

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 50

(TUESDAY 19 OCTOBER 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Sir Geoffrey Cox QC, Mr Edward Risso-Gill and Ms Sara-Jane Knock of Withers (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Counsel to the Commission Mr Bilal Rawat also appeared.

HE John Rankin CMG gave evidence.

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Session 1

Sir Geoffrey Cox QC, Withers LLP
Mr Edward Risso-Gill, Withers LLP
Sara-Jane Knock, Withers LLP

Mr Bilal Rawat

Ms Juienna Tasaddiq, Assistant Secretary to the Commission
Mr Andrew King, Senior Solicitor to the Commission
Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Session 2

Sir Geoffrey Cox QC, Withers LLP
Mr Edward Risso-Gill, Withers LLP
Ms Lauren Peaty, Withers LLP

Mr Bilal Rawat

HE John Rankin CMG

Mr Steven Chandler, Secretary to the Commission
Ms Juienna Tasaddiq, Assistant Secretary to the Commission
Mr Andrew King, Senior Solicitor to the Commission
Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Denver Prince, Royal Virgin Islands Police
Force

P R O C E E D I N G S

Session 1

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3 COMMISSIONER HICKINBOTTOM: Good morning, everyone.
4 We're ready to begin.

5 Sir Geoffrey, I think there are four matters of law
6 that we are going to deal with this morning. Hopefully, most of
7 them will be quite short, I think.

8 Firstly, Section 67.

9 SIR GEOFFREY: Yes.

10 COMMISSIONER HICKINBOTTOM: Secondly, there is at
11 least "standard of proof" upon which you've given submissions in
12 relation to paragraph 1.

13 Third was the application for permission to question
14 three witnesses.

15 And fourth, there is the application for redactions in
16 relation to the radar barges.

17 Can we just deal with those in turn, Sir Geoffrey.

18 In terms of Section 67, firstly, thank you for your
19 written submissions which were helpful. I think it's right to
20 say that the issue turns upon a narrow and quite a simple
21 point--I mean, a simple point at least to put, even if not to
22 answer, and that is in Section 67(7) of the Constitution,
23 whether the words "as they're described" pertain to such
24 contract or pertain to becoming a party to such contract, and
25 you say it's the former.

1 SIR GEOFFREY: Yes.

2 COMMISSIONER HICKINBOTTOM: Can I just raise two
3 questions in relation to that before we ask Mr Rawat if he has
4 anything to add.

5 First, as I understand your construction, which I
6 think I do understand, if an individual Member enters into a
7 contract with the BVI Government, then unless he obtains an
8 exemption under Section 67(7) before the event, he then has to
9 vacate his seat on your instruction.

10 SIR GEOFFREY: Yes.

11 COMMISSIONER HICKINBOTTOM: But if the Member in any
12 corporate--I'm sorry, just pausing there for a moment, and that,
13 I assume, includes a d/b/a, which is really the individual
14 simply trading as a particular name.

15 But if the Member trades in corporate form or as a
16 partner in a firm or as a director or manager of a company, then
17 he doesn't have to vacate his seat if that firm or company
18 entered into a contract with the BVI Government, if, as soon as
19 practicable, after becoming otherwise interested in that
20 contract, he obtains--he discloses to the House and that
21 interest and thereafter obtains an exemption, so there is a
22 difference between an individual acting as the Party to the
23 Contract and the individual not being a party but merely being a
24 partner in a firm or a Directorial Manager of a company; is that
25 correct?

1 SIR GEOFFREY: Yes.

2 COMMISSIONER HICKINBOTTOM: And can you help me with
3 this, and what is the purpose behind that distinction which
4 means that if a Member enters into, I would have thought even a
5 Works Order, but certainly a Petty Contract with the BVI
6 Government in his or her own name for anything--for
7 sandwiches--and doesn't obtain the exemption, then he or she is
8 out, has to vacate the seat. But if that Member literally in
9 corporate form enters into a contract, he or she is not
10 necessarily out. And that, of course, could be a very large
11 contract.

12 So, what's the reasoning behind that? What's the
13 possible reasoning behind that?

14 SIR GEOFFREY: Well, exactly.

15 I think the important point is the words in Section 67
16 of the Constitution, 67(7), which is before becoming a party,
17 you do not become a party to a contract if you are a partner in
18 a firm that contracts or a director in a company that contracts.

19 So, plainly in our submission, in the Attorney's
20 submission, the draftsmen of this Section of the Constitution
21 considered that there was an important distinction between
22 somebody who became a party in their own right--that is to say
23 they had to contract in their name--as themselves, and somebody
24 who became interested in a contract via some other legal entity
25 or vehicle, corporate, partnership, and so on.

1 Now, the only practical thought that I can submit to
2 you is that in some cases that would make perfect sense because
3 were a manager or a director in a business that was incorporated
4 where managers were entrusted beneath you to contract, it may be
5 more likely in that sort of structure that you would not find
6 out about it at the time.

