

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 8
(WEDNESDAY 2 JUNE 2021)

International Arbitration Centre
3rd floor Ritter House
Wickhams Cay II
Road Town, Tortola

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Mr Hussein Haeri of Withers LLP (instructed by the Attorney General), Mrs Fiona Forbes-Vanterpool Principal Crown Counsel of AG's Chambers, Mr Niki Olympitis of Withers LLP and Ms Sara-Jane Knock of Withers LLP appeared for various BVI Government Ministers and public officials.

Counsel to the Commission Mr Bilal Rawat also appeared.

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Those present:

Mr Hussein Haeri, Withers LLP

Mrs Fiona Forbes-Vanterpool, Principal Crown Counsel

Mr Niki Olympitis, Withers LLP

Ms Sara-Jane Knock, Withers LLP

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Mr Steven Chandler, Secretary to the Commission

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police Force

Mr Dame Peters, Audio-Visual Technician

P R O C E E D I N G S

1
2 COMMISSIONER HICKINBOTTOM: We're ready? Good. Thank
3 you very much.

4 I'm sorry. Despite the short delay due to just
5 technical issues here, which have now been sorted out, I'm
6 delighted that this hearing is being live-streamed. The
7 hearings to date, which have focused on production of
8 information and documents, couldn't be public because, through
9 the Attorney General, the BVI of Ministers and Ministries she
10 represents reserved their rights and privileges in respect of
11 the information and documents being discussed. I stress that
12 the Ministers and the Ministries were fully entitled to rely
13 upon such rights and privileges that they have to keep documents
14 and information from the public, but it regrettably meant that
15 the hearings could not be in public. As I'll explain, we're now
16 beyond that stage; and, absent exceptional circumstances, all
17 future hearings of the Commission of Inquiry will be
18 live-streamed.

19 As you're all aware, in January I was appointed by the
20 then-Governor to conduct a COI to establish whether there is
21 information that corruption, abuse of office, or other serious
22 dishonesty in relation to public officials may have taken place
23 in recent years; and, if appropriate, to make independent
24 recommendations with a view to improving the standards of
25 governance and the operation of the agencies of law enforcement

1 and justice in the British Virgin Islands.

2 In the first stage of the Inquiry, in addition to
3 considering information which was helpfully submitted by members
4 of the public, the COI made requests for voluntary production of
5 information mainly from Ministers and other public officials.
6 Just pausing for a moment just in case there's any problem? No?
7 We're still good to go.

8 Many documents were provided by the Government, and
9 I'm deeply grateful to the public officials who, on top of their
10 regular duties, have been involved in considerable amounts of
11 work to respond to our requests. I sincerely thank them for
12 their considerable efforts.

13 However, the initial COI hearings held in May, to
14 which I've already referred, confirmed that the documents
15 produced were significantly incomplete and generally in very
16 poor order. Often, it was impossible to ascertain the story
17 that they told. For example, I heard evidence from witnesses
18 over several days on the BVI Government contracts in respect of
19 radar barges simply to try and understand how those contracts
20 might have come into being. Even now the COI does not have a
21 full set of the relevant documents. At the hearing on the 20th
22 of May, Sir Geoffrey Cox, Queen's Counsel, on behalf of the
23 Attorney General, frankly and properly conceded that the BVI
24 Government's files are in "severe disarray", and that (he said)
25 largely explained why the documents produced to the COI have

1 been in such very poor order.

2 That inevitably has had a serious adverse impact on
3 the progress of the COI. In particular, it's inevitable that
4 the analysis of the documents and the COI hearings will be
5 significantly more difficult and will take substantially longer.

6 Once, on the 20th of May, the Attorney General had
7 made clear the situation with regard to the Government's
8 documents, I promptly took a number of steps to mitigate the
9 problems that resulted:

10 First, on 20th of May itself, I directed that by the
11 31st of May, having made any further checks necessary, each
12 Minister and other public official who had responded to a Letter
13 of Request from the COI, the documents, should swear an
14 affidavit setting out the steps that had been taken to identify
15 documents covered by each request and confirm that they
16 considered--that they had taken all reasonable steps to ensure
17 that disclosure was now complete. I directed that those
18 affidavits--I directed that those assurances be supported by an
19 affidavit by the Attorney General (or a senior member of her
20 team) confirming that, in her view, reasonable steps have been
21 taken to ensure the documents produced are complete. The
22 Attorney General has asked for an extension to lodge those
23 affidavits to the 7th of June, which I have granted. Those
24 affidavits will give me some reassurance that the disclosure of
25 documents, such as it is, is complete.

1 Second, I've commissioned a specialist IT system
2 called Relativity to manage the documents that we have. This
3 system is widely used in public inquiries and major judge-led
4 inquests in England and Wales, including some which receive
5 material of a highly personal nature (such as the Inquiry into
6 the Grenfell Tower Fire and the Infected Blood Inquiry) or which
7 engage national security (such as the Undercover Policing
8 Inquiry and the Jermaine Baker Inquiry). The system provides me
9 with the necessary confidence that documents provided to the COI
10 will continue to be held in a secure way; but it also has
11 powerful search and analysis functionality which, with the
12 affidavits to which I've referred, will reduce the risk that
13 poor or incomplete documents will disrupt future hearings.

14 Third, I'd already invited those who have participant
15 status, such as the Attorney General and elected Ministers and
16 Members of the House of Assembly, and others with a particular
17 interest in these matters to provide me with position statements
18 setting out their response to specific questions regarding
19 governance and the operation of the law-enforcement and justice
20 systems. This gives an early opportunity for those with a
21 constitutional interest in these matters to inform the work of
22 the COI. These position statements are still being received
23 but, subject to any compelling objection, I propose publishing
24 them on the COI's website so that the public can better follow
25 our work.

1 The next step, which will begin shortly, is for the
2 COI to issue letters requesting corporate statements from the
3 relevant Ministries which, in respect of particular topics of
4 interest, set out the relevant facts as they see them and
5 explain the available documents. These, I hope and expect, will
6 again ameliorate deficiencies in the documents and will enable
7 more focused hearings moving forward.

8 With those measures in place, we can resume
9 substantive hearings, which I propose to do on Monday, the 14th
10 of June. As I've said, unless I exceptionally grant an
11 application that a hearing be heard in private, all hearings
12 will be live-streamed, and a link to that recording will be
13 available on the COI website. If, during the course of a
14 hearing, counsel to the Commission or a participant or a witness
15 considers that the evidence being given is privileged or
16 confidential or otherwise cannot properly be given in public,
17 then that person will make that clear to me and the live stream
18 will be temporarily suspended whilst that point is aired and
19 determined. There is a three-minute delay to the streaming so
20 no confidentiality will be lost. The live stream will be
21 resumed as soon as it can. In addition to the live stream
22 recording, once available, Transcripts of the hearings will
23 continue to be published on the COI website.

24 I propose holding hearings from the 14th of June on
25 the basis of a four-day hearing week, Monday to Thursday, which

1 will give Fridays and weekends as preparation time. Hearings
2 will generally commence at 10:00 a.m. and be concluded by 4:30
3 in the afternoon; but, as with all procedure before the COI, I
4 will remain flexible, and we are fully prepared to sit outside
5 those times and days to ensure that our work proceeds
6 efficiently and effectively.

7 Key information concerning the conduct of hearings has
8 been set out in a protocol published yesterday. Those who have
9 already attended private hearings will be aware of some of this
10 information, but publishing it ahead of the public hearings has
11 the important benefit of assisting the BVI public better to
12 follow the public hearings.

13 I'd like now to give some more detail about the
14 forthcoming hearings.

15 I propose to deal with the subject matter under
16 inquiry by topic. Although that may mean that some witnesses
17 will be called more than once, again this will ensure that the
18 work of the COI proceeds in an organised and efficient manner,
19 and will give the participants a full opportunity to engage with
20 the process. Whilst I repeat I propose to be flexible, and
21 other issues may arise during the course of proceedings, the
22 proposed order in which I intend to take the topics is as
23 follows:

24 First, the interests held and declared by Members of
25 the House of Assembly and elected Ministers.

1 Second, questions arising from the position statements
2 submitted by participants and others on governance and the
3 law-enforcement and justice systems.

4 Third, the work of the Auditor General, the Internal
5 Auditor, and the Complaints Commissioner.

6 Fourth, the composition and function of statutory
7 boards.

8 Fifth, the purchase and leasing of Crown Land; and

9 Sixth, the system under which the BVI Government
10 enters into contracts, both in general and in relation to
11 specific contracts.

12 Now, that is an ambitious programme, but one which is,
13 in my view, necessary to fulfill my Terms of Reference. I
14 intend to allocate a specific number of days to each topic.

15 I expect those who have the privilege of participant
16 status and their legal representatives to make every effort to
17 assist me and my team in maintaining the progress of the
18 Commission of Inquiry. One way in which that can be done is if
19 participants now make submissions on the topics I've set out,
20 identifying any issues within those topics they consider I
21 should investigate and witnesses whom I should call. To have
22 such matters raised shortly before hearings relating to a
23 particular topic just before they are about to commence would be
24 disruptive of the Hearing Schedule. Participants should
25 therefore send any submissions they wish to make on those

1 matters in writing to the COI by the 9th of June.

2 I don't expect any difficulty with participants
3 complying with that direction, given that it is that they who
4 have provided much of the documentation received by the COI on
5 these topics; and, at least in the case of those who have
6 instructed the Attorney General, we have been led to believe
7 that work has been progressing for some months.

8 As and when the COI can give more information on each
9 topic, for example, as to which witnesses will be called, then
10 it will do so: I expect the first information to be sent out to
11 the participants today or tomorrow. A rolling timetable will be
12 available to the public on the COI website.

13 I would also like to say something about redaction
14 because this is something else which has the potential for
15 interfering with our timetable. It is something with which the
16 lawyers in the room will be familiar, but for the benefit of the
17 public, redaction is a process by which certain information
18 which cannot be made public in a document is blanked out. It
19 means that the rest of the document that can be referred to in
20 the public. There may be good reasons why a document needs to
21 be redacted; for example, it may contain personal data or
22 information otherwise confidential or privileged. What is
23 redacted out is ultimately a decision for me as Commissioner,
24 taking into account both the relevant law and all of the
25 circumstances, including the views expressed by both

1 participants and others that this Inquiry should be as
2 transparent as possible.

3 On the 5th of March, the COI published a redaction
4 protocol. It is detailed but, put simply, it allows those who
5 provide documents to the COI to make representations as to why
6 information should be redacted from the documents which they've
7 provided. However, I am concerned that the problems surrounding
8 the disclosure received from government bodies will undermine
9 the effectiveness of that protocol. Whilst respecting rights of
10 privacy and confidentiality, which I will do, it is important to
11 maintain and safeguard the hearing programme. I've therefore
12 published an updated redaction protocol, which allows the COI to
13 invite those providing documents to identify any information
14 they want redacted, and the reasons for that request, but
15 without rendering it necessary to rule on every redaction issue
16 before a hearing. Such issues will only be determined as and
17 when necessary in the light of how hearings, in fact, proceed.

18 There is a balance to be struck between ensuring that
19 sensitive information, which for legitimate reasons, needs to be
20 redacted, is not put into the public domain, and the COI, being
21 as transparent as possible, a balance which I consider the new
22 protocol, provides. I expect the legal representatives of
23 participants to work with the COI Team in a proactive way to
24 find a pragmatic solution to any issues that might arise.

25 I stress that none of this exercise will compromise in

1 any way the COI's undertaking to members of the public who have
2 made information available on a confidential basis, that that
3 material will remain confidential, and the source of it will
4 remain anonymous, if that's what the giver of the information
5 wishes.

6 I intend to press forward with the public hearings as
7 quickly as is consistent with my Terms of Reference, which
8 require the Inquiry to be not only faithful and impartial, but
9 also full.

10 However, irrespective of those efforts, it will be
11 clear to all from what I've said that it is not now possible for
12 me to deliver my Report of the 19th of July, the initial date
13 for its delivery in my Instrument of Appointment. Indeed, it is
14 inconceivable that the hearings will be over by that date. I
15 have therefore written to His Excellency the Governor seeking an
16 extension of that time. The Governor has been kind enough to
17 indicate that, given the matters to which I have alluded and the
18 sheer weight of issues which have been brought to the attention
19 of the COI for investigation, he is in principle willing to
20 grant such an extension, but he has asked me to report on
21 progress of the COI by mid-July, before he appoints a date by
22 which he will require me to report. I am grateful to His
23 Excellency. He, and all of those who live in the BVI, may rest
24 assured that I will press forward with the Inquiry, and deliver
25 my Report with all due speed.

