17 sensationalist but it's newsworthy and it mentions
18 you. So was it drawn to your attention?
19 A. Each morning we get an on-line version of the press
20 clippings, sorry, when I was in the Guards we used to 11:36
21 get it electronically. I may have gone down through it
22 and read it, I may have read it in the paper I bought
23 later on in the day, and I may have read it -- and I've
24 certainly read it since then.

25 153 Q. Yes. But you have no specific memory of reading it at 11:37
26 the time, have you? Did it not cause a bit of interest
27 at the time? Was it not the talk of the station?
28 A. I wouldn't think so. No, is the answer, it was not the
29 talk in the station.

1 154 Q. But it's a document that appears to be disclosing
2 matters that are confidential, confidential to a
3 whistleblower and confidential to Garda management, is
4 it not?

5 A. Well, if the newspapers publish something... 11:37

6 155 Q. My question is, surely this came up in conversation
7 with colleagues, did you see, somebody is after
8 broadcasting details of confidentially meetings?

9 A. No, I have no recollection of any colleagues raising
10 this with me at all. It is what it is. 11:37

11 156 Q. But were you not dismayed, for instance, on Garda
12 Keogh's behalf, that the confidentiality of his process
13 was being blown open?

14 A. I wouldn't say I was dismayed. You know, I mean, it's
15 not pleasant reading, but I mean, that's democracy, 11:38
16 that's what newspapers write.

17 157 Q. And when you did discover it, did you take any steps to
18 ascertain how it was leaked?

19 A. No. I had no complaint about it.

20 158 Q. You had no complaint about? 11:38

21 A. The article.

22 159 Q. You have no complaint about the article?

23 A. No, I had no complaint about the article from anybody,
24 so I wasn't going to initiate an investigation.

25 160 Q. But were you not in your own mind concerned that it 11:38
26 appeared to disclose confidential matters, either from
27 the point of view of the whistleblower or of
28 management?

29 A. I must say, I didn't see there was any crime in it.

1 161 Q. But I thought you had emphasised in your correspondence
2 that from the whistleblower's point of view it was very
3 important to maintain confidentiality of the process?
4 A. In accordance with the bullying policy, confidentiality
5 has to be protected insofar as possible. 11:39
6 162 Q. Yes.
7 A. That's my point.
8 163 Q. This was disclosing details of how Garda management
9 were proposing to deal with a bullying and harassment
10 complaint of an individual whose name is broadcast in 11:39
11 the article. Did that not cause you concern?
12 A. Not particularly, no. No. I didn't put much emphasis
13 on it. Like, as I said to you earlier, I don't even
14 recall reading it on the day.
15 164 Q. But on the day afterwards, was it drawn to your 11:39
16 attention?
17 A. No, not even the day after that I don't recall it.
18 I'm saying it would have come out in the press
19 clippings on the evening or the mornings, it would have
20 been in probably the paper I brought. But did I read 11:39
21 all the papers all day, no. I can't recall that.
22 165 Q. Thank you.
23 A. Thank you.
24
25 END OF EXAMINATION 11:39
26
27 CHAIRMAN: Anything else.
28 MR. MÍCHEÁL O' HIGGINS: That's it, Chairman.
29 CHAIRMAN: Thanks very much. Nobody else?

1 Mr. McGarry, yes, you are for Assistant Commissioner
2 Fanning.

3 MR. MCGARRY: Chairman, just a couple of matters.

4 CHAIRMAN: Yes, certainly.

5

11:40

6 FORMER ASSISTANT COMMISSIONER FINTAN FANNING WAS

7 EXAMINED BY MR. MCGARRY, AS FOLLOWS:

8

9 166 Q. MR. MCGARRY: Mr. O'Higgins mentioned Garda Keogh's
10 acknowledgment, Mr. Fanning, of the fact that he had no 11:40
11 issue with regard to your stewardship of the file or
12 the matters, and he mentioned Day 109, I think. I just
13 want for the record to alert you to the fact that he
14 also accepted at Day 105, at page 64, there he had no
15 difficulty -- there is no need to bring it up on the 11:40
16 screen.

17 CHAIRMAN: Just give me that again.

18 MR. MCGARRY: It's Day 105, page 64, in which he says
19 and accepts that he has no difficulty or issue with
20 regard to any aspect of your stewardship of the file. 11:40

21 CHAIRMAN: Okay. Thank you very much.

22 167 Q. MR. MCGARRY: The second matter is, I don't know if you
23 are aware Mr. Nugent, when he gave evidence, commented
24 on a concern that he had about the manner in which in
25 An Garda Síochána information would appear in the 11:40
26 public domain on a very regular basis and that he was
27 concerned generally about the fact that there appeared
28 to be media reports of meetings, confidentially
29 decisions and so on, on a very regular basis and that

1 that was a source of concern for him. I don't know if
2 you know that he said that in his evidence?

3 A. No, I didn't. But I think I read somewhere else where
4 somebody briefed other members about what happened at
5 that meeting. But I mean, that's the nature of the 11:41
6 business and that's what happens.

7 168 Q. Yes. And I think there were a lot of people at that
8 meeting; isn't that right?

9 A. There was, yeah, you know, it was a good meeting.

10 169 Q. Thank you. 11:41

11 A. Thank you.

12

13 END OF EXAMINATION

14

15 CHAIRMAN: Now, Mr. McGuinness. 11:41

16

17 FORMER ASSISTANT COMMISSIONER FINTAN FANNING WAS
18 RE-EXAMINED BY MR. MCGUINNESS, AS FOLLOWS:

19

20 170 Q. MR. MCGUINNESS: Just one matter. Your attention was 11:41
21 drawn to a portion of your report to the Commissioner
22 of the 21st December, which is a 13-page report. It
23 highlighted in one respect your reference to the fact
24 that there was no agenda for the meeting of the 23rd.
25 But I think you probably got the e-mail from Mr. Nugent 11:41
26 in relation to the meeting in advance of it, at page
27 6898. Perhaps we will just look at that. It's a very
28 short e-mail. It says:

29

1 "You are asked to attend a meeting in the Officers Club
2 Monday 12:15 to prepare a status update in respect of
3 issues associated with the Nicholas Keogh matters. The
4 purpose of the meeting is to confirm the chronology of
5 actions to date in addressing the issues raised and 11:42
6 agree the next steps in addressing issues outstanding.
7 Please confirm whether you believe others should also
8 attend."

9
10 You wouldn't regard that as an agenda in a formal 11:42
11 sense?

12 A. No. I mean, I suppose, what was I to bring to the
13 meeting, as in, you know, what areas were going to be
14 discussed. As I say, the issue I had about it was,
15 about my own behaviours was, that there was a bit about 11:42
16 confidentiality in the bullying policy and I wasn't
17 comfortable sort of stepping outside my own comfort
18 zone in that. So, I suppose, if I had known that the
19 bullying and harassment was coming up, I would have
20 asked for the meeting to be sort of dealt with just 11:42
21 with me and whoever else they wanted to talk about
22 that. A bit like the meeting on the 3rd October.

23 171 Q. Thank you.

24 A. Just to enable me -- the agenda would have enabled me
25 to prepare better, I suppose. 11:43

26 172 Q. Thank you.

27 THE WITNESS: Thank you very much.

28
29 END OF EXAMINATION

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CHAIRMAN: Thank very much, assistant commissioner.
You're free to go now.

THE WITNESS THEN WITHDREW

11:43

MR. MARRINAN: Chairman, the next witness is Former
Acting Commissioner Ó Cualáin.

FORMER ACTING COMMISSIONER DONAL Ó CUALÁIN, HAVING BEEN
PREVIOUSLY SWORN, WAS DIRECTLY-EXAMINED BY MR.
MARRINAN, AS FOLLOWS:

11:43

CHAIRMAN: Thanks very much.

173 Q. MR. MARRINAN: Thank you, Mr. Ó Cualáin. You are being
recalled in relation to issue 20, concerning the
promotion of Superintendent Murray. If we could just
perhaps revisit the times of your appointments as
deputy commissioner in the first instance. I think
that that was in early July of 2015, and you were
appointed deputy commissioner of strategy and change
management, is that right?

11:43

A. No, chair. In July of 2014 I took up an acting role of
deputy to assist then Commissioner Nóirín O'Sullivan.
In October of 2015 I was formally appointed to the
position of deputy commissioner and took up that role.

