

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 21

(THURSDAY 1 JULY 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Mr Niki Olympitis of Withers LLP (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Counsel to the Commission Mr Bilal Rawat also appeared.

Ms Erica Smith-Penn gave evidence.

Ms Sheila Brathwaite gave evidence.

Mr Myron Walwyn gave evidence.

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Those present:

Session 1

Mr Niki Olympitis, Withers LLP

Mr Bilal Rawat

Ms Erica Smith-Penn

Ms Sheila Brathwaite

Mr Steven Chandler, 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

Mr Albert Cheraymond, Audio-Visual Technician

Session 2

Mr Bilal Rawat

Mr Myron Walwyn

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

Mr Albert Cheraymond, Audio-Visual Technician

P R O C E E D I N G S

Session 1

COMMISSIONER HICKINBOTTOM: Good morning, everyone.

Just before we resume the evidence, could I just deal with one small point. Over the last 24 hours there have been a number of press reports concerning the evidence that The Honourable Speaker gave to the Commission of Inquiry with regard to his Declarations of Interests. Anyone following the work of the Commission of Inquiry on YouTube or in the Transcripts will know the position clearly, but some of the press reports were confused. The position is very straightforward.

On the 18th of June, The Honourable Speaker gave evidence to the Commission of Inquiry on his Declarations of Interests. Despite requests, he had not produced any information or documents before the Hearing nor, indeed, did he produce any documents at the Hearing.

However, during the course of his evidence, he said that he might have some documents relating to these matters, and I said that if he sent them in, they would be evidence and I would take them into account. He sent in some further documents a week later.

During the course of the Hearing, The Honourable Speaker's learned counsel, Mr Rowe of Silk Legal, accepted that if a Member lodged his Declaration a day late, then that would be a breach of Section 3 of the Register of Interests Act 2006,

1 and there was no "reasonable excuse" defense. On the basis of
2 the documents that the Speaker has produced, together with the
3 documents that were produced by the Registrar of Interests, the
4 dates on which he submitted his Declaration forms are clear.
5 Where documentary evidence is clear and uncontroversial, it is,
6 of course, unnecessary to hear any oral evidence about it.
7 Hopefully that will have made the position clear for those who
8 have been struggling with it.

9 The press report, or at least some them, simply
10 grasped the wrong end of what I'm bound to say is a fairly short
11 stick. But can I also say this: It was also, in my view, the
12 wrong stick. I heard six days of evidence and submissions in
13 relation to Declaration of Interests, and the Register of
14 Interests. I heard that evidence and those submissions in the
15 context of governance, which is expressly a matter which I have
16 to consider under my Terms of Reference.

17 At the start of those six days, nobody suggested that
18 the Register of Interests Act was anything other than a firm
19 pillar of governance in the BVI, and none of the 22 Members of
20 the House of Assembly, current and past, had said that they were
21 in breach or not compliant with any of the provisions of the
22 Act. Indeed, several of the elected Members have written to the
23 Commission of Inquiry expressly to say that they had been fully
24 compliant.

25 By the end of the six days, it was clear that, leaving

1 aside the Attorney General, to whom these issues were not put,
2 all 21 Members of the House of Assembly, current and past, had
3 not been compliant with Section 3 of the Act, a position which
4 they each accepted.

5 Furthermore, in relation to the system which I was
6 mainly concerned with, the elected Ministers, through Sir
7 Geoffrey Cox, Queen's Counsel, accepted that the implementation
8 of the constitutional provisions through the Register of
9 Interests Act 2006 was, in his term, practically hopeless. In
10 those circumstances, the picture painted by the evidence as a
11 whole is absolutely clear; and, in those circumstances, the
12 minute details of how a single Member made efforts to comply
13 with his statutory obligations pale by the side of this picture,
14 clear and on a broad canvass.

15 With those comments, hopefully the episode of the
16 Register of Interests which, as I say, we heard over six days,
17 that chapter can be closed, and we can move on to deal with the
18 other important aspects of the Inquiry with further evidence
19 today.

20 Mr Rawat.

21 MR RAWAT: Good morning, Commissioner.

22 Before I introduce our Witnesses for this morning, can
23 I just, for the purposes of the Transcript, record that, in the
24 hearing room today we have Mr Niki Olympitis of Withers BVI on
25 behalf of the Attorney General and the elected Ministers. In

1 terms of the remaining Member of the House of Assembly, they are
2 not represented either in person or remotely.

3 COMMISSIONER HICKINBOTTOM: Thank you.

4 MR RAWAT: Two witnesses this morning are Ms Sheila
5 Braithwaite, who was, until very recently the Complaints
6 Commissioner, and her successor in the role Ms Erica Smith-Penn.

7 Commissioner, with your permission, what I propose to
8 do today is to have both the former and current Complaints
9 Commissioner giving evidence together because there is
10 overlapping in the questions I would have otherwise have to put
11 to them.

12 COMMISSIONER HICKINBOTTOM: No, that is sensible.

13 MR RAWAT: So, before we proceed, can I asked that
14 they be sworn in turn or invited to take the oath.

15 COMMISSION SECRETARY: Good morning, Ms Minister
16 Smith-Penn. Would you like to swear an oath or make an
17 affirmation?

18 THE WITNESS: (Ms Smith-Penn) Good morning. I would
19 like to affirm, please.

20 COMMISSION SECRETARY: If you would like to take the
21 sheet to your right-hand side and read the words on the
22 affirmation.

23 THE WITNESS: (Ms Smith-Penn) Yes.

24 I, Erica Smith-Penn, do solemnly, sincerely and truly
25 declare and affirm that the evidence I shall give shall be the

1 truth, the whole truth and nothing but the truth.

2 COMMISSION SECRETARY: Thank you. Would you like to
3 swear an oath or make an affirmation?

4 THE WITNESS: (Mrs Braithwaite) I would like to
5 affirm.

6 COMMISSION SECRETARY: Again, if you can take the
7 sheet in front of you and read the words.

8 THE WITNESS: (Mrs Braithwaite) I, Sheila Braithwaite,
9 do solemnly, sincerely and truly declare and affirm that the
10 evidence I shall give shall be the truth, the whole truth, and
11 nothing but the truth.

12 COMMISSION SECRETARY: Thank you.

13 COMMISSIONER HICKINBOTTOM: Now, Mrs Braithwaite, we
14 didn't ask you to produce a position statement on governance,
15 which we did some other people, but you've written to me, and I
16 know that you want to say a few words about governance before
17 you give your evidence, and I'm very content that you say those
18 words now. Thank you very much.

19 THE WITNESS: (Mrs Braithwaite) Good morning,
20 everyone, and thank you, Commissioner, for the opportunity.

21 I begin with a brief Opening Statement. I state that
22 Mr Elton Georges was the first Commissioner who established the
23 office in 2009 and managed it until 2015. When I joined the
24 Commission, Mr Georges was very welcoming and shared with me as
25 much as he could on the workings of the office. He had already

1 paved the way with the Public Service, by pointing out to them
2 the necessity of responding to questions from the Commission, so
3 that complaints received from members of the public could be
4 resolved. He also endeavored to have his recommendations
5 implemented by officers. In my estimation, Mr Georges did a
6 very good job in ferreting out information and informing
7 officers of their needed to be of better service to the public.
8 He essentially laid the groundwork for the Commission to be
9 effective in its mandate.

10 In my tribute to him in 2018, I said, "Mr Georges
11 genuinely cared about the image of the Public Service and did
12 all he could to change any negative habits".

13 As the Commissioner, I experienced high's and low's
14 during my tenure. The high's came when I was able to resolve an
15 issue for a complainant, and expressly when they expressed
16 gratitude; also when any recommendations were implemented by
17 departments.

18 Those were days of frustration when officers were not
19 responding to requests for information and I had to go into
20 encouragement mode. My recognition that the Act did not provide
21 me any assistance to get the information needed, added to my
22 frustration.

23 In my estimation, the Commission has been relatively
24 successful in being effective under the circumstances of
25 budgetary and staffing constraints; the number of complaints

1 dealt with, the processing of Annual Reports; the need for
2 amendments to the Act; independence of the office, and
3 human-rights issues.

4 May I also take this opportunity to offer my
5 understanding of good governance.

6 Good governance is defined by the United Nations
7 Economic and Social Commission for Asia and the Pacific as
8 having eight major characteristics: It is participatory,
9 consensus oriented, accountable, transparent, responsive,
10 effective and efficient, equitable, and inclusive and follows
11 the rule of law, which ensures impartial protection of human
12 rights, has an independent judiciary system and the police force
13 should enforce the rule of law in an incorruptible manner. Good
14 governance assures that corruption is minimized, the views of
15 minorities are taken into account and that the voices of the
16 most vulnerable in society are heard in decision-making. It is
17 also responsive to the present and future needs of society.

18 In the Public Service, good governance should ensure
19 that the service has the right set of laws, regulations,
20 policies and procedures to ensure accountability, openness,
21 fairness, honesty, integrity, impartiality, and professionalism
22 in every aspect of its operations.

23 At the Complaints Commission we operate under a set of
24 guiding principles to achieve good governance. These principles
25 are: Integrity, independence, professionalism, accessibility.

1 My thought is that good governance involves
2 transparency of activities, accountability and honesty of
3 actions to the Government, colleagues, and the public; fairness
4 for all; being accessible by all especially the less fortunate
5 in society and adherence to the rule of law.

6 COMMISSIONER HICKINBOTTOM: Thank you,
7 Mrs Braithwaite.

8 Mrs Smith, you haven't asked to do so, but is there
9 anything else you want to add to that?

10 THE WITNESS: (Mrs Smith-Penn) Thank you very much,
11 Commissioner.

12 The points that I would wish to make on good
13 governance I think I had said that I would intersperse them as I
14 gave evidence at hand.

15 COMMISSIONER HICKINBOTTOM: I'm very happy for you to
16 do that. You will be asked questions, and it's likely that they
17 will be covered by those questions.

18 THE WITNESS: (Mrs Smith-Penn) Yes. And I should just
19 like to mention that the points on good governance that I intend
20 to raise would be those that are enshrined in the Universal
21 Declaration on Human Rights that gave rise to the European
22 Convention on Human Rights that also enshrined in the
23 Constitution of the Virgin Islands, namely the Virgin Islands
24 Constitutional Order 2007.

25 And to just expose on what those principles mean

1 within the context of democracy, human rights, the rule of law,
2 and good governance.

3 COMMISSIONER HICKINBOTTOM: Thank you very much.

4 THE WITNESS: (Mrs Smith-Penn) Thank you.

5 COMMISSIONER HICKINBOTTOM: Mr Rawat.

6 MR RAWAT: Thank you, Commissioner.

7 BY MR RAWAT:

8 Q. Mrs Braithwaite, Mrs Smith-Penn, the first part of
9 what I need to do today is to go through various formalities
10 before I get into the substance of my questions. How I would
11 like to do things, if I may, is that most of my questions will
12 probably be directed at Mrs Braithwaite in the first instance
13 because she obviously has longer experience of being the
14 Complaints Commissioner. There will be some questions that
15 Mrs Smith-Penn may be better able to answer but, Mrs Smith-Penn,
16 if at any point you wish to add to an answer that
17 Mrs Braithwaite gives to us, I will give you that opportunity.

18 But if I turn to Mrs Braithwaite first and just deal
19 with the formalities. The first formality I need to ask you to
20 deal with is to give the Commissioner your full name.

21 A. (Mrs Braithwaite) My name is Sheila Naomi Braithwaite.

22 Q. Mrs Smith-Penn, if you could do the same, please.

23 A. (Mrs Smith-Penn) My name is Erica Rosetta Smith-Penn.

24 Q. Thank you. Normally I would ask a witness to give a
25 professional address, but I don't think we need to do that

1 because we do have your Annual Reports and that tells us where
2 the Complaints Commissioner operates from.

3 What I would say is this, I try as I go through to
4 keep the questions short and simple. I confess it doesn't
5 always work, but if at any time you have difficulty
6 understanding a question I've put to either one of you, please
7 do stop me and ask me to repeat or rephrase it.

8 You both have, as you confirmed, you have a bundle
9 that's been prepared for the Hearing which is essentially a
10 bundle of the Annual Reports that the Complaints Commissioner
11 issues. We may need to go and look at some of that as we go
12 through.

13 The last point to make is to ask you this: Just to
14 both remember just to please keep your voices up and speak
15 slowly. The microphone that you have in front of you will not
16 amplify; it will just record. But it is very important that we
17 do have an accurate record of what evidence you can give us
18 today.

19 If I start with Mrs Braithwaite, could you give the
20 Commissioner an outline of your career before you were appointed
21 to the post of Complaints Commissioner.

22 A. (Mrs Braithwaite) Certainly.

23 My career began in Jamaica West Indies, where I was a
24 teller at the Bank of Nova Scotia, and then that was followed up
25 with me being a Tax Inspector at the Inland -- at the Tax

1 Department of the Government of Jamaica.

2 I graduated with a Bachelor's degree in chemistry and
3 mathematics from the University of the West Indies, and then I
4 came home, and I began to work as a Tax Inspector in the BVI
5 Government. I eventually became the Deputy Commissioner at the
6 Inland Revenue Department. I was a senior--I have been back and
7 forth in several Ministries and Departments over my 35-40 years
8 of service in the BVI.

9 And I was a senior administrative officer in the
10 Ministry of Health, Education and Welfare at the time and then I
11 became the Permanent Secretary in the Ministry of Health and
12 Social Development, which is what it's called now.

13 I was an Assistant Secretary and then Permanent
14 Secretary in the Ministry of Natural Resources and Labour where
15 I spent most of my time. I think I was there for about 10 years
16 of my service in that Ministry.

17 I was Permanent Secretary in the Deputy Governor's
18 Office for a very short period of time and Permanent Secretary
19 in the Ministry of Education and Culture from where I retired in
20 2010. In June 2001, I took the master of business management
21 degree at the University of the Virgin Islands in St. Thomas,
22 USVI.

23 Between 2011 and 2015, I was the Chairman of the
24 National PAC Trust of the BVI.

25 I hold, in addition to my Bachelor's of Science and

1 MBA, I hold an executive diploma in Strategic Management from
2 the Charter Management Institute of the United Kingdom and a
3 certificate in Public Administration from the University of the
4 West Indies. I actually became the local tutor after I had
5 completed that certification for the University of the West
6 Indies.

7 I also worked at Barclay's Bank at the time. It's now
8 called Inter-Caribbean Bank in the BVI for about four years, and
9 then I had left the Public Service and went back after that
10 period of time at the bank because I wanted to insure that I
11 preserved my prior service towards my retirement.

12 And then in 2015 I became the Complaints Commissioner.

13 Q. That was on the 1st of July 2015?

14 A. (Mrs Braithwaite) 1st of July.

15 Q. Thank you.

16 A. (Mrs Braithwaite) 1st of July.

17 I actually reported on the 8th of June, though, was
18 Election Day before voting into office.

19 Q. Mrs Smith-Penn, could I ask the same question of you.
20 If you could give an outline of your career before you came to
21 the post of Complaints Commissioner.

22 A. (Mrs Smith-Penn) Thank you very much.

23 In 1989, I joined the Chief Minister's Office, as it
24 then was, as the Filing Clerk and essentially the keeper of the
25 record.

1 I then went on in the Chief Minister's Office to
2 become the sole accounts officer responsible for the accounts at
3 that time.

4 During that time, I sat at the feet of all who were
5 responsible for bringing the H. Lavity Stoutt Community College
6 to pass, and there is a reason why I mention that and I will
7 come on to it later.

8 In 1991, I left the Chief Minister's Office and
9 attended the University of the Virgin Islands where I studied
10 and eventually graduated summa cum laude with a Bachelor of Arts
11 degree in Management with a concentration in Computer
12 Applications.

13 In 1995 I left the University of the Virgin Islands St
14 Thomas campus and I joined the Deputy Governor's Office where I
15 was assigned to work directly with Mr Elton Georges, CMGOB, (oh,
16 blessed memory). And I worked with him for that period until
17 1996 when I was drafted by His Excellency the Governor David
18 McKilligan.

19 I was then appointed to be the private secretary who
20 worked directly with the Governor until I was then elevated to
21 hold the post of private secretary together being the Clerk to
22 what was then the Executive Counsel. We know it now to be the
23 Cabinet. That opportunity afforded me a grand and long extended
24 experience to be the keeper of the record of the policy or the
25 chief policy-making body of the Territory of the Virgin Islands.

1 In 2002, I was promoted and left the Governor's Office
2 to become the Deputy Permanent Secretary in the Ministry of
3 Education. During that time, one of the special assignments was
4 to work with the "Laurie Form" (phonetic) Commission and bring
5 in to pass on the special committee appointed a new Education
6 Act which is now known The Education Act 2004 for the Territory
7 of the Virgin Islands.

8 In that same period in 2003, I was appointed
9 simultaneously to be the Deputy Supervisor of Elections and
10 worked in one of the most contentious period and one of the
11 hottest contested elections in the Territory of the Virgin
12 Islands.

13 After the election, I returned to the Ministry of
14 Education and worked there until 2005, when I left to study law
15 at the University of Birmingham in the United Kingdom. I
16 graduated from the University of Birmingham with a Bachelor of
17 Law degree, and then I went on to study and achieve my graduate
18 Diploma in Law at what was then the College of Law in
19 Birmingham, United Kingdom. It's now known as the University of
20 Law.

21 I returned to the Territory of the Virgin Islands.
22 And in 2009, I was appointed to work in the Land Registry of the
23 Territory of the Virgin Islands.

24 And then, in 2010, I was appointed to the position of
25 Chief Registrar of Lands. I worked there until that time and

1 went on later to be appointed Registrar of the Supreme Court,
2 and I worked in the Supreme Court as the Registrar in the period
3 up until 2020 at the 31st of December 2020, and so I worked in
4 that position for a period of six years. And it was in that
5 particular position where a lot of what I had learned began to
6 take shape in the aforementioned areas that I discussed with
7 respect to good governance.

8 I will stop there, I think, and thank you very much.

9 COMMISSIONER HICKINBOTTOM: Thank you.

10 BY MR RAWAT:

11 Q. Thank you.

12 And just to confirm, you were appointed to your role
13 on the 1st of January 2021?

14 A. (Mrs Smith-Penn) Yes, I was.

15 Q. Thank you.

16 Let's look at that role, please.

17 The Complaints Commissioner was established, it's a
18 constitutional position which was established under Section 110
19 of the Constitution, but your functions are set out in the
20 Complaints Commissioner Act of 2003. Can I ask you each in
21 turn, I will start with Mrs Braithwaite.

22 Mrs Braithwaite, what did you consider your role as
23 Complaints Commissioner to be?

24 A. (Mrs Braithwaite) I considered my role to be primarily
25 to assist members of the public to get resolution to the

1 complaints, but to also do it in a fair manner to both sides,
2 both the Public Service and the complainant.

3 Also in reporting my findings to departments, I
4 thought my role was to be--to point out the short-falls that I
5 had discovered and, you know, give some recommendations as to
6 how they could be improved so that the public would recognize
7 that the Public Service tries to abide by the rules of good
8 governance.

9 Q. Mrs Smith-Penn, can I put the same question to you.
10 What do you consider your role to be as Complaints Commissioner?

11 A. I think that the role of Complaints Commissioner
12 is--first of all, the nomenclature is probably a little bit
13 limited in its scope and it sends the wrong message, in my
14 humble view. The Complaints Commissioner, in my view and thus
15 my role is understood to be one that is at the apex of the
16 complaints procedure in and for the Public Service of the
17 Territory of the Virgin Islands.

18 That means that with respect to administration, the
19 Complaints Commissioner is the person to whom all Members who
20 need to rely on the services of the -- what we traditionally
21 used to call the Civil Servants, as well as statutory bodies or
22 in any respect any of those bodies that's defined under the
23 Complaints Commissioner's Act, would need to rely on those
24 services. It means, therefore that, persons who do not normally
25 have access perhaps do not have the means nor the monies to seek

1 out redress for whatever maladministration they may consider,
2 would have a right to come to the Commission, and the Commission
3 would then be the voice of that individual.

4 We're responsible for, therefore, ensuring that good
5 governance is at all times protected; that the rights that are
6 ensured to every man--every human being on this Earth--is upheld
7 that the rule of law is robustly protected and upheld; and that
8 where there is a need to apply justice and human consideration,
9 that the Complaints Commissioner would mediate or cause to be
10 mediated on behalf of such individuals, satisfactory resolution
11 to whatever problems they may come against. And in all those
12 respects, democracy is a critical role that the Commission is
13 responsible for protecting.

14 If I may very quickly say that, the International
15 Ombudsman Institute under which the Complaints Commission has
16 had the opportunity to benefit from in training, as well this
17 year the theme for the training that they had was giving voice
18 to the voiceless, and we very much adopt that in everything that
19 we do, and I should say that we have been doing that at the
20 Commission from the time of its inception until the present
21 time.

22 Q. And can I follow that up, please, Mrs Smith-Penn, with
23 a separate question, which is: How--what is--how is your office
24 currently staffed? Aside from yourself, how many other staff
25 and what roles do they have?

1 A. (Mrs Smith-Penn) I have three Members of staff in
2 total at the Commission: The Administrative Officer--well,
3 she's the Senior Administrative Officer and Intake Officer as
4 well as Investigator; and then we have the Lead Investigator who
5 is a trained lawyer; and the Commissioner, which is myself
6 currently.

7 Q. So, a total complement of three?

8 A. (Mrs Smith-Penn) Three officers.

9 Q. Mrs Braithwaite, was it a similar level of staffing
10 during your time as Complaints Commissioner?

11 A. (Mrs Braithwaite) It was. Except that there is one
12 post that's not filled because of funding. It's called the
13 Office Generalist.

14 A. (Mrs Smith-Penn) Yes, correct.

15 A. (Mrs Braithwaite) And that person acts as a clerical
16 officer. That person would handle visitors, take telephone
17 calls.

18 And during my time, I tried to recruit someone who
19 spoke Spanish because we had a number of persons coming into the
20 office who spoke Spanish--we didn't speak Spanish--and there was
21 some difficulty in understanding what their complaints were.
22 So, we recruited someone who was bilingual, and we lost her
23 after the hurricanes of 2017 because our office was destroyed,
24 basically. Half of the office was destroyed, so we lost a lot
25 of furnishings. We lost some of our files, et cetera, and we

1 had to--we tried to get from Government monies to replace these
2 things, but they said that we should find savings.

3 So, with a painful heart, I had to release the
4 officer. She had already been asked for any way because of, you
5 know, her professionalism and the manner in which she worked,
6 and so I reluctantly released her so that we could restart the
7 office, so to speak, because we had to buy a lot of furnishings
8 and so on.

9 Q. Thank you.

10 A. (Mrs Braithwaite) That was one of the constraints that
11 we had.

12 Q. Can I come back in due course to the question of
13 funding, which I will ask of both of you, but under the Act--and
14 I can take you to the Complaints Commissioner Act if you need
15 it, but you probably both know it very well in any event.

16 The task is to investigate allegations of
17 maladministration by government departments or public
18 authorities; and, as I understand it, Mrs Braithwaite, perhaps
19 you can confirm this, but the Complaints Commissioner can do
20 that by either receiving a complaint from members of the public
21 or there is a power for you to investigate complaints of your
22 own motion; is that right?

23 A. (Mrs Braithwaite) Yes, we can initial own motion
24 investigations. If we see that the number of persons in the
25 public would be affected, we can do our own motion, or if--and

1 that would come about when we receive a number of complaints
2 about the particular area, subject area.

3 And just by looking and observing what's going on in
4 the Territory, we can also decide to do our own motion
5 investigation.

6 Q. Now, maladministration is actually defined in the act,
7 and perhaps if I just put it in the record, Commissioner for
8 your note, it's at this part--it's the law bundle at page 211.

9 COMMISSIONER HICKINBOTTOM: Thank you.

10 BY MR RAWAT:

11 Q. Section 2 of the Act defines the Complaints
12 Commissioner Act 2003 defines maladministration as this:
13 "Maladministration means inefficient, bad, or improper
14 administration and without prejudice to the generality of the
15 foregoing includes (a) unreasonable conduct including delay,
16 discourtesy, and lack of consideration for a person affected by
17 any action; (b) abuse of any power, including any discretionary
18 power or authority, including any action which (1) is
19 unreasonable, unjust, oppressive or improperly discriminatory or
20 which is in accordance with the practice which is or may be
21 unreasonable, unjust, oppressive or improperly discriminatory;
22 or (2) was based wholly or partly on a mistake of law or fact".

23 And the final part of the definition is at (c) which
24 defines it as "unreasonable, unjust, oppressive or improperly
25 discriminatory procedures".

1 So, again to Mrs Braithwaite, what the Complaints
2 Commissioner can do is investigate a complaint. You can make
3 Findings of Fact.

4 A. (Mrs Braithwaite) Yes.

5 Q. You then can report on it, and you can make
6 recommendations--

7 A. (Mrs Braithwaite) Yes.

8 Q. --in your Report.

9 A. (Mrs Braithwaite) Yes, that's correct.

10 Q. I don't know whether you have the Act with you, but if
11 you need it, it is in another bundle that's on the desk, but can
12 I take you both to Section 11 of the Act, and I want to ask you
13 something both in turn, please.

14 If you look at 11, it says there "power to obtain
15 evidence", and it says: "Subject to subsections 2 and 3, the
16 Commissioner shall have the power of the High Court to summon
17 witnesses to appear before him, to compel them to give evidence
18 on oath, and to produce documents relevant to the proceedings
19 before him". And the people you can't summons or make demands
20 of are defined in (2) and (3) as "the Governor and any
21 Minister", and so effectively you--and (3) relates to Executive
22 Council, which is what became the, I think, the Cabinet?

23 A. (Mrs Braithwaite) Yes.

24 Q. But other than that, you do have as Complaints
25 Commissioner power to compel the production of witness evidence

1 or documents.

2 Mrs Braithwaite, in the time that you were Complaints
3 Commissioner, how often did you use the power under Section 11?

4 A. (Mrs Braithwaite) I don't recall the frequency, but I
5 have used it. Especially when we were doing certain
6 investigations, we would call in witnesses and we would have
7 them swear on a--I don't have the document with me, but we have
8 a particular document that they would swear, which falls under
9 this Section. Or affirm, as it shows.

10 Q. And did you use the power also to compel the
11 production of documents to you?

12 A. (Mrs Braithwaite) In writing--yes, by writing and
13 requesting documentation.

14 Q. And in your experience, was there any resistance to
15 your exercise of that power?

16 A. (Mrs Braithwaite) In terms of witnesses, no. In terms
17 of getting documentation, on occasion there was resistance. I
18 may have received excuses such as "we can't find the
19 information" or, you know, "the person who is dealing with the
20 matter is not here", things of that nature.

21 But eventually, in most cases, they were able to get
22 the documentation we needed.

23 Q. Mrs Smith-Penn, you have obviously been in the role
24 for a shorter time, a few months, but in that time since taking
25 on the role, have you had occasion to use the power under

1 Section 11?

2 A. (Mrs Smith-Penn) I have had the occasion to use that
3 power. Indeed, I have, in the short space of time.

4 Q. And again, have you encountered resistance to the
5 exercise of that power?

6 A. (Mrs Smith-Penn) I have experienced delay, I would say
7 as well, resistance. And if you would allow, I would explain a
8 little further.

9 It has been my experience in that short time that it
10 has more to do--any delay or resistance has more to do with
11 understanding, and it is very much necessary that when one is
12 applying the law that the particular provision be at all times
13 put in a place or position so that person understands, so what
14 we have done in requesting documentation, we put a penalty which
15 flags up this Section, and it brings the matter to the attention
16 of the persons to whom it is addressed. Anyone seeing the
17 particular wording about the powers of the High Court, they are
18 quickly then assured of the seriousness of the document.

19 Q. Now, one of the other elements I summarised for you
20 both Section 4, but you have got the Act in front of you,
21 Commissioner, this is page 212. If we go to Section 5,
22 Section 5--Section 4 having set out for a Complaints
23 Commissioner what he or she can investigate. Section 5 sets out
24 the restriction on matters for investigation. I won't set it
25 all out, but if I just draw your attention to Section 55, which

1 is on the next page because what--it refers to subsection 4, it
2 says, for example, that the Complaints Commissioner can't
3 investigate something that is--where there is an alternative
4 remedy, so where someone could go to court or take a judicial
5 review. But Section 5 says that: "Notwithstanding
6 subsection 4, the Commissioner may investigate a matter
7 notwithstanding that the complainant"--sorry, give me a moment.

8 Sorry. I meant to take you to Section 5(3), sorry,
9 which is on 212. Sorry. Yeah, Section 5, as we said, deals
10 with restrictions on matters for investigations. But 5(2) says
11 that: "The Commissioner may investigate a matter,
12 notwithstanding that such matter raises questions as to the
13 integrity or corruption of the Public Service or of any
14 Department of governmental public authority and may investigate
15 any conditions resulting from or calculated to facilitate or
16 encourage corruption in the Public Service or any such
17 Department or authority, but he shall not undertake any
18 investigation to specific charges of corruption against
19 individuals".

20 And then subsection 3 says: "Where in the course of
21 an investigation it appears to the Commissioner that there is
22 evidence of any corrupt act by any individual, he shall report
23 the matter to the Governor with his recommendations as to any
24 further investigation he may consider proper".

25 First question on this and to Mrs Braithwaite,

1 obviously Section 4 and 5 working together tell you what you can
2 and can't do.

3 A. (Mrs Braithwaite) Yes.

4 Q. But when you were Complaints Commissioner, how did you
5 decide whether a complaint made to you fell within the ambit of
6 your powers, particularly if it related to a potential
7 allegation of corruption?

8 A. (Mrs Braithwaite) Could you repeat the question,
9 please?

10 Q. Yes, of course.

11 When you were Complaints Commissioner, how did you
12 decide whether a complaint was appropriate for you to
13 investigate?

14 A. (Mrs Braithwaite) Having looked at the
15 information--the complainant--the complaint itself, what the
16 individual set out, and then having looked at the information
17 which you would gather from the Department or what have you.
18 Then you would decide whether or not to go through the
19 investigation.

20 First of all, it has to fall under--it has to fall
21 under Section--

22 Q. Are you thinking of Section 4?

23 A. (Mrs Braithwaite) That says it should not be trivial,
24 it should not be frivolous, it should not be vexatious. It
25 should be made by the individual themselves and things of that

1 nature. If they want to get the information from the
2 Department, you would go through that information and decide
3 whether or not you continue with the investigation.

4 In terms of corruption, as you go through the
5 information and you recognize that there may be--there may
6 be--corruption, whether it is actual corruption or it's
7 sloppiness on the part of the Department or poor record-keeping
8 or what have you, then you can go to Section 5(3). And if it's
9 just a suspicion in your mind, you go to Section 5(3), and you
10 ask the Governor to have the Auditor General look at the matter
11 because she has more powers than we have, and she has more--she
12 has audit tools which we don't have, and so they would--that
13 would be dealt with through the Governor from there on.

14 Q. And during--you've set out the process that you would
15 approach. Did you have a written policy or procedure or--I
16 appreciate you have a small team, but this was just the approach
17 that you, yourself--

18 A. (Mrs Braithwaite) Just use that approach, and though
19 we don't have any written policies or procedures--in fact, we do
20 have a procedure manual. Yes, we do. We do have a procedure
21 manual, but I don't think it speaks to the Section 5
22 specifically of the Act.

23 Q. Did you, in your time, looking at Section 5(3), did
24 you have occasion to refer a Section 5(3) matter to the
25 Governor?

1 A. (Mrs Braithwaite) Every third one that I had a
2 suspicion of, I was unable to say whether there was corruption,
3 but I had my own suspicions in terms of the documentation that I
4 was able to get. The documentation is incomplete. But what I
5 had, showed me that there is a suspicion.

6 And so, what I had wanted was for the Auditor General
7 to then--but I couldn't send it to her. It had to go through
8 the Governor.

9 Q. I see.

10 Mrs Smith-Penn, from your perspective, how do you
11 approach determining whether a complaint falls within the scope
12 of what the Complaints Commissioner is permitted to do by
13 statute?

