

**INDEPENDENT REVIEW OF THE RESPONSE OF THE DEPARTMENT OF
JUSTICE & EQUALITY TO REQUESTS FOR DOCUMENTS FROM THE
TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER THE
PROTECTED DISCLOSURES ACT 2014 AND OTHER MATTERS**

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**INDEPENDENT REVIEW OF THE RESPONSE OF THE DEPARTMENT OF JUSTICE &
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1. INTRODUCTION

- 1.1. On 13 December 2017, the Taoiseach appointed me, Michael M. Collins, Senior Counsel, to conduct an independent review (“**the Review**”) of the practices and procedures employed by the Department of Justice and Equality in response to requests for documents from the Tribunal of Inquiry into Protected Disclosures made under the Protected Disclosures Act 2014 and Other Matters chaired by Supreme Court Judge Mr Justice Peter Charleton (“**the Tribunal**”).

- 1.2. In accordance with the Terms of Reference for the Review, the Department of Justice and Equality (“**the Department**”) furnished on 21 December 2017 a briefing document setting out and explaining the actions taken in response to requests by the Tribunal for documents, together with copies of orders for discovery and disclosure made by the Tribunal and copies of affidavits of discovery sworn on the Department’s behalf. In January 2018 I received certain further documents from the Department from time to time which were primarily updates on the Department’s correspondence with the Tribunal. I was also supplied with a transcript of the evidence given by certain officers of the Department to the Joint Committee on Justice and Equality on 6th December 2017. At my request I was subsequently sent on an ongoing basis transcripts of the evidence given by officers of the Department to the Tribunal. Following the receipt of those documents, I sent the Department a detailed questionnaire on 30th January 2018 and some supplemental questions on 2nd February 2018. I was supplied with a detailed response on 12th February 2018, together with supporting documentation. A number of officers and former officers of the Department gave evidence to the Tribunal between 12th January 2018 and 7th February 2018.

- 1.3. A number of current and former officials at the Department were separately interviewed for the purposes of this Review and afforded an opportunity to provide any information they considered relevant for the purposes of the Review. The current Minister for Justice and his predecessor were also interviewed. A list of the individuals interviewed appears as a schedule to this Report. The Review has also

encompassed a consideration of the evidence provided by Department officials to the Tribunal (both in the form of witness statements and oral evidence).

- 1.4. The Department and its relevant officials (including retired officials) have provided me with all necessary cooperation and assistance for the purposes of the Review, including access to documents, records and other relevant materials and I wish to thank them for this and for their courtesy. I also wish to record my thanks to Mr. William Abrahamson B.L. who has very ably assisted me throughout the review process.

2. TERMS OF REFERENCE

2.1. The Terms of Reference for the Review are as follows:

1. *Michael Collins S.C. is appointed to conduct an independent review and undertake a thorough examination of the practices and procedures employed by the Department of Justice and Equality in regard to its obligations to provide documents to the Disclosures Tribunal.*
2. *The review shall involve consideration of a written document, to be prepared by the Department by 21 December 2017, setting out and explaining the actions taken in response to requests by the Disclosures Tribunal for documents, with particular reference to any orders made or directions issued by the Tribunal requiring the production of documents. The review will also encompass an examination of all relevant documents and records held by the Department together with any additional material obtained from any interviews with Department officials and other relevant persons, as considered appropriate by the Reviewer. Specifically the reviewer will examine why the emails of 15 May 2015, 25 May 2015 and 4 July 2015 were not sent to the Tribunal until November 2017.*
3. *The Reviewer shall be given all necessary cooperation by the Department, including access to documents, records and other relevant materials.*
4. *At the conclusion of the review, the Reviewer shall submit a written report to the Taoiseach which will set out the facts as found, together with such observations or comments as are considered necessary, in relation to the following matters:*
 - (a) *The actions taken by the Department in response to all requests for documents directed to the Department, whether formal or informal;*
 - (b) *the processes and protocols within the department which gave rise to those actions, including processes relating to:*
 - i. *the receipt of requests for documents,*
 - ii. *the assignment and communication of responsibility for responding to such requests,*

- iii. *the supervision and management of those responsible for responding to such requests, including any decisions or discussions taken about the material that was to be sent to the Tribunal,*
- iv. *the search process is used to locate relevant documentation, and*
- v. *the provision of documents to the Tribunal;*

(c) The communication of information to and from senior management and with the Minister at the Department concerning the Department's response to requests for documentation made by the Tribunal including a review of any relevant notes or minutes of any interactions.

5. *In the report the reviewer may identify any concerns arising from the above with regard to:*

(a) practices and procedures operated by the Department in relation to the storage, identification and retrieval of documents,

(b) management and supervision processes relating to interactions, including the sending of documentation, with the Tribunal in the Department,

(c) communication of information within the Department,

(d) communication of information between the Department and the Tribunal,

(e) whether, taking account of the recent additional trawl, insofar as its practical, the department has now carried out an appropriately comprehensive search and retrieval to identify any relevant material for the Tribunal.

The Reviewer may also advise on what further measures, if any, might be taken to address those concerns.

6. *The Reviewer shall use his best endeavours to submit a final report to the Taoiseach on or before 19 January 2018 or at the earliest possible date thereafter.*

3. BACKGROUND TO THE REVIEW

- 3.1. The establishment of the Tribunal followed a number of prior inquiries into matters arising in connection with allegations made by Sergeant Maurice McCabe concerning the operation of the Bailieboro Garda District. The first of those inquiries was a review conducted by Sean Guerin S.C., who presented his report to the Taoiseach in May 2014. In light of Mr Guerin's recommendations, the Government on 3 February 2015 established a Commission of Investigation under Mr Justice Kevin O'Higgins to investigate Sergeant McCabe's allegations ("**the O'Higgins Commission**"). The final report of the O'Higgins Commission was presented to the Minister for Justice and Equality ("**the Minister**") in April 2016. The records of the O'Higgins Commission were also lodged with the Department in accordance with section 43 of the Commissions of Investigation Act 2004.
- 3.2. In October 2016, subsequent to the presentation of the final report of the O'Higgins Commission, the Minister received protected disclosures from two members of An Garda Síochána, Superintendent David Taylor and Sergeant Maurice McCabe, made under the Protected Disclosures Act 2014. These included allegations that senior officers in An Garda Síochána had directed Superintendent Taylor to brief the media negatively against Sergeant McCabe and to say that he was motivated by malice and revenge. The Minister appointed a retired High Court Judge, Mr Justice Iarflaith O'Neill, to review those protected disclosures. Mr Justice O'Neill reported on 7 December 2016, recommending the establishment of a Commission of Investigation. Following all-party discussions in the Oireachtas, the Government decided instead to establish a Tribunal of Inquiry.
- 3.3. The Tribunal was established pursuant to the Tribunals of Inquiry (Evidence) Acts 1921 to 2011. The Instrument appointing Mr Justice Charleton was made by the Minister on 17 February 2017, following resolutions passed by both Houses of the Oireachtas on 16 February 2017.
- 3.4. The Terms of Reference for the Tribunal are as follows:
- (a) *To investigate the allegation made in a Protected Disclosure under the Protected Disclosures Act 2014, on 30 September 2016, by Superintendent David Taylor, wherein he alleges that he was instructed or directed by former Commissioner Martin Callinan and/or Deputy Commissioner Nóirín O'Sullivan, to contact the media to brief them negatively against Sergeant Maurice McCabe and in*

particular to brief the media that Sergeant McCabe was motivated by malice and revenge, that he was to encourage the media to write negatively about Sergeant McCabe, to the effect that his complaints had no substance, that the Gardaí had fully investigated his complaints and found no substance to his allegations and that he was driven by agendas.