7 But whether or not that is a practical--a sufficient,
8 practical basis for the distinction that the draftsman draws it,
9 we submit, is compellingly clear. You simply cannot say--and
10 our argument continues as you will have seen--you simply cannot
11 apply the meaning that was put to me some weeks ago, if I may
12 respectfully submit, that otherwise interested must mean
13 interested in a matter that isn't described in Section 67(3)(e)
14 because, of course, that would not be disqualifiable. You are
15 only to be disqualified if you are to become interested in the
16 contract either by contracting in your own right when you're a
17 party or if you become interested because you are--and it's a
18 closed-ended description, a partner, a Director, or a manager.

19 So, we submit that it's quite plain that the draftsmen
20 is drawing this essential distinction between somebody who
21 contracts in their own right, in their own name, and somebody
22 who doesn't, and we submit it's a compelling construction. It's
23 the long-standing one that's been applied it doesn't make sense
24 to apply the construction, that, in my respectful submission and
25 in the Attorney's, that somehow or other, the other words

1 "otherwise interested" must indicate some other form of interest
2 other than that contained in Section 67(3)(e).

3 COMMISSIONER HICKINBOTTOM: I understand that your
4 submission is that the words on their face are plain. I
5 understand that.

6 SIR GEOFFREY: Yes.

7 COMMISSIONER HICKINBOTTOM: I just wondered, and
8 you've answered the point as well as you can.

9 SIR GEOFFREY: As well as we can.

10 COMMISSIONER HICKINBOTTOM: We have to look at the
11 words.

12 SIR GEOFFREY: You do.

13 COMMISSIONER HICKINBOTTOM: Looking at it in a
14 purposive way, what that dichotomy might be based on.

15 SIR GEOFFREY: Exactly.

16 COMMISSIONER HICKINBOTTOM: The second point is this,
17 and I assume that this has been done, but on the basis of on the
18 construction that the Attorney favors which you say is clear, as
19 I say, a Member who has become a party to a contract in his or
20 her own name or as a d/b/a, has to vacate his or her seat, and I
21 assume that a check has been made of the current Members as to
22 whether any fall into that category.

23 SIR GEOFFREY: I would have to take instructions on
24 the latter point as to whether there is a check been made, but
25 I'm not aware that it's thought that there are any into that

1 category.

2 COMMISSIONER HICKINBOTTOM: Okay.

3 SIR GEOFFREY: I've obviously held discussions with
4 the Attorney. We haven't addressed this point precisely, but
5 clearly we have been inquiring into the history so that we can
6 assist you with what's happened in the past, and I'm afraid
7 you've got the results of those researches.

8 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, I understand
9 that.

10 And I know--and I see that the force in the
11 submission, your submission, that the words are clear. That's
12 something I'm going to have to think about, but I think probably
13 this point has not been focused upon necessarily in the past and
14 that's why I raise that question.

15 SIR GEOFFREY: I don't understand, sir, why you do.

16 One thing one should add is that we've endeavored to
17 look at comparative jurisdictions. There's a similar wording in
18 the Cayman Islands, but we've been unable to find any authority
19 on the point; otherwise, I would have put it before you.

20 COMMISSIONER HICKINBOTTOM: Thank you very much, Sir
21 Geoffrey. Just to see if Mr Rawat has something to add on to
22 Section 67.

23 MR RAWAT: Firstly, that I would agree with Sir
24 Geoffrey that there isn't any useful law out there. My searches
25 didn't reveal anything.

1 In terms of the operation--and Commissioner, I don't
2 know whether you have the Constitution and Law Bundles.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 MR RAWAT: But the provisions are at Pages 36 and 37
5 of that bundle. Perhaps it's helpful just to start by reminding
6 ourselves how we got here.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 MR RAWAT: And so our starting point was Section 66(f)
9 which deals with those who seek election to the House of
10 Assembly, but that Section obviously prompts two important
11 points:

12 The first is that, if it is complied with, it gives
13 the electorate full detail of the extent of any contracts that
14 the candidate may have with the Government of the Virgin
15 Islands; and

16 Secondly, we see that the wording, the reference to "a
17 party to or a partner in a firm or a director or manager of a
18 company which is a party to" is replicated in 67(3)(e) and
19 67(7). When we turn to Section 67, we are, of course, dealing
20 with the position of someone who is already elected to the House
21 of Assembly. As you observed on the last occasion, 67(3)(e) is
22 draconian. If you fall within its scope, and the House of
23 Assembly won't grant an exemption, then you are out
24 straightaway.

25 But in my submission I would contend for the

1 alternative construction, which I've put forward in oral
2 submissions on the last occasion. At that time, it was a
3 provisional view, but what I would say is this: That if one
4 looks at 67(7), it has two limbs:

5 The first, which operate independent of each other,
6 the first would be, if, in the circumstances it appears just to
7 the House of Assembly to do so, the House may exempt any elected
8 Member from vacating his or her seat under subsection (3)(e).
9 If such a Member, before becoming a party to such contract as
10 there described, discloses to the nature of such contract and
11 his or her interest or the interest of any such firm or company
12 in it.