11:44

174 Q. I think you remained in that role until September 20
'17, you say in your statement. What was the actual
date that you took over your role as acting

1 commissioner?

2 A. I took up my role on the 11th September.

3 175 Q. Yes.

4 A. Commissioner O'Sullivan retired at 12 midnight and I
5 took up immediately. 11:44

6 176 Q. CHAIRMAN: So on the 11th September '17?

7 A. 11th September '17, that's correct, Chairman.

8 177 Q. MR. MARRINAN: I think we had covered this, but I am
9 not sure that we had the precise dates, so these may or
10 may not be important. But I think that you refer in 11:45
11 your statement, this is at page 7309, that you were
12 acting commissioner from mid July until the end of
13 August?

14 A. That's correct, Chairman.

15 178 Q. When Commissioner O'Sullivan was on extended leave, is 11:45
16 that right?

17 A. That's correct, Chairman.

18 179 Q. Do you have the dates in mid July?

19 A. I would say sometime around the 16th or 17th July.
20 Commissioner O'Sullivan returned just at the end of 11:45
21 August and I then took leave, annual leave. I was on
22 leave from I think the 2nd September, which might have
23 been a Monday, or the Tuesday, but around that time.
24 And just a few days later I received a call that I
25 needed to come back to the country, that the 11:45
26 appointment had been made.

27 180 Q. You were interviewed by the Tribunal investigators in
28 relation to, amongst other things, this matter as well.
29 That's at page 7334 of the material, going to 7337 of

1 the material. Before we go into your signing of the
2 forms, the clearance forms in relation to
3 Superintendent Murray, can you say, when you took over
4 the role as acting commissioner in July of 2017, what
5 was your knowledge in relation to the allegations that 11:46
6 were then being made by Garda Keogh and were being
7 mentioned in Dáil Éireann?

8 A. I had no knowledge of the bullying and harassment
9 claim. My first knowledge of that was actually after I
10 was appointed acting commissioner in September. It was 11:47
11 over the public airwaves on the 24th September during a
12 news report. That was my first time hearing about
13 Garda Keogh's bullying and harassment complaint, which
14 had been made, and to give context to it, in relation
15 to it being made earlier that year and that there was 11:47
16 still no appointment.

17 181 Q. I will come to that in a moment. Are you referring to
18 his official complaint through the process in An Garda
19 Síochána or are you referring to it in general terms?

20 A. I am referring to it in the formal sense of it coming 11:47
21 in to the organisation.

22 182 Q. Yes.

23 A. Yes.

24 183 Q. Because we have heard from the last witness, former 11:48
25 Assistant Commissioner Fanning, that I think at senior
26 level in headquarters you'd receive a daily briefing
27 from the garda Press Office; is that right?

28 A. Yes we got press clippings from anything to do or
29 mentioning An Garda Síochána would be circulated to all

1 senior management.

2 184 Q. We know from the materials that was provided to the
3 Tribunal by Superintendent Murray, that certainly in
4 February of 2017 an issue was being raised in Dáil
5 Éireann by Deputy Wallace concerning an allegation of 11:48
6 bullying and harassment by Garda Keogh in relation to a
7 superintendent in Athlone. Do you recall reading about
8 that?

9 A. I may have, but at that time I would have been aware of
10 a previous allegation of bullying and harassment made 11:48
11 by Garda Keogh, which was during my actual
12 investigation when I was on the ground in Athlone, or
13 my team were. So I would have interpreted it as being
14 one and the same bullying and harassment complaint,
15 which at that stage had been, from my recollection, 11:49
16 given to GSOC. That was what happened the initial
17 issues that Garda Keogh had. He was happy to go to
18 GSOC with them and that's what he wanted to do with
19 them. And that happened during my investigation in
20 2014 and '15. 11:49

21 185 Q. If we could just look at some documentation that may or
22 may not be significant. If we can first of all have
23 page 3533 up on the screen. This is a letter to the
24 Garda Commissioner from the head of policing in the
25 Department of Justice, Mr. Power, the policing 11:50
26 division. This would have come in to the
27 Commissioner's office and at that time you were acting
28 commissioner, is that right?

29 A. Yes. I would have -- what that role entailed in an

1 active capacity essentially was to just ensure that
2 critical items of post were being moved, that
3 extensions, applications for certain matters to do with
4 surveillance were being covered. But I also retained
5 responsibility for my own area as well during that 11:50
6 time. So, I would have worked out of my own office and
7 just visited the Commissioner's office maybe in the
8 morning and in the evenings, just to ensure that post
9 was moving etcetera.

10 186 Q. Well, this would appear to be a significant letter 11:50
11 insofar as -- if we just go through it there. If you
12 can just scroll up, Mr. Kavanagh.

13
14 "I am directed by the Minister to seek urgent updates
15 on the cases of Garda Keogh and another whistleblower. 11:51
16 You will recall that the department had requested that
17 it be kept up-to-date with developments in relation to
18 these cases."

19
20 Then it refers to Garda Keogh. 11:51

21
22 "The last update in relation to Garda Keogh's case was
23 in December 2016. At that time it was indicated that
24 Garda Keogh was happy with developments and that he had
25 been put back on the payroll. A chief superintendent 11:51
26 had been appointed to investigate his bullying
27 complaint.

28
29 Garda Keogh's solicitors have recently written to the

1 Minister and the Joint Oireachtas Committee of Justice
2 and Equality in similar terms in relation to his case.
3 They say that Garda Keogh has been absent from work
4 since December 2015 and that his doctors have certified
5 this as work related stress. In their letter they also 11:52
6 say that An Garda Síochána have, however, recorded
7 certain absence as due to flu and others because of
8 mental health. They allege that the work related
9 stress was the result of bullying and
10 harassment/bullying visited on him by the management of 11:52
11 An Garda Síochána and more particularly by
12 Superintendent Pat Murray. They further allege that as
13 a consequence of this failure to accurately record the
14 clinical finding, there has been a consistent failure
15 over more than 18 months to trigger an investigation of 11:52
16 the cause of Garda Keogh's work related stress. This
17 stress, they state, arises from his allegations of
18 bullying and harassment. It has, furthermore, resulted
19 in a failure to pay Garda Keogh at the rate at which
20 members of An Garda Síochána, who are absent due to 11:52
21 work related injury, are paid.

22
23 They allege that Garda Keogh is therefore left
24 suffering ongoing detriment as a consequence of the
25 official misrecording of the true medical reason for 11:53
26 his absence. They have asked the Minister to
27 investigate the failure of An Garda Síochána to carry
28 out any timely investigation into the causation of this
29 work related stress to the prejudice of Garda Keogh and

1 advantage those he has made allegations against. They
2 have sought the restoration of full pay for Garda
3 Keogh.

4
5 Garda Keogh's solicitors have been advised previously 11:53
6 that the Minister has no role in relation to workplace
7 arrangements and that these are a matter for the Garda
8 Commissioner.

9
10 Nevertheless, the Minister has asked that he be 11:53
11 provided with an urgent report on the issues raised."

12
13 Then if we go over to page 3535:

14
15 "You will appreciate that the department is seeking to 11:53
16 brief the new Minister in relation to these sensitive
17 and complex cases and that it is essential that the
18 most up-to-date information is available."

19
20 Do you recall that letter being brought to your 11:54
21 attention?

- 22 A. No, Chairman. In the normal course what would happen
23 with a letter of that nature is that the sections
24 having, I suppose, control of the information that
25 would be required to prepare a response, would be asked 11:54
26 to provide material for reply. A lot of this
27 correspondence coming in, of which there would be I
28 think hundreds per day into the Commissioner's office,
29 would be managed in that way by the staff and would

1 have been channelled to the, I suppose, place where
2 they felt they could get the information they needed to
3 respond.

4 187 Q. Even a letter of this nature coming from Mr. Power?
5 A. Yes. There would be many letters coming from the 11:54
6 department on a daily basis on different issues. You
7 know, issues of this nature, also finance issues,
8 across the board there'd be multiple items of
9 correspondence.

10 188 Q. You will appreciate this is a letter that's coming in 11:55
11 and it is looking for urgent attention, and it also
12 refers to the fact that this is a sensitive and complex
13 case?