- (b) To investigate the allegation of Superintendent Taylor in his Protected Disclosure, that he was directed to draw journalists' attention to the allegation of criminal misconduct made against Sergeant McCabe and that this was the root cause of his agenda, namely revenge against the Gardaí.*
- (c) To investigate what knowledge former Commissioner Callinan and/or Commissioner O'Sullivan and/or other senior members of the Garda Síochána had concerning this allegation of criminal misconduct made against Sergeant McCabe and whether they acted upon same in a manner intended to discredit Sergeant McCabe.*
- (d) To investigate the creation, distribution and use by Tusla of a file containing false allegations of sexual abuse against Sergeant Maurice McCabe that was allegedly sent to Gardaí in 2013, and whether these false allegations and/or the file were knowingly used by senior members of An Garda Síochána to discredit Sergeant McCabe.*
- (e) To investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into certain matters in the Cavan/Monaghan district under the chairmanship of Mr Justice Kevin O'Higgins.*
- (f) To investigate whether senior members of An Garda Síochána attempted to trap or falsely accuse Sergeant McCabe of criminal misconduct.*
- (g) To investigate such knowledge which former Commissioner Cullinan and Commissioner O'Sullivan had concerning the matters set out in (a), (b), (c), (d), (e) and (f) above.*
- (h) To investigate contact between members of An Garda Síochána and:*

- *Media and broadcasting personnel,*
- *members of the government,*
- *Tusla,*
- *Health Service Executive,*
- *any other State entities,*
- *or any relevant person as the Sole Member may deem necessary to carry out his work*

relevant to the matters set out in (a), (b), (c), (d), (e) and (f) above.

- (i) To examine all records relating to the telecommunications interactions used by Superintendent Taylor, former Commissioner Callanan and Commissioner O'Sullivan, in the period from 1 July 2012 to 31 May 2014 to ascertain whether there are any records of text messages or other telecommunication interactions relating to the matters set out at (a), (b), (c), (d), (e) and (f) above and to examine and consider the content of any such text messages or other telecommunication interactions.*
- (j) To examine all electronic and paper files, relating to Sergeant Maurice McCabe held by An Garda Síochána and to consider any material therein relevant to (a), (b), (c), (d), (e) and (f) above.*
- (k) To investigate whether Commissioner O'Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTÉ on 9 May 2016, purporting to be a leaked account of the unpublished O'Higgins Commission Report, in which Sergeant McCabe was branded a liar and irresponsible.*
- (l) To investigate whether a meeting took place between former Commissioner Callinan and Deputy John McGuinness on 24 January 2014 in the car park of Bewleys Hotel, Newlands Cross, Co. Dublin and to examine and consider the circumstances which led to any such meeting, the purpose of such meeting and matters discussed at such meeting.*
- (m) To investigate such knowledge which Commissioner O'Sullivan had of the meeting referred to in (l) above.*

- (n) *To investigate contacts between members of An Garda Síochána and Tusla in relation to Garda Keith Harrison.*
- (o) *To investigate any pattern of the creation, distribution and use by Tusla of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and of the use knowingly by senior members of An Garda Síochána of these files to discredit members who had made such allegations.*
- (p) *To consider any other complaints by a member of An Garda Síochána who has made a Protected Disclosure prior to 16 February 2017 alleging wrongdoing within An Garda Síochána where, following the making of the Protected Disclosure, the Garda making the said Protected Disclosure was targeted or discredited with the knowledge or acquiescence of senior members of An Garda Síochána.*

3.5. The first public sitting of the Tribunal was held on 27 February 2017. The sole member, Mr Justice Charlton, made an opening statement on that date (“**the Tribunal Opening Statement**”) in which he made a general call for assistance. In particular, the Tribunal Opening Statement included the following:

“Are you a witness to this matter? Then, the tribunal needs your help and needs it urgently. Many have already indicated publicly and in various circumstances that they have some knowledge. Now the opportunity has arrived to cooperate in this enquiry. The tribunal wants to know the detail of that; who did what, who said what, when, in what terms, who communicated with whom, by whatever means, and in what terms. What evidence have you of this beyond what you are saying? The details are central. The tribunal needs the detail. Today, the tribunal is calling for all those people with knowledge of the matters in the terms of reference (a) to (o) inclusive to provide a written statement and to forward this to Elizabeth Mullan, solicitor to the Tribunal at Dublin Castle, Dublin D02Y337. The statement should be detailed and should be received by close of business on this day fortnight, 13 March 2017. ...

While the tribunal has made a range of orders preserving or requiring the handing over of documents, if any person has a phone, computer, electronic records or paper records, relevant to the terms of reference, then these should be brought to the tribunal within the same timeframe.”

- 3.6. This report sets out the steps taken by the Department in response to the Tribunal Opening Statement. It also identifies a number of orders for discovery and/or disclosure which the Disclosures Tribunal directed to the Department, and outlines the Department's response to those orders. The Department has supplied a number of tranches of documentation to the Disclosures Tribunal in response to both the Tribunal Opening Statement and orders made by the Disclosures Tribunal.
- 3.7. In November 2017, a controversy arose concerning the extent of the Department's cooperation with the Tribunal. A number of Parliamentary Questions had been tabled in Dáil Éireann concerning communications said to have occurred between the Garda Commissioner and the Department on 15 May 2015. In light of those Parliamentary Questions, on 9 November 2017 an email was identified in the Department dated 15 May 2015 from Michael Flahive (Assistant Secretary, Garda Division, now Policing Division) to the Minister's private secretary, Christopher Quattrociochi, which referred to events at the O'Higgins Commission on that date. The fact that the Department had not provided that email to the Disclosures Tribunal before November 2017 gave rise to a more general concern that the Department might not have met its broader obligations to provide documents to the Tribunal. Further searches for relevant documents in the Department followed, and further documents were furnished to the Tribunal. In light of the controversy created by these events, the Taoiseach directed that this Review be carried out to investigate the matters specified in the Terms of Reference set out above.
- 3.8. It is important to record here that it is no function of this Review to determine the extent to which the Department has or has not complied with orders of the Tribunal. That is a question for the Tribunal itself. Insofar as the Terms of Reference quoted above might allow of any interpretation to the contrary, they have been interpreted for the purposes of this Review in a manner which excludes any trespass into the functions or powers of the Tribunal.

4. THE DEPARTMENT'S RESPONSE TO THE ESTABLISHMENT OF THE TRIBUNAL AND TO THE TRIBUNAL OPENING STATEMENT

- 4.1. On 21 February 2017, very shortly after its establishment, the Tribunal made an order requiring the Minister to provide transcripts and recordings from the O'Higgins Commission. The precise terms of that order were as follows:

"IT IS HEREBY ORDERED THAT the Minister for Justice and Equality preserve and deliver within 4 days from the date hereof in electronic format the following evidence until further order:

All transcripts and audio recordings of the hearings of the O'Higgins Commission."

- 4.2. The Minister holds the records of the O'Higgins Commission in accordance with section 43 of the Commissions of Investigation Act 2004 ("**the 2004 Act**"). Section 11 of the 2004 Act provides that the proceedings of a Commission of Investigation are in general to be held in private and that evidence and documents provided by witnesses to a Commission are not to be disclosed save in certain specified circumstances. Those circumstances include where a Tribunal of Inquiry is established to inquire into any matters forming part of the Commission's terms of reference. Under section 45 of the 2004 Act, the records of the Commission are to be made available to the Tribunal either by the Commission itself, or where it is no longer in existence, by the Minister in whose custody the records are being held.
- 4.3. The Tribunal expressly invoked section 45 of the 2004 Act in making its order of 21 February 2017. The Department took the view that it would not be appropriate for its own staff to review the records of the O'Higgins Commission, because the Department had itself been a party to the Commission's investigations and because it was felt that neither the Minister nor departmental officials should be made privy to the private proceedings at the O'Higgins Commission. Accordingly, the Department engaged counsel to retrieve and schedule the relevant records.
- 4.4. By letter dated 24 February 2017, the Principal Officer in charge of the Governance and Accountability Section in the Policing Division of the Department, Martin Power, wrote to the Tribunal on the Department's behalf enclosing a disc containing searchable PDF versions of the transcripts from the O'Higgins Tribunal. The letter confirmed that there were no audio recordings of the hearings of the O'Higgins

Commission deposited with the Department. A further letter was sent to the Tribunal by Mr Power on 2 March 2017 enclosing a further transcript from the O'Higgins Commission which was not among the records deposited with the Department and which the Department obtained directly from the stenographer for the purpose of making it available to the Tribunal.