13 The second limb would then be if, in the circumstances
14 be it just to the House of Assembly to do so, the House may
15 exempt any elected Member from vacating his or her seat under
16 subsection (3)(e), if such Member, before or as soon as
17 practicable after becoming otherwise interested in such
18 contract, whether as a partner in a firm or director or manager
19 of a company, disclose to the House the nature of such contract
20 and his or her interest or the interest of any such firm or
21 company in it.

22 I make that submission for the following reasons:

23 Firstly, that the words "as they're described" should
24 not be read narrowly. What you should look to is the phrase--if
25 I could have a moment.

1 (Pause.)

2 MR RAWAT: Party--such contract as there describes.
3 That is a direct link back to Section 67(3)(e) and to all the
4 circumstances set out there, and that provision (3)(e) covers
5 not only where an elected Member becomes a party to a contract
6 in his or her own name but where a firm in which he or she is a
7 partner or a company in which he or she is a director or manager
8 entered into a contract, so it's not limited to a direct
9 interest that the individual has in a contract with Government.

10 Second, if one wanted just to capture the
11 circumstances in (3)(e) in Section 67(7), because, as Sir
12 Geoffrey points out, the purpose of 67(7) must be to afford an
13 opportunity to be exempted from having to vacate your seat. It
14 is difficult to know what the words "after becoming otherwise
15 interested in such contract" add because they, taking them away
16 won't actually undermine the force of 67(7).

17 The third is that I question why the need then for
18 before appearing twice. I say that because if I take you,
19 Commissioner, back to the submissions that were originally made
20 on behalf of the Attorney on 13th of September 2021, one of the
21 questions that was asked--and this is at page 5--was, "as a
22 matter of law, what is the purpose or intention behind Section
23 67(7) and the operation of Section 67(7)? And on behalf of the
24 Attorney, Withers submitted this: "The Section provides a
25 mechanism for an exception in appropriate cases, i.e., where if

1 to be as just, to the rule which would require the Member of the
2 House of Assembly to vacate his or her seat upon becoming party
3 to or interested in a contract for the Government of the Virgin
4 Islands provided that the relevant Member has disclosed his
5 interest as soon as practicable."

6 So, the Attorney at that point was not making the
7 distinction which I understand Sir Geoffrey now makes, which it
8 that if you have a direct--you are the direct contractor, the
9 effect is that, if you haven't declared the Contract or declared
10 the interest before entering into the Contract, you will have to
11 vacate, whereas if you become associated with the Contract in a
12 different way, you would have as either before or as soon as
13 practicable, so you have a further opportunity to declare your
14 interest.

15 The fourth point I would make is that when one looks
16 at what I call the "second limb" it does link the reader back to
17 Section 67(3)(e) because it makes reference to such contract,
18 and that reference can only be directing the reader back to
19 Section 67(3)(e).

20 The final point I would make, and it's the point that
21 you've made, Commissioner, is that it is difficult to understand
22 the rationale, or to even come up with one, which would justify
23 the approach that the Attorney's now putting forward because the
24 sole trader, if you like, who might be a relatively small
25 entrepreneur would be caught by the analysis or by the

1 submission that Sir Geoffrey makes on behalf of the Attorney and
2 would, if they only make a declaration after the event that they
3 would not be able to rely on Section 67(7), whereas someone who
4 is involved with a large multinational company that has a number
5 of contracts with Government and that person knew that their
6 Company had contracts with the Government before becoming a
7 Member would be able to rely on "as soon as practicable", and we
8 have seen--and you certainly you've heard the submissions that
9 are made on behalf of The Honourable Neville Smith in that, that
10 "as soon as practicable" has a subjective element to it; that
11 the effect is that you would only need to take steps to seek an
12 exemption, once you became aware of the Contract, which could
13 mean that you become aware some considerable time into your
14 tenure as a Member of the House of Assembly.

15 So, for those reasons, I would argue for the
16 alternative construction, as I've called it, to Section 67(7).

17 COMMISSIONER HICKINBOTTOM: Thank you.

18 Sir Geoffrey, firstly, I reiterate that I see the
19 force in the submissions you make in respect of the construction
20 except two points do concern me, which make it less clear than
21 it might otherwise be, and neither of which I suspect you can
22 give any further help. One is the point we've already discussed
23 and Mr Rawat referred to it, and that is the question why, why
24 is this a differentiation? And not all of us can go too far on
25 that because we just have to construe the words that are there.

1 And the second thing is--and this is a point of
2 construction--that the words that we're looking at "or before as
3 soon as practicable after becoming otherwise interested in such
4 contract (whether as a partner in a firm or director or manager
5 of a company)" reflect 67(3)(e), but they do not replicate them.
6 And, of course, the tentative construction where different words
7 are used in the same statute, it is a tentative construction
8 that they usually mean different things but that may simply be a
9 conundrum in relation to this particular subsection.