1 Now, before we get on to the main business before us
2 today, which concerns Cabinet documents, just to confirm who is
3 here--who is here for the participants: Mr Haeri; Mr Olimpitis;
4 Ms Knock; and Ms Forbes-Vanterpool for the Attorney General;
5 Mr Rowe, I think it is, for Silk Legal, who is here remotely.

6 Welcome, everyone.

7 Can I just clear the decks before we begin the
8 discussion on Cabinet minutes.

9 Mr Rowe, if I can deal with one or two matters with
10 you and your clients. First, you, of course, represent the
11 Members of the House of Assembly who are not represented by the
12 Attorney General, and that is those Members who are not
13 Ministers.

14 We wrote to you, Mr Rowe, on 17th of May asking for a
15 position statement on governance by the 31st of May. I referred
16 to that in my Opening Statement; and when chased yesterday, you
17 said that you were taking instructions from your clients,
18 yesterday, of course, after the date for the position statements
19 to be lodged.

20 Now, in the meantime, some individual members have
21 lodged their own submissions on governance, and at least one of
22 them I have seen looks to be very useful. But could you tell us
23 what the position is, the Members are participants, you are
24 their legal representatives in the Commission of Inquiry. We
25 correspond with you on a more or less daily basis, but it's very

1 important, given that the timetable that we've set, that you
2 keep up. Could you tell us with regard to the position
3 statement what the position is?

4 MR ROWE: Good morning, Commissioner.

5 The Legislators are composed of both government and
6 opposition members, and we can only forward the directives or
7 any requests you make to us through the Speaker to these Members
8 and await their response. We are thus creatures of their
9 instructions. I will go into details, but there was a period
10 where we were unable by circumstance to be active. We can only
11 give an assurance that we will double our efforts to have the
12 Members respond in the manner which we consider very quite
13 proper and effective in conducting the Inquiry.

14 What has been sent to you has not, in fact, been sent
15 to us, so it's very difficult to satisfy the requests you have
16 made without--

17 COMMISSIONER HICKINBOTTOM: Given that you applied on
18 behalf of the Members of the House of Assembly for participation
19 status and they applied that you represent them in the COI,
20 that's not a very happy circumstance, is it?

21 MR ROWE: I would agree with every respect,
22 Commissioner, but it may well be that they have respectively
23 declined the invitation you give, which I think is open to them
24 as well.

25 COMMISSIONER HICKINBOTTOM: But you aren't able to

1 tell us?

2 MR ROWE: No. We have not--we communicated
3 immediately your request to the Speaker, who is the direct
4 contact with them, and what has occurred is better known to
5 yourself than to us. We have not even--we have not received
6 those Reports you indicate you received from--

7 COMMISSIONER HICKINBOTTOM: But the difference is that
8 the Members are your clients in the COI.

9 MR ROWE: As practitioners--Commissioner, clients,
10 particularly those in positions of power, are not necessarily
11 the most cooperative--terrible, I would suggest--in this
12 instance. I would daresay in some respects the invitation you
13 made may have been declined.

14 COMMISSIONER HICKINBOTTOM: But you don't know. This
15 seems to be linked to an invitation or may be linked--who
16 knows--to an invitation I received from the Speaker inviting me
17 to "appear before" the House of Assembly Members, all of them,
18 all 15, both those you represent and those the Attorney General
19 represents, for what I understand would be an informal private
20 meeting. I'm not quite sure what the scope of the meeting is
21 intended to be.

22 And, of course, earlier on in the Inquiry I made it
23 clear that I was very willing to meet those who wished to engage
24 with the Inquiry. And, indeed, I met a number of Members of the
25 House of Assembly, but obviously things have moved on since

1 then. The House of Assembly Members are now all participants,
2 formal participants, in the Inquiry. We have made requests of
3 them to provide position statements. The position in respect of
4 those seems to be unclear, but as I've said, some have responded
5 directly to us.

6 And furthermore, all of the Members of the House will
7 be witnesses. They've all been summoned in respect of the first
8 topic as you know, because you have been copied into that.

9 And the request to go and see the House is an
10 invitation to see them one clear day before they're due to
11 appear as witnesses before the Inquiry.

12 As I've said, I've made clear, and I reiterate, that
13 I'm very happy to meet anyone who wishes to be engaged with the
14 Commission of Inquiry, but I have to say it doesn't seem to me
15 to be appropriate in the circumstances I've outlined, given that
16 you are representing them or the Attorney General is
17 representing them, and I'm in communication with you and the
18 Attorney on a daily basis, and many times a day for the
19 Attorney, for me to meet them in those circumstances.

20 But what further information do your clients wish to
21 have of the Commission of Inquiry that they--that you haven't
22 passed on to them?

23 MR ROWE: All that you have submitted through us has
24 been passed to them through the Speaker.

25 COMMISSIONER HICKINBOTTOM: All right. Well, I think

1 the answer is, Mr Rowe, that the Members, both those represented
2 by you and the Attorney--but I'll hear from Ms Forbes-Vanterpool
3 in a moment, as it were--need to make up their mind, but they've
4 instructed lawyers with whom we're engaged. And if a meeting
5 would be valuable, then I would welcome it, but we need to--we
6 need to draw clearer lines of communication, I think, before any
7 meeting takes place with a group of participants.

8 So, perhaps you could pass that back to your clients,
9 Mr Rowe.

10 Ms Forbes-Vanterpool, can you--

11 MR ROWE: I'm happy to do so, sir.

12 COMMISSIONER HICKINBOTTOM: Ms Forbes-Vanterpool,
13 would you like to contribute a word to this part of the debate?

14 (Pause.)

15 MR ROWE: Before you proceed, Commissioner, just for
16 your information, Mr Daniel Davis is in the room with me.

17 COMMISSIONER HICKINBOTTOM: Just hold on a minute,
18 Mr Rowe, because there is a small hitch with the live stream
19 that we just want to correct before we proceed. Just one
20 moment.

21 MR ROWE: Okay.

22 (Pause.)

23 COMMISSIONER HICKINBOTTOM: Good. I'm sorry about
24 that delay. I'm afraid we've come to rely on machinery; things
25 will go wrong from time to time, but I understand the live

1 stream now is working.

2 Ms Forbes-Vanterpool, anything to add, or are you
3 happy to go away? What I propose is if you come back to me or
4 Mr Rowe comes back to me setting out why such a meeting would be
5 a good idea outside the Hearings, then I'll consider it.

6 MR HAERI: Commissioner, good morning. If I may, I
7 have been asked to appear before you on behalf of the Attorney
8 General--

9 COMMISSIONER HICKINBOTTOM: Yes.

10 MR HAERI: --and the elected minutes and Departments
11 which she represents, so if I may just go to that question, sir.

12 I am informed that the Attorney General did not
13 initiate and was not involved in the invitation that was given
14 to you by the Speaker of the House of Assembly. I trust that's
15 of assistance in response to your question.

16 COMMISSIONER HICKINBOTTOM: Well, it's certainly of
17 assistance to determine what to do. It just--she is one of
18 those whom the invitation covered that I was as a person to see.
19 So, it looks as though communication has fallen down a bit or a
20 lot, and so I think, Mr Rowe, unless you have any further
21 observations to make or Mr Davis has any more observations to
22 make, what I'll do is I will leave it. But if--and the letter
23 was sent by the Speaker, who I know that he is your client and
24 you're in touch with him, but if you consider that such a
25 meeting may be a good idea, then you, as his legal

1 representative, should, I think, write to me and set out the
2 purpose of the meeting and so on, and then we can consider it in
3 due course.

4 Does that sound sensible, Mr Rowe?

5 MR ROWE: Totally, Commissioner.

6 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.

7 And thank you, Mr Haeri, for confirming the Attorney
8 General's instructions. Yes?

9 MR RAWAT: Even go on to the next matter, may I just
10 invite you to make one direction which arises out of the
11 response that you received from those who instruct Silk Legal in
12 the COI.

13 When the letter went out on the 17th of May, the
14 anticipated response was that there would be one position
15 statement from all seven Members of the House of Assembly that
16 Silk Legal represent, and the reason for that is because there
17 should be no conflict of interest between them.

18 You have, as you pointed out, received an individual
19 position statement from one of those seven. I believe it's two
20 others have asked for extensions of time to submit those.

21 COMMISSIONER HICKINBOTTOM: Correct.

22 MR RAWAT: But in addition to that, two Members of the
23 House of Assembly, who ostensibly are represented by Silk Legal,
24 have written in the same terms to you to say that they have seen
25 the position statements by Ministers and that they are in

1 agreement with it.

2 Now, that we take to be a reference to the Position
3 Statement that was made on behalf of the elected Ministers, the
4 persons that Mr Haeri represents, and that was somewhat of a
5 surprise because those two members are part of a group of
6 Members of the House of Assembly who asserted that they could
7 not represented by the Attorney General because they had no
8 confidence in her. It seems that at least two now, which is to
9 say for themselves, with a position statement which at the time
10 that they wrote the letters had not reached the Commission, and
11 so against that background, I would invite you perhaps to direct
12 that Silk Legal by the end of today set out in the letter who
13 precisely they still represent because I anticipate that if,
14 going forward, we are going to have individual position
15 statements from those that who instruct them or--

16 COMMISSIONER HICKINBOTTOM: Just one moment, Mr Rawat.

17 (Pause.)

18 MR RAWAT: I've reached the end of the point I wanted
19 to make. I think just some clarity as to who Silk Legal still
20 represents may be of use.

21 COMMISSIONER HICKINBOTTOM: Yes. Mr Rawat, I think
22 that's a very good idea, subject to any observations you have,
23 and subject to any submissions you have to make, what I direct
24 is that, by the end of--by the end of today--

25 MR ROWE: Would that mean tomorrow, sir?

1 COMMISSIONER HICKINBOTTOM: Until tomorrow, that's
2 fine, isn't it, Mr Rawat?

3 MR RAWAT: Yes.

4 COMMISSIONER HICKINBOTTOM: Because you do need to
5 take instructions but if you could do two things. Could you
6 write to the Commission by 4:00 p.m. tomorrow confirming those
7 members for whom you still act, and setting out the position
8 with regard to position statements. That is whether you are
9 going to lodge a position statement at all on behalf of any or
10 whether those you represent intend to lodge position statements,
11 and if so, by when they propose to lodge them.

12 MR ROWE: Will do.

13 COMMISSIONER HICKINBOTTOM: Thank you very much,
14 Mr Rowe.

15 Anything else, Mr Rawat?

16 MR RAWAT: Not on that matter.

17 COMMISSIONER HICKINBOTTOM: Good. Thank you.

18 Mr Rawat, I'll address this to you, but this may
19 actually refer to Ms Forbes-Vanterpool, but you can decide.

20 There's been some concern expressed about why the
21 Transcript of Mr Wade Smith's evidence is not on the website.
22 It's not been made public, and the reason is that we are waiting
23 to hear from the Attorney General on one particular matter
24 relating to a redaction. That is a matter which I think you
25 will want us to hear in private, it's only a very narrow one,

1 but you'll want us to hear that in private; and, if that's so,
2 can we deal with that at the end of the public hearing?

3 MR HAERI: Yes, sir.

4 COMMISSIONER HICKINBOTTOM: Thank you very much.

5 That will then mean that--that's the only thing
6 holding it up, and Mr Wade Smith's evidence can then be
7 published with whatever redactions I consider appropriate.

8 And finally, before we get on to the documents,
9 yesterday the COI Team obtained the balance of the documents
10 from the Registrar of Interests, and I think this is right, so
11 that the COI have the documents, but the Registrar wished, I
12 think, to take advice, understandably, on what use, if any, the
13 COI can make of those documents. And what we did yesterday
14 afternoon is to write to the Registrar, copy to the Attorney
15 General, asking for a response from the Registrar on any
16 conditions attached to the documents that we have. And we've
17 also set that matter down for a hearing on Friday at 10:00
18 because that's something which needs to be resolved, if there
19 are any issues quickly in the light of the timetable.