- 4.5. On the same date, namely 2 March 2017, Mr Power wrote separately to the Tribunal enclosing copies of a report to the Minister under section 41 of the Garda Síochána Act 2005 dated 8 February 2017 and a protected disclosure received by the Minister on 20 February 2017, both of which concerned Sergeant McCabe.
- 4.6. Mr Justice Charleton made the Tribunal Opening Statement on 27 February 2017. He called for "*people with knowledge of the matters in the terms of reference (a) to (o)*" to provide a written statement to the Disclosures Tribunal by 13 March 2017. He also said that persons with relevant electronic or paper records should make them available to the Tribunal by the same date.
- 4.7. The Department's response to the Tribunal Opening Statement is described as follows in the briefing document prepared for the purpose of this Review:

"While it is for the Tribunal to determine the quality of the Department's compliance with its orders, including any implied obligation arising from the opening statement, it was the Department's view that it was primarily directed at those who had made allegations or were witnesses, with evidence relevant to the terms of reference of the Tribunal.

Having said that, in response to the opening statement, the Department caused a search to be undertaken to ascertain whether it had any further material relevant to the Tribunal's terms of reference. This search was a targeted search, based on the knowledge that the Tribunal would be examining matters that had been raised in the O'Higgins Commission of Investigation."

- 4.8. It has become apparent during the course of this Review that senior officials within the Department considered that the Department was of peripheral relevance to the Tribunal's terms of reference. It is true that the Department is not the focus of the Tribunal's inquiries, but it nonetheless established the Tribunal and is the arm of government with responsibility for An Garda Síochána, which is the focus of the investigation. It also appears that there may have been an undue emphasis at a

senior level within the Department on clause (h) of the Tribunal's terms of reference, which covers communications between the Gardaí and government ministers. Although the Department has indicated to me that it does not share that view as to the emphasis on clause (h), that was the impression I formed on the basis of the interviews I conducted. There may not have been a sufficient recognition within the Department that the Department might hold documents of potential relevance to other elements of the Tribunal's terms of reference. This view of the terms of reference may, to some extent, have informed the fact that there was relatively little involvement at a senior level in the Department's interactions with the Tribunal.

4.9. The search for records conducted within the Department at the outset in response to the Tribunal Opening Statement was coordinated by Martin Power who was nominated as the liaison point with the Tribunal. This was because it was considered that the Policing Division was by nature of its remit the Division most naturally involved in matters to do with the Gardaí and accordingly was considered the area within the Department most likely to hold relevant documents. Mr Power also contacted the Crime Division of the Department, which responded to indicate that it held no relevant documents falling within the Tribunal's terms of reference. There appears to have been no formal decision to allocate the tasks of dealing with the Tribunal or responding to its requests or orders to the Policing Division. Rather, it appears to have been simply assumed that it was the most obvious place for this work to take place, which was a reasonable assumption. There was also little oversight or periodic review of the work undertaken in connection with the Tribunal's requests for documents and the Policing Division was trusted to do whatever was required.

4.10. The search was confined to three specific sources within the Policing Division. These were as follows:

4.10.1. Records relating to the Independent Review Mechanism ("the IRM"). The IRM was a process established in the Department in 2014 under which external counsel were engaged to consider allegations of Garda misconduct or inadequacies in the investigation of such allegations. The IRM did not involve a re-investigation of the alleged crimes, but rather an analysis of the process followed by An Garda Síochána in its investigation. The "*Miss D case*", which has been the subject of evidence at the Tribunal, was the subject of an examination by the IRM. The IRM had its own electronic database in the Policing Division.

- 4.10.2. The electronic document library for the Policing Division. The electronic document library is where any electronic documents generated in the Department (such as letters and submissions) and external communications are stored. It does not include internal emails.
- 4.10.3. Records relating to legal actions. These are largely held in hard copy in the Policing Division.
- 4.11. According to information supplied by the Department for the purpose of this Review, the electronic search conducted at this time (mainly in the first two of these sources) was by key-words taken from the Tribunal's terms of reference. These included the terms "*McCabe*", "*Bailieboro*", "*Tusla*" and "*HSE*".
- 4.12. One potential source of relevant material which was not included in the search carried out at this time was the email accounts of individual Department officials. Emails received by the Department are generally forwarded to the relevant division (e.g. the Policing Division) where they can be stored in one (or both) of two ways: they may be printed and placed on a hard-copy file; or added to the relevant electronic file. This does not apply to every email, but only to emails which are considered by the recipients of the emails to warrant being filed in this way, owing to their significance or relevance. However all emails received by the Department remain stored in the email in-boxes of the individuals by whom they have been received. Thus, a search of email in-boxes within the Policing Division (or the Department as a whole) would have captured any emails relevant to the Tribunal's terms of reference which, for whatever reason, had not been filed elsewhere.
- 4.13. Apart from the email accounts of individuals in the Department, there is also a group email known as "SecGenOffice" which is discussed further in section 6 below. Emails intended for the Secretary General's office are sent to "SecGenOffice" and are thereby sent to the email accounts of four persons in the Secretary General's office (which group includes the Secretary General's private secretary although not the Secretary General himself or herself). The purpose of this arrangement is that even if the Secretary General's private secretary is absent or otherwise engaged, the incoming email will come to the attention of at least one or more persons in the Secretary General's office and so will be drawn to the attention of the Secretary General if of sufficient importance or will be otherwise dealt with and sent to the appropriate division within the Department. Although the SecGenOffice group email

may thus be considered as a likely repository of relatively important emails, the search conducted in response to the Tribunal's Opening Statement did not extend to the SecGenOffice group email or to the Secretary General's own email account.

4.14. The reason why email in-boxes were not included as a potential source of relevant material at this time is unclear. It is important, however, to record that this Review has identified no evidence that the Department, or individuals within the Department, deliberately excluded or sought to exclude potentially relevant sources of information for the purpose of omitting or concealing relevant documents. Rather, it appears that the possibility of searching email in-boxes at this time simply did not occur to the relevant personnel, because it was assumed that any relevant material would be located within one of the sources identified above. This view of the potentially relevant sources of documents may to some extent have been influenced by the Department's view that it itself was not the subject of the Tribunal's investigation and therefore internal emails of Department personnel were not thought to be of relevance. I am satisfied that the search undertaken in response to the Tribunal Opening Statement was conducted in good faith and that the personnel involved considered that it was reasonable and appropriate to confine their search to those sources. However, it should also be pointed out that, with the benefit of hindsight, there is now a general acceptance among most officials interviewed in connection with this Review, and by both the current and former Ministers, that the email in-boxes ought to have been searched from the outset. Had that been done some of the obvious search terms (e.g, "McCabe") would have identified the May 2015 and July 2015 emails which subsequently became the subject of controversy and which are discussed further in sections 6 and 7 below.

4.15. Following this initial search, the Governance and Accountability Section within the Policing Division sent a submission to the Minister on 13 March 2017. The submission listed potentially relevant material identified in the search and sought the Minister's approval for a letter to the Tribunal informing the Tribunal that relevant material had been identified and would be made available to the Tribunal at the earliest possible date. However the submission did not identify for the Minister the sources from which the material derived, so the Minister had no knowledge that email accounts had not been searched for relevant material. The Minister approved the proposal. Her then private secretary, Niall Colgan, wrote to the Tribunal by letter dated 13 March 2017 (but sent, it appears, on 14 March 2017) indicating that, while potentially relevant files had been identified, examination of those files was ongoing and relevant material would be supplied to the Tribunal at the earliest possible date.