10 I think--an overarching point, of course, is that it's
11 not my brief to construe the whole of the BVI Constitution, and
12 it may not be necessary for me to resolve this issue if I
13 conclude that there is an issue to be resolved, and so I think
14 that we can--unless you've got anything else to say, Sir
15 Geoffrey.

16 SIR GEOFFREY: No, you don't want to hear me in answer
17 to that.

18 The fundamental problem with Mr Rawat's
19 interpretation, of course, is that he simply offers no serious
20 or credible answer to why the phrase is becoming before becoming
21 a party as there described simply means becoming a party as
22 there described. The only way Section 67(3)(e) provides that
23 somebody becomes a party is by contracting in his own name.
24 Really, I don't want to be impolite, but the truth is the words
25 here are pretty clear, but they do--they do--they do, of course,

1 give rise to the interesting conundrums that you've expressed,
2 and I can see why one might look for another meaning but the
3 literal and ordinary meaning of this is the one that's been
4 adopted.

5 And I quite understand the point about the odd use of
6 the expression "otherwise interested", one rather suspects the
7 draftsman simply adopted it as a shorthand, and the compelling
8 nature of the other factors that I have drawn to your attention,
9 I would submit, are clearly--clearly demonstrate that this
10 should be construed in the manner the Attorney submits is
11 correct.

12 But may I move on from there because I know we've got
13 much more to deal with today, and it may be better if that one
14 is--I agree entirely with your analysis, it will be a matter for
15 you to decide whether you really need to come to a view on this.
16 There's plenty else for you to come to a view on. This may not
17 be one of the things you need to.

18 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, I agree.

19 Can we move on then to what's referred to as
20 "standards of proof", at least in inverted commas.

21 SIR GEOFFREY: Yes.

22 COMMISSIONER HICKINBOTTOM: And this is the
23 construction of paragraph 1 of the Terms of Reference, and I've
24 had, and we've discussed the meaning of corruption of use of
25 office or the serious dishonesty in relation to officials.

1 We've dealt with that. This is another aspect of the same
2 paragraph, and that is really the proper approach to the
3 establishment of whether there is information that corruption,
4 et cetera, may have taken place in recent years and again, thank
5 you for your short and focused submissions on this.

6 Can I just raise one or two questions just to clarify.
7 The word "information" is used in paragraph 1, and what you say
8 that, in this context, the term "information" means evidence of
9 facts. I mean, it seems to me that that's right in the sense
10 that it at least includes evidence. It may possibly be wider,
11 but it certainly focuses on evidence. And if we say that
12 information equals evidence, that seems to me to be fine, and
13 that's your first proposition at paragraph 8.1.

14 SIR GEOFFREY: Yes. The first proposition is what
15 meaning do you give to information. That's what we've had to
16 grapple with and, no doubt that with which you are grappling, I
17 suspect in a good deal more advanced way because it would have
18 no doubt troubled you from the outset how you would look at this
19 question of information and what it means.

20 Essentially, what we submit, but we fully accept that
21 in an inquiry of the nature you're conducting, this is a matter
22 for you and, furthermore, it's got to be flexible. There's not
23 a question here of tying you to precise forensic, probative
24 standards.

25 But given the emphasis on "there is" information, what

1 we would submit, I think, is that there has to be facts. It's
2 not enough just to say, well, I've had a piece of information in
3 a bottle that's arrived anonymously in a bottle in the sea.
4 This information has to be robust. It has to be--live up to
5 appropriate standards upon which you could make and reasonably
6 draw conclusions.

7 Now, we've offered a thesis here that it is
8 effectively tantamount to saying are there facts? Are you in
9 the presence of facts? Which you can comfortably find on
10 varying scales of probative standards before you then ask
11 yourself the main question is from which you can deduce that
12 certain conduct may have happened.

13 So, what I'm anxious to clarify for you is that we
14 don't say it's enough just to say, well, I've got some evidence
15 here. You've got to be satisfied--we would submit it would be
16 appropriate for you to be satisfied--on some objective scale,
17 which we've indicated in writing that those facts genuinely
18 exist. Thus there is information.

19 COMMISSIONER HICKINBOTTOM: Yes, we really have to
20 separate out because they're conceptually very different
21 evidence from facts. "Information" is the word that's used, and
22 what you say is that information means evidence. Evidence, of
23 course, is all facts. You can't have any other sort of
24 evidence.

25 SIR GEOFFREY: Yes.

1 COMMISSIONER HICKINBOTTOM: But information means
2 evidence.

3 So, I understandably, I can only act on evidence.

4 SIR GEOFFREY: Yeah.

5 COMMISSIONER HICKINBOTTOM: And there has to be
6 evidence.

7 SIR GEOFFREY: Exactly.

8 COMMISSIONER HICKINBOTTOM: But once I have evidence,
9 then we move on to the second part of the phrase whether
10 it--whether corruption, et cetera, may have taken place in
11 recent years, and you say in, I think, paragraph 9 that there
12 has to be at least, you say, a real possibility that paragraph 1
13 conduct has taken place on the basis of the evidence.

