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THE HONOURABLE TIMOTHY FRANCIS CARMODY SC, Commissioner

MS K McMILLAN SC, Counsel Assisting
MR M COPLEY SC, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS INQUIRY ACT 1950
COMMISSIONS OF INQUIRY ORDER (No. 1) 2012
QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

BRISBANE

..DATE 31/01/2013

Continued from 30/01/2013

DAY 19

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THE COMMISSION COMMENCED AT 9.35 AM

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COMMISSIONER: Good morning, everyone.

MR COPLEY: Good morning, Mr Commissioner.

COMMISSIONER: Mr Copley, Mr Thomas.

MR COPLEY: May I resume?

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COMMISSIONER: Okay.

THOMAS, BARRY JOSEPH on former oath:

MR COPLEY: Mr Thomas, yesterday we got up to exhibit 164 and the question that I'd asked you is what parts of that document you had composed, because you said it was actually the sum of the efforts of three persons and you said that you'd be able to assist me on an answer to that if you could have access to the advisory or appeals and advocacy file from the Crown Solicitor's office?---Yes. I since - - -

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Since then have you had access to the file?---Yes, I have.

All right. So can you help me now on that issue?---Of the letter dated 16 February I believe I had involvement in the first page - - -

Yes?--- - - - perhaps working with Mr O'Shea because a lot of it is obviously information from him about what happened in a phone call.

Yes?---But nothing else of that letter (indistinct) in the draft of 14 February. I would have created the first and the last page of a four-page document but the 16 February is a five-page document and my conclusions had changed completely.

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Yes. Now, when you say in the draft of 14 February you're not referring to any exhibit that I've shown you?---No.

But rather you're referring to a draft document on the Crown Law file?---That's so.

Right. Just so that we know when we look at this in the future. So there was no material change, was there, between the draft of page 1 as you settled it and the page 1 that was actually sent to Mr Tait?---No.

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And there was a material change in the letter sent to Mr Tait on page 5 compared to the draft you prepared or

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contributed to in that the view, presumably, that you had, you were adhering to, that the records Mr Heiner generated were not public records?---Yes.

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But Mr Dunphy's opinion to the contrary was the one that Mr O'Shea shared, obviously, because that found its expression in Mr O'Shea's letter 16 February 1990?---Yes, and that the documents could be returned to Mr Heiner, was my opinion but wasn't carried through - - -

Yes?--- - - - in the letter that was actually sent.

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Right. And no doubt so far as you were concerned that was simply a matter where more senior officers of the office had decided that they'd - well, the most senior officer in the office had decided he'd prefer the view of the more senior lawyer to you in this issue?---Yes, I thought both were legal decisions, I just thought mine was simpler and easier.

Yes, but obviously Mr O'Shea must have thought Mr Dunphy's was the better - - -?---Yes.

- - - the better option or the preferred option?---Indeed.

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Okay. Well, thank you for that.

COMMISSIONER: He might have even had his own view.

MR COPLEY: Well, of course, that's true, he may well have done, but - and you'd agree he may well have had his own - - -?---Yes.

For you all you know Mr Dunphy - - -?---A very experienced lawyer.

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Yes, Mr Dunphy's view might simply have comforted the view Mr O'Shea had already formed?---Indeed.

Yes, thank you. Exhibit 164 can be returned. Now, as a result of that letter going off it appears that another letter was sent to Ms Matchett, and I'll get you to look at exhibit 165. There are two copies of the same letter there but you'll see it's got Mr O'Shea's signature block on it. Is that his signature?---Yes.

Did you compose that for him - draft for him?---I don't think so, no.

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Okay, thank you. Could you have a look at exhibit 166. Again on the same day a letter in very similar terms to that sent to Ms Matchett went to Mr B Stewart. Does it bear Mr O'Shea's signature?---Yes.

Did you drafted for him?---No.

Thank you. And lastly on this area can you look at exhibit 167. You'll see there that according to the memorandum Mr O'Shea conveyed a copy of the letter that he wrote Mr Tait to the attorney general and attached it to a memorandum?---Yes.

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Does that memorandum clear Mr O'Shea's signature?---It does.

And did you draft that memorandum for him?---No.

Okay, thank you. Would you please look at exhibit 169? This is a letter from Mr Tait to Mr O'Shea. Mr O'Shea is there being asked to comment upon the suitability of the draft letter that Mr Tait wanted to send to Mrs McGregor the archivist. Did Mr O'Shea show you that letter from the cabinet secretary Mr Tait?---No.

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All right, that can - - -?---I think he - my involvement was very much with Families and I think that letter to Mr Tait that we've already discussed is just about the only involvement I had with anyone outside Families. I wasn't dealing with the cabinet secretariat, I wasn't dealing with Mr Stewart.

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When you say "the letter I just showed you" you're referring back to the five-page letter - - -?---Sorry, yes.

- - - where you composed certainly page 1 and page 5 ended up very different to that which you had composed?---Yes.

Okay, thank you. I'll just get you now to look at what seems to be Mr O'Shea's reply to Mr Tait's letter, exhibit 172. And you may have anticipated this question in your last answer but I'll ask it anyway: did you draft that reply for Mr O'Shea to send to Mr Tait?---No, not at all.

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Thank you. That can be returned. Could you now look at exhibit 170. You will see it's dated another day, 22 February. It's a letter to Mr O'Shea but it says, "Attention Mr B.J. Thomas," on it?---Yes.

And it is signed by Ms Matchett. Is there anything on it - any handwritten notations to suggest you received it? ---Yes, at the bottom it says, "Received BT 23/2/90.

Okay. And that enclosed a copy of a letter that had been received on 15 February requesting - well, advising about the effect of a telephone call?---Yes.

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And did it also enclose the responses that are attached? ---Yes.

And was it your understanding - it's called an interim response in the body of the letter to Mr O'Shea where she says, "I enclose an interim response." Was it your understanding that that response had actually been sent by the time he received a copy of it here?---Yes, that's what I'd infer from it.

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All right. It says in response to Mr Berry that Ms Matchett was in a position to advise that none of the material Mr Berry was seeking was contained on a file held in relation to either Coyne or Dutney. Now, you wouldn't have been able to have formed a view about the truthfulness or accuracy of that comment at all, would you, because you said yesterday you'd never seen the files relating to either Mr Coyne or Ms Dutney?---That's so.

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Okay, thank you. Now, if you hang onto exhibit 172 for a second, I would suggest to you that exhibit 176 might be the relevant response. That has got your name in the top left-hand corner, hasn't it?---Yes.

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And down the bottom you have signed it for Mr O'Shea?
---I've signed for O'Shea.

So you drafted exhibit 176 in response to the letter in exhibit 170?---Yes.

Okay, thank you. Now, would you look at exhibit 171? This is a memorandum to Mr O'Shea from Di Fingleton. Is there any marking on that document to suggest you saw it on or about 22 February 1990?---There's something down a bit that could be, "Attention Mr Thomas: please discuss, Ken O'Shea."

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Right. Looking at it, it says that the attorney has been asked to advise Ms Warner as to what should be her reply to solicitors for the former manager who have written in relation to the availability of documents. Ms Fingleton says, "We have advised Ms Warner that proceedings for defamation would have to be on foot before she would have to comply with any request for documents." Now, were you the source of that advice that Ms Fingleton speaks of there?---I don't remember this document despite it being marked for my attention.

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Right. Approaching it in a slightly different way, in the course of your handling of this matter for Mr O'Shea, did you have any conversations with Di Fingleton?---I don't believe so. I don't think I met her till she was a magistrate and spoke with her.

All right. That can be returned.

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COMMISSIONER: Where was she before she was a magistrate? Did she work in Crown Law?---I think she worked in the attorney-general's office.

MR COPLEY: The letter that has got her name on it and a signature is headed "Attorney-General of Queensland", isn't it?---Yes.

And it's a memorandum to Ken O'Shea, crown solicitor, and down the bottom there's a typewritten address of "8th Floor State Law Building". Does that assist you in terms of answering the question about where Ms Fingleton worked? ---Yes, certainly the attorney-general's office was in the State Law Building.

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Right?---I think it moved between different floors at different times around this time.

COMMISSIONER: Who was the attorney then, Mr Wells? 1
---Welford I think was the first attorney.

MR COPLEY: I think we can actually clear that up by
looking at - - -

COMMISSIONER: We have got gazettes, have we?

MR COPLEY: We have. I think it would be exhibit - it
might be about 283 or thereabouts. That will tell us. It
might be 282. Yes, 282, please. Just show that to the
witness. 10

You can perhaps just tell us who the attorney-general was
from 7 December 1989?---Yes, the Honourable Dean MacMillan
Wells.

Thank you. Could you look at exhibit 183, please? It's a
letter dated 19 March 1990 addressed to Mr O'Shea from
Ms Matchett? Is there anything on it to suggest - and it
says "Attention Mr B.J. Thomas". Is there anything on it
to suggest that you ever actually saw that, Mr Thomas?
---The stamp on the bottom is marked "ANA" which means that
it would have come to the file that was now containing the
documents that I had rather than going directly to
Mr O'Shea or anything like that so - - - 20

The file that you had - was it a file number 890 or - - -?
---I couldn't tell you.

You can't remember?---That's the one that I asked for at
various stages and never seen again.

All right. So in this letter it advises you that on
15 March cabinet decided that the material gathered was to
be given to the archivist for destruction and in view of
that advice was sought about an appropriate response to
Rose Berry Jensen's letter requesting production of
Mr Heiner's material and you were informed that cabinet's
decision did not extend to certain statements forwarded to
Mr Pettigrew by the State Service Union prior to
Mr Heiner's appointment?---Yes. 30

Now, I will just get you in relation to that letter to look
at exhibit 191. This letter would appear to be your
initials on the second page?---That's so, yes.

And there is other writing on the second page that I will
come to it, but on the first page under "Reference" it says
"Mr Thomas"?---That's so. 40

Do you have a recollection of drafting this letter?---I
accept I drafted it. I can't think to the particular time
that I drafted it.

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It would appear though to be responsive to her letter of 19 March which is exhibit 183, wouldn't it?---Yes. 1

Yes?---Quite clearly.

Now, in the letter you state that, as far as you were concerned, if the original letters of complaint were not to be disposed of but to be kept by the government, then they needed to be placed in the appropriate files of Mr Coyne? ---Yes.

And would thus be accessible to Mr Coyne if he wished to see them?---Yes. 10

But your view was that because the letters didn't refer to Ms Dutney, she had no entitlement to be looking at them? ---That's so.

It says, "I enclose the copies of the statements forwarded should they be needed for destruction," and under the words "E and C" there's a list of names in handwriting. Is that your handwriting?---Yes.

So were you intending by that to convey you were returning to them copies of statements from Daniel Lannen, Smith, Pearce, McGregor, Collins, McNeven, Clements and Konicanin and a person who had signed their name "Very concerned"? ---Yes, I was recording on our file the documents that went back so we would know what we sent back in case there was ever a question. 20

Okay; and the documents that you were sending back were not the originals of the statements, were they?---No, I don't believe so.

I will show you exhibits 72B through to 72J which it's common ground here and from their face you will be able to see are original documents from each of those persons and I will ask you: have you seen those original letters before?---No, I don't think I was ever given any originals of anything. Certainly I have no memory of seeing - well, I'm quite certain I never got a pile of originals this size. 30

Okay, but in terms of at least those originals now it stands to reason, doesn't it, that you must have received copies of those if you were able to so accurately reproduce in a list those eight names, plus the title "Very concerned"?---My memory is it was a much shorter document that just had a series of paragraphs beside each name - - - 40

Well, we might be able - - -?--- - - - rather than this amount of documentation.

We might be able to help you there. I'll show you another document. I'll show you exhibit 88?---Yes, that's more what I recall.

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So having looked at exhibit 88 and exhibit 72B through to 72J, is your memory now that you didn't actually receive copies of 72B to J but merely that summary document which is exhibit 88?---Yes.

Okay, thank you?---That's more what I recall.

Thank you. I'd like you to look at exhibit 194 and exhibit 200 together. If you look at exhibit 200 first, would you agree with the proposition that you drafted and signed exhibit 200?---Yes.

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It refers back to a letter of 8 May 1990 from Ms Matchett? ---Yes.

Would you agree that that letter is exhibit 194 now? ---That's so.

In this letter Ms Matchett is conveying the fact that the cabinet was never asked to consider what to do with the material provided by the State Service Union to Mr Heiner and that Ms Matchett didn't wish to approach cabinet further on the matter?---That's so.

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And that she drew to your attention the caveat that the union had put upon how widely these letters should be circulated and that she wanted to return the documents to the union officer who provided them, or at least invite them to have them back?---Yes.

She therefore sought your assistance simply in the preparation of replies to people who had requested access to this material?---Yes.

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You then in the letter, exhibit 200, said, "Well, I've drafted responses for Mr Knudsen, Ms Walker, Rose Berry Jensen and Mr Martindale"?---That's so.

The responses that you drafted are all there?---Yes.

I have no further questions.

COMMISSIONER: Thank you. Mr Selfridge?

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MR SELFRIDGE: No questions for the witness.

COMMISSIONER: Thank you. Mr Harris?

MR HARRIS: No questions.

COMMISSIONER: Mr Bosscher?

MR BOSSCHER: I do, thank you, commissioner. If I could just have one moment.

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Good morning, Mr Thomas?---Good morning, Mr Bosscher.

I shouldn't keep you too long and hopefully you can get out of here fairly soon?---Thank you.

One of the first things you gave evidence about was the role of the crown solicitor and the role of the solicitor-general and some transition that was occurring at that time?---Yes.

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Could you just outline what each office - what their particular role was at that time?---As at January the solicitor-general was no longer within the public service, he was an independent member of the private bar, Mr Davies, and he operated out of his chambers, therefore the crown solicitor, I suppose, became the senior officer for the whole Crown Law office, taking over the responsibility that had previously resided with the solicitor-general for the appeals and advocacy branch and the advisory branch. So he was the senior officer for the entire Crown Law office.

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That person at the time was Mr O'Shea?---Yes.

As I understand your evidence to us that when this particular matter came to the attention of the crown solicitor's office there were two files being run simultaneously, one by you in the appeals and advocacy section and Mr O'Shea had his own separate file?---No, when it - there were matters, I think, that had already engaged Mr O'Shea or the Crown Law office in relation to files and youth workers' access to their files. So there was that file, the advisory file, that continued into these questions about the Heiner matter, and because I wasn't getting access to that file, it was staying with Mr O'Shea, I ultimately set up an appeals and advocacy file, but that didn't exist at the start when I first became involved on 19 January. It was formed some time after that when I was building up documents without a file to put them on.

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Because as we all know, the Crown Law office has got to store them somewhere. They have to be accountable to a file of some sort?---Yes.