- 4.16. The Department sought the advice of the Attorney General concerning these records and was advised that the Tribunal should be invited to make an order for disclosure of certain records, while others attracted legal professional privilege.
- 4.17. On 14 April 2017, Mr Colgan again wrote to the Tribunal. He indicated that the Department had identified three categories of records which might be relevant to the Tribunal's terms of reference, namely: records relating to complaints against a member of An Garda Síochána named in the terms of reference; records from the O'Higgins Commission which were not covered by the Tribunal's order of 21 February 2017; and files relating to ongoing litigation initiated by Sergeant McCabe, Superintendent Taylor and Garda Keith Harrison. The Tribunal was invited to make an order for the disclosure of the first two of these categories of records, while the letter indicated that the records falling within the third category were covered by legal professional privilege.
- 4.18. In response to Mr Colgan's letter of 14 April 2017, the Tribunal issued an order on 28 April 2017 requiring the Department to make discovery on oath of the following items:
- (1) The four files referred to at the paragraph numbered 1 in the letter dated 14th April 2017 from Niall Colgan private secretary to the Tánaiste and Minister for Justice and Equality to the Solicitor for the Tribunal two of which said files were referred to the Independent Review Mechanism the third file being a representation to the said Minister from a local councillor and the fourth file being a report of an investigation by the Garda Síochána Ombudsman Commission of an allegation that a sexual assault by a member of an Garda Síochána was not properly investigated;*
 - (2) Audio recordings referred to at the paragraph numbered 2 and at the first bullet point thereat in the said letter (and transcript created from these recordings) of a meeting between Sergeant Maurice McCabe and other Gardaí at Mullingar on the 23rd August 2008;*
 - (3) A report referred to at the said paragraph numbered 2 and at the second bullet thereat furnished to Superintendent Michael Clancy by Sergeant Maurice McCabe dated the 25th February 2008 and related documents.*
- 4.19. Mr Power swore an affidavit of discovery on 19 May 2017 for the purpose of complying with the Tribunal's order of 28 April 2017. The documents discovered by

Mr Power on the Department's behalf included records from the O'Higgins Commission which were retrieved by external counsel, as in the case of the transcripts previously supplied to the Tribunal.

- 4.20. While the Department took the foregoing steps to identify relevant documentation in response to the Tribunal Opening Statement, it is noteworthy that no Department official supplied a written statement to the Tribunal at that time. Department Officials were later asked by the Tribunal in November 2017 to furnish (and did furnish) witness statements addressing the discovery at that time of a series of emails from May and June 2015 concerning events at the O'Higgins Commission, but no witness statements were volunteered before that time. The Tribunal raised with at least one Department Official during the course of evidence in its public hearings why a statement had not been provided earlier. The response was that the individual in question did not consider that the call in the Tribunal Opening Statement applied to everyone, and that he assumed that the Department would have a central process in place for the discovery of documents and the provision of statements to the Tribunal. Clearly there was in fact no arrangement in place within the Department for the delivery of witness statements, until these were expressly requested by the Tribunal.

5. SUBSEQUENT ORDERS MADE BY THE TRIBUNAL

- 5.1. The Tribunal made four further orders requiring discovery / disclosure from the Department.
- 5.2. The first of those orders was dated 11 September 2017 and required the Department to make discovery of the following category of documents:

“All communications and materials received, documents generated and responses thereto by the Department of Justice and Equality whether electronic or otherwise concerning Garda Keith Harrison and HSE/TUSLA as referred to in term of reference (n) of the Tribunal’s terms of reference, namely: ‘To investigate contacts between members of an Garda Síochána and TUSLA in relation to Garda Keith Harrison’.”

- 5.3. In response to this order, a search was conducted in the Policing Division of the Department. That search encompassed hard-copy files, the document library for the Policing Division and emails. Resulting from that search, Mr Power swore an affidavit of discovery on 18 September 2017. The records discovered by Mr Power in that affidavit comprised records received from Garda Harrison, his partner and his lawyers, together with some correspondence between the Department and the Department of Children and Youth Affairs.
- 5.4. Separately, the Office of the Secretary General was asked to search for relevant records falling within the terms of the order of 11 September 2017. It has been explained for the purpose of this Review that the Policing Division asked the Office of the Secretary General to search for files responsive to the order of 11 September 2017 because there had been communication by Garda Harrison’s solicitors to the Secretary General. The request was communicated by the Assistant Secretary General in the Policing Division, John O’Callaghan, by email dated 18 September 2017 to the private secretary to the Secretary General, Denis Griffin. Arising from this request, Mr Power swore a supplemental affidavit of discovery on 28 September 2017 listing documents identified in the Office of the Secretary General.
- 5.5. The Tribunal made a further order on 30 November 2017 requiring the Department to produce the following documents:

“All written submissions submitted by parties represented before the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr Justice O’Higgins in writing or electronically at the conclusion of each module and relating to the matters under investigation in each module and all booklets of core documents together with any additions thereto which were prepared by the said Commission of Investigation for the purpose of the workings of the said Commission of Investigation.”

- 5.6. Consistent with its prior approach to records of the O’Higgins Commission, the Department engaged external counsel to look for documents responsive to that order. Three batches of documents were supplied to the Tribunal. By letter dated 6 December 2017, Mr Power sent, in electronic format, some of the parties’ written submissions and a number of the core booklets from the O’Higgins Commission. A further core booklet from one of the modules at the O’Higgins Commission was sent to the Tribunal under cover of a letter from Mr Power dated 8 December 2017. Finally, by letter dated 12 December 2017, Mr Power sent some remaining portions of a core booklet from the O’Higgins Commission from which privileged notes made by the O’Higgins Commission and its legal team had been removed.
- 5.7. Also on 12 December 2017, Mr Power wrote to the Tribunal to inform it that, in the course of retrieving documents falling within the terms of the order of 30 November 2017, certain other records from the O’Higgins Commission which might be of interest to the Tribunal had been identified by counsel. Mr Power stated that he was bringing this to the Tribunal’s attention, *“[i]n line with the Minister’s and the Department’s consistent reassurance to the Tribunal of its full support and cooperation ...”*. Mr Power invited the Tribunal to make a further order for the production of those documents.
- 5.8. In light of Mr Power’s letter of 12 December 2017, the Tribunal issued an order dated 15 December 2017 seeking the production of the following:

“The final agreed statement of facts issued by the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr Justice O’Higgins to the parties appearing before it in writing or electronically prior to the commencement of each module and relating to the matters under investigation in each module for the purpose of the workings of the said Commission of Investigation.”

- 5.9. Mr Power responded by letter dated 19 December 2017 listing the documents to be supplied and indicating that they would be furnished by file transfer.
- 5.10. The Tribunal made a further order for production on 4 January 2018. This arose from a letter to the Tribunal prepared by the Policing Division and signed by the Minister's private secretary dated 22 December 2017, identifying certain additional files relating to the IRM. The files sought by the Tribunal in that order were supplied under cover of a letter from Martin Power dated 15 January 2018.