14 SIR GEOFFREY: Yeah.

15 COMMISSIONER HICKINBOTTOM: I mean, lots of other
16 phrases could have been used but the real possibility seems to
17 me to be fine.

18 So that, on the evidence, there has to be a real
19 possibility that corruption, et cetera, may have taken
20 place--has taken place, but that's it, isn't it?

21 SIR GEOFFREY: Well, we've tried to go a little
22 further than that, as you'll probably detect. What we say, I
23 think, is that evidence must have some standard applied to it.
24 In other words, you would have to find--you would have to find
25 that the evidence was to your satisfaction and did establish the

1 fact on which you concluded that it may have happened or may
2 not.

3 COMMISSIONER HICKINBOTTOM: But the evidence has to
4 establish whether corruption, et cetera, may have taken place.
5 That's what the evidence has to do.

6 SIR GEOFFREY: Yes, but there may be facts from which
7 you would infer that. The question is to what standard do those
8 facts from which you might draw an inference that certain
9 conduct may have taken place have to be established?

10 COMMISSIONER HICKINBOTTOM: But this is not--this is
11 not an Inquiry, as many other Inquiries are, which seek to
12 establish facts in that sense. You refer to some of the
13 Inquiries. This Inquiry, paragraph 1 seems to me to be very
14 clear. This Inquiry has to establish whether there is evidence,
15 information, evidence that corruption, et cetera, may have taken
16 place in recent years.

17 To make that conceptually simple task, it's not
18 simply, in practice, but conceptually simple task that more
19 difficult by bringing in concepts from other Inquiries with very
20 different Terms of Reference as to whether what happened, which
21 these Inquiries are investigating normally, did take place
22 doesn't seem to me to be very helpful.

23 SIR GEOFFREY: It's not an intention to be helpful. I
24 think what we felt and what is clearly a finding that there is
25 evidence that somebody may have taken place does require you to

1 be satisfied in some way that the evidence is capable of belief,
2 reliable. You simply couldn't--I mean, if you didn't believe
3 the evidence, for example, or you found--you felt that the
4 evidence was inconsistent with other evidence and, therefore,
5 raised real questions as to whether you should rely on it, what
6 then?

7 I mean, is it really the case that you've come here
8 for nine months as it now turns out to be, and all you're being
9 asked is is there some evidence upon which something might have
10 happened? Surely, we must have a more--if that's all you're
11 being asked to do, with respect, I'm not sure how far it takes
12 us. Evidence that something might have happened. Of course,
13 there may be some evidence that something might have happened,
14 but where does it take us?

15 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, that leads
16 us to other questions. It doesn't--it doesn't affect the proper
17 construction of paragraph 1. That goes off then to other
18 questions, such as Recommendations.

19 SIR GEOFFREY: Yes.

20 COMMISSIONER HICKINBOTTOM: I fully accept that--let's
21 just take for the moment that paragraph 1 means what it says and
22 that my task is to establish whether there is information, that
23 is evidence, that corruption, et cetera, may have taken place in
24 recent years, and I determine in respect of something that that
25 has been established.

1 But Recommendations, then, that flow from that may be
2 dependent upon likelihood.

3 SIR GEOFFREY: Right.

4 COMMISSIONER HICKINBOTTOM: If you said "real
5 possibility", I have no great argument with that as a phrase
6 with regard to the word "may", but if there is merely a real
7 possibility that it happened, then the Recommendations may be
8 different.

9 SIR GEOFFREY: I agree.

10 COMMISSIONER HICKINBOTTOM: Highly likely to have
11 happened.

12 SIR GEOFFREY: Yes, I agree.

13 COMMISSIONER HICKINBOTTOM: I'm not saying that those
14 questions are irrelevant to the Terms of Reference because they
15 may be highly relevant to other aspects of it, but simply in
16 respect of paragraph 1, I find that parsing out between
17 paragraphs 8.1 and 8.2 of your submissions difficult because 8.1
18 says the term "information" means evidence. 8.2 starts "if
19 finding such facts exist". And there's a--I don't say this
20 unkindly, but there seems to me to be an incongruity between
21 evidence and facts. But as I say, I fully accept that gradating
22 the possibility that chance, as you've suggested, in 8.2, 8.3
23 and 8.4, in the context of these Terms of Reference, may be
24 necessary--may certainly be helpful in determining the
25 Recommendations.

1 SIR GEOFFREY: I think, with respect, that's what was
2 on our mind.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 SIR GEOFFREY: How you then move to making
5 Recommendations will depend upon a flexible scale, which will
6 depend on the nature of the Recommendation in your minds, its
7 substance, its weight, its reach, and so on. And so, we felt
8 perhaps we should have done it in stages and looking back on it,
9 I think you're, if I may say so with respect, right, it is
10 pertinent to the question of what you then go on to recommend.