So there was information on Mr O'Shea's file that you weren't privy to?---Yes.

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And I assume that there was information on your file that Mr O'Shea may not have been aware of either?---We spoke - particularly at the start, we were speaking very regularly. As time went on there were obviously - he was involved in things with the cabinet issues, the destruction of the document issues, that I wasn't involved in. So I spoke to

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him or spoke to Mr Dunphy when he was around about issues as they came up if they were, in my opinion, appropriate to seek his opinion on, or else I dealt with them myself. So at the start we were closely involved. As time went on he was less directly involved but kept aware of things.

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But other Crown Law officers also became involved. As you said, Mr Dunphy, you indicated that Conrad Lowe may have been involved?---No, I don't - I have no recall of Conrad being involved at all, which is somewhat odd because he was my direct superior officer, but I think it was more because I started off being involved with the crown solicitor. There was that line of communication rather than passing it up through Conrad. There was somebody in advisory, I think, who got involved.

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You also indicated yesterday that Mr Campbell, Robert Campbell, may have become involved as well?---Yes, I think he may have around the time of that letter to Mr Tait.

So it seems clear that quite a large proportion of the intellectual property of the crown solicitor's office at that time was being devoted at least in part to the issues being raised by the department and by cabinet?---Yes, it was a busy time. People were dealing with lots of issues with the new government, all sorts of changes, and short staffed.

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Could Mr Thomas, commissioner, please be shown exhibit 126?

COMMISSIONER: Sure?---Yes.

MR BOSSCHER: That's the file note that you made during the meeting that you had with Ms Matchett?---They're the notes I made. I don't - I normally wouldn't keep this. It would be translated into something like a memorandum, but because I didn't have a file, documents got accumulated in a way that would not normally be accumulated.

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When you spoke to us yesterday you were shown a memorandum. I won't take it to you now, but while you were being shown that memorandum you were being referred back to the notes that you made here in this document?---Yes.

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It was a memorandum, from memory, to Mr O'Shea about the meeting and the issues discussed?---Yes. 1

I take it from your evidence yesterday you composed that in part at least from your memory but also in part from what you wrote down here?---Mostly from my memory and these were notes to jog it that I took in the meeting.

Yes, and as read that, they were sort of your dot points of the key issues at the meeting?---Yes.

And at some point, I would assume fairly shortly thereafter, you dictated that longer memorandum to Mr O'Shea?---Would've started the same day. 10

Yes, but the document you have in front of you now, exhibit 126, are just that, the dot points that you took during the course of that meeting?---Indeed.

While you were discussing the matters with Ms Matchett? ---Yes.

My early legal training came from a man called Mr Pulsford. Do you know him?---Yes. 20

He taught me that the first thing you should try and obtain when dealing with a client is what the outcomes are that they're after. It's just fairly commonsense advice, you would agree?---Yes.

When you met with Ms Matchett on 22 January of 1990, I assume one of the key things that was discussed not was the issue but what possible outcomes were being sought by her as effectively the client?---Yes.

And you note some of those things down. One of the things that she wants is a reply to the solicitors that were agitating for possession of the documents?---Yes. 30

The first part of your notes seem to be the dot points as to what the issues were that have led to this particular point?---That's so.

COMMISSIONER: Just a point of clarification, if I may, Mr Bosscher.

Just so I understand, are you saying that the client's outcomes would determine the view of the law that you would take or the view of the law would determine the outcome regardless of what the client might have wanted? ---Certainly the view of the law determines the outcome. In these circumstances Ms Matchett was wanting to know what was the lawful way to get to a particular result which was - - - 40

If there was one?---Yes.

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Yes, thank you, Mr Bosscher.

MR BOSSCHER: Just to elaborate a little bit on what the commissioner just asked you, I assume during the course of your career when practising that clients have indicated to you particular outcomes they would like that were not obtainable by virtue of legislation or other issues that may arise?---Yes; yes, I've had to withdraw from cases that couldn't be resolved.

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Yes, and even an early conference, for example, a client might indicate to you they are seeking a particular outcome and the advice that you have to give them is that that outcome cannot be achieved?---Yes.

And there can be all sorts of reasons for that; the legislation, authorities, convention, all sorts of things that apply?---Indeed.

But going back to my question, one of the things I assume we all try and do on behalf of clients is find out from them what it is that they want to achieve?---Yes.

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And if it's lawful to do so, try and find a mechanism to help them?---Yes.

That's effectively what we do whether in private practice or acting on behalf of client departments?---Give legal advice to assist their decision-making.

Yes, and one of the outcomes, it seems from the notes that you have here in exhibit 126, being sought by Ms Matchett was the destruction of the documentation?---She was wanting to know whether they could be destroyed but I think the outcome was more that the documents not go to Mr Coyne.

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That's probably a better way to phrase it. The outcome that she was after perhaps was that the documents not get to Mr Coyne and one of the mechanisms she asked you to consider and to provide advice on was whether or not the department had the authority to destroy them?

COMMISSIONER: Sorry, are we interpreting a document here or is Mr Thomas giving us the benefit of conversations he has had with Ms Matchett that sort of he gleaned what she was after from? Which are we doing at the moment?---I was summarising the effect of the conversation.

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Yes, and were you doing the same, Mr Bosscher, or were you interpreting the document itself through Mr Thomas?

MR BOSSCHER: Effectively, commissioner, because it's a dot-point document.

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COMMISSIONER: Yes.

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MR BOSSCHER: I make no criticism of that. It's the exact type of document that I would make before I did a file note when talking to somebody because you don't want to be scribbling away madly. I'm asking him to put some colour around it.

COMMISSIONER: Yes, that's fair enough.

I suppose there's a difference between someone asking you what can be done and what should be done?---Yes.

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What document are we talking about?

MR BOSSCHER: It's exhibit 126.

COMMISSIONER: 126. Can I have a look at that, please?

So these are really your notes, are they, Mr Thomas?---Yes.

And what you're after, Mr Bosscher, is to know what Mr Thomas meant when he wrote "Destroy files" down there?

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MR BOSSCHER: Yes.

COMMISSIONER: Yes, and what that's meant to convey presumably to him will be influenced by various sources. So you're asking whether "Destroy files" was an instruction or how it came to be put on this piece of paper, exhibit 126.

MR BOSSCHER: Yes, and I think he has answered my question in that the outcome being sought by Ms Matchett, as I understand Mr Thomas's evidence - and he can correct me - was that she was keen that the documents not get to Mr Coyne and that one of the mechanisms that may be available at law was their destruction and she was seeking advice on that particular issue.

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Is that as I understood what you said to us a moment ago? ---Yes. This was very much a preliminary, I suppose, exploration of the issue where it was clear I was going to go away, do some research and she would get an opinion from the crown solicitor on what was the lawful process of dealing with the situation.

So what she wanted was clear, but as to whether or not she could have it or the method by which she could have it needed to be explored by you to make sure it accorded with law?---Yes.

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In that meeting, did she express to you a reason why she was keen that Mr Coyne not get possession of that documentation?---The complaints were about his overbearing

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nature and if he identified the complainants, then there might be - further problems for those complainants seemed to be the issue, what might now be called reprisals.

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Thank you.

COMMISSIONER: You know the indemnity for Mr Heiner?
---Yes.

Who would actually indemnify him and against what at this point in time?---There was very minimal chance in any realistic sense of anything happening, but he had raised it and could I indemnify him against his legal costs should someone have launched an action against him. The chances that any action would've been successful was, I think, negligible.

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The action would be what?---Defamation was one of the issues raised by the crown solicitor. I didn't think that was realistic at that time because he hadn't done anything.

He hadn't put pen to paper?---He'd gathered information but - - -

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That's right, he hadn't put pen to paper so he wasn't really publishing defamatory material?---Correct.

And at that stage defamation would have been governed by the Criminal Code?---The Criminal Code.

So that seems to have been a trigger. Tell me if I'm getting things wrong here, but he goes to the department just as he is about to write his report and says, "Well, hang on, if I say something in my report that impugns somebody's character, then if I repeat it, I might be liable and if I use it to make a finding, I might be liable to something and I better get some indemnity against it"?
---Yes.

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MR COPLEY: Well, Mr Commissioner, can I just remind you of the evidence? 1

COMMISSIONER: Yes.

MR COPLEY: It would appear that he didn't go to the department in that sense, in the sense that he initiated discussions about the issue.

COMMISSIONER: With?

MR COPLEY: With anyone. There's no evidence that he initiated discussions. The material - - - 10

COMMISSIONER: No. Tait is a result of - - -

MR COPLEY: Yes, the evidence we've tendered in the form of the documents is that he was instructed to present himself to Ms Matchett for a discussion because she wasn't clear on what basis he'd been asking for certain information. He then replied in the letter saying, "Well, this was the basis upon which I was asking. There's no problem. Forget about it. If there's nothing else to discuss I don't see any need to meet with you." 20

COMMISSIONER: But by this time she was wanting to discuss things with him.

MR COPLEY: That's right. And that's why Trevor Walsh made the file note that he advised Jan Cosgrove that, "No, Ms Matchett does have things to discuss with Mr Heiner so we'd like him to attend." And we say - - -

COMMISSIONER: Yes. And where was Mr Heiner's inquiry at, exactly, at this point? What had happened? What was yet to be done? 30

MR COPLEY: Well, other documents would suggest that he had finished the process of speaking with and interviewing people.

COMMISSIONER: So the investigative processes were finished.

MR COPLEY: His reporting process had either commenced in the privacy of his own study or office; or he was about to commence the reporting process, one assumes. 40

COMMISSIONER: Is there any evidence of any draft report or working notes that, you know, starts paragraph 1?

MR COPLEY: No. We haven't tendered any. I've not seen any in the material I've subpoenaed.

COMMISSIONER: All right.

MR COPLEY: And so Mr Heiner then wrote a letter to Ms Matchett - - - 1

COMMISSIONER: Yes.

MR COPLEY: - - - dated 19 January 1990 which Walsh testified he saw and initialled at about 11.20 or 11.30 on that morning of 19 January 1990. That appears to set out in writing, at least, Mr Heiner's concerns about matters.

COMMISSIONER: Just remind me, from what the evidence - what do you say the evidence suggests or what inferences would they support that Mr Heiner - what sort of inquiry did Mr Heiner think at this time he was conducting? 10

MR COPLEY: Well, I'd rather go to the document that Mr Heiner wrote to start with.

COMMISSIONER: Righto. Sorry, Mr Thomas, I just want to contextualise, bring myself up to - - -?---I understand.

MR COPLEY: It doesn't hurt for everyone to remind themselves of these things, perhaps. As we go. If you, Mr Commissioner, look at exhibit 123 and if you look at the attachment, which is Mr Heiner's letter to Ms Matchett, it is dated 19 January. It was received by Walsh at 11.30. 20

COMMISSIONER: Yes.

MR COPLEY: And that sets out in the first paragraph that his letter of appointment from Mr Pettigrew and his terms of reference authorised him to investigate and report to the minister and the director-general on the eight matters in the annexure. But he said he perceived the inquiry was really encompassed by the first of the eight, namely the validity of the complaints from staff members. He then said he believed the other seven matters were - and I'm paraphrasing - subsumed in that. He then in the next big paragraph thought that he actually had cabinet approval to do this, that he proceeded throughout on that basis. 30

COMMISSIONER: Sorry, can I just interrupt you. That's an assumption that he's made because Pettigrew appointed him, presumably.

MR COPLEY: Well, we don't know - - -

COMMISSIONER: Why. 40

MR COPLEY: - - - why he made that assumption.

COMMISSIONER: No. Why would cabinet be - - -

MR COPLEY: The possibility is that Mr Pettigrew told him or told him that Ms Nelson had mentioned it to cabinet or had discussed it with the cabinet or had informed the

cabinet of it. He may have said no more than that.
Mr Heiner may then have drawn certain inferences from that.

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COMMISSIONER: And Ms Nelson was saying the sort of inquiry she was envisaging was a ministerial inquiry.

MR COPLEY: That was her expression.

COMMISSIONER: And the unionists were saying that the one they were envisaging was a broad-based systems inquiry.

MR COPLEY: Well, they didn't like the word inquiry, Walker said.

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COMMISSIONER: No.

MR COPLEY: She said - - -

COMMISSIONER: It was overstating it.

MR COPLEY: - - - a review or an investigation.

COMMISSIONER: Yes.

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MR COPLEY: But that's all - - -

COMMISSIONER: Of management.

MR COPLEY: Yes.

COMMISSIONER: Okay.

MR COPLEY: But then you'll - - -

COMMISSIONER: Yes. Right, so he's had a conversation with Ms Matchett then that's triggered some concerns about his legality.

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MR COPLEY: And then you'll see in the last paragraph that he says that:

There's been reference to legal proceedings being taken as a result of my inquiries. I believe if there is any legal action the department should take action to indemnify all my actions to date.

COMMISSIONER: But at this point was defamation the action that was around, or was it natural justice requirements being enforced?

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MR COPLEY: Well, the answer to that is clear, that there had been an intimation - clear intimation from Mr Berry that if Ms Matchett did not take steps to ensure that Mr Heiner accorded his clients the degree of natural justice that Mr Berry what they were entitled to, Mr Berry

could take - and he asserted would be likely to succeed in obtaining a writ of prohibition. It's clear that action had been - in the looser sense of the word - threatened. But I have not tendered any document before you that contains a threat about defamation in the looser sense of the word. You will recall Mr - - - 1

COMMISSIONER: So can you just tell me when Mr Heiner started talking about indemnification, what sort of legal action at that point had been mentioned by anyone?

MR COPLEY: Well, exhibit 117 obtaining a writ of prohibition. 10

COMMISSIONER: Yes. Was this pre-Judicial Review Act?

MR COPLEY: Yes. That wasn't past two 1991.

COMMISSIONER: Right.

MR COPLEY: Or 2 - 1. So it was prior to that.

COMMISSIONER: So he would have had a writ of prohibition around - - - 20

MR COPLEY: Mr Coyne had written letters, as you know, in access to this material himself. Whether that would have raised in the mind of anyone the possibility that Mr Coyne might have taken a step to obtain something in the nature of - - -

COMMISSIONER: But he was wanting it for natural justice, wasn't it? He was saying, "Tell me what people are saying about me."

MR COPLEY: Yes, yes. But you've asked me what legal action might have been in the wings. 30

COMMISSIONER: But has anyone mentioned the D word at this stage?