14 A. I understand that, Chairman, yes.

15 189 Q. You don't recall seeing this? 11:55
16 A. No. As I say, if I had read that letter, as you've
17 just read it there now, at the time, it may have
18 occurred to me that there was something more recent
19 than what I had in my mind, Garda Keogh's bullying and
20 harassment issues, which were pretty old and dated at 11:55
21 that stage, but this would have brought them into a
22 more recent timeframe.

23 190 Q. Okay. If we just move on then to page 3532 of the
24 material. This is from Mr. O'Reardon, who is an
25 inspector in the Commissioner's office. It's dated 11:56
26 16th August 2017. It is to the deputy commissioner at
27 Policing and Security and Mr. Nugent as chief
28 administrative officer.
29

1 "I am directed by the acting commissioner to forward
2 the attached correspondence for your necessary
3 attention.

4
5 Please provide an update on all matters under your 11:56
6 remit insofar as they relate Garda Keogh to include,
7 but not confined to, Garda Keogh's bullying and
8 harassment allegation, his submission regarding
9 workplace related stress and pay issues.

10
11 Please reply by Monday, 21st August 2017. " 11:56
12

13 was that a letter that you had directed or is it a
14 letter that was sent by Mr. O'Reardon?

15 A. Mr. O'Reardon, yes. This is how correspondence would 11:57
16 be managed in the context. Of course, he couldn't
17 write direct three a deputy commissioner and direct
18 anything himself, he would have to use the office of
19 Commissioner to give authority to the correspondence
20 that he was sending out. But literally dozens of 11:57
21 letters of this nature would leave the Commissioner's
22 office and, indeed, any office on a daily basis, worded
23 it that way, taking the authority of the office holder
24 to look for whatever information was required.

25 191 Q. If we could 3541 up on the screen. This is an e-mail 11:57
26 dated 17th August 2017, which is the following day.
27 It's to Minister Flanagan; to Nóirín O'Sullivan,
28 Commissioner; to Josephine Feehily of the Policing
29 Authority; and also to Mr. Ó Caoláin TD. If we just

1 look at the second paragraph there:

2

3 "We now understand that Garda Keogh's express
4 complaints of harassment, bullying, detrimental
5 treatment and his formal invocation of the Garda 11:58
6 bullying and grievance procedures have been suspended.
7 Garda Keogh has been advised in fact that the
8 whereabouts (in An Garda Síochána) of his formal
9 complaints are unknown. His complaints have been
10 effectively been clandestinely secreted and covered 11:58
11 up. "

12

13 Do you recall that being brought to your attention?

14 A. No. Again, Chairman, that would immediately have rung
15 bells in my mind, the bells that rang very loudly in 11:59
16 September when I heard the press, I suppose, programme
17 in relation to matters regarding Garda Keogh and his
18 bullying and harassment complaints. That would have
19 brought it into then a current issue as distinct from
20 something that my view of Garda Keogh's issues were at 11:59
21 the time when I was hands on in my own investigation in
22 the context of the issues that he had. This brought it
23 into a far more recent timeframe.

24 192 Q. Yes, because it's fairly from the letter. Do you
25 recall seeing this letter? 11:59

26 A. I don't, Chairman, I have to say. That line, if I had
27 seen that, this thing about "clandestinely secreted and
28 covered up" that would definitely have caused me to ask
29 questions as to why this was being alleged.

1 193 Q. If we could have page 3538 up on the screen. This is a
2 letter from Mr. O'Reardon, again dated 18th August
3 2017. He says:

4
5 "I am directed by the acting commissioner to forward 12:00
6 the attached correspondence for your necessary
7 attention."

8
9 It's addressed to Mr. Nugent.

10 12:00
11 "Previous correspondence from this office dated the
12 16th inst. also refers, in which an update in respect
13 of Garda Keogh was requested.

14
15 Please ensure that a suitable response issues to John 12:00
16 Gerard Cullen Solicitors in early course, a copy of
17 which should be forwarded to this office."

18
19 Is there a possibility that the letter from Mr. Cullen
20 again wasn't shown to you in the Commissioner's office? 12:01

21 A. What would happen these matters, is that several
22 members of the staff who had responsibility for
23 different areas would seek to meet me for -- and they
24 have a bundle of files, they would talk through and
25 say, this is what has come through today in relation to 12:01
26 these matters and this is what I propose to do with it.
27 That's how I would have dealt with these matters, where
28 Inspector O'Reardon would have said to me, maybe not on
29 a daily basis, but definitely every second day, I would

1 have dealt with him or with Superintendent Broderick or
2 any other member of staff who had maybe a
3 responsibility for discrete areas of policy and which
4 needed to be actioned in relation to correspondence.

5 194 Q. At 3540 there's an acknowledgment sent by sent by 12:01
6 Mr. O'Reardon to Mr. Cullen. It says:

7
8 "I am directed by the acting commissioner to
9 acknowledge receipt of your e-mail correspondence dated
10 17th inst.. 12:02

11
12 Your correspondence has been forwarded for the
13 attention of the chief administrative officer. You
14 will be communicated with further in course." 12:02

15
16 Now, it appears that no report was received from
17 Mr. Nugent in relation to these matters. Because if we
18 go to page 3545, there's a reminder that is sent on
19 25th September 2017, by Inspector O'Reardon again,
20 where he says: 12:03

21
22 "I am directed by the acting commissioner to refer to
23 the above matter.

24
25 The acting commissioner has sought a report on the 12:03
26 present position on the bullying and harassment
27 complaint of Garda Keogh.

28
29 In addition, a response is outstanding in respect of

1 this office minutes of the 16th August, the 18th August
2 and 8th September 2017.

3
4 Please treat as urgent and reply by return. "

5
6 I mean, one might think looking at these documents
7 coming from the Department of Justice and then the
8 letter from Mr. Cullen not only to the Commissioner but
9 also to the Minister, the TD and the head of the
10 Policing Authority, that one might have thought that
11 you must have been aware of the contents of
12 Mr. Cullen's letter insofar as it related to the
13 bullying and harassment matter and Garda Keogh's
14 assertion that the formal complaint that he had made
15 within An Garda Síochána had in some way been secreted? 12:03

16 A. No, Chair, I wasn't. As I say, for that few weeks in
17 mid 2017 I was in an acting commissioner capacity. I
18 wouldn't have been aware in my own role as deputy
19 commissioner of these matters because they did not come
20 through my office. They would always have gone either 12:04
21 through the -- most have gone to the chief
22 administrative officer, because it was in his area that
23 the HRPD or others who could respond to these matters
24 were. So, I would have taken comfort from the staff in
25 the Commissioner's office who said Mr. Nugent is 12:05
26 dealing with this matter and he has the information, we
27 would go in that direction to get it back. So, if I
28 had been getting that as deputy commissioner as
29 distinct as it coming into me as an acting capacity, I

1 probably would have read it. If it was coming from the
2 Commissioner's office to me to action, I would have
3 read it, yes.

4 195 Q. If we could just 4103 up on the screen, please. This
5 is the next matter that arises, it's a letter from
6 Ms. Healy. This concerns the clearance of candidates
7 for appointment to the rank of superintendent in An
8 Garda Síochána. And then it's addressed to the
9 Commissioner?

12:05

10

12:06

11 "The Policing Authority is in the process of
12 considering the appointments of a number of candidates
13 on the panel for the rank of chief superintendent in An
14 Garda Síochána.

15

12:06

16 In this regard, I would be grateful if you would
17 arrange for the completion of the attached clearance
18 forms in respect of the candidates concerned. A copy
19 of the candidates' consent to the provision of
20 information sought in this regard is also attached for
21 your information.

12:06

22

23 As you will appreciate, this information is of a
24 sensitive and personal nature and I would be grateful
25 if you would treat it as strictly confidential.

12:06

26 Similarly, any information you provide to the Authority
27 will be dealt with sensitively in accordance with our
28 clearance process and data protection law."

29

1 I think that that was originally signed off by
2 Assistant Commissioner Finn; isn't that right?

3 A. That's correct, Chairman.

4 196 Q. If we go to page 4021. In the first instance we see
5 there, the candidate's name is Pat Murray. If we 12:07
6 scroll through the document, 4021, and then 4022, we
7 will see there that it's signed off by Assistant
8 Commissioner Finn, who makes the necessary declaration.
9 I think that may be the 10th September, is that right?
10 No, it may be the 16th September, is that right? 12:07

11 A. It looks like the 16th, Chair, it does.

12 197 Q. Yes. So I think that that didn't satisfy their
13 requirements and then you were requested to sign off on
14 it, is that right?