11 Our concern was simply that if you were simply basing
12 it upon so slender a footing as whether or not there might be
13 information that something might have happened--because what
14 you're postulating, it seems to me--and I may be wrong, and you
15 will tell me obviously, sir, if I am, but essentially what
16 you're postulating is something akin to that which might afford
17 reasonable grounds to suspect to a Police Officer. What
18 effectively you're saying is that paragraph 1 simply invites you
19 to say--because I don't think one can say that information--I
20 don't think you're saying, as I understand it, that
21 "information" means that something that doesn't have standards
22 which can reasonably be capable of belief. The Police Officer
23 who was arresting must believe, and the facts stated to him must
24 be capable of being believed before he has reasonable grounds.

25 But if that's what you're saying to me at that point,

1 do I have information, evidence that is capable of being
2 believed and which I think by definition, sir, this may be an
3 open question, but you believe, yourself, to be likely to be
4 true, then thereafter you move forward to seeing on a higher
5 scale or a flexible scale as to where that leads you in terms of
6 Recommendations.

7 I don't think we differ from that. I think the
8 concern we've got is, as I say, when you reach the second and
9 third stages and ask yourself what should be done, as far as--

10 (Overlapping speakers.)

11 SIR GEOFFREY: --clauses are far-reaching.

12 COMMISSIONER HICKINBOTTOM: Absolutely, but that's a
13 sort of distinct exercise in a sense.

14 SIR GEOFFREY: Yes.

15 COMMISSIONER HICKINBOTTOM: Once I've made relevant
16 findings in relation to paragraph 1, I will need to go on to
17 consider things like Recommendations.

18 But also you can't look at any particular finding
19 under paragraph 1 in isolation. Just for example--and this is
20 entirely hypothetical; this doesn't relate to anything in
21 relation to this Inquiry--but the Recommendations are going to
22 be very different. If there is one instance of a mere
23 possibility that may not be any more than mere possibility, then
24 if there were findings in respect of lots of incidents which may
25 be greater than a mere possibility. So, it's a matter of taking

1 the whole thing into account at that stage on Recommendations.
2 But none of that, in my view, at the moment, bears upon the
3 construction of paragraph 1 where the hurdle is--the hurdle is a
4 modest one.

5 Having said that, I also take into account this: That
6 one would not leap over even that modest hurdle, I don't think,
7 in respect of public officials, particularly senior public
8 officials, without some very considerable thought and some
9 anxious scrutiny.

10 SIR GEOFFREY: If I may say so, yes, that again was in
11 our minds. The threshold for the kinds of behavior that you're
12 being asked to look at on paragraph 1 do admit of again a
13 sliding scale of anxiety--anxious scrutiny, and possibly even
14 the approach that Lord Hoffmann took, the famous approach of
15 whether it's a lion or an Alsatian in Hyde Park.

16 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, I agree with
17 all of that.

18 SIR GEOFFREY: Yes.

19 COMMISSIONER HICKINBOTTOM: And I say, if by was of a
20 hypothetical example where there is one instance where I would
21 be minded to make a finding under paragraph 1, then for the
22 reasons Lord Hoffmann set out I might not be minded to make
23 those findings because it may be inherently unlikely.

24 SIR GEOFFREY: That's broadly the principle that we
25 wanted to draw to your attention.

1 COMMISSIONER HICKINBOTTOM: That's Lord Hoffmann's
2 view.

3 SIR GEOFFREY: Yes.

4 COMMISSIONER HICKINBOTTOM: None of the--all of the
5 examples I've used are hypothetical because I've got here the
6 reminder of the evidence and think long and hard about
7 everything I have heard. But that's very helpful.

8 Just before I ask Mr Rawat if he's got anything to
9 add, is there anything that you want to add at the moment, Sir
10 Geoffrey?

11 SIR GEOFFREY: No, thank you, sir.

12 COMMISSIONER HICKINBOTTOM: Mr Rawat, anything to add?

13 MR RAWAT: Very briefly, Commissioner.

14 I think the position we've reached is that, Sir
15 Geoffrey is not pursuing the apparent sort of two-stage approach
16 that was set out in his written submissions which was that first
17 you make the findings of fact to the civil standard, and then
18 you may go on to consider whether there has been behavior that
19 comes within paragraph 1 to a lower standard. I think, in my
20 submission that is, he's right not to pursue that approach.

21 What we have to remind ourselves is that you are
22 conducting an Inquiry bound by your Terms of Reference. What
23 you are asked to do is not to determine civil or criminal
24 liability, not to adjudicate between competing cases but rather
25 to answer the question in the Terms of Reference and, to do so

1 where necessary and only where necessary making findings of
2 fact.