MR COPLEY: I've tendered no material before you can say that they have; I've seen no material to say that they've had; I don't recall there being any evidence from Mr Coyne that he'd ever said that. I'm just going to assist you by saying the repeated demands from Mr Coyne to see this material and praying in aid various regulations made pursuant to a statute could have given rise in the mind of a lawyer to the possibility that: well, could this man seek something in the nature of a mandatory injunction or something of that nature, to have the documents handed over to him? 40

I'm only speculating now, but it seems to me that that perhaps covers the whole ambit of what was realistically, from the material, possible at that time Mr Heiner was speaking about taking action to indemnify him.

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COMMISSIONER: So you would say it was on the basis of material, but at the moment Mr Heiner wanting, expecting, needing indemnity against defamation proceedings is drawing a long bow - too long a bow.

MR COPLEY: Well, I'm saying to you that Mr Heiner is dead.

10

COMMISSIONER: Yes.

MR COPLEY: And so we can't know - - -

COMMISSIONER: No.

MR COPLEY: - - - what he's referring to really in this letter.

COMMISSIONER: No, but what would be inference be? What would the probable inference be based on the material that we've got, do you say?

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MR COPLEY: That would depend upon whether you're a lawyer or not a lawyer.

COMMISSIONER: What was Mr Heiner?

MR COPLEY: Yes, but he - if we're wondering what did this induce - - -

COMMISSIONER: No, I mean seriously, he was a magistrate, but was he a lawyer?

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MR COPLEY: Yes, I can - if it needs to be established I can tender material that would show that he had been admitted as a solicitor in 1965 or 6, I think from memory. So he was - unlike a lot of magistrates at that time - an admitted practitioner. But the issue I'm positing back to you is it's all very well to speculate about what was in Mr Heiner's mind, but what would what he wrote have engendered in the minds of the reader of that letter?

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Now, that might depend upon whether you were a lawyer who had access to all the material that had been written about this or whether you were a non-lawyer but who was familiar with all the material. It might raise different possibilities depending upon your level of knowledge of the law.

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COMMISSIONER: Who was the first one to mention defamation in all of this?

MR COPLEY: It appears it came from the department?---In Mr O'Shea's letters the week that I got involved he speculated about defamation.

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COMMISSIONER: Okay, so did he talk to you about why he thought defamation - what was it that - - -?---I think it was just that simple - people have made complaints.

Yes?---If somebody is upset that's, you know, the first - "I'll sue you. You said something nasty about me." There was no disclosure of there's been some discussion or a threat of defamation from anyone, it was more an insurance policy for what might happen.

20

When you were giving your advice were you thinking about the report and natural justice requirements or was that not a consideration of yours?---It was, I think, very clear from the point I got involved that no report was ever going to get done.

So - - -?---So no, that was stopping all those natural justice considerations and isolating and quarantining that information.

What would it do to defamation considerations?---Well, I didn't think it was a real possibility and I think I said that in my first memorandum, but that may be no comfort to Mr Heiner.

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MR COPLEY: Can I just direct your attention to exhibit 117?

COMMISSIONER: Yes.

MR COPLEY: 113, sorry. I've called it 117. It's the letter from Mr Berry of 17 January, 113, and in particular the last two paragraphs on the first page of the letter.

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COMMISSIONER: I've just read that, because I had 117.

MR COPLEY: On which you made an order would not be published.

COMMISSIONER: No, so I won't read it out. Thank you.

MR COPLEY: But everyone here has got a copy. 1

COMMISSIONER: Yes, all right. Thanks, Mr Copley. All right, now, sorry, Mr Thomas, I - Mr Bosscher, I interrupted you.

MR BOSSCHER: Just to add to the conversation, you raised, commissioner, if - and I'll be guided by Mr Copley in relation to the chronology, but another issue arises fairly shortly into this activity in relation to regulation 65 of the PSM and E, as it was colloquially referred to in the day, and that was a person's right to access documentation - - - 10

COMMISSIONER: On a file.

MR BOSSCHER: - - - on a file, and then there is some dispute as to whether that needs to be on a personal file relevant to the individual or whether simply on a file within the department.

COMMISSIONER: Or whether the act knew that the department would have parallel files. 20

MR BOSSCHER: Yes, and there's some notes and we will probably come to them through my cross-examination of the potential of separate files and whether that's acceptable, et cetera.

COMMISSIONER: Yes, okay.

MR BOSSCHER: But going back to my basic premise that gave rise to that conversation, the outcome sought, just to clarify, from Ms Matchett, was that Mr Coyne not get possession of the documents and one of the areas for your consideration was whether or not they could lawfully be destroyed?---Yes. 30

As a result of that meeting that I just took you to, you created a fairly lengthy memorandum to the crown solicitor. That's exhibit 128. If the witness may see that, please, Mr Commissioner. Could I also ask the witness be shown exhibit 113 simultaneous to this, because my questions will refer to both documents.

If you just start, please, Mr Thomas, with exhibit 113. That's a letter that's been sent to the director-general of families from Rose Berry Jensen Solicitors and it's dated 17 January of 1990. Just for your information, because you may not be aware, and to ensure we don't offend the commissioner's orders, on page 1 at the bottom there are two paragraphs. There's been an order that they not be published so in answering my questions if you could just make sure you don't refer to those at all?---Certainly. 40

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MR COPLEY: Or if he needs to, he could refer to the matters contained in those paragraphs in that formula of words.

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COMMISSIONER: Yes.

MR COPLEY: If he needs to answer the question by reference to those paragraphs he should be permitted to do so.

COMMISSIONER: Yes, and then we can join the dots from there.

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MR BOSSCHER: Yes. I don't think we'll go there but I just wanted to be careful, because Mr Thomas wouldn't have been aware of your order, I'm sure, commissioner.

Mr Thomas, this particular letter dated 17 January of 1990, as I understood your evidence yesterday, this was one of the documents that you had seen before your meeting with Ms Matchett?---I don't know that I'd seen it before the meeting but I think I saw it - the only thing I recall seeing before the meeting was Mr O'Shea's letter, because it literally all happened in fairly quick succession. I was called to his office on the Monday morning, he briefed me, he showed me the advice and then I think I just walked to the meeting. I didn't have time to look at a lot of things.

20

Well, then just to clarify, this particular letter you did see at some point in time?---Yes. I think I'd seen it perhaps by the time I wrote the memorandum, not necessarily by the time I saw Ms Matchett.

This particular letter outlines effectively the issues that Mr Berry on behalf of Ms Dutney and Mr Coyne had with what had been going on in relation to Heiner?---Yes.

30

On page 2 of that letter he'd asked for, at the bottom of the page with the paragraph marked (b), "All specific allegations relating to our clients be particularised as to time and place and action of the words alleged"?---He did.

Then paragraph (c), "Allow for them or either of them to have copies of all allegations and evidence taken to date, including copies of the tapes used in recording the evidence"?---That's so.

40

So it was very clear at the time that - or certainly once you had read this letter it would have been very clear to you at that time that the information being sought by Mr Coyne and Ms Dutney included what Mr Heiner had done up until that point in time?---Yes.

Not just limited to allegations that may have been made but everything that had occurred - or, sorry, all interactions that had occurred between Mr Heiner and others as part of his inquiry to that point in time?---Yes, as they impacted on either of the people. 1

In the memorandum, taking you now to exhibit 128, the bottom second-last - probably a better way to put it, the paragraph that starts, "I was informed that Mr Heiner did not." Do you see that paragraph?---Yes.

The last sentence of that paragraph states, "He intended to make findings of fact but no recommendations in his report"?---Yes. 10

Following on from some evidence yesterday, you informed us that that, from your discussions with Ms Matchett, was not what was contemplated certainly in her mind as to what Mr Heiner was supposed to do?---Yes.

That somewhere the expectation of what Mr Heiner was supposed to do and what he thought he was supposed to do had diverged significantly?---Yes. He'd taken a very narrow view of, I suppose, investigating complaints rather than a systemic view of what the problems at the centre - that these may be some symptoms of. 20

So that was information given to you by Ms Matchett?---The effect of it, yes.

Yes, and the issue was that he was effectively trawling through complaints against management and particular the manager?---Yes.

As opposed to looking at overall issues of improving the management and the facility?---Yes, that's a good summary. 30

And that was conveyed to you by Ms Matchett and that is effectively what you have contained in this memorandum to Mr O'Shea?---Yes.

When you write that particular sentence that I'm referring you to, he intended to make findings of fact but no recommendations in his report. Do I understand that to mean that Ms Matchett informed you that Mr Heiner was going to make findings of factual matters about the complaints that he was investigating?---That's as I understood it, yes. 40

But no recommendations in relation to what should occur to improve the management of the centre et cetera?---Very much so.

And that regardless of what his terms of reference were, Ms Matchett informed you that he was really conducting an investigation into Peter Coyne and his management style?
---Yes, I think that's reasonably accurate.

1

Now, Ms Matchett also informed you that it was her understanding that Mr Heiner - firstly, he hadn't produced a report at that stage?---No.

That was clear because none had been delivered to the department?---That's as I understood it, yes.

10

Yes, but Ms Matchett also informed you that he hadn't commenced the reporting process at that time?---I have no memory either way whether there was talk about, you know, whether it was two-thirds written or anything like that. I don't know that it was touched on. Just no report has been done.

Now, the bundle of material that constituted Mr Heiner's work to date - did you ever access that or look at that?
---No.

So you're unable to assist us if that material contained a draft report at all, for example?---No, I was told it had been handed over in a sealed envelope - - -

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You actually say that - sorry, I don't mean to interrupt you, sir?---I never even saw the envelope.

Now, if I can just take you to the bottom of page 3 of that particular memorandum to Mr O'Shea, the last sentence reads:

Naturally, as some of the material that Mr Heiner has received is of a defamatory nature, he is concerned about his legal position and I think it is most reasonable that an approach be made to cabinet by the acting director-general that an indemnity for any legal costs, et cetera, be extended to Mr Heiner?

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---Yes.

Now, you didn't speak to Mr Heiner directly in relation to this matter?---No.

So the expression of Mr Heiner's concern was part of the instructions that were given to you by Ms Matchett?---Yes.

40

And the statement there of fact "as some of the material that Mr Heiner has received is of a defamatory nature" - that's not something you have exercised an independent legal judgment on?---No, I think it probably could've been better expressed. Later down the page I say "may well contain defamatory matter". It was linking to that - - -

Again, the information that you had so far as that was concerned would have come through Ms Matchett?---Yes, that it was all criticism of Mr Coyne and his management style.

1

Again, sir, just taking you further down this particular document through page 4, the second paragraph deals with how the material or the documentation collected by Mr Heiner could be dealt with?---Yes.

About halfway through the paragraph a sentence commences as follows:

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As no legal action has been commenced concerning those documents, I believe the safest course would be the immediate destruction of those documents to ensure confidentiality.

And then the paragraph goes on?---Yes.

I suppose the obvious question the safest course for whom? ---For everybody; that there wasn't to be a report, therefore - the only reason that the documents were brought into existence was to generate a report so they weren't needed. They contained material that might infer - criticise Mr Coyne's professional skills. They hadn't been tested. They hadn't been judged by anyone. They shouldn't continue to poison the well in relation to his reputation. The people who had given the information had done it in good faith. There were concerns that, given, as I understood it, Mr Coyne's overbearing nature, people were concerned about reprisals. They were documents that the longer they waited around, the more chance that disclosures would occur and people would be harmed in their reputation or by reprisal or by anything else.

20

Now, at the time that you gave this particular advice or the memorandum to Mr O'Shea for consideration, did you have in your mind or did you contemplate at that time the regulation 65 of the PSM and E Act that we spoke about earlier?---I was aware of that from, I suppose, my general experience in the public service. I knew that if the documents remained or became public service documents that he would be entitled to see them. I didn't think they were.

30

No, that was your view at that time?---Yes.

That view was not one ultimately shared - well, let me ask you this question: is it fair to say that that view was not one ultimately shared by Mr Dunphy and Mr O'Shea? ---Yes, I think the problem is as time goes on it becomes difficult or more difficult to disentangle what's happening with a document that you hang onto which is why I wanted it all done quickly because things cascade into each other. The longer you keep it, the more arguments there are about what it's become.

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That is probably fair comment that that can occur, but if the documents were ones that were subject to regulation 65 of the PSM and E, they were - just assume that's a fact. Nobody can be sure about that.

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MR COPLEY: Sorry to interrupt. Would it be perhaps better for the witness to have a copy of these regulations that he's now being questioned about?

MR BOSSCHER: I'm happy with that.

COMMISSIONER: Sure, yes.

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MR COPLEY: Thank you. All of the regulations are in this folder that's about to handed to you and it's opened on the page for regulation 65.

COMMISSIONER: Just for those who don't have a copy of the regulations, can we just read out what the regulation is so that - - -?---"Access - - -"

- - - they can follow the evidence?---Sorry, Mr Commissioner, "Access to officers' file", 65(1):

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At a time and place convenient to the department an officer shall be permitted to peruse any departmental file or record held on the officer.

Subsection (2):

The officer shall not be entitled to remove from that file any record or paper contained in it but shall be entitled to obtain a copy of it.

Thank you. Yes, Mr Bosscher, thank you.

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MR BOSSCHER: Thank you, commissioner.

Without the ultimate intervention of a judicial officer to rule on this particular matter - and, as you would know, intelligent minds can disagree on what the interpretation of a particular regulation or provision of an act may be, but the question I'm proposing to you is that if the relevant documents did fall under regulation 65 - and just assume for the sake of my question that they did - they had that characteristic as at the time you wrote this particular advice, didn't they?---Any document that fell within the category of being a file or record, the officer could have seen. The real question was whether they would have filed a record, yes.

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Yes. And your view was - and you've expressed it not only in the exhibit I'm taking you to - sorry, in your evidence, but in another exhibit, your view was that that particular regulation did not apply?---Yes.

1

And that the Heiner documents did not fall under regulation 65 of the PSM and E?---Yes.

But a contrary view was held by other members of Crown Law including the Crown solicitor?---At a later stage, yes.

Yes, at a later stage. I accept that. It's not an issue that they had considered prior to that time, was it?---I don't know.

10

And to go back to my original question, was it something that exercised your mind, that particular regulation, at the time you wrote this advice; or was it not till a later point in time that it became apparent that it may be relevant?---It would have been apparent, I think, at any stage when you're talking about a public servant wanting a file, that yes, they have access to things on their file or records about them. Perhaps there's an unstated subtext whenever you're dealing with a public service issue.

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One of the pieces of advice you gave to Mr O'Shea in your memorandum is contained the third paragraph up from the bottom of page 4. You advise him about halfway down the paragraph:

Further, I believe the solicitors should be advised that the inquiry has been terminated and the material collected at the inquiry has been destroyed?

---Yes.

30

You then propose another alternative to Mr O'Shea as follows in the next paragraph:

Another option would be for the solicitors to be advised that the inquiry has been terminated and the material will be destroyed within a limited time.