15 A. No, Chairman. 12:08

16 198 Q. No.

17 A. I became aware that clearances had been sought. In my
18 role as deputy commissioner of Governance and Strategy,
19 I would have been the point of contact from the very
20 early stages of the Policing Authority's taking over 12:08
21 the whole promotion process in early 2017.

22 199 Q. Yes.

23 A. The Commissioner then delegated the function of the
24 clearance process to assistant commissioner of
25 Governance and Accountability. 12:08

26 200 Q. Yes.

27 A. Who was Eugene Corcoran at the time, Commissioner Eugen
28 Corcoran, and he was under my control and my side of
29 the house. So, all clearance requests came in to the

1 Commissioner's office and were sent out through my
2 office for the attention of Assistant Commissioner
3 Corcoran, who could then go to all of the sections and
4 ensure that matters that were required in the clearance
5 forms would be explored and that they would come back 12:09
6 with the response.

7
8 In those early stages, when this policy was still being
9 bedded in by the Policing Authority, there was some
10 questions about the form itself. For example, it was 12:09
11 very clear that they wanted any criminal or discipline
12 issues recorded, but they were silent on bullying and
13 harassment, even though having discussed it with them
14 myself, it was clear to me very early on that bullying
15 and harassment was something they wanted to hear about. 12:09
16 So it was something that need to be in form, if there
17 was anything of that nature.

18 201 Q. Yes.

19 A. After the early stages, where there was an issue with
20 the few clearance forms because of that lack of 12:09
21 clarity, it was decided that either myself or the
22 Commissioner would sign all subsequent clearance forms,
23 that it had to be at my level at a minimum. So there
24 was a higher level view and we could ensure that all
25 necessary sections were contacted in relation to 12:10
26 whatever information might be out there.

27
28 So that's how things developed offer the early part of
29 2017. So then, I took over on the 11th September. I

1 found out shortly after taking over that clearance
2 forms had gone back to the Policing Authority. Now,
3 Assistant Commissioner Finn at that stage was in charge
4 of traffic, policing and policy.

5 202 Q. Yes.

12:10

6 A. And he had a headquarters office. It was very close to
7 the office of Assistant Commissioner Corcoran. We had
8 paring arrangements in place for all or assistant
9 commissioners, whereas two could not be on leave at any
10 given time, there always had to be somebody there to
11 cover the absence of one. This was across the board,
12 across the country. Say, for example, the western
13 Region, which I used to be in, would pair with the
14 Northern Region. Therefore, both I and my colleague in
15 the northern region couldn't be on leave at the same
16 time. If I was on leave he'd cover for me and vice
17 versa.

12:10

12:11

18
19 So this was a paring arrangement. I would say what
20 happened in this regard is, Assistant Commissioner
21 Corcoran wasn't available, they saw it as urgent and
22 they got Assistant Commissioner Finn to sign it in that
23 case.

12:11

24 203 Q. Yes.

25 A. And another error they made was, they sent it back
26 directly to the Policing Authority.

12:11

27 204 Q. Yes.

28 A. And that never had happened. So I said, no, this needs
29 to be signed by a deputy commissioner. So I said -- or

1 the Commissioner. So I want the forms to be resent
2 through the process so that I sign them and that the
3 Authority will be happy at the level that they needed
4 to be signed from there. So that's what happened.

12:11

5
6 So, the week that the request came in I think was the
7 6th September, I was away on leave that week, that's
8 the week when Commissioner O'Sullivan decided to
9 retire. And that all happened in those few days. Then
10 Assistant Commissioner Finn signed these forms. I
11 realised that there was an error in the context that he
12 shouldn't have gone directly back and he shouldn't have
13 been the person signing it, and I remedied that by what
14 I did.

12:12

15 205 Q. That clears up the issue as to why it's signed by
16 Assistant Commissioner Finn and yourself. That's very
17 helpful.

12:12

18 A. Yeah.

19 206 Q. If we have a look at the form and we might go through
20 the one that you signed off on, it's the same as the
21 one that Assistant Commissioner Finn signed off on.
22 It's at 4026. This is purely a clearance form, it's
23 not a reference of any sort; isn't that right?

12:12

24 A. Absolutely not. We're there to support the Policing
25 Authority in their statutory obligation through the
26 promotion process to do a due diligence and a clearance
27 process on all successful candidates at interview.
28 This is the last thing they would do. So this was just
29 giving them the information they requested.

12:12

1 207 Q. So we see there, if we go down:

2

3

"Clearance process required by the Authority."

4

5

We see there:

12:13

6

7

"In order to facilitate the Authority's clearance process, the Garda Commissioner is requested to:

8

9

1. Sign the declaration of suitability at section 1.

10

2. Provide the information sought at section 2-4.

12:13

11

3. Complete the confirmation at section 5 of this form."

12

13

14

Then if we scroll over to page 4027, we see:

15

12:13

16

"Section 1: I declare that there are no grounds known to the Garda Síochána relating to health, character or otherwise, why this candidate is not suitable to be appointed to the position of chief superintendent at

17

18

19

20

this time. I declare that the candidate is suitable to

12:14

21

be appointed to the post of chief superintendent having

22

regard to the candidate's sick leave record and any

23

relevant sick leave regulations and policies."

24

25

And you have signed that. It's dated the 19th

12:14

26

September. Then section 2 deals with previous

27

disciplinary actions.

28

29

"Please provide details below of any disciplinary

1 actions under the Garda Síochána discipline regulations
2 that the candidate was the subject of. This should
3 include, nature of the breach of discipline, nature of
4 the sanction, date of the sanction and any other
5 relevant matters you wish to bring to the Authority's
6 attention. " 12:14

7
8 All those matters relate to disciplinary actions, isn't
9 that right?

10 A. That's correct, Chair. 12:15

11 208 Q. Then it goes on to say:

12
13 "You do not need to include details of the following:
14 Any disciplinary matters dealt with under Regulation
15 10. " 12:15

16
17 We are familiar with that. And then:

18
19 "Any disciplinary matters dealt with under section 90
20 of the Garda Síochána Act 2005. " 12:15

21
22 Then we have here in the box, and this may relate to
23 what you were talking about earlier:

24
25 "In accordance with the provisions of 1.28 of HQ 12:15
26 directive 159/08, the candidate has no previous
27 discipline actions arising from any discipline or
28 complaints/investigations within the last three years. "
29

1 Is that now broader? Is this where there is actually a
2 declaration in relation to bullying and harassment
3 investigations?
4 A. No, I don't know what the new form looks like. It may
5 have been updated since then. 12:15
6 209 Q. Yes.
7 A. But at this point in time, Chairman, I was well
8 aware -- now the three year reference there is
9 something that was agreed with the representative
10 bodies, that in any event, if something is over three 12:16
11 years old it shouldn't appear on the record and the
12 Policing Authority were happy with that. But I was
13 aware when signing these forms that there was a
14 requirement on me, if I knew about it, to report on a
15 bullying and harassment complaint if such was the case. 12:16
16 210 Q. Right.
17 A. And I was well aware when I signed those forms that
18 that was the requirement. And I ensured and asked my
19 office staff as it came back to me, has this gone to
20 Internal Affairs, has this gone to the HR section, has 12:16
21 it gone around the houses in the context of ensuring
22 that we have the most up-to-date position in relation
23 to all of the candidates, not just Superintendent
24 Murray.
25 211 Q. Then if we scroll over to page 4028, you see section 3 12:16
26 there, previous convictions, it doesn't apply?
27 A. Yes.
28 212 Q. Then:
29

1 "Section 4: Outstanding criminal or disciplinary
2 investigations.

3
4 Please provide details below of any ongoing outstanding
5 investigation (criminal or disciplinary) that the 12:17
6 candidate is the subject of.

7
8 This should include the nature of the alleged
9 wrongdoing; nature of the investigation process
10 (criminal or discipline, less serious discipline or 12:17
11 serious discipline process); and details of the stage
12 the investigation/process. "

13

14 Then again in the pox is recorded:

15

16 "Records at this office indicate that there are
17 presently no outstanding discipline or criminal
18 investigations in respect of this candidate. "

19

20 Then if we go over the page, at 4029, section 5 is the 12:17
21 confirmation by you:

22

23 "I confirm that the information provided in sections
24 1-4 is complete and that I will notify the Policing
25 Authority without delay of any change or update of that 12:18
26 information until a the panel of candidates arising
27 from this selection competition expires and if
28 requested. "

29

1 And then it's signed by you on the 19th September. So
2 to be clear about this, had you known of a bullying and
3 harassment allegation, you would have included that on
4 this form?