14 A. The approach that is first taken is that, under
15 Section 4, which gives the overarching responsibility to
16 investigate, and then going to the tests under (a), (b), and (c)
17 of Subsection 4(a), 4(2)(a), (b), and then (c). The Complaints
18 Commissioner takes on a matter based on one of those particular
19 referrals from an individual or from a Member of the House of
20 Assembly or (c) in any other circumstance in which the
21 Commissioner considers that he ought to investigate the matter
22 on the ground, that some person or body of person has or may
23 have sustained an injustice as a result of maladministration.

24 And with respect to maladministration, we go directly
25 to the further test, the wider test, the common law test, the

1 constitutional test, the test under the various Human Rights
2 Convention, and we see whether maladministration, in any way,
3 has happened under any one of those particular legal principles.

4 The first thing that we do is on under Section 8 we
5 then approach from the basis of having a preliminary inquiry.
6 And so, based on the preliminary inquiry, we are able to
7 determine from the form that is filled by the person complaining
8 if it's done under 4(a) or (b) being a person or being a House
9 of Assembly Member. We then have the individuals fill out the
10 particular concerns that they have. That form we created--it's
11 a very excellent form--and it indicates for the Commissioner
12 what the person considers they have suffered and how has that
13 affected them particularly. It causes the individual to make a
14 request or set out exactly what remedy they hope to achieve.

15 Based on that, we go directly, first and foremost, to
16 determine whether we can bring redress, quick redress, and
17 resolution to the particular complaint, and so oftentimes we may
18 find that individuals are really after a service or a good; and,
19 if we can get that business discharged very quickly, we do so on
20 behalf, and that's where mediation function comes in off the
21 cuff and initially.

22 In the case where we are unable to determine
23 straightaway or see a clear path to a quick resolution and the
24 particular maladministration is something of a historical or a
25 breach that has occurred and cannot be immediately resolved,

1 then we then go into a further need to search out the evidence
2 and to bring in very systematically all of the documents, et
3 cetera, to set out what the problem is, what the remedies should
4 have been, and to point to recommendations.

5 If it then takes us to any suspicion at all, we are
6 fully of the mind that Section 5, which deals with suspicion or
7 any indication of corruption, we are fully prepared to proceed
8 on that basis having regard only to the indication that if a
9 specific charge of corruption is seen to be an issue or against
10 a particular individual, then we have to pause at that stage.
11 Under Section 26--well, first of all, under Section 5, it says
12 that the Commissioner should then refer the matter to the
13 Governor, but it also under Section 26 gives the Commissioner
14 the powers to refer the matter to any other authority.

15 So, if it's a criminal matter, it also gives the
16 Commissioner powers to do that. If it's a matter for the Audit
17 Department or something that we're concerned about otherwise,
18 then we can go ahead and do that.

19 Q. Returning, Mrs Smith-Penn, to Section 5, if I may,
20 just to be clear about it, your view that there is scope that
21 you say for the Complaints Commissioner to investigate
22 corruption in the Public Service, say, well, up to the point
23 where it's against a specific individual?

24 A. (Mrs Smith-Penn) Yes. When it begins to narrow off,
25 then it becomes essentially a matter for the criminal

1 investigation, law enforcement authority. Then at that point we
2 have to give way, refer the matter either to the Governor or to
3 the relevant criminal authorities.

4 And I think that underscores the independence of the
5 Commission because it then makes way for the Governor to be
6 really notified, but it provides a clear path--a clear path--to
7 justice being achieved without any delay. So, we see under
8 Section 26 that we can refer the matter to either the Director
9 of Public Prosecution or to the Police to investigate, whatever
10 the case may be. If there is a need to refer it to another
11 individual within the entire Public Service/good governance
12 framework, then we see that pathways very clearly to do that.

13 Q. So, do you think that the way that Section 5(2) is
14 drafted causes any difficulty for the Complaints Commissioner in
15 investigating allegations of corruption?

16 A. (Mrs Smith-Penn) I would not immediately say that it
17 does, having explained what I just explained, in the normal
18 course of things, I am not sure that there is anybody--any other
19 authority that has responsibility for investigating corruption.
20 I see the path as being very clear. If it's a financial matter,
21 it can be referred under Section 26. If it's a matter for the
22 Public Service, the Governor, as the head of the Public Service,
23 it can be referred to the Governor, and to the Police and to the
24 Director of Public Prosecutions accordingly.

25 Q. Thank you.

1 Now, perhaps a question to you both. As we
2 understand, in effect, the Complaints Commissioner can produce--

3 A. (Mrs Braithwaite) Counsel, excuse me, could I just ask
4 Ms Smith-Penn to indicate whether or not she's referring to
5 Section 26 Subsection 2?

6 A. (Mrs Smith-Penn) It's important, if you will, under
7 Section 26 which deals with the Commissioning staff to maintain
8 security, and then you go to 26 Subsection 2, it says "subject
9 to (1) shall not apply as to prevent the Commission or any
10 person appointed under 20, 21, or 22, from (a) disclosing in the
11 course of proceedings or an offense under this Act, any matter
12 relevant to those proceedings (b) reporting evidence of any
13 crime to such authority as he considers appropriate. (c)
14 disclosing to a person any matter referred to in Subsection (1)
15 which, in the opinion of the Commissioner, are the persons
16 appointed may be grounds for a complaint by that person or (2)
17 it's necessary to be disclosed to that person for the purpose of
18 investigating a complaint or decision whether an investigation
19 should be undertaken, continued or discontinued".

20 So, under 26(2)(b), for example, where there is an
21 indication of a crime and corruption, in its sense, you can link
22 it to a number of things which can be investigated, and so that
23 gives a very broad idea of how the particular statutory power
24 can be dealt with.

25 Q. It's your evidence, Mrs Smith-Penn comes to this:

1 That you have power to investigate corruption. But if you
2 uncover evidence that relates to a specific individual or the
3 material you've gathered points to a specific individual, you
4 have to refer it to the Governor, but under Section 26, you also
5 have a route to refer it to other agencies as well for further
6 investigation?

7 A. (Mrs Smith-Penn) Yes. It says such Authority, it's
8 not limited in any way.

9 Q. Mrs Braithwaite, do you take a slightly different
10 approach in that, was it your approach that where you were in
11 that situation you would defer to the Governor in the first
12 instance?

13 A. (Mrs Braithwaite) I would defer to the Governor
14 because in the particular instance that I looked at, I did not
15 have evidence that there was indeed a crime, I only had a
16 suspicion, so I would defer to him and then he would decide
17 whether or not he would take it to the DPP, the Auditor General,
18 the Police or whomever.

19 Q. And it's a hypothetical for you because that wasn't
20 the situation you were in, but if you did have evidence that
21 led--

22 A. (Mrs Braithwaite) If I had evidence, then 26(2) would
23 apply, yes.

24 Q. Thank you.

25 A. (Mrs Smith-Penn) If I may.

1 Q. Yes, please.

2 A. (Mrs Smith-Penn) We are not at all to assume that all
3 things will remain equal at all times. And so, if the--as this
4 particular statute reads, and in my understanding, they are the
5 two parts, but if one were challenged in referring a matter to
6 the Governor, say, for example, the person was the Governor and
7 this is no respect--no disrespect intended at all, and when we
8 test the law, these are very important points for us to
9 consider. If the person were somebody of a higher authority,
10 and there was a concern about conflict, the good governance
11 machinery and the regime must work that there is no bar
12 whatsoever to justice being achieved.

13 So there is the path with the Governor, and of course
14 we collaborate, and the Governor is the appointing officer in
15 this case for the Complaints Commissioner's position, but it
16 needs to be made very, very clear that there is no bar
17 whatsoever to a matter being reported if there is any concern
18 about complaints. We have a very well established regime to
19 deal with corruption, to deal with crime. And so, if it is
20 found at all, it can be reported under (1) and (2) of those
21 particular avenues.

22 Q. Although it's been a short time, have you made any
23 such reports in the time that you've been Complaints
24 Commissioner?

25 A. (Mrs Smith-Penn) I have found no evidence to make such

1 a report.

2 Q. Now, in terms of written reports, as I understand
3 it--and I will address this to Mrs Braithwaite first, if I
4 may--a Complaints Commissioner can produce an investigation
5 report under Section 12?

6 A. (Mrs Braithwaite) Um-hmm.

7 Q. And that would go to the Cabinet and the Governor;
8 would you agree with that?

9 A. (Mrs Braithwaite) A copy of the Report goes to the
10 Governor and the Premier and the Minister responsible for the
11 subject area.

12 Q. And then Section--

13 A. (Mrs Braithwaite) I recognize that Section 12(4)
14 indicates that it should go to each Member of Cabinet, but that
15 has not been the practice.

16 Q. I see?

17 A. (Mrs Braithwaite) It only goes to the Minister because
18 when you send it to those three persons, the Minister, in
19 particular, his Ministry is being asked to make comments on the
20 Report, so...

21 Q. We've got to remember that obviously the Act predates
22 the 2007 Constitution and hasn't been updated, but was your
23 approach then, when you were Complaints Commissioner producing
24 the Section 12 Report, that you would send the draft to the
25 Ministry effective comment in advance--

1 A. (Mrs Braithwaite) Um-hmm.

2 Q. --before finalizing?

3 A. (Mrs Braithwaite) Yes.

4 Q. The next type of report you can write as Commissioner
5 we find at Section 14, which is a special--it's described as a
6 special report, and that is, as I understand it, is where in
7 response to a recommendation made, no appropriate action has
8 been taken or the Commissioner considers no appropriate action
9 is taken, you can then write a report--

10 A. (Mrs Braithwaite) Yes.

11 Q. --which will then be put before the House of Assembly;
12 is that right?

13 A. (Mrs Braithwaite) Yes, that is correct.

14 Q. And then--and we've seen these reports, under
15 Section 24, the Complaints Commissioner has to produce an Annual
16 Report?

17 A. (Mrs Braithwaite) That is correct.

18 Q. And then Section 5, in the circumstances that we've
19 been discussing just now, there is also scope under Section 5 to
20 write a report; is that right?

21 A. (Mrs Braithwaite) Yes.

22 A. (Mrs Smith-Penn) Yes.

23 Q. Now, I want to take you to the bundle of Annual
24 Reports that have been provided to us. If you go to page 5 in
25 that bundle. If you give me a moment, please.

1 (Pause.)

2 Q. If you see that the second paragraph, and this is from
3 the First Report from Mr Elton Georges in 2009, so it was in the
4 year that the--the end of the year that the Complaints
5 Commissioner was established. Elton Georges wrote this: "While
6 I stressed at the outset and have continued to stress that I see
7 the Complaints Commissioner's role is assisting in raising
8 standards in Public Administration, quality assurance, as one
9 perceptive officer put it, it isn't always clear how one
10 measures that impact. The main measure of success must still be
11 how well persons who seek help with their matters feel they have
12 been served, how those who might be the subject of
13 investigations due to the fairness and professionalism of the
14 office and the extent to which recommendations are acted upon".

15 Now, you have already spoken of some of this in your
16 opening remarks, Mrs Braithwaite. But during your time as
17 Complaints Commissioner, how did you measure the effectiveness
18 of your office?

19 A. (Mrs Braithwaite) Very long answer.

20 Effectiveness was measured by budgetary constraints.
21 We were unable to do proper training for staff because we didn't
22 have the funds. We are limited with our marketing of the office
23 because we didn't have the funding. As I indicated earlier, we
24 had to release one of our officers who--her presence allowed the
25 Commissioner and the Assistant Commissioner to be able to

1 concentrate more on investigations and to begin OMIs, so the
2 level of the effectiveness of the office was affected by the
3 limitations of the budget.

4 One thing that I found is that, under the Act Section
5 16(2) provides for the Commission to have a bank account, and my
6 predecessor did not take--make use of that provision, and I
7 tried but my efforts failed. And the reason why I'm noting it
8 is because for simple things as having to travel to conferences,
9 et cetera, you have to get permission from the Ministry of
10 Finance in order to travel, from the Premier, and that can take
11 up to two-three weeks, just depending on what's happening in the
12 country, as so when you book your ticket, your travel ticket, by
13 the time you get back to collecting your ticket, the price has
14 gone up significantly, and I found that if we had access to our
15 own funds, yes, you have to get permission to travel, and I
16 fully support that, but you could go ahead and at least ensure
17 that you secure your ticket so that there is no increase in fee.

18 Also, sometimes you have--you go to a provider, a
19 service provider, and you get an LPO and then you have to get
20 approval and what have you in order to get the supplies. By the
21 time you go back to pick up the supplies, the price has gone up,
22 and so those are some of the difficulties we had.

23 Sometimes we were unable to travel to the sister
24 islands because we didn't have local travel funds, and those
25 things affected our effectiveness because we were not able to

1 serve the sister islands as we would have liked.

2 Staffing, I mentioned that already.

3 Another area which persons may not even consider to
4 be--affect our effectiveness is the requirement to submit Annual
5 Reports under Section 24. Now, these Annual Reports should be
6 submitted to the Governor by the 30th of June under the Act, and
7 the Governor's Office should then have them sent to Cabinet by
8 the 30th--the 30th of September of that same year. That has not
9 been happening, and it's not for want of writing and calling and
10 reminding the office to prepare the Cabinet paper for
11 submission, which could also be a relatively long process.

12 So, for example, the 2014 Report was laid in the House
13 of Assembly on 18th of April 2016 instead of by September 30th,
14 2015, okay? And it was on time, it had gone to the Governor on
15 the 24th of June 2015.

16 I don't see the need personally--I don't see the need,
17 and the Act doesn't ask for it for the Annual Reports to go to
18 Cabinet. The Act says that the Governor should present it to
19 the House of Assembly, but him not being a Member of the House,
20 would have to have the Premier present this paper. But if you
21 use that route from the Governor--from our office to the
22 Governor straight to the House of Assembly, we would not be
23 viewed--our office would not be viewed as being late with our
24 Reports. And so that, I think, has affected the effectiveness.
25 It's a bad reflection on the office, basically.

1 And I, therefore, recommend that that the submission
2 of the paper to Cabinet be--that process be skipped. Because
3 there is really nothing for Cabinet to approve; and if there are
4 any questions, they can be asked when the Report's laid in the
5 House.

6 We have been effective in giving advice to
7 individuals, not just advice. A lot of times persons come in
8 and just ask for advice, and it's not recorded anywhere, and so,
9 if we just indicate it as an inquiry, but it's not really
10 recorded, so people don't--are not aware of the effectiveness of
11 the office. And as I indicated earlier, we do our own motion
12 investigations, they have yielded good results in the main. For
13 example, the very first one which I concluded was entitled "this
14 land is our land", and the Permanent Secretary and the relevant
15 ministry, which is Communications and Works, he was happy to
16 follow through on one of the main recommendations which I had
17 made, which was to transfer the function to the Ministry of
18 Natural Resources and Labour, the function being when Government
19 wants to acquire land, whether to extend a roadway or to build a
20 retaining wall to protect a roadway, they would purchase land
21 from private persons. Sometimes persons are not paid for the
22 land that is taken from them, but the Ministry of Communications
23 used a relief officer to negotiate with the private individuals,
24 and that slowed up the process many times.

25 And so because the Ministry of Natural Resources and

1 Labour is responsible for lands and for acquiring land, I
2 recommended that it goes over to them, and he said "I thank you
3 for the work of your office in helping to point out the
4 shortcomings of the process, without which we would not have
5 thoroughly looked at this and further developed the best way
6 forward in the interests of our Territory". And you can find
7 that in one of the Reports on page 140.

8 The Act itself has a limited effectiveness because we
9 are unable to demand that individuals, public officers follow
10 through on recommendations that we make, and so I think that
11 that needs to be looked at as an amendment.

12 Mr Georges had said in one of his Reports--his 23rd
13 report--he said that--he prepares these special report--he
14 prepared a bunch of special reports, but--and the public
15 was--the media was telling him that he should--they should--we
16 should make the Act more--give it teeth, and Mr Georges said
17 that, instead of passing more restrictive laws or threatening
18 punishments, Government should act right by the people, and you
19 will find that on page 74 of the bundle. Although I agree with
20 him on that, I still think that there are two things we can do.
21 We can set a fee for those persons who--for officers to pay or
22 the Department to pay to aggrieved individuals who have lost
23 time, lost money, lost whatever it might be. And we should be
24 given the power to demand that the recommendations be
25 implemented, subject to availability of funds in the various

1 departments.

2 What one of the things I did when I went--when the new
3 government came in, I asked for a meeting, and I introduced them
4 to the functions and the jurisdiction of the office, and they
5 graciously allowed me to do that, and one of the things I
6 requested of them is that, as the Ministers of Government
7 encourage their staff to respond to question that we may ask,
8 respond to and implement recommendations, and I think I was able
9 to convince them of the necessity, but sometimes things get left
10 by the wayside. People are people; staff do what they want
11 sometimes.

12 So, in essence about the Commission has been
13 effective, but we have those constraints.

14 Q. One of the points that emerges when one looks across
15 the Annual Reports, though, is that there appears to be a
16 decline in the number of complaints that the office handle, so I
17 can take you to the pages, if you want, but for example in 2011,
18 there were what the reports call "contacts", there were 135
19 contacts, in 2016 you recorded 77.

20 A. (Mrs Braithwaite) Yes.

21 Q. And in 2018, you recorded 16.

22 A. (Mrs Braithwaite) Right.

23 Q. Now, again, to you, Mrs Braithwaite, what do you
24 attribute that decline in contacts to?

25 A. (Mrs Braithwaite) I'm not sure what happened between

1 '14 and '15--or '15 and '16, but I--I do think that by '17,
2 because of the hurricanes, the latter part of the year we had no
3 complaints. We literally didn't have an office, and so you note
4 that '18 was also fairly low.

5 And I think in addition to that, the officers are
6 beginning to recognize the importance of--and respect the
7 importance of the Office of the Complaints Commission and they
8 are improving on their customer service, and I think it also
9 goes along with some of the initiatives of the Deputy
10 Governor--the Deputy Governor's Office has introduced, which
11 rewards Public Servants, sorry, for good performance. So, I
12 think that as a result complaints have reduced substantially.

13 Q. Mrs Smith-Penn, if in your time as Complaints
14 Commissioner, are you seeing a similarly low level of complaints
15 or approaches, or do you anticipate an increase?

16 A. (Mrs Smith-Penn) We have seen an increase in matters
17 that is not within our remit. That's one of the reasons why the
18 law is such a beautiful thing because it's subject to
19 interpretation.

20 So, for example, we just had a matter on Human
21 Resources, and we had a matter before that touched on Human
22 Resources as well. Human Resources matters are not matters that
23 the Complaints Commissioner can touch. However, if it comes, or
24 the overarching issue which prevents the individual from getting
25 to a point of dealing with the particular Human Resources

1 matter, then the Commission, in collaboration with the relevant
2 Ministry, whether it's at the Permanent Secretary level if it's
3 a devolved matter or to the Director of HR, we can certainly
4 pick up the phone on behalf of the staff member, and we can say,
5 as we have done very recently, person X has a concern why we are
6 limited in this particular regard, could you please arrange to
7 get that individual a response by X time.

8 I think our colleagues appreciate the dialogue that,
9 in the formal structure of a court setting, we deal with time, 7
10 days, 14 days, 21 days, 3 days, it depends on the matter, and
11 once that training and that partnership is established, they are
12 quite happy to say well, right, let's get on and let's assist.

13 And so, what we do, we ask them to get back to us by a
14 certain time so that we can then consider the matter closed, and
15 we issued a particular instruction in that regard very recently.

16 And I think the Head of Department and the Permanent
17 Secretary concerned were quite happy. During the COVID season,
18 an employee needed to come in and to express concerns about
19 observation of the various protocols. Now, that individual did
20 not want to be seen or to be heard because the Complaints
21 Commission offers investigations in privacy, according to the
22 Act, so that person's rights were protected. They were able to
23 come. We took their information. We explained to them that we
24 are not able to get into HR matters, but on this particular
25 point, we would certainly communicate the matter to the Director

1 of HR, which we did, and we got a response from both the
2 Director and the Department to say that they were going to look
3 into the matter and they were going to deal with that.

4 And that's the kind of partnership that allows you,
5 given a very wide interpretation of the provisions under the
6 Act, to give that voice to someone who is really in need of a
7 particular redress.

8 A. (Mrs Braithwaite) I quite agree with what
9 Mrs Smith-Penn has said. We view that and that's what I
10 mentioned when I talked about getting into encouragement mode.
11 That was one facet of it, and then we would do referrals or just
12 make phone calls.

13 And you will note that in many instances in the
14 reporting, some of the inquiries were dealt with very speedily.
15 You may have up to 17 dealt with in a year, very speedily, you
16 just make a simple phone call and you talk to the Head of
17 Department.

18 But one of the things which the public--some members
19 of the public, I should say, have not yet come to terms with is
20 that we are the last resort. They are to ensure that they try
21 to resolve their matter within the Department or the Ministry
22 before coming to the Complaints Commission.

23 A. (Mrs Smith-Penn) Correct.

24 A. (Mrs Braithwaite) But when they do come, even if it's
25 the first time, we don't just turn them away. We try to assist

1 as much as possible.

2 COMMISSIONER HICKINBOTTOM: In the report, there is a
3 breakdown of the type of complaint, which is helpful. Where the
4 category inquiry, is that simply an inquiry that's been made and
5 not pursued?

6 THE WITNESS: (Mrs Braithwaite) The inquiry would have
7 been made and pursued, whether it's dealt with by a phone call
8 or whether you just give somebody advice of where to go, what to
9 do, like in one case it became a full investigation, so to
10 speak, but it began as an inquiry, a gentleman who--let me use a
11 different example.

12 There was a young lady who was being battered by her
13 partner, and--you know, we advised her to seek redress with the
14 Social Development Department, but we also got in touch with the
15 individual because it was a public officer and, you know,
16 encouraged him to change his behavior because it could end up
17 before the Courts, et cetera. But that was just someone who was
18 really very distressed, and we didn't want to put her through,
19 you know--

20 COMMISSIONER HICKINBOTTOM: So inquiry is something
21 where you may take some steps but not investigate it?

22 THE WITNESS: (Mrs Braithwaite) Right, yes.

23 COMMISSIONER HICKINBOTTOM: Thank you.

24 THE WITNESS: (Mrs Braithwaite) There is no full
25 investigation.

1 MR RAWAT: Commissioner, I've noted the time, can I
2 suggest we take a very short break just to give the Stenographer
3 perhaps a brief break?

4 COMMISSIONER HICKINBOTTOM: Certainly, yes. Let's
5 take five minutes. Good. Thank you. Thank you very much.

6 (Recess.)

7 COMMISSIONER HICKINBOTTOM: Good. Thank you,
8 Mr Rawat.

9 Can I just pick up one point arising out of the last
10 few questions, and that was in terms of falling numbers in the
11 Commissioner's Office.

12 In the bundle at page 281, which is probably the best
13 page to go to, there are some numbers for a number of years
14 there in terms of total contacts. These are the numbers I think
15 Mr Rawat referred to earlier, and these show the number of
16 contacts in 2013, 115; 2014, 123; and then a decline, a decline
17 down to 77 in 2016; 2017, 22. And Mrs Braithwaite, you rightly
18 said that the hurricane in September would have had a
19 devastating effect on your work as it did in respect of so many
20 other things but that was nevertheless 22 cases in about eight
21 months or so in that year.

22 And if you go to page 284, which show the complaints
23 for 2020, there are 30 complaints, 12 of which are inquiries, so
24 the number of investigations is down to 18 from really a much,
25 much higher figure in about 2013, and you've said that you think

1 that part of the reduction is caused by the service given by
2 government departments improving?

3 THE WITNESS: (Mrs Braithwaite) Improving, Yes.

4 COMMISSIONER HICKINBOTTOM: But has the service given
5 by government departments improved that much? It sometimes a
6 very, very large diminution in workload. I wondered whether you
7 could give any further help--you may not be able to, but I just
8 wondered if you could give any further help.

9 THE WITNESS: (Mrs Braithwaite) Commissioner, I think
10 in addition to the Public Service having improved in their
11 performances, and as I mentioned the Deputy Governor's Office
12 giving--having initiatives that reward Public Servants for good
13 performance, in addition to that, we still in the Territory up
14 to last year, we are still dealing with the effects of the
15 hurricanes of 2017, and a lot of persons were in the first part
16 in '17, '18, and '19, trying to get their personal lives
17 together.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: (Mrs Braithwaite) And government offices
20 were scattered here, there and everywhere, and sometimes you
21 couldn't find them. And so reporting complaints was not, I
22 think, personally on the mind of individuals.

23 COMMISSIONER HICKINBOTTOM: I understand that.

24 THE WITNESS: (Mrs Braithwaite) But in addition to
25 that, there came COVID-19 in 2020. We had lockdowns. We had

1 persons being afraid to move about too much. Services
2 were--Public Services were diminished to some extent because we
3 worked on shifts, so there are a number of reasons why those
4 numbers could be down. It could also be that we have not been
5 advertising--we have not been reminding persons that we're here,
6 that the office is open and so on.

7 COMMISSIONER HICKINBOTTOM: No, that's very helpful.
8 Thank you very much. Thank you.

9 THE WITNESS: (Mrs Braithwaite) You're welcome, sir.

10 COMMISSIONER HICKINBOTTOM: Mr Rawat.

11 MR RAWAT: Thank you.

12 BY MR RAWAT:

13 Q. Mrs Braithwaite, you spoke about the opposite, the
14 encouragement side of the coin, if you like, but in terms of
15 where the Act could be improved, in your view, you mentioned two
16 things: Firstly, that one could impose a fee on a public
17 officer who complied with the Complaints Commissioner, but
18 secondly that finding some route by which recommendations made
19 by the Complaints Commissioner could be enforced.

20 A. (Mrs Braithwaite) That's correct.

21 Q. So, would it be fair to take from that that your
22 findings and recommendations as Complaints Commissioner have
23 often been ignored by government departments?

24 A. (Mrs Braithwaite) In--in--I would say at least
25 50 percent of the cases, and I hasten to say that we have public

1 officers who are very, very responsive, who are very, very
2 careful to do what we asked them to do, but then there will
3 always be that group that are not as responsive.

4 Q. And the only--in circumstances--

5 A. (Mrs Braithwaite) And if I may say, there is no
6 penalty for officers to not--not carry out the recommendations
7 that they make.

8 In addition to that, it could very well be that the
9 Ministry or Department just doesn't have the funds or they don't
10 have the relevant staff because some of the recommendations we
11 make has to do with amendment legislation, and sometimes we ask
12 that you look at your Reporting systems, your procedures, your
13 policies, so there is a need for staff with the capacity to do
14 those things, so, you know--it may not be that they're just
15 ignoring completely but they just don't have the capacity.

16 Q. And because recommendations of those sorts are wanting
17 changes in the system?

18 A. (Mrs Braithwaite) That's correct.

19 Q. Rather than dealing with an individual position?

20 A. (Mrs Braithwaite) That's correct.

21 Q. Now, the only, if you like, power that any Complaints
22 Commissioner has under the Act is that if there isn't an
23 appropriate response, you can write another report which goes to
24 the House of Assembly. Would it be again fair taken from the
25 evidence you've given to the Commissioner that you don't see

1 that as in any way a particularly powerful tool for you to use?

2 A. (Mrs Braithwaite) I don't because if you remember I
3 said earlier that Mr Georges had found that although he had
4 written a number of special reports, he had not even been
5 questioned when they were laid in the House of Assembly. No
6 member of government questioned him on any aspect. And as a
7 result, the understanding would be or the inference would be
8 that, the Ministers who sit in the House of Assembly would not
9 have gone back to their staff and said look, you need to deal
10 with this matter or perhaps even we need to refer this matter to
11 the Ministry of Finance because there are financial implications
12 or we need to refer it to the Attorney General because there are
13 legal implications.

14 So, you know--

15 Q. Go no further?

16 A. (Mrs Braithwaite) They just simply go no further.

17 Q. Mrs Smith-Penn, would you agree that Section 14 is not
18 that useful to a Complaints Commissioner?

19 A. (Mrs Smith-Penn) Section 14 has its uses. I note
20 Mr Georges has made reference in the First Report that there is
21 no special committee to consider the recommendations, and that
22 is--that is a very important point to note, that if we were to
23 have something like that, that would be very useful where there
24 is a formal procedure having sent forward recommendations where
25 the Commissioner can go similar to Standing Finance where, as of

1 right and responsibility, the Heads of Department, the
2 Accounting Officer is responsible to defend their budgets can go
3 along and they can certainly support and argue for more--more
4 support. We often ask for more. I have not known anyone to
5 have asked for less monies, but certainly that.

6 And I would like to say at this juncture, that has
7 been put in the draft 2020 report that the first Commissioner,
8 Mr Georges, and Mrs Braithwaite, have done an excellent job in
9 both establishing the Complaints Commission and holding the
10 fort, as we say, to ensure that this very important institution
11 of good governance remains until this day. In terms of getting
12 the recommendations done, we just have to continue to press.
13 Mrs Braithwaite made a very critical point in that the
14 Territory, having suffered hurricane--well, three storms, in
15 2017, floods in August, and then early September Hurricane Irma
16 and later in September Hurricane María. Some persons are still
17 rebuilding. I am one of those persons, my windows haven't been
18 put in.

19 And the reason for that for a lot of public officers
20 is because they dedicated their lives to bringing the Territory
21 back up speedily. In that period, lots of people had to leave
22 the Territory because conditions were very much unbearable.
23 Those of us who decided to stay, we decided to stay and to
24 rebuild, but it came at a significant cost to all of us.

25 So, in the period where we note a decline 2017 and

1 still continuing, it's a lot to do with what Mrs Braithwaite has
2 said as well, but we have to be mindful that we are very much in
3 the rebuilding stage, rebuilding from a position of having lost
4 90 plus percent of the infrastructure and homes of the
5 Territory. I can tell you, on the day after the storm, we had
6 to leave everything and just look after life and limb. We have
7 not been able to rebound from that.

8 Persons, therefore, in the government department, when
9 you ask about the point of whether there has been very much
10 improvement, so to speak, I would just mention that we have gone
11 out. We have devoted a considerable period of time from
12 1st January to today to going out and visiting public offices.
13 We haven't gotten to every single one, but we are going to do so
14 because it's important if you are at the head of any public
15 office that has responsibility for other offices that you get up
16 and you go and you see the conditions of your colleagues and how
17 they are working and how they are making the day to day
18 arrangements for the work that they have to do.

19 So, we have done two impromptu visits in the last 14
20 days where we were not expected because again going to the
21 points of rights, the public has a right to insist that they get
22 a good service.

23 A. (Mrs Braithwaite) Yes.

24 A. (Mrs Smith-Penn) I would like to make it very clear on
25 the record, that public officers, as human beings, they're

1 entitled to their human rights, and they also have rights in
2 order to be able to function and to give a good service, their
3 working conditions must be--they must be good.

4 A. (Mrs Braithwaite) Yes.

5 A. (Mrs Smith-Penn) I can say on the record that working
6 conditions for public officers, for the most part, are not the
7 best at present because of the rebuilding--the rebuilding phase
8 that we are still in, and resources, considerable resources,
9 have had to have been reapplied to fighting the COVID pandemic.

10 A. (Mrs Braithwaite) That's right.

11 A. (Mrs Smith-Penn) And to keep persons in the Territory
12 safe. There was a particular period early last year where we
13 were very much afraid that we would not have sufficient food to
14 eat. We were concerned that we weren't able to get PPE. Even
15 now we can't get certain PPE. It's limited, the health services
16 are able to get, I'm sure, at a considerable cost, but the
17 average person to care for the elderly, because we have a lot of
18 elderly at home, persons need PPE to be able to care for their
19 loved ones, and these are all a lot of things that public
20 officers who come into the work place, these are the things that
21 they have to be grappling with.

22 So, it's by no means a situation where it's business
23 as usual, and that's the point my colleague, Mr Potter, brought
24 up very clearly in the Annual Report for 2020: It is business
25 unusual; it is not business as usual. And the reality for the

1 Virgin Islands, and living in the Virgin Islands is that we are
2 operating under very strenuous circumstances.

3 Q. If we take it back to the question and try and look at
4 it as something looking forward--

5 A. (Mrs Smith-Penn) Um-hmm.

6 Q. --you have just taken on the role of Complaints
7 Commissioner. You've explained that the steps you are taking in
8 terms of visiting other Public Services to explain the role of
9 the Complaints Commissioner.