So that is an alternative to the immediate destruction of the documentation?---Yes.

The purpose of following that course would be to enable the solicitors to exercise whatever legal avenues they had for access to the documents?---That would be one of the things they could do, or let them make further submissions, or whatever, to give other people an input into the situation.

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You then go on to say in that paragraph that you did not favour such a course because it could only generate further problems in an already confused situation?---Yes.

What are you referring to there by way of problems?---As I said before, as time goes on things cascade. You don't know what goes where. The original complainants might then get concerned that this material was being preserved and it may get disclosed and generate industrial issues. There was talk of strikes. And this is all in a centre that's there to look after challenging youth. I couldn't predict what would happen, but the longer it went, to me, the worse it would become.

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But clearly when you wrote that in your mind it was apparent that - well, firstly you were aware of the fact that Mr Coyne and Ms Dutney wanted copies of documentation?---They wanted the opportunity for natural justice in that inquiry.

10

But it was very specific in that letter that I referred you to, Exhibit 113, that they required copies of everything that Mr Heiner had done?

MR COPLEY: Well, in my submission the letter speaks for itself that what they were after was Ms Matchett giving a direction to Mr Heiner that the inquiry needed to be conducted a certain way.

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COMMISSIONER: Yes. That's as much as we know.

MR: (indistinct).

COMMISSIONER: All we've got is a letter. We don't know whether there were any discussions or anything like that. That might have qualified it, but that's all we've got, is the letter.

MR BOSSCHER: That's right. I'll come back to it this way: Mr Thomas, given you've proposed the alternative option there even though you don't favour it?---Yes.

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It will be the case that by proposing that and also recognising the problems that may flow from its adoption - - -?---Yes.

- - - that in your mind when you wrote it that there may be some legal avenues available to Mr Coyne and Ms Dutney to access the Heiner material?---I was trying to be fair to everybody and raise for consideration what could do it. I wasn't so much thinking about what would end up in a court because I didn't think that likely. But giving people the opportunity to have input into it was one of the considerations. I suppose there's a reason why grievances are supposed to be settled in one to two weeks; they just have other things add to them and it all gets confused and difficult to disentangle. So I raised it because I thought people needed to think about it before they make the decision. My attitude is finish it quickly and cleanly.

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Okay, we'll come back to that in a moment, if we may. I just ask that those two documents remain with the witness for the time being. I'll then also ask that exhibit 129, please, be given to Mr Thomas. Do you have that, sir?
---Yes.

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That's the letter that Mr O'Shea sent to Ms Matchett - - -?
---Yes.

- - - effectively - well, it was drafted by you, as I recall of your evidence?---Yes.

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And it is the next step in the process of the conferences that you'd held, the memorandum of advice given to Mr O'Shea, the discussions that you've had, and now it's condensed into your letter of advice to your client, department?---That's so.

Now, the advice that you give in relation to the destruction of the documentation is predicated very clearly on the fact that no legal action was on foot?---Yes.

And of course I assume from that - and please correct me if I'm wrong - that had an actual writ been served, the advice that she would have given would be different?---Yes.

20

That once matters were formally on foot the destruction of any evidentiary material that may relate to those matters had to be preserved?---Indeed.

And you draw a significant differentiation between the potential of a threatened legal action and a commenced legal action?---Yes. Threats of legal action are the language of the adversary system; people are always saying, "I'll sue."

30

Yes. But that in your mind was not sufficient or significant enough to require the documents be retained?
---No.

And that only an actual writ - and I just use the term very loosely?---Yes.

- - - before the court, stamped and served - at least stamped - and advised to you, would require the documents be retained?---That's so.

MR COPLEY: May I interrupted say that it in my submission should be incumbent upon Mr Bosscher at some point out of fairness to this witness to suggest to the witness what legal action he has in mind when he speaks of the possibility of legal action, because the cross-examination so far seems to have focused on a right to see something under a public service regulation, so - - -

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COMMISSIONER: He might be confusing him. 1

MR COPLEY: Does one issue a writ to see something under a regulation? Does one have a legally enforceable right to see something under a regulation, and if he does, how would he go about commencing a process to enforce that right? I mean, these are matters that - the time has now come, in my submission, for this all not to be spoken of in the abstract about legal actions being commenced and people being denied legal actions for this, that and the other thing. The difficulty, of course, is that the man in whom this right, if there was one, inhered, does not have any interest in pursuing this matter with this witness or anybody else. 10

COMMISSIONER: You mean Mr Coyne.

MR COPLEY: I mean Mr Coyne, yes. So this matter is being pursued - - -

COMMISSIONER: Indirectly.

MR COPLEY: - - - indirectly, whether on behalf of Mr Coyne or for Mr Coyne's benefit now, who knows, but - - - 20

COMMISSIONER: Do we have - well, in Mr Berry's letters they talk about two forms of action, one in the District Court, one in the Supreme Court.

MR COPLEY: No, Mr Commissioner.

COMMISSIONER: No?

MR COPLEY: No, that was, in my submission, in the letter, in the memorandum Peers wrote to the director-general, saying Mr Coyne telephoned and spoke of this action and that action. 30

COMMISSIONER: Yes.

MR COPLEY: One being continued, the other being discontinued.

COMMISSIONER: It wasn't ever mentioned by Berry.

MR COPLEY: Not to my recollection, no. 40

COMMISSIONER: What did Berry say in his letter?

MR COPLEY: Well, at the moment can we forget about anything Mr Berry said beyond what he wrote in the letter of 17 January?

COMMISSIONER: Yes, that's the one I'm asking about.

MR COPLEY: Okay, well, Mr Berry said in the letter of 17 January that the principles of natural justice were well founded, that it was his opinion that they would be able to persuade a court to intervene on a writ of prohibition to injunct Mr Heiner from inquiring further until observance with the principles of natural justice, "However, that is costly and unnecessary if you recognise the correctness of our principles and I await your advice." So that's what Mr Berry was talking about 17 January. Mr Thomas is then drafting advices, he said, based upon an awareness of that and based upon an awareness of regulation 65.

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COMMISSIONER: I think you're right. I think we need to stop talking in vagaries and I think it's probably about time I had a chronology. Have we got one?

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MR COPLEY: I'm not in a position to hand you up a chronology in a typewritten format today.

COMMISSIONER: No, all right. It's just there's a lot of things starting to contract now and we need to make sure that we don't - - -

MR COPLEY: Well, I'm simply asserting at the moment that in fairness to this witness who is being asked about really the quality of his advice or the degree of thoughtfulness that he put into it, it really is incumbent upon Mr Bosscher to at some point in this examination or cross-examination or questioning of the witness put to him for consideration what legal action was in contemplation that he may have overlooked.

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COMMISSIONER: You suggested then there was some that were overlooked, Mr Bosscher?

MR BOSSCHER: That were overlooked?

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COMMISSIONER: Or will you when you - put it this way, what you've got to do is ask questions that will form a basis for a submission ultimately to me about what I should find, presumably.

MR BOSSCHER: Yes.

COMMISSIONER: In order for me to make any suggested findings I'll need the evidence, so if you're going to make a submission that something was overlooked or there was a legal action that was reasonably possible or in contemplation or should have been in contemplation, then I think Mr Copley is right, you really need to put it to the witness while he's here so that he can comment on it.

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MR BOSSCHER: I agree with you and I agree with Mr Copley, but I think he might be suffering from premature objection, because at the moment I'm only dealing with 23 January and

at this stage the only issue is that one that he's raised,
natural justice.

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COMMISSIONER: Yes.

MR BOSSCHER: Now, as you go through it chronologically
there is the issue then of the potential of a writ of
prohibition and there is also a question put - - -

COMMISSIONER: Well, don't - because Mr Thomas doesn't
necessarily know these things and doesn't want to - - -

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MR BOSSCHER: He does, commissioner. It's in all of the
material that Mr Copley took him to yesterday

COMMISSIONER: Yes, okay.

MR BOSSCHER: Then there is the contemplation of - - -

COMMISSIONER: Why don't you go through it chronologically
with him?

MR BOSSCHER: I am.

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MR COPLEY: The other thing that Mr Bosscher needs to bear
in mind is what Mr Thomas might have known down the track
cannot - - -

COMMISSIONER: Yes.

MR COPLEY: May or may not bear upon what he actually knew
when he wrote advices, and he might have only been asked to
write a certain number of advices.

COMMISSIONER: Yes, I know, that's why - Mr Thomas, can
you bear that in mind when you're answering the questions,
that - well, you know the tendency to backward math?---Yes.

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Just answer the question based on a statement of what you
would have had at the date that Mr Bosscher is going to
identify to you?---Yes, Mr Commissioner.

So that you don't get chronologically confused like I am.

MR BOSSCHER: If it reassures Mr Copley and Mr Thomas,
I've asked him whether or not that particular regulation
was in his mind at the time.

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COMMISSIONER: And of course he'd need to be asked - - -

MR BOSSCHER: He says, look, it's an undercurrent of just
about anything you deal with at the crown solicitor's
office at that particular time.

COMMISSIONER: All right, well, you just carry on, Mr Bosscher, and we'll deal with it ball by ball. 1

MR BOSSCHER: Yes, there is no other way to do it, commissioner, other than chronologically, which is what I'm endeavouring to do, as Mr Copley - - -

COMMISSIONER: Okay.

MR BOSSCHER: Now, when I've used a term with you "writ", I'm using that in its most generic form. We could replace that with the term "formal legal action", because as to whether it's a writ or some other action, there was nothing on foot at the time?---No. 10

At the time that you wrote this letter to Ms Matchett, which is 23 January, she had conveyed to you that it was her intention that the inquiry would not continue?---Yes.

Had that information at that stage been conveyed to the solicitors acting on behalf of Ms Dutney and Mr Coyne, to your knowledge?---No.

If the witness could give that exhibit back, please, Mr Commissioner, and I'd ask that he be given exhibit 133. 20

This again - do you have that in front of you, sir?---Not yet. Thank you.

This is a note that you made I assume during the course of a further meeting with Ms Matchett?---I suspect it was a phone call rather than a meeting. It may have been a meeting, I don't know.

Well, I'll rephrase that. During a conversation, whether it be face to face or over the phone with Ms Matchett? ---Yes. 30

It post-dates the exhibit that I just took you to, which was 129. It's the following date?---Yes.

I think by looking at it does that - at the very top, "R. Matchett." You have a number there. Is that a time before the date?---Yes, 9.30, 24/1/90.

Is it reasonable to assume it's in response to the letter of advice that you'd given her? Do you have any recollection of that now?---I honestly don't know. Things were faxed around then and I suspect that would have been faxed, but I don't - - - 40

I won't press that with you. About halfway down - well, just at the top you have POA there. That's Professional Officers Association, you said yesterday?---Yes.

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Things were hotting up?---Yes.

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"Staff very - - -"?---"Committed to going through."

"- - - committed to going through." So that is part of the conversation that - or information Ms Matchett is conveying to you?---Yes.

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There's a little bit of a break in the page and just under the top third, "Union want off-record - - -"?---"Discussion with Matchett and parties," I think that is. 1

Again that's information she has conveyed to you?---Yes.

It's not something you would have a knowledge of obviously? ---No.

You then again have the words "destruction of documents" and then underneath that "backlash from union"?---Yes. 10

Can you just elaborate whether - first of all, should those two dot points be read together?---There's a connection but I'm not certain they necessarily should be read together, as in I can't recall clearly at this stage whether the "backlash from union" is in relation to closing down that inquiry or about there would be a backlash if the documents were destroyed.

So you don't now have a recollection whether one followed from the other?---No; see, what you have is a line. There's "destruction of documents" and then "cabinet approved" and then underneath you have "backlash from union" so I'm not certain that they - - - 20

Then that particular line "destruction of documents" and then "cabinet approval" - was that here again expressing an intention as to the outcome or method to get to the outcome that she expressed to you in the first meeting or is that you providing some advice to her? If you can't recall, please feel free to say so?---There would've been no reason for me to suggest cabinet approval for destruction of documents.

It's always been your opinion, hasn't it, that that wasn't required?---Yes. 30

If that was always your opinion, then is it fair to suggest to you that she has raised the destruction of documents with you again and suggested that they're going to seek cabinet approval for that?---That seems a fair inference, yes.

Because it's not something you would suggest to them that was necessary?---No; no.

Putting it in its bluntest form, sir - and I don't mean to be crass or rude, but your legal view was that they could have picked those up and put them straight into a shredder then and there?---Yes. Well, my preference would have been to give it back to Mr Heiner. 40

Yes, but you saw no legal impediment for them being shredded immediately?---No - well, there was the Libraries and Archives Act.

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Your preferred codicil?---Yes. 1

Certainly no need for cabinet approval?---No.

COMMISSIONER: Sorry, were they public records, as far as you were concerned?---No, but there was that - I suppose there was the crown solicitor's involvement so it's a bit difficult sometimes to, as you say, backwards reason but, yes, as at 24 January the documents, in my opinion, could have been destroyed either by Mr Heiner or by the department if they had the consent of Mr Heiner as the owner of the property. 10

Then would the - - -?---Any archives issue wouldn't have arisen - - -

Wouldn't have arisen?--- - - - because they wouldn't have public records.

MR BOSSCHER: Not at that time. It becomes relevant later on because - - -

COMMISSIONER: Yes, I know, but we are just sticking to the date and moving forward. 20

MR BOSSCHER: I understand that, but, with respect, by asking that I think we might have jumped forward a little bit.

COMMISSIONER: Yes, I think Mr Thomas brought that in.

MR BOSSCHER: Yes.

COMMISSIONER: Out of order, yes.

MR BOSSCHER: Could I ask that be returned, please, and Mr Thomas be given exhibit 158 - apologies, that was the wrong exhibit; 153. 30

Do you have that, Mr Thomas?---Yes.

Now, we're jumping forward now a couple of weeks into mid-February. The letter there to Mr O'Shea from Ms Matchett is marked as received on 14 February?---Yes, by me.

By yourself?---Yes. 40

It contains a number of attachments or contains an attachment. Is that correct?---Yes.

And Ms Matchett is referring you to a letter received from Rose Berry Jensen Solicitors?---Yes, that's so.

That letter is dated 8 February?---Yes.

So you don't receive this until some six days after the letter was at least written or sent by the solicitors acting on behalf of Mr Coyne and Ms Dutney?---Yes. 1

And it's at this time that regulation 65 of the PSM and E becomes very much one of the relevant factors in the retention or destruction of these particular documents? ---Yes.

To your recollection, is that the first time that Rose Berry Jensen make a specific request pursuant to that regulation for the documentation?---I think so, yes. I don't think there were two many from the solicitors in the early time. 10

Now, as we discussed earlier, the first request for documents or information from Heiner really were tied up amongst a general stamping of the foot in relation to the issue of natural justice?---Yes.