5 A. Yes. And that is despite the fact that the office 12:18
6 charged with holding the record, as it were, came back
7 and said we have nothing on record. In effect, no
8 appointment had been made to investigate anybody or in
9 this case Pat Murray. But if I had known that there
10 was the possibility of that happening, I would have 12:18
11 referenced it in that report going back. Even though
12 there was no appointment made, it was important that
13 the Authority would be kept fully briefed in relation
14 to any matters, even if there hadn't been appointments
15 made, in my view, and that is what I did immediately 12:19
16 having learned of it on the 24th September. I would
17 have been in contact with the Policing Authority
18 immediately, saying, look it, there are issues around
19 that clearance because there is -- there may be a
20 disciplinary matter or a bullying and harassment matter 12:19
21 that has to be dealt with by Pat Murray.

22 213 Q. But, of course, ultimately it's up to the Policing
23 Authority whether or not they factor that matter into
24 any decision they may or may not make, isn't that
25 right? 12:19

26 A. Absolutely, that's their statutory obligation, yes.

27 214 Q. Now, I think that you referred earlier on and you
28 advised our investigators that the first that you
29 became aware of fact that there was an allegation of

1 bullying and harassment that had been made internally
2 was on the RTÉ News Now programme, isn't that right?

3 A. That's correct, Chairman, on the 24th September, yes.

4 215 Q. And this is the 24th September. If we have page 2648
5 up on the screen. It's headed:

12:20

6
7 "Letter claims Garda whistleblower was kept in dark
8 over allegations probe."

9
10 If we scroll over to the next page. 2649. We see
11 there:

12:20

12
13 "Secondly, in 2015 he complained that a related
14 investigation which examined this alleged criminality
15 was not properly carried out."

12:21

16
17 That is a reference to your investigation.

18
19 "Assistant Commissioner Jack Nolan was appointed to
20 head that inquiry up but since Mr. Nolan retired
21 earlier this year, Garda Keogh now has no idea who is
22 in charge of that procedure."

12:21

23
24 That relates to Assistant Commissioner McMahon.

25
26 "Or if it is even ongoing, he says in his
27 correspondence."

12:21

28
29 Then if we scroll over to page 2650:

1
2
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29

"Garda Keogh outlines in the letter that on the 27th March of this year, he then made a complaint of bullying and harassment in which he says he was singled out and subject to mistreatment after he brought the original complaint to senior management. 12:21

He says that the letter that the bullying complaint relates to in part to his senior officer in the force who has sought promotion, and he has questioned whether the Policing Authority would have been made aware of this complaint. " 12:22

Then the next paragraph:

"On the bullying and harassment complaint, Mr. Cullen said 'Garda Keogh invoked a formal procedure about six months ago and we don't have any idea what has happened since then'. " 12:22

In relation to that, when you read that, what action did you take? 12:22

- A. Well, I can't recall reading that particular article, Chairman, but what I did immediately, having heard the news article on RTÉ, was that I sought an immediate report. I got on to my office staff and said I want a report on this, I want a full chronology of events as to when matters were first brought to our attention. Because I felt here I was in my first two weeks as 12:22

1 acting commissioner and I am hearing about a very
2 serious matter over the airwaves. So, I wasn't very
3 happy with that. I looked for reports. I brought it
4 up at my first executive meeting of that week and would
5 have asked the CAO, Joe Nugent, to ensure that we get a 12:23
6 full update as quickly as possible, because I was aware
7 that the clearance had gone to the Policing Authority
8 and I was anxious to ensure that I was able to give
9 them as clear and as accurate a position as I could,
10 because at that juncture, as we now know, an 12:23
11 appointment still hadn't been made and there was some
12 confusion as to who was actually being complained of
13 over that number of months.

14 216 Q. Three days before that was broadcast, at 3558 of the
15 material, a letter had come in, another letter had come 12:24
16 in from Mr. Mr. Cullen to the Commissioner's office.
17 It's dated 21st September 2017. 3558, please. We will
18 wait for it to come up. 3558, Mr. Kavanagh. This is
19 addressed to Minister Flanagan, to yourself and to
20 Ms. Josephine Feehily of the Policing Authority. And 12:24
21 it says:

22
23 "We now enclose herewith, in manuscript, a letter dated
24 17th September 2017, written by Garda Keogh. This
25 letter directly raises urgent issues in the case and 12:25
26 shows some of the human cost to Garda Keogh."

27
28 It goes on the following page, at 3559:
29

1 "Because of the economy of its style and the historic
2 failure to respond to correspondence, we have decided
3 to send this letter directly to all of you so as to
4 allow Garda Keogh speak directly in his requests for
5 the courtesy of a rational response." 12:25

6
7 It encloses the letter that had been written by Garda
8 Keogh. It's at page 3560. In paragraph 1 he refers to
9 the disciplinary investigation. But then paragraph 2,
10 he says: 12:25

11
12 "On 27th March 2017 I made a formal internal complaint
13 of bullying and harassment in accordance with the Garda
14 Policy document, Working Together to Create a Positive
15 Working Environment. This investigation was 12:26
16 suppressed --"

17 CHAIRMAN: No, supposed.

18 217 Q. MR. MARRINAN: I beg your pardon.

19
20 " -- was supposed to commence within one week of making 12:26
21 the complaint. I want to know who is investigating
22 this and where does it stand."

23
24 Then he links that at paragraph 3 to:

25
26 "... the subject of the bullying and harassment 12:26
27 complaint, a superintendent is currently on the
28 Policing Authority promotion list."
29

1 So those were matters that Garda Keogh had raised in
2 this letter. You're familiar with the letter now?

3 A. I am.

4 218 Q. But do you recall seeing the letter at the time?

5 A. That was dated the 21st September, was it? 12:26

6 219 Q. No, it was dated the 17th September. The letter that
7 came in was dated --

8 A. Oh, the letter, okay. So it would be received by my
9 office possibly on the 22nd September.

10 CHAIRMAN: Yes. 12:27

11 220 Q. MR. MARRINAN: Yes.

12 A. I would have -- again, if I had read that letter on
13 that date, I wouldn't have been surprised by what came
14 out in the news media on Sunday.

15 221 Q. Yes. 12:27

16 A. And therefore, it was the following week and I do
17 recall going through those points in the context of
18 what matters were issues for Garda Keogh at that point
19 in time.

20 222 Q. Was any contact made with the Policing Authority by the 12:27
21 Commissioner's office in relation to the clearance that
22 had been sent at that time?

23 A. Yeah. I was in almost daily contact, I would say, with
24 the Policing Authority, either the CEO, Ms. Helen Hall,
25 or with Aileen Healy, who dealt specifically with areas 12:27
26 around the promotion competition. That was to do or to
27 deal with lots of matters, not just clearance matters.
28 Just to be clear, Chairman, I mean there were other
29 candidates who had clearance issues, Superintendent

1 Murray wasn't the only one. Therefore, there were lots
2 of contacts with my office and with me with regard to
3 clarification of all of these issues. And I know that
4 Helen Hall did write formally to me some time in early
5 October.

12:28

6 223 Q. We will look at that.

7 A. Yes.

8 224 Q. 12471 up on the screen, please. This is a letter from
9 Helen Hall, who was the chief executive officer of the
10 Policing Authority. 12471, Mr. Kavanagh, please. It's
11 dated the 12th October. It relates to the clearance of
12 candidate for appointment to the rank of chief
13 superintendent.

12:28

14

15 "Candidate: Superintendent Patrick Murray.

12:29

16

17 Dear Commissioner, further to the clearance form you
18 completed on the 19th September in respect of the above
19 candidate, I would be grateful if you would clarify a
20 matter arising further to the Authority's clearance
21 process.

12:29

22

23 Further to an alleged matter which is in the public
24 domain, I would be grateful to know if any bullying or
25 harassment complaint has been received or if there is
26 any investigation relating to same in train or being
27 contemplated with regard to this candidate and if so,
28 the stage of those processes.

12:29

29

1 If you need further clarification on this matter,
2 please contact me or my colleague, Ms. Aileen Healy."

3
4 It would appear that the Policing Authority hadn't been
5 alerted between the 22nd September and the 12th October 12:30
6 in relation to the bullying and harassment allegation?