20 Any observations on that, Mr Haeri?

21 MR HAERI: I will need to take instruction, sir, but I
22 think it's very clear what you've just set out now.

23 COMMISSIONER HICKINBOTTOM: We don't know whether
24 there were be any issues.

25 MR HAERI: Yes.

1 COMMISSIONER HICKINBOTTOM: But if there are, we just
2 need to deal with them sooner rather than later. And that there
3 may be legal issues, but there may also be pragmatic practical
4 issues which need to be sorted out. Thank you very much,
5 Mr Haeri.

6 Now, that does bring us to the main issue for today.

7 Firstly, can I thank you, Mr Haeri, because your name
8 is on the bottom with Sir Geoffrey Cox's for the submissions
9 made in respect of "Cabinet documents," if I can use that as a
10 broad term. Can I just summarise where I think the Attorney
11 stands on this, then and you can correct me if I've got it
12 wrong, but I hope that will help identify what issues we need to
13 deal with today.

14 The Cabinet documents--they're actually defined in the
15 Cabinet Handbook, but for these purposes they are really
16 comprised firstly the Agendas, Cabinet Agendas; secondly
17 documents that go to Cabinet, normally a memorandum and
18 supporting documents, perhaps a report; and thirdly, Cabinet
19 Minutes, and I include in that any record of what happened in
20 Cabinet, so that's finalised minutes, draft minutes, notes
21 before draft minutes, and now we know that some of the Cabinet
22 Meetings which have not been where the minutes haven't been
23 finalised were recorded, so there are oral recordings.

24 My understanding of the Attorney's--well, my
25 understanding of the Cabinet's position as related by the

1 Attorney is this, and this is what I'd just like confirmation
2 on:

3 Firstly, the Cabinet is willing to give the COI access
4 to documents in these categories: Firstly, the Cabinet Agendas;
5 secondly, the record of the Cabinet Meeting which will be
6 minutes or drafts or notes, but not recordings--we will come
7 back to that--and, thirdly, the Cabinet Decision; that's part of
8 the minutes, but the Cabinet Decision.

9 And the Cabinet is willing to allow us to see all of
10 those, but for no further disclosure, no public disclosure or
11 further disclosure, except on a case-by-case basis.

12 Now, is that--we'll come back to recordings, but is
13 that the correct position with regard to other documents?

14 MR HAERI: Mr Commissioner, thank you for setting that
15 out. I do have some submissions which I would hope and I expect
16 would respond to the issues you've raised, and in answering it
17 set out the context to that. If I may answer it in that way,
18 sir, I'd be grateful.

19 COMMISSIONER HICKINBOTTOM: Yes, not to stop you from
20 doing that, but is that--is that the--is that the Cabinet
21 position?

22 MR HAERI: The position in summary, sir, before I come
23 on to set out that background in context--

24 COMMISSIONER HICKINBOTTOM: Yes.

25 MR HAERI: --is, indeed, the Cabinet is and has given

1 all Cabinet Agendas that have been sought as well as all Minutes
2 of Meetings that have been finalised, as well as all drafts of
3 meetings, as well as all notes of meetings, whether manuscript
4 or electronic, as well as, indeed, finally the final Cabinet
5 Decisions.

6 COMMISSIONER HICKINBOTTOM: Yes.

7 MR HAERI: So, what we are seeking, sir, is your
8 adjudication with regard to the oral recordings of Cabinet
9 Meetings, and that is something on which we consider that the
10 public interest would need to be balanced by you, sir, and
11 that's the point on which I've got submissions that I would like
12 to come to.

13 COMMISSIONER HICKINBOTTOM: No--and you can make those
14 submissions, if necessary, but I have to say the submissions are
15 well, if I might say so, very well set out in your--in your
16 written submissions.

17 Can I just raise a couple of things.

18 MR HAERI: I'm sorry, sir, I don't think I fully
19 answered your question with regard to the disclosures to the
20 public because the position on that is that, in accordance with
21 the two-stage process, the understanding was that there would be
22 an opportunity to address the issue of public interest immunity,
23 for example, if there were, for instance, national security
24 considerations that would in particular circumstances based on
25 the evidence at issue, merit redaction from the public, but

1 other than that, there is no departure, sir, from your two-stage
2 process. There is no principal objection, as it were, that's
3 being taken, with regard to public access to even documents as
4 sensitive as Cabinet minutes.

5 COMMISSIONER HICKINBOTTOM: That's very helpful.

6 And just to make clear, by "Cabinet Minutes," you mean
7 not only the finalised minutes, but any drafts and notes but not
8 the recordings?

9 MR HAERI: Yes, I do distinguish between Cabinet
10 Minutes which are and have a formal status under the Virgin
11 Islands Cabinet Handbook as distinct from drafts and notes which
12 don't under paragraph 4.22 of the Cabinet Handbook have the
13 status as minutes, so I do distinguish between minutes and
14 drafts and notes, but you are correct, sir, that the principle
15 that I've set out and the two-stage process and the approach
16 that is being taken by those that instruct me is, indeed, the
17 same for the drafts and notes as well as for the minutes
18 themselves.

19 COMMISSIONER HICKINBOTTOM: That's really helpful by
20 way of clarification.

21 Just a couple of points, and the first is just to
22 confirm--and I understand this is a two-stage process, of
23 course, but in respect of the--those documents, all the
24 documents except for the recordings, you understandably wish to
25 have an opportunity before they are made public to look at any

1 particular documents or minutes that might be put into the
2 public domain before they go into the public domain to make
3 those redactions or to make an application for bits to be
4 redacted if you consider they're covered by what privilege or an
5 indemnity or an obligation of confidentiality?

6 MR HAERI: That is correct, sir. Again, in accordance
7 with the two-stage disclosure process that you've set out for
8 your Commission.

9 COMMISSIONER HICKINBOTTOM: Okay. That's very helpful
10 because, again, we'll hear from Mr Rawat in a moment, but it
11 seems to me that the main issue to be dealt with today is not
12 really a legal one because I'm not--well, we'll hear from
13 Mr Rawat, but I'm not sure that I disagree with the legal
14 position set out in your helpful written submission, and that
15 is, to put it in a sentence or two, that Cabinet documents, but
16 I think particularly the Cabinet discussions as recorded in
17 however they are recorded are conventionally confidential as a
18 matter of public interest.

19 Secondly, that it is a matter public interest, and so
20 that public interest may in certain circumstances have to be
21 balanced against other elements of public interests, but I think
22 you say or certainly would say that the public interest in
23 confidentiality of Cabinet documents is a strong one, but
24 nevertheless has to be balanced against other things.

25 And almost the reverse side of the coin to that

1 Cabinet Confidentiality is Cabinet Responsibility because all
2 Cabinet Members, once a decision is made, are bound by that
3 decision and bound not to express any views contrary to the
4 decision and not to reveal any views they might have expressed
5 in Cabinet with regard to the merits of the proposed letter of
6 the decision.

7 Now, that puts probably inelegantly what you set out
8 in your submissions.

9 MR HAERI: Thank you, sir.

10 I think I would put it slightly differently, if I may.

11 COMMISSIONER HICKINBOTTOM: Yes.

12 MR HAERI: I don't--I don't disagree I don't think
13 markedly, but if I may explain the position so that it's
14 entirely clear.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 MR HAERI: And for all, sir.

17 So, I do have submissions in respect of three matters.
18 The first are the Cabinet Minutes, the final formal minutes of
19 Cabinet Meetings. The second relates to the draft Cabinet
20 Minutes, including the notes. And the third relates to the
21 recordings of Cabinet Meetings.

22 Now, I think it is important in terms of the
23 background and context to the submissions that we make, sir, to
24 keep in mind that the Cabinet system is a new form of Government
25 introduced into this Territory in the 2007 Constitution.

1 COMMISSIONER HICKINBOTTOM: I'm sorry, but in relation
2 to these submissions? I'm not sure they're contentious?

3 MR HAERI: But, sir, this is relevant also to the
4 recordings. And it is important, I believe, and also for the
5 public to be aware and to have a transparent position--

6 COMMISSIONER HICKINBOTTOM: No, no, of course.

7 MR HAERI: In terms of, if I may, sir--

8 COMMISSION SECRETARY: And the way you propose to do,
9 it may be the best way of doing it or your preferred way of
10 doing it. What I'm particularly interested in is the difference
11 in principle between the recordings and draft minutes.

12 MR HAERI: And I certainly intend to address you on
13 that, sir.

14 COMMISSIONER HICKINBOTTOM: Thank you.

15 MR HAERI: Thank you.

16 Article 47(3) of the Constitution provides that
17 Cabinet has responsibility for the formulation and the
18 implementation of policy on, and I quote, "every aspect of
19 Government," save those for which the Governor has special
20 responsibility. You have heard Commissioner from the Cabinet
21 Secretary on the Cabinet Handbook, which is the authoritative
22 instrument governing Cabinet and its proceedings and strictures
23 in this Territory.

24 I would like to take you, sir, to the Cabinet Handbook
25 and two important principles that apply in this Territory, and

1 it is Commissioner in Bundle C1 that you have before you, the
2 Cabinet Handbook of the Virgin Islands. It's on page 11, it's
3 Paragraph 2.1 at the top of the page, and it provides,
4 "Collective Responsibility is at the core of the Cabinet system
5 of Government." What that means is that Cabinet speaks as one
6 executive authority, one voice. This constitutional convention
7 of Collective Responsibility was addressed by Mrs Justice Ellis
8 in the case of Claude Skelton-Cline versus the Cabinet office of
9 the Virgin Islands. That's a recent judgment in this
10 jurisdiction of the 23rd of May 2019 in the BVI High Court of
11 Justice. The reference is BVIHC 2016/0063, and that can be
12 found, sir, at Bundle C, Tab 2 before you.

13 And in that ruling at Paragraph 120, Mrs Justice Ellis
14 held that Cabinet Collective Responsibility, "prescribes that,
15 while Ministers may express their views privately, once a
16 decision has been made by the Cabinet, it is binding on all
17 Members of Cabinet, and they must publicly show a unified
18 position."

19 COMMISSIONER HICKINBOTTOM: With respect to Mrs
20 Justice Ellis, it is with great respect, but it is trite law,
21 isn't it?

22 MR HAERI: It is important, sir. It is trite because
23 it is important and it is--

24 (Overlapping speakers.)

25 COMMISSIONER HICKINBOTTOM: It is well-established?

1 MR HAERI: It is well-established and in this
2 jurisdiction as well, sir.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 MR HAERI: I would agree.

5 And this leads on, sir, to the second principle which
6 flows from Collective Responsibility, and that is the one to
7 which you alluded with relation to it, namely Cabinet
8 Confidentiality.

9 Now, that obligation of publicly showing a unified
10 position is what necessitates Cabinet Confidentiality of
11 discussions in Cabinet which Mrs Justice Ellis eloquently
12 described as "a natural correlative of Collective
13 Responsibility." And that, I believe, sir, is something similar
14 to what you were saying earlier.

15 Without Cabinet Confidentiality, how could Cabinet
16 Ministers speak freely in Cabinet while ensuring that Collective
17 Responsibility on which Cabinet system Government is based is
18 upheld.

19 COMMISSIONER HICKINBOTTOM: But again, all of this is
20 trite law, isn't it?

21 MR HAERI: Yes, sir, it is, in the sense of it being
22 generally accepted, but nevertheless important, I would submit,
23 sir. It's in the submissions that I'm making.

24 COMMISSIONER HICKINBOTTOM: Both the confidentiality
25 and the responsibility, Collective Responsibility,

1 confidentiality in Cabinet dealings, is well-established because
2 it's in the public interest.

3 MR HAERI: That is correct, sir, it is in the public
4 interest.

5 Now, there are points which I don't believe are
6 necessarily as you would put it trite law in the sense that
7 there are differences between the principle of Cabinet
8 Confidentiality, at least in the temporal aspect in this
9 jurisdiction as compared with in England and Wales, and if I
10 may, sir, I would like to come on to address also those
11 differences.

12 COMMISSIONER HICKINBOTTOM: But there are differences
13 here because it goes on forever, and it's arguable as in other
14 jurisdictions it may not go on forever. But that's not relevant
15 here because we're not thinking of forever. We're thinking
16 about the last period of time.