It was squarely on that basis that the documents were being requested and certain things were asking to be done?---In relation to the Heiner inquiry. 20

Yes?---Yes, not generally.

The position clearly shifts as a result of this letter or the basis upon which the Heiner material is being sought is very different in this particular letter from Rose Berry and Jensen?---Yes.

It's abandoning the natural - maybe not abandoning it but not referring to the natural justice issue and it's clearly in relation to section 65 of the PSM and E?---Yes.

Could I ask that be returned and the witness be given exhibit 168, please? No, apologies, I have given you the wrong number again. My technology is letting me down. It should be exhibit 164. 30

Now, this is a letter dated 16 February which you were asked about this morning and in fact we had got to this point, from memory, yesterday in the evidence when we adjourned?---Yes.

This is a letter drafted, as I understand your evidence this morning, by yourself in part and also by others in part? ---Yes, that's so. 40

Certainly the first page, as you have informed us today, is your work predominantly?---That's so.

And the balance of the letter is effectively constructed by others?---That's as I recall it, yes.

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You've had the benefit of accessing a draft of that letter contained on the Crown Law file?---Yes. 1

As I read this letter - and please feel free to correct me if I'm wrong - the issue that was raised and that you were aware of on 14 February in relation to regulation 65 of the PSM and E isn't addressed in this particular advice. Would that be a fair comment?---Yes. I don't recall seeing that.

But the issue of the Libraries and Archives Act is addressed and the divergence of views between you and Mr O'Shea and Mr Dunphy - - -?---Yes. 10

- - - is reconciled from the Crown solicitor's point of view by the final advice on page 5?---That's so.

The absence of reference or consideration to regulation 65 of the PSM and E, was that discussed amongst the three of you in that compilation of this particular advice?---No, I don't believe it was. I think the focus was on whether the documents could be subpoenaed or discovered in that sense through a legal process.

And although you were aware of regulation 65, and in particular the specific requests for access to the material by Rose Berry and Jensen pursuant to that regulation, it wasn't deemed of significance so far as this advice was concerned?---This was a request from Cabinet about the process of discovery. 20

This particular advice, though, does provide the mechanisms that need to be gone through in relation to protecting the documents, for want of a better word. Do you agree with that?---Yes.

Because it does address the issue that Mr O'Shea raised with you sometime previously about the Libraries and Archives Act, and although he shared your initial view, that view changed?---Yes. 30

I'll ask you to hand that back and I'd ask the witness be given exhibit 191?---Thank you.

That's a letter addressed to you - sorry, it's addressed - - -?---To Ms Matchett from me.

- - - to Ms Matchett from yourself?---Yes. 40

This is dated in April of 1990?---Yes.

And it is dealing with, as I recall it, the original statements that were provided prior to the commencement of the Heiner inquiry?---Yes, that's the union wanting documents.

Yes?---Pettigrew.

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It's not relating to the Heiner material that Mr Heiner collected because that's already been shredded as I recall by this time?---Yes, I believe so, yes.

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In this you're dealing with the question of how to dispose of - for want of a better word - the originating documents that were provided through this union?---Yes.

In this particular advice on the second paragraph you address the issue squarely of regulation 65. You see that at the top of page 2?---Yes.

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And the position that you adopt there is that if those documents are retained they could be discoverable or should be made available pursuant to that regulation 65 to Mr Coyne, other than one particular document?---Yes.

And that's because they deal with Mr Coyne specifically?---Yes.

And clearly you - I don't think you had the actual documents but you had a summary of them, I think your evidence was?---Yes.

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But certainly enough information to know that those documents dealt with Mr Coyne and by virtue of that fact if they are returned to the department or retained by the department he would, pursuant to regulation 65, be able to gain access to them?---Yes.

You've had opportunity to go through your file, or the appeals and advocacy file in relation to this matter?---No, that was one of the issues.

Okay?---The appeals and advocacy file appears to have been amalgamated into the advisory file and there's a cover sheet on the appeals and advocacy file that I would have made notes on. So that's not available.

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Have you had access to the amalgamated file?---Yes.

I presume, given they've turned to files into one, it would be difficult now, given the subject matter, to know with any certainty what was your file and what was Mr O'Shea's file?---Yes. Obviously the advantage of my handwriting is when it's on something, I recognise it.

So far as your reading or perusal of that file is concerned, combined with your memory, are you able to answer this question: is this the first time that you have expressly dealt with regulation 65 of the PSM and E Act in your advice to anybody so far as this matter is concerned?--I think so. I think that issue probably got delayed by other things that were happening in relation to what was going to happen to the documents. So if they ended up on a

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file then it would have been disclosed because Cabinet held over decision and other things and it never became clear where they were going to end up. 1

Now, without trying to be unfair to you - and if needs be I'll try and dig up the relevant material that gives me this recollection - but there is a recollection that I have that it was considered or discussed that a separate file to hold these documents - or the Heiner documents - as opposed to placing them on Mr Coyne's file would not give them the type of characteristic that would protect them under regulation 65. Now, do you recall that? If you don't, please feel free to say so?---I think there was advice even earlier than the Heiner about something like that, that you can't create another file. It's a bit artificial to hold it across. 10

Yes.

COMMISSIONER: But you weren't asked to consider that in the context of advising Ms Matchett?---No.

MR BOSSCHER: Just to follow on from what you said, that it was your opinion in any event that trying to create an artificial file, for example, and putting these documents on them that related to Mr Coyne wouldn't prevent access to them through regulation 65 anyway?---No, they're a record. 20

Yes?---It doesn't matter what the title in front of it is, it's still a record.

Commissioner, do you intend to take a morning break?

COMMISSIONER: I don't know. It depends how long you think you're going to be. 30

MR BOSSCHER: I don't think I'll be much longer but I would appreciate the opportunity of a 10-minute break.

COMMISSIONER: You want to regroup?

MR BOSSCHER: Just to make sure I'm not missing anything and I don't want to have Mr Thomas recalled.

COMMISSIONER: Okay. How long do you think?

MR BOSSCHER: 10 minutes is sufficient. 40

COMMISSIONER: All right. We resume at 11.30 by that clock.

MR BOSSCHER: Thank you, Commissioner.

THE COMMISSION ADJOURNED AT 11.21 AM UNTIL 11.30 AM

THE COMMISSION RESUMED AT 11.34 AM

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COMMISSIONER: Yes, Mr Bosscher?

MR BOSSCHER: Thank you, commissioner.

Mr Thomas, I would ask you just to hand onto exhibit 164, but could I ask he also be shown, commissioner, please, exhibit 176?

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You have in front of you there now exhibit 176?---Yes, thank you.

This is a letter that you authored to Ms Matchett, as I understand it?---Yes.

And it's dated 26 February of 1990?---That's so.

The second paragraph says this, "It would appear that the matter cannot advance further from the department's point of view until cabinet makes a decision"?---Yes.

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What are you referring to there? What can't advance further?---I think that is the question of whether the documents were destroyed. If they weren't destroyed, then that might indicate where they would be and whether access had to be granted to them.

If you just follow down that to the second page, you prepare a draft reply there to Rose Berry and Jensen?---Yes.

I refer to your letter of 15 February and advise of Mr Walsh's recollection of the conversation. No statement," et cetera, "As advised in my letter of 16 February, the other matters are subject to ongoing consideration"?---Yes.

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Now, the other matters are the requests for the documents pursuant to regulation 65. Would that be right?---I take it that's what it is; connects back to whatever was raised in those particular letters which seems to be, as I recall, section 65.

As at 26 February, you were still aware, of course, that the Heiner material itself had not been destroyed?---I don't know that I was ever kept up to date with where things were with the course of decisions for destruction. I think it was adjourned a few times, but I take it from this that perhaps after talking to Ms Crook I knew that it was still with cabinet.

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Could I then ask you to go back, please, to exhibit 191? The witness could be given that document back?---Thank you.

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Now, just taking you to the bottom of the first page, this is your advice in relation to regulation 65?---Yes. 1

And in that you relate, as we have discussed, the fact that if the documents you're referring to in this letter - and they are the documents that specifically name Mr Coyne - - -?---Yes.

- - - are in existence, then regulation 65 applies because they name him?---Yes.

And you also there make reference to the fact that it would appear artificial to say they are not part of a departmental record held on him even though they are not in his personal file?---That's so. 10

The advice that you give there is very clear and very specific. Do you agree with that?---Yes.

So far as the Heiner material is concerned, given the evidence that we discussed earlier that Mrs Matchett had informed you of the fact that effectively Mr Heiner, in her mind, had gone off on a tangent and was investigating complaints against Peter Coyne and perhaps not what he should have been doing, is it a reasonable assumption or is it a reasonable proposition that the advice you give her here in relation to these documents is equally applicable to the material collected by Mr Heiner, given its subject matter?---No, because the material that Mr Heiner had created were his working papers. They were not something the department was holding. They were in the department's possession while they decided what needed to happen with them but not part of their records, if I can put it that way. 20

They were documents relating to Mr Coyne?---They were. 30

On your understanding certainly in the advices that you had given, they may contain matters that were defamatory or at least critical of Mr Coyne?---Yes.

After Mr Heiner handed them to Ms Matchett they were documents in the possession of the department?---In their possession, yes, but not their record or file. They were being held while people were trying to classify what they were. I had my view. Over time other people came to a different view. 40

Yes. So your view was they didn't form departmental records?---Yes.

But others formed the view that they did?---Yes.

If the latter view, the view that you disagree with, is correct, then your advice in this particular document would apply to those documents as well, wouldn't it?---Yes.

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And they were documents that Mr Coyne would have been entitled to pursuant to regulation 65?---If they remained on a departmental record or file.

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If they remained in the department's possession?---Yes, and I think that was the issue about - - -

Between you and others?---Yes.

So they didn't need to formally be attached to a file. So long as they belonged to the department, then the view of Mr O'Shea and Mr Dunphy was that they would, combined with your advice, of course, fall under regulation 65?---Yes.

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Could I now, please, ask the witness be given exhibit 200, but I would ask you to keep hold of 191 as well?

This is the last exhibit I want to ask you about, but this one is a letter that you have sent to Ms Matchett - - -? ---Yes.

- - - in May of 1990, noting her instructions and attaching some draft letters to what we will call interested parties so far as these documents are concerned?---That's so.

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In particular if you could work through that document - I don't have page numbers but there is a document entitled "Draft" dated 18 May 1990 to Messrs Rose Berry and Jensen and it only contains three paragraphs?---Yes.

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The draft letter is that in response to the request pursuant to regulation 65, the request cannot be complied with under that regulation because there are no such documents in existence?---Yes.

Now, I assume - - -

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MR COPLEY: Well, it doesn't say "in existence", it says "in its possession or control".

MR BOSSCHER: Were you aware at that time from Ms Matchett that those documents themselves had been destroyed? Had that occurred, to your knowledge?

MR COPLEY: Now, Mr Bosscher needs to be precise about which documents. Secondly, Mr Bosscher needs to bear in mind his knowledge, that if he's speaking about the complaints from the unions, the letters from union members complaining, Mr Bosscher knows that they have not in fact been destroyed because they're here.

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MR BOSSCHER: Well, they are here. I'll ask it this way, a different way. What was the basis for you being in the position to draft those responses in those terms, that the documents were not in the possession or control of the department?---The letter of 8 May. I can't remember the detail. Perhaps if I look at that that will provide me with whatever instructions I - - -

I don't have an exhibit number for that to hand, commissioner.

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MR COPLEY: It's exhibit 194.

MR BOSSCHER: Exhibit 198, my friend helpfully advises. Could that please be given to Mr Thomas?

COMMISSIONER: Sure?---Thank you.

MR BOSSCHER: I'm not sure that's the document that you're after?---In this - well, this letter refers to 8 May and in that it said, "I would prefer being fair to all concerned now that the inquiry has been discontinued to return these documents to the union officer who provided them, or at least invite that officer to receive the documents back. Staff could then be advised to - any continuing grievance they may have through the departmental process established pursuant to regulation 63," and then advises that the Heiner material was destroyed on 23 March.

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So on the basis - let's assume that was carried through, and I think the evidence agrees with this, that those documents were returned to the union. That's right?---Yes.

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That gives you the basis then to draft the response that we were looking at in exhibit 200?---In anticipation of them going back, yes.

The department no longer has possession of those documents? ---Yes.

Or the department has no documents in its possession that fall under that category?---That's so.

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At the time that the request was made back on 14 February of 1990 by Rose Berry and Jensen the department did have possession of documents of that type, did it not?---Yes, I would take they must have.

Consistent with the advice that you gave the department, those documents being in the department's - were they in the department's possession, were documents that Mr Coyne was entitled to pursuant to that regulation?---He had a right to examine them at a convenient time, yes.

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Yes, so you might be able to assist me here. Was it your view that by giving them to - or the department giving them to a third party; the union in this case, they no longer had them in their possession and at the time that the letter was written or sent clearly they're not documents that are disclosable if they don't have them?---Yes.

But that seems, with respect - and I don't mean to be critical, but that seems to be an artificial way of sidestepping a request that's been made for documents that were at the time the request was made in the department's possession.

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MR COPLEY: Now, my learned friend needs to bear in mind the terms of regulation 65, which is that an officer shall be permitted to peruse any departmental record held on the officer. So these nine letters are what we're talking about, and we forget about the word "file", because no-one here obviously wants to argue semantics about files.

COMMISSIONER: Are they held on - - -

MR COPLEY: Well, "Peruse any departmental record held on the officer." This is the premise that my learned friend's question proceeds on. It must do, because that's what regulation 65 says.

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COMMISSIONER: Sure. I suppose Mr Thomas needs to bear in mind the provision in answering the question. It's not just the question he needs to bear in mind. Ask again.

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MR BOSSCHER: I'll go back. I thought I'd covered this but I apologise if I haven't. Your advice to Ms Matchett was that if those documents were in the possession of the department regulation 65 applies and Mr Coyne would be entitled to them?

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---Yes.

When she asks you to provide that advice clearly the documents were in the possession of the department?

---That's so.

When they were requested by Messrs Rose Berry and Jensen back on 14 February they were also in the department's possession?

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---Yes.

So the chronology is a request is made pursuant to regulation 65 for some documentation, or access to some documentation. Correct?---That's so.

That documentation is in the possession of the department?

---Indeed.

Your advice to Ms Matchett is that it is documentation that the requestor is entitled to pursuant to regulation 65?

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---Yes.

If it is in the possession of the department?---That's so.

The mechanism arrived at to achieve Ms Matchett's outcome of not providing them to Mr Coyne was for the department to put them in the possession of another?---Yes.