7 A. That's not correct. They weren't alerted in writing,
8 Chairman, but I would have been in contact with the
9 Authority. At that stage all I knew was what in the
10 public domain, some of my staff were putting together 12:30
11 the chronology of events and it was around early
12 October before I started to get a clear picture of what
13 actually was happening with Garda Keogh's bullying and
14 harassment file. At that stage I felt that it would be
15 prudent for me to take a step back in the context of 12:30
16 any future involvement in decision-making around that
17 process. I did alert the CEO, Helen Hall of that, and
18 I sought legal advice internally on that matter.
19 That's the course I took, and I appointed the CAO,
20 Mr. Joe Nugent to deal with all matters pertaining to 12:31
21 both the clearance process in the first instance, but
22 also the bullying and harassment complaint and ensuring
23 that it was moved on as efficiently and as urgently as
24 possible.

25 225 Q. Now, I think that at page 4030, on Tuesday, the 17th 12:31
26 October, you've noted there:

27
28 "9:00pm executive - JT, JN, DM. Nick Keogh file to
29 Mr. Nugent."

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Is that right?

A. That's correct, yes.

226 Q. You made a decision that you weren't going to have any more dealings with the matter, is that right?

12:32

A. Not in the decision-making aspects of it.

227 Q. Yes.

A. No. I was well aware that as head of the organisation I couldn't abdicate completely. This was a very serious issue for the organisation. So I had to remain informed but I didn't think I should be informed on the detail of any appointments or what was being proposed in relation to the actual complaint. And on that basis I asked Mr. Nugent to do that on my behalf.

12:32

228 Q. Mr. Nugent has given evidence that in general terms he kept you updated in relation to the matter?

12:32

A. Absolutely, it is something I would talk to him about every time I met him, as to how they were progressing matters that were at issue.

229 Q. Why did you see a conflict there?

12:32

A. Well, I had already been involved in the investigation of Garda Keogh's original complaint. I knew that he had issues about my investigation and that he may question my judgment in relation to any other matters that fell out of that.

12:33

230 Q. Was, was it then more that there might be a perception of conflict as opposed to an actual conflict that you felt?

A. Absolutely. I felt it was a prudent thing to do, yes.

1 231 Q. Now, you will be familiar with the general allegation
2 that is made by Garda Keogh, that there was a delay
3 first of all in relation to the bullying and harassment
4 investigation. From your knowledge as Commissioner at
5 the time, did you regard it as a delay? 12:33

6 A. Yes. To be honest, Chairman, I felt from the time I
7 became aware of it and sought -- and attached urgency
8 to it, within a matter of weeks we had an appointment
9 of someone to investigate the issues raised by Garda
10 Keogh. I felt that -- well, if we take it from March, 12:34
11 when there was statements available, that it had taken
12 an inordinate amount of time to have the matter
13 progressed.

14 232 Q. What do you say to the fact that your internal
15 processes didn't pick up that there was this bullying 12:34
16 and harassment allegation, when you had requested that
17 all the departments be contacted before you sign the
18 clearance form?

19 A. Yes. There was learning there as well, Chairman.
20 Obviously even before appointments are made, if the 12:34
21 organisation is aware that there is a pending or
22 possible complaint, let it be in discipline, bullying
23 and harassment or criminal, whatever area, it's
24 important that the Commissioner's office is fully aware
25 of all of those things at this juncture, because in 12:35
26 order to ensure that we are fully informing the
27 Policing Authority with regard to the promotion
28 prospects of the candidates. But, more importantly,
29 that, you know, individuals who are coming forward with

1 these complaints, that they're, you know, in this -- at
2 this point we have a confidential reporter, a protected
3 discloser, who had come forward much earlier. He was
4 well known in the organisation in the context that he
5 had made this complaint. So, there should have been, I 12:35
6 think, an elevated sense of urgency about that
7 particular complaint.

8 233 Q. In terms generally in relation to what you now know in
9 relation to how Garda Keogh was treated by the
10 organisation, the various matters that he complains of 12:35
11 in relation to the discipline investigation and how
12 long that took, you have already commented in relation
13 to your own investigation and you have dealt with the
14 issues that arose during the course of that. But he
15 has made a complaint that the discipline investigation 12:36
16 was delayed for a substantial period of time, I think
17 that in total it lasted for the three years and eight
18 months, and then now this bullying and harassment
19 investigation, he complains about delay. He says that
20 he and certainly has a perception in some way that this 12:36
21 was targeting him. What do you say in relation to
22 these allegations that he has made and the response of
23 the organisation?

24 A. Well, if I take -- there are three issues there.

25 234 Q. Yes. 12:36

26 A. My own investigation, I have already spoken at length
27 about that. There was no delay in that. It was given
28 absolute priority. I think once a criminal type
29 investigation is ongoing, there are issues about moving

1 on with a discipline file. That's the reality.
2 However, appointments had been made early on in that
3 matter. It took a while to conclude the discipline,
4 but they had to await the outcome of my investigation
5 before they could -- rather than having go around the 12:37
6 houses again, look for statements that I had taken as
7 part -- or that my investigation team had taken, and we
8 were careful at the outset to ensure that all of those
9 statements were taken for both purposes, so that we
10 would be able to hand them over at a certain time. 12:37
11

12 In regard to the bullying and harassment, this came
13 into the organisation I think in November of 2016, if
14 my memory serves me, according to what I heard here,
15 and an appointment wasn't made for 11 months. There is 12:38
16 an issue there in relation to delay, in my view. It
17 should have happened much quicker.

18 235 Q. Could you answer any questions?

19 A. Thank you.

20 12:38

21 END OF EXAMINATION

22

23 CHAIRMAN: Thank you very much. Now, Mr. Kelly.

24

25 FORMER ACTING COMMISSIONER DONAL Ó CUALÁIN WAS 12:38

26 CROSS-EXAMINED BY MR. KELLY, AS FOLLOWS:

27

28 236 Q. MR. KELLY: Good afternoon. If I have understood you
29 correctly, your understanding of the clearance process

1 with the Policing Authority certainly wasn't ambiguous
2 at all, you understood that firstly criminal
3 convictions clearly have got to be declared?
4 A. Yes.
5 237 Q. Breaches of discipline and so on. But also, 12:39
6 outstanding complaints and investigations had to be
7 declared?
8 A. Yes.
9 238 Q. And that, you were quite specific, included allegations
10 of bullying and harassment? 12:39
11 A. That's correct, Chairman. Now that is something that I
12 learned over time.
13 239 Q. Yes, of course.
14 A. Formally, in the initial stage of clearance, the first
15 few that came in, was very clear in what we had to deal 12:39
16 with in the context of what was said. It was what
17 wasn't said really, maybe just by putting in one line
18 and anything else, the Authority were saying, that's
19 what that means, anything else. I was clear early on
20 in the process that this is what they needed and I 12:39
21 insisted on that happening at every other --
22 240 Q. I'm sure we are at one on this. If you just look at
23 page 4023. I don't know whether this may be the form,
24 I think it's actually the formed by Mr. Finn, but I
25 don't think there is any material difference? 12:40
26 A. It's the same form.
27 241 Q. It's the same form. If we look at section 4 there:
28
29 "Please provide details below of any

1 ongoing/outstanding investigations (criminal or
2 disciplinary) that the candidate is the subject of.

3
4 This should include: The nature of the alleged
5 wrongdoing; the nature of the investigative process 12:40
6 (for example criminal or discipline, less serious
7 discipline or serious discipline process); and details
8 of the stage of the investigation/process."

9
10 That's what we're referring to, isn't it? 12:40

11 A. Yes.

12 242 Q. You are saying that, look, had I have known this, I
13 would have put it in there?

14 A. Maybe not at that box, Chairman, but it would have gone
15 in. I would have made room for it in the context of -- 12:41
16 because subsequent to earlier issues around this
17 matter, we did find space in the form to report on
18 matters such as bullying and harassment.

19 243 Q. Yes.