10 Mrs Braithwaite, does her evidence, if I've got it
11 right, is that she doesn't see Section 14 and the ability to
12 write a special report as being a particularly useful part of
13 the Act. My question to you is whether--and this is looking
14 forward, yes, to better times when you can perhaps function as
15 you would want, but would you see--do you agree with Mrs
16 Braithwaite as to her view of whether Section 14 gives you
17 something that you can use, or would you like her wish to see an
18 amendment to the Act that allows for enforcement of the
19 recommendations made by a Complaints Commissioner?

20 A. (Mrs Smith-Penn) Well, I think that the point I was
21 trying to get across--and forgive me if I didn't make myself
22 clear--the Standing Finance procedure where we do not have
23 powers, we simply go and we make our representations, and they
24 are taken on board on the basis of merit. The Section 14
25 reports are to be taken on board similarly on the basis of

1 merits. And if we don't get what we want, then we should become
2 a thorn in the side of a legislator, beginning with the
3 Governor, and do the exact same thing.

4 Q. So, what you would--you would see is not powers to
5 enforce being given to the Complaints Commissioner but rather
6 the establishment of a committee which would--of the House of
7 Assembly which would then discuss with the Complaints
8 Commissioner the content over any systems recommendations?

9 A. (Mrs Smith-Penn) Yes. I would support that.

10 A. (Mrs Braithwaite) I would support that as well.

11 A. (Mrs Smith-Penn) Because we have systems that have
12 been working without coercive powers. I can tell you in a
13 former role, as the Defender of the Independence of the Court,
14 the Registrar has had to appear at the Standing Finance
15 Committee. After Irma, the Budget Coordinator personally called
16 on our office and was able to find out from us what our needs
17 were and to put certain things in place. I wish she would visit
18 me tomorrow and do a similar thing.

19 However, a promise has been made to provide us with
20 the resources that we need, and so we are moving on with that.

21 The reports I note as well in the Complaints
22 Commissioner's First Report, he makes mention of the Canadian
23 model where the--where the Parliament--they had received in a
24 very good manner and, indeed, lauded the ombudsman there for the
25 recommendations that had been made in reports and that they had

1 put them in place. We think with the proper training and
2 progression and the level of legal, political, and other
3 maturities we are going to get the--with the provisions and with
4 those particular things being put in place to have a body that
5 goes through those recommends for the Territory.

6 But I think the Permanent Secretaries themselves,
7 insofar as they have the power and notwithstanding the fact that
8 they do not have the ability to apply funds to themselves or to
9 give funds to themselves, but they have scope to a great extent.
10 And where there is no scope, then we go ahead and we make the
11 recommendations for application in the upcoming budget cycle.

12 Q. I want to separate funding from dealing with
13 recommendations.

14 A. (Mrs Smith-Penn) Okay.

15 Q. I will come back to funding very, very soon.

16 Recommendations, where I think your evidence has got
17 to is there is a need for a committee of the House of Assembly
18 that looks at systems recommendations made by a Complaints
19 Commissioner?

20 A. (Mrs Smith-Penn) Yes.

21 Q. But secondly, also, at least it's Ms Braithwaite's
22 position, that there may be benefit in the Act being amended?

23 A. (Mrs Braithwaite) Yes.

24 Q. So that recommendations can be--ultimately be
25 enforced?

1 A. (Mrs Braithwaite) Yes.

2 Q. Now, I told you I would come back very quickly to
3 funding and that's what I'm going to do. It's perhaps a
4 question--I think you've touched on it already, Mrs Smith-Penn,
5 and perhaps we can take it shortly.

6 Mrs Braithwaite spoke of budgetary constraints and the
7 impact that those constraints had on the effectiveness of the
8 Complaints Commissioner. Of course, ever service would--always
9 wants more money, but first question is, would you,
10 Ms Smith-Penn, be of the view that the Complaints Commissioner
11 in the office would be more effective if you had your own budget
12 and you could manage your own budget?

13 A. (Mrs Smith-Penn) Yes. With more money, one can do a
14 lot of things.

15 Q. It's not just more money. What Ms Braithwaite spoke
16 about was that the time it takes, for example, to arrange
17 travel, the time, the limitations on training--

18 A. (Mrs Smith-Penn) Training, yes.

19 Q. And so, if you were allocated your own budget to start
20 the Fiscal Year to spend as you thought necessary, of course you
21 would have to account for it--

22 A. (Mrs Smith-Penn) Yes.

23 Q. --but do you think that would be--give the Complaints
24 Commissioner more freedom to achieve a more effective service to
25 the public?

1 A. (Mrs Smith-Penn) I would have to be very honest.
2 Ms Braithwaite is very correct in saying that there would be
3 more autonomy if there were to be a separate budget, with more
4 monies to do all the things that are required. And not that I'm
5 not honest all the time, but being very honest in this case is
6 to emphasize and to underscore that I'm coming to a point where
7 there is a particular indication that has to be made that is
8 perhaps not the most welcoming thing to hear.

9 We are in the situation where we couldn't purchase a
10 particular item for \$150 in this climate.

11 And I am speaking to the Commission inasmuch as I'm
12 speaking to the public because public officers--and I know I've
13 had the problem--when we try our very best to control
14 expenditure and to say to persons that the public purse cannot
15 afford that, we have been victimized. We have been victimized.
16 I can say that I worked in a place--I've worked in many places
17 where I enjoyed a budget to do as I will to get whatever I want,
18 but it's perhaps a bit of irony now, as Complaints Commissioner,
19 that I should see the situation that I was trying to avoid in
20 that \$150 is something that--a luxury in this day and age.

21 COMMISSIONER HICKINBOTTOM: Can I just draw into that
22 slightly. We've heard evidence from the other Government
23 departments, using Government departments in the broadest sense,
24 other arms of Government as to this, what their evidence was--I
25 just want to make sure that you're in the same position.

1 THE WITNESS: (Mrs Smith-Penn) Yes.

2 COMMISSIONER HICKINBOTTOM: Their evidence was that
3 they apply for a budget, go in front of the Standing Finance
4 Committee, and as it were, justify what they've asked for, and
5 they get allocated a budget, whatever that is. But they don't
6 get the money. If they want any money during the course of the
7 year, they have to go to the Ministry of Finance and get the
8 money.

9 And we've heard other stories from other arms of
10 government that, for example, it takes so long to get the money
11 for whatever it is, a person or a piece of equipment, that
12 that's very unsatisfactory for that arm of government. They
13 lose the person or the cost of the equipment goes up, and they
14 don't have it for several months. Or sometimes, although
15 they've got the allocation, they don't get the money at all.

16 Is that the issue that you're talking about?

17 THE WITNESS: (Mrs Smith-Penn) I would--I would say
18 "yes", but I would also need to clarify. I didn't go to
19 Standing Finance for this present budget. Ms Braithwaite would
20 have done that. I take a more of a robust approach to
21 requesting budget funding.

22 And again, everything must be explained and justified
23 in terms of the money, so Ms. Braithwaite would be able to speak
24 that.

25 COMMISSIONER HICKINBOTTOM: But that's a different

1 point.

2 THE WITNESS: (Mrs Smith-Penn) It is.

3 COMMISSIONER HICKINBOTTOM: That's getting the
4 allocation.

5 THE WITNESS: (Mrs Braithwaite) Um-hmm.

6 COMMISSIONER HICKINBOTTOM: And whatever the
7 allocation is, I'm sure that you and most other arms of
8 government would want more in the allocation, and that might in
9 some arms of government be a challenge or a problem.

10 But leaving that aside, we have been told of a
11 different challenge, a different problem, and that is having got
12 the allocated budget, which is really a paper budget, getting
13 the money within the allocation during the course of the year,
14 the money isn't there, it's not your bank account because you
15 haven't got one. You have to go and get your \$150 or whatever
16 it is from the Ministry of Finance. And that we have been told
17 in other spheres is a problem because sometimes you don't get
18 the money, sometimes the money's delayed by an unfortunate time.

19 And is it this latter that you're talking of, actually
20 getting the money from an allocated budget?

21 THE WITNESS: (Mrs Smith-Penn) I will defer to my
22 elder, and then I'll answer after.

23 COMMISSIONER HICKINBOTTOM: Yes, Mrs Braithwaite, can
24 you help us?

25 THE WITNESS: (Mrs Braithwaite) In the latter--after

1 the hurricanes, the funds, as you would recognize had for the
2 Government, receipt of funds for the Government, had reduced.
3 Both from taxes and from Financial Services, et cetera, and so
4 there was some limitation on the funds that were approved for
5 Ministries and Departments. But in addition to that, the
6 practice that I noted in 2020 was that, 2019-2020, was that you
7 would receive funds especially when it came to staff and
8 emoluments and so on, but there would also be an "R" next to the
9 amount, which meant it's reserved. And in order for you to be
10 able to access the money that was allocated, you would then have
11 to go through the process of going to the Ministry of Finance
12 and then getting approval, and even--well, we didn't have that
13 particular situation where you need a member of staff, but in
14 other Departments, I know that just to get a member of staff on
15 board, you would have to--would be there, you go through the
16 process, the Ministry of Finance, the Ministry of Finance goes
17 to the Premier, and then depending on what recommendation is
18 made from the Ministry, the member of staff is either approved
19 or not approved.

20 And so, you know, it became a tenuous situation.

21 COMMISSIONER HICKINBOTTOM: So, you have--

22 THE WITNESS: (Mrs Braithwaite) But we understood the
23 budget cuts. It's just that we had gotten down to bare bones,
24 just covers salaries, rent, which in our case, and I think I
25 need to speak because it has been a thorn in my--it was a thorn

1 in my flesh, our rent, after the Hurricane and the building was
2 refurbished, doubled, literally, and then we were asked to pay
3 fees--I forget exactly what they were called, but they were
4 enshrined in the lease, which we didn't approve, but which was
5 approved by the Deputy Governor's Office and signed off by the
6 Ministry of Finance, and I had raised an objection to those fees
7 but I didn't have the power to say "yes" or "no".

8 But we pay property tax for the owner. We pay things
9 like--there's property tax, there's an administration fee, and
10 things of that nature, so it really limited us. And that's one
11 of the reasons why--not only with the furnishings for all our
12 departments but having had a doubling of our rent we hadn't
13 expected. I had to release the--

14 COMMISSIONER HICKINBOTTOM: I see that, but I'm right,
15 I think, from your evidence, that there are two challenges. The
16 one is, as it were--

17 THE WITNESS: (Mrs Braithwaite) Accessing--

18 COMMISSIONER HICKINBOTTOM: In the Standing Finance
19 Committee, you've got to get, as it were, a paper budget?

20 THE WITNESS: (Mrs Braithwaite) Yes.

21 COMMISSIONER HICKINBOTTOM: And as you say, that you
22 may not think is enough. But you've got to get that.

23 But even having got that, during the course of the
24 year, there are still challenges--

25 THE WITNESS: (Mrs Braithwaite) There are challenges

1 to actually access the funds.

2 COMMISSIONER HICKINBOTTOM: --to access the funds.

3 THE WITNESS: (Mrs Braithwaite) Um-hmm.

4 COMMISSIONER HICKINBOTTOM: You put it far better than
5 I.

6 THE WITNESS: (Mrs Smith-Penn) I would--I would
7 support that--that understanding as well, that that is the case
8 but it was not always the case. And again, we have to go back
9 to the 2017 hurricanes and 2019. We had the situation where
10 money was not in as high demand as it is now for doing other
11 more pressing things, and so we didn't have the "R", which we
12 call reserved funds, next to the budget. And, of course,
13 because the economy has been closed in certain areas and
14 sluggish, there was not as much revenue coming in.

15 But I would like to say as well, there is a prevailing
16 practice that there are some Departments that are more entitled
17 than some to have funding, and where I sat, I couldn't tell you
18 that there were departments that the Ministry of Finance would
19 make every provision for, and this goes back all the way back to
20 1996. Every single item that was asked for in support was
21 given, and so you didn't have to wait until Standing Finance
22 came. The RVIPF was one of those departments where in order to
23 support Policing and all that was done. At the time, the
24 Commissioner of Police was Vernon Malone, and whatever he asked
25 for he got. That continues to this day. As we are all aware in

1 the public, quite a bit of resources are put towards the Police,
2 they're put towards Financial Services and other departments.

3 And these things are necessary to ensure that our
4 criminal justice system works and it works well, and that our
5 economy, the things that support the economy, that they work
6 very well.

7 I should say, in 2014, when I joined the Supreme Court
8 as Registrar, in 2016, we had a challenge in that the
9 infrastructure was crumbling around us, and I asked myself the
10 question: How did we get to the point where the primary
11 institution responsible for protecting and upholding the rule of
12 law was fighting for the very existence of being able to provide
13 access to justice? And it showed clearly that there was a
14 disparity.

15 COMMISSIONER HICKINBOTTOM: Because we've heard
16 evidence from the Police Commissioner as to his budget and the
17 challenges he has, but what you're saying is, in your view, some
18 arms of government find access to money from the Ministry of
19 Finance easier than others?

20 THE WITNESS: (Mrs Smith-Penn) I wouldn't say easier
21 than others. They make a strong case, just like the rest of us
22 do, but we have to prioritize according to the demands and the
23 needs of the Territory, and we are in a time of limited
24 resources.

25 The very--the very economic position of the Virgin

1 Islands, notwithstanding the current GDP, is that we are a
2 Territory that is coming from a long way of lack, of dearth, our
3 ancestors have had to travel overseas to work in order to be
4 able to support our families, and so we have always operated on
5 the basis of limited resources. This is our reality.

6 BY MR RAWAT:

7 Q. If you look--again, trying to look forward with it,
8 would you both accept this, that preserving the independence of
9 the Complaints Commissioner is very important?

10 A. (Mrs Braithwaite) Yes.

11 A. (Mrs Smith-Penn) It is.

12 A. (Mrs Braithwaite) Very much so.

13 Q. And a reason that it is very important is public
14 confidence in being able to come to the Complaints Commissioner?

15 A. (Mrs Smith-Penn) Right.

16 Q. You would agree with that both of you?

17 A. (Mrs Braithwaite) Yes.

18 A. (Mrs Smith-Penn) Yes.

19 Q. But in order to maintain public confidence, the
20 Complaints Commissioner has to deliver on the service that she
21 promises?

22 A. (Mrs Braithwaite) Yes.

23 A. (Mrs Smith-Penn) That's right.

24 Q. So, bringing that down--and I know it's always an
25 element of a wish list, and Ms Smith-Penn has very eloquently

1 explained the current circumstances and the very recent history
2 of the Territory, but looking forward and perhaps looking
3 forward with a bit of a pragmatic eye, in order to deliver
4 services, Complaints Commissioner, and this perhaps is more
5 general, what level of personnel do you need in the office?
6 Ms Braithwaite has explained the circumstances in which you lost
7 your generalist. So, at the moment you're a team of three?

8 A. (Mrs Smith-Penn) yes.

9 Q. To deliver the service that you want to deliver to be
10 able to meet your statutory and constitutional remit, how many
11 people would you say you would need?

12 A. (Mrs Smith-Penn) Well, because I'm just in, I'm not
13 about calling numbers. Right now what is at the top of my wish
14 list is to do training because a lot of--and if I may be very
15 forthright, the world is based and focused too much on money.
16 There is sufficient capacity within the Public Service to be
17 able to train our colleagues and for us to be able to get on
18 with a lot of the work that is indeed giving rise to complaints
19 being made.

20 And once that training is done, we can then move on to
21 the next level.

22 And so I will say that His Excellency the Governor has
23 been very supportive. He received me very recently to a meeting
24 where he has given support for two bits of training that are to
25 go on. Before I met with the Deputy Governor, who was equally

1 supportive, I have met with the Director of HR--well, via
2 teleconference anyway. And as well as the House of Assembly,
3 all of whom are very much interested in engaging in the
4 particular service as well as the number of top managers and
5 Heads of Departments.

6 Now, I don't have the money to do that training, but
7 what I have said to them is that you will pay for the particular
8 training that is being done by the University that's going to
9 put that on. And that's just finding creative means. It is, in
10 fact, one of the qualities of the Virgin Islands that we become
11 very creative in making a lot of things happen out of no
12 resources.

13 So, the emphasis on money, yes, we want more money.
14 My landlord would not like me to say this, but we need a place
15 where we have an elevator and that elderly persons are able to
16 come up, and it has been mentioned in several reports that
17 persons have had a difficulty in accessing services because of
18 that.

19 And so, we began to look. It's not a matter only that
20 we don't have funding because I believe that we would be able to
21 get a building but there are no buildings that are available for
22 us to get that will service our needs, and so we are constrained
23 by that particular reality, a lack of resources in terms of
24 buildings.

25 Q. Mrs Braithwaite, I mean, obviously at the time that

1 you were Complaints Commissioner and particularly when you had
2 to release your generalist, from your perspective, what is the
3 sort of ideal sort of capacity in terms of personnel that the
4 Complaints Commissioner should enjoy?

5 A. (Mrs Braithwaite) I think if we have--I think if we
6 have four persons, the current complement of staff would be
7 adequate for the time being and because personally I'm hoping
8 that complaints don't really increase but that the Department
9 would be able to do, as Mrs Smith-Penn is saying, put on
10 training and look more at own motion investigations, so I think
11 that if there are four persons, one which would be the clerical
12 person who should be bilingual, and also being able to--for that
13 person to be able to deal with the clerical--all the clerical
14 issues, and then avoid the Commissioner and the Assistant
15 Commissioner having to answer the telephone on a regular basis,
16 things of that nature.

17 And then if you train the clerical officer to be able
18 to go to things like agriculture fairs and so on and give out
19 information, even take complaints, you know, train the person to
20 be an intake officer, that would certainly give the senior staff
21 more freedom to do the real work.

22 COMMISSIONER HICKINBOTTOM: You mentioned,
23 Mrs Braithwaite, and I understand why you said it, that you
24 hoped that the number of complaints wouldn't rise; and, of
25 course, one doesn't want to criticize Public Servants where

1 there is no criticism to be made. But an increase in complaints
2 might reflect increased confidence of the public in the Office
3 of the Commissioner might do. I know that--and you said it very
4 eloquently--

5 THE WITNESS: (Mrs Braithwaite) That is--

6 COMMISSIONER HICKINBOTTOM: --and with substance that
7 there have been various reasons why the numbers have dropped.

8 THE WITNESS: (Mrs Braithwaite) That is correct,
9 Commissioner, but I was thinking more along the lines of
10 improvement in the Public Service, that we are seeing
11 improvement in the service, the customer service, that is being
12 delivered.

13 THE WITNESS: (Mrs Smith-Penn) If I may, I agree you
14 with, Commissioner, that--and that's why I don't like the word
15 "complaints", Commissioner. I agree with you that more
16 complaints will go to the overall general health and well-being
17 of measuring, giving feedback, as well as giving an indication
18 of things that have to be done.

19 We have asked for, in addition to the three Members of
20 staff that we have now, we've asked for two additional persons,
21 and we are looking for those persons, one to be a lawyer, so
22 we've asked for an additional lawyer, who will be specifically
23 dealing with the issue of rights. That it has gone through the
24 Deputy Governor's Office as well as it has gone to the Human
25 Resources Department as the normal budget cycle requires. So,

1 we call it a "CURT" application. So, we've made two of those
2 and we've asked for an upgrade--well, a renaming of the current
3 lead investigator's post to that of Deputy Complaints
4 Commissioner. So, those are the particular plans because we
5 think that we do need to get out and do more as we have been
6 doing, but we need to travel to the sister islands and all of
7 those places.

8 So, we are hopeful that this process as well, although
9 we are quite able to make a strong case that this process will
10 support, and that's why we're so glad that we are going through
11 this process.

12 COMMISSIONER HICKINBOTTOM: Yes, and increase public
13 confidence in the office which is vital.

14 THE WITNESS: (Mrs Smith-Penn) Correct. Correct.

15 COMMISSIONER HICKINBOTTOM: Thank you very much.

16 BY MR RAWAT:

17 Q. Could I ask Mrs Braithwaite just to turn up page 167,
18 please, in that bundle. This is the report of 2017 we're going
19 to, and if you look at page 167?

20 A. (Mrs Braithwaite) I see it.

21 Q. You should see one of the last paragraphs, sort of
22 bottom half of the page which begins: "It's my hope that in
23 2017 the proposed amendments to the Complaints Commissioner Act
24 2003 which was submitted to the Governor during the former
25 Commissioner's tenure and subsequently during my first year,

1 will be processed and promulgated by the Government before he
2 demits office in August 2017. The amendments to the Act will
3 provide the Commissioner with more flexibility and autonomy".

4 Two questions: Firstly, can you remember in what way
5 you were hoping to have more flexibility and autonomy under the
6 Act? And secondly, what has happened to those amendments so far
7 as you know?

8 A. (Mrs Braithwaite) Nothing has happened to them. In
9 terms of flexibility, I don't recall exactly why I put that word
10 there but in terms of autonomy, I think we want to be able
11 to--do things--we are already independent, but we want to be
12 able to have--because I think one of the recommendations was to
13 have the bank account set up, and so that would give us--well,
14 it would give both flexibility and autonomy because then we
15 would be able to spend according to our needs on account of how
16 much money we have available, but we would be able to do it in a
17 timely manner, and we would over-expend and then have to go
18 ahead and do reallocations in order to cover some areas.

19 Q. If I take you to 126 now, please. This is a strategy
20 document covering 2014 to 2018, so it was looking forward as a
21 document, and it lists a sort of number, if you like, aims. One
22 of the points made is to push for enactment of Freedom of
23 Information Act and regulations and the widening of the
24 Complaints Commissioner's role to include Human Rights
25 Commission with adequate budget.

1 I think the Human Rights Commission is something that
2 is a possibility or that it's part of the Constitution but it's
3 never been or the machinery of it has never been sort of in
4 place?

5 A. (Mrs Braithwaite) Right.

6 Q. You're referring to it there.

7 Now, what did you, sort of, envisage the interplay
8 between the Human Rights Commission and the Complaints
9 Commissioner's role would be?

10 A. (Mrs Braithwaite) Well, we were receiving a number of
11 complaints from persons whose complaints could be considered
12 under human rights, and I have some listed which I will give you
13 in a minute, but--and I just heard Ms Smith-Penn talk about
14 having an officer to deal solely with rights.

15 So, the Commissioner and the human rights chapter
16 would be able to respond in time, quick time, to those
17 complaints that have been come in. There may be some measure of
18 overlap, I take it, but there would be--be back to private
19 citizen more readily because the Human Rights Commission is a
20 line item. It has been like that for some time, and I think it
21 needs to be either operationalised and made into a separate
22 entity or allow the Complaints Commissioners office to deal
23 human rights issues.

24 Q. Until at least a Human Rights Commission is--

25 A. (Mrs Braithwaite) Is settled properly, yes.

1 Q. Mrs Smith-Penn, that prompts two questions for you.
2 The first is: Would you like to see the establishment--the
3 operationalisation of the Human Rights Commission, but second,
4 how does the Complaints Commission now deal with the complaints
5 that have been brought on citing a breach of a human right?

6 A. (Mrs Smith-Penn) Would I like to see the Human Rights
7 Commission brought in, yes. I believe it's critical.
8 Currently, how we deal with it, and perhaps in anticipating that
9 we would have a discussion and necessary to have a discussion.
10 The whole issue of human rights it's overarching, the whole
11 question of governance, and once you have that
12 understanding--it's very much a legal term as well as--you know,
13 it has applications to every single discipline of human
14 existence, so we approach it from that basis. We do not see
15 ourselves limited in any way within the scope of the current
16 Act.

17 In fact, we always argue from a mediation standpoint
18 beginning at human rights--well, we first, of course, we love to
19 depend on a rule of law, if there is one available; and, if
20 there is none, the fallback position is always from a human
21 rights perspective. And that's why we made the point about the
22 Complaints Commissioner being the voice for the people. We
23 definitely have to have that understanding, and you will see in
24 the 2020 Annual Report that it talks about doing training in
25 those particular areas, and not only because of the Human Rights

1 Commission, but because every individual should have an
2 understanding of what this concept means.

3 When you look at the human rights provisions in the UN
4 Declaration that I referred to in full and the European
5 Convention on Human Rights and even our Constitution, this is
6 something that every individual should be taught beginning from
7 the elementary understanding of it in primary school all the way
8 up, and that's the approach that we take, and that's why it's so
9 very important because I suspect we will get on to other
10 questions that will flag up the need for such a commission.

11 And one of the things that I would just flag at this
12 stage is that the very limitations that are put on the Act in
13 terms of certain areas being shut off from the Commission being
14 able to investigate, the human rights provisions that are in
15 those international treaties that have been brought in into the
16 Constitution will open up the door--enact, in fact, the door is
17 wide open right now, but it will put it in a more formal
18 placement that there is a body that can go in and address and
19 attack any sort of infringement, whether it's of an individual
20 that has been enjoying and, therefore, is at risk of, you know,
21 being abrogated.

22 And so, until that happens, we are quite happy to lead
23 the charge.

24 Q. So, from the perspective of the work that you were
25 doing as the Complaints Commissioner, does it come to it that

1 you keep in mind human rights and in particular human rights as
2 they are set out in the Constitution of 2007?

3 A. (Mrs Smith-Penn) We keep in mind--exactly we keep in
4 mind human rights the rule of law. And, of course, we often
5 like to refer back to paragraph 3 in the Preamble of Universal
6 Declaration on Human Rights, and I think it's important, and we
7 are very much doing training on that. And if I may,
8 Commissioner, it says whereas--it is essential if man is not to
9 be compelled to have recourse as a last resort to rebellion
10 against tyranny and oppression that human rights should be
11 protected by the rule of law. And that's the basis from which
12 we are training quietly and individually and systematically the
13 departments with which we interface on those particular points,
14 and that's why people complain, there are some breaking of a
15 rights, whether it's a human or some other rights. And, of
16 course, to have those understandings of what the legal
17 ramifications are.

18 Q. Thank you very much.

19 MR RAWAT: Commissioner, I have actually reached the
20 end of my questions.

21 THE WITNESS: (Mrs Braithwaite) If I may.

22 COMMISSIONER HICKINBOTTOM: Of course.

23 THE WITNESS: (Mrs Braithwaite) You have asked also
24 how we dealt or how we deal with human rights complaints, and I
25 worked with the list, if you don't mind, Commissioner, I would

1 like to--

2 COMMISSIONER HICKINBOTTOM: Are these examples, Mrs
3 Braithwaite?

4 THE WITNESS: (Mrs Braithwaite) Examples.

5 COMMISSIONER HICKINBOTTOM: Yes. Obviously, you'll
6 depersonalize them, anonymise them, so that--

7 THE WITNESS: (Mrs Braithwaite) Certainly.

8 COMMISSIONER HICKINBOTTOM: Yes.

9 THE WITNESS: (Mrs Braithwaite) Over my tenure, we've
10 had complaints come in from prisoners, and these complaints
11 covered things like improper protection, someone may be in
12 isolation but they're still being beaten by other prison
13 officers--other prisoners. Recently we had a murder in a
14 prison.

15 There was one case where a prisoner called and talked
16 about lack of toiletries, and then there was another instance
17 where a prisoner wanted legal assistance, and he didn't know
18 where to find or how to find information.

19 So, in cases like that, I think that under the
20 Constitution, they have a right under Section 17(1) of the
21 Constitution not to endure humane treatment--inhumane treatment.

22 And what I had done was call the superintendent of
23 prison and the Ministry to report these matters, but then we
24 also physically with the lead investigator, who is a trained
25 lawyer, we went to the prison itself, and we were able to guide

1 them as to where they could find legal sources to mount a
2 defence, so that is one instance.

3 Then we would have, and I think I mentioned this one,
4 ladies who complain that public officers battered them. And
5 persons like that are entitled under Section 13 of the
6 Constitution which deals with the Section also from inhumane
7 treatment.

8 We've had police officers, during arrests, would hurt,
9 for the want of a better word, parents during the arrest
10 process, but the individuals did not want to complain, so I was
11 able to just say to them that you have a right under Section 12
12 of the Constitution, to equality before the law, Section 12(1).

13 Then we have police officers who, in their private
14 lives do things which are not on the up and up, so to speak.
15 And in one particular instance, I met with the former
16 Commissioner. He investigated the matter and then said he had
17 no recourse because it was not a dereliction of duty. But I
18 think that the private individual who was denied his right to
19 proper service from the Police Officer for monies paid had a
20 right under Chapter 12 as well, and Section 25(1)(b) of the
21 Constitution, and I advised that individual to seek legal aid
22 because he was unable to pay a lawyer.

23 And then we've had teachers express concerns that
24 warranted investigation, but they did not want to have an
25 investigation carried out, so we would ask hypothetical

1 questions of the Ministry or the Department of Education, but
2 they have a right to protection under Section 23, they have a
3 right to freedom of expression. And in one--in two of the
4 cases, they have a right to not be discriminated against due to
5 a disability and which was an illness in both cases.

6 So, we do have situations where we receive these human
7 rights issues or complaints, and then we would make telephone
8 calls, make contact with the relevant department or agency to
9 try and have the matter resolved because we don't have, you
10 know, the power to do anything significant about it.

11 COMMISSIONER HICKINBOTTOM: Thank you very much.

12 THE WITNESS: (Mrs Smith-Penn) If I may, Commissioner,
13 on the point of prisoners, we do have an issue now in the
14 Territory with prisoners, and I'll draw reference to under the
15 United Nations Goal 16, which speaks to building strong
16 institutions for peace and justice, it mentions on the website
17 UN.org/sustainable development/peace-justice/, it mentions for
18 the statistics and facts and figures, it says that the rule of
19 law and development have a significant interrelation and a
20 mutually reinforcement, making it essential for sustainable
21 development at national and international level.

22 Then goes on to say: The proportion of prisoners held
23 in detention without sentencing has remained almost constant in
24 the last decade, 31 percent of all prisoners.

25 There are persons who are presently in need of redress

1 on that particular issue. It is not a matter directly in the
2 executive or the legislative arm but it is one that the
3 prisoners, their rights in this particular case they are
4 enjoying, in that there is a need to look at the matter.

5 And if I may clarify the record, Commissioner, I heard
6 a reference being made by the current Commissioner as to reasons
7 which he had heard with respect to the jury and why there were
8 delays. And I also heard the Director of Public Prosecutions
9 speaking to the issue that (noise interference) The Honourable
10 Smith had settled the matter of the jury. And I am subject to
11 clarification.

12 But on those two points, I would like to say that
13 if--if this Commission is to be able to rely on evidence, it
14 should be evidence that is spoken from the persons who have been
15 authorized to speak to the issue, who have direct knowledge and
16 who have the facts, and the facts are these:

17 The current situation is that the decision that was
18 rendered by Her Ladyship Justice Smith has been looked at and
19 considered, and a subsequent application was made in the High
20 Court in the Territory of the Virgin Islands before his Lordship
21 The Honorable Justice Trevor Ward of Her Majesty's Queen's
22 Counsel at the beginning of 2020, and the essence of that
23 decision was that there was essentially no right to
24 challenge--to challenge the array, if there was no known defects
25 in the array, and I would ask that that record be brought up

1 because it speaks also to the fact that an admission had to be
2 made that there was no known defects in the record, in the
3 array, and so to come to the High Court to make an application
4 for making an application's sake was not the thing to do.

5 The record will also show that the question was posed
6 that there was an opportunity, and there is an opportunity under
7 the Jury Act of 1914 for persons to go along and under the
8 relevant procedure to the Magistrate's Court and to raise any
9 question of whether a person is or is not eligible, and in that
10 process persons can add whomever they will once they meet the
11 criteria.

12 And the statistics will show that for the period of
13 2014 to 2020, no one from the public or the private Bar attended
14 at any of those hearings, notwithstanding the fact that the
15 notice was published as prescribed by law in the courthouse, and
16 all and sundry could inspect them to go along.