6. THE MAY 2015 EMAILS

- 6.1. The terms of reference for this Review raise a specific question about why emails dated 15 May 2015 and 25 May 2015 (“**the May 2015 Emails**”) were not sent to the Tribunal by the Department until November 2017. In considering this issue, it is first necessary to address the nature of the emails themselves and their treatment in the Department at the time they were sent and received.
- 6.2. The email of 15 May 2015 was sent by Michael Flahive to Christopher Quattrociochi at 16.57 on that date. Mr Flahive was at that time the Assistant Secretary in charge of the Policing Division (which was then called the Garda Division). Mr Quattrociochi was the private secretary to the Minister. The email was copied to Ken O’Leary, who was the Deputy Secretary General and Mr Flahive’s line manager at that time, and to Mr Power (Principal Officer in the Policing Division) who reported to Mr Flahive. It was also copied to an email group called “*SecGenOffice*” referred to at paragraph 4.13 above. That group comprised Dale Sutherland (principal officer in the Corporate Secretariat), Bernadette Phelan (assistant principal in the Corporate Secretariat), Denis Griffin (private secretary to the Secretary General), and Paula Monks (a clerical officer in the Office of the Secretary General).
- 6.3. The function of the Corporate Secretariat is to support the Offices of the Secretary General and the Minister, including management of diaries, dealing with parliamentary questions and preparing papers for meetings of the Management Board. The purpose of the *SecGenOffice* email group is to ensure that emails which need to be brought to the attention of the Secretary General are brought to his or her attention. That is primarily the responsibility of the private secretary to the Secretary General, but if he or she is unavailable then another member of the *SecGenOffice* group can ensure that the relevant communication is placed before the Secretary General. Emails sent to the *SecGenOffice* group arrive in the individual email inboxes of each member of that group.
- 6.4. In addition to the foregoing recipients, Mr Quattrociochi also separately forwarded the email of 15 May 2015 to William Lavelle and Marion Mannion (each of whom was a special adviser to the Minister) and to the Minister herself at 17.04 on the same date. Mr Griffin forwarded the email to the then Acting Secretary General, Noel Waters, at 17.16.

- 6.5. Mr Quattrociocchi replied to Mr Flahive at 17.05 on 15 May 2015 to confirm that he would “*flag this to the Minister*”. Mr O’Leary also replied to Mr Flahive at 17.00 on 15 May 2015 saying, “*That’s grand, Michael, thanks.*” Mr Griffin subsequently sent an email to Mr Flahive on 18 May 2015 indicating that the original email had been “*Noted by Acting SG*”.
- 6.6. On 25 May 2015, Mr Quattrociocchi informed Mr Flahive by email that the Minister had “*noted*” the email of 15 May 2015. That email of 25 May 2015 was also copied by Mr Quattrociocchi to Mr O’Leary, to Mr Power and to the SecGenOffice group.
- 6.7. The original email of 15 May 2015 had asked Mr Quattrociocchi to pass it on to the Minister “*for information*”. It referred to a call received by Mr Flahive from Richard Barrett of the Attorney General’s Office concerning events at a hearing of the O’Higgins Commission earlier that same day. Having described the events in question, the email concluded with the following comment from Mr Flahive:
- “Richard [Barrett] and I agreed that this is a matter for the Garda Commissioner, who is being legally advised, and that neither the Attorney [General] nor the Minister has a function relating to the evidence a party to a Commission of Investigation may adduce.”*
- 6.8. As explained above, emails in the Department are stored in the in-boxes of their recipients, but may also be filed electronically and/or in a hard copy file. The Department officials who provided information for the purposes of this Review have explained that files are rarely held in the Office of the Minister or the Office of the Secretary General. Where a document is filed, that usually occurs in the relevant division. In this case, it appears that the division to which the email of 15 May 2015 related was the Policing Division.
- 6.9. For reasons which are unclear, this particular email did not find its way onto a hard-copy file or an electronic file in the Policing Division. (It was copied to the Principal Officer’s own email account but not otherwise filed). In the course of interviews with Department officials for the purpose of this Review, it was acknowledged that an email of this nature would ordinarily be filed in the Policing Division (either in hard copy or perhaps electronically in the documents library). However the sheer volume of emails received in the Department was emphasised, and it was also suggested that the email might not have been filed owing to the sensitivity of the reference to “*a serious criminal complaint against Sergeant McCabe (which has always been*

denied)” where the complaint was one of sexual abuse and a desire to limit its circulation to the persons to whom it was copied for that reason. The point was also made by a number of Department officials that the email was expressly sent “*for information only*” and that both Mr. Barrett (of the Attorney General’s office) and Mr. Flahive (of the Department) are recorded as agreeing that the dispute which arose in the O’Higgins Commission hearings as to the issue raised by counsel for the Garda Siochana was not a matter for the Attorney General or the Minister. Department officials do not appear to have any meaningful recollection about the receipt of this email, so it is clear that the information they have provided for this Review concerning its treatment in May 2015 is speculative. However, it is important to note that this Review has found no evidence to suggest that there is anything suspicious about the failure to file the email. The failure to file an email which, although of a sensitive nature, did not call for any action does not appear to have been anything other than inadvertence.

- 6.10. Nonetheless, it must be observed that there appears to be no particular system in place in the Department to ensure that emails are filed appropriately. In the course of interviews for this Review, Department officials indicated that emails generally find their way to the appropriate Division and it is simply assumed within the higher ranks of the Department that personnel in the relevant Divisions will file emails when and where appropriate. This appears unsatisfactory. It has been explained that a new system for the storage of electronic communications, known as eDocs, is to be introduced across the Civil Service and it may be that the new system will address this problem. As matters stand, there appears to be an appreciable risk that important emails might not find their way to the relevant file and might accordingly be overlooked when a search is conducted, in the context of a public inquiry or otherwise, for relevant material. Indeed, that is what occurred on this occasion. It was acknowledged both by current and former officials and by the current and former Ministers that improvements are required to the arrangements for the allocation and storage of electronic communications.
- 6.11. The email of 15 May 2015 and the subsequent string of forwarded emails and responses were not furnished to the Tribunal or brought to the Tribunal’s attention until November 2017. In particular, the emails were not included in the Department’s letter of 14 April 2017 in response to the Tribunal Opening Statement identifying records in the possession of the Department which were potentially relevant to the Tribunal’s terms of reference as they had not been identified in the search process.

- 6.12. It has been suggested by a small number of individuals in the course of this Review that the May 2015 Emails might not necessarily have fallen within the Tribunal's terms of reference. Whilst the interpretation of those terms of reference is primarily a matter for the Tribunal itself, it seems clear on any reasonable analysis that the May 2015 Emails are documents which relate to the Tribunal's terms of reference. The original email of 15 May 2015 referred specifically to issues raised by counsel for An Garda Síochána at the O'Higgins Commission in relation to the motivation of Sergeant McCabe. It appears to fall squarely within clause (e) of the Tribunal's terms of reference, which addresses whether the Garda Commissioner relied on unjustified grounds to discredit Sergeant McCabe at the O'Higgins Commission. As noted above, the Department appears to have focussed on clause (h) of the Tribunal terms of reference and to have taken a view that it was unlikely to hold material relevant to other elements of the terms of reference. However, it is for the Tribunal, not the Department, to decide what is relevant, and anything of potential relevance ought to be made available so that the Tribunal can make that determination for itself.
- 6.13. It is also for the Tribunal itself to determine questions of compliance with its own orders for discovery and disclosure. Without seeking to trespass on this function of the Tribunal, it seems clear on any interpretation of the various orders directed to the Department that they did not encompass the May 2015 Emails. The orders required the discovery or disclosure of specific documents, which did not include the May 2015 Emails and thus no valid criticism can be made that the Department did not discover the May 2015 Emails when responding to the Tribunal's various specific disclosure orders.
- 6.14. Nonetheless, the Department appears to have recognised that it had a general obligation, arising from the Tribunal Opening Statement and separate to the requirement to comply with specific orders, to make available to the Tribunal any relevant material in its possession. So the question arises as to why the May 2015 Emails were not included in the list of potentially relevant items identified in the Department's letter to the Tribunal of 14 April 2017. The answer to this, as discussed in section 4 above, is two-fold:
- 6.14.1. First, the original email of 15 May 2015 had not been filed in the Policing Division. If it had been filed in the document library for the Policing Division or with the IRM files, then it seems likely that it would have been identified in the search which took place in response to the Tribunal

Opening Statement. The Acting Secretary General has acknowledged in an interview for the purpose of this Review that the May 2015 Emails would have been disclosed to the Tribunal had they been on a file within the Policing Division.

6.14.2. Secondly, the search conducted in response to the Tribunal Opening Statement did not include the email in-boxes of anyone in the Department or the SecGenOffice group email. Had the search included the email in-boxes of officials in the Policing Division or the Secretary General's Office, the May 2015 Emails would most likely have been identified.