3 And you are also entitled to make statements of
4 opinion and to make comments, so I think we shouldn't conflate
5 evidence with the standard of proof. The evidence is, is it
6 what it is, it is a bulk of information that you will have to
7 have. You are in a different situation from the English
8 Inquiries, and I know Sir Geoffrey in his submission refers to
9 Al Sweady. I think the better and proper starting point is the
10 ruling of Dame Janet Smith in Shiffman--

11 COMMISSIONER HICKINBOTTOM: Yes.

12 MR RAWAT: --which then led on to rulings by Lord
13 Saville in Bloody Sunday and Sir William Gage in Baha Moussa,
14 all of which establish one point, which is that there is no set
15 standard of proof in an Inquiry. But in my submission you are
16 in a different position because your Terms of Reference set your
17 starting point, which is may, and whether you say reasonable
18 grounds to suspect, reason for suspicion--

19 COMMISSIONER HICKINBOTTOM: Real possibility.

20 MR RAWAT: --may not matter, but that is the starting
21 point.

22 And the reason I say it's a starting point is that
23 depending on your assessment of the evidence, you too can adopt
24 a variable standard, there may be circumstances in which you may
25 say that I am satisfied or it is likely. You are not fixed to

1 that starting point, but it is--you can go as low as that if
2 necessary.

3 COMMISSIONER HICKINBOTTOM: I understand that.

4 Good. Thank you.

5 Sir Geoffrey, the third matter is the application for
6 permission to question witnesses, and I've got your application.
7 Thank you very much.

8 Just before we come on to the particular witness--

9 SIR GEOFFREY: I'm not sure which applica--you have a
10 letter I think written by those instructing me; is that right?

11 COMMISSIONER HICKINBOTTOM: No, I have an application
12 by the Attorney General dated the 30th of September.

13 SIR GEOFFREY: Right, okay, thank you. I'm afraid
14 that it's something that I've fairly relatively recently come
15 into, but I can make the submission this morning if you wish it
16 to be made.

17 COMMISSIONER HICKINBOTTOM: Okay. No, no, I do,
18 please.

19 Just before we come on to the particular individuals,
20 there are three of them, the Auditor General, the Governor, and
21 the former Governor, we've heard evidence from the Auditor
22 General. We're about to hear evidence from the Governor.

23 But just looking at the Act and the principles--

24 SIR GEOFFREY: Yes.

25 COMMISSIONER HICKINBOTTOM: The application focuses on

1 two things, really, Section 12 of the Commissions of Inquiry
2 Act, and the requirements of natural justice, what we would say
3 now is the requirements of procedural fairness to those who may
4 be accused or criticized in some way.

5 In relation to the Act, Sir Geoffrey, the relevant
6 section is not, of course, Section 12, it's Section 13. Section
7 13 deals with examination of witness by counsel because that's
8 the side note, and that says that omitting irrelevant words for
9 these purposes. A Barrister or Solicitor authorized by the
10 Commissioner as to appear before them for the purpose of
11 representing any person so far as the Commissioners think
12 proper, examine or cross-examine any witness on any matter which
13 the Commissioner has deemed relevant to the Inquiry, and a
14 witness so examined or cross-examined shall have the same
15 privileges, et cetera, as if you were to be examined by a
16 Commissioner. So that's the relevant Section.

17 So that gives me a discretion as to whether to allow
18 any questioning of witnesses on the basis that any questioning
19 may be helpful, may be relevant to the Inquiry, and also helpful
20 to me. That's the first point.

21 And the second point in relation to procedural
22 fairness, which you raise, in respect of the matters that you
23 wish to question the three witnesses about, these are matters in
24 which the Elected Ministers whom you represent, the Attorney
25 represent, the Elected Ministers criticized them, the Auditor

1 General, the Governor and the former Governor are the object of
2 criticisms made by the Elected Ministers.

3 So procedural fairness in ensuring that I am fair to
4 witnesses applies to the Auditor General, the Governor and the
5 former Governor. It doesn't apply to the accuser. It applies
6 to the individuals that are criticized.

7 So, in respect of general principles, any further
8 submissions on either of those?

9 SIR GEOFFREY: I don't think I agree with you insofar
10 as your analysis goes, but I don't think you can, with respect,
11 ignore the fact that your Inquiry is playing out in public in a
12 very clear political context which the Minister's statements
13 have drawn to your attention, or sought to do so. And while
14 there may be from the point of view of your procedures the
15 points you raised of procedural fairness to the witnesses, there
16 is a broader sense, in my submission, in which fairness to the
17 Elected Ministers to have--to be effectively represented in your
18 Inquiry, and Section 12 clearly means effectively represented,
19 it means an adequate opportunity to--the word "representation"
20 doesn't mean simply sitting passively unable to influence your
21 thinking, unable to affect your judgment on matters of acute
22 concern to the participant.

23 And in our submission, to be effectively participating
24 in your Inquiry must at some point mean having the opportunity
25 to address questions to witnesses whose evidence of is critical

1 importance to aspects of your Inquiry which touch upon the
2 Ministers, their concerns and their interests.

3 Now, as you know, the central focus of the Ministers'
4 concern before you, which it goes back to almost every aspect of
5 the Inquiry that you have recently been conducting, is the--is
6 the condition--conditions of service, training, capacity,
7 resourcing of the Public Service. What the Ministers say to you
8 is that if you ask why there is no proper policy for something,
9 no proper written policy that has been published and is
10 transparent to the public, their answer to that is because the
11 Public Service has not been in the habit, say, sporadically in
12 following those kinds of practices.