17 So, I think it is necessary for the record that we do
18 not apply hearsay but we apply the correct authority and the
19 correct fact, and so that decision of his Lordship Judge Trevor
20 Ward Queen's Counsel it then says that, in the event where there
21 is no defect.

22 And I would say--

23 COMMISSIONER HICKINBOTTOM: I'm sorry, Ms Smith-Penn,
24 sorry to interrupt. We're on human rights.

25 THE WITNESS: (Mrs Smith-Penn) Yes.

1 COMMISSIONER HICKINBOTTOM: We've moved off the
2 complaint. We've moved on human rights.

3 THE WITNESS: (Mrs Smith-Penn) Bear with me. I'm
4 going to that very issue.

5 Because the position that is being made here that when
6 the record is not clear and when there is a misunderstanding and
7 when the rule of law is not followed in the course that it ought
8 to be followed, then there is a danger that corruption can come
9 in.

10 And since this window has been opened, I am asking
11 that you allow the full record to be brought into the scene
12 because the reason that the rights of prisoners are presently in
13 danger where we have persons similar to the UN Goal 16, not
14 sitting at Her Majesty's prison, not having a hearing, the fact
15 that is on record is that on the 10th and the 11th of
16 December 2020, His Lordship The Honorable Justice John had an
17 extensive Case Management Session, and all--all persons that are
18 at Her Majesty's prison were scheduled, we went to an extensive
19 exercise of bringing in an additional judge. It was carefully
20 planned. It was strategically put in place so that persons
21 would have an opportunity and all counsel appeared and on behalf
22 of themselves and their clients who are able to sit and
23 systematically and carefully decide on dates. The dates were to
24 run until June of 2021, and so that would have disposed of every
25 single matter by way of first hearings so that we would not have

1 a backlog.

2 And I've heard, although I didn't pay slavish
3 attention to what was said. I have heard in passing, because
4 it's played in the Office of the Complaints Commission, that
5 there is backlog at the Courts. Let me be very clear. The
6 backlog at the Courts came in as a result in the Magistrate's
7 Court because the 2017 hurricanes caused the buildings to be
8 damaged. The High Court's buildings were damaged as well. All
9 of the residences of the Judges were destroyed. For our part,
10 we walked the length and breadth of Tortola, and we visited 38
11 houses in order to find buildings for the Judges to live in.

12 As a result of that, the Courts were able to function,
13 but the Magistrate's Court, of course, they would have been
14 challenged because we made reference before that there was
15 limited spacing in which to house a court.

16 So, I do not want the record--

17 COMMISSIONER HICKINBOTTOM: This is evidence--has
18 evidence relevant to your role as the Complaints Commissioner?

19 THE WITNESS: (Mrs Smith-Penn) It's an own motion
20 exercise because what we are seeing now and the complaints that
21 the prisoners need to bring forward, they are prejudiced in that
22 if they were to go on record in raising a complaint, it could
23 have implications for their matters before the Courts. We are
24 in a small jurisdiction. And so, because there is no Human
25 Rights Commission, someone must speak for them.

1 COMMISSIONER HICKINBOTTOM: No, I understand that.

2 BY MR RAWAT:

3 Q. Are you conducting an own motion investigation now?

4 A. (Mrs Smith-Penn) I am. I am.

5 Q. We will have to pause it there because what we
6 wouldn't want to do is compromise that investigation allowing
7 you to talk about it.

8 A. (Mrs Smith-Penn) Well--

9 Q. What we can do, Commissioner, if I may suggest,
10 obviously Ms Smith-Penn has spoken to matters that have been
11 raised before you by other witnesses, she set her view out on
12 the record and the history on the record, which we can take to
13 those witnesses if necessary, but what we can also do is I
14 suggest, perhaps that if we could pause this issue for the time
15 being because we might need--it would be more careful to what we
16 need to come back to the Complaints Commissioner about if there
17 is an ongoing investigation.

18 COMMISSIONER HICKINBOTTOM: Exactly.

19 It would help if you have anything further to say on
20 this subject, Complaints Commissioner, if you could write to us
21 about it because we can then take it up with other witnesses.

22 THE WITNESS: (Mrs Smith-Penn) Yes, I could do that.

23 MR RAWAT: Thank you.

24 THE WITNESS: (Mrs Smith-Penn) If it pleases you, sir,
25 I think I have to make it very clear that, on the point of the

1 right to freedom of expression and other things, the evidence
2 that has to be given, it ought not to be put off. I would be
3 grateful for an opportunities of an indication as to whether
4 this evidence can be given sooner rather than later.

5 COMMISSIONER HICKINBOTTOM: I'm sorry, what evidence?

6 THE WITNESS: The evidence in terms of the point that
7 is being made about the prisoners that are held in detention
8 without sentencing.

9 COMMISSIONER HICKINBOTTOM: No, you write us as soon
10 as you can, and we will take it into account, and investigate it
11 by referring to other witnesses as appropriate. But it can only
12 really be done in writing, Mrs Smith-Penn.

13 THE WITNESS: (Mrs Smith-Penn) Correct, I understand.

14 There is one further point, and it is the point of the
15 public welfare that's under the complaints the Commission of
16 Inquiry Act of 1880.

17 BY MR RAWAT:

18 Q. How does that relate to the work of the Complaints
19 Commissioner?

20 A. (Mrs Smith-Penn) It's an own motion matter.

21 Q. Again, Ms Smith-Penn, are you conducting an own motion
22 investigation--

23 A. (Mrs Smith-Penn) I think I have completed that,
24 Commissioner, and if you would bear with me, I will just read
25 the point that I hope raise in brief and come back to later.

1 Q. Before you do, can I just clarify, what is the own
2 motion investigation that you have launched?

3 A. (Mrs Smith-Penn) Public welfare. Remember that I said
4 that--and my colleague here and the former Complaints
5 Commissioner made mention of the own motion investigations that
6 we can do in the Complaints Commission.

7 Q. So, you have launched a number of own motion
8 investigations--

9 A. (Mrs Smith-Penn) We have launched a number of own
10 motion investigations, and in addition to issues that have been
11 raised with us, and that's why we are making the point that,
12 under the human rights aspects, the concern and the issue that
13 is before this very body by way of the matter being raised now,
14 is that persons are very much concerned about public welfare,
15 and we are grateful to the Commission for coming. I wish to
16 underscore that and to very clearly say that, by your coming, a
17 lot of justice will be done in the Territory of the Virgin
18 Islands.

19 And the question of public welfare, if I may justice
20 very quickly clarify, it says that it shall be lawful for the
21 Governor whenever he shall deem it advisable to issue a
22 commission appointing one or more Commissioners and authorizing
23 such Commissioners or any quorum of them there to mention to
24 inquire into the conduct or management of any Department of the
25 Public Service in the Territory, of any public officer of the

1 Territory, or of any Parish or District there into any manner in
2 which an inquiry would, in the opinion of the Governor, be for
3 the public welfare.

4 It is the point of the public welfare that it is the
5 test that has caused the rights of every Virgin Islander to be
6 raised here to the Commissioner.

7 And the thanks not only goes to you but it goes also
8 to the Government of the Virgin Islands for opening up this
9 public inquiry to live video and audio observation by Members of
10 the public, and it has been brought to the Commission's
11 attention that persons indeed very shocked to learn of the many
12 and numerable incidents of late filings and what has been put on
13 the record as breaches of the Registrar of Interests Act, and I
14 am obliged to raise on behalf of those persons on the basis of
15 human rights that we have a constitutional crisis. We have a
16 constitutional crisis.

17 And the reason why we have a constitutional crisis
18 because, as regards good governance, the responsibility to
19 inform the public every single time a breach has been undertaken
20 or in any way has come about by a Member of the House of
21 Parliament, in this case the House of Assembly, it is the
22 responsibility of the Governor to make the voters and the
23 Members of the Virgin Islands aware that such a breach has
24 occurred.

25 COMMISSIONER HICKINBOTTOM: I'm sorry, Mrs Smith-Penn.

1 THE WITNESS: (Mrs Smith-Penn) Yes.

2 COMMISSIONER HICKINBOTTOM: There is a regulatory
3 scheme, there is a scheme under the Register of Interests Act of
4 2006. We discussed that with witnesses and then submissions
5 over six days. There is a scheme. Some of the evidence
6 indicated that the scheme was not always properly implemented,
7 but I don't think we can take that any further today. If you
8 have had complaints, which you are going to investigate, you
9 will investigate them.

10 THE WITNESS: (Mrs Smith-Penn) We have--we have
11 investigated them, and I would just crave your indulgence for a
12 little while longer.

13 We have that regime, but before that regime and above
14 that regime, we have the Constitution, and we have the
15 provisions under the Constitution which says that not only does
16 the Governor have a responsibility for public welfare to bring
17 the consistent breaches of that legislation to the attention of
18 the voter--

19 COMMISSIONER HICKINBOTTOM: I'm sorry, Mrs Smith-Penn.
20 I understand what you're saying, but I do think that we are
21 getting into difficult territory for this reason: The elected
22 Ministers, as I understand their submissions and we're going to
23 debate them later in these hearings--as I understand their
24 submissions, they say that the Governor cannot do that--not that
25 he has a duty, but he simply cannot do it. And what I don't

1 want is a debate in respect of matters of law which may well
2 form parts of the hearings in this Commission at this stage.

3 THE WITNESS: (Mrs Smith-Penn) Yes, you are quite
4 right, Commissioner.

5 MR RAWAT: Could I also raise another point?

6 COMMISSIONER HICKINBOTTOM: Yes.

7 MR RAWAT: I would agree with you, Commissioner, that
8 we have ventured into issues of law, and we're quite far away
9 from the purpose of this morning, which was the work of the
10 Complaints Commissioner.

11 But also secondly, if the Complaints Commissioner is
12 investigating certain complaints, in my submission, we need to
13 allow that course to run its way before taking this matter any
14 further.

15 COMMISSIONER HICKINBOTTOM: Yes, because you, as
16 Complaints Commissioner, also have obligations of
17 confidentiality?

18 THE WITNESS: (Mrs Smith-Penn) We do have those
19 obligations, and I thank you very much, commissioner, and to
20 you, Mr Bilal, but this is the work of the Complaints
21 Commission. The welfare--the welfare of the persons--

22 BY MR RAWAT:

23 Q. Ms Smith-Penn, I'm not in any way trying to either
24 have an argument with you or dispute what you perceived to be
25 the work of the Complaints Commission. What I'm merely

1 submitting is that we should allow you to continue to do your
2 work, and when you have reached a conclusion, and provided that
3 you have complied with the statutory regime under which you
4 operate, that may be the better point at which you can bring the
5 matters back to the Commission's attention.

6 A. (Mrs Smith-Penn) If I have just have 10 more minutes
7 by then I will close the matter on.

8 COMMISSIONER HICKINBOTTOM: But Ms Smith-Penn--

9 THE WITNESS: (Mrs Smith-Penn) Yes.

10 COMMISSIONER HICKINBOTTOM: --you have made legal
11 submissions which are going to be the subject of legal
12 submissions before me, before the end of this Commission of
13 Inquiry.

14 THE WITNESS: (Mrs Smith-Penn) Yes.

15 With respect, Commissioner, the legal submissions that
16 are going to be made and the very nature of the breach says that
17 we have a conflict, and that's why I say we have a
18 constitutional crisis. The legal submissions that are going to
19 be made are going to be made by counsel that has been hired for
20 the 13 elected Members and/or will be done by the Attorney
21 General. That counsel cannot represent the people, and that is
22 why we are saying--

23 COMMISSIONER HICKINBOTTOM: I'm sorry, Ms Smith-Penn.
24 If that's your stance, then what you must do is you must apply
25 to the Commission of Inquiry, which you can, to become a

1 participant. I can determine that application, and if you
2 become a participant, then you can make submissions on these
3 matters of law at the appropriate time.

4 THE WITNESS: (Mrs Smith-Penn) Yes. I will put on
5 record we do not have the resources to apply, to make
6 submissions. You've heard that we have very limited resources,
7 and so we have to act notwithstanding the fact that the
8 Complaints Commissioner presently is a lawyer, but from the
9 basis that any person in law can appear in person to make
10 representations. That person, even though they may take up an
11 Act and they may read from the Act, they are doing so on the
12 basis of making representations. I do not think that we should
13 call them legal representations. We do not have the means to do
14 it in the manner in which you are saying.

15 It's a simple matter that we are bringing to the
16 attention of the Commission, that from 2008 until 2020, the
17 electorate, under the principles of democracy and the rule of
18 law, have heard for the first time of the consistent breaches
19 that has caused the rule of law in the Territory of the Virgin
20 Islands to be eroded, so we have to take judicial notice of the
21 fact in the Constitution that the Governor has a boss, and that
22 boss is the Secretary of State.

23 COMMISSIONER HICKINBOTTOM: I'm sorry, Ms Smith-Penn--

24 MR RAWAT: You are, indeed, making a legal submission.

25 COMMISSIONER HICKINBOTTOM: Yes, but it's a legal

1 submission that's directly contrary to the position taken by the
2 elected Ministers. They are not here, and if you wish to make
3 these submissions--

4 THE WITNESS: (Mrs Smith-Penn) And we do not represent
5 the Ministers. We are speaking on behalf of the people and the
6 confusion that has arisen. The people are very concerned about
7 the number of breaches that have been brought out on the record
8 and the international arena that says that the Registrar of
9 Interests has repeatedly reported these breaches.

10 And going to the point of good governance, good
11 governance starts at the very height of public officials in the
12 Territory of the Virgin Islands. The height of that position is
13 the Governor, who is Her Majesty's lawyer's representative. He
14 has a boss, which is the Secretary of State to whom he makes the
15 Reports, and we are in a--

16 COMMISSIONER HICKINBOTTOM: I'm sorry, Mrs Smith-Penn,
17 firstly, these are legal submissions.

18 Secondly, they're legal submissions without
19 any--anything in writing, and I'm not at all sure that they are
20 sound in any respect.

21 THE WITNESS: (Mrs Smith-Penn) Yes.

22 COMMISSIONER HICKINBOTTOM: If you wish to make
23 further submissions on this point which is going to return to
24 the Commission of Inquiry before the end of it, then please
25 write to me, and we will ensure that any voice that should be

1 heard is heard. But now is not the time, and this is not the
2 form that is helpful to me.

3 THE WITNESS: (Mrs Smith-Penn) I understand that, my
4 Lord, I'm sorry to call you "my Lord", but essentially the
5 position is this: Between the Years of 2008 and 2020--

6 COMMISSIONER HICKINBOTTOM: No, you've said this.

7 THE WITNESS: (Mrs Smith-Penn) Yes.

8 COMMISSIONER HICKINBOTTOM: I understand what you've
9 said. And as I say, if you wish to make these submissions, then
10 you must write to me, and then we can take it forward in a
11 helpful manner. This is not helpful. And if it's going to be
12 helpful you need to set it out in writing with the legal basis
13 of your legal submissions, and we will take it from there.

14 THE WITNESS: (Mrs Smith-Penn) Can I put on record--

15 BY MR RAWAT:

16 Q. Ms Smith-Penn--

17 COMMISSIONER HICKINBOTTOM: I'm sorry, Mr Rawat.

18 You can't put things on the record which I do not find
19 helpful. Write to me. If they're helpful, then they will be
20 brought forward in evidence or in the form of proper
21 submissions, and we will deal with them. But we cannot deal
22 with them in this particular way.

23 THE WITNESS: (Mrs Smith-Penn) I understand. I
24 understand the rules.

25 And you speak to that very issue because when I

1 reviewed cap 237 which is an 1880 statute, namely the Commission
2 of Inquiry Act, there is no clear path for me to access on
3 behalf of the people regarding--

4 COMMISSIONER HICKINBOTTOM: I'm sorry,
5 Ms Smith-Penn--firstly, that's another legal submission.
6 Secondly, it is patently wrong. I am the Master of the
7 procedure in this Commission of Inquiry. If you write to me
8 about these matters, then I can consider whether it's
9 appropriate and the form in which it's appropriate to take them
10 into account.

11 THE WITNESS: (Mrs Smith-Penn) I respect that, and I
12 gave you thanks for that.

13 I will say as well--I'm afraid I have to say it on the
14 record.

15 MR RAWAT: Commissioner--

16 THE WITNESS: (Mrs Smith-Penn) I do have concerns--I
17 do have concerns with respect to--

18 MR RAWAT: I have concerns as well.

19 (Overlapping speakers.)

20 MR RAWAT: The concern I have, Mrs Smith-Penn is that
21 we have another witness scheduled for 2:00, and we do need to
22 get ready for that other witness. I have concluded my questions
23 to you as Complaints Commissioner.

24 COMMISSIONER HICKINBOTTOM: I have no other questions.
25 If you have any other concerns about the Commission of Inquiry,

1 any aspect of it, you can write to us.

2 THE WITNESS: (Mrs Smith-Penn) I do not think that
3 writing to you will give the fairness that is required.

4 COMMISSIONER HICKINBOTTOM: I'm sorry, Mrs Smith-Penn.
5 I'm the judge of fairness of the proceedings because that's my
6 job. If you write to me, I can then take an informed view on
7 the appropriate way to deal with any submissions you want to
8 make sure that this Commission of Inquiry is fair to everyone
9 involved. But the way in which you're conducting this
10 particular part of it runs a risk of it being unfair to people
11 who are not here.

12 THE WITNESS: (Mrs Smith-Penn) And you are quite
13 right, and that is the very reason why I make them here because
14 there was no other way for them to be made.

15 COMMISSIONER HICKINBOTTOM: I'm sorry, Mrs Smith-Penn.
16 That's not right. There is another way. You can write to me,
17 and I will then take it into account and get back to you as to
18 the most appropriate way of dealing with any further submissions
19 you wish to make.

20 THE WITNESS: (Mrs Smith-Penn) I will put the point on
21 record that I will seek an audience with the Deputy Governor and
22 the Governor in order to do so because the matters that I have
23 to raise, there are of critical national importance.

24 And I will say, Commissioner, on the record, that in
25 my training, insofar as independence, insofar as impartiality

1 goes, I am concerned as the Commissioner that, when you,
2 Commissioner, arrived in the Territory, you arrived with the
3 Governor who was responsible for the Commission of Inquiry.

4 COMMISSIONER HICKINBOTTOM: I'm sorry, Ms Smith-Penn.

5 THE WITNESS: (Mrs Smith-Penn) And as regards the
6 rule--

7 COMMISSIONER HICKINBOTTOM: I'm sorry, Ms Smith-Penn.
8 This is simply not appropriate. I've made it clear that it's
9 not appropriate.

10 THE WITNESS: (Mrs Smith-Penn) You are quite right.

11 COMMISSIONER HICKINBOTTOM: Yes, and I am quite right.

12 THE WITNESS: (Mrs Smith-Penn) You are quite right,
13 Commissioner, and I think you will agree that I am quite right
14 to raise the point of impartiality as well as independence of
15 the Commission.

16 COMMISSIONER HICKINBOTTOM: Not here, not now. You
17 can write to us. You're here at the moment to answer questions
18 from me through Mr Rawat in your role as Commissioner of
19 Complaints. That you've done. Thank you very much for it. If
20 there are any other matters, then please write to us, and we
21 will deal with them in an appropriate way.

22 THE WITNESS: (Mrs Smith-Penn) Thank you so very much.

23 MR RAWAT: I suggest we rise so that we can get the
24 room ready. The next witness will be here at 2:00.

25 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.

1

(Recess.)

1 Session 2

2 MYRON WALWYN, COMMISSION WITNESS, RESUMED

3 COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat.

4 MR RAWAT: Thank you, Commissioner.

5 (Microphone not on.)

6 MR RAWAT: I should say, actually, for purposes of the
7 Transcript none of the participants are legally represented in
8 the room this afternoon or indeed remotely.

9 For the Transcript, our next witness is Myron Walwyn.
10 Mr Walwyn has previously given evidence to the Commission, and
11 so there is no need for him to either take the oath or affirm
12 again.

13 BY MR RAWAT:

14 Q. Mr Walwyn, can I first of all start by thanking you
15 for returning to give further evidence.

16 A. Actually, no problem at all.

17 Q. The only thing I need to say in terms of preamble is
18 just to ask you to keep your voice up and speak slowly so that
19 your answers can be recorded.

20 A. Yes.

21 Q. And, hopefully, your microphone on, but whether it's
22 on or not, it doesn't amplify.

23 A. Okay.

24 Q. Thank you.

25 Now, when you were last here, we went through your

1 electoral history. It's right, isn't it, that, in 2014, you
2 were the Minister for Education and Culture in the NDP
3 administration?

4 A. That's correct.

5 Q. And you had been elected, if I recall correctly, as an
6 at-large representative?

7 A. That's correct.

8 Q. Can I ask you just--you should see a Constitution and
9 Law Bundle at the very edge of the table over there.

10 A. Yes, um-hmm.

11 Q. If you could pick that up, please. It's the smallest
12 bundle further away from you. That one, yes.

13 A. Um-hmm.

14 Q. Now, if you turn to page 30 of that.

15 A. Three-zero?

16 Q. Three-zero, please.

17 And that should take you to Section 56 of the
18 Constitution of 2007.

19 A. What page is this, sir?

20 Q. It should be page 30, three-zero, at the bottom.

21 A. The bigger number?

22 Q. Yes. It's--like all bundles prepared by lawyers, it
23 has more than one number on it.

24 COMMISSIONER HICKINBOTTOM: This has two pages--

25 (Overlapping speakers.)

1 THE WITNESS: Sometimes they're aligned, sometimes
2 they don't.

3 BY MR RAWAT:

4 Q. Thank you.

5 It's Section 56, which you will be very familiar with.
6 It's the provision that deals with the assignment of
7 responsibilities to Ministers.

8 A. Um-hmm.

9 Q. And I wanted to just direct your attention to 56(5):
10 "Where a Minister has been assigned responsibility under this
11 Section for the administration of any Department of Government,
12 the Minister shall, subject to this Constitution and any other
13 law, exercise direction and control over that Department,
14 including directing the implementation of government policy as
15 it relates to that Department, and subject to that such
16 direction and control that the Department shall, unless
17 otherwise agreed between the Governor and the Premier, be under
18 the supervision or a Permanent Secretary who shall be a public
19 officer".

20 I pause there.

21 A. Yes.

22 Q. Now, would you agree that the effect of Section 56(5)
23 is to give any Minister overall responsibility for his or her
24 Ministry?

25 A. It does.

1 Q. Yesterday, the Commissioner heard from The Honourable
2 Mr Mark Vanterpool, and I put to him--there were questions asked
3 about Section 56, and I asked him whether in his view the buck
4 stops with the Minister. Is that a view that you would share?
5 He said "yes", but is that a view you would share?

6 A. I wouldn't share that view entirely because that's
7 subject to a number of things.

8 The policy direction and the control that the Minister
9 has in the day-to-day running of his Ministry, of course, is
10 subject to the powers that the Governor as well as it relates to
11 the Civil Service and the ability to direct all matters within
12 the Ministry. So, as far as my knowledge goes, certainly me as
13 Minister--and even reading this and knowing how it applies in
14 the ordinary course of things here, the Minister doesn't have
15 carte blanche control of his Ministry. That is not so.

16 Q. So, your position is that whatever the Constitution
17 says in practice--

18 A. Um-hmm.

19 Q. --it's not a sort of unfettered direction and control?

20 A. Not at all.

21 Q. Thank you.

22 Now, as you may be aware, on Monday and Tuesday of
23 this week, the Commissioner also heard evidence from the Auditor
24 General.

25 A. You are finished with this?

1 Q. Yes, I have.

2 Now, she gave evidence about the role of Auditor
3 General.

4 A. Um-hmm.

5 Q. Her Annual Reports and a number of issues that were
6 raised in those Annual Reports but also a number of specific
7 reports that spanned a period of years. Now, that included a
8 report into the Elmore Stoutt High School Perimeter Wall.

9 A. Yes.

10 Q. And the questions that I want to put to you today
11 relate to that project.

12 A. Yes.

13 Q. Because you were--as there is no dispute, you were the
14 Minister for Education and Culture at that time?

15 A. Yes.

16 Q. Now, one of the matters that was canvassed with the
17 Auditor General was a press statement she released which took
18 issue with an interview that you, yourself, gave. I will show
19 you a copy of this press statement, in due course, if you need
20 it. It's on the desk.

21 A. No problem.

22 Q. But your interview was with--I believe it was with Ron
23 Grant of 284.com.

24 A. That's correct.

25 Q. And I would like to begin by asking that that

1 interview be played now to you before I begin to ask you further
2 questions.

3 MR RAWAT: So, Mr Peters, if we could play the
4 interview. Thank you.

5 (Video played.)

6 MR RAWAT: Thank you very much, Mr Peters.

7 BY MR RAWAT:

8 Q. I'm not going to, Mr Walwyn, read out the report in
9 great deal. I'm sure you're very familiar with the detail of
10 the Auditor General's Report.

11 A. I think--I think it's important because you brought me
12 here for the report. The report has to be the primary
13 discussion.

14 Q. Yes. Yes.

15 A. And I would appreciate as well, when you speak of the
16 report, you reference the Section in the report.

17 Q. Of course.

18 A. I think that is very important.

19 Q. All right.

20 A. Reference to the report.

21 Q. Yep.

22 A. Good.

23 Q. Let's go, then, to--do you have a bundle that's
24 labeled "Part 2"?

25 A. What is in Part 2?

1 Q. The two lever-arch files there. In Part 2, you will
2 find the report that we need to look at.

3 A. I have--I have--I brought mine.

4 Q. Well, I think I prefer it if you use that because it's
5 numbered and, therefore, I can take you to proper pages.

6 A. Okay. "Part 2", it says?

7 Q. Yes.

8 That is the one.

9 If you go to page 784, please.

10 So, that should be the front page of the special
11 report issued by the Auditor General on the Elmore Stoutt High
12 School Perimeter Wall.

13 Do you have it?

14 A. Yes.

15 Q. Right.

16 If you go to paragraphs 4 and 6.

17 A. 4 and 6?

18 Q. Yes.

19 A. Um-hmm.

20 Q. 4 to 6, if you want me to read them out to you, just
21 do tell me, but if you go from 4 to 7, in summary, what that
22 explains is that the what I will call the "wall project" was
23 done in two phases.

24 A. Um-hmm.

25 Q. Phase 1 was in December 2014.

1 A. Um-hmm.

2 Q. Phase 2 was in 2015.

3 Now, if you look at 5--

4 A. Um-hmm.

5 Q. --it says that your Ministry received an estimate from
6 SA Architect in October 2014.

7 A. Which Section are you reading from, sir?

8 Q. Look at paragraph 5.

9 A. Um-hmm.

10 Q. And look at the first sentence of it.

11 A. Can you read it for me?

12 Q. "In response, the Ministry received an estimate from
13 SA Architect in October 2014".

14 COMMISSIONER HICKINBOTTOM: Page 789.

15 THE WITNESS: Reading "Background Information"?

16 Yes.

17 BY MR RAWAT:

18 Q. I mean, I think it will be better if we stick to the
19 same pagination.

20 A. No, I made my note, sir.

21 Q. I understand.

22 A. I have--

23 (Overlapping speakers.)

24 Q. Fair enough. But as long as we're both working from
25 the same document--

1 A. Yes, I think we are, I think we are, but you have to
2 bear in mind that I have to be prepared as well, as of course
3 you are.

4 Q. Yep.

5 A. Good.

6 Q. So, what it comes down to is that the Ministry of
7 Education and Culture used the services of SA Architect on the
8 school project, so SA Architect ultimately was the entity that
9 oversaw the project on behalf of the Ministry of Education and
10 Culture?

11 A. That is not correct.

12 Q. It isn't?

13 A. No.

14 Q. So--

15 A. And I think--I think what we can do--I mean, I know
16 it's your inquiry, but you brought me here, and I want to be
17 able to assist you, Commissioner, as best I can.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: I think it's good to start at the
20 beginning of the--of the--of the document particularly starting
21 with the Executive Summary because--and you brought me here, and
22 I have time, so I'm prepared to go through it with you--

23 BY MR RAWAT:

24 Q. Yes.

25 A. --rather than jumping through Sections because it's

1 important that we get the full gist of what we're discussing, if
2 that's fine you with, Commissioner.

3 COMMISSIONER HICKINBOTTOM: Yes. I mean, we certainly
4 know what the Executive Summary says.

5 THE WITNESS: I know.

6 COMMISSIONER HICKINBOTTOM: Which parts would you like
7 to take us to?

8 THE WITNESS: I would like to go through certainly
9 from, if you can go from one all the way down to 11.

10 BY MR RAWAT:

11 Q. You're wanting us to read the whole--

12 A. I think we need to ventilate it. I think it's
13 important.

14 Q. My question is directed to how we ventilate it.

15 A. We can ventilate it line by line, point by point like
16 you're raising. Can we do that?

17 COMMISSIONER HICKINBOTTOM: This is the Executive
18 Summary.

19 THE WITNESS: I know, but there is--

20 COMMISSIONER HICKINBOTTOM: But the Executive Summary
21 is taken presumably from the body of the report.

22 THE WITNESS: I know.

23 COMMISSIONER HICKINBOTTOM: So, can we go to the body
24 of report and then deal with the Executive Summary?

25 THE WITNESS: Commissioner, I'm sure when you see my

1 point later on you will understand why I took that tact, and I
2 would be very grateful if at least that can be done.

3 COMMISSIONER HICKINBOTTOM: So, what points would you
4 like to make--we read the Executive Summary.

5 THE WITNESS: Yes, I know.

6 COMMISSIONER HICKINBOTTOM: Yes.

7 THE WITNESS: Yes.

8 COMMISSIONER HICKINBOTTOM: So, which point would you
9 like to make in respect of it?

10 THE WITNESS: I would like to start off, if I can,
11 with the first point, that states that we started the project in
12 2014 with the first part of it being 96,727.40.

13 2 says, in February 2015, the Minister of Education
14 and Culture sought approval from Cabinet for emergency funding
15 of \$828,000 and wavier of the tender process to continue
16 construction of the perimeter wall.

17 COMMISSIONER HICKINBOTTOM: If we're going to get
18 through it, we need to go through it, Mr. Walwyn.

19 THE WITNESS: Yes.

20 COMMISSIONER HICKINBOTTOM: Paragraph 1, you say the
21 cost is £96,000.

22 THE WITNESS: Yes. She's referring to--

23 COMMISSIONER HICKINBOTTOM: We're in "Petty Contract"
24 country here.

25 THE WITNESS: Yes.

1 COMMISSIONER HICKINBOTTOM: But what the Executive
2 Summary says is this was done using 11 Work Orders at a cost of
3 \$96,000.

4 THE WITNESS: That is fine. I agree with that.

5 COMMISSIONER HICKINBOTTOM: Okay. Then two, request
6 for emergency funding.

7 THE WITNESS: Um-hmm.

8 COMMISSIONER HICKINBOTTOM: And waiver of the tender
9 process. So, we've a contract which would be major contract,
10 \$828,000, waiver of the tender process to continue with the
11 work.

12 THE WITNESS: Yes, but the--the Section says that the
13 Minister for Education and Culture sought approval from Cabinet.
14 That is wrong. The Minister for Education never brought any
15 paper to Cabinet. And that's why I'm saying it's important for
16 the Executive Summary to start at the beginning so that we can
17 have a full understanding as to what has happened. The Minister
18 of Education could not bring a paper to Cabinet because he does
19 not have the authority to bring a paper to Cabinet of that
20 amount. The amount that came to Cabinet was \$828,000. If a
21 contract is worth a hundred thousand dollars, it must be brought
22 by the Minister of Finance.

23 BY MR RAWAT:

24 Q. But you had nothing to do with bringing the request of
25 the Cabinet?

1 A. The point of the matter is, is that the report says
2 the Minister of Education brought a paper to Cabinet. That is
3 false.

4 COMMISSIONER HICKINBOTTOM: I'm sorry, it doesn't say
5 that.

6 THE WITNESS: It says that.

7 COMMISSIONER HICKINBOTTOM: What it says is the--the
8 Minister of Education sought approval from Cabinet.

9 THE WITNESS: But the Minister of Education did not
10 seek any approval because he did not bring the paper. The
11 primary--the primary Ministry for the project was the Ministry
12 of Finance. The Ministry of Education was the executing arm or
13 the executing ministry.