6.15. The May 2015 Emails were ultimately identified in November 2017. The catalyst for this was a series of parliamentary questions submitted in Dáil Éireann concerning contact between the Garda Commissioner and the Secretary General of the Department on 15 May 2016 (where the reference to 2016 rather than 2015 transpired to be a mistake) and a press query from RTÉ referencing a meeting at Garda Headquarters on 15 May 2015. On 9 November 2017, in response to those parliamentary questions and the press query, the Secretary General's private secretary, Mr Griffin, looked at the Secretary General's emails and diary for 15 May 2015 and 15 May 2016, and discovered the email of 15 May 2015. The string of emails forwarding and responding to the original email of 15 May 2015 (including the email of 25 May 2015 recording that the Minister had noted the initial communication) were subsequently identified by Mr Griffin, as well as by the Minister's private secretary Mr Quattrociocchi and the head of the Corporate Secretariat Mr Forsyth, following a request from Mr Power to look for emails in the days following 15 May 2015. Mr Power sent copies of the May 2015 Emails to the Tribunal by letter dated 21 November 2017.

6.16. The information considered in the course of this Review demonstrates that it is undoubtedly the case that the May 2015 Emails could and should have been furnished to the Tribunal prior to November 2017. The failure to do so arose from the manner in which those emails were handled in May 2015 (i.e. the fact that they were not filed within the Policing Division) and the nature of the search conducted in response to the Tribunal Opening Statement, which did not include a search of email in-boxes. However, this Review has identified no evidence of any deliberate intention or scheme on the part of any public servant or politician to conceal or withhold the May 2015 emails from the Tribunal.

7. THE JULY 2015 EMAILS

- 7.1. The terms of reference for this Review also make express reference to an email dated 4 July 2015, which was also furnished to the Tribunal by the Department in November 2017. The email in question was sent by the Deputy Secretary, Ken O’Leary, to the Minister. It stated that Mr O’Leary had received a telephone call from the Garda Commissioner to notify him of queries received from a journalist about Sergeant McCabe. The queries related to whether Sergeant McCabe had sought a transfer from the traffic unit in Mullingar and whether the Garda Commissioner “*had instructed counsel to adopt an aggressive stance towards Sgt McCabe at the O’Higgins Commission*”. The email went on to suggest how the Minister might address these matters should they be raised with her.
- 7.2. Mr O’Leary’s email was copied to a number of people in the Department, namely Marion Mannion and William Lavelle (the Minister’s special advisers), Noel Waters (the Secretary General), Fiona O’Sullivan (press officer), Dale Sunderland (Corporate Secretariat), Michael Flahive (Policing Division) and Christopher Quattrociocchi (private secretary to the Minister).
- 7.3. Mr O’Leary sent a further email to the Minister later the same day, correcting an error as to the identity of the journalist raising the queries and addressing the prohibition on reporting evidence heard before a Commission of Investigation. Mr O’Leary also forwarded to the Minister a copy of the press query itself and a communication from the Garda Press Office to the Garda Commissioner concerning the query. Mr O’Leary also forwarded to the Garda Commissioner copies of his emails to the Minister.
- 7.4. These emails (“**the July 2015 Emails**”) were not identified in the Department’s initial search for documentation in response to the Tribunal Opening Statement. Unlike the May 2015 Emails, Department officials take the view that the July 2015 Emails were unlikely ever to be filed in the Policing Division because they related to a press query. Nonetheless, the July 2015 Emails would most likely have been identified at an early stage had the initial search for documents encompassed email in-boxes.
- 7.5. The July 2015 Emails were discovered in the course of a search conducted by the Department between 22 and 27 November 2017. That search occurred in the wake of the discovery of the May 2015 Emails and the political response to the publication of those emails. On 22 November 2017, during Leaders Questions in the Dáil, the

Taoiseach stated that he had asked the Department “... *to go through a trawl of the documents again to see if there is anything that it has not yet come across, that it has not yet passed on to the Tribunal ...*”.

- 7.6. In response to the Taoiseach’s request, the Office of the Secretary General issued a request to eleven personnel in the Department to search for any relevant documentation. The request was sent by Bernadette Phelan, assistant principal in the Corporate Secretariat, by email dated 22 November 2017. Its recipients were personnel currently or formerly assigned to the Policing Division, together with the Office of the Minister, the Office of the Secretary General and the Office of the Deputy Secretary. The email stated as follows:

“Many of you have already undertaken such a search, but I would be grateful if you could ensure that a wide ranging and comprehensive search is undertaken of any emails, records and files in connection with the legal strategy taken by the Commissioner at the O’Higgins Commission of Investigation.

The purpose of this ongoing trawl is to establish if there is any additional information available and in the possession of the Department that has not yet been passed to the Charleton Tribunal. It is imperative that if any new information is identified, it be submitted to Justice Charleton without delay.

The relevant timeframe is 19 December 2014 (when O’Higgins was established) to publication of the Report on 11 May 2016.

If you are unsure as to whether a record falls under the scope of this request, please ensure that you include it in your return.”

- 7.7. Ms Phelan subsequently prepared a report for the Secretary General dated 27 November 2017 in which she reported the results of the search. The report recorded the fact that the search involved “*the manual review of thousands of emails across numerous email accounts ...*”. Department Officials interviewed for the purpose of this Review have confirmed that in some cases it took a number of days to manually review all of their emails for the period in question.
- 7.8. Ms Phelan’s report went on to list the records which had been forwarded to Ms Phelan in response to her email. These were copies of the May 2015 Emails (which had previously been identified and sent to the Tribunal) and the July 2015 Emails.

The July 2015 Emails were then sent to the Tribunal by Mr Power, under cover of a letter dated 27 November 2017.

- 7.9. There is no doubt that the July 2015 Emails fall within the Tribunal's terms of reference and ought to have been identified in the course of the Department's initial search for documents. They do not appear to fall within the terms of any of the Tribunal's orders for discovery or disclosure, although, as stated above, the interpretation of those orders is primarily a matter for the Tribunal itself. Notwithstanding the omission to provide these emails to the Tribunal at an earlier stage, as in the case of the May 2015 Emails, this Review has identified no evidence to suggest that the July 2015 Emails were deliberately withheld or concealed from the Tribunal. The Minister's instructions were that all relevant documents should be furnished to the Tribunal and I am satisfied that the Department officials at all times acted bona fide in attempting to give effect to this. However it bears observation that if an email, similar to that sent by Ms Phelan on 22 November 2017, had been sent to Department officials at the time of the Tribunal Opening Statement, the May 2015 Emails and the July 2015 Emails would have been discovered at that time.

8. THE JANUARY 2018 SEARCH

- 8.1. On 20 December 2017, the Acting Secretary General, Oonagh McPhillips, wrote to the Tribunal seeking its observations concerning the Department's obligations. Ms McPhillips stated that "*recent public criticisms of the Department's interactions with the Tribunal*" had prompted her to write to the Tribunal.
- 8.2. Ms McPhillips pointed out that the Department had complied with discovery and production orders made by the Tribunal and that it had made voluntary disclosure of additional material. She emphasised that the Department had adopted a policy of not commenting publicly on its interactions with the Tribunal, but that a certain amount of information had been put into the public domain to reassure the Oireachtas and the general public. This appears to be a reference to the appearance by Ms McPhillips and Mr O'Callaghan before the Joint Oireachtas Committee on Justice and Equality on 6 December 2017.
- 8.3. Ms McPhillips's letter continued as follows:

"I also wish to ask if there is any further action that the Tribunal considers the Department should take at this time to ensure that it fulfils its obligations to the Tribunal.

In particular, I am seeking any views the Tribunal may wish to convey on a number of issues as set out hereunder.