17 MR HAERI: And that period of time, sir, is less than
18 one year in the context of every single recording that we are
19 discussing.

20 COMMISSIONER HICKINBOTTOM: But all that means, with
21 respect, is that the public interest in confidentiality may be
22 stronger than if we were concerned with matters that happened 10
23 or 20 years ago.

24 MR HAERI: And I agree, sir. I think it does show
25 that the public interest in confidentiality is higher in this

1 jurisdiction in that respect certainly than in England and
2 Wales.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 MR HAERI: And if I may come back to my submissions, I
5 would like to go through the illustrations of that in the
6 context of the Cabinet Handbook that applies here to this issue.

7 COMMISSIONER HICKINBOTTOM: But nobody's saying
8 that--all of this is set out in the Cabinet Handbook, and since
9 speaking for myself and not for Mr Rawat, who will make
10 submissions in a moment, it's all uncontentious.

11 MR HAERI: That may well be to you, sir, but it may
12 not necessarily be fair to the public, and since we've had an
13 opportunity to make submissions to you today, I hope I will not
14 take up too much time if I may be allowed to complete my
15 submissions.

16 COMMISSIONER HICKINBOTTOM: Okay. Thank you.

17 MR HAERI: Thank you, sir.

18 I'd like to refer next to Paragraph 2.10 of the
19 Cabinet Handbook, which is at Bundle C1 again, and here it
20 provides, and I quote: "The concept of Collective
21 Responsibility and strict confidentiality goes hand-in-hand.
22 Cabinet business conscious is, therefore, conducted in strict
23 confidence and is only broken with the permission of Cabinet."

24 And now I come on to the time dimension which we were
25 just discussing, because Paragraph 11 of the Cabinet Handbook is

1 entitled, as you anticipated, sir, "Confidentiality Maintained
2 in the Future." And it provides, and again I quote, "Cabinet
3 Confidentiality on a particular issue or during a discussion
4 must be maintained in the future." And that is reinforced by
5 Paragraph 2.13 of the Cabinet Handbook, which provides, again I
6 quote, "Cabinet Confidentiality and Collective Responsibility
7 are permanent and are never to be broken with or without the
8 permission of individual Ministers."

9 Now, despite this very strict framework, there can be
10 a limit in time after which Cabinet documents may be disclosed.
11 In Attorney General versus Jonathan Cape, the Crossman Diaries
12 case, Lord Widgery, Chief Justice noted in England and Wales
13 that 10 years had passed following the relevant Cabinet
14 meetings, and he contrasted that ten-year time period with a
15 30-year period which he rightly said did not apply in England
16 regarding the confidentiality of Cabinet discussions, and that
17 is at Bundle C at Tab 4, Page 126, Page 771 E within the
18 judgment.

19 Yet, sir, the position is different in this Territory.
20 Indeed, the Virgin Islands Cabinet Handbook explicitly provides
21 at Paragraph 7.32 that, and I quote, "Cabinet discussions are
22 not open to the public until after 30 years."

23 So, the 30-year time period that Lord Widgery rightly
24 said didn't apply in England does explicitly apply in this
25 Territory.

1 And to put that in context, sir, all of the recorded
2 Cabinet Meetings that we are discussing took place within the
3 last year; in other words, less than one year ago. And we
4 submit, sir, that that is a matter that does raise an issue in
5 the public interest because not least as Lord Widgery himself
6 observed himself in the Crossman diaries case, "it is
7 unnecessary to elaborate the evils which might flow if at the
8 close of the Cabinet Meeting a Minister proceeded to give the
9 press an analysis of the voting." Now, that must apply with
10 greater force to the disclosure of the Cabinet discussions that
11 preceded the voting.

12 Now, that is the background. The first issue that I
13 would like to address, sir, is the Cabinet Minutes themselves.
14 The principles that I have addressed, of course, apply to
15 Cabinet Minutes. Notwithstanding, sir, these important
16 principles in this Territory, Cabinet has decided to give your
17 Commission all of the Cabinet Minutes sought, every single one
18 of them sought without exception, and I've been informed that
19 all have been sent to the COI.

20 COMMISSIONER HICKINBOTTOM: In coming to that
21 decision, Mr Haeri, and obviously I'm grateful for it, the
22 Cabinet presumably took into account the public interest in the
23 Inquiry seeing the documents as well as the public interest in
24 confidentiality of Cabinet proceedings.

25 MR HAERI: Sir, Cabinet has adopted a policy of

1 transparency and of cooperation with your Inquiry, and this is
2 a, I would submit, very clear reflection and evidence of that,
3 notwithstanding the important and sensitive principles with
4 regard to Cabinet Confidentiality and Cabinet Collective
5 Responsibility in this Territory itself.

6 COMMISSIONER HICKINBOTTOM: They're taking into
7 account the public interest in the COI seeing these documents?

8 MR HAERI: They've taken into account their policy of
9 being transparent and constructive with your commission, sir,
10 yes.

11 COMMISSIONER HICKINBOTTOM: Yes, thank you.

12 MR HAERI: The second point is the draft Cabinet
13 Minutes or notes that were taken of meetings. Now, here, sir, I
14 think one can observe that there are notes that have not been
15 finalised and turned into Cabinet Minutes, notes of meetings due
16 to the very high volume of Cabinet Meetings that took place in
17 2020 in the context of the COVID-19 pandemic and the
18 Government's response to it. And as we can imagine, this
19 Territory's success in managing COVID-19 is not fortuitous,
20 whereas in an ordinary year there might be 40-odd meetings of
21 Cabinet, in 2020, there were not less than 94 meetings of which
22 51 were special meetings to discuss the COVID-19 crisis and the
23 Government's response to it.

24 The result of that was that not all minutes could be
25 finalised in the ordinary timely way.

1 COMMISSIONER HICKINBOTTOM: How many were finalised,
2 Mr Haeri?

3 MR HAERI: Sir, I'd need to come back to you with the
4 exact statistic, but I believe it is set out in a table which is
5 at the back of the--

6 COMMISSIONER HICKINBOTTOM: I think it's 21, I think,
7 as of the 94 have been finalised.

8 MR HAERI: Well, I'm sure--I'm sure I'll be told if
9 that figure is incorrect, sir.

10 COMMISSIONER HICKINBOTTOM: And of the requests made
11 by the Commission, which I think there are 25, five sets of
12 Cabinet Minutes have been finalised. The others are in mainly
13 note form, one or two in draft, but mainly in note form.

14 MR HAERI: Again, sir, I will revert back to you if
15 there is reason to doubt the figures that you have given.

16 The result of that, sir, was that not as you note, all
17 minutes could not be finalised in the ordinary timely way, given
18 this deluge of meetings, some of which lasted more than one day.
19 Notes taken of those meetings are not operative as minutes, a
20 point as I made earlier that is set out in Paragraph 4.22 of the
21 Cabinet Handbook. And even in England and Wales where there is
22 a Freedom of Information Act which does not exist in this
23 Territory, it has been held a disclosure of draft minutes and
24 notes is more problematic and damaging to the public interest
25 than the finalised minutes themselves, and that is not least

1 because they may contain errors of both accuracy and
2 attribution, and I would refer you, sir, in this regard to
3 Cabinet Office versus the Information Commissioner. It's a
4 decision of the Information Tribunal of England and Wales, and
5 that is at Bundle C, Tab 3 before you.

6 And in that case, the Information Tribunal refused to
7 order disclosure of draft minutes of Cabinet Meetings regarding
8 the decision to go to war in Iraq.

9 COMMISSIONER HICKINBOTTOM: Can you help me with this:
10 Paragraph 4.22 of the Handbook, which I think it explains quite
11 a lot, the outcomes of Cabinet deliberations, it says, "are
12 recorded as Cabinet Minutes by the Cabinet Secretary, assisted
13 by the Cabinet Recording Secretary. Cabinet Minutes are not
14 operative until they are confirmed by Cabinet and signed by the
15 Cabinet Secretary and Chairman of the Cabinet."

16 So, what that, and looking further on, what that
17 envisages is that Cabinet Minutes are prepared, presented to the
18 next Cabinet Meeting and signed off, and it's only then that the
19 decisions become operative.

20 MR HAERI: That's correct, sir.

21 COMMISSIONER HICKINBOTTOM: Now, in circumstances in
22 which very few of the Cabinet Minutes have been finalised over a
23 period of about a year, where does that leave the decisions?

24 MR HAERI: Sir, my understanding is--but I may need to
25 revert to you on if it proves not to be correct, but my

1 understanding of this is, for that period, essentially June to
2 December of 2020, decisions were nevertheless taken, and there
3 can be extracts of the decision which can be circulated, but the
4 minutes themselves, which can also record discussions at least
5 as a matter of practice, are the minutes that come to record the
6 discussions and deliberations that preceded the decisions, it is
7 those minutes that reflect also the discussions and
8 deliberations that have not been finalised as compared with the
9 decisions themselves. And I'm told that that is the case, sir.

10 COMMISSIONER HICKINBOTTOM: Well, that's very helpful.

11 And where is that in the handbook? Where is that
12 procedure in the handbook? I'm sorry, it's not intended to be a
13 sort of test.

14 MR HAERI: Well, let me come back to you on that, if I
15 may, sir.

16 COMMISSIONER HICKINBOTTOM: So, where is the authority
17 for Cabinet Decisions which are not the subject of finalised
18 minutes?

19 MR HAERI: I have your question.

20 COMMISSIONER HICKINBOTTOM: Thank you.

21 MR HAERI: So, if I may revert to the case of Cabinet
22 Office versus the Information Commissioner, as I was saying,
23 that's a decision of the Information Tribunal of England and
24 Wales, and in that case the Information Tribunal refused to
25 Order disclosure of draft minutes of Cabinets in England

1 regarding the decision to go to war in Iraq.

2 COMMISSIONER HICKINBOTTOM: In that case, where are
3 the finalised Cabinet minutes? In that case, were there
4 finalised Cabinet minutes?

5 MR HAERI: Yes, there were finalised Cabinet Minutes
6 in that case, yes, sir.

7 The point that I am addressing here, though, having
8 addressed finalised Cabinet Minutes is the drafts and the notes,
9 and that's the relevant point for the purposes of my submission,
10 which is that despite the significant public interest in
11 attaining those notes and drafts under the Freedom of
12 Information Act, again, as I say there is no such Freedom of
13 Information Act in this Territory. The Information Tribunal
14 nevertheless refused to disclose the drafts and notes, and they
15 held as follows: "Disclosure would be likely to have a greater
16 impact on debates within Cabinet and the manner in which a
17 record of them was maintained than in the case of the minutes
18 themselves."

19 They went on to say that, and I quote: "They believe
20 it could have a further damaging effect in that the manner in
21 which an individual takes contemporaneous notes is likely to be
22 idiosyncratic and could well give a false impression as to the
23 weight and importance that should be attributed to a particular
24 part of the debate or the tone in which the points of discussion
25 were expressed." And what this shows is that there is a greater

1 sensitivity and deference towards non-disclosure in the context
2 of drafts and notes than the finalised minutes themselves for
3 reasons that have been given, including errors possibly of
4 attribution and of accuracy.

5 And yet, sir, nonetheless, consistent with the
6 Government's policy of transparency and cooperation with your
7 Commission, Cabinet has again decided that also all drafts and
8 notes are to be disclosed to you. And once again, sir, I'm
9 informed that this, too, has been done.

10 COMMISSIONER HICKINBOTTOM: And we're very grateful,
11 but again the public interest in confidentiality in these drafts
12 has to be balanced against the public interest in the Commission
13 of Inquiry seeing them.

14 MR HAERI: Absolutely, sir, and they have been
15 disclosed in their entirety.

16 COMMISSIONER HICKINBOTTOM: And I'm very grateful
17 because otherwise I would have had to make--I would have had to
18 look at them and decide where the public interest lay, so I'm
19 very grateful.

20 MR HAERI: Thank you, sir.

21 It does bring me on to the recordings of Cabinet
22 Meetings which is a matter that you had asked about as well,
23 and, of course, sir, ordinarily recordings of meetings of
24 Cabinet would not be made, as we know, not here and not in
25 England and Wales, and the reason that they were made on an

1 exceptional basis is that the volume of meetings in 2020
2 necessitated it so that the minutes could be prepared
3 thereafter.