My question was to you, is that not, with respect, an artificial way of avoiding regulation 65?---Well, it's a balance that Ms Matchett had to decide on. She was given the information by the union with conditions that they not be circulated widely, if I recall. There were concerns about what Mr Coyne would do with the information identified in the complaints. She, I suppose, initially had to decide whether she was going to keep them in the department record, with all that flowed from it, or there was a legal solution to that.

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COMMISSIONER: And one of the things that flowed from it was giving it to Mr Coyne?---Yes.

MR BOSSCHER: I won't go back over that, but as I understand that chronology, certainly until the time she handed them to the third party they were documents on your advice that fell under regulation 65?---Yes.

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Similarly, despite you having a different view, the view of the crown solicitor as to the nature of the Heiner material would also state that that material fell under regulation 65?---Yes.

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Thank you, commissioner.

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COMMISSIONER: Thanks, Mr Bosscher. Mr Copley, anything arising?

MR COPLEY: If you could just go back and look at exhibit 164, please. Now, this is the letter that Mr O'Shea wrote to Mr Tait - - -?---Thank you.

- - - that you were asked to contribute to, or that you made the contribution to?---Yes.

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And which you've conceded doesn't contain any reference to regulation 65?---Yes.

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At the time you were asked to contribute to the compilation of what is exhibit 164 were you aware of exhibit 158 and aware of exhibit 158 in the form in which it appears here, which is not just a letter, but a handwritten file note? I'll have it shown to you?---I don't recall seeing it. Now, Mr O'Shea of course, as we've established, is dead? ---Yes. 1

So I can't ask him this question. But would you agree with me that the letter from Tait was singularly unhelpful in terms of conveying to Mr O'Shea what Mr Tait really wanted advice about?---Yes, it's a very generic letter. 10

And either Tait either couldn't be bothered deigning to explain to the Crown solicitor what he wanted advice about particularly; or was too busy to do so; or for some reason decided it would be better to be conveyed through his subordinate, Mr Littleboy; but the letter to Mr O'Shea tells him that he can contact Ken Littleboy to get further information about the matter. And then Mr O'Shea rings Mr Littleboy and Mr Littleboy apparently tells Mr O'Shea that they want to know whether their possession - their mere possession of these documents would allow them to be regarded as cabinet documents and thus be secret?---Yes. 20

And that was, it would seem, the task that Mr O'Shea then had to - the issue Mr O'Shea then had to address in exhibit 164?---Yes, it talks about - nothing in the original letter, I think, even mentions the Heiner documents. It's about the official records of cabinet.

The only reference to the Heiner documents, I'd suggest, appears in the handwritten note that Mr O'Shea has got written on there, which appears to be information he's derived from Mr Littleboy?---Yes. 30

But you say that you do not have any recollection at the time you were asked to contribute to exhibit 164 of having seen either the letter itself and/or the letter with the handwritten notation on it?---It seems likely that I would have, to respond, but I don't recall this. And as I say, I can't reconcile those two things.

Okay?---Whether it was because Ken O'Shea told me or started this and then I started to add bits to it, but it was one of those letters that grew and morphed and did various things on the way through. 40

Okay. I have no further questions.

COMMISSIONER: Thank you. Mr Thomas, thanks very much for your evidence. Much appreciated?---Thank you.

You're formally excused from your summons?---Thank you.

WITNESS WITHDREW

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THOMAS, B.J. REXN

COMMISSIONER: Yes, Mr Woodford. 1

MR WOODFORD: Mr Commissioner, I call Wendy Anne Modini.

MODINI, WENDY ANNE affirmed:

ASSOCIATE: For recording purposes please state your full name and your occupation?---Wendy Anne Modini. Defence social worker.

COMMISSIONER: Good morning, Ms Modini. Welcome? 10
---Good morning.

Yes, Mr Woodford.

MR WOODFORD: Thank you, Mr Commissioner. May Mrs Modini see a three-page document that's been supplied to the commission under her name?---Yes.

Mrs Modini, you've had a document placed in front of you there. Hopefully it's a three-page document that carries your signature on the last page?---Yes.

That is the statement that you supplied this commission of inquiry?---Yes. 20

Now, your name, Modini; when you were working back in the late 80s was it Kropp, was it?---It was Kropp.

K-r-o-p-p?---That's right.

I have a few questions for you today about the John Oxley Youth Centre. From your statement do I understand that you were there for a few months between mid-1988 and late 1988? ---Yes. 30

You were employed as a social worker?---Yes.

We have heard in this inquiry about something called an investigation by Mr Heiner. Do I understand from your statement that you were not involved in that inquiry?---No, I wasn't.

And the statement that you have supplied to the commission that we've just referred to, that's the only document that you've ever supplied to any sort of inquiry or investigation in relation to the John Oxley Youth Centre? ---Yes, it is. 40

Thank you. The name Annette Harding; from your statement do I understand - and I'm on the last paragraph - that you have no personal recollection of that young person from the John Oxley Youth Centre?---No, I don't.

While you were giving your statement to the police were you shown a two-page document under the hand of a Mr Fremantle? ---They mentioned - referred to the document today and I've read it just before coming in to the commission today. 1

Terrific. Mr Commissioner, may the witness see exhibit 248, please?

COMMISSIONER: Sure.

MR WOODFORD: While that's coming over - it's a two-page report under the hand of Mark J Fremantle - - -?---Excuse me, there was a copy of that report behind my statement. I already have it here. 10

Okay. Just so we're sure you've got the right one we'll work off the exhibit?---Yes, I have it here.

So prior to coming into court today you've had an opportunity to familiarise yourself with that document? ---Yes, I have.

There are two specific areas of it that I want to draw your attention to and ask you some questions about. You'll see on the third paragraph of the first page of that document Mr Fremantle refers to having a telephone conversation with yourself in relation to a particular male detainee and he notes that he was seeking some extra information and support. Do you have any recollection of that conversation at all?---No, I don't. 20

Okay, thank you. Moving through the document, on the last page of it now, you'll note from the document that Mr Fremantle recites some information that he's received from a particular male detainee. And then on that third-last paragraph of the document he again refers to having some contact with yourself and Mr Peter Coyne in relation to the matter. Do you have any recollection of that at all?---No, I don't. 30

Do you have any recollection at all of having any part in any investigations or inquiries at the centre in relation to Annette Harding?---No, I don't.

Thank you very much. I don't have any further questions.

COMMISSIONER: Thank you. Mr Selfridge. 40

MR SELFRIDGE: I have no questions for this witness.

COMMISSIONER: Thank you. Mr Harris?

MR HARRIS: I have no questions, Commissioner.

MR BOSSCHER: Nothing, Commissioner.

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COMMISSIONER: Mr Woodford?

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MR WOODFORD: Mr Commissioner, may Mrs Modini be excused?

COMMISSIONER: Yes. Mrs Modini, thank you very much for coming, much appreciated. You're excused.

WITNESS WITHDREW

MR WOODFORD: I tender that document, the statement of Mrs Modini, and there's nothing in it that requires your attention in terms of publication, Mr Commissioner.

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COMMISSIONER: The statement will be exhibit 301 and I direct its publication.

ADMITTED AND MARKED: "EXHIBIT 301"

MR WOODFORD: Thank you.

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MODINI, W.A. XN

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COMMISSIONER: Yes, Mr Copley? 1

MR COPLEY: I call Suzanne Jane Crook.

CROOK, SUZANNE JANE affirmed:

ASSOCIATE: For recording purposes please state your full name and your occupation?---Suzanne Jane Crook; public servant.

Please be seated. 10

COMMISSIONER: Welcome, Ms Crook?---Thank you.

Yes, Mr Copley?

MR COPLEY: Could the witness be shown her statement, please?

Now, Ms Crook, could you just look through that document to confirm that it is a statement that you signed on 30 January 2013?---Yes, that's correct.

Thank you. I tender that statement. 20

COMMISSIONER: The statement will be exhibit 302.

ADMITTED AND MARKED: "EXHIBIT 302"

MR COPLEY: Ms Crook, in the statement you say that in 1989 to 1990 you were the principal industrial relations officer for the Department Family Services?---That's correct, yes.

And when you worked in the industrial relations section there, there were about three staff there besides you, I assume, or three including you?---Three including me with the - they were industrial relations practitioners. We did have some administrative support which we shared amongst the human resources area. 30

Well, in paragraph 7 of your statement you identify the three staff as including David Herbert and Ted Clarke? ---Yes.

And presumably yourself?---Yes.

And then there were the administrative support staff? ---That's right. 40

Now, were David Herbert and Ted Clarke subordinate to you? ---Yes, they were.

All right; and was one man subordinate to the other or were they co-equals?---As I recall, David - at that time David Herbert was subordinate to Ted.

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CROOK, S.J. XN

So you were in charge, then there was Ted Clarke, then David Herbert, then all the rest?---Yes, but both of whom reported directly to me.

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Yes?---Yes.

Yes, and to whom did you report in the department, say, prior to the election in 1989?---To the manager personnel services.

And that person's name was?---Maria O'Leary.

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And then after the election in January, February, March of 1990, do you recall whether it was still Ms O'Leary or Miss O'Leary or Mrs O'Leary that you were reporting to? ---Yes, it contained to be Ms O'Leary.

All right, thank you. Now, did you know Alan Pettigrew? ---I knew who he was but I never had any contact with him. I may have met him once.

What about Mr George Nix?---Yes, I knew George Nix. I had worked with George Nix quite early on in my career in the early eighties so I knew him when he came to the department, but didn't have a lot of contact with him.

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Do you remember when Mr Nix came to the department?---No, I don't, I'm sorry.

What about Ian Peers? Did you know him in early 1990? ---Yes, I did. I would have had some dealings with him.

Right?---It was part of my job to have dealings with all of the management in the department, depending on the issue.

Yes?---Yes.

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Now, I just want to see whether or not anything you have ever written in your life appears on this document so I will show you exhibit 70. I would like you to concentrate on the handwriting that appears in various places on it? ---Yes, that's my handwriting.

All right. Are you identifying your handwriting as occurring only in one place or more than one place?---No, more than one place.

Can we start at the top of the document and work our way down?---Yes, "David for necessary actions, Sue C," and the date is mine.

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Yes?---The "No change to existing practices required" and my signature is there and I signed that I had received the document to the right of that.

All right. Now, that is a letter dated 27 September 1989 to the director-general which bears the signature block of K.M. O'Shea?---Yes.

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And it may or may not have been signed by him, but it is some advice regarding where merit statements that were generated as a result of the process of interviewing applicants for public service positions might be stored, if at all, should those merit statements contain material adverse to the public servant. Do you agree in summary? ---Yes.

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You can check if it you want, but I'm just suggesting that's what it's about?---Yes, that's what it's about.

Now, the crown solicitor wrote this because he got a letter. He got a letter some time earlier from Mr Pettigrew and I just want to find out from you whether, thinking back about it now and looking at that document, you know why or how it came to be that Mr Pettigrew would have been seeking advice on that issue. The reason I posit the issue for you to consider is that you have written on it "David for necessary actions" which might tend to suggest that you either knew that the issue was a matter that the department wanted advice about or you were perhaps reflecting there that it was going to change procedures or something. Can you help us?---I can't be absolutely certain, but the fact that I have instructed David on that to work on the matter indicates to me that it was some work that he was doing on developing policies and procedures for both disciplinary processes and grievance-management processes. That was one of the roles that I had around about that time and there were questions raised about how documentation relating, for example, to recruitment and selection exercises and so on and so forth should be stored and part of that was not just in terms of how management stored it but in terms of fairness to an applicant that if material was stored on their personal file forever and a day, it was there potentially as, I suppose, a mark against them and - - -

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Or it could be used - - -?--- - - - you know, for future reference if, say, in a future selection exercise or future consideration. So where documentation was to be stored and should be stored and how was an issue in relation to those issues other than the general personnel records of a person.

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The Queensland public service had probably been in existence in some forum or another for about 130 years or thereabouts by 1989?---Yes.

Had there been something that had occurred that had caused some uncertainty about where things should be stored or kept?---Well, there was a new piece of public service - I

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mean, the Public Service Management and Employment Act I believe came in in 1988 and there was a move towards establishing public service management standards as well which applied to the whole of the public service and those departments were required to review and ensure that the policies were consistent with the standards. Now, I'm not sure when they came it but - I mean, we sort of anticipated some of that and started working on some of our policies, I do recall, before those standards came into place, but it was in anticipation of that happening.

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All right. So it could be as simple an explanation as there was a little bit of uncertainty around things over a legislative and regulatory regime in summary?---Yes; yes; yes. My position as well was a new position and there was, I guess, a renewed focus on some of those issues.

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Yes?---There had been a fairly ad hoc approach to it in the past.

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Thank you. Now, could you have a look at exhibit 84, please?---Sorry, thank you. 1

Just have a look through that document first, then I'll ask you some questions?---Yes.

Now, your name appears as one of the participants in a meeting on 17 November 1989, doesn't it?---Yes.

Do you know whether this document was a document typed up by someone in your department or your area or it was typed up by a person unknown? What's your feeling there?---It probably was from our area. We would produce a brief recording of those meetings. 10

All right?---That looks like the format that we would have used.

The first subject that was discussed was the feedback from the last meeting. Do you see that heading under 1?---Yes.

Right, and at the end of the document there's a heading Next Meeting 15 December 1989, 9.30, Level 5, Family Services Building?---Yes. 20

That tends to suggest, I would suggest, that this was simply one meeting of a number that occurred?---Yes, that's correct. We held monthly meetings and the purpose of those, you will see there that there are representatives from both the State Service Union and the POA but also the AWU.

Okay?---So they were joint meetings that we held on a monthly basis to discuss broader issues.

With those unionists and with members of the department? ---Yes, who were union delegates. 30

So in this particular meeting there was Sue Crook - you present, Edward Clark, David Herbert?---Yes.

All from the department?---Yes.

And then after that we see the names of people who, can I suggest to you, might have associated with various unions? ---The only name I don't recognise is D. Catt, but, yes, the others are all from the various unions. 40

All right, and in the minutes there under the heading 1, Feedback from Last Meeting, item 7 records, "John Oxley Youth Centre investigation has commenced"?---Yes.

So can I take it from that that at least as at 17 November 1989 you were aware that there was an investigation going on out at the John Oxley Centre?---Yes, and that's about all - that would have been all I knew.

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CROOK, S.J. XN

All right?---Yes, that there was an investigation. 1

You would also have known, according to the next paragraph, that the State Service Union had sought a copy of the terms of reference, but as at 17 September that document hadn't been supplied to the union?---Yes, that would have been what they advised us.

Thank you. Now, in your statement you state at paragraph 13 that you recall speaking with union delegates from JOYC such as Fred Feige and Brad Parfitt?---Yes. 10

You formed the view as a result of that that there was significant unrest out there and that the staff were divided into two camps?---Can I just stop you? I didn't form a view as a result of just speaking to Fred Feige and Brad Parfitt.