20 A. What I felt that would be of interest to the Authority 12:41
21 in the context of clearance.

22 244 Q. In fairness to you, when you made the statement to the
23 Tribunal's investigators, you were asked about this and
24 you were very upfront about it, if I may say so. I
25 think it's page 7335. If it's called up, so if you 12:41
26 have just got your own statement in front of you. Do
27 you have it there? If we just start from the top:

28
29 "I was aware that the Policing Authority required all

1 clearance forms to be signed by the Commissioner or
2 deputy commissioner and I signed a batch of clearance
3 forms, including one for Superintendent Murray in
4 September 2017. "

12:41

5
6 Then you are asked about:

7
8 "Whether I was made aware --" it's line 4 and 5 I am
9 reading, I am skipping out a couple of lines there.

10
12:42

11 "Whether I was made aware at the time of any query from
12 the Policing Authority with regard to Superintendent
13 Pat Murray's promotion application. "

14
15 Your reply was:

12:42

16
17 "No.

18 Q. I have been asked if I had been aware of a
19 complaint made against Superintendent Pat Murray under
20 the bullying and harassment policy, Working Together to
21 Create a Positive Working Environment, would this have
22 been noted on the clearance forms returned to the
23 Policing Authority in relation to Superintendent Pat
24 Murray's application for promotion to chief
25 superintendent.

12:42

26 A. I was not aware of a complaint made against
27 Superintendent Pat Murray under the bullying and
28 harassment policy. If known, this would have been
29 noted in the relevant clearance form being returned to

1 the Policing Authority."

2

3 That's always been your position, hasn't it?

4 A. That's correct, Chairman. 12:43

5 245 Q. That's fine. You then go on in that statement to cover
6 stuff we have already been over. You learned from an
7 RTÉ radio one broadcast on 24th September 2017 that
8 that wasn't actually the position in relation to Pat
9 Murray and you took steps to act upon that?

10 A. That's correct, Chairman. 12:43

11 246 Q. Yeah. That's fine. What I want to ask you about this:
12 This is a question of, it came up, I think it was
13 yesterday with Joe Nugent, about what needed to be
14 declared in relation to promotion, whether it was
15 merely just allegations that were proven or at that 12:43
16 stage merely allegations as yet unproven?

17 A. Yes.

18 247 Q. Just so that you get a flavour of it, I had it a moment
19 ago, I think it's -- yeah, it's Day 148 of the
20 transcript. Did you read the transcript of this? 12:44

21 A. I was here for it.

22 248 Q. Oh you were, well then you will know what I am talking
23 about?

24 A. Yes.

25 249 Q. Where Joe Nugent appeared to be saying that it was his 12:44
26 view that it was basically unfair to report on
27 allegations that were at that stage allegations and yet
28 unproven?

29 MR. DIGNAM: Chair, I wonder if I might just intervene.

1 I don't think that was Mr. Nugent's evidence. His
2 evidence was an unproven allegation shouldn't hold up
3 the promotion, not that it shouldn't be declared or
4 reported to the Policing Authority.

5 250 Q. MR. KELLY: Okay, I will go along with that, but it's 12:44
6 all there with the transcript and in due course in
7 submissions I will go through it. I don't want to
8 waste a lot of time on this here today. But is that a
9 view you share?

10 A. As far as I'm concerned, Chairman, when it comes to 12:44
11 clearances, I would be of a view we give the Policing
12 Authority everything we have. Everything. Proven,
13 unproven allegations, whatever they might be, because
14 it is for the Authority to make the decision. We don't
15 have any part in the decision-making process or giving 12:45
16 our views or recommendations. We merely provide
17 information that we have at our disposal, whatever
18 category of information it might be.

19 251 Q. They should be given the full picture, in your view, 12:45
20 for them to make their decision, which is what they are
21 entrusted to do?

22 A. That's correct, and that's what I was doing from the
23 beginning of 2017, and got very clear -- as I went
24 along that route with the Authority, as to exactly what
25 they required. And I had very, very frequent 12:45
26 conversations with both the ladies I have just
27 mentioned in the context of issues around some of those
28 clearances. For example, there was a note about is it
29 serious discipline, is it less serious discipline.

1 This is a very important distinction, because the
2 outcome for the individual if they were found in breach
3 would be far more serious in a serious breach as
4 distinct from a lesser breach. These were the nuances
5 that needed to be discussed and that I was involved in 12:46
6 on a regular basis with the Authority.

7 252 Q. Yes. If we could call up page 16228, it's volume 57 of
8 the volumes of evidence.

9 CHAIRMAN: 16228, Mr. Kelly.

10 MR. KELLY: Yeah, 16228. 12:46

11 CHAIRMAN: Thanks very much.

12 253 Q. MR. KELLY: It's one of Pat Murray's diary entries. It
13 should be 31st October '17. Have you seen this before?

14 A. Yes, Chairman, I have.

15 254 Q. You see it there. He records: 12:46

16

17 "At 17:05 I received a call from [mobile number] which
18 lasted. . . . It was Joe Nugent. He said
19 Commi ssi oner. . . "

20 12:47

21 That's a reference I think to you at the time?

22 A. Yes.

23 255 Q. "Asked him to contact me as he might be compromised.
24 He said that he and the Commi ssi oner were concerned
25 that unsubstantiated allegations could block my 12:47
26 appointment. He said he suspected he would have more
27 information from the Policing Authority ei ther tonight
28 or tomorrow and would have a better sense of
29 understanding of the issue. He said he would get back

1 to me tonight or tomorrow and asked me to ring him at
2 this time Wednesday. "
3
4 was that your view; unsubstantiated allegations?
5 A. No, as I say, this is the 31/10. 12:47
6 256 Q. Yes.
7 A. My reason for passing the thing on, with respect to
8 everyone concerned, and Pat Murray included, I wasn't
9 going to talk to him direct, I gave it to the CAO.
10 257 Q. Yeah. 12:47
11 A. My view was very clear and I just made it.
12 258 Q. Yes.
13 A. Everything of relevance should be made available to the
14 Policing Authority to assist them in getting to their
15 decision. I wasn't going to take any position on that. 12:48
16 259 Q. In fairness to you, what you are saying, if I am
17 understanding you correctly, is, I most certainly never
18 would have used that word unsubstantiated allegations
19 at that stage?
20 CHAIRMAN: Say that again, Mr. Kelly, I didn't hear 12:48
21 you. I didn't hear what you said.
22 260 Q. MR. KELLY: I never would have used that word
23 unsubstantiated at that stage, is that right.
24 A. Well, is he actually saying that I used that word? He
25 said he --that Joe Nugent and I were concerned. 12:48
26 261 Q. Yes.
27 A. So I don't know where the word unsubstantiated. I
28 didn't have that concern.
29 262 Q. Yes.

1 A. Everything is unsubstantiated until it's substantiated.
2 So on that basis --
3 CHAIRMAN: He is expressing a view, as I understand it,
4 Mr. Nugent -- sorry, Superintendent Murray is quoting
5 Mr. Nugent as saying that he, Mr. Nugent, and you, the 12:48
6 Commissioner, were concerned that unsubstantiated
7 allegations might block his promotion. Don't worry
8 about unsubstantiated, unproven, unestablished,
9 whatever it was, that's what he was saying.

10 A. Yeah. 12:49

11 263 Q. CHAIRMAN: what do you say to that, Commissioner?

12 A. I didn't use the word unsubstantiated.

13 264 Q. CHAIRMAN: Okay.

14 A. I made it very clear that I regarded anything, any
15 information in the knowledge of the organisation that 12:49
16 would assist the Policing Authority in their
17 determination, it was fair for us to pass that on.

18 265 Q. MR. KELLY: So in fairness to you, I think what you are
19 saying is, well look, I certainly would never have
20 taken this view, which could have been described as 12:49
21 dismissive of these allegations at that stage?

22 A. No.

23 266 Q. Quite the opposite, you wanted to keep clean hands and
24 an open mind?

25 A. That's correct, Chairman. 12:49

26 267 Q. Mr. Nugent was appointed by you, I understand what you
27 are saying in relation to that, your desire to keep
28 clean hands.

29 A. Yes.

1 268 Q. And to get a distance. But we learned from him
2 yesterday he had never undertaken such a function
3 before and nor since, are you aware of such a position
4 having arisen before?