4 Now, former Governor Jaspert and the Ministers could
5 have had no idea at the time that every word they spoke in
6 Cabinet could be publicly disclosed after the hearings had been
7 recorded. To return to England in the Court of Appeal case of
8 D v. L which is at Bundle C Tab 10 in your folder, Lord Justice
9 Waller made observations which amply support the proposition
10 that recordings should be approached with particular care and
11 sensitivity.

12 COMMISSIONER HICKINBOTTOM: In what context was that?

13 MR HAERI: Well, it was a very different context, sir,
14 but it does, I believe, nevertheless make the point about
15 sensitivity with regard to recordings.

16 Now, sir, I'd like to place these submissions in the
17 context of this Territory. The Cabinet of this Territory did
18 not authorise the Commission of Inquiry. They were not
19 consulted on it. Nor even were they given meaningful notice of
20 it before it was launched by the former Governor. Now, that is
21 plainly different, sir, to what happens in the United Kingdom
22 when a Commission of Inquiry is initiated where such a
23 commission is approved by Cabinet. The law used to launch this
24 Commission is more than a hundred years older than the
25 establishment of Cabinet Government in this Territory. That

1 1880 Act permits any Governor to issue a commission for this
2 Territory whenever he thinks it advisable.

3 If you can reach in from the United Kingdom, whenever
4 a Governor so chooses and obtain the recordings of the Cabinet
5 of this Territory, why would elected Members of Cabinet ever
6 speak freely and openly in Cabinet again? Such a potentially
7 chilling effect on what is said in Cabinet is, sir, in our
8 respectful submissions, a matter of public importance in this
9 Territory. Yet even here the constructive approach has been
10 taken by the elected government to your Commission. The
11 Government has brought to your attention existence of the
12 recordings.

13 Therefore, we seek a written ruling from you, sir, on
14 two points:

15 The first, do you wish to direct the production of
16 recordings of the Governor and Cabinet under Stage 1 of your
17 two-stage process.

18 And number two, if so, we would respectfully invite
19 your adjudication to weigh and balance whether the public
20 interest of producing such recordings to the COI outweighs the
21 important principles of Cabinet Confidentiality and Collective
22 Responsibility in this Territory to which I have referred.

23 Thank you, sir.

24 COMMISSIONER HICKINBOTTOM: Thank you.

25 I think, Mr Haeri, with respect, we go back to where

1 we started, and that is I still don't understand the difference
2 in principle between recordings, which will be accurate, and
3 draft minutes and notes, which you say will contain
4 inaccuracies. What is the difference in principle between a
5 recording of discussions in Cabinet and notes made in Cabinet of
6 those discussions? What's the difference in principle?

7 MR HAERI: The notes are a prelude to the
8 formalisation of the Cabinet Minutes themselves. Cabinet
9 Minutes do not, as a matter of practice in this Territory or
10 indeed elsewhere, reflect every word that is said in Cabinet.
11 They are designed to summarise the essence of a particular
12 position--the gist, if you might like--they are not a verbatim
13 account, and the notes are no more a verbatim account of what is
14 said. On the other hand, a recording is a verbatim account.

15 COMMISSIONER HICKINBOTTOM: With respect, therefore,
16 the recording has benefits so, for example, if the notes record
17 the position taken by a particular Ministry and Cabinet, you
18 accept that those notes may be wrong, the recording won't be
19 wrong. It's not the only element of public interest, but the
20 recordings have some benefit.

21 MR HAERI: Well, I don't--I don't say that that may
22 not be a factor you would wish to consider in the context of the
23 way, but I do say--

24 (Overlapping speakers.)

25 MR HAERI: In answer to your question, if I may, there

1 is a difference not least because things may be said that are
2 not for the purposes of the Minutes themselves in the context of
3 a private conversation, and that is the nature of a recording.
4 There are real issues not just for former Governor Jaspert but,
5 of course, in the context of anyone being recorded, where they
6 are then going to be taken in a verbatim Transcript.

7 So, that is what we would say, sir, that is does raise
8 an issue that is to be factored into your weighing of the public
9 interest.

10 COMMISSIONER HICKINBOTTOM: But I accept that. There
11 is no doubt about that, but if it's to be weighed in the public
12 interest, which I have to balance, are you saying that there is
13 no difference in principle between the recordings and the draft
14 minutes?

15 MR HAERI: No, I'm not saying that. I'm saying there
16 is a difference in principle.

17 COMMISSIONER HICKINBOTTOM: What's the difference in
18 principle? You say that I have to--way up in the public
19 interest balance, what I hear on a recording and other strands
20 of the public interest, how can I weigh what's on the recording
21 in the public interest without listening to it?

22 MR HAERI: Well, sir, that goes to your second stage
23 of the process, and--

24 COMMISSIONER HICKINBOTTOM: We're in the second stage
25 of the process.

1 MR HAERI: I know we are, sir, but your question goes
2 to the content. What we are saying is that in principle there
3 is a difference between a recording and a handwritten note of
4 it, and we would submit that most people would recognise that.
5 That's a point that was made by Lord Justice Waller in his case
6 where he said, and I quote, "the recorded details of the very
7 words of a private conversation can make more impact and cause
8 greater embarrassment and distress than a mere account of the
9 conversation in question." It's from a different context, sir,
10 but I believe that most people would understand that, having
11 their every recorded word transcribed and then disclosed is a
12 different matter from a formal summary of the essence of a
13 Cabinet deliberation and decision-making.

14 COMMISSIONER HICKINBOTTOM: So, how do you expect me
15 to weigh in the public interest the confidentiality due to the
16 recordings which you say is very strong? How can I weigh that
17 without listening to the recording?

18 MR HAERI: Well, sir, we've made before you our
19 submissions on the point. You have our authorities--

20 COMMISSIONER HICKINBOTTOM: How do I do it? How in
21 practice do I do it? How can I take into account something that
22 you say I can't listen to?

23 MR HAERI: Well, sir, I don't say you can't listen to
24 it. What we say is that it's a matter of adjudication for you
25 in the first instance to weigh out the public interest as a

1 matter of principle.

2 Even here, sir, as I say, the Government is taking a
3 constructive approach--

4 (Overlapping speakers.)

5 MR HAERI: We're not simply saying you cannot have it.
6 We are saying it does merit adjudication. It's an important
7 point in principle, sir, for the reasons I've given.

8 COMMISSIONER HICKINBOTTOM: But it's not an
9 adjudication on principle that I can't listen to any recordings.
10 You say that, in an appropriate case, the cases may be few, I
11 can listen--in fact, I'm bound to listen to the recording to
12 weigh it in the public interest.

13 MR HAERI: No, that's not the position we're taking,
14 sir. The position we're taking is that at this first stage we
15 would invite you to make an adjudication on principle with
16 regards to the weighting of the public interest for recordings
17 qua recordings with the second stage as you set out to be
18 addressed in the context if you so find the answer to the first
19 stage to be yes of any specific issues that were discussed.

20 COMMISSIONER HICKINBOTTOM: But can't I only consider
21 the public interest in relation to particular circumstances? I
22 can't consider the public interest in a vacuum.

23 MR HAERI: We would invite you, sir, to consider the
24 submissions that we've made to give information that we say is
25 pertinent to the determination in principle of the adjudication

1 with regards to the recordings, and that is, as a preliminary
2 matter, the submissions that we have made before you, sir. It's
3 for you, of course, to determine whether you are persuaded by
4 that, that there is a real public interest that needs to be
5 weighed in the context of the submissions we've made or if there
6 is no weighing that you would wish to do at this stage in
7 principle based on the submissions and authorities you have
8 before you, sir.

9 Thank you.

10 COMMISSIONER HICKINBOTTOM: Mr Rawat?

11 MR RAWAT: May I start just with a point that Mr Haeri
12 relies upon, which is the fact that this Commission of Inquiry
13 was not established by Cabinet, the contrast is with the
14 position in the United Kingdom. With great respect to him, I do
15 not accept that in the United Kingdom an Inquiry would be
16 ordered by Cabinet. That is wrong. The Inquiry Act was 2005,
17 which is now the primary act under which Inquiries are set up in
18 England and Wales, and there are similar statutes in Scotland
19 and Northern Ireland, is that it is a Minister that establishes
20 an Inquiry.

21 Prior to that, being open to that Act, the lead or the
22 leading statute was the Tribunals of Inquiry Act of 1921, which
23 required a public Inquiry to only be set up following a
24 resolution of both Houses of Parliament, and there were
25 subsidiary pieces of legislation which allowed Ministers again

1 to establish, for example, the Department of Health that
2 established Inquiry. To my knowledge, and no doubt Mr Haeri
3 will correct me if I'm wrong, but I'm not aware of Cabinet
4 having a statutory power to establish an Inquiry.

5 In any event, even if I'm wrong, the point is a bad
6 one for this reason because it ignores the fact that yours is an
7 independent Inquiry. You may have been established by the
8 Governor, but you are independent of the Governor.

9 And it also seems to be a bad point to say that, had
10 you been established by the Cabinet, then the issue which you're
11 being asked to adjudicate upon would not have arisen. You are
12 either provided with relevant material or you are not.

13 The issue of the heart of today is about disclosure of
14 Cabinet material, if I may call it that, and you have already
15 broken it down into different categories. There are the Cabinet
16 papers that are put before Cabinet. Secondly, there are
17 finalised minutes which are the product of the work of the
18 Cabinet Secretary. Then we have draft minutes and notes. And
19 also, then, if you like, the Record of Decisions, which as
20 Sandra Ward has explained to you when she gave evidence in
21 private hearing on the 4th of May, are recorded either--and she
22 says this in her Affidavit, which Mr Haeri relies upon, either
23 regular extracts or expedited extracts.

24 Now, as I understand the position, all of that is
25 material that in response to requests, the position of elected

1 Ministers is, and of the Attorney General, is that you are
2 entitled to see that at least the first stage, and you're
3 entitled to see it unredacted; that is, without any information
4 blanked out.

5 The reason, and perhaps what I would add, is that the
6 saga--and it has been a saga of the COI obtaining Cabinet
7 material has been a lengthy one. We have been asking for
8 disclosure for Cabinet material for months. They are only now
9 coming through to us in a form that can be used. We only
10 learned, or you only learned, sir, of the existence of draft
11 minutes on the 4th May 2021 when Ms Ward was giving evidence.
12 She did not reveal then that these recordings existed. The COI
13 was only informed of that on Monday, May the 24th.

14 Now, that's some background for it, but it seems to me
15 the first point I would like to make is if Cabinet has taken the
16 policy decision--and Mr Haeri explains that it is based on the
17 need for transparency and to cooperate with the COI, if they
18 have taken a policy decision to disclose all of that material to
19 you, that, in itself, undermines the argument that you're not
20 entitled to see or to receive the electronic recordings because
21 they are simply a different form in which the same information
22 which those who instruct Mr Haeri agree is relevant is recorded.

23 If I just briefly turn just to the law, I accept that
24 the convention of joint Cabinet Responsibility is important to
25 the effectiveness of the system of Government that operates

1 within the Virgin Islands. I accept that that convention sits
2 alongside the convention of Cabinet Confidentiality, and that
3 that precludes, therefore, for example, Ministers discussing
4 Cabinet Decisions in public. So, to give a more precise
5 example, were a Minister to give a lengthy statement at a press
6 conference and then start giving details as to the different
7 views of those attending a Cabinet Meeting or to comment on the
8 actions of another attendee at that Cabinet Meeting, that would
9 breach the convention.

10 Now, that's relevant in two ways. I would say that,
11 at a later stage in the process, it may be relevant to your
12 consideration of where the interest lies if there have been such
13 comments made in the press.

14 And it also--confidentiality in this jurisdiction does
15 not appear to be absolute because there are post-meeting
16 statements issued which set out what was considered at a Cabinet
17 Meeting, and decisions are made available and appear on the
18 website of the Virgin Islands Government. That reiterates, as I
19 say, the first--the third principle that reapplies, and in my
20 submission, it's the principle that is really engaged here, and
21 that is that neither convention operates as a complete bar when
22 considering what material can be given to a court or a tribunal
23 or, indeed, a Commission of Inquiry. It is ultimately for the
24 Commission in this case to adjudicate whether disclosure should
25 be made to it, and then what use can be made of that disclosure,

1 and that is the decision you're being asked to make. You're
2 being asked to decide where the balance of public interest
3 falls.