14 Secondly, within that same number 2, Cabinet approved
15 funding and waived the tender process to allow use of Petty
16 Contracts. That, too, is not true.

17 Do you have a copy of the--of the paper? You don't
18 have that. Do you know the decision that was made by the
19 Cabinet in relation to the wall?

20 BY MR RAWAT:

21 Q. Well, we know the decision that the--what was in the
22 Auditor General's Report.

23 A. But have you gotten the extract of the report--of the
24 Cabinet's decision?

25 Q. I don't believe that's been provided to the COI.

1 A. I think that would have been a very important point at
2 which to start.

3 Q. Well, can we--shall we try and do it in an organized
4 fashion.

5 A. Sure.

6 Q. No, let's try to do it in an organized fashion.

7 A. The reason--the reason I'm suggesting this way is
8 because you're going to ask me questions that I may not be able
9 to answer, and I have to give you the background of what
10 happened.

11 Q. But I think--let's start at this point which I think I
12 hope we can both agree: The Commissioner will ensure you are
13 fairly treated.

14 A. Um-hmm.

15 Q. The second thing is, if you don't know the answer to a
16 question, then you can tell us you don't know the answer to the
17 question. If there is more information that's necessary, can
18 you tell us what that further information is.

19 Now, what you're asking us to do--and it may not be
20 the most productive way of going through the afternoon, but if
21 that's what you want--you want us to go line by line to take out
22 the points that you agree or disagree with.

23 A. Not specifically. I think the Executive Summary sets
24 the scene for the questions that you're going to be asking me,
25 Commissioner.

1 Q. I think--we have to do it in one of two ways. We
2 either ask you questions based on the assumption that this is a
3 report that you may have read before. And, indeed, the
4 interview that we just played suggests you may have more than
5 passing knowledge of the report. Or if you wish and if the
6 Commissioner allows, we will do the process that you're
7 suggesting.

8 A. Um-hmm.

9 Q. But in fairness to the Auditor General, the Executive
10 Summary may not--is not the entirety of the report.

11 A. No, I'm not in any way suggesting that we go through
12 the Executive Summary. That's not what I'm saying.

13 Q. You would like us to go through every line of the
14 report?

15 A. That's not what I'm saying at all. I'm saying that
16 the Executive Summary sets the scene of what is in the report,
17 and there may be very important information that could assist
18 you as well with your questioning. That's the reason I'm
19 suggesting it.

20 But if--

21 Q. Let's go--let's go through the first one. Let's
22 establish where the areas are that you dispute. The first area
23 you dispute in relation to paragraph 1 of the Executive Summary
24 which reads: "Due to security concerns, the Ministry of
25 Education and Culture initiated a project to replace the

1 chain-link fence at Elmore Stoutt High School with a concrete
2 perimeter wall in 2014".

3 A. Yes.

4 Q. And you agree with that?

5 A. I agree with that.

6 Q. "Initial works were carried out in December 2014 to
7 address an area on the west side that presented persistent
8 issues", and that's been labeled, and it re-appears in the
9 report as the 2014 Focus Area.

10 A. That's correct.

11 Q. And you agree with that?

12 A. I agree with that.

13 Q. So, just to assist you, Mr Walwyn, in the course of
14 the Inquiry's proceedings, we have been referring to that as
15 "Phase 1".

16 A. That's fine.

17 Q. This was done using 11 Work Orders at a cost of
18 \$96,727.40.

19 A. That's true.

20 Q. Do you agree with that?

21 A. That's correct.

22 Q. So, Work Orders were used to deal with the first phase
23 of the rebuilding of the wall?

24 A. That's correct.

25 Q. All right. Second, number 2: "In February 2015, the

1 Minister of Education and Culture sought approval from Cabinet
2 for emergency funding of \$828,004.10, and waiver of the tender
3 process to continue construction of the perimeter wall. Cabinet
4 approved funding and waived the tender process to allow for the
5 use of the Petty Contracts".

6 Now, you take two issues with this, as I understand
7 it.

8 A. Yes.

9 Q. Firstly, it was not the Minister of Education and
10 Culture who sought approval from Cabinet.

11 A. That's correct.

12 Q. And secondly, that Cabinet, in waiving the tender
13 process, did not allow for the use of Petty Contracts.

14 A. What I would--what I would do to help with that, I
15 have a copy, Commissioner, of the actual draft that was sent to
16 Cabinet--it's dated the 19th of January 2015--and it says
17 Cabinet paper number, "Exception of waiver of tendering process
18 for construction, memorandum by the Minister of Finance". The
19 Minister of Education's name is not on this paper because I did
20 not bring the paper. I did not have the authority to bring the
21 paper.

22 Q. May I ask you a question?

23 A. Sure.

24 Q. The point you're making is that the requirements of
25 the Minister of Finance to bring the document to Cabinet, to

1 bring the proposal to Cabinet; yes?

2 A. I didn't hear your question.

3 Q. Your evidence is that it's not for you as Minister of
4 Education. It falls squarely in the lap of the Minister of
5 Finance--

6 (Overlapping speakers.)

7 Q. --to bring the matter to Cabinet?

8 A. Yes, because I'm looking at it in terms--

9 Q. Between the decision to start Phase 1--

10 A. Um-hmm.

11 Q. --and this matter being taken to Cabinet by the
12 Minister of Finance, what involvement did you have in it?

13 A. Phase 1 itself was done in a different budgetary year.

14 Q. Under the secondary school budget--

15 A. Yes.

16 Q. --of 2014?

17 A. Of 2014.

18 Q. Yes.

19 A. Which the Minister had the authority to do because the
20 contract was under a hundred thousand dollars.

21 Q. So, that was done by your Ministry--

22 A. Yes.

23 Q. --and you had authority to do that?

24 A. Yes.

25 We reallocated monies from elsewhere because we had a

1 very serious problem in that particular area with illicit drugs
2 coming into the school, and so--

3 Q. So, your evidence, then, is that the Minister of
4 Finance seeks approval for 828,000-odd from the Cabinet?

5 A. That's correct.

6 Q. Okay.

7 A. And that's the reason why I wanted to highlight it
8 because the document says the Minister for Education brought the
9 paper. That is not true.

10 Q. Well, to be fair, it says "sought approval from
11 Cabinet".

12 A. But that's not--the paper is here.

13 Q. Well--

14 A. That is not correct.

15 Q. Mr Walwyn, I think what we should not get into, if we
16 are going to go through this on a line-by-line basis, is
17 rewriting it. Let's just use the language of the Executive
18 Summary.

19 A. No, we're not rewriting it.

20 Q. My question is--

21 A. Commissioner, we have to be fair. I--

22 COMMISSIONER HICKINBOTTOM: What the report says is
23 the Minister of Education sought approval from Cabinet.

24 THE WITNESS: Which is not correct.

25 COMMISSIONER HICKINBOTTOM: All right.

1 THE WITNESS: And the document says here it's not
2 correct, and you're trying to let me accept something that is
3 not correct.

4 BY MR RAWAT:

5 Q. I'm not.

6 A. But that's what you're saying to me.

7 Q. No, Mr. Walwyn, I'm not. I'm trying to ask you a
8 question--

9 A. And I answered you several times--

10 Q. You haven't, with respect, Mr Walwyn.

11 The question I asked you was: On the basis of your
12 evidence that the Minister of Finance took the proposal to
13 Cabinet--

14 A. That's correct.

15 Q. --what involvement did you have in it, if at all?

16 A. The Ministry of Education would have worked in
17 conjunction with the technical folks in the Ministry of Finance
18 and provide the background information and so forth. The paper
19 then leaves the Ministry of Education which, in this case, in a
20 draft form. It goes to the Ministry of Finance--

21 COMMISSIONER HICKINBOTTOM: I'm sorry, the Minister of
22 Education--the Ministry of Education and Culture prepared a
23 draft paper.

24 THE WITNESS: That's what normally happened; right?
25 Because it had the background information.

1 COMMISSIONER HICKINBOTTOM: Formally present it to
2 Cabinet by the Ministry of Finance because of the amount.

3 THE WITNESS: Yes.

4 COMMISSIONER HICKINBOTTOM: We know that.

5 THE WITNESS: Yes.

6 COMMISSIONER HICKINBOTTOM: Yes.

7 So, you prepare a draft paper.

8 THE WITNESS: Um-hmm.

9 COMMISSIONER HICKINBOTTOM: You send it to the
10 technocrats.

11 THE WITNESS: In the Ministry of Finance, and then
12 it's brought by the Minister of Finance.

13 COMMISSIONER HICKINBOTTOM: Fine.

14 THE WITNESS: So, when it says here squarely that the
15 Minister of Education sought approval, that is not correct.

16 COMMISSIONER HICKINBOTTOM: Well, I mean--I don't
17 think we need to bandy words.

18 THE WITNESS: Okay.

19 COMMISSIONER HICKINBOTTOM: I understand what
20 happened.

21 THE WITNESS: Okay. Thank you.

22 BY MR RAWAT:

23 Q. If you now deal with the second point.

24 A. The second part says: "Cabinet approved funding and
25 waived the tender process to allow for the use for Petty

1 Contracts". That is the wording in the Act--in the draft
2 document because I have the draft here. It's dated 19th of
3 January 2015, and on the seat there were five or six decisions
4 sought that Cabinet had to decide, the one which is being
5 considered here is (c), "Approval be granted to execute the
6 project utilizing Petty Contracts and that the Ministry of
7 Finance's Project Support Unit, assist the Ministry of Education
8 and Culture with the management of this project". This is what
9 this is referring to, but this is the draft document that is
10 referenced here. That was not the decision that Cabinet made in
11 relation to this particular point. And that's why I asked the
12 question as to whether or not you had a copy of the decision
13 sought by Cabinet or the extract from Cabinet because that would
14 have helped the Commission.

15 COMMISSIONER HICKINBOTTOM: But you have it?

16 THE WITNESS: I have verbatim what it says.

17 BY MR RAWAT:

18 Q. Pause there for a moment, Mr Walwyn.

19 A. Yes.

20 Q. Two things.

21 A. Yes.

22 Q. When you're talking about draft paper--

23 A. Yes.

24 Q. --that's a draft paper prepared by your Ministry.

25 A. That was a draft paper prepared and forwarded. Most

1 time it's done in consultation.

2 Q. But I just want to make sure for the Transcript that
3 we know the sequence of documents.

4 A. Yes.

5 Q. The document--the first document is the draft paper
6 that you have that, yes, prepared in consultation but then
7 leaves your Ministry and goes to the Ministry of Finance.

8 A. In draft form, yes.

9 Q. The second document will then be a Ministry of Finance
10 document that makes its way to Cabinet.

11 A. That's correct.

12 Q. The third document that you're now referring to is the
13 extract of the decision.

14 A. The actual decision in Cabinet because when the paper
15 goes into Cabinet it may not come back out the same way.

16 Q. When you say that you have it verbatim--

17 A. Right.

18 Q. --do you have the actual document--

19 (Overlapping speakers.)

20 A. I don't have the actual document, but I have the
21 actual decision in relation to it.

22 Q. And where did that come from? Where did the document
23 that you have in your hand come from?

24 A. I have the Cabinet paper. I keep my notes.

25 So, the meeting of Cabinet was on the 4th of February

1 2015, and the decision by Cabinet in relation to (c), which is
2 replicated in 2, says: "Approval given to execute the project
3 by Petty Contracts and different suppliers and contractors".
4 That was--that's the exact wording that came from the Cabinet
5 paper itself that Cabinet passed.

6 COMMISSIONER HICKINBOTTOM: So Petty Contracts?

7 THE WITNESS: No, no. Petty Contracts and different
8 suppliers and contractors.

9 So, it says it gives permission for you to use Petty
10 Contracts but to also use Work Orders and Purchase Orders in
11 relation to different suppliers and contractors.

12 And it just simply says here in the report "Cabinet
13 approved funding and waived the tender process to allow for the
14 use of Petty Contracts". It is incomplete. It doesn't give the
15 full picture of what Cabinet did.

16 COMMISSIONER HICKINBOTTOM: And how was the Cabinet
17 using when it did that?

18 THE WITNESS: What?

19 COMMISSIONER HICKINBOTTOM: What power was the Cabinet
20 using to turn a contract that was worth the best part of a
21 million dollars--

22 THE WITNESS: Um-hmm.

23 COMMISSIONER HICKINBOTTOM: --into something which
24 could be performed by the use of something less than Petty
25 Contracts?

1 THE WITNESS: Well, I mean, I can't say that, but what
2 I would say that Cabinet--

3 COMMISSIONER HICKINBOTTOM: Did the Cabinet have that
4 power?

5 THE WITNESS: Cabinet has the power. Cabinet has the
6 power to do that.

7 COMMISSIONER HICKINBOTTOM: All right.

8 THE WITNESS: The Cabinet of the country has the power
9 to do that.

10 BY MR RAWAT:

11 Q. So, the Cabinet of the country could have done this
12 project entirely using Work Orders of up to \$10,000?

13 A. The Cabinet of the Virgin Islands made a decision to
14 do it by Petty Contracts and different suppliers on contracts.

15 Q. Yes.

16 A. That was the decision of the--of the--of the Cabinet,
17 sir.

18 Q. Yes. You told the Minister--the Commissioner that.

19 A. Yes.

20 Q. But my question was actually directed to your next
21 answer, which was the Cabinet has the power, so my question was:
22 Does the Cabinet have the power to have done this contract
23 entirely by Work Orders?

24 A. If Cabinet decided to do that, I do believe the
25 Cabinet has the power do that.

1 COMMISSIONER HICKINBOTTOM: I'm sorry, it's only
2 because I find it easier to read them than listen. Could I just
3 have the Cabinet Decision that you have--

4 THE WITNESS: Sure.

5 COMMISSIONER HICKINBOTTOM: --for a moment.

6 (Document exchanged.)

7 COMMISSIONER HICKINBOTTOM: I don't think we have the
8 Cabinet Minutes.

9 MR RAWAT: I don't--

10 COMMISSIONER HICKINBOTTOM: Anyway, not to hand.

11 MR RAWAT: Not to hand.

12 I think what we have to do is also be a little
13 careful, if it's a Cabinet paper anyway.

14 COMMISSIONER HICKINBOTTOM: We do.

15 MR RAWAT: It does appear Mr Walwyn has--

16 BY MR RAWAT:

17 Q. I take it you have at least two of the three documents
18 that we've--that you've referred us to?

19 A. I said I keep my notes and things.

20 COMMISSIONER HICKINBOTTOM: I mean, it's a very
21 peculiarly--

22 THE WITNESS: I know.

23 COMMISSIONER HICKINBOTTOM: I'm sorry, it's a very
24 peculiarly drafted decision.

25 THE WITNESS: Um-hmm.

1 COMMISSIONER HICKINBOTTOM: The paper was clear,
2 "Petty Contracts". That's what the paper says, the draft paper.

3 THE WITNESS: Yes. The draft said that.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 THE WITNESS: But in the decision of Cabinet--

6 COMMISSIONER HICKINBOTTOM: We will come to the
7 decision.

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: So the paper said "Petty
10 Contracts".

11 THE WITNESS: Um-hmm.

12 COMMISSIONER HICKINBOTTOM: What that decision says is
13 "Petty Contracts", that's fine--that's in accordance with the
14 paper--and "different suppliers"--

15 THE WITNESS: And contractors.

16 COMMISSIONER HICKINBOTTOM: No, no, different
17 suppliers.

18 THE WITNESS: When it says "different suppliers", it's
19 allowing us to be able to use Purchase Orders to purchase
20 things.

21 COMMISSIONER HICKINBOTTOM: Purchase Orders, exactly.

22 THE WITNESS: And the Work Orders. And I said that
23 because I remember the conversation vividly in Cabinet, and the
24 conversation involved--include Work Orders and Purchase Orders.
25 That is why--what my concern really is, is that what is

1 replicated here in the Executive Summary at (2) should have been
2 verbatim of what the Cabinet Decision was. To simply say "Petty
3 Contracts" is not truthful. It should say the entire decision
4 of the Cabinet.

5 COMMISSIONER HICKINBOTTOM: Mr Walwyn--and this is
6 speculation slightly on my part, but I suspect the Auditor
7 General couldn't get hold of Cabinet Minutes because they're
8 confidential. But before the report is made final, then, of
9 course, the Ministers have an opportunity--

10 THE WITNESS: We did that.

11 COMMISSIONER HICKINBOTTOM: --their input.

12 THE WITNESS: We did that.

13 And as we get further into the conversation, I want to
14 share those with you.

15 COMMISSIONER HICKINBOTTOM: So, you saw that what was
16 said in paragraph 2?

17 THE WITNESS: Yes, which the Ministry disputed because
18 when you get--when you get a copy of--of the Audit Report, it
19 goes to the Ministry, and then what the Ministry did is they
20 gave you a chance to--

21 COMMISSIONER HICKINBOTTOM: Input?

22 THE WITNESS: Input.

23 We gave our input, and the final document came back
24 without even the changing of an article; was changed after we
25 said what we did.

1 COMMISSIONER HICKINBOTTOM: We will presumably come to
2 that.

3 THE WITNESS: Yes.

4 BY MR RAWAT:

5 Q. Shall we go back to the Executive Summary?

6 A. And the reason why--and Commissioner, I'm not trying
7 to be difficult. I'm really not.

8 COMMISSIONER HICKINBOTTOM: No, no.

9 THE WITNESS: What I'm trying to do is assist the
10 Commission because I know, counsel, your questions are going to
11 come down to asking about Work Orders; and, if you don't get the
12 premise of it, then you're going to be asking me questions on
13 the misconception that we did something that we were not
14 authorized to do, and so I was trying to be helpful to the
15 Commissioner.

16 COMMISSIONER HICKINBOTTOM: We will get on to the
17 authorization. At the moment we're determining who made what
18 decisions.

19 THE WITNESS: Yes.

20 COMMISSIONER HICKINBOTTOM: And you say firmly that
21 the Cabinet determined that this contract, for the best part of
22 a million dollars, could be--could be implemented, if necessary,
23 completely by Works Orders.

24 THE WITNESS: Not necessarily by Work Orders. That's
25 not what it says.

1 COMMISSIONER HICKINBOTTOM: Okay.

2 THE WITNESS: It says "Petty Contracts"--

3 COMMISSIONER HICKINBOTTOM: Yes.

4 THE WITNESS: --and "different suppliers" and
5 "contractors".

6 COMMISSIONER HICKINBOTTOM: Yes.

7 THE WITNESS: So, it's a mixture. It's Petty
8 Contracts, Work Orders, Purchase Orders. This is what it says
9 here, and that was the discussion that was had in Cabinet.

10 COMMISSIONER HICKINBOTTOM: Okay.

11 THE WITNESS: Okay? I just wanted to make sure I
12 provided that information.

13 MR RAWAT: Yes.

14 THE WITNESS: No, if, counsel, you want to go back
15 into your direction that you want to go, that's fine. I can do
16 that.

17 BY MR RAWAT:

18 Q. No, no. Mr Walwyn, the last thing I want ask is
19 misconceived questions.

20 A. Surely.

21 Q. The reason for calling you and asking for your
22 assistance is to add detail--

23 A. Yes.

24 Q. --to what is in the Auditor General's Report.

25 A. Yes.

1 Q. So but--and you know, I appreciate that you say that
2 there is other information that will assist the Commissioner,
3 and that's what we want from you.

4 A. Yes.

5 Q. The one word of caution, perhaps, I would is just that
6 obviously there is a principle of collective Cabinet
7 Responsibility and Cabinet Confidentiality, and I would just ask
8 you to bear that in mind as far as you can.

9 A. I have thought that in mind.

10 Q. Thank you.

11 A. But it's important in the public interest that the
12 full story be given. It's very important because we cannot say
13 that something was given by Petty Contracts when Cabinet gave
14 permission to do more than that. That isn't right.

15 Q. I think the Commissioner has your firm evidence on
16 that.

17 A. I'm grateful.

18 Q. Let's go to 3, please.

19 A. Thank you.

20 Q. The project was managed by the Ministry of Education
21 and Culture, which outsourced these duties to an independent
22 contractor without adequate oversight or the involvement of the
23 Ministry of Finance Project Management Unit or the Public Works
24 Department.

25 Is that--hopefully--I will let you elaborate, but as a

1 "yes" or "no" answer, is it a proposition that you accept or
2 not?

3 A. I can't--I can't accept it in its entirety.

4 Q. Please tell the Commissioner where you take issue.

5 A. Because when you read it, Commissioner, it gives the
6 impression as if the Project Manager was brought on just for the
7 purposes of that project. That is not true. That the Project
8 Manager SA Architect, I met them working with the Ministry when
9 I came as Minister, carrying out support in the same way I
10 carried out support to me over the eight years, including this
11 project.

12 So, they were not just hired just for the sake of this
13 project. Any--any project in the Ministry, whether it required
14 tendering or not, we had the external support of SA Architect to
15 go out do the Bill of Quantities, make sure that people do their
16 work properly, make sure--and so, between the SA Architect,
17 which was the external Contract Project Manager, we also had an
18 internal Assistant Secretary with responsibility for projects.
19 She--we made sure she went to England, she got trained and she
20 came back, and the two of those persons worked together very
21 closely on projects.

22 So, the way this is written is if we just picked up SA
23 Architect and brought them here. They were always there working
24 with us. And as a matter of fact, I do believe they are still
25 working with the Ministry of Education even after I left.

1 The Ministry of Finance's Project Management Unit, at
2 the material time the Project Unit was in its embryonic stages.
3 It wasn't fully constituted at that time. I do not believe that
4 anybody in the Ministry of Education--none of the technocrats
5 would have told the Project Unit to get lost because we were
6 taking whatever help we could get.

7 Public Works. Public Works does not provide that type
8 of level of support to Ministries. It didn't happen when I was
9 there as Minister, and it certainly doesn't happen now. Public
10 Works have always talked about serious shortages of people to do
11 certain things. So, to say you could have Public Works on a
12 project for almost a year, you can't do it. It doesn't happen
13 in practice. I have never seen it.

14 Q. Can we try and break it down and get some detail from
15 you.

16 A. Sure.

17 Q. The firsts thing is SA Architect--you say SA Architect
18 were effectively working for the Ministry before you became the
19 Minister.

20 A. Yes, in the same capacity.

21 Q. Right.

22 A. And they do excellent work.

23 Q. Right.

24 Well, the first question is just can you tell the
25 Commissioner who SA Architect are.

1 A. The principal of SA Architect is a gentleman called Mr
2 Steve Agustin.

3 Q. And how big is the practice?

4 A. I can speak now on the size--

5 Q. At the time.

6 A. At the time would have had about three or four persons
7 in his office, but he's a trained architect and Project Manager.

8 And I must say to you that, over the time that I have
9 been working with him, I found him to be very efficient, above
10 reproach, and a person of full integrity, and the Commission can
11 feel free within the community at any time to ask about this
12 gentleman.

13 Q. But given, without being dismissive, you effectively
14 inherited that firm--

15 (Overlapping speakers.)

16 A. I inherited them, but I made a decision based on what
17 I saw and the recommendations to keep him on.

18 Q. Where did you get those recommendations from?

19 A. From the Ministry.

20 Q. Well, can you be a little bit more specific?

21 A. I can't say Tom, Dick or Harry.

22 Q. Can you say Permanent Secretary or Assistant
23 Secretary?

24 A. Let's put it this way: The Permanent Secretary didn't
25 have any objections to keeping him on, and we live in a small

1 community, so everybody knows everybody, and the quality of work
2 and the reputation that they have. So you have to use that in
3 forming your decisions.

4 Q. Did you know that before coming on to office? Did you
5 know the reputation of SA Architect?

6 A. I knew him but I didn't know he worked for the
7 Ministry. I know he was contracted before my time, but I knew
8 of him. It's a small place.

9 Q. Yes.

10 My question was that you said, well, everybody knows
11 would know about his reputation.

12 A. Yes.

13 Q. Good or bad, if anyone.

14 A. Yeah.

15 Q. So--but when you came into office, did you know of his
16 reputation?

17 A. Yes, I knew of his reputation.

18 Q. And you say you had recommendations.

19 A. Yes.

20 Q. But then you said the Permanent Secretary didn't say
21 anything against it.

22 A. No.

23 Q. There's a difference between being neutral and
24 recommending. Did you have positive recommendations?

25 A. Yes, I did.

1 Q. And from senior officers within the Ministry?

2 A. Absolutely.

3 Q. And by "senior", I mean, can you give us--

4 A. I would say the Permanent Secretary was in full
5 agreement. The now Assistant Secretary would have vouched for
6 him. The Finance and Planning Officer would have vouched for
7 him.

8 Q. And you, yourself, didn't have any kind of prior
9 personal connection?

10 A. No.

11 Q. Professional connection?

12 A. No. Absolutely not.

13 As a matter of fact, as I said, Commissioner, I was
14 surprised when I came, and he was there because I didn't know
15 that the Ministry would have had those support services.

16 Q. And did you make a positive decision to keep him on?

17 A. After I saw his work, yes.

18 Q. Right.

19 A. Yes.

20 Q. What work exactly did you see?

21 A. Well let me say remember I started off by saying that I
22 got recommendations of the quality of work that he provided, and
23 then during the course of time, when I--when the--because we
24 came in the office initially in November of 2011, so his
25 contract would have probably still been in place until December;

1 renewed the contract, so I had a whole year to be able to work
2 with him before the contract was renewed again because it was
3 renewed on a yearly basis.

4 So, based on his efficiency over the years, the Bill
5 of Quantities he would put out, the responsiveness, I just
6 trusted what he was doing, and he earned that trust, and so
7 there was never really an issue when it came to renewing because
8 we're seeing good results that we were pleased about.

9 Q. I will take you back to the Executive Summary, but
10 it's a convenient time just to ask you to look at something--

11 A. No problem at all.

12 Q. If you go to 79, paragraph 79, of the report.

13 A. The report itself?

14 Q. Yes, please.

15 A. Yes.

16 Q. Now, this is page 800. The section of the Auditor
17 General's Report which is headed "Project Management".

18 A. Yes.

19 Q. Are you more comfortable using your own copy of the
20 report?

21 A. Yes, I made my notes on this.

22 Q. I will use paragraph numbers and then for the
23 Transcript I will give the page.

24 A. Yes. That's very helpful.

25 Q. But you go to page--it's your paragraph 78, Mr Walwyn.

1 A. 78, yes.

2 Q. Yes.

3 Now, the first paragraph says. "Cabinet's approval
4 stipulated that the Ministry of Finance Project Management Unit
5 would assist with the management of this project".

6 Is that accurate?

7 A. That is--that is in the paper, yes.

8 Q. Well, we have--is that in your draft paper?

9 A. It's in the draft.

10 Q. Is it the Ministry of Finance paper?

11 A. It's in the draft, and it's in the decision of
12 Cabinet.

13 Q. Right. So Cabinet stipulated that?

14 A. These are there.

15 COMMISSIONER HICKINBOTTOM: But it wasn't in the
16 decision that you showed me.

17 THE WITNESS: No. I just showed you the decision in
18 relation to (c). When I was speaking to him, I made that clear,
19 Commissioner. So, for instance--

20 COMMISSIONER HICKINBOTTOM: Haven't we got the Cabinet
21 Decision?

22 THE WITNESS: Sorry?

23 COMMISSIONER HICKINBOTTOM: Have we even the extract
24 of the Cabinet Decision?

25 THE WITNESS: No, what I gave to you, Commissioner,

1 was just the extract was the decision in relation to (c) that
2 dealt with Petty Contracts.

3 COMMISSIONER HICKINBOTTOM: But--so, we haven't got
4 the Cabinet--we certainly haven't got the Cabinet Minutes but we
5 haven't got the extract.

6 THE WITNESS: Okay.

7 COMMISSIONER HICKINBOTTOM: Have we? You don't have
8 the extract?

9 THE WITNESS: No, I don't have it with me, but I can
10 confirm that what is written here is accurate in relation to
11 what was said about the project management.

12 BY MR RAWAT:

13 Q. That's your notes of the decision, isn't it?

14 A. That was one of the provisions.

15 Q. I see.

16 But it's not the entire decision?

17 A. No.

18 Q. But the--and the slightly aside tangent but a good
19 point to do it, obviously the Cabinet produces minutes of
20 decisions, but we have also been told that you could get an
21 expedited extract--

22 A. Okay.

23 Q. --which is done before the minutes are agreed and
24 signed off.

25 A. Yes.

1 Q. And the purpose of an expedited extract is that a
2 decision needs to be taken urgently?

3 A. Yes.

4 Q. It will go out to the Ministry concerned?

5 A. Yes.

6 Q. Now, the basis of this decision was a need for
7 emergency funding. That's from the Auditor General's Report.

8 A. Well, I don't--

9 Q. Did you know if there was an expedited extract in this
10 case?

11 A. Looking at the draft that I have, Commissioner, it's
12 at (f), an expedited extract be issued to allow for immediate
13 action.

14 Q. So, certainly that was being sought, at least we can
15 say?

16 A. Yes, that was being sought.

17 Q. Let's go back to paragraph 78--

18 A. Yes.

19 Q. --and the first line of that.

20 A. Um-hmm.

21 Q. I appreciate we may be dealing with this from memory,
22 but Cabinet's approval stipulated the Project Management Unit
23 would assist.

24 A. Um-hmm.

25 Q. Is that something you can agree or disagree with?

1 A. Yeah, I can admit that. It's in the paper.

2 Q. The reason I'm trying the rec--I want to reconcile
3 your agreement with that line with what you said a little
4 earlier about the Project Management Unit, which was essentially
5 that it was in its infancy.

6 A. It was. I stand--and I stand by that.

7 Q. So, what use was made of the Project Management Unit
8 during the course of this wall-building project?

9 A. What I would say in--can you give me--can you give me
10 a moment?

11 COMMISSIONER HICKINBOTTOM: Of course.

12 (Pause.)

13 THE WITNESS: What I would say, Commissioner, in
14 relation to that, that I do remember, for instance, it was
15 around that time that the Project Unit was being started. I
16 think it started very late in, I think, 2014. The Premier had
17 spoken to us about putting that unit together. The role of the
18 unit was not fully developed because initially we were told that
19 the unit would just be for helping various Ministries to manage
20 loan funding.

21 At the time when this paper came into being very early
22 in January, the unit was not properly constituted. It didn't
23 have all the staffing that it needed. But notwithstanding that,
24 the way the wording of the paper indicated, it says that the
25 Project Unit will assist.

1 Now, I wouldn't know from where I sit whether or not
2 they reached out to the Ministry. If they reached out to the
3 Ministry, knowing the folks in the Ministry like I know them,
4 they would have worked with the--with the Project Unit.

5 COMMISSIONER HICKINBOTTOM: But whatever.

6 THE WITNESS: Okay.

7 COMMISSIONER HICKINBOTTOM: Given that you agree that
8 the Cabinet's approval--

9 THE WITNESS: Yes.

10 COMMISSIONER HICKINBOTTOM: --stipulated that the PMU
11 would assist with the management of this project.

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: That was obviously
14 Cabinet's view.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: Yes.

18 BY MR RAWAT:

19 Q. Now, in relation--if we look at 78, you said that the
20 Public Works Department were--or the point is made that Public
21 Works were not involved in the management and supervision, so
22 your position is it's simply not something that's suitable to
23 the Public Works Department?

24 A. No, I haven't seen it since the time I have been
25 there.

1 Q. And this is, just to understand how--and it's not just
2 your Ministry but all Ministries operated?

3 A. Um-hmm.

4 Q. In terms of your responsible--or one of your
5 responsibilities was the schools--

6 A. Yeah.

7 Q. --in terms of maintaining schools or doing projects of
8 this sort of whatever size construction projects--

9 A. Yes.

10 Q. --you had effectively your own unit within the
11 Ministry?

12 A. That--yes.

13 Q. And that unit was the Assistant Secretary who--
14 (Overlapping speakers.)

15 A. It was a team of the Assistant Secretary, the Finance
16 and Planning Officer, and the external project company that we
17 had, SA Architect.

18 Q. And SA Architect effectively, without being dismissive
19 to yourself, your public officers, they were responsible for the
20 sort of construction element of it?