What else contributed to that view?---I formed the view generally - pardon?

What else contributed to that view then?---Well, we were in touch with management and a whole range of staff and employees on a regular basis, gathering information, receiving information, on issues that were happening. The unions themselves made contact with us over issues, but, I mean, our job was to, I guess, keep abreast of the sorts of things that were happening generally. 20

Yes?---So it came from a whole range of, I guess, sources, not just those two. Certainly they would have contributed, though, yes.

Bearing in mind that it was your job to keep abreast of issues out there, you state in the statement, paragraph 13, that no issues were raised with you regarding sexual abuse at John Oxley Youth Centre. Is that the case?---That's correct, yes. 30

Now, you then state that your first involvement, in paragraph 14, with anything to do with the Heiner inquiry was when the acting director-general Ruth Matchett contacted you or spoke with you or communicated with you concerning whether the inquiry had been properly established?---That's right.

Did you attend a meeting Ms Matchett had with Mr Heiner? ---Yes, I did. 40

That meeting, I'd suggest, was held on 19 January 1990? ---I'll have to take your word for that.

All right, but do you recall - - -?---It may have done, yes. I don't recall the exact date.

Well, recall it at least being - can you confirm it was in January 1990? If not, say so?--No, I can't. 1

Okay, thank you. Do you recall where the meeting occurred? ---In Ruth's office in the family services building on the 7th floor.

Do you recall whether the meeting occurred in the morning or the afternoon?---No, I don't recall.

Who else was present besides you, Ms Matchett and Mr Heiner?---To the best of my recollection nobody else was present. 10

Can you tell us what was discussed at the meeting?---In broad terms, Ruth raised concerns about the establishment of Mr Heiner's investigations and the validity of its establishment and consequential issues arising from that.

Your presence at that meeting was something that she had brought about by saying she wanted you to be present at the meeting, did she?---Yes.

How soon before the meeting or how long prior to the meeting had she said to you, "I want you to attend this meeting with Mr Heiner?---I don't recall. I have no idea. 20

Did she tell you before the meeting what the purpose of the meeting was or what the issues were that she wanted to explore with you?---I was possibly aware that there were issues - she did - I had some discussions with her I believe before that meeting took place.

Yes?---But beyond that - and she'd certainly raised her concerns about the appropriateness of how the inquiry had been established and so on and so forth. 30

All right. Well, did you say, "Look, Ruth, I'll make a few inquiries around the department with your predecessors to find out how it had been established"?---No, I didn't.

Is there any reason why you didn't say to her that you would do that?---Because her issues were about the legality of how they were established.

Yes?---She was aware - she was part of the senior management team that established the - that, you know, would have been discussing - well, that's what I assumed at the time. She'd been, you know, part of the senior management team prior to her appointment as a D-G. She was talking to me about the legality of those issues, so my advice was, "Well, get some advice from - get some legal advice on it." 40

So when you say that she was perhaps a part of the establishment of it, is that - - -?---Well, I don't know if she was a part of the establishment but she was part of the senior management team of the department when it was established.

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Right, okay, so therefore are you positively asserting she was involved in the establishment of it or are you saying that because she was a part of the senior management when it was established you assumed she had some knowledge about how it had been established?---The latter, yes.

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Did that assumption have any effect upon how active you got in terms of trying to work out why and how it had been established?---Possibly. I don't - I'm not sure. I don't know.

All right. If you can just cast your mind forward now to the actual meeting with Mr Heiner?---Yes.

Tell me again what was said by Ms Matchett and/or you and what was said by Mr Heiner in as much detail as you can? ---Well, I don't think I said anything.

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Right?---Ruth, to the best of my recollection, raised issues about the way the inquiry had been constituted and that there may not be protections for Mr Heiner by way of - that may have been afforded to him if it had been set up as a commission of inquiry.

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And how did Mr Heiner reacted that?---I think he was a bit 1
alarmed by it, actually.

Did he say something to - - -?---Well, he said, "I'm
certainly not" - his reaction was to say, "Well, I've been
acting in good faith" - I mean, I don't know whether they
were his exact words but my recollection was that he felt
he'd been acting in good faith, he'd been appropriately
appointed, and any necessary safeguards for him to do his
job were in place.

Yes. And what was her response to him saying that was his 10
belief?---I think she tried to sort of reassure him that
she wasn't trying to accuse him of doing anything wrong.
You know, I think he was a little bit anxious and thought
she was maybe trying to indicate to him that, you know,
he'd done the wrong thing. I really can't remember - - -

Did she say anything else or anything to him about the 20
position of the people that he'd been speaking with at all
or the people he'd been investigating?---Well, not
specifically about the people because she wouldn't have
known to the people were.

What do you say that?---Because to the best of my
recollection she wasn't aware of who'd been to have
discussions with Mr Heiner.

Okay?---So these were broad concerns in terms of the
validity of the inquiry. She did raise issues about, you
know, the potential - if there was any potential for
defamation if the material was, you know, made available to
third parties or more widely.

Right?---And she was concerned about that because people 30
would have gone to him also believing that their issues
would be treated confidentially and so on.

You say because that's what people would have done; did she
say, "Because people have gone to you believing it would be
treated confidentially," to Mr Heiner? Did she actually
say that or is that - - -?---I don't know, I can't recall.

Okay?---I'm not being difficult, I just can't.

I'm not suggesting your being difficult, I'm - - -?---Yes,
I just can't recall the words. 40

Well, was he invited to send a letter to her at all at the
meeting as a result of the discussion?---I don't know. I
can't recall.

Do you know if he did send a letter?---As a result of the
meeting?

Yes?---I know there was some correspondence subsequently. 1

Were you shown it? Were you ever shown a letter from Noel Heiner to Ms Matchett after that meeting?---I'm not sure if I was shown it at the time. I've been looking through the exhibits that have been presented here, so - - -

All right?---I think the other thing that came out that I guess was possibly material, but there was an agreement that he would not continue any further with whatever he was doing. 10

Okay. Now, how did that agreement come about? For example, whose idea - or who first raised the idea of him stopping?---I think it was him.

Yes?---Along the lines of, "Well, I'm not going to continue if this is the situation."

Right. Was there any discussion about the material that he gathered, if any?---There probably was. I can't recall exactly what was discussed.

All right. Anyway, your view was that Ms Matchett needed to get legal advice?---Yes. 20

Okay?---Yes.

Could you look at exhibit 123, please? Now, that's a letter to Mr O'Shea dated 19 January 1990 and it's signed by Ms Matchett, isn't it?---Yes.

Yes. Are and in that letter she refers to have discussions with Mr Heiner that morning and Mr Heiner having delivered an attached letter to her at 11.30. And in the letter Ms Matchett seeks Mr O'Shea's urgent advice, doesn't she, down the bottom?---Yes. 30

Did you draft that letter for Ms Matchett to sign? You probably won't - - -?---I don't know.

You don't know?---No, I don't know.

All right. Okay, thank you. We'll have that returned. Now, would you now have a look at exhibit 125, please. We've heard evidence that this is a document prepared by Sue Ball from the State Service Unions?---Yes. 40

And you'll see at the top that it purports to be a report regarding a meeting with Ms Matchett that was held later on 19 January 1990 at 3.30 at which Ms Matchett and you attended. You'll see the name of the other attendees there?---Yes.

And if you want to take a moment to peruse its contents to see the body of that document first before I ask you any questions; and the first question I'll be asking you is whether or not, having read that document, you recall even attending that meeting?---Okay. I do recall attending a meeting with those people.

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Okay?---Whether this is the meeting, I can't be absolutely certain.

All right?---Possibly was.

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The meeting that you recall attending, where was held?---In Ruth's office, I believe.

Which was where?---Family Services building.

What floor?---Seventh.

Now, the document says at the top of it that Ms Matchett indicated that she had caused the meeting to be convened because she was of the belief that the investigation by Mr Heiner was not properly constituted. Okay?---Yes.

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And it then says that you, Ms Crook, indicated that it was now believed by the department that Mr Pettigrew had in fact not had the power to establish the departmental inquiry, nor to appoint Mr Heiner to carry out the inquiry. Do you recall saying that?---No, I don't, and I wouldn't have been as unequivocal as that.

Right?---I may have made some reference that there were concerns but I certainly say in fact he didn't have the power because I wouldn't have known that at the time.

However, would you have believed at the time that the department didn't have the power to appoint Mr Heiner? ---Well, I don't know. I'm not quite sure of the sequence of events, whether we have received any legal advice by then.

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Okay?---If we'd received the legal advice would have formed some sort of view. Before that I wouldn't have been giving advice or an indication of a view because that's not the way I operate.

Well, having been aware since 17 November 1989, at least according to that earlier exhibit I showed you, that there was an investigation that was going to be conducted?---Yes, but that's all I knew.

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Yes?---I didn't know anything else about it.

Well, you didn't, for example, start from a standpoint in November that: I wonder how - by what authority they're doing his investigation; I wonder is it valid or lawful? You wouldn't have adopted that mindset towards the investigation, would you?---No.

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No?---No.

Because?---My mindset at that time was - it was really a sort of through the grapevine that we were informed. We were specifically - you know, the industrial relations area was - that there was an investigation into some issues at John Oxley.

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Yes?---And that was it.

Okay. So perhaps acknowledging that from a commonsense point of view when the government does something like set up an inquiry, a person in your position, down the rung, doesn't automatically start pondering about whether they can lawfully do it or not; if we work on that assumption? ---Yes, that's right.

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What occurred prior to this meeting that caused you allegedly to say that it was now believed by the department that there was no power to appoint Mr Heiner?---I didn't - I'm saying that I didn't necessarily say that. I wouldn't have stated something as unequivocally as that.

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I see?---I may have said that there were concerns about the validity of the - - -

All right?---But I wouldn't have expressed it in those terms, but one did happen - - -

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Can you just answer this question though?---Yes.

Where did you derive an understanding that there were at least concerns about it from?---From Ruth Matchett.

And did she tell you where she derived her concerns from? ---I don't recall whether she went into as much detail as that, other than that she had - she was aware that there may have been some problems with the way it was established and the - you know, the relevant safeguards around it.

Now, this note then says in the next paragraph:

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It was further indicated that certain management staff at JOYC had threatened legal action against the department as a result of the inquiry and this was also causing concern to Ms Matchett.

We heard evidence yesterday from Ms Ball that the person who indicated that was in fact not Ms Matchett but you. Now, can you comment on the proposition that that was information you conveyed to the meeting?---I would be very surprised if I'd said anything like that. I wouldn't be - if somebody's initiating legal action, I'm not going to be telling other people about it.

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All right?---It's just not - I would respect the confidentiality of those, I would have thought anyway, yes. I'd be very surprised if I - I mean, look, this is what, 25 years ago?

Are you trying to convey to me that you don't have a recollection of saying that?---I am, yes.

And it's not the type of thing that you think you would have said?---That's right.

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We can leave it at that?---Okay.

But what I then wanted to ask you was: thinking back on things, leaving aside whether you did or didn't say anything at a meeting like this, around the time that you met with Mr Heiner, had it come to your attention - had you

heard about any threats about legal action at all at around the time that you and Ms Matchett met with Heiner?---My recollection when we met with Mr Heiner is that we hadn't, but, as I say, the sequence of events is a little bit hazy so I couldn't - I couldn't swear to that one way or another. 1

The document goes on to say in the next paragraph, "Ms Crook indicated that the department was now seeking advice from Crown Law as to how to proceed"?---Yes.

Do you have a recollection of saying that at the meeting? ---No, but I may have said that. 10

All right, thank you. Now, the position is that you in fact attended a meeting with a gentleman from Crown Law, didn't you, in the company of Ms Matchett?---Yes.

A Mr Barry Thomas?---Yes.

You saw him here this morning?---Yes.

Did you recognise him and remember the meeting?---Well, I remembered the meeting anyway. 20

You remembered the meeting, right, and where did that - - -?---I mean, I remembered going to the meeting.

Where did the meeting with Mr Thomas occur?---I think it was in his office.

In the State Law Building?---I would assume so, yes.

Yes, all right. Well, see, I suggest to you that the meeting occurred in the morning of a particular day. Do you recall it being a morning meeting?---No, I don't. 30

I take it, if I was to suggest a date to you for the meeting, you wouldn't recall it?---No, I wouldn't.

All right, but I will suggest to you that at the meeting it was conveyed to Mr Thomas that there were about 55 members of staff at John Oxley Youth Centre. Do you remember that being told to him?---No.

No. Do you remember Mr Thomas being informed that there was an issue about whether Mr Heiner could or should receive some sort of indemnity for costs?---I am aware that we sought some advice from Crown Law. When you say for costs, for what? 40

I can't answer your question. I can only ask them?--- Sorry, I don't understand. Indemnity for costs - I'm not sure what you mean so, no, I don't.

All right. Do you recall mention being made about the
destruction of files or destruction of records at this
meeting?---Not at that particular meeting. My involvement
- if I can just explain why I'm saying, "Not at that
particular meeting" - - -

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Sorry, you just explain what?---If I can explain my
recollection or lack of recollection of dates - - -

Well, I haven't put to you, for example, that your lack of
recollection is because you're dishonest - - -?---No, I'm
not - - -

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- - - or trying to be difficult. I haven't put that to
you?---No.

So there isn't really any need at the moment to explain
that?---All right; okay.

It works best if you just answer the questions and you
answer each question, you know, responsively to the terms
of the question, okay, and if the commissioner thinks that
I'm being unfair by cutting you off or some other person at
the bar table thinks that, they will interrupt and object,
okay, and in fact - - -?---I wasn't suggesting that you
were doing that. I was just trying to assist.

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Yes. You're aware that you have got lawyers here who are
representing your interests in the form of the Crown
Solicitor's Office, aren't you?---Yes, I am.

Yes, okay, thank you?---That wasn't my issue.

All right, thank you. Now, I'm just going to get you to
have a look at exhibit 129, please, which is a letter that
was sent to Ms Matchett by Mr O'Shea on 23 January 1990.
Have a look through that, please?---Okay.

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Now, if we work on the assumption that that was received on
the day it was written, 23 January 1990, was that a
document that Ms Matchett ever showed to you?---I would've
seen that document at some stage, yes.

I just want you now to have a look at - you can leave that
one there for the moment. I want you to have a look at
exhibit 135 which purports to be a summation of a meeting.
The summary was made by Ms Ball and you will see at the top
of it it's a summation of a meeting with the acting
director-general about John Oxley on Tuesday, 6 February
1990. According to Ms Ball, you were present with
Ms Matchett at that meeting but that on this occasion the
meeting only involved people from the State Service Union.
Now, do you recall a meeting like that where there was no
POA or Australian Workers' Union representative at it?
---Yes, I think so.