- 1. Would the Tribunal wish the Department to conduct an electronic search of all the records that mention anyone or any issue engaged by the Tribunal's terms of reference?*
- 2. Should the Department request officials (including any retired officials) to search their own private email accounts and mobile phones based on search criteria which would identify any documents referencing, inter alia, the O'Higgins Commission, individuals who gave evidence at the Commission and individuals referred to in the protected disclosures and the Tribunal's terms of reference or request them to make these devices available to be examined for any such material?*
- 3. The search of the Department's records that uncovered the emails of May and July 2015 was limited to the period commencing with the date on which the Government laid the resolution to establish the O'Higgins Commission of*

Investigation and ending on the date that Mr Justice O'Higgins reported (i.e. from 19 December 2014 to 11 May 2016). The Department did not consider that records outside of these dates would be relevant in the context of the terms of reference, Should the Department extend its search and, if so, to cover what period?"

- 8.4. The Tribunal replied by letter dated 22 December 2017. That letter commenced as follows:

"You will note that the Tribunal has not sought to suggest in any way that the Department has not cooperated in the discovery process that is inherent in this inquiry."

- 8.5. In response to Ms McPhillips's request for guidance as to the need for further searches, the Tribunal commented as follows:

"As to what further action the Department regards as necessary, it may help you to know that as regards electronic searches, the Tribunal has conducted these on other systems with the express purpose of attempting to uncover any denigration, concerted or otherwise, of Maurice McCabe in the context of what is relevant to the terms of reference. Similarly, some retired officials have been included in such trawls. Other parties have conducted similar exercises on behalf of the Tribunal. As to the dates you mention, you might recall that the Tribunal's duty to investigate contacts between members of AGS and State entities is not limited in paragraph (h) only to what occurred or did not occur before the O'Higgins Commission under term of reference (e) but also includes terms of reference (a), (b), (c), (d), (e) and (f). It would perhaps assist your process to read these terms of reference and we enclose a copy thereof. You may take it as an imperative that the Tribunal wants to receive any material of relevance as soon as possible. Can you confirm that you are at present in fact undertaking a comprehensive trawl in the Department for all relevant information and, of so, can you inform us of when this is likely to be completed. ..."

- 8.6. Ms McPhillips replied to this letter by email dated 28 December 2017, in the following terms:

“I refer to your letter of Friday 22 December and wish to confirm that the Department will undertake a comprehensive electronic trawl for all records relevant to the terms of reference.

The Department has identified an external IT provider which will be contracted to undertake the necessary electronic searches and the [Attorney General’s Office] has been requested to nominate independent documentary counsel to decide the relevance of any material located.”

8.7. The external IT consultant, Waterford Technologies, conducted a search in early January encompassing all Department email accounts, document libraries and databases. It included approximately 30 million emails. Search terms were applied to these sources reflecting the persons and issues identified in the Tribunal’s terms of reference. The search covered a date range between 1 July 2012 and 30 September 2016. The search retrieved 35,500 documents which were responsive to the search terms and these (together with a small number of hard-copy files) were supplied to counsel for review. Counsel ultimately identified 90 documents which were potentially relevant to the Tribunal’s terms of reference. Of those 90 documents, 11 had previously been supplied to the Tribunal and two were withheld for legal reasons, so there were 77 documents identified for disclosure to the Tribunal. The Department has pointed out that there was a large degree of repetition within those 77 documents. For example, 40 of them related to the drafting of the same statement. Those documents were forwarded to the Tribunal by the Chief State Solicitor on the Department’s behalf on 19 January 2018, together with a short report detailing the methodology adopted and the results of the search. A small number of documents were redacted for relevance and privilege was asserted over one document.

8.8. Accordingly, this search produced only 79 additional documents of potential relevance to the Tribunal. However the breadth and depth of the search enables the Department to say with reasonable certainty that all relevant material has been retrieved and furnished to the Tribunal. This provides a desirable degree of public confidence that the Department is providing the fullest possible cooperation and assistance to the Tribunal, particularly in light of the controversy which arose in November 2017 concerning the extent of that cooperation and assistance. Had a search of this nature been conducted from the outset, that controversy might have been avoided.

8.9. Ms McPhillips, has informed this Review that the Department intends to introduce new procedures for interaction with Commissions of Investigation and Tribunals of Inquiry in the future. In particular, she has indicated that the Department will use specialist IT consultants, where needed, for discovery, and that the Department will establish a separate unit to interact with Tribunals and Commissions, so that such interaction is no longer through the relevant line Division within the Department. Ms McPhillips has also pointed out that a new electronic file management system, eDocs, is to be introduced across the Civil Service and that this will help to ensure that electronic documents, including emails, can more easily be associated with relevant files. These innovations are to be welcomed.

9. THE TOLAND REPORT

- 9.1. On 3 June 2014, the Minister established an Independent Review Group to undertake a comprehensive review of the performance, management and administration of the Department, under the chairmanship of Kevin Toland. The Review Group presented its report to the Minister on 11 July 2014 (“**the Toland Report**”). The Toland Report identified a number of weaknesses in the Department and made recommendations to address those weaknesses. The weaknesses identified included “*very poor document tracking and IT systems*” and “*a serious lack of integrated and timely data*”. The recommendations included the following:

“Better use of technology and data management systems. Modernise and streamline systems, and stop duplication and unnecessary work, including duplication of electronic and paper files. ...

Need for integrated systems that provide accurate and timely information.”

- 9.2. It is outside the scope or expertise of this Review to provide any detailed analysis of the IT systems operated in the Department or the manner in which material is stored and accessed. However it will be apparent from some of the views expressed above concerning the Department’s interactions with the Tribunal that the shortcomings identified in the Toland Report have to some extent been manifest in the Department’s efforts to identify and retrieve documents for the Tribunal. In light of this, the Department was asked for the purposes of this Review to provide an update on steps taken to address these aspects of the Toland Report. Its response was as follows.

Development of ICT Capacity and Services in Department of Justice and Equality

Since the publication of the Toland Report in 2014, investment in ICT capacity has been prioritised by the Department with a view to making better use of modern technology and data management systems and laying the basis for the organisation to participate to the fullest extent possible in the civil service-wide Government IT strategy. The focus has been on improving communications and service delivery.

The Department invested significantly between 2014 and 2017 in rolling out 3,000 modern desktops, at a cost of approximately €1.5m, along with full hardware and software stack updates. This work was necessary to facilitate the organisation's upgrade to Microsoft Windows 7, including MS Office Suite, which was followed by a full migration in 2017 from a Lotus Notes based email system to Microsoft Outlook.

The Office of Government Chief Information Officer (OGCIO) is responsible for developing shared ICT systems to operate across the civil service and its new eSubmissions system was piloted by the Department in 2015 and fully adopted in 2016. Its ePQ system was rolled out in 2017. Preparations are underway for the introduction of related new eFOI and eCabinet systems in 2018. A fully electronic file management system (eDocs) developed by the OGCIO is scheduled for this year. Overall, while some databases and apps still operate in the old Lotus Notes environment, a phased migration is underway and generally all new systems are developed on the OCCIO's Sharepoint platform. Annual expenditure on Sharepoint and MS Office licences is €1m.

An electronic register of all data sources (Our Sources) held by the Department has also been developed which will facilitate compliance with the forthcoming GDPR.

This work has taken place against a backdrop of a significant increase in the user base supported by the Department's ICT Division, providing services to over 70 locations, and 3,000 users. System developments have included the introduction of

- Rebuild of entire datacentre in 2015 and subsequent expansions to support more users, as well as upgrades and new applications at a cost of €3.5m since 2015*
- Voice over Internet Protocol phone services*
- Wi-Fi networks in Departmental buildings*
- Video conferencing*
- Network upgrades*
- Comms rooms upgrades and reorganisation.*

9.3. The current Minister has emphasised in an interview for the purposes of this Review that he recognises the need for improved processes to ensure best practice for the

filing of electronic communications. That recognition and the developments and planned improvements set out above are to be welcomed. It appears likely that they will facilitate future requirements for the Department to identify and retrieve documentation in connection with Tribunals, Commissions, and other inquiries.