21 A. Yes.

22 Q. Internally, you would have had Financial Controller
23 and Project Manager?

24 A. Yeah.

25 But in addition to that, we also had the Ministry

1 itself, under the Department, had a Maintenance Unit that would
2 do the simple things, but when it came to things that required a
3 bit more technical skills, SA Architect will go out and do the
4 assessments, Bill of Quantities, bring them back, and the team
5 would work and get the thing executed.

6 Q. Well, if as they say--one of the criticisms that
7 emerges from the Auditor General's Report is that The Bill of
8 Quantities was effectively inflated. The figures were just too
9 high.

10 Now, if you have an external contractor coming into
11 your Ministry with a Bill of Quantities--

12 A. Yes.

13 Q. --who within your Ministry at the time, 2014-2015, had
14 the skills and the knowledge and the information to critically
15 assess that Bill of Quantities?

16 A. Well, it would be done--as I said, the team would have
17 been the external Project Manager, the Project Manager within
18 the Ministry, and the Finance and Planning Officer. It would
19 have been difficult because we wouldn't have had--if you're
20 asking if we had a third eye, the answer would have been "no",
21 and that was perhaps part of the vision or the reasoning that
22 the Premier had when they asked for the unit to be implemented.

23 Q. For the Project Management Unit?

24 A. Yes.

25 Q. But you what can't help the Commissioner with is the

1 extent to which the Project Management Unit were actually
2 involved with that?

3 A. I can't help with that.

4 Q. Or the extent to which your public officers within
5 your Ministry used that unit?

6 A. That's correct.

7 But what I can remember is that the unit, as I said,
8 was in its very embryonic stages at the time when it happened,
9 and it was not fully constituted. But also knowing the staff
10 that I had, there would be no reason to deny the help of the
11 project management. There would be no need to do that.

12 Q. If you look at 79 and 80, please.

13 A. Okay.

14 Q. This is directed towards SA Architect.

15 A. Yes.

16 Q. Management of the project was outsourced by the
17 Ministry to an independent contractor in 2014 without
18 competitive solicitation or vetting by any of the two government
19 agencies named above. So, in effect, the criticism is you
20 didn't go out and find an external Project Manager for a project
21 of this size nor did you seek the views of the PMU or the PWD,
22 say, is this the right person for the job. Do you have any
23 further response to that? I know you have explained the
24 circumstances in which SA Architect was engaged, but is there
25 anything else you would like to add?

1 A. Well, what I would say, as I said before, they were
2 engaged all along to give support. When that particular project
3 came on stream, there were some additional sums that were paid
4 to them slightly outside of the scope of their work, but it was
5 not as if it was starting a new relationship with somebody.

6 Q. Well, I think you sort of partially answered my next
7 question, which relates to 80.

8 A. Um-hmm.

9 Q. Because if one has the idea of an ongoing relationship
10 between Ministry and external character, that then gives the
11 impression there is an ongoing contract already, and at 80--

12 A. Repeat that again, Commissioner?

13 Q. What you told us is that there is an established
14 relationship between the Ministry and SA Architect.

15 A. Yes, but every year there was a contract.

16 Q. Right.

17 A. Yes.

18 Q. I see.

19 So, there was an annual renewal?

20 A. Annual renewal, yes.

21 Q. And you as Minister was happy--were happy to sanction
22 that renewal?

23 A. Based on recommendations, yes.

24 Q. At 80, it says this arrangement, and that is the
25 arrangement between the Ministry and SA Architect as the

1 independent contractor for the wall, was formalized in May 2016
2 with a Petty Contract for \$47,000-odd after the project was
3 stopped for lack of funds. An amount of \$43,000-odd was paid in
4 September 2016 with the project still complete. Treasury
5 records indicate that the Project Manager was paid a total of
6 265,000 in 2016 for this project and others under the Ministry
7 of Education and Culture.

8 Now, it's the "petty contract" element of it that I
9 just ask if you could shed any more light on. Because it's a
10 contract--a payment seems to be made to SA Architects--

11 A. Yes.

12 Q. --in relation to the wall but after works have--well,
13 things have ground to a halt, frankly.

14 A. What I would say to you, Commissioner, is perhaps--and
15 I think part of it came out in the video that was shown, and I
16 indicated to you that I would not be able to give you answers on
17 everything for the simple reason that when a project comes to
18 the Ministry based on Government's policy, my job essentially is
19 to make sure that the funding is available for it. The work in
20 terms of working out what needs to be done, the Bill of
21 Quantities and all of those things, they're done by the Project
22 Team and putting papers and different things forward to move to
23 the next stage.

24 So, if you ask me a specific question like this, I may
25 not be able to give you the specific response because I would

1 not have been intimately involved at this level.

2 What I can say to you is that the contract--the
3 project did not stop for lack of funds. That's not what
4 happened. The Government made a conscious decision to the
5 Minister of Finance to stop all projects at that particular time
6 while the wall was being built. The Government was experiencing
7 some cash-flow disputes, so every single project that was being
8 done by the Government was halted. So, to suggest that the
9 project stopped for lack of funds is not true.

10 COMMISSIONER HICKINBOTTOM: That sounds right.

11 THE WITNESS: Huh?

12 COMMISSIONER HICKINBOTTOM: I thought you said that
13 that was right.

14 THE WITNESS: No, no, no. I didn't say that. That's
15 not what I said.

16 COMMISSIONER HICKINBOTTOM: I thought you said that
17 all projects stopped.

18 THE WITNESS: Yes, but when you read this, the
19 project--after the project was stopped for lack of funds. That
20 is not necessarily the entire picture because it suggests that
21 this project alone was stopped because money ran out.

22 COMMISSIONER HICKINBOTTOM: Okay.

23 THE WITNESS: So all projects were stopped.

24 COMMISSIONER HICKINBOTTOM: So, it's literally true
25 all projects--

1 THE WITNESS: Yeah, all projects were stopped. All
2 projects were stopped. This is not particularly singled out and
3 stopped. That's not what happened. But in relation to the
4 other numbers, I can't dispute them at this time because I don't
5 have the information for me to assist on.

6 BY MR RAWAT:

7 Q. But it would chime with what you said a little earlier
8 that there was some additional payments made--

9 A. Yes.

10 Q. To SA Architect for work that was outside the scope of
11 their usual contract.

12 A. That's correct.

13 And what I do know is that at the time when the wall
14 was being constructed, it was part of a bigger revamping of the
15 school because there were a number of other things that we had
16 planned to get done, and SA Architect had already started to do
17 some of the work, so I don't know exactly what portion would
18 have been attributed to the wall and what portion would have
19 been attributed to other things, but I do know they had other
20 payments. Amounts I can't verify, but--

21 Q. But it's--I mean, my understanding of your evidence is
22 that it wasn't just sort of a normal here is your annual
23 contract to do the usual work.

24 A. Yes.

25 Q. They had additional payments for work that was seemed

1 to be accepted to be outside the scope.

2 A. Yes.

3 Q. The next question is, would you remember what kind of
4 work it is? Because what you've got is an external contractor
5 whose job it is, is to assist your Ministry with Bills of
6 Quantities with project management with project delivery with
7 construction. He's an architect, and that's what he does.

8 A. Yes.

9 Q. So, what was it that he did above and beyond that that
10 allowed him to be paid, I think, \$43,000-odd on the figures
11 here?

12 A. As I said, Commissioner, I don't--I wouldn't have--I
13 wouldn't be able to answer intelligently.

14 What I would say as relates to the second part of what
15 the Auditor General has said here, I wouldn't dispute it except
16 that I can't--I can't confirm the amounts, and I'm not in a
17 position to do that.

18 Q. Can I just ask you to turn--we will go back to the
19 Executive Summary at some point, but just please turn to
20 paragraph 86.

21 A. Yes.

22 Q. It's a heading that says "Planning Approval".

23 A. Yes.

24 Q. But I can read it all out, if you want, but the point
25 that the Auditor General's Report makes here is that for both

1 phases--

2 A. Um-hmm.

3 Q. --planning, as in plans being submitted to Town and
4 Country Planning, was done after the event.

5 A. Again, Commissioner, what--what I would be able to do,
6 what I have to do is I have to rely now on some notes because I
7 indicated that when the draft comes out first, the Ministry
8 responds, so I want to read what the response is in relation to.
9 Is it 86?

10 Q. Is this from the response that you--that the Ministry
11 made--

12 A. Yes.

13 I wasn't part of this because, like I said, I wouldn't
14 know all these details, but I do know the responses that were
15 given.

16 COMMISSIONER HICKINBOTTOM: But is the document you've
17 got in your hand the response--

18 THE WITNESS: Yes.

19 COMMISSIONER HICKINBOTTOM: --that was sent to the
20 Auditor General?

21 THE WITNESS: Yes.

22 I brought copies, if you like, as well for yourselves.

23 COMMISSIONER HICKINBOTTOM: Thank you very much.

24 THE WITNESS: Can I pass them to you?

25 COMMISSIONER HICKINBOTTOM: If you've got copies,

1 thank you.

2 THE WITNESS: I brought some of the questions as well
3 that the Project Manager could have answered.

4 COMMISSIONER HICKINBOTTOM: Certainly.

5 The other documents which you have referred to is the
6 draft Cabinet--your draft Cabinet paper.

7 THE WITNESS: Yes.

8 Would you like it now?

9 COMMISSIONER HICKINBOTTOM: Please, yes. That would
10 be very helpful. Thank you.

11 THE WITNESS: That's one.

12 MR RAWAT: If we could perhaps just for the Transcript
13 introduce the documents in total.

14 BY MR RAWAT:

15 Q. Mr Walwyn, what you produced is a document which is
16 six pages in length.

17 A. Yes.

18 Q. It's headed "Comments from Senior Officers with
19 Oversights of Project MEC".

20 A. That's correct.

21 Q. And that is a response prepared to a draft of the
22 Auditor General's Report.

23 A. Yes.

24 Q. When you say it's prepared by senior officers, that
25 means it's not prepared by you?

1 A. No.

2 Q. And which senior officers were involved?

3 A. It was prepared by the Assistant Secretary responsible
4 for projects, the Finance and Planning Officer, assisted by an
5 oversight--and overseen by Permanent Secretary.

6 Q. I see.

7 COMMISSIONER HICKINBOTTOM: To put it bluntly, the
8 right people?

9 THE WITNESS: Yes, the technical people who actually
10 did the--because I would not know myself.

11 BY MR RAWAT:

12 Q. What we should say is, at the end of page 5 is when we
13 have comments from Steve Agustin, Project Manager?

14 A. Yes, and then--that is correct. And then you have the
15 supplemental document.

16 Q. Yes. I will introduce that now.

17 A. Yes.

18 Q. What you have also given the Commissioner today is an
19 e-mail dated the 12th of September 2018 addressed to Dr Marty
20 Potter who was then the Permanent Secretary of the Ministry for
21 the Education and Culture.

22 A. Yes.

23 Q. And it is--it runs to, I think, something like five
24 pages again--yes, five pages--and it is from Steve Agustin,
25 principal at SA Architect?

1 A. That's correct.

2 Q. And that again, if you could confirm, it's his
3 comments on the Elmore Stoutt High School Audit Report as a
4 draft?

5 A. That's correct.

6 COMMISSIONER HICKINBOTTOM: I'm sorry to break in
7 again.

8 And this was the comprehensive response to the draft
9 report?

10 THE WITNESS: Yes. This is what I was
11 responding--what was provided.

12 COMMISSIONER HICKINBOTTOM: Thank you.

13 BY MR RAWAT:

14 Q. Do you know whether the e-mail from Steve Agustin to
15 Dr Potter was sent to the Auditor General, whether it was the
16 one comprehensive document?

17 A. I honestly can't say because discussions with the
18 Auditor General's Office was between the Permanent Secretary and
19 the team.

20 Q. You had no involvement in that process yourself?

21 A. Very little. The only--the only involvement I had in
22 relation to the response is when the first draft was done, I
23 noticed that a lot of the questions were not answered. I asked
24 them to go back and provide as much more information as they can
25 on the points raised by the Auditor General. But in terms of

1 the actual involvement and the exchange with the Auditor
2 General's Office, I didn't have any involvement.

3 Q. Thank you.

4 Now, I had taken you to paragraphs 86 to 88 of the
5 Auditor General's Final Report, and I summarised it on the basis
6 that there was a process of getting planning approval, as she
7 puts it, after the fact, at paragraph 88, and you were going to
8 direct the Commissioner's attention to one response in the--

9 A. Yes. If you go to page 4--

10 Q. Yes.

11 A. --of the response itself. It says--you see 86 in the
12 underline.

13 Q. Yep.

14 A. It says: "This project was submitted to the Town and
15 Country Planning and Public Works Department for approval. It
16 was necessary for the work to be completed during the 2014-2015
17 Christmas break when school was not in session. The drawing was
18 approved by Town and Country Planning, Public Works Building
19 Authority"--no. "The drawing was approved by Town and Country
20 and Public Works building authority made site visits to inspect
21 the foundation of the wall before the concrete was poured".
22 That is the response from the technical folks in the Ministry in
23 relation to 86.

24 Q. That responds to 86. The Auditor General also
25 responded on 87. She said on 87 that effectively the same thing

1 happened. I mean, let me read it.

2 A. Yes.

3 Q. 86, the Auditor General's Report said: "The 2014
4 Focus Area of the project was constructed from 1st to 30th
5 December 2014".

6 A. Um-hmm.

7 Q. "The plans for this phase was submitted to the
8 Planning Authority on 15th December 2014 and approved on
9 17 December 2015, that were then subsequently approved by the
10 Building Authority on 13th of January 2015 after the works had
11 ended and the contractors were paid".

12 A. Okay.

13 Q. Now the response you directed the Commissioner's
14 attention to is in response to that paragraph.

15 What the Auditor General then says is, on 87: "The
16 works for 2015 phase for continuation of the wall commenced 1st
17 of March 2015. The plans were submitted to Town and Country
18 Planning for approval on 23rd of March 2015 and approved on the
19 2nd of April 2015".

20 A. Sure.

21 Q. Now, the senior officers did not respond to that
22 paragraph, so can the Commissioner take it from that that they
23 had no issue with that paragraph?

24 A. I would take it as such. They were late in submitting
25 it. I think that is fair to say.

1 COMMISSIONER HICKINBOTTOM: And also under
2 paragraph 86, the work started on the 1st of December, and the
3 comment is that it was necessary for the work to be completed
4 during the Christmas break when the school was not in session.

5 THE WITNESS: Yes.

6 COMMISSIONER HICKINBOTTOM: Paragraph 86 is not
7 inconsistent with paragraph 86 of the Auditor General's Report.

8 THE WITNESS: No, it is not. I wouldn't say it is.

9 COMMISSIONER HICKINBOTTOM: No, no.

10 Thank you.

11 BY MR RAWAT:

12 Q. Can we go back to the Executive Summary.

13 A. Sure.

14 Q. Which is the next one.

15 COMMISSIONER HICKINBOTTOM: I'm sorry to go backward,
16 which is never a good step, but if we could go back just very
17 quickly.

18 Paragraph 2, which we already dealt with, there are no
19 comments on paragraph 2 of the Executive Summary in any of the
20 comments that were sent to the Auditor General. It's really a
21 question. I couldn't see any.

22 THE WITNESS: No, I don't think any was--I don't think
23 it was. Nothing was there. I don't think so.

24 COMMISSIONER HICKINBOTTOM: Thank you.

25 THE WITNESS: Yes.

1 BY MR RAWAT:

2 Q. Shall we go to--I think we're at 4.

3 "For contracting purposes, the work was divided by
4 area segments and work type. 70 contractors were engaged using
5 15 Petty Contracts and 64 Work Orders to build a wall 1,562 feet
6 long".

7 A. Um-hmm.

8 Q. "Some individuals received multiple engagements on
9 this project".

10 A. Um-hmm.

11 Q. Now, I pause there, Mr Walwyn. Any response or issue
12 that you take with that to some or part of the Executive
13 Summary?

14 A. I would take--I would agree with the first part of it,
15 and that's why it was important that I try at least to let you
16 know what the decision of Cabinet was because I knew the
17 question would come up at some point, that we used Petty
18 Contracts and Work Orders to complete the work.

19 The second part of it that some individuals received
20 multiple engagements on this project, I can't confirm or deny
21 that. I wouldn't know. What I probably could see as a
22 possibility would probably have been if somebody might have
23 worked on the first portion that was done in 2014 December and
24 then perhaps got a second opportunity to work on the bigger
25 project.

1 COMMISSIONER HICKINBOTTOM: But that was all done by
2 others and you can't really--

3 THE WITNESS: Sorry, Governor?

4 COMMISSIONER HICKINBOTTOM: That was dealt with by
5 others, but your team.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: Not by you.

8 THE WITNESS: Not by me. I'm trying to be as helpful
9 as I can.

10 COMMISSIONER HICKINBOTTOM: No, I understand.

11 THE WITNESS: But I can--

12 COMMISSIONER HICKINBOTTOM: This was for works, the
13 wall with the works--the wall, that was the works.

14 THE WITNESS: Yes.

15 COMMISSIONER HICKINBOTTOM: \$828,000-odd, and the
16 works were split into 15 Petty Contracts and 64 Work Orders?

17 THE WITNESS: Yes.

18 COMMISSIONER HICKINBOTTOM: Okay.

19 BY MR RAWAT:

20 Q. If we could, there is one point to put to you on this,
21 on paragraph--if you go to paragraph 69.

22 A. Six-nine?

23 Q. 799.

24 A. Sorry?

25 Q. I'm just giving the Commissioner the page, which is

1 799.

2 A. Oh.

3 Q. For you, Mr Walwyn, it's paragraph 69, please.

4 A. Yes. Yes.

5 Q. Now, 69 makes the point, and if your answer that this
6 is not the sort of detail that a Minister would get involved in,
7 it's important to have it.

8 A. Okay.

9 Q. The point is made that, under the Public Finance
10 Management Regulations--and that's 181--that requires Government
11 officers to obtain a list of pre-qualified contractors from the
12 Ministry of Finance for procurement services and construction
13 works where there has been no tender process. There was no
14 consultation with the Ministry of Finance Project Management
15 Unit or the Public Works Department on the selection or
16 eligibility of contractors.

17 I'm going to--it's the next point I particularly want
18 to draw your attention to. What is said--and I will read it
19 out--"The contractors used on the project were selected by the
20 Minister of Education and Culture. The Assistant Secretary who
21 provided project liaison services within the Ministry advised
22 that the contracts and work orders sections and amounts were
23 assigned to individuals based only on instructions received from
24 the Minister".

25 Now, when I cross-refer to the response that you've

1 helpfully provided to the Commissioner today, I can't find a
2 response, in fact, to that going to any of those paragraphs.
3 That paragraph is particularly points for reasons I'm sure will
4 be quite obvious.

5 A. Would you like me to respond to that?

6 Q. Yes. I will let you respond, first of all.

7 Putting it clearly, there is a distinction between
8 being drawn between the Ministry and the Minister, and the
9 reference to "Minister" is clearly a reference to yourself.

10 A. That's fine. Yes.

11 Under 69--and I have to speak for what I know happened
12 in practice. I actually became aware of the Regulation when I
13 read the report for the first time, and I'm not disputing
14 whether the Regulation says that or not. I believe it does,
15 based on what I read.

16 But certainly in practice, I don't know if any
17 Ministry goes to the Minister of Finance or for a list of
18 pre-qualified contractors. I don't think that that happens in
19 practice. I've never heard of it, and I have never seen it
20 happen.

21 COMMISSIONER HICKINBOTTOM: It's very frank of you to
22 say that.

23 THE WITNESS: Yes.

24 COMMISSIONER HICKINBOTTOM: It's slightly concerning
25 that none of the Ministries comply with Regulation 181.

1 THE WITNESS: Again, Commissioner, I said I'm not
2 aware of it. I have never seen it happen in practice. What I
3 do know what happened, for instance, when I came in as Minister
4 first--and that might be something that I may have to research,
5 and the Commissioner could take a look at it because I don't
6 know what delegation of powers the Premier might have had under
7 those Regulations, but I remember, for instance, getting a
8 letter from the Premier--and all the Ministers got
9 it--authorizing them to sign contracts that were under a hundred
10 thousand dollars.

11 So, I don't know how helpful that might be to your
12 Commission, but certainly as it relates to having a
13 pre-qualified list of contractors, I have never heard of anybody
14 doing that, and I don't even know if it exists, to be quite
15 frank.

16 BY MR RAWAT:

17 Q. Then there is a difference between what you're obliged
18 to do, it seems, and what perhaps in practice happens.

19 A. Yes.

20 Q. And you've candidly said that this wasn't a regulation
21 that you were aware of until you read the report itself, but is
22 it a regulation you would have expected an external contractor
23 to have been aware of?

24 A. Not necessarily because that wouldn't be his
25 responsibility. This is more of an internal responsibility.

1 COMMISSIONER HICKINBOTTOM: Whose responsibility is
2 it, then?

3 THE WITNESS: It would have had to have been the
4 Ministry or someone within the system would have to know--have
5 to know this, but I was saying in practice I don't think the
6 list exists.

7 BY MR RAWAT:

8 Q. But it--well, I mean, if the question is not about
9 whether the list exists or not, the question is whether anyone
10 knows to ask for the list.

11 A. Well, I--

12 Q. The answer might come back it doesn't exhibit--

13 A. From my knowledge, I don't think so.

14 Q. But you have got an external contractor who is
15 assisting your Ministry on a number of projects who gets, on the
16 Auditor General's Report, over \$265,000 for the wall and other
17 projects. It's not--it's not a regulation you might expect that
18 person to be aware of?

19 A. I don't think that is his responsibility. That would
20 be the responsibility for the Ministry or for the persons within
21 the service itself.

22 COMMISSIONER HICKINBOTTOM: But in any event, so far
23 as these works were concerned, there was no reference to any
24 list.

25 THE WITNESS: No.

1 BY MR RAWAT:

2 Q. If you could--I mean, and the point that it links to
3 is at paragraph 72.

4 A. Yes.

5 Q. Because the point made by the Auditor General is if 70
6 contractors used on the project, 40 did not have construction
7 trade licences, and that obviously goes to an important question
8 of whether the Ministry's getting value for money and whether
9 the Ministry is actually engaging with contractors that could
10 actually dot job.

11 Was that at any point whilst the project was going on,
12 did you ever find out or were you ever informed that some of the
13 contractors didn't have construction trade licences?

14 A. No. That is the reason why, for instance, I would
15 have anticipated a question like this coming. That's why I
16 started off with the starting point which would be the Cabinet
17 paper. If you're working under a Work Order, you don't need a
18 contractor's licence.

19 COMMISSIONER HICKINBOTTOM: Well, we may have to check
20 this--

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: --because my recollection
23 is--and this may be wrong, so it would need to be checked--my
24 recollection is that if you work under a Works Order--I think
25 this is the Auditor General's evidence--I think it was

1 somebody's evidence--you have to have a--I was going to say
2 "obviously"--you have to have a construction trade licence to be
3 able to construct. But if you're under--if you're within a
4 Works Order, you don't have to show it, but you still have to
5 have it. You can't just start building things without a
6 construction trade licence.

7 MR RAWAT: That was the Auditor General's answer.

8 THE WITNESS: That is not the way. I mean, I
9 honestly--I didn't hear the Auditor General's testimony.

10 COMMISSIONER HICKINBOTTOM: Yes.

11 THE WITNESS: So I have to tell you from what my
12 knowledge says, all right?

13 If you--if you have the--the difference between a
14 Petty Contract and a work order is one cent. If it's \$10,000 or
15 more, it's a Petty Contract. And that is where the good
16 standings come in. You need a trade licence, you need to make
17 sure that your NHI and Social Security and all of those things
18 are paid up. If it is a work order, you don't need those
19 things.

20 COMMISSIONER HICKINBOTTOM: You don't need to check?

21 THE WITNESS: Huh?

22 COMMISSIONER HICKINBOTTOM: You don't need to check?

23 THE WITNESS: Where--do you know where the information
24 is that says you have to check?

25 BY MR RAWAT:

1 Q. The Auditor General--

2 A. That can't be the Authority for the purposes of law.

3 COMMISSIONER HICKINBOTTOM: No, we will need to check
4 it.

5 THE WITNESS: Yes.

6 COMMISSIONER HICKINBOTTOM: There is no point in
7 speculating.

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: Can we leave it like this
10 because we will need to check this as a matter of law.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: But, in any event--I mean,
13 so what was your position with regard to the construction trade
14 licences? You thought they weren't required? You may have not
15 thought about it.

16 THE WITNESS: I--as I said, I came into the Ministry
17 knowing that system, that if you are working on a work order,
18 you do not need a trade licence.

19 COMMISSIONER HICKINBOTTOM: That was your
20 understanding in any event.

21 THE WITNESS: And that has been the practice
22 throughout the service.

23 COMMISSIONER HICKINBOTTOM: And we can check the law.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: Okay.

1 BY MR RAWAT:

2 Q. I want you to give you an opportunity to deal with the
3 detail at 71.

4 A. Yes.

5 Of 71?

6 Q. Yeah.

7 A. The contractors on the project was selected by the
8 Minister of Education. Yes, I selected the contractors.

9 Q. You selected all the contractors?

10 A. I selected the contractors from a list that we had
11 within the Ministry of persons who asked for opportunities to
12 work, and the list was being kept there, and we would obtain the
13 list of persons. The technical team would vet those persons
14 sometimes as well based on history of working in the Ministry
15 over years. And once they're pleased with the names that are
16 put forward, they accept them.

17 There have been times they rejected them for not doing
18 good work from before. There are times, for instance, when the
19 petty contractors may not have had adequate standings or
20 different things and they reject them and say, "Minister, can we
21 have another name?" That has been the practice then, and it is
22 still the practice now.

23 Q. On what basis did you choose which contractor--which
24 70 people on this list would get a contract?

25 A. It--the bigger--the bigger works, for instance, that

1 were Petty Contracts you would normally give to people who have
2 construction companies; and, in that case, they provide trade
3 licences and good standings and all the others.

4 In relation to the Work Orders, because of the policy
5 of successive governments to try to engage and provide
6 empowerment opportunities for--you know, as many persons as you
7 possibly can in the community, entrepreneurial, who could do
8 things and have skills and so forth, I think that was the
9 impetus behind the Work Order programme. So, what I would
10 generally do, I would put the name on the Work Order based on
11 the list that we have, and sometimes they accept them, sometimes
12 they say, "Minister, this person had done work with us before.
13 We were not pleased with the work. We are not comfortable
14 utilizing this person", and provided another name for that
15 person.

16 Q. 71, which is setting out information from the
17 Assistant Secretary and the Ministry, so that's the external
18 Project Manager?

19 A. Yes.

20 Q. It says it was based only on instructions received
21 from the Minister.

22 A. That's correct.

23 Q. It stopped. You were the person who decided which 70
24 would get the contracts?

25 A. I was the person who put forward the names. I

1 wouldn't say I decided. I put forward the names. If the
2 persons who were not suitable, they were rejected, but the names
3 originated from me, yes.

4 Q. All right. We may just have to agree. 71 is
5 clearly--the way it's written is--makes clear the 70 who got the
6 job--

7 A. Yeah.

8 Q. --were selected by you?

9 A. Yeah.

10 Q. Not the Civil Servants that objected and then backed
11 away from that?

12 A. No, I'm not shying away from that.

13 Q. Right.

14 Now, on the 248 interview, you said that Ministers
15 shouldn't get intimately involved in projects.

16 A. Yes.

17 Q. Would you not say that when you are sitting there
18 choosing which 70 people would get work on this project that you
19 are intimately involved in that?

20 A. I wouldn't say that. As I said--as I said in November
21 when he came in as Ministers because we got a letter from the
22 Minister of Finance indicating--giving us the authority to sign
23 contracts that were below a hundred thousand dollars.

24 And again, as I said, that has always been the
25 practice, that was the practice then, the practice before me,

1 and the practice now. The Ministers--once the projects are
2 under a hundred thousand dollars, the Minister puts--assigns
3 individuals to the projects.

4 Q. And by assigning individuals, those are individuals
5 within your Department?

6 A. Yes.

7 Q. Right.

8 But in this case, although you were beyond "petty
9 contract" territory, weren't you? In reality, this was a major
10 contract?

11 A. I wouldn't say that at all. I would say that I was
12 acting within the authority given to me by the Cabinet.

13 Q. Because the Cabinet had decided that there should be a
14 sequence of Petty Contracts and Work Orders?

15 A. That's correct.

16 Q. I see.

17 So, this shouldn't be seen as one single major
18 contract but a number of Petty Contracts and Work Orders?

19 A. The thing is, Commissioner--and I wouldn't shy away
20 from it at all--in the community in which we live, we have a
21 number of skilled persons. They may not be on a large scale in
22 terms of being able to do big projects but we have a history of
23 being able to build things in this country. And we try to give
24 opportunities to those persons to assist them who have the
25 skills to assist us with certain works that can be done, and

1 that happens.

2 COMMISSIONER HICKINBOTTOM: The--again, it's to take a
3 step backwards, and I will frame the question.

4 You have shown us the Cabinet Decision. The Cabinet
5 Decision refers to Petty Contracts. It doesn't refer in terms
6 to work orders. It refers to different suppliers and
7 contractors.

8 You say that it's implicit in that that it could be
9 done, at least in part, by Works Orders?

10 THE WITNESS: That was a conversation and intention in
11 Cabinet.

12 COMMISSIONER HICKINBOTTOM: We can't--we can't discuss
13 that because that is confidential.

14 THE WITNESS: Yes.

15 COMMISSIONER HICKINBOTTOM: And there won't be any
16 minutes because minutes, as I understand it, from that period
17 were not taken. All we've got is the decision of understanding.

18 THE WITNESS: Minutes were not taken?

19 COMMISSIONER HICKINBOTTOM: That's my understanding
20 from the evidence.

21 THE WITNESS: That--that can't be right. We confirmed
22 minutes--we confirmed minutes of every meeting we had in Cabinet
23 the next week. I'm sorry, I don't know that that's truthful.

24 (Overlapping speakers.)

25 COMMISSIONER HICKINBOTTOM: But there is an issue

1 about Cabinet Confidentiality, and what went into Cabinet was
2 your draft paper, which we will look at perhaps after the
3 Hearing, but we will look at the draft paper.

4 THE WITNESS: Um-hmm.

5 COMMISSIONER HICKINBOTTOM: The draft paper goes in
6 saying "Petty Contracts", full stop.

7 THE WITNESS: Um-hmm.

8 COMMISSIONER HICKINBOTTOM: It comes out as Petty
9 Contracts, on your interpretation of the decision, as Petty
10 Contracts plus Works Orders.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: And at the moment--

13 THE WITNESS: And Purchase Orders.

14 COMMISSIONER HICKINBOTTOM: And Purchase Orders, yes,
15 under Regulation 172.

16 THE WITNESS: Yes.

17 COMMISSIONER HICKINBOTTOM: I understand that.

18 And we can see whether anything else from the Cabinet
19 Secretary may assist us on that.

20 THE WITNESS: Okay.

21 COMMISSIONER HICKINBOTTOM: But I still have a slight
22 problem because the works were that the wall, \$828,000 of
23 works--

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: --and what the Regulations

1 say is that, the Cabinet can waive the procurement provisions
2 relating now to contracts of over a hundred thousand dollars in
3 the Regulations, \$75,000 is increased, so waive that, so you
4 don't have to deal with procurement provisions of a major
5 contract. It doesn't say anything about Work Orders in that
6 part of the Regulations. What it does say is that two or more
7 Works Orders shall not be issued for the same works or services.

8 THE WITNESS: Okay. I understand that.

9 But I also said to you in my response I can't confirm
10 or deny that, that that actually happened.

11 COMMISSIONER HICKINBOTTOM: Okay.

12 THE WITNESS: I wouldn't be able to assist with that.

13 COMMISSIONER HICKINBOTTOM: No, that's very fair.

14 Thank you.

15 BY MR RAWAT:

16 Q. We turn to the question--well, let's go back to the
17 Executive Summary. I think we've got to 5 now. Costings of the
18 segments was inflated to more than double the authorized costs
19 for the wall segments. This led to over-expenditure of the
20 original amount. The project also suffered from lost economies
21 of scale and discrepancies in the rates of the quantities
22 applied.