4 Now, Mr Haeri has referred--Mr Haeri, I apologise, has
5 referred to the two-stage process by which the COI receives
6 documents. The first stage is to obtain and receive all
7 potentially relevant material, and the comfort that is given to
8 those who provide that material at that first stage is that it
9 comes with the safeguard that it is only seen by you, sir, and
10 your team. The second stage which we are not yet at, concerns,
11 put simply, what use can be made of the material, and that is
12 whether the material can be deployed, for example, in a public
13 hearing. It concerns whether it can be used in your Report, and
14 that is at which stage, as you have indicated, you will welcome
15 and you will afford an opportunity to those who have provided
16 that document to ask that it be redacted or that certain
17 information contained in it not to be referred to in, for
18 example, a public hearing.

19 We are at the first stage, and a better way of
20 describing the first stage is receipt of relevant material. And
21 so, if one bears that in mind and considers the essence of
22 Mr Haeri's submission, which is that you should not be provided,
23 even alone and notwithstanding the safeguard that it comes to
24 you alone, with electronic recordings of Cabinet Meetings.

25 The first is, the point I would make is that the

1 relevance threshold, which should be seen as a low one,
2 potential relevance, has already been crossed, and that is
3 because material, which refers to the same subject matter has
4 already and will continue to be disclosed to you. And so, to
5 distinguish electronic recordings from a note is to make an
6 artificial separation.

7 The second point I would make is that caution has been
8 expressed, both in correspondence to you and in the written
9 submissions that you've received, that the draft minutes may
10 contain inaccuracies, and this is a point that you have
11 canvassed with my learned friend. One can imagine easily a
12 situation where, at a hearing of the COI, the AG having agreed
13 or accepted that a draft minute can be put to a witness, that
14 the Witness says, "well, that's not an accurate record of what I
15 said." If you then were to call the Cabinet Secretary and she
16 were to assert, either in oral evidence or in an affidavit that,
17 in fact, it was accurate, then how are you to adjudicate on that
18 point without going back to what is the best evidence available
19 to you, which is a recording?

20 I pick up at this point a submission made by Mr Haeri,
21 which is this: That the recording may contain ancillary
22 material. There may be private--private conversations which are
23 not relevant. Well, firstly, it's difficult to really
24 understand the circumstances in which a private conversation
25 would arise in the context of a Cabinet meeting.

1 Secondly, those engaged in the private conversation
2 would, I anticipate, have been aware that it was being recorded
3 and to some extent been aware, therefore that it would have been
4 heard by others, and I would point out that, for example, in
5 order to provide--to obtain Transcripts of the recording,
6 Ms Ward, the Cabinet Secretary, has engaged the services of a
7 Stenographer or Court Reporter, but it also ignores the
8 fundamental point that, you, sir, as Commissioner of the COI
9 have significant judicial experience, and judges are trained to
10 determine--or to identify the--

11 (Lost audio.)

12 MR RAWAT: I think the final point, and it returns to
13 I think the submission that you're being asked to make is
14 without sight of the electronic recordings, you should at this
15 point make an assessment of where the public interest lies.

16 If you were to undertake that exercise, and these are
17 factors that would come into play whether or not the recordings
18 were available to you but you have on one side the argument that
19 the need to or the public interest in maintaining the
20 conventions of joint Cabinet Responsibility and Cabinet
21 Confidentiality in particular, particularly where it relates to
22 matters which are recent in history, that's one public interest,
23 which you are--which it is submitted to you should be preferred.
24 That has to be balanced against, in my submission, firstly, the
25 subject matter of this Inquiry. You are being asked to

1 investigate whether there is information that tends to show
2 corruption, abuse of office or, other serious dishonesty on the
3 part of public officials, elected or appointed. That is not
4 just a wide term of reference, but it is also one that is
5 enormously significant.

6 You are also being asked to look at the systems of
7 governance, law enforcement and justice in this jurisdiction,
8 and to make recommendations, and you have heard submissions
9 already, both from those instructed on behalf of the AG and on
10 behalf of seven Members of the House of Assembly, about the
11 ramifications of that, and you are in the process of receiving
12 position statements on them.

13 The second factor that goes on the other side of the
14 balance to Mr Haeri's point is the need to promote the
15 transparency of the COI's work and proceedings, which is
16 something that, as I understand it, both the Attorney General
17 and those she acts for are very keen to promote and sustain.
18 And as I've said, I've made the point that, having already taken
19 a decision to disclose the same information in a different form
20 to you, that is--that's a point that is relevant to that factor.

21 Another factor I would point to is the need for the
22 public to understand how Government decisions are taken in the
23 context of the COI, which, as I've said is fundamentally
24 concerned with good governance and has the power to make
25 recommendations.

1 Those submissions, from me, boil down to this: In my
2 submission, you cannot properly assess the public interest and
3 determine where the balance lies without some understanding of
4 the content of these recordings. And given the protective
5 factors that exist, given that it cannot be said that these
6 recordings are not relevant, the first stage is satisfied and,
7 in principle, these should be disclosed to you.

8 The way forward, I would suggest, is that all those
9 involved here, both COI and those instructed by the Attorney
10 General, should take a pragmatic and proportionate approach to
11 this. What is most important at this stage in order to preserve
12 the Hearing Schedule particularly is for the COI and for you,
13 sir, to be assured that you have seen the papers that went
14 before Cabinet, and you have seen the decisions that follow from
15 that. Once you are satisfied of that, it is easier to then
16 assess the extent to which Cabinet Minutes that might record the
17 deliberations or draft minutes or electronic recordings need to
18 be used.

19 And so, what the pragmatic approach I would put to
20 you, is that whilst I maintain that the principle is that you
21 are entitled to this material, the Attorney General should agree
22 to ensure that the recordings are preserved, and the COI will
23 then ask for inspection of any recordings on a case-by-case
24 basis.

25 So, unless there is any other matters on which I can

1 assist, I have nothing to say at this point in time.

2 COMMISSIONER HICKINBOTTOM: No, thank you very much.

3 Mr Haeri?

4 MR HAERI: Thank you, sir. Yes, I have responses on
5 four points in particular. The first is that Mr Rawat took a
6 point with regards to the authorisation of Commissions of
7 Inquiry, the point being that, in the United Kingdom, it is a
8 Minister of Cabinet of the United Kingdom Cabinet who can
9 authorise a Commission of Inquiry, and the Grenfell Inquiry and
10 in the Blood Infection Inquiry as well as with regards to the
11 COVID Inquiry, it was no less than the Prime Minister; and, of
12 course, he sits in the Cabinet. That is a very different
13 position than the situation in this jurisdiction where no
14 Minister of Cabinet has been involved in the authorisation of
15 this Commission of Inquiry.

16 COMMISSIONER HICKINBOTTOM: But how does that affect
17 the public interest, the public interest that I'm considering
18 here?

19 MR HAERI: I will explain, sir.

20 Because the public interest that you are considering
21 here must necessarily include the chilling effects that
22 disclosure of recordings of Cabinet discussions can have on open
23 and frank discussion within this Cabinet in circumstances where
24 a Commission of Inquiry can be called at any time by another
25 body, the unelected part of the Government, thereby acquiring

1 them in a way that would not be the case for the United Kingdom.
2 That is why in this Territory and in this circumstance it is a
3 relevant consideration with regards, we respectfully submit, to
4 your weighing of the public interest in this Territory.

5 COMMISSIONER HICKINBOTTOM: That they may be put to an
6 improper use?

7 MR HAERI: No, sir, not that they may be put to an
8 improper use, but that the principle of open and frank
9 discussion in Cabinet may not happen in the same way if Cabinet
10 Members were to perceive that a Governor at any time, an
11 unelected element in terms of the governance of this Territory,
12 could get the discussions that are ordinarily subject to
13 strictures of confidentiality and Collective Responsibility. In
14 other words, they may not have open and candid discussions in
15 Cabinet anymore in the same way as the principle requires in
16 order to have meetings of Cabinet properly minuted, properly
17 recorded reflecting an open deliberation and discussion because
18 of the perception that at any time a Governor who considers it
19 advisable may authorise a Commission of Inquiry to access those
20 minutes. That simply wouldn't happen in the United Kingdom.

21 COMMISSIONER HICKINBOTTOM: But the Governor won't get
22 these Minutes. I will get them.

23 MR HAERI: Well, yes, although you report to the
24 Governor.

25 But I think the point that's made--

1 COMMISSIONER HICKINBOTTOM: No, no, with respect,
2 that's--what do you mean I report to the Governor? My Report
3 has to go to the Governor.

4 MR HAERI: There are two separate points, sir. The
5 first is that in the United Kingdom, the report with regards to
6 a commission goes to the Minister. In this case, it goes not to
7 a Minister of this Territory. You're report goes to the
8 Governor. That is one point.

9 There is a separate point with regard to who has
10 access to these documents and in particular I should say
11 recordings when they are given to you. The point that was made
12 in that regard is that they only go to you. Of course, sir, we
13 know that's not the case. The FCDO is a Data Controller, a
14 joint Data Controller, of all information this is given to your
15 Commission of Inquiry Team. So it is not, I would respectfully
16 submit the case, that these recordings would only go to you,
17 they would also go to the FCDO, they would also go to the
18 Commission of Inquiry Team--

19 COMMISSIONER HICKINBOTTOM: With respect, this is
20 complete nonsense.

21 MR HAERI: Is that not the case, sir, that the FCDO is
22 a joint Data Controller? I may have misunderstood then.

23 MR RAWAT: (drop in audio) Mr Haeri makes a serious
24 allegation. Sorry, that is a really serious allegation.

25 MR HAERI: I'm sorry, I may have misunderstood--

1 (Overlapping speakers.)

2 MR RAWAT: May I explain my point, please. It's not
3 about joint Data Controller. What your allegation is about, is
4 about whether the Commission of Inquiry is routinely sharing its
5 information with the FCDO.

6 MR HAERI: No, sir.

7 MR RAWAT: That is the implication you make, Mr Haeri,
8 and I must put it on the record that it is one that I reject.

9 (Overlapping speakers.)

10 MR RAWAT: I'm not going to argue with you on this
11 point. What I want to do--

12 COMMISSIONER HICKINBOTTOM: No, no, because Mr Rawat
13 is not in charge. I am.

14 MR RAWAT: Of course.

15 COMMISSIONER HICKINBOTTOM: But he makes a good point,
16 and it goes even beyond that, which is a good enough point, but
17 it also goes to the independence of the Inquiry.

18 MR HAERI: Sir, I'm not in any way impugning, please,
19 let me clarify your independence, or the independence of the
20 Inquiry.

21 COMMISSIONER HICKINBOTTOM: So, what--why did you
22 mention the FCDO?

23 MR HAERI: Well, sir, because the point that was made
24 and I understood it by Mr Rawat is that as a factual matter it
25 would be only you that would have access to the recordings that

1 were submitted to you, and the point that was made, and I think
2 it's a matter of fact, and I may be corrected, is that in actual
3 fact it would go also to your Commission of Inquiry Team, and it
4 would go also to the joint Data Controller. If I'm wrong on
5 that, I stand to be corrected. And I would invite correction on
6 it. I believe it's on the Commission of Inquiry website which
7 is that it says for the purposes of data protection legislation,
8 the Commission and the FCDO are joint Controllers of the data
9 collected. If that's wrong, I would be glad to be corrected.

10 MR RAWAT: This is wrong. That's out of date. This
11 is wrong. That's been corrected.

12 MR HAERI: Well, thank you, sir, for bringing that to
13 our attention. I was not aware of--

14 (Overlapping speakers.)

15 MR RAWAT: The point is more--I'm sorry, sir, I will
16 ask in due course to make a submission on this.

17 COMMISSIONER HICKINBOTTOM: As I've said, it seems to
18 be more fundamental than that. It suggests that the FCDO have
19 access to the documents which only I have access to and my team
20 have access to. That is simply wrong.

21 MR HAERI: Thank you, sir.

22 COMMISSIONER HICKINBOTTOM: And even the suggestion is
23 firstly, the suggestion shouldn't have been made, and it's
24 deeply unhelpful to an independent Commission of Inquiry when
25 there's a suggestion that it is not independent.