10. CONCLUSIONS AND SUMMARY OF FINDINGS

- 10.1. The findings reached in this Review are based on a consideration of all of the correspondence between the Department and the Tribunal, detailed information supplied by the Department in written form concerning its interactions with the Tribunal and the steps taken to identify and retrieve documents for the Tribunal, the transcripts of hearings before the Tribunal, and interviews with the persons identified in the Schedule to this Report.
- 10.2. This Report identifies certain shortcomings in the Department's response to the Tribunal's initial call for potentially relevant information to be furnished for its consideration. However the Review has found no evidence to suggest any deliberate concealment or withholding of material from the Tribunal. It is clear that the Minister and the officials of the Department acted at all times in good faith and believed that they were acting reasonably in the manner in which they conducted searches for documentation.
- 10.3. While compliance with the Tribunal's orders is primarily a matter for the Tribunal itself to determine, this Review has identified no evidence of failure to comply with those orders. The Department responded promptly to each formal order of the Tribunal for the discovery or production of documents. To date, the Tribunal has made no criticism of the Department's compliance with those orders. Whilst there has been a degree of controversy concerning the Department's failure to disclose the May and July 2015 Emails prior to November 2017, it does not appear that the failure to do so amounted to a breach of any order of the Tribunal.
- 10.4. In addition to this, the Department voluntarily undertook a search for relevant documents in response to the Tribunal Opening Statement. That search was confined to the Policing Division (although the Crime Division was also invited to participate) and, more particularly, to three sources of information within the Policing Division, namely:
- (a) records relating to the IRM;
 - (b) the electronic document library for the Policing Division; and
 - (c) records relating to legal actions.
- 10.5. Crucially, this initial search for documents did not include the email accounts of officials in the Policing Division or senior officials in the Department or the Secretary

General's office. No meaningful explanation has been provided for this omission, other than that it did not apparently occur to officials within the Policing Division to search such email accounts, possibly because they did not consider that the focus of the Tribunal's investigations was on the Department. It appears to have been assumed that any relevant material would have been located within one or other of the three sources identified above. There is no systematic arrangement for the filing of emails within the Department, which means that important emails may in some cases not find their way to a file within a Division of the Department. For this very reason, email accounts appear to be an obvious source within which to look for material of potential relevance to the Tribunal's terms of reference and should have been included in the Department's initial search for documents. There is a general acceptance by current and former officials and at ministerial level, at least with the benefit of hindsight, that an email search should have been conducted from the outset.

- 10.6. The May and July 2015 Emails were not identified in the Department's initial search owing to two factors, namely the failure to file these emails at the time they were sent or received, and the failure to include email accounts as one of the sources for the initial search. Had the emails been on a relevant file in the Policing Division or elsewhere in the Department, or had a search been conducted in email accounts, then it appears very likely that the May and July 2015 Emails would have been identified and sent to the Tribunal from the outset. There has been some suggestion that the May and July 2015 Emails might not be relevant to the Tribunal's terms of reference, but that does not appear to be correct having regard in particular to clauses (e) and (h) of those terms of reference.
- 10.7. The May and July 2015 Emails eventually came to light in response to parliamentary questions and a press query in November 2017. Thereafter, the Department conducted a much more rigorous search involving external IT support and independent counsel including a search of approximately 30 million emails. This ultimately resulted in the identification of only 79 additional documents of potential relevance (many of which were related to the drafting of a single statement), but nonetheless provides an appropriate degree of confidence that the Department has identified and supplied all material of potential relevance to the Tribunal.
- 10.8. Responsibility for the initial search and for compliance with orders of the Tribunal fell to the Governance and Accountability Section in the Policing Division. This does not appear to have occurred as a result of any detailed consideration, but rather it

appears to have been understood generally that the Policing Division was the natural home for these matters having regard to the subject matter of the Tribunal. The Governance and Accountability Section had previously taken responsibility for liaising with the O'Higgins Commission.

- 10.9. There appears to have been little communication at senior level within the Department concerning interactions with the Tribunal (at least prior to November 2017) and no formal oversight or periodic review of the work carried out by the Policing Division in this regard. Rather, there appears to have been an element of trust that the Governance and Accountability Section would identify all relevant material. Whilst it is not suggested that this trust was misplaced, it may be that the omission of email accounts from the initial search would have been avoided had there been some formal supervision or oversight of the process.
- 10.10. The search processes used to identify documents were somewhat *ad hoc*. Once the search was extended in November 2017, some officials reported manually reviewing all emails within certain date ranges, while others conducted electronic searches based on key words. Ultimately, the Department engaged external IT support and documentary counsel to conduct a wide-ranging search over a longer timescale of all electronic files.
- 10.11. To some extent, it appears that the Department's handling of these matters has been a function of a view at senior level that the Department has a peripheral role in the Tribunal's terms of reference. The Department appears at a senior level to have placed undue emphasis on clause (h) of the Tribunal's terms of reference, and not to have focussed sufficiently on the likelihood that it might hold documents of potential relevance to other elements of the terms of reference (such as clause (e), to which the May and July 2015 Emails relate).
- 10.12. It is not the function of this Review to determine how best to allocate resources within the Department, but it does appear that a more formal protocol for dealing with Tribunals and Commissions, including provision for supervision or periodic review at an appropriately senior level, would be preferable to the somewhat less formal arrangement which pertained in this case. It is to be hoped that the proposals to introduce a dedicated unit for this purpose and to place greater reliance on external IT support will address this in the future. It may also be that the new eDocs system to be introduced across the Civil Service will facilitate more effective and efficient searching for electronic information where required for inquiries.

- 10.13. The principal issue of general concern identified in the Review relates to the lack of a clear system for the filing and storage of emails. There appears to be a general acceptance – both among current and former officials at all grades and at ministerial level – that this is a problem which needs to be addressed. It is to be hoped that the steps being taken in response to the Toland Report and the introduction of eDocs will go some way to alleviating this difficulty.
- 10.14. The Review has also demonstrated that, while the Department and its officials acted in good faith in their interactions with the Tribunal, the introduction of a general protocol to govern such interactions would be desirable, so that a template exists for document searches and making discovery in the future. The proposal to designate a unit for this purpose is a positive development in this regard.
- 10.15. It is, of course, appropriate to expect a degree of proportionality in the response of any government department to the establishment of a Tribunal, so as to avoid any wasteful expenditure of public funds. It is not suggested that every arm of the State should undertake a major electronic search in connection with every public inquiry. A degree of common sense must be brought to bear in determining what form of search is appropriate in any given case. Where – as in this case – an inquiry is so clearly connected to the work of a particular department and the agencies which operate under its aegis, it follows that a thorough search for relevant material will be required.

Michael M. Collins S.C.

SCHEDULE

LIST OF PERSONS INTERVIEWED FOR THE PURPOSE OF THIS REVIEW

- Charlie Flanagan T.D., Minister for Justice and Equality
- Frances Fitzgerald T.D. former Minister for Justice and Equality
- Oonagh McPhillips, Acting Secretary General
- Noel Waters, retired Secretary General
- Ken O'Leary, retired Deputy Secretary General
- Michael Flahive, Assistant Secretary Criminal Law Reform (formerly Assistant Secretary Garda Division)
- John O'Callaghan, Assistant Secretary Policing Division
- Martin Power, Principal Officer Governance and Accountability Section, Policing Division
- Dale Sunderland, formerly Principal Officer Corporate Secretariat
- Patrick Forsyth, Principal Officer Corporate Secretariat
- Bernadette Phelan, Assistant Principal Corporate Secretariat
- Denis Griffin, former Private Secretary to the Secretary General
- Marion Mannion, former Special Adviser to Minister for Justice and Equality
- William Lavelle, former Special Adviser to Minister for Justice and Equality

Christopher Quattrociocchi was unavailable for interview in the time available.