23 Do you want to say anything to the Commissioner on
24 that?

25 A. Yes, I do.

1 One of the things I did, Commissioner, as I said, even
2 as the project was taking place, I never met one contractor yet.
3 I had not--I don't think I even visited the site because I
4 trusted the folks there to do the good job. When the report
5 came back, one of the things that I did when I saw this fight
6 about inflation, it angered me because if I'm relying on people
7 to do work and they're doing things that they should not be
8 doing and misleading me, and I don't--I'm not pleased with that.
9 What I did do, I went out, and I did some assessments, and I
10 brought copies here that I want to share with you for part of
11 the discussion.

12 Even some of the things that were broken out in the
13 report and certain sections of the wall, I can't help you with
14 that. I'm not a technical person, so I wouldn't be of any help
15 to you there.

16 Q. Pause there one moment, Mr. Walwyn.

17 Just to orientate yourself on the report, from 36,
18 take a quick look at paragraph 36 in the report.

19 A. 36?

20 Q. Yeah.

21 This is--

22 A. 36.

23 Q. It starts at 31, but it's the section of the report
24 where the Auditor General is beginning to break down the costs.

25 A. Yes.

1 Q. And she goes to the comparative analysis.

2 A. Yes.

3 Q. Now, is that the area where you saying it's not
4 something can you help with--

5 A. Yes, but I think the response might be in the paper
6 that I provided.

7 Q. Right.

8 A. That might be there because the Project Manager would
9 be the one who would have to respond to that.

10 Q. Right.

11 A. What I can provide for you, Commissioner, as I did
12 when I read Section 5 of the report.

13 COMMISSIONER HICKINBOTTOM: Just tell us in a couple
14 of sentences--

15 THE WITNESS: Yes, I can.

16 COMMISSIONER HICKINBOTTOM: --what these are.

17 THE WITNESS: Oh. Do you want see what they are?

18 COMMISSIONER HICKINBOTTOM: No, just what are they?

19 THE WITNESS: They are assessments that were done.

20 COMMISSIONER HICKINBOTTOM: Assessments of what?

21 THE WITNESS: Of the wall, value assessments.

22 COMMISSIONER HICKINBOTTOM: So, these are assessments,
23 valuing the wall as it's been built?

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: And we will see those.

1 THE WITNESS: I would hope so.

2 COMMISSIONER HICKINBOTTOM: I think that's another
3 issue.

4 My understanding, though, paragraph 37--is this where
5 we are, Mr Rawat?

6 THE WITNESS: 37 or 5? Because you brought me to 5.

7 BY MR RAWAT:

8 Q. It's 5 and leapt across to 37 because that leads
9 through to two things, but I will let the Commissioner--

10 COMMISSIONER HICKINBOTTOM: My understanding is
11 paragraph 5 of the Executive Summary is a summary of the section
12 starting at paragraph 37.

13 THE WITNESS: Okay, that's fair.

14 COMMISSIONER HICKINBOTTOM: And just you may be able
15 to help me understand it if I've misunderstood it, but looking
16 at Table 2.

17 THE WITNESS: Um-hmm.

18 COMMISSIONER HICKINBOTTOM: And just looking at first
19 line of it, what this does is--that doesn't--the evaluation of
20 the wall is a different matter. What this does is--and it
21 looked at the approved estimate, and then it looks at the
22 payments actually made in respect of that particular part of the
23 project.

24 So, wall and columns construction--the wall was with
25 respect to the engineer a very, very simple design, was a base,

1 three columns, and then things slotted in between the columns.
2 Here, the wall and column construction estimate \$289,000, actual
3 payments \$652,000. Nothing to do with the value of the wall.
4 It's simply a difference between what the estimate was and the
5 actual payments made. Does your paper go to that issue?

6 THE WITNESS: Well, what--what that evaluation
7 does--and I said, when it comes from 36 to 39, perhaps we might
8 have to go to what the contractor said, the Project Manager
9 said.

10 (Overlapping speakers.)

11 BY MR RAWAT:

12 Q. Is that his e-mail?

13 COMMISSIONER HICKINBOTTOM: It's on page 2. I haven't
14 read it. That's paragraph 37, still.

15 THE WITNESS: For instance, if you go to second page
16 of his e-mail and it says costing the segments 37, yes? You got
17 that?

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: His response is SA Architect established
20 a price of \$828,004.10 during the month of October 2014. This
21 was a preliminary cost based on a total of 12 line items, namely
22 site clearance, evacuation, works, columns, block work,
23 rendering, paint works, frame bars, main gate, subtotal,
24 unforeseen, and total. These quantities were preliminary and
25 were developed prior to the drawing. At this time the Ministry

1 was seeking to appreciate costs. However, detailed costs could
2 not be provided as the drawings of the perimeter wall were not
3 yet completed.

4 COMMISSIONER HICKINBOTTOM: I understand that because
5 what this says is approved estimate. It wasn't a quote. It was
6 an estimate.

7 THE WITNESS: Yes.

8 COMMISSIONER HICKINBOTTOM: But the architect said
9 this was a preliminary cost.

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: To give you an idea--to
12 give you an estimate.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: The estimate is £289,000.
15 What was actually paid was £626.

16 THE WITNESS: Not pounds. Dollars.

17 COMMISSIONER HICKINBOTTOM: I'm terribly sorry.
18 Dollars.

19 THE WITNESS: Yes.

20 COMMISSIONER HICKINBOTTOM: I think the Auditor
21 General's point is that's not a very good estimate.

22 THE WITNESS: I can--again, Commissioner, I'm not of
23 much help.

24 COMMISSIONER HICKINBOTTOM: I say--

25 THE WITNESS: I can't help.

1 COMMISSIONER HICKINBOTTOM: What you rely on is what's
2 said in that--

3 THE WITNESS: In the report.

4 And I said to you before, if you can allow me to do
5 so, what I did as Minister--I think that was part of my
6 responsibility--was to look at it from a macro sense to see what
7 the value overall for the wall would have been. That would have
8 been level I could have gone to. I was not involved here. And
9 that's what I sought to do, I wanted to share that with the
10 Commissioner.

11 COMMISSIONER HICKINBOTTOM: Yes.

12 THE WITNESS: Very briefly. I know your time is
13 limited.

14 COMMISSIONER HICKINBOTTOM: No, I would like to see
15 these.

16 THE WITNESS: Okay. I prepared these. Who could take
17 those?

18 COMMISSIONER HICKINBOTTOM: Thank you very much.

19 BY MR RAWAT:

20 Q. Are these the reference to Toddman that you mentioned?

21 A. Yes, this is what I did--

22 Q. Yes.

23 A. --as Minister when I saw information on under 5.

24 Now, Mr James Toddman, everybody who would know
25 Mr Toddman is perhaps the best contractor that we have in this

1 country; does significant projects. He was asked to take a look
2 at the wall exactly what exists now at the wall. His total came
3 in at \$861,442.30. That is what his estimate was of what is
4 physically there.

5 COMMISSIONER HICKINBOTTOM: Right. This isn't his
6 estimate for what the wall should cost?

7 THE WITNESS: No. This is what is on the ground.

8 COMMISSIONER HICKINBOTTOM: So, this was an estimate
9 of what has been built?

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: If he had to build what
12 is--

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: Okay.

15 THE WITNESS: The second one came from BCQ West and
16 known in the Caribbean for quantity surveying and the work that
17 they do. Their figure came in at \$899,892.36, and it's broken
18 out as well here.

19 The third one I asked the Permanent Secretary to make
20 contact with Public Works so she could get one of the quantity
21 surveyors to come in and do a cost evaluation.

22 And I got--a letter was sent back to the Permanent
23 Secretary on the 26th of November 2018 from the Permanent
24 Secretary of the Ministry of Communication and Works,
25 Mr. McMaster. Mr. McMaster is now the interim CEO of the RDA.

1 It says: "I hereby submit on behalf of the Acting Director of
2 Public Works Department PWD's Assessment Report under the
3 subject caption. While the report will speak to the project in
4 question, I'm concerned about the conditions under which the
5 Public Works Department has similarly been used in this entire
6 audit exercise. Firstly, in our meeting last week, you related
7 the Auditor General's Report mentioned that Public Works
8 Department provided estimates that were significantly lower than
9 the costs to build. However, in discussions with the Acting
10 Director, you are both surprised to learn of such. The Acting
11 Director also confirmed, which I know to be the case, that
12 Public Works Department did not assess or provide any
13 information in regards to the estimated costs of the wall. We
14 were surprised to learn that this was the case, and therefore I
15 would like to receive a copy of the Auditor's Report. It would
16 appear that the official assessment was previously completed,
17 and I would like to have a better understanding since I consider
18 it to be mischievous. Nonetheless, the report is hereby
19 submitted for your review and understanding".

20 Then the second letter says--this is from the Acting
21 Director to the Permanent Secretary on 26th of November 2018.
22 It says "Assessment of Elmore Stoutt High School Wall". "In a
23 reference to the memorandum dated 12th of November 2018
24 pertaining to the Elmore Stoutt High School Wall, we are
25 submitting to you our estimate of the wall, and the report

1 highlights the following: The appropriate costs--the proximate
2 costs for the proposed 1650 feet of perimeter wall, 816 square
3 feet of sidewalk, and 2,325 square feet of lay by constructed
4 based on SA Architect's design, it's \$1,045,374.28. The
5 approximate cost for the actual 1,572 feet of the perimeter
6 wall, 816 square feet of sidewalk, and 2,325 square feet of lay
7 by constructed based on SA Architect's design. It's
8 \$871,592.44".

9 Now, as I said, Commissioner, I conducted this
10 exercise in relation to 5 to see where the costing was and
11 whether there was any major discrepancy in terms of the
12 spending.

13 Now, the total amount on the wall, purpose of the
14 money spent in 2014 which was 90-something thousand, and 2015 is
15 1,052,837.37. What I did was I found the average of those three
16 quotes, and the average of those three quotes came in at
17 \$877,758.90, the difference being between the average quotes
18 here and what was actually spent on the wall, including the two
19 parts, is \$175,078.47.

20 COMMISSIONER HICKINBOTTOM: Do the quotes take into
21 account the fact the wall isn't complete?

22 THE WITNESS: Yeah. It's what is on the ground
23 because there was no intention to complete the wall in that
24 financial year. The wall--it was an ongoing project because we
25 were redeveloping the entire campus. We couldn't do the wall in

1 one financial year because it would take more than half the
2 money for the capital budget for the Ministry, so it was a
3 phased project, so what is here now is what is actually on the
4 ground. And the difference between what's actually on the
5 ground, the average of the three that I just mentioned to you
6 and what was spent was \$175,000.

7 How I accounted for that in my mind, I know the
8 Ministry did make one error--well, it probably made others, but
9 the one main error that I spotted, when the figure of \$828,000,
10 as the Project Manager indicated was an estimate of what he
11 thinks it should cost for what we were trying do at that time,
12 what that figure is a figure for one person carrying out the
13 works. When you do split it up--

14 COMMISSIONER HICKINBOTTOM: It cost a lot more money.

15 THE WITNESS: 175,000 more, but that's what
16 accounts--but when you read the Cabinet paper itself, under
17 decision of Cabinet, it gives the 828 as the figure whether it
18 proceeds to give permission to use Petty Contracts and Work
19 Orders, so you can clearly see that there was an error somewhere
20 in relation to what should happen because you can't give a wall
21 of that magnitude. Even in the BVI context--and I wouldn't
22 support it, honestly, to give that to one person. If you give
23 that out for one person, then five people or five companies will
24 be the only ones doing any work in the BVI, and the smaller guys
25 who can't afford to put up a bond and do different things would

1 not be able to participate at that level, and that is part of
2 the thinking of government, to see how we can assist and empower
3 persons who have certain skills.

4 COMMISSIONER HICKINBOTTOM: I don't want you to breach
5 any Cabinet Confidentiality.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: But at the moment we don't
8 know why the paper went into Cabinet on the basis of Petty
9 Contracts, and there would have been at least nine Petty
10 Contracts, £820,000 estimates. Why it went in as Petty
11 Contracts and came out as Petty Contracts plus, you say, Works
12 Orders.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: And there are, whatever it
15 was, 70 or 80 contracts, whatever it was. And we don't know why
16 there was that change.

17 But are you saying that it was a policy of Cabinet in
18 respect of major construction projects to spread the work around
19 smaller operators, if I could put it that way, small contractors
20 as a deliberate policy although, of course, it must cost a lot
21 more money?

22 THE WITNESS: That would not be a general thing. But
23 certainly with that wall, certainly you don't have to really be
24 a top-level contractor to do that, so that would be one of the
25 projects that certainly--I believe the Government that I was a

1 part of would have wanted to be done in a particular way.

2 COMMISSIONER HICKINBOTTOM: But you accept it would
3 inevitably cost more because it was a set of costs--

4 THE WITNESS: Yeah, it would cost more, at least in
5 terms of dollars, but in terms of distribution and assistance
6 throughout the community, we have to also consider those things
7 because if we were to give that contract to one person, that
8 would have been one person eating--you know, that's a different
9 approach.

10 COMMISSIONER HICKINBOTTOM: I understand that.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: I understand that's a
13 policy.

14 MR RAWAT: Commissioner, I wonder if we could just
15 pause for a five-minute break just to give the Stenographer a
16 break.

17 COMMISSIONER HICKINBOTTOM: The Stenographer who is
18 very robust, I'm afraid we have to give him a give-minute break
19 every now and then.

20 THE WITNESS: Yes, of course.

21 COMMISSIONER HICKINBOTTOM: Thank you very much.
22 Could I just borrow the draft paper?

23 THE WITNESS: Sure.

24 COMMISSIONER HICKINBOTTOM: Thank you very much. I
25 will just have a quick look at it.

1 THE WITNESS: You want a copy of the actual report,
2 the actual--because this is just in relation to (c).

3 COMMISSIONER HICKINBOTTOM: No. I've got it.

4 THE WITNESS: Okay.

5 (Recess.)

6 COMMISSIONER HICKINBOTTOM: Thank you, can we have a
7 copy of it?

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: We will make a copy.

10 THE WITNESS: Once we remember that that it just a
11 draft.

12 COMMISSIONER HICKINBOTTOM: No, it was a draft. I
13 don't think this is--I don't think this is secret, most of it's
14 to do with justification for the wall, which was, as it were, a
15 strong case, as you said.

16 THE WITNESS: That's the part that the Ministry
17 normally prepares the most.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 And what that was for was for Petty Contracts with
20 authorized contractors?

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: Thank you.

23 BY MR RAWAT:

24 Q. And again, what you're giving is that the draft paper
25 that we prepared--

1 A. Are we on formally?

2 COMMISSIONER HICKINBOTTOM: Yes, I'm sorry.

3 THE WITNESS: I didn't know that.

4 COMMISSIONER HICKINBOTTOM: Yes, we are.

5 THE WITNESS: Okay, good.

6 BY MR RAWAT:

7 Q. That's the draft paper prepared by your Ministry which
8 then went to the Ministry of Finance?

9 A. I think in consultation with the Ministry of Finance,
10 the draft, yes.

11 Q. Yes.

12 A. But what came out was different.

13 Q. Yes. And that's what you haven't got and that's what
14 went to Cabinet?

15 A. Yes, but what I read out to you in relation to the
16 Section about Petty Contracts, I read out to that authorization.
17 Everything else remained the same except for that provision.

18 Q. I see.

19 A. Yes.

20 Q. Which was point--I think it's your point (c)?

21 A. It was (c), yes.

22 Q. That's a helpful clarification.

23 A. Yes.

24 Q. Could you just assist the Commissioner a little bit
25 more with the--at least when you were in Government, the

1 approach to the waiving the tender process. The point the
2 Commissioner has made is that you have a very substantial
3 contract on any view, which would easily come within a major
4 contract, would also qualify to be a number--worked as a number
5 of Petty Contracts.

6 A. Um-hmm.

7 Q. Just in terms of the approach of waiver of the tender
8 process, when you were in Cabinet, what was the approach? I
9 mean--

10 A. We--

11 Q. Can I just also explain the reason why I've asked, and
12 you may not be aware of this, but the Commissioner has been
13 provided with an advice that was given, and has been told of the
14 advice that was given by the then Attorney General Baba Aziz.
15 Now, this is advice that postdates your time in Cabinet.

16 A. Um-hmm.

17 Q. And it is to the effect that using a tender process
18 when you are dealing with a project that's over \$100,000 should
19 be the norm rather than the default, and that you would have to
20 provide very strong reasons to displace that position, and
21 that's a position in law. Now, you said a little about this
22 before we had the short break but in terms of the policy
23 approach of your Cabinet to contracts of this magnitude, what
24 was it?

25 A. It would have--it would have to have been something

1 that would have warranted that to happened. It wasn't something
2 that we just did willy-nilly. We were not that type of
3 government. If a business case was put together, which it
4 normally had to have been and the explanation given as to why
5 you need to take a certain course of action, that was a
6 determining factor for us. It was not a device that we used
7 willy-nilly at all. We gave great consideration to it.

8 In relation to the wall, for instance, safety was a
9 major issue at the compound. We had a wire mesh fence that was
10 probably there for about three decades. Students would cut the
11 fence and go out and then put it back together, so you would
12 even know where the cuts were. People who were not supposed to
13 be on the campus, made holes in the campus--to the mesh fence
14 and came through as well.

15 When we did that first Section, that is called the
16 focus area, there was an adjacent space where we had
17 intelligence from the Police and from also people in the
18 neighborhood that illegal drugs were being given to students to
19 come in and give to others. And that is why we took that major
20 step and reallocated monies to get that area blotted out. That
21 was the first area.

22 When we discovered who the persons were, the boys were
23 who were doing it, then they got--the people who were bringing
24 the drugs into the schools started to use girls, so we had a
25 major problem. We'd have fights, people would bring brass

1 knuckles into the school, bring knives. And the project itself
2 was not--in the grander scheme of developing the campus, it
3 was--it was--we would have needed to do that, but it became
4 urgent because of the issues we were having, and we were
5 prompted by the principal at that time that we must do something
6 to protect the students and the teachers, and that was the
7 reason why that wall was done. It would have been something we
8 would have done eventually but we would have preferred to
9 probably build more classrooms and do different things rather
10 than that. But then if somebody send their child to school and
11 they get stabbed or they come home high off marijuana, they were
12 in the care of the Government and the school. And that was the
13 reason why we had to move quickly.

14 Q. That explains certainly Phase 1, the focus area of
15 2014, the use as you said of--

16 A. In that particular--in that particular area.

17 Q. The school budget to build a section of wall.

18 A. Yes.

19 Q. The Auditor General's Report puts the approach to
20 Cabinet and the seeking of approval of Cabinet, was for
21 emergency funding.

22 I suppose my question was targeted to two things. It
23 seems there are at least two possibilities for why rather than
24 going through a tender process the option--an alternative option
25 was adopted. Now, possibility one is the need to move quickly.

1 Possibility two, and they're not mutually exclusive, but
2 possibility two, which is what you seem to hint at or speak of
3 earlier--not hint, you spoke of it--was that there was a benefit
4 to use your words, to feed a greater number, that if the
5 contract--rather than if you could only give a contractor one
6 major person, you would have five people doing all the contracts
7 on the island whereas in this way, by using Petty Contracts and
8 Work Orders, you distributed the work to a greater number, so
9 from a policy perspective, which have those two possibilities
10 was the driver between in choosing to deal with the wall in that
11 way?

12 A. Well, what I would say first to you is that the use of
13 the term "emergency funding" is not an accurate term because
14 emergency funding suggests that you didn't have the money
15 allocated in your budget, and you had to go and ask for it from
16 somewhere else. That is not what happened. The money was
17 allocated under the Ministry of Education because we were
18 towards the end of the Financial Year.

19 So, by the time the project started in January, there
20 was money under the budget of the Ministry to do the project, so
21 to term it as "emergency" would not be the correct way to term
22 it.

23 For us in relation to that project--and I will say
24 this in relation to tendering here in the BVI, and this has been
25 my experience, Commissioner. The tendering process in the

1 country needs to be looked at. There is--there is a view that
2 Government has a pile of money, and when the Government puts out
3 something to tender very often, what the other thinking happens
4 with tendering here and in some parts of the world, that is not
5 so. What we try to do is that we want to know--that's why the
6 Project Manager is so important. If you're going to build this
7 school for me, I need to know what the value of it, what the
8 cost of that school is going to be. If it's going to be
9 \$2 million, the Government needs to be armed with that
10 information that it will be \$2 million. Sometimes we put the
11 things out to tender and they come back at four or \$5 million
12 because it's a government project. That has been my experience
13 here in many respects.

14 As in relation to the school, the wall, the driving
15 force for us was the safety of the students and the teachers.
16 That was the driving force because we were moving to another
17 policy of extending an additional school year, so we needed to
18 build more buildings to accommodate the additional students who
19 were there. Our preference would have been to utilize the money
20 in that way. But we had to--we had to make a decision based on
21 what was happening.

22 We even got to the point where we were even
23 asking--trying to ask the Police to have a Police or two on the
24 campus because it was just too much work for the teachers to
25 teach and still have to deal with children and articles and

1 different things coming into the classroom.

2 Q. So, that's, if you like, aspect one?

3 A. Yes.

4 Q. Which is there was security, a security issue, so
5 perhaps emergency--emergency funding may not have been the right
6 words, but certainly we can change that to a need to safeguard
7 the security of children and of teachers.

8 A. Yes.

9 Q. But just develop the second point that you were
10 speaking to the Commissioner earlier about, which--which is my
11 question--and the wall is just an example.

12 A. Yes.

13 Q. And then that is using what would otherwise be works
14 that would have to go out to tender.

15 A. Yes.

16 Q. As a means of spreading work, spreading money and,
17 therefore, you default to using a Petty Contract for Work Orders
18 process.

19 A. I would hasten to say it's not a model or device that
20 we use like that the history of the BVI, we have a number of
21 persons who are skilled in various areas. And if the economy of
22 our country is of such that the Government continues to play a
23 major role in the economic development of the country. Our
24 model is that the Government is most often the driver as opposed
25 to the private sector. Certain Governments have tried to change

1 that, but when there are certain projects--if you're going to
2 build a building, you don't do that by Petty Contracts and Work
3 Orders. You would never do that. That would be crazy. You
4 can't do that. But if you are building a wall with the
5 dimensions that people can follow and they are supervised, that
6 can be a project that can be one that is used in that way, and
7 that is what the Cabinet approved to be done.

8 Q. Thank you for that.

9 Can I move on to just a different topic, if I may, and
10 this is--you should find, I hope, on the desk somewhere a copy
11 of a press release that was issued by the Auditor General.

12 A. Yes.

13 Q. When I took--the Commissioner received evidence from
14 the Auditor General, I took her through that Press Release, and
15 I wanted to give you an opportunity as well to respond to it
16 insofar as necessary. The genesis of the press release was a
17 284.com interview.

18 A. Yes.

19 Q. And the Auditor General then issued the press release.
20 I read that into the Transcript. Unless you require me to,
21 Mr Walwyn, I won't do it now. I will just take you to what she
22 said was the fact-check.

23 A. Yes.

24 Q. And what you've explained is that there was an
25 opportunity to respond to the Auditor General, and you've told

1 us that at least one of the two documents that you've shown us
2 were, in fact, put to the Auditor General.

3 A. That's correct.

4 Q. And then the Report was--

5 Now, if I look through those--I mean, can we just--I
6 suppose the Auditor General in context. Would you agree that
7 the work of the Auditor General's Office is important?

8 A. Absolutely.

9 Q. And that it is important--well, firstly, it's an
10 important constitutional role, so it's important that this
11 office's independence be preserved.

12 A. (Inaudible.)

13 COURT STENOGRAPHER: I'm sorry, could the Witness come
14 back closer to the microphone and repeat that answer.

15 BY MR RAWAT:

16 Q. I will put the question to you again, if I may.

17 The question was would you agree that the independence
18 of that office needs to be preserved?

19 A. Absolutely, absolutely.

20 Q. Now, the sequence of events seems to have been draft
21 report was sent to the Ministry, the Ministry had an opportunity
22 to respond and did respond, finalized report was issued and as
23 we understand it, the next step is it goes--it's laid before the
24 House of Assembly.

25 A. That's correct.

1 Q. You chose to, it seems, disclose the Auditor General's
2 Report to the press before it was laid before the House of
3 Assembly; is that right?

4 A. I did that.

5 Q. And I appreciate you're not--you haven't obviously
6 been following every day of the COI's proceedings but that's, in
7 fact, was prayed in aid by the Solicitor General in a recent
8 submission to the Commissioner as an example of someone crossing
9 the line.

10 A. Um-hmm.

11 Q. Were you aware that there was prohibition on your
12 making that disclosure?

13 A. Can you tell me what the prohibition was?

14 Q. That you shouldn't put it into the public domain
15 before it had been laid before the House and debated?

16 A. Where is the prohibition?

17 Q. I take it that there is from the general submission
18 and from the Auditor General.

19 COMMISSIONER HICKINBOTTOM: No, it's a very fair
20 question.

21 I think the answer, and Mr Rawat will correct me if
22 I'm wrong is, the Auditor General told us that there was.

23 THE WITNESS: That cannot be the law. If you're going
24 to put something to me, Commissioner, you have to tell me where
25 it is.

1 COMMISSIONER HICKINBOTTOM: No, that's where it comes
2 from.

3 THE WITNESS: Where does it come from? Because you
4 put something to me. What's the original of that?

5
6 BY MR RAWAT

7 Q. The original is (1) the Auditor General in evidence
8 saying that her understanding of the process is that a report
9 that she finishes and submits goes to the House of Assembly, it
10 is laid before the House, it is then debated and then it becomes
11 public, and it's at that point it becomes public.

12 And the second origin from it is the submission of the
13 Solicitor General who've relied on that and relied on what your
14 actions as an example of someone crossing the line and making
15 something public before there was--before Parliament had
16 effectively debated it.

17 A. Do you have a copy of the Solicitor General attack?

18 Q. Yes.

19 A. Can I lead you in it?

20 COMMISSIONER HICKINBOTTOM: A copy of?

21 THE WITNESS: The Audit Act. Yes.

22 And even though I say I don't listen, I listen
23 intermittently.

24 BY MR RAWAT:

25 Q. The Audit Act is at page 223.

1 A. 20. It says the Auditor General may at any time
2 prepare and submit a special report to the Governor if he's
3 satisfied that there is a matter that should be brought to the
4 attention of the Governor.

5 Are you with me, counsel?

6 Q. Yes.

7 A. Do you have it? I will read it again.

8 (1) That the Auditor General may at any time prepare
9 and submit a special report to the Governor if he's satisfied
10 that there is a matter that should be brought to attention of
11 the Governor.

12 (2), the Governor shall within three months of receipt
13 of the special report cause the Report to be laid before
14 Legislative Council.

15 And (3), the Auditor General shall at the same time as
16 submitting the special report to the Governor submit a copy of
17 the special report to the Minister and the Financial Secretary.

18 Now, it lays out the procedure, and it gives a copy to
19 the Minister. The Act is somewhat deficient in terms of what
20 the Minister can or cannot do when the Report is given to him.
21 I did apologize for releasing the Report because the Premier
22 spoke with me on it and showed me that perhaps that should not
23 have been the best course of action, and I apologized for that,
24 and that remains.

25 But I also want to mention that my thinking was the

1 same as yours, counsel, at the time, because I'm reading from
2 your statement itself in relation to this very same matter, and
3 this is what you had to say when a question was raised by the
4 very same Solicitor General in relation to the grants reports
5 that were released, and you said, and I'm reading and you can
6 perhaps correct BVI news if you're wrong.

7 Q. That's all right. I know what my own submissions.

8 A. Let me read it into the record.

9 "COI attorney, Bilal Rawat in his response argued that
10 the process of placing the documents before the House of
11 Assembly was essentially a procedural step before making the
12 documents public. He said the AG's document was essentially
13 final since it was submitted to the Governor, and when it's in
14 the hands of the Governor, no changes are usually done after
15 that point unless in the form of an addendum". Those were the
16 thoughts that were in my mind as well at the time.
17 Notwithstanding the fact that I think that I was not
18 necessarily--that was not the proper course of action.

19 COMMISSIONER HICKINBOTTOM: I don't want to put words
20 into your mouth, but is this what you thought or you now think?

21 THE WITNESS: Yeah--

22 COMMISSIONER HICKINBOTTOM: Can I just try and
23 formulate it.

24 THE WITNESS: Sure.

25 COMMISSIONER HICKINBOTTOM: Tell me if I'm wrong.

1 You are not aware of any prohibition in the Act that
2 prevented you from disclosing the Report which you've received,
3 but you accept that there may be a convention--

4 THE WITNESS: Yeah, the convention came--the
5 convention doesn't come from the Act. It came from the House.

6 COMMISSIONER HICKINBOTTOM: No.

7 THE WITNESS: And that was the point. My apology
8 because--

9 COMMISSIONER HICKINBOTTOM: I absolutely understand.

10 THE WITNESS: Yes.

11 BY MR RAWAT:

12 Q. And so, were you aware of the convention before you
13 decided to release the Report?

14 A. No, didn't--I didn't. But--

15 Q. Your perception was that it was in the public interest
16 that you release it?

17 A. Well, it was in the public interest to an extent
18 because we live in a very small community, Commissioner, and as
19 you've picked up from the video that you played of me speaking,
20 when things happen in the country, Ministers are dragged through
21 the mud as being the worst people rather than sometimes trying
22 to understand what is happening.

23 Ministers have lives outside of the Ministry of
24 Education or any Ministry for that matter. When you leave
25 public life, private life and your businesses and you come to

1 serve your country, you want to leave with your dignity intact.
2 And when you have things like a report that's out there making
3 you look as if--and you're getting calls from lawyers and
4 different people that you work with, saying Myron, what's going
5 on, we're hearing her name with the wall. You have to do
6 something to defend yourself.

7 COMMISSIONER HICKINBOTTOM: But the position is you
8 didn't know of any--

9 THE WITNESS: I didn't--I didn't know at the time.

10 COMMISSIONER HICKINBOTTOM: You didn't know of any
11 statutory prohibition, you didn't know at the time of the
12 convention, you know about the convention now, but you acted on
13 the basis of your knowledge then?

14 THE WITNESS: Well, as I said, there is nothing--there
15 is nothing in the Act that says--

16 COMMISSIONER HICKINBOTTOM: No--

17 THE WITNESS: And that's a deficiency in the Act
18 because it just gives it to you. And that's why I read what you
19 said, counsel, because my thinking when you read it, that it's
20 already at the point of the Governor's hands already. Nothing
21 it is going to change essentially with the Report except for it
22 to be laid. And it says a copy must be given to the Minister
23 and the Financial Secretary. But it puts--it puts a condition
24 on the Governor in terms of what he must do with it. It doesn't
25 put anything on the Minister or the Financial Secretary.

1 And I apologize because I breached some of the rules
2 of the House, and it was on that basis that I said that was not
3 the right thing.

4 COMMISSIONER HICKINBOTTOM: I understand.

5 BY MR RAWAT:

6 Q. It was you who that put it into the public domain?

7 A. Well, I wouldn't--I wouldn't say--I wouldn't say that
8 entirely.

9 Q. But you decided to release it to the press?

10 A. I--I did a press conference where I discussed it, yes.

11 Q. So you put it into the public domain?

12 A. Officially, I would say that, yes.

13 Q. And until you put it into the public domain, nobody
14 knew the detail of it?

15 A. You have to spend a little bit more time in Tortola.
16 Everybody knows everything.

17 Q. Well, the problem with that, Mr Walwyn, is that that
18 catches everything, doesn't it? It's about your decisions.
19 Until you decided to put it into the public domain, nobody knew
20 the reality of its contents?

21 A. Nobody knew what the Auditor General ruled.

22 Q. Yes, because the answer to your question about
23 everybody knows everything, is well, what's the point of you
24 putting it in the public domain?

25 A. But from House--from sittings of the House where the

1 wall was being used as a political football, damage was already
2 being done to my reputation and the repetition of the people who
3 worked with me.