1 MR HAERI: Sir, I did not mean to suggest for a moment
2 that you were not--and your Inquiry was not independent, sir.

3 COMMISSIONER HICKINBOTTOM: Well, the suggestion that
4 the FCDO can look at any documents they want to is clearly a
5 suggestion that we're not independent.

6 MR HAERI: Sir, there would seem to be a correction
7 which has been made with regards to what's on the website in
8 this respect, and I'm grateful for that correction, and I
9 certainly did not mean to suggest, sir, anything with regards to
10 your independence.

11 COMMISSIONER HICKINBOTTOM: Good.

12 MR HAERI: And I apologise if any such imputation was
13 perceived, I certainly did not intend that to be the case, sir.
14 I was merely trying to address what I understood to be the
15 factual position. I have been corrected on it. I understand
16 that the FCDO is not (sound interference) control.

17 COMMISSIONER HICKINBOTTOM: Well, that point is a bad
18 one.

19 Is there anything else, Mr Haeri?

20 MR HAERI: Yes, sir. There were two other points that
21 were made that I would like to respond to. The first is that,
22 the point was taken by Mr Rawat that it is not absolute in terms
23 of the principle of confidentiality, and I would accept that, of
24 course, and the term that is as a matter of trite law used in
25 this context is that it is not a rigid dogma. It's certainly

1 not a rigid dogma, confidentiality, that's not what was
2 submitted. What was submitted is that there is an issue of
3 public importance, and in the weighing of that public
4 importance, there are very real and serious issues to be
5 considered and weighed by you, sir, in your discretion.

6 COMMISSIONER HICKINBOTTOM: In assessing that because
7 you're asking me under no circumstances to listen to any of the
8 recordings, at whatever the circumstance is.

9 So, just to take Mr Rawat's example, which, frankly,
10 is at the modest end of examples, if a draft minute is used and
11 presented to a witness, a Cabinet Minister, in the course of a
12 hearing, and he says that Cabinet minute is wrong, that draft
13 minute is wrong. You accept that it may be wrong. You accept
14 that?

15 MR HAERI: I do, sir.

16 COMMISSIONER HICKINBOTTOM: Because it may be
17 inaccurate.

18 MR HAERI: I do, sir.

19 COMMISSIONER HICKINBOTTOM: Are you saying that it
20 would not be in the public interest to look at that particular
21 part of the recording and determine whether he said it or not?

22 MR HAERI: I can see very well, sir, that may be a
23 relevant factor in your determination.

24 COMMISSIONER HICKINBOTTOM: So, that means that I
25 can't strike out this whole thing as a class. I have to look at

1 each case on its individual merits, which, in terms of public
2 interest, in my experience, is always the case?

3 MR HAERI: That is a matter for your determination,
4 sir.

5 COMMISSIONER HICKINBOTTOM: But you've accepted that
6 that must be right?

7 MR HAERI: I have not accepted that that must be
8 right. I've accepted that that is a matter that you may wish to
9 consider in the context of your adjudication informed as well by
10 the submissions that we've made on the subject.

11 COMMISSIONER HICKINBOTTOM: So, there are no
12 circumstances you say that I should have regard to these
13 recordings even if the Witness says that the draft minutes are
14 wrong, I still can't--if you're right, I'm forbidden from
15 looking at the recording?

16 MR HAERI: That is not the position that we've taken,
17 sir, with respect. The position that we've taken, is that as a
18 matter of principle, it is your adjudication that will be
19 respectfully requested on this matter informed by the
20 submissions.

21 COMMISSIONER HICKINBOTTOM: But as a class of
22 documents?

23 MR HAERI: Yes, and it's not a polemical position we
24 are taking. We're not saying under no circumstance could you
25 see them. We're saying that there is an important issue that

1 requires balancing, sir.

2 COMMISSIONER HICKINBOTTOM: So, it's not an absolute
3 position. I need to look at the circumstances of each
4 particular case anyway?

5 MR HAERI: You need to look at the circumstances of
6 the principles, sir, we would say, to make an adjudication of
7 this first stage, and then at the second stage in a light--in
8 accordance with your procedure, you need to look at the
9 specifics.

10 COMMISSIONER HICKINBOTTOM: But why look at the first
11 stage at all?

12 MR HAERI: Because there is a principle point, sir,
13 which we believe is one that merits and deserves adjudication by
14 you, sir.

15 COMMISSIONER HICKINBOTTOM: But the principle point
16 might be overridden on the individual facts of a particular
17 case.

18 MR HAERI: You may consider, sir.

19 COMMISSIONER HICKINBOTTOM: Right.

20 Anything else, Mr Haeri?

21 MR HAERI: Yes, sir. There is one final point, which
22 is with regards to the Cabinet Secretary. The Cabinet
23 Secretary's understanding of the requests that were made to her
24 was to give the specific minutes that pertained to requests that
25 were asked to her, and in answering with regard to those

1 specific minutes that go to the specific request, she gave what
2 she considered to be the response that the Commission of Inquiry
3 was looking for. Now, it's since been clarified that, in fact,
4 where a request relates to Cabinet Minutes, it's not the
5 specific minute that was wanted, it is the entire minutes,
6 including dealing with any other issues that are unrelated to
7 the specific requests subject matter. In accordance with that,
8 she has professionally collated all of the minutes, and in
9 addition, after Cabinet approved it, all of the notes and drafts
10 of Cabinet Meetings. She's worked professionally, diligently,
11 tirelessly under very difficult circumstances and all such
12 documents have been disclosed to the Commission. I should add
13 that she's been working without a Recording Secretary in this
14 time period, and I think the important point to conclude on is
15 that all documents requested have been disclosed. If there are
16 any that are missing, I would please invite counsel for the
17 Commission or any of the Commission Team to let me know, and I
18 will ensure that that is addressed but I believe you now have
19 everything that you sought.

20 COMMISSIONER HICKINBOTTOM: Those documents were sent
21 yesterday?

22 MR HAERI: Some were sent yesterday, and some have
23 been sent, I understand, previously, but yes, there were some
24 additional documents sent yesterday, and I hope that you now
25 have, sir, everything that you have asked for.

1 COMMISSIONER HICKINBOTTOM: Mr Rawat, just on that
2 final point, if there's nothing else, do you have any
3 observations to make on that final point about the scope of the
4 initial request?

5 MR RAWAT: Well, can I stress, I'm not making any
6 criticism of Ms Ward or the effort that she has put in to
7 supplying the Commission with material.

8 MR HAERI: Thank you.

9 MR RAWAT: I don't think--I see little benefit in
10 ventilating the detail, but the point to make is that, as from
11 the 5th of March, it was made clear that the Commission wanted
12 to have documents in unredacted form, so if a document is being
13 supplied in partial form, it is being redacted, and that was
14 made clear. And the understanding that the Commission had was
15 that it would from that point receive full minutes. It did not
16 do so.

17 We're grateful for the efforts that Ms Ward is making
18 and that they are now being received, but I think--I don't think
19 there is anything more I can say on that.

20 Unless it were--sir, may I just come back on the
21 "chilling effect" point.

22 COMMISSIONER HICKINBOTTOM: Yes, thank you.

23 MR RAWAT: In my submission, it doesn't particularly
24 help Mr Haeri's argument that the chilling effect relates to
25 material being aired in public rather than aired alone in front

1 of a judge or a commission. And what may also help is to look
2 briefly at the decision of Mrs Justice Ellis in the Claude
3 Skelton-Cline in the Cabinet of the Virgin Islands, which you
4 will find in Bundle C at Tab 2. To give a brief background,
5 this was a (drop in audio).

6 I will pause, sir.

7 (Pause.)

8 COMMISSIONER HICKINBOTTOM: While we pause, Mr Rawat,
9 if you could perhaps give us the paragraph number?

10 MR RAWAT: Yes. I will take you, first of all, to
11 page 5 and paragraph 61 and then page 19 and then page 25 at
12 paragraphs 81 and 82.

13 COMMISSIONER HICKINBOTTOM: The bottom page or the top
14 right?

15 MR RAWAT: Bottom page, internal pagination, bundle
16 pagination. Page 25, paragraphs 81 and 82.

17 (Pause.)

18 COMMISSIONER HICKINBOTTOM: Mr Rawat.

19 MR RAWAT: Thank you, sir, to take you to this
20 judgment of Mrs Justice Ellis, which was in the Eastern
21 Caribbean Supreme Court, in the High Court, and as Mr Haeri has
22 pointed out, the 2019 Judgment. Briefly to set out the
23 background, Claude Skelton-Cline had been appointed as the
24 Managing Director of the BVI Ports Authority, and he sought a
25 judicial review of the decision of the Cabinet not to approve a

1 renewal of his contract, which was in 2015, so that's well
2 within the sort of recent history timeline that Mr Haeri relies
3 upon.

4 The High Court determined--and this is at
5 page--paragraph 61, that the decision was amenable to judicial
6 review, and then a second question that arose was whether the
7 Cabinet had failed to provide adequate reasons for its decision,
8 and you see that at--as a question is posed at Page 19.

9 If I just take you, the paragraphs that I'd like to
10 refer you, sir, are paragraphs 81 and 82--

11 COMMISSIONER HICKINBOTTOM: Yes.

12 MR RAWAT: --because in considering whether that
13 question of whether Cabinet had provided adequate reasons, Mrs
14 Justice Ellis first determined that there was a duty to provide
15 reasons in this case, and we see that at 81, but she then refers
16 to a Cabinet paper that the defendant--and that is the
17 Cabinet--had put forward before her as appropriately setting out
18 the reasons for its decision, and at 82 she quotes from that
19 Cabinet paper. And the lead into that quote is a quote from the
20 second Affidavit of the Cabinet Secretary Sandra Ward, which
21 says: "I wish to confirm, having been present at the
22 deliberations and being responsible for the minutes which are
23 recorded and finalised thereafter, the Cabinet's decision in
24 this regard was ultimately based on the rationale provided at
25 paragraph 4 for Cabinet paper."

1 This, in my submission, and the reason I put it before
2 you, sir, and on the record is because it is a neat example and
3 a recent example of the extent to which the Cabinet of the
4 Virgin Islands had been willing to put material before a court
5 to be adjudicated upon in an open forum, and the extent to which
6 I would say when one looks at Ms Ward's--the reference to
7 Ms Ward's Affidavit, there has been a willingness to refer to
8 deliberations within Cabinet.

9 Other than that, there's nothing more I wish to say,
10 save for one point, if I may, sir, and that's this: I would
11 like to put on record that I do take my obligations as counsel
12 to the Commission seriously, and I do appreciate that I have a
13 role as independent counsel to represent the public interest in
14 this Commission, and I have throughout, and I continue to intend
15 to do this, discharge my obligations to this Commission without
16 fail or favor.

17 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

18 Anything else, Mr Haeri?

19 MR HAERI: Just a final point, sir, with regards to--

20 (Pause.)

21 COMMISSIONER HICKINBOTTOM: What I will do, then, that
22 will give Mr Kasdan a better opportunity to have rested up
23 because he's been working on the Transcript, and shall I come
24 back at 20 past 12:00? Then we can all go and come back. Yes,
25 thank you, everybody.

1 MR RAWAT: Thank you.

2 (Recess.)

3 COMMISSIONER HICKINBOTTOM: Apologise for that delay,
4 which I think has something to do with the internet facilities
5 here.

6 We're going to proceed now. This will not be
7 live-streamed, but it will be recorded and, therefore, the link
8 that will go onto the website later on today will have the full
9 recording, but this is not going out live.

10 During the break we've had, I think the issue
11 concerning Wade Smith's statement has been resolved, so we
12 needn't deal with that, and that will--it has been resolved.

13 (Comment off microphone.)

14 COMMISSIONER HICKINBOTTOM: Thank you. That means you
15 don't have to deal with that.

16 And the Transcript with the necessary redactions will
17 go on this afternoon or tomorrow. Good. Thank you. Thank you
18 all.