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It starts off by stating, "Ms Matchett said she had called the meeting separately to the POA as we stood on different ground." Do you remember Ms Matchett saying something like that?---Not specifically, no. 1

The next paragraph says, "The department outlined that as a result of legal advice they had abandoned the inquiry and they were yet to be advised as to whether to destroy all the evidence." Now, Ms Ball said yesterday that that was something that you said at the meeting. Do you recall saying that?---No. 10

Is it something you could have said?---Well, I suppose I could have said it, but I have no recollection of specifically saying that.

Okay, thank you. That can be returned. In paragraph 26 of your statement, which you can turn to if you want to, you say that in relation to cabinet's consideration of the Heiner inquiry you had input in the submission regarding the indemnity issue. This included drafting sections of the cabinet submission. Do you see that?---Yes.

I'll get you to have a look at exhibit 151, please. We've heard evidence from Trevor Walsh that the first page of that document which is headed Cabinet Minute and the decision number was not drafted by anyone in family services but was drafted by somebody attached to the cabinet office. What do you say to that?---I would have expected that that is what would have happened, yes. 20

Because you didn't draft the decision page, did you?---No, certainly not.

No, thank you. We can turn that page over and perhaps to all intents and purposes forget about it for the moment then. The next document that we've got, we heard from Mr Walsh, is in fact, even though they all follow consecutively, two separate documents. He said that the first one is called a cover sheet. It goes for pages 1, 2 and 3?---Yes. 30

Then the second one which begins at page 4 is in fact the cabinet submission and it goes through to page 7?---Right.

He gave evidence that what's contained in the cover sheet was effectively just a condensed version or a summation of what was contained in the document called cabinet submission?---Yes, that's - - - 40

Does what I'm saying to you accord with your recollection of how these sorts of documents were prepared in 1990? ---Yes.

Or is it news to you?---No, that would be consistent with the process that was adopted.

31/1/13

CROOK, S.J. XN

So in order of creation, one would need to create the cabinet submission before one could be creating the condensed summary of the cabinet submission, wouldn't one?
---Yes.

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Okay?---Or maybe contemporaneously, but yes, I would have - logically it would make sense.

We might turn to page 4 of the document and start with the submission then, because according to your statement you had an input into this document?---Yes.

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If you were to go back and look at the decision page you would see that this was the document that resulted in cabinet making a decision to indemnify Mr Heiner?---Yes.

So what I want to know from you is that when you said in paragraph 26 that you had an input into this cabinet document, is it this exhibit number 151 that you had an input into?---Yes, I believe so.

All right. Now, take as much time as you like to peruse the cabinet submission and then would you be able to tell me what part or parts of it you drafted or caused to be put in there?

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---Not in - not as categorically as that. I would have done an initial draft possibly of the whole document.

Right?---Then it would have or could have been reviewed by Ruth Matchett. In fact, I'm sure it would have done, and I may not have seen what her changes were. So I can't say that this is what I wrote originally completely, but the broad thrust of it would have been based on an initial draft that I would have done, I would have thought, to the best of my recollection now.

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Mr Walsh said that this was the very first submission that went from the minister for family services to the cabinet after the election in 1990?---Right.

What do you say to that proposition?---Don't know. No comment.

You had not been asked to draft any - you'd not had an input into drafting any other submissions prior to this one?---Not that I'm aware of.

Okay?---Sorry, prior - under the previous government I'd drafted cabinet submissions, yes, but not that I'm aware of following the transition to the other government.

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In the body of the submission which begins at page 4 there's a heading called Background, isn't there?---Yes.

Looking at those three paragraphs that are devoted to the background, do you have a recollection now of whether or not that's part of what you had an input into?---I think I would have had some input into it.

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Reading each of those paragraphs through, what do you say as to whether or not they were changed in any material way between the way you drafted them and the way they got to cabinet?---I can't comment on that. I don't know.

You don't know?---No.

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In paragraph 3 of that document it states in the last sentence, "An important consideration was a lack of statutory immunity from and thus exposure to the possibility of legal action against Mr Heiner and informants to the investigation because of the potentially defamatory nature of the material gathered by Mr Heiner"? ---Yes.

Is that something that you would have written?---Possibly, yes.

Turning over the page, under the heading Objective it speaks of there being extant a policy issued by cabinet in 1982 regarding basically the indemnification or protection of public servants who had acted for the crown?---Yes.

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Is that a document that you would have been aware of in order to make an input to this cabinet submission?---Yes.

Okay?---I've come across it for other reasons in the course of my employment.

So is it the case that if I took you through this document sentence by sentence you wouldn't be able now to categorically identify which sentences you composed in it? ---No, I wouldn't.

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But, correct me if I'm wrong, are you content to proceed on the basis that this cabinet submission was to all intents and purposes the result of a draft that you had originally provided to Ms Matchett?---It would be largely the result of a draft which I in turn based on the legal advice that we'd received from Crown Law at the time.

The document does not - the document states in paragraph 7 that there was no legal impediment to the acting director-general destroying material, doesn't it, if you read the first sentence?---Yes.

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But it doesn't, for example, state that the acting director-general wishes to destroy the material and as a result she went off and obtained advice from the crown solicitor, does it, and to that extent the document doesn't

give cabinet a completely full picture of how it came to be 1
that the crown solicitor was saying, "Look, there's no
legal impediment to destruction," does it?---No, it
doesn't.

Did you draft the paragraph below that that:

*As the material relates to an investigation which
has been terminated it is recommended that all the
material, with the caveat of official material
mentioned above, be destroyed?*

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---I'm not sure.

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Apart from you making a draft of this to give to Ms Matchett, did anybody else to your knowledge either collaborate with you or look at your draft and make a contribution to it before it went to Ms Matchett?---I would have doubted it.

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Okay?---No, I don't think so. I mean, Trevor may have seen it because - but I don't know what Ruth chose, you know, to share with Trevor or other people. She may have shown it to other people.

Right?--- I don't know.

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COMMISSIONER: Were you in a position to see who Ms Matchett relied upon within the department more than others?---Yes, I probably was. I mean, it was a bit of an evolving thing at the time. She certainly - she would have relied on Trevor Walsh certainly for the administrative and bureaucratic procedures because he had that knowledge of the department. From my own perspective because I had the contact with the unions, that was, I think, her motivation for involving me in this process. And it was - I think also at the time the government was also, I suppose, re-establishing its relationship with the unions as a party in power, not a party in opposition. So they were - - -

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The Labor party, you mean?---Yes. So there were influences from that. They were finding their feet. She also recruited - or brought into the director-general's office somebody - Don Smith - who joined that office, I think it was a bit later on. And once he joined I guess my role lessened to some extent.

Where did he come from?---He was - there was a role - I think it was called principal child care officer or principal child safety officer and it oversaw the broad child protection child safety function. My understanding of that role was it was more in terms of a professional oversight rather than administrative oversight. I was fairly new to the department myself. I'd, you know, just joined the department late 88, early 89. So still finding things. But there was - - -

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As between Mr Nix - - -?---Sorry.

Mr Nix and anybody else, who - sorry, I've just forgotten his name. Who was the fellow who gave evidence yesterday?

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MR COPLEY: Mr Walsh.

COMMISSIONER: Mr Walsh - as between George Nix and Trevor Walsh, who had the more forceful personality within the office?---In terms of influence on Ruth?

Yes, or reliance on them by her?---I would have - my assessment would have been she would have been ambivalent towards Mr Nix.

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Yes?---But certainly quite reliant on Mr Walsh. She certainly trusted him and relied on him - - -

Okay, thank you?--- - - - to keep her informed and keep her, you know, make sure that processes were appropriately followed and so on and so forth.

MR COPLEY: I'm aware of the time, but there's just one issue I wanted to finish off before we adjourn.

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COMMISSIONER: Go ahead.

MR COPLEY: Could I?

COMMISSIONER: Yes, of course.

MR COPLEY: Thank you.

COMMISSIONER: How much longer will you be?

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MR COPLEY: Less than five minutes, I hope. With the witness in full?

COMMISSIONER: Yes.

MR COPLEY: She's going to have to come back tomorrow, Mr Commissioner.

COMMISSIONER: In any event?

MR COPLEY: Yes.

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COMMISSIONER: Okay.

MR COPLEY: I probably wouldn't be finished by 2.00 if we sat on.

COMMISSIONER: All right, fair enough.

MR COPLEY: She's probably going to be questioned by other people, I'd imagine.

COMMISSIONER: Yes, okay. If you've got to come back in any event, we'll adjourn at 1 o'clock or thereabouts.

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MR COPLEY: But she won't be required when we resume first thing tomorrow because we're hearing evidence from Mr Peers, you'll recall.

COMMISSIONER: Yes.

MR COPLEY: Yes. So people will arrange a time with her as to when we think it will be best for her to come back tomorrow.

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COMMISSIONER: Okay.

MR COPLEY: And if there's any difficulty with that, well that can be conveyed to those people when we adjourn. So you needn't tell us now in evidence?---Yes.

But whilst we've got you here, could you have a look at exhibit 113, please. You'll see that that's a facsimile copy of a letter sent in to Ms Matchett from a solicitor acting for Mr Coyne and Ms Dutney. There are two copies of that letter as part of the exhibit, they're both the same except the second one has a handwritten note at the top on the left-hand side. Do you see that?---Yes.

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Do you recognise the writing there?---Yes, it's mine.

It says, "Originally received in personal services on 19/1/90," and it is signed S. Crook, isn't it?---Yes.

Acting manager, RS?---PS, personal services.

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All right?---Right.

Okay. So if you wrote something like "originally received" in that area as the acting manager on that date?---Yes.

Is that intended to convey that you received and saw that document on 19 January 1990?---Yes.

Okay. So bearing in mind - yes?---I was just going to say that doesn't mean I saw the faxed copy, so that would have been the - - -

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You might have seen the - - -?--- - - - the postal one, the original one.

Right?---What that is saying is that posted copy came through.

Fair enough?---Yes.

Fair enough. And this letter can be summarised this way: that the solicitor, Mr Berry, points out that there's an investigation going on; that Ms Dutney and Mr Coyne are the subject of it; that they don't know what the allegations are against them; that they've been denied an opportunity to see what the complaints are; that they've been denied the chance to see the evidence Mr Heiner has gathered; and that Ms Matchett should give a direction to Mr Heiner to make the evidence to Mr Coyne and Ms Dutney because if that didn't occur then in the solicitor's view there'd a sound

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basis to proceed to court to obtain what's called a writ of prohibition, which means to stop Mr Heiner from proceeding further with the inquiry until those people got a copy of the evidence?---Mm.

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Okay?---Mm.

Now, did you read that document when you initial it as having received it in personal services?---I may have seen it before then, I don't know.

Okay?---But I would have, I think - I mean, I don't specifically call this, but I would have read it, I would have seen it, yes.

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Well, that issue that the solicitor raises there about these people being desirous of seeing the material is the inquiry to continue - - -?---Yes.

- - - doesn't find any expression in the Cabinet submission at paragraph 9, does it, if you were to look at paragraph 9 on page 6?---I haven't got that any more, have I?

I think you do still, does she?---No, I think you took it away, didn't you. That's another - - -

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It's the Cabinet submission, exhibit 151. Sorry, you were right, it has been taken away. So my question was the interest that those people might have had in knowing about the evidence from Mr Heiner doesn't find any - the fact that they were interested in it as at 17 January, which in new you on 19 January, doesn't find any expression in paragraph 9 of the Cabinet submission, does it? All it says there is that - - -?---Sorry, paragraphs 6 or paragraph - - -

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No, 9. Look down the bottom to Under Consultation? ---Right.

It says that the unions have been consulted and they're happy enough for Mr Heiner to have an indemnity and for the documents to be destroyed. That's the effect of that paragraph, isn't it?---Yes.

It doesn't say that: by the way, there is this individual or there are these two people who have got a solicitor who wrote a letter?---Mm'hm.

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Is there any reason why the fact that the solicitor had written that letter in those terms - is there any reason why that was put into the Cabinet submission to that Cabinet know about that?---The only reason I can think of is so that the material will have no further purpose and not be used.

Yes?---And therefore if it's not going to be used it's not going to be - there are no allegations going to be aired. 1

Okay, so - - -?---That's the only reason I can think of.

So in summary are you saying to me that: well, because the decision had been made to end the inquiry, that meant there'd been no report from Mr Heiner, therefore it really just wasn't germane to let Cabinet know that in the time before the decision to end the inquiry had been made there had been a request made for the inquiry to be conducted along a certain fashion by a solicitor?---It may have been. 10

Okay?---I'm surmising.

Well, that's one possibility; the other possibility, I suppose, is that it was simply omitted either deliberately or inadvertently, it was overlooked to tell Cabinet that. What do you say to the possibility that it was an omission to tell Cabinet - that it was a deliberate omission? What do you say to that scenario?---I haven't (indistinct) I don't know.

All right. Would that be a convenient time? 20

COMMISSIONER: Yes, certainly. Now, we're adjourning tomorrow at what time?

MR COPLEY: Well, we cannot start, apparently, until 11.30 and we're starting with Mr Peers by phone (indistinct).

COMMISSIONER: Right.

MR COPLEY: And then the court room is available until 4.30. 30

COMMISSIONER: So what about this witness? What time do we get her back? I'll leave that to - - -

MR COPLEY: We could perhaps ask Mr Bosscher how long he anticipates he's going to be with Mr Peers.

COMMISSIONER: So I just give a not before time if I can, or round about.

MR BOSSCHER: I would have thought somewhere between 30 and 45 minutes with Mr Peers. 40

COMMISSIONER: Do you? All right. Well, in that case not before - how long will you be with him, do you think, Mr Copley?

MR COPLEY: There's just one other issue I've got to canvass with him which would just take a minute or two.

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COMMISSIONER: Yes, okay. Well then, not before 12, I think, for this witness. Would that be safe tomorrow? **1**

MR COPLEY: I think that would be more than safe.

So what the Commissioner is saying is that you won't be required to return before noon tomorrow?---Okay.

COMMISSIONER: Is that okay?---Yes.

We try to get - we've got another witness. We think he'll take half an hour. We can't start till 11.30. And rather than have you around waiting, we'll try to make as little inconvenience on you as possible. So if you come back by 12 that should be fairly close to you resuming?---Okay. **10**

Thank you. Can Ms Crook's statement be published?

MR COPLEY: It can be, yes.

COMMISSIONER: I direct publication of exhibit 302. 11.30 is fine.

WITNESS WITHDREW **20**

THE COMMISSION ADJOURNED AT 1.08 PM UNTIL
FRIDAY, 1 FEBRUARY 2013

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