4 Again, I have said that I should not have done it, I
5 apologized on it, and I have moved on, but I'm saying to you,
6 counsel, that my thinking was the same as yours when you
7 indicated that Cabinet laid in the House is just merely a
8 procedural step. Those are one of the thoughts in my mind as
9 well.

10 COMMISSIONER HICKINBOTTOM: I understand that.

11 THE WITNESS: Good.

12 BY MR RAWAT:

13 Q. What I would like to do is before I go through the
14 press statement you with--

15 A. No problem.

16 Q. --is just to check whether there's any other aspect of
17 the Executive Summary that you want to come back on in terms of
18 further evidence you wish to give to the Commissioner.

19 A. Can you give me a moment?

20 Q. Of course.

21 A. Thank you.

22 (Pause.)

23 A. There was a concern, Commissioner--I'm trying to find
24 it--in relation to the quality of work. I think when I--I think
25 at one point I heard that the quality of work was poor.

1 Q. It's not in the Executive Summary, though?

2 A. No, it's not in the Executive Summary, but the
3 Executive Summary is what yielded it. I just told you in terms
4 of whether or not there was--because I know you're going to move
5 on to the Fact Sheet. But was that evidence--

6 Q. No, I wanted--you started your evidence on the basis
7 that you wanted the Executive Summary?

8 A. That's fine.

9 Q. And if there's anything else. I'm just conscious of
10 the time.

11 A. Understood.

12 Q. I will try, whilst you look at the Executive Summary,
13 I will try and see if I can find a reference to the quality of
14 the work?

15 A. I would appreciate that. I would appreciate that. I
16 would love to have that conversation if we could. But apart
17 from that, yes, I think I'm fine in relation to the Executive
18 Summary.

19 COMMISSIONER HICKINBOTTOM: That's at paragraph 65.

20 THE WITNESS: Paragraph 65.

21 COMMISSIONER HICKINBOTTOM: Under the heading
22 "Inconsistencies in execution of the works damage". I think
23 that's it, Mr Rawat.

24 THE WITNESS: So, if you go, for instance, to--

25 COMMISSIONER HICKINBOTTOM: 65 and 66.

1 THE WITNESS: Yes, 65 and 66, where the project
2 inconsistencies were noted about the length. I think perhaps
3 the Project Manager might have addressed that, but when you look
4 at 66, inconsistencies were also noted in the rendering of the
5 wall. In some areas the block wall was visible to the unpainted
6 plaster, and so on.

7 If you look--the Report is dated, what is it,
8 August 2018?

9 COMMISSIONER HICKINBOTTOM: Yes.

10 THE WITNESS: If you look at the pictures at the back
11 of the Report.

12 COMMISSIONER HICKINBOTTOM: Yes.

13 THE WITNESS: Are you with me, Commissioner?

14 COMMISSIONER HICKINBOTTOM: Yes.

15 THE WITNESS: These pictures were taken after that
16 wall went through the worst flooding that we've ever had in BVI,
17 Category 5 Hurricane Irma and a Category 5 María. That is what
18 you're seeing here in these pictures. This is the wall probably
19 three years, two-three years after being built, after passing
20 through. A major flood and two Category 5 hurricanes. I don't
21 know how anybody could reasonably expect the quality to be the
22 same as when it was built.

23 And what is also important to note is that with those
24 three catastrophic events, that wall was the only wall in Road
25 Town that was built that stood up.

1 So, she produced pictures from after the Hurricane to
2 substantiate the Report with the quality of work, it's not
3 necessarily the best thing.

4 COMMISSIONER HICKINBOTTOM: But I don't think it does.
5 I think the pictures go to paragraph 67, which refers to the
6 Hurricane wind and debris damage.

7 THE WITNESS: But it also goes to 66, Commissioner.
8 It says inconsistencies were also in the rendering of the wall.
9 In some areas the block wall was visible through the unpainted
10 plaster. Weathering and so on and that kind of thing would
11 create that.

12 COMMISSIONER HICKINBOTTOM: But the Hurricane wouldn't
13 have affected 65, which is the width and height of the wall.

14 THE WITNESS: Yeah. But you see, that also brings us
15 to another issue that we have to look at, and again, I'm not
16 blaming anybody. I'm just looking at the Report, and the reason
17 why, Commissioner, I may seem a bit--if I seem a bit--I don't
18 want to use the word "aggressive" but a bit strong, it's not for
19 me because I know clearly that my hands are entirely clean in
20 relation to this. It's for the people that work with me. I
21 know those people, and they work hard, and there are honest
22 decent people. And so when I see things that try to suggest
23 that they have done things that are wrong, when I myself have
24 carried out my own investigation, I don't like it because I have
25 to be able to defend the people as well who work for me.

1 COMMISSIONER HICKINBOTTOM: I understand that, but if
2 there were sections of the wall which should have been 10 feet
3 that were 8 feet and if the height of the wall differed, isn't
4 that a fair point?

5 THE WITNESS: It's a fair point to the extent that
6 the--and I've said this before, even in the statement, in the
7 interview I did, more support needs to be given to the Office of
8 the Auditor General. There are no engineers in there. There
9 are no architects in there. There are no Project Managers in
10 there, so how do you--and then you see that Public Works
11 indicated that they did not help you. There was no help.
12 That's what the Permanent Secretary said, that they were no way
13 involved in the assessments, so how do you get these numbers
14 when you don't have Public Works assisting you and you don't
15 have the assistance in the Department?

16 COMMISSIONER HICKINBOTTOM: I would I understand that
17 point on a more technical issue, but a wall being 8-foot long
18 rather than 10-foot long--

19 THE WITNESS: I understand, but do you know the
20 Project Manager was never called to the site? This same SA
21 Architect was never called to the site. He should have been
22 called and made to account for the work that he did. That never
23 happened. The Auditor General's Office.

24 BY MR RAWAT:

25 Q. He did receive the Report?

1 A. Yes.

2 Q. Can I finish my point, please, Mr Walwyn?

3 A. Sure.

4 Q. He received the Report, he fed through to Dr Potter
5 the e-mail that you provided us in which he gave responses, and
6 they include responses on paragraph 65 and 66. And on my swift
7 reading of those, he doesn't seem to be saying that what you're
8 now saying, that 65 and 66 are attributable to hurricane damage
9 and flood damage, nor does--and it's not something that you can
10 necessarily explain. The actual official response, which is
11 from your senior officers, they don't contain any reference to
12 paragraph 66 which refers to the point you're now making of
13 hurricane flood damage.

14 A. There is a reference to 66. There is a reference to
15 65 and 66 and 67 in the same report that you're talking about.

16 Q. In which report? Your senior officer's report?

17 A. The one you said that there was none in.

18 Q. Where is it? Direct me to it?

19 A. Go to the third-to-last page you will see it.

20 Q. The third-to-last page?

21 A. Yes, it says "inconsistencies in the execution of the
22 works and damage 65".

23 Q. Pause.

24 A. Yes.

25 Q. You're looking at Mr Agustin's e-mail?

1 A. Yes.

2 Q. I thought you were directing me to this document?

3 A. No, I wasn't. The two things together.

4 Q. Yes, but my point is if you look at what Mr Agustin,
5 the Project Manager's response is to inconsistencies in
6 execution of works and damage 65, he's not making the point you
7 now make about hurricane and flood damage.

8 A. No.

9 Q. And keep doing it when we look at inconsistencies of
10 the execution of works and damage 66. Nor does it appear at all
11 in this document. And that begs the question: You were there,
12 you were the Minister, you were the person who received the
13 Report and decided to put it in the press. Why didn't your
14 concerns about hurricane and flood damage being a factor in the
15 way the Auditor General approach ever make it to the official
16 document that responded to her Report?

17 A. Well, I can ask the question: How is it that nothing
18 that the Ministry said ever made it to the Report?

19 Q. Well, with respect, Mr Walwyn, that's not an answer to
20 the question, is it?

21 A. No, but we are looking, counsel, at 65, 66, and 67.
22 Can we go through them?

23 Q. Well, I think you have made the point to the
24 Commissioner about what you feel a factor that wasn't taken into
25 account.

1 A. In relation to--

2 Q. To those three paragraphs.

3 A. Counsel, you're stretching what I said to cover 65,
4 66, and 67. And that's not correct. My responses in relation
5 to the Hurricane was in relation to 66, where it speaks about
6 the inconsistencies were also in the rendering of the wall. In
7 some areas the block wall was visible through unpainted plaster.
8 That is what I recommend in terms of weathering would have been.
9 In relation--

10 COMMISSIONER HICKINBOTTOM: But the response to the
11 architect to that was that it may have been a result of painting
12 too early on the cement.

13 THE WITNESS: Where are you reading from,
14 Commissioner?

15 COMMISSIONER HICKINBOTTOM: The final page of his
16 e-mail.

17 THE WITNESS: 65? Or 66?

18 COMMISSIONER HICKINBOTTOM: 66. This is the problem.

19 BY MR RAWAT:

20 Q. Last page?

21 A. This is a problem that some of the biggest building
22 built--commercial buildings in the BVI face. Some equate this
23 to painting too early on the cement while others equate it to
24 the moisture build up in the cement joints. And that might be
25 accurate but one can also not discount the fact that this is a

1 wall that would have gone through--

2 COMMISSIONER HICKINBOTTOM: That's right.

3 THE WITNESS: So, it doesn't necessarily mean that
4 because the Project Manager did not mention that means that it's
5 not a factor for consideration.

6 COMMISSIONER HICKINBOTTOM: I understand that.

7 THE WITNESS: Okay.

8 COMMISSIONER HICKINBOTTOM: I mean, he did mention it.

9 THE WITNESS: Yes.

10 COMMISSIONER HICKINBOTTOM: I'm not sure that the
11 quality of the wall in the sense of paragraphs 65 and 66 is at
12 the heart of things here. The Auditor General merely thought
13 that the wall could have been--

14 THE WITNESS: If we look at 65, for instance,
15 Commissioner, just bear a minute with me. 65 in the Report says
16 throughout the project inconsistencies were noted, he speaks of
17 the size. This is a response in 65 that was given by the
18 Project Manager, recognizing that the site is not flat and
19 slopes there about 9 feet from rear to the front, the rails will
20 have to follow as stepping height configuration. So the wall
21 cannot--the wall cannot be entirely straight if the slope in the
22 land is not straight.

23 COMMISSIONER HICKINBOTTOM: I've read that.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: But it doesn't answer the

1 point made by the Auditor General which was that the low wall,
2 just the low walls to hold the rails were at different heights,
3 but I don't think that the quality of the wall is at the heart
4 of this.

5 THE WITNESS: Okay. All right. I will accept that,
6 Commissioner.

7 BY MR RAWAT:

8 Q. If you have no other points in terms of--I think you
9 have in terms of the Executive Summary, can I just deal finally
10 with the fact-check aspect.

11 A. Sure.

12 Q. So that we can at least try and tie off as much as we
13 can today.

14 A. No problem.

15 Q. Now, I think the first point that the Auditor General
16 responded to was your assertion on 248.com was that PWD, the
17 Public Works Department, was not consulted during the Audit
18 process. She rejected that and said they were contacted, the
19 Auditor visited the PWD, conferred with both the current and
20 former Directors together in person. PWD was asked to provide a
21 costing for the wall but the then Director declined indicating
22 that they were not involved in the planning and execution of the
23 Elmore Stoutt perimeter wall. Do you have anything else to add
24 to that?

25 A. I think the letter--I think the letter from the

1 Permanent Secretary in the Ministry is a perfect rebuttal to
2 that, where it indicated that they were not--that they were
3 never used in the entire audit exercise.

4 Q. Well--

5 A. That's what he said.

6 Q. Draw the Commissioner's attention to the sentence
7 which says that?

8 A. If you read the one that I gave you from Public Works.

9 Q. Yes, got it. You don't need to read it out, but
10 just--

11 A. It says--if you come to third line from the first
12 paragraph.

13 Q. You're concerned about the conditions?

14 A. Which the Public Work Department had similarly been
15 used in this entire audit exercise. And you go on that the
16 related articles report mentioned that the PWD estimates that
17 were significantly lower than the cost to build. And he's
18 categorically denying that the Public Works did not assess or
19 provide any information in regards to the estimated costs.

20 So, it seems as if their concern is that the first
21 time they became aware of the audit and even get the Report is
22 when we sent it to them.

23 Q. Well, at the time you hadn't sent the Report to them
24 because they asked for a copy of it.

25 A. Yes, a copy of it--

1 Q. I would like to see a copy of the Auditor's report.
2 That's in November 2018.

3 A. Yes, but that maybe you're not hearing me well. Maybe
4 you're not speaking loud enough. I said the first time they
5 would have gotten sight of the Report is when we sent it to
6 them.

7 Q. And I said neither of us are disagreeing with each
8 other, Mr Walwyn. But when I said at the time they hadn't
9 received a copy of the Report.

10 A. Good.

11 Q. But what the Auditor General actually says in her
12 Report is that, to further assess the rates and quantities used
13 in the Bill of Quantities--

14 A. Where are you reading from?

15 Q. Go to 43 in her Report.

16 A. Page 43?

17 Q. Yeah. Paragraph 43.

18 A. Paragraph 43.

19 Q. She refers there to a comparative examination was
20 performed with four similar construction projects for reinforced
21 block walls, costed and supervised by PWD 2015 Petty Contracts.
22 So, what I read that as is what the Auditor General was doing is
23 that they--or her office took four similar construction projects
24 and used those for a comparative analysis, but the Office did
25 the comparative--the Auditor did the comparative analysis, that

1 they didn't ask PWD to do it.

2 A. But that, Commissioner, in and of itself, raises an
3 issue: Every project and every wall is different. You have to
4 look at the dimensions, and that makes the determination. For
5 you to use for the numbers from four walls. It's not an
6 accurate way to do something. You can't--you can't--you can't
7 do that.

8 If I go to 43 from the information that was given from
9 the Project Manager, he says: "The comparison to four similar
10 concrete block walls is not a fair comparison". Are you
11 following me?

12 Q. Yes, I am. As long as you tell me are you in the
13 e-mail?

14 A. In the e-mail.

15 Q. Or in your response?

16 A. In the e-mail. Last page.

17 Q. I see it.

18 A. "The comparison to four similar concrete block walls
19 is not a fair comparison. Engineer Leslie Blair provided us
20 with a footing design that measures 3 feet wide by 2 feet deep.
21 This equates to the total of six square feet of surface area.
22 Typical footings of walls as referenced in the Report measures
23 2 feet by 8-inches. This equates to 1.3 square feet.
24 Therefore, a similar comparison"--and I must say that engineer
25 Leslie Blair is an engineer that worked in the Public Works

1 Department many, many years, he's now in the private sector.

2 "Therefore, a similar comparison cannot be made as the
3 engineered footing of the wall at Elmore Stoutt High School
4 measures 4.5 times the size of a typical footing. This equates
5 to more concrete, more steel, more formwork, more labour, and a
6 higher cost. To make the statement in the Report fair, the
7 comparison must have the same size footings and conditions".

8 Now, if I stop there for a second, the reason why the
9 footings had to be the way they were is because there is a major
10 ghut by the school, and the school is prone to flooding when the
11 ghut runs over. And if the footings were not the way that they
12 were made, the wall would have fallen down during the floods and
13 during the two Hurricanes that we had.

14 And he goes on to say again, "Sheet A-105 does not
15 provide a height at the interior of the wall due to variances
16 and an increase in height. This was left deliberately
17 dimensioned as it varies vastly. Therefore, a square foot
18 comparison creates an unfair comparison as the wall in many
19 interior cases measured greater than 8 feet, just as we
20 envisioned when developing the quantities, site measurements in
21 some areas at the wall's interior, measures 11 feet. These
22 factors are critical as they are unique to the site and
23 deserving of cost considerations. To neglect these factors and
24 compare ESH's wall to typical applications would result in an
25 unfair comparison".

1 And if we want to go to the Fact Sheet that you
2 brought to me--that you sent to me, Commissioner--

3 Q. This is the press statement?

4 A. This is the press statement, at four, I said there are
5 no quantity surveyors in the Auditor General's Office, and the
6 response was "true: The Audit Office does not provide Quantity
7 Surveying services nor does it claim to do so".

8 But in addition, the Auditor General rightfully also
9 indicated to five where I said the Auditor General has requested
10 more resources for staffing and training, and I support that
11 because I've heard them make those support--make those calls.
12 But there are no Quantity Surveyors, there are no architects,
13 there are no engineers in the office. How can we turn around
14 and make a comparison of four walls and apply that to a wall
15 that has different dimensions? That is fundamentally flawed in
16 and of itself. You can't do that.

17 Q. That is a question we may need to put to the Auditor
18 General. It's not one I can answer for you, but can I do it--

19 A. Can you at least agree that that comparison cannot be
20 fair?

21 Q. It's not for me to agree, either.

22 A. Oh, okay.

23 Q. It's for me to put questions, and I will put the
24 questions to the Auditor General.

25 A. Hmm.

1 COMMISSIONER HICKINBOTTOM: It's a question for the
2 Auditor General, not Mr Rawat, to be fair.

3 BY MR RAWAT:

4 Q. The one thing I can't do, Mr Walwyn, is give evidence.

5 A. No problem at all. And I understand. That is fine.

6 Q. So, you've dealt with one whether PWD was not
7 consulted during the audit process and that that remains an
8 issue of dispute between yourself and the Auditor General.

9 A. Yes.

10 Q. In terms of the Audit Report valued at the wall at
11 372,000, we may not be able to take this perhaps as far as we
12 might want because I think in light of the fact that you have
13 produced, shall we call them a number of additional assessments?

14 A. Yes.

15 Q. Again, that is something that perhaps we will be
16 submitting for the Commissioner we need to put to the Auditor
17 General.

18 A. No problem.

19 Q. For her response.

20 COMMISSIONER HICKINBOTTOM: Can we do this, can you
21 just indicate where you said the Audit Report valued the wall at
22 \$372,000, where that figure comes from.

23 THE WITNESS: Commissioner, all the numbers that I
24 would have gotten--as I said, I would have gotten them from my
25 technical people. I cannot--I have not been able to assess and

1 find the statement where that was made but I know I was advised
2 that way.

3 COMMISSIONER HICKINBOTTOM: No, thank you.

4 THE WITNESS: And I think that what we were speaking
5 about was just the wall itself, not necessarily with all the
6 trimmings, and I think that's what the point the Auditor General
7 was trying to make as well.

8 BY MR RAWAT:

9 Q. She says the amount appears to be an incomplete
10 computation, but these figures you were not sat up all night
11 with a calculator working this out?

12 A. No.

13 Q. This came from what you call the technical people.

14 A. But then--

15 Q. I know "technical people" seems to be a very popular
16 phrase, but can we just bring it down to which technical people
17 you were talking about here? Are we talking about the external
18 Project Manager?

19 A. The external Project Manager would have had to help me
20 in the calculations, in the calculations.

21 Q. Only the external Project Manager, or did you use your
22 internal Assistant Secretary?

23 A. What I would say is that he would have had to have
24 been the principal person at the time.

25 And also to be fair, the Auditor General was

1 referring--was, as you say, from this Fact Sheet was responding
2 to the video that was sent.

3 Q. Yes.

4 A. Okay. I would have--in order to be able to use that
5 specific figure of 372, I had to have been advised on
6 that--utilizing the particular--

7 Q. Yes, you can see that in the fact-check because it
8 says "Minister's assertions as presented in his statement as
9 reported in 284 interview".

10 So, what I take from that is it's--I think you said
11 that you made a statement to the press, and then we have seen
12 the interview?

13 A. Yes.

14 Q. But in order for you to make that statement and give
15 such figures, they were provided to you by SA Architect, your
16 external Project Manager?

17 A. More than likely, yes. Because I wouldn't call
18 figures out of head below that.

19 Q. It's not so much about pulling them out of the head,
20 it's who worked them out?

21 A. Yes, but of course, we do have supporting information
22 because, as I said, we have the numbers that have been provided
23 in the Report.

24 Q. Yes.

25 A. And the additional information that I provided.

1 Q. And you referred to those in the 284 interview, and as
2 I indicated it may be a matter that we need to put to the
3 Auditor General.

4 Minister's Procedures No. 3, please. Just if you have
5 any additional evidence to assist the Commissioner on this.
6 "Minister's procedures satisfied Government requirements for
7 payment. The Ministry circumvented the Public Service payment
8 procedure by sending documents which falsely certified that the
9 work was done and payments were due. Payments were made based
10 on these four certifications which the Ministry accompanied the
11 purchase orders and vouchers".

12 A. Can you stop here for a second?

13 Q. Yes.

14 A. Can you show me where in the Report it says that
15 persons falsified records? Can you show me that?

16 Q. Give me a moment.

17 A. That is a serious indictment.

18 Q. It is one you responded to.

19 Give me a moment, please.

20 COMMISSIONER HICKINBOTTOM: Certainly paragraph 85.

21 THE WITNESS: 85. Okay. It says "Payments were made
22 where the work was incomplete. This was especially apparent in
23 2014 (noise interference) contracts have been allotted and
24 payments issued for rail and painting works, five of the
25 contracting segments but none of the sections were painted. The

1 contractors were all paid in full". Let me see.

2 COMMISSIONER HICKINBOTTOM: It was a Works Order so
3 they couldn't have been paid without--

4 THE WITNESS: Give me a moment.

5 (Pause.)

6 BY MR RAWAT:

7 Q. 85.

8 A. 85.

9 Q. If you look at it at 83 as well?

10 A. Yes.

11 Q. Start from there.

12 A. Start from 83, right?

13 Q. Yes. Payment discrepancies:

14 A. Yes.

15 If I can read the response to you, if you can follow
16 me on it, from this one that was done by the technical staff.

17 Q. Shall we call that the official response?

18 A. Shall we--we can call it the response done by the team
19 in the Ministry.

20 Q. Yes. I mean, the reason I want to call it that is
21 because it's not entirely clear whether the SA Architect's
22 e-mail made its way through?

23 A. We're not sure yet. That's not something I can
24 answer, but I'm sure that the staff would have passed it on.

25 COMMISSIONER HICKINBOTTOM: Which paragraph are we

1 looking at?

2 THE WITNESS: We're on page 3, Commissioner.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 THE WITNESS: From 83, Line 33. "In an effort to
5 minimize"--you've got it?

6 COMMISSIONER HICKINBOTTOM: Yes, thank you.

7 THE WITNESS: "In an effort to minimize the security
8 risk on the campus, the urgency to enclose the exposed campus,
9 contractors that were assigned work in a specific location may
10 have been relocated to another location, but note that work
11 description remained the same. No contractor was assigned work
12 on a different type or monetary amount unless--unless--amount
13 less than or more than what they had originally signed on the
14 work order processed".

15 84 says: "Correction made to the statement in that
16 there were four contractors that were issued mobilization
17 payments, halfway payments for works that were not carried out
18 at the time when the project was stopped. These contractors are
19 indicated and clear that the contractors with have paid amounts
20 under the columns heading 'amount paid'" and the Work Orders
21 number are there. And she said as a canceled Work Order that
22 was never issued to the contractor and was never processed for
23 payment. "As illustrated in the table of contractors that was
24 provided to the Auditor General", and I don't have it here,
25 "there was no monetary amount filled in this column for the said

1 Contractor, and the total reflects the same".

2 I don't know how helpful that is.

3 COMMISSIONER HICKINBOTTOM: Well, it's helpful in
4 paragraphs 83 and 84 but not helpful, of course on paragraph 85
5 which is where payments were made.

6 THE WITNESS: That one I can't, but I'm sure that the
7 Ministry has a very good explanation for what happened here. I
8 think that--I don't think that it would allow something like
9 this to happen just like this.

10 BY MR RAWAT:

11 Q. Let's go back to the fact-check and make sure--I think
12 we've done two and three.

13 I think on four you've made the point that there are
14 no Quantity Surveyors in the Auditor General's Office. She
15 agrees.

16 You've made the point at five that the Auditor General
17 has requested more resources for staff and training. That's one
18 that she agrees with you. I think she may differ from you in
19 deciding what resources and training she needs? But I think in
20 principle you agree.

21 A. That's fine.

22 Q. What you say is that attached to the Audit Report
23 should have been a PWD valuation, and I think you've got the
24 response false, the Minister does not determine what goes into
25 what is attached to an Audit Report. Maybe that speaks for

1 itself, if there is nothing necessarily you want to add to that,
2 you have given us the PWD assessment that you obtained.

3 A. The point that I was making is more of a wider point,
4 Commissioner. When an Audit--and this is in no way an attack on
5 anybody because that's not what I'm doing here. I'm just
6 defending the work that I know the folks in the Ministry of
7 Education did.

8 When an Audit Report is done, I think we need to get
9 to the point where the responses from the Ministry become an
10 addendum to the Report because here you have a situation where
11 this report was done, like other reports, the Ministry submits
12 responses to you, and the responses just go away, and so when
13 you're reading the Report, you don't get the full picture of
14 what has happened.

15 COMMISSIONER HICKINBOTTOM: My understanding of the
16 evidence of the Auditor General is that an addendum to her
17 Report can be made, but I think it's made at the stage of the
18 consideration for the House of Assembly.

19 MR RAWAT: But also it's up to her to decide--

20 THE WITNESS: Yeah, but I'm saying--I'm saying even
21 what I have identified--even in the Act where it doesn't say
22 what the Minister can do with the Report. The Act itself
23 perhaps because if finance serves in the public's domain and the
24 public reads it, it's good that you can go back and you can read
25 what the Minister responds and I think gives you a clearer

1 picture of what has happened in relation to it. It may or may
2 not change the content of the Auditor General's Report but it
3 gives the reader a greater appreciation for what may have taken
4 place. I think we even get to that point.

5 BY MR RAWAT:

6 Q. In terms of your overall involvement with the project
7 whilst it was in progress, you were not, to borrow your words,
8 to wait for media intimately involved in it.

9 A. No, and I don't get intimately involved in--I didn't
10 get intimately involved in any projects at the Ministry, whether
11 it's the wall or otherwise.

12 Q. So, the information that you were able to give to 284
13 media and you have been able to give today and in the statement
14 you may have made at the time was informed by discussions with
15 your external Project Manager and your internal technical
16 people?

17 A. Yes.

18 Q. And the external Project Manager is SA Architect,
19 Steven Agustin?

20 A. That's correct.

21 Q. Internally, it was--you had the team, if you like--

22 A. Yes.

23 Q. --was the Assistant Secretary--

24 A. Responsible for projects.

25 Q. Yes. And your financial control?

1 A. The Financial Planning Officer.

2 Q. Yes.

3 A. And, of course, the Permanent Secretary as well.

4 Q. But would it be fair to say that the Permanent
5 Secretary may not have been as directly involved?

6 A. No, because you have the Assistant Secretary doing the
7 work.

8 Q. So effectively, the focus is a team of three?

9 A. Yes.

10 Well, yes, because the way we operated it is that we
11 trusted the people to do their work because they're competent.
12 If you have an issue, if you have a problem, you come to us, we
13 discuss it, and we solve it. That's the way we worked on
14 everything.

15 Q. Now, I apologize if I've asked you this already, but
16 in terms of--you have an external Project Manager who is under
17 contract to the Ministry?

18 A. Yes.

19 Q. And I know your evidence is doing more than one piece
20 of work for the Ministry.

21 Does it just fall to the Assistant Secretary for
22 project management to, if you like, oversee and supervise and
23 check the accuracy of what that external Project Manager is
24 doing?

25 A. By and large. That's an area--you know, that needed

1 improvement. I won't deny that.

2 Q. Because there is--and I'm not speaking about this
3 specific incident but there is a potential for (overlapping
4 speakers) there, isn't there?

5 A. I accept that entirely.

6 Q. May I just have a moment, please, Commissioner.

7 COMMISSIONER HICKINBOTTOM: Certainly.

8 (Pause.)

9 MR RAWAT: Commissioner, I think I've reached the end
10 of my questions. It may be that we may need further assistance
11 from Mr Walwyn on this point, but it might be that it can be
12 done in writing and it doesn't necessarily require him to
13 re-attend for an oral hearing, but can I conclude, first of all,
14 by thanking him.

15 I'm going to do three things, actually. I'm going to
16 thank him for coming to give evidence.

17 I'm going to thank him for the way he has given his
18 evidence.

19 And unfortunately, I'm also going to probably give him
20 some homework to do.

21 THE WITNESS: No problem.

22 BY MR RAWAT:

23 Q. I just wanted to check and some of it may be more
24 homework for ourselves rather than Mr Walwyn, but the first is
25 obviously the draft paper, which the project consultation

1 between the Ministry of Education and Minister of Finance.

2 COMMISSIONER HICKINBOTTOM: We have the copy. We have
3 a copy of draft paper.

4 THE WITNESS: I didn't get the original.

5 COMMISSIONER HICKINBOTTOM: We will give you that
6 back.

7 MR RAWAT: Then we will be responsible for then I
8 think seeking the paper prepared by the Minister of Finance that
9 went to Cabinet.

10 COMMISSIONER HICKINBOTTOM: Yes.

11 MR RAWAT: We can also get a hold of the full
12 Cabinet's Decision.

13 THE WITNESS: Yes.

14 MR RAWAT: And I think the only--the homework is
15 becoming more hours, but the other thing we will need to check
16 is the issue about construction trade licences, and if you are
17 on a Work Order whether you have to show it or not.

18 THE WITNESS: Yes.

19 MR RAWAT: And I think the other thing we will do and
20 it's probably simpler for us to do it as the Inquiry is just to
21 check which--what document went to the Auditor General, there
22 is, what I call, the official response from the Ministry but
23 there is also the Steven Agustin e-mail, and I think the best
24 way is for us to write to them and the Auditor General can
25 confirm what she received with her.

1 THE WITNESS: You have to also right to the Permanent
2 Secretary to confirm what she sent.

3 MR RAWAT: Yes, we can do that as well.

4 THE WITNESS: I think that's very important.

5 MR RAWAT: That's it.

6 COMMISSIONER HICKINBOTTOM: No, thank you.

7 Could I ask one further question. I understand that
8 the photographs attached to the Auditor General's Report are
9 post the Hurricane.

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: So, as it were, paint a
12 different picture.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: From the pre-Hurricane
15 picture.

16 THE WITNESS: Yes.

17 COMMISSIONER HICKINBOTTOM: But was the wall ever
18 completed?

19 THE WITNESS: No, it wasn't fully completed because,
20 as I said, it was a project that was being phased over time.

21 COMMISSIONER HICKINBOTTOM: We've got the 2014 phase
22 as it were, the most urgent one.

23 THE WITNESS: The most urgent.

24 COMMISSIONER HICKINBOTTOM: The 2015 major project.

25 THE WITNESS: Um-hmm.

1 COMMISSIONER HICKINBOTTOM: But after that, there was
2 no further work done?

3 THE WITNESS: No, no. We didn't go on because we had
4 to--as I mentioned to you, it's part of an overall plan, and by
5 then we would have lost time, so we had to move towards building
6 some additional classrooms for students, but by and large, the
7 main perimeter that we were majorly concerned about was at least
8 completed and secured, to a large extent. It needed some
9 painting and some bars needed to go back in and so on. And then
10 we needed to to the front of the building, which was part of a
11 different phase. But, by and large, a replacement of the wire
12 mesh was, in fact, achieved.

13 COMMISSIONER HICKINBOTTOM: Okay. Thank you very
14 much.

15 Can I just thank you also, Mr Walwyn, for your time
16 and the courteous and careful way in which you've given your
17 answers and for the documents that you produced which have been
18 helpful. Thank you very much for all of that.

19 (Witness steps down.)

20 COMMISSIONER HICKINBOTTOM: Good. Mr Rawat.

21 MR RAWAT: That does conclude our business for the
22 week. We will be starting again at 10:00 on Monday.

23 COMMISSIONER HICKINBOTTOM: Tuesday.

24 MR RAWAT: Tuesday. Of course, because Monday is a
25 bank holiday.

1 COMMISSIONER HICKINBOTTOM: Good. Thank you very
2 much.

3 (Whereupon at 5:12 p.m. (EDT), the Hearing was
4 adjourned.)

5
6

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 dark ink, appearing to read "David A. Kasdan", is written over a horizontal line.

DAVID A. KASDAN