5 A. This arises every day of the week, Chairman, in the 12:50
6 context of delegated authorities from the Commissioner.
7 There are multiple delegated authorities that go down
8 as far as chief superintendents, in fact, and some as
9 far as superintendents in relation to all of the powers
10 in the initial instance and any statute will be vested 12:50
11 in the Commissioner and then the Commissioner can
12 delegate that. Obviously we're not going to be taking
13 calls 24 hours a day to extend people that are under --
14 are being detained, that kind of thing. So under
15 discipline regulations, under lots of other statutes, 12:50
16 there are lots of things. And the first thing I had to
17 do on taking up office as Commissioner on the 11th
18 September was to sign a whole heap of delegations that
19 went to all of the officers concerned around the
20 country. 12:51

21 269 Q. But I think historically where were you would have been
22 doing that, it would have been to officers or members
23 who had served in, been in An Garda Síochána, whereas
24 on this occasion it was someone coming in from the
25 civil service. Is that fair or have I got it entirely 12:51
26 wrong?

27 A. No, but we have had a CAO since 2005 and that office is
28 hugely important. I suppose it's a tripod to support
29 the Commissioner between the two deputies and the CAO.

1 Of course, the CAO has control over HRPD and other
2 critical aspects that feed into the clearance process.
3 So it was quite appropriate that Mr. Nugent would be
4 doing that. I could have gone and said it to
5 Mr. Twomey, but he was -- I felt this was the most 12:51
6 appropriate person to take it on board.

7 270 Q. Do you still think that?

8 A. I do, yes.

9 271 Q. Right. Okay. Thanks very much.

10 12:52

11 END OF EXAMINATION

12

13 CHAIRMAN: Now. Yes, Mr. Dignam.

14 MR. DIGNAM: Chair, just one or two very brief
15 questions. 12:52

16 CHAIRMAN: It's all right. Take your time.

17

18 FORMER ACTING COMMISSIONER DONAL Ó CUALÁIN WAS
19 EXAMINED BY MR. DIGNAM, AS FOLLOWS:

20 12:52

21 272 Q. MR. DIGNAM: Mr. Ó Cualáin, Mr. Marrinan took you
22 through your role as acting commissioner while
23 Commissioner O'Sullivan was on leave in July or August
24 2017?

25 A. That's correct. 12:52

26 273 Q. I think is it fair to say from your evidence that you
27 were essentially holding the fort for that period while
28 Commissioner O'Sullivan was on leave?

29 A. That's correct, Chair, yes.

1 274 Q. I think she then returned from leave and you went back
2 to your -- sorry, you then went on annual leave pretty
3 much immediately, is that right?
4 A. Yes. She was back on the Sunday and I think I was on
5 leave on Monday. So I didn't actually meet her. There 12:52
6 was no cross over there. The next time I met her
7 actually she was retired.
8 275 Q. Yes. And I think the sequence then that Mr. Marrinan
9 brought you through, was that Commissioner O'Sullivan
10 retired on 10th September 2017? 12:52
11 A. That's correct.
12 276 Q. And you were appointed as acting commissioner on 11th
13 September 2017?
14 A. Yes. There is a distinction between those two acting,
15 you know, I was now charged by Government with all 12:53
16 responsibility.
17 277 Q. CHAIRMAN: I understand.
18 MR. DIGNAM: That is the part I wanted to clarify,
19 Mr. Ó Cualáin. Also, I think on the 13th September you
20 announced that you wouldn't be applying for the role of 12:53
21 Commissioner when that was put out to open competition,
22 is that right?
23 A. That's correct, Chairman. The media seemed to have a
24 huge interest in this at the time. I had decided well
25 before this that I would be retiring in October 2018 in 12:53
26 any event, because I would have to retire on age
27 grounds in January 2019. So I decided I would -- so
28 that was my long-term plan at the time. I made this
29 known to the department on taking on the

1 responsibilities, that I would not be going forward for
2 promotion to be formally ratified as the next
3 Commissioner.

4 278 Q. That became publicly known then around this time?
5 A. I think there was a passing out parade in the Garda 12:54
6 college in my first week, it was a Friday, and there
7 was a large media contingent there who asked that
8 question and I was able to confirm that I wasn't going
9 forward, yes.

10 279 Q. You described that you became aware of the bullying and 12:54
11 harassment claim that had been made by Garda Keogh by
12 way of press reports on the 24th September?
13 A. That's correct, Chairman, yes.

14 280 Q. Could you tell the Chairman what steps you took when
15 that became known to you? 12:54
16 A. Well, I immediately looked -- sought -- contacted my
17 office. I know that there's some references in the
18 notes that I have submitted to making contact with
19 Superintendent Broderick and instructing her that I
20 wanted a full report on the matter. And as early as 12:54
21 the following day, when we arrived in headquarters I
22 would have met with my senior team and expressed my,
23 you know, disquiet at what had come out in public and
24 that I wanted an explanation as quickly as possible and
25 that I wanted the matter resolved as quickly as 12:55
26 possible.

27 281 Q. Just for the purpose of completeness, could I ask you
28 just to be briefly shown the document at page 3545.
29 This is a letter from your office to the chief

1 administrative officer, Mr. Nugent?

2 A. Yes.

3 282 Q. Is that the letter that was sent on foot of your
4 disquiet, having heard the news reports on the 21st
5 September?

12:55

6 A. It is. But it also is a letter, as was previously I
7 think opened, in the context of previous requests from
8 the office. But this was me coming in Monday morning
9 saying, get me some information on this, and that was
10 the outcome of it, yeah.

12:55

11 283 Q. Yes. Now you were asked about the question of the
12 period of time and the delay that it took to action the
13 bullying and harassment complaint that had been made by
14 Garda Keogh.

15 A. Yes.

12:56

16 284 Q. And you have very clearly said that it was too long a
17 period, there was a delay, things should have moved
18 quicker, things should have happened sooner. It's
19 ultimately a matter for the Chair, but have you any
20 evidence or knowledge that the matter was deliberately
21 delayed to facilitator or to ensure the promotion of
22 then Superintendent McBrien?

12:56

23 A. I don't, Chairman, have knowledge of that.

24 285 Q. Thank you.

25

12:56

26 END OF EXAMINATION

27

28 CHAIRMAN: Thanks very much. Anybody else? Yes,
29 Mr. Murrinan.

1 MR. MARRINAN: No further questions.

2 CHAIRMAN: Thank you very much, and I know you have
3 been patient because you have been waiting here for a
4 few days. So thank you very much, commissioner, for
5 coming around to us again and for being patient. 12:56
6 Obviously you are free to go now.

7

8 THE WITNESS THEN WITHDREW

9

10 CHAIRMAN: Now, the situation we have, Mr. McGuinness? 12:56

11 MR. MCGUINNESS: Yes, Chairman, we have at least two
12 further witnesses for the Tribunal to hear.

13 CHAIRMAN: Yes.

14 MR. MCGUINNESS: We will be reviewing other matters in
15 the interim. But the intention is to resume some 12:57
16 hearings in the week after St. Patrick's Day, possibly
17 on the 19th and 20th.

18 CHAIRMAN: Right.

19 MR. MCGUINNESS: But we will be notifying parties in
20 due course in advance. 12:57

21 CHAIRMAN: Very good. Thank you very much. So we are
22 in the home straight. There are two witnesses, as I
23 understand, who for one reason or another, it wasn't
24 possible to take them this week, even if we could have
25 reached them. So that's the situation, as 12:57
26 Mr. McGuinness has explained. Any problems, people can
27 discuss with him. So we anticipate two witnesses.

28

29 Have we circulated information about submissions and

1 that, Ms. McGrath.

2 MS. McGRATH: No.

3 CHAIRMAN: No. Well, we will be obviously seeking and
4 welcoming submissions. I think at the same time as
5 mentioning dates for witnesses, we will deal with -- is 12:58
6 that convenient, Ms. McGrath?

7 MR. McGUI NNESS: Yes, Chairman, we will undertake to
8 contact all parties in relation to that.

9 CHAIRMAN: Very good. Thank you very much. Yes,
10 Mr. Kelly. 12:58

11 MR. KELLY: Yes, certainly from my perspective I have
12 no problem with that. I have spoken already to
13 counsel.

14 CHAIRMAN: And if there are problems, any particular
15 problems, people can talk to counsel. We will 12:58
16 accommodate as far as reasonably possible.

17 MR. KELLY: And I am sure that there will be what I
18 perhaps ineloquently call a mopping up section before
19 then. But certainly I have no problem, Chairman.

20 CHAIRMAN: Very good. Thank you very much, everybody, 12:58
21 and thank you for your cooperation. That's great.
22 Thank you very much.

23

24 THE HEARING THEN ADJOURNED TO A DATE TO BE CONFIRMED

25

26

27

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