19 Mr Haeri, I think we were with you.

20 MR HAERI: Yes, thank you, sir.

21 And I have only--I believe there was one final point
22 that was made by my colleague in terms of the case of Claude
23 Skelton-Cline versus the Cabinet of the Virgin Islands. This is
24 the decision of Mrs Justice Ellis reaffirming the importance of
25 the principles of Cabinet Collective Responsibility and

1 Confidentiality in this Territory. And the point that was
2 taken, if I've understood it, is that, in that case, Cabinet
3 papers were authorised by the Cabinet for disclosure to the
4 judge in that case. The only point I would make on that is
5 that, in this case, Cabinet has similarly so authorised that all
6 Cabinet papers sought by the Commissioner have been presented to
7 him, and that has been done as well as, of course, the more
8 pertinent subject for today's hearing, which is the Cabinet
9 Minutes and the drafts and the notes, but that's the only final
10 submission I'd make on that, sir.

11 COMMISSIONER HICKINBOTTOM: Good. Thank you. Thank
12 you, Mr Haeri.

13 MR HAERI: Thank you, sir.

14 COMMISSIONER HICKINBOTTOM: May I raise one final
15 point with you, and that is the position of the Governor. The
16 Governor attends Cabinet meetings. He chairs Cabinet meetings,
17 but he's not a Member of the Cabinet. He's not, therefore, a
18 part of the Cabinet Confidentiality/Responsibility, those
19 back-to-back things.

20 I'm not suggesting, of course, that he could disclose
21 outside Cabinet the individual views of voting Cabinet Members,
22 but if he were to express an opinion as to a measure in
23 Cabinet--for example, if he's to express concern about a
24 particular matter--that would, in any event, be--not be covered
25 by confidentiality. There would be no point in him expressing

1 concern.

2 MR HAERI: Sir, if by that you're inviting a
3 confirmation from me that the Governor is not subject to
4 confidentiality in terms--

5 COMMISSIONER HICKINBOTTOM: I didn't say that.

6 MR HAERI: I'm sorry, sir. I didn't understand.

7 COMMISSIONER HICKINBOTTOM: As I understand it, he
8 would be subject to this confidentiality. He couldn't disclose
9 outside Cabinet the views of voting Cabinet Members, but there
10 is nothing to prevent him, is there, having expressed, say,
11 concern about a measure? He can't vote, he can't vote against
12 it, but if he expresses concern, there would be no problem about
13 confidentiality in respect of that.

14 MR HAERI: If he expresses concern within Cabinet; in
15 other words, he is able to express concern within Cabinet?

16 COMMISSIONER HICKINBOTTOM: Yes.

17 MR HAERI: Subject to his strictures, yes, sir, I
18 believe that's right, he could express concern within Cabinet
19 subject to his strictures of confidentiality.

20 COMMISSIONER HICKINBOTTOM: I don't think you got the
21 point yet.

22 I accept that he is subject to confidentiality to this
23 extent, that he cannot disclose outside Cabinet the views of
24 voting Cabinet Members who are subject to joint Cabinet
25 Responsibility. But if he expresses concern about a proposal,

1 which it's open to him to do, you're not saying that that would
2 be confidential?

3 MR HAERI: Well, it's not been the focus, I have to
4 say, of my submissions today in particular. I think I'd want to
5 take that under advisement, if I may, if you're inviting a
6 specific response on his position in that respect.

7 COMMISSIONER HICKINBOTTOM: No, I'm happy for it to be
8 dealt with later, but it's something that we again have to
9 address, particularly bearing in mind the position statement
10 lodged by the Ministers on governance at 7:00 yesterday. And
11 that's not a criticism of when it was lodged--it's just come in,
12 so we haven't had time to consider it properly yet--but it
13 seemed to me that that's an issue that may crop up in due
14 course.

15 MR HAERI: Understood, sir. Thank you. We will
16 consider it further.

17 COMMISSIONER HICKINBOTTOM: Okay. So, I propose now
18 to give a short ruling on the submissions.

19 The background to this hearing is that it has been
20 clear from the outset that Cabinet Decisions, some Cabinet
21 Decisions, would fall within the purview of the subject matter
22 under inquiry in this COI. Indeed, in the initial hearings, a
23 number of Ministers referred to matters upon which Cabinet
24 either made a decision or approved a decision that was the
25 subject matter of questions put to them.

1 Consequently, some months ago, a Letter of
2 Request--Letters of Request were sent to the Cabinet Secretary
3 seeking production of various Cabinet documents. It is
4 unnecessary to go through the long saga of correspondence
5 passing to and fro in relation to those requests, although a
6 long saga it has been.

7 Yesterday, further Cabinet documents were produced to
8 the COI, which Mr Haeri of Withers on behalf of the Attorney
9 General believes to be complete. But over and above that, the
10 position taken by the Attorney General now that, in relation to
11 these documents, is clear. It is set out substantively in the
12 written submissions she has made for this hearing, dated the
13 28th of May, drafted by Mr Haeri and Sir Geoffrey Cox QC and
14 confirmed by Mr Haeri today. That position is as follows:

15 In respect of Cabinet documents, they can be broken
16 down into the following categories: (1) Cabinet Agendas; (2)
17 records of Cabinet Meetings, which include finalised minutes,
18 draft minutes, notes and, we've recently been told, some oral
19 recordings; and (3) Cabinet Decisions.

20 In respect of each of those categories of documents,
21 except recordings to which I shall shortly return, the Attorney
22 General now takes a consistent view; that is, that all will be
23 produced to the COI for consideration, but in respect of further
24 publication, including making the documents literally public,
25 she reserves her right to consider that the particular documents

1 and make an application in respect to redactions in respect of
2 those documents as she considers appropriate.

3 In relation to the Cabinet Minutes, the position again
4 has recently become clearer. Although some Cabinet Minutes over
5 the last year are in finalised form, many--out three-quarters of
6 the minutes--are not in finalised form and are in the form
7 either of draft minutes or more likely simply notes that were
8 taken by the Cabinet Secretary during the course of the meeting.
9 Those notes and, indeed, those draft and finalised minutes
10 include, as I understand it, a summary of the positions taken by
11 particular Ministers in relation to particular proposals.

12 Whilst I am grateful to the Cabinet, through the
13 Attorney General, for making the Concession as to production of
14 those documents to the COI, that concession was no doubt taken
15 after advice and after taking into account not only the public
16 interest in the Cabinet proceedings remaining confidential, but
17 also the public interest in the work of the COI and its Terms of
18 Reference. With respect to the submissions that I have seen and
19 heard, although it is not for determination now, it seems to me
20 that the Cabinet had little option.

21 However, as you said in relation to the recordings,
22 that they are, in principle, different from the minutes and
23 notes of Cabinet Meetings which have been disclosed; and that I
24 can and should now determine that, as a class of documents,
25 those recordings that need not be disclosed to the COI at all.

1 In both the written and oral submissions, Mr Haeri has
2 elaborated upon those submissions with reference to
3 well-established principles in relation to the Cabinet
4 Government, for example, the Cabinet business is conducted in
5 confidence as a quid pro quo, in effect, for joint Cabinet
6 Responsibility; and, he submits with force, the public interest
7 in that confidence is a matter of considerable weight.

8 However, he accepts that that public interest in
9 maintaining that confidence may be outweighed by countervailing
10 strands of public interest; and consequently, whilst the
11 principle of Cabinet Confidentiality is of great importance, it
12 is not rigid, and its application, he submits, can be outweighed
13 if another important public interest so dictates. He has
14 referred me to a number of authorities in support of that
15 principle, which is again well-established.

16 I do not find any force in these submissions which go
17 to the proposition that I can and should now determine that, as
18 a class of documents, none of the recordings need be disclosed
19 to the COI. They are, in my view, clearly subject to the same
20 principles that I have outlined and the same balance of public
21 interest, which Mr Haeri accepts, applies.

22 The recordings are no different in principle to draft
23 minutes or notes of discussions in Cabinet and, in my view,
24 should clearly be treated the same. That is, that whilst the
25 Commission of Inquiry should be allowed to listen to any

1 relevant parts of the recordings, any further publication should
2 not be made without the Attorney General having a proper
3 opportunity to make submissions with regard to whether a
4 disclosure is overall in the public interest. I fully accept
5 that, in that balancing exercise, the principle of
6 confidentiality of Cabinet business has considerable weight.

7 Having said that in respect of the ruling, the
8 important documents, so far as I can see, are likely to be not
9 the Cabinet discussions but the documents which go to Cabinet
10 with the proposal upon which the Cabinet make that
11 consideration, and the decision which they made.

12 Individual Cabinet discussions in relation to a
13 particular matter are unlikely to be relevant because of the
14 principle of joint Cabinet Responsibility. But, for example,
15 taking the possible circumstances suggested by Mr Rawat, that if
16 draft minutes which we have seen, which we will see are put to a
17 particular Minister and they contain an inaccuracy, in his view,
18 as Mr Haeri accepts, may be the case from time to time, it seems
19 to me that the public interest may well be in favor of listening
20 to the small part of the recording dealing with that matter and
21 confirming whether or not the Minister's recollection is true
22 and the draft minutes do not reflect it.

23 Furthermore, there may be an issue. The Governor's
24 role in governance and where he has expressed concern about a
25 particular measure, although not having a vote in a Cabinet,

1 that again may, on the facts of a particular case, warrant
2 consideration of a recording to confirm that that concern was
3 expressed. Everything, as is so often the case, will depend
4 upon the particular facts of a specific case.

5 Indeed, as I understand his submissions, although he
6 made a submission in principle covering the category of
7 documents, Mr Haeri accepted that, on specific facts of a case,
8 it may be proper for me to consider a recording. That, it seems
9 to me, belies the principle which he sought to uphold.

10 Consequently, in relation to the recordings, I will
11 not make a ruling that the COI will not seek disclosure of any
12 of them. I reserve the right to identify a particular
13 recording. No doubt it will be a part of a longer recording to
14 consider, either myself or the COI Team, even if only to assess
15 where the true balance of the public interest lies. As I've
16 indicated, I do not consider that we will have to listen to many
17 or much of the recordings which are available.

18 Finally, I appreciate that these hearings are being
19 recorded and generally live-streamed, and without further
20 criticism of Mr Haeri, I would urge in future that counsel
21 representing the participants restrict themselves to issues that
22 I have to determine in this particular case of Cabinet Minutes,
23 given the concessions made by the Cabinet, that those issues in
24 my view that are likely to be practical and pragmatic rather
25 than legal. But in any event, these hearings should not be

1 viewed as an opportunity to put forward views that might be held
2 by participants with regard to wider matters or to what might be
3 described as "political statements." Such statements do not
4 help me, and indeed they are positively unhelpful to the process
5 that I am conducting.

6 Mr Haeri's suggestion during the course of his
7 submissions that the whole independent process which I'm engaged
8 in is undermined because the Foreign Commonwealth and
9 Development Office that might have access to documents,
10 including the recordings, he said, if they were to be disclosed,
11 to which only I and my team, in fact, have access, was, in my
12 view, an irresponsible suggestion, and certainly an unfounded
13 one. I have accepted his apology, but I do not wish to have any
14 repetition from any counsel for any participant.

15 Good. Mr Rawat, is there anything else?

16 MR RAWAT: Sir, I don't believe we have any further
17 business to deal with in this hearing today.

18 COMMISSIONER HICKINBOTTOM: Mr Haeri, anything else?

19 MR HAERI: No, sir, save, if I am unmuted, to simply
20 say that, as I had hoped clarified, no imputation was meant with
21 regards to your independence at all, sir. I was, I believe,
22 merely stating what I had understood to be the position
23 represented on multiple occasions with regard to the Data
24 Controller position; I am corrected on that. I am told that
25 that is not the position, and nothing further to say on that,

1 sir.

2 COMMISSIONER HICKINBOTTOM: Even if it were the
3 position, it would not mean that the FCDO had access to the
4 documents; but, as I say, apology accepted, but these are
5 not--these are not helpful suggestions.

6 What I'll do is I wouldn't propose perfecting that
7 ruling unless someone within 24 hours indicates that they
8 proposed challenging it, in which case I will perfect it.

9 Otherwise, nothing else?

10 MR HAERI: Nothing further.

11 MR RAWAT: Nothing from me, sir.

12 COMMISSIONER HICKINBOTTOM: Thank you. Good. Thank
13 you.

14 (Whereupon, at 1:28 p.m. (EDT, the hearing was
15 concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in cursive script, reading "David A. Kasdan", positioned above a horizontal line.

DAVID A. KASDAN