13 If you ask why was it not possible to design and
14 execute pandemic relief schemes in the time scale that the
15 emergency required with greater precision, accountability,
16 transparency, the answer comes back to the diagnosis that the
17 Ministers have made in their lengthy statements to you in
18 writing that the Policy formulation function of the Public
19 Service while, indeed, all four aspects of critical
20 policy-making, policy formulation, policy development,
21 monitoring and evaluation, all of those four critical aspects of
22 the Policy function were diagnosed by the Ministers on the basis
23 of reports before you disclosed to you as having been
24 chronically neglected. This is something which is the center of
25 the Ministers' submission to you.

1 If you ask why a Minister doesn't follow appropriate
2 policy in a policy environment that guides his decision-making,
3 it's because that environment doesn't exist. Now, why doesn't
4 it exist? The Ministers say not because of the elected
5 institutions into which a great deal of attention has been
6 devoted, but because those responsible for the conduct,
7 stewardship, training, discipline, modernisation and reform of
8 the Public Service have not entertained it for years and didn't
9 until 2017.

10 Now, that is so fundamental not only to your
11 paragraphs 2, 3, and 4, but it's a relevant factor to your
12 considerations on paragraph 1. What may be evidence of
13 something in a UK context may well not be evidence of something
14 in this jurisdiction because in a UK context your expectations
15 will be conditioned by certain basic expectations of how matters
16 would run.

17 Let me give you another example. It's a fundamental
18 fact that the Attorney has attested to you in her evidence that
19 the record keeping of the Public Service isn't methodical, isn't
20 scientific, and at times isn't even coherent. You've suffered
21 from that, we've all suffered from that, and in the course of
22 your Inquiry. Now, again, the absence of records might well in
23 a different jurisdiction context give you to have some anxiety,
24 but in this jurisdiction, with respect, it's not unusual. Now,
25 there have been exacerbating factors.

1 So, we say that this fundamental question of the
2 condition in which the apparatus and infrastructure surrounding
3 democratically Elected Ministers are able or forced to do their
4 jobs is of critical relevance, and the Ministers should be
5 permitted to ask questions on these central questions that go to
6 all parts in paragraphs in order to demonstrate that it is--this
7 is what I mean by the wider context, but it isn't only the
8 elected and local institutions that you are here to inquire
9 into, but faithful to the terms of your oath and your mandate
10 into all aspects of the governance of these islands.

11 We submit--yes.

12 COMMISSIONER HICKINBOTTOM: But that's right. So,
13 when the Auditor General gave evidence on Friday, I, lodging
14 through Mr Rawat, of course, but I raised questions about VINPP
15 and the publication of that Report, and I raised criticisms
16 because these had been raised by the Ministers, that she took a
17 stance on the issues which you've raised, which is not an
18 objective stance, and it's a political stance. Those matters
19 were put to the Auditor General.

20 SIR GEOFFREY: Yes, they were.

21 And let me deal with that straightaway because I need
22 to--I need to deal with that immediately.

23 Of course, the questions were put, or at least some of
24 them were put, but if your Inquiry is to have the public have
25 confidence of the public that it is genuinely looking into

1 matters connected with the governance of these islands that lie
2 at the door, not at the elected institutions but others as well,
3 it would be (a) enhanced by allowing the Minister's
4 representatives to ask the questions, and (b) it is extremely
5 difficult when your Inquiry has been per force no doubt centered
6 so much upon the public officials of this Territory, it does
7 look as though the cross-examination or the examination of those
8 has been pursued with a vigor and persistence that was not
9 always apparent in the questions asked of the Auditor General.
10 Let me be candid--and let me explain why.

11 There were five broad areas that I wished to ask
12 questions of the Auditor General:

13 First, the language. My learned friend Mr Rawat
14 canvassed the question of the language used in the Auditor
15 General's Reports, and he put to the Auditor General but one
16 word of that language in a manner that drew the sting of the
17 real criticism. I mean no disrespect to Mr Rawat. I know he
18 knows that, he has a difficult job, being counsel for the
19 Inquiry is exceedingly difficult. But the fact is that the real
20 word which the Ministers deplored and which is difficult, I
21 would respectfully submit, to justify in an Auditor General's
22 Report is the word "falsify".

23 Now, the criticism made in the Minister's
24 response--that is to say the Premier's Office's Response--is
25 that the various adjectival and verbal expressions used by the

1 Auditor General leave no doubt in the mind of the reader that
2 what she at least is leaving open as a possibility is that there
3 was a quite deliberate attempt to falsify documents and claims.

4 And the word "falsify" and the conjunction of the
5 language that she used, which is the point made in the Premier's
6 Office's Response, namely inflate alongside "falsify" the
7 expression that is used in the document on the Premier's
8 Office's behalf is there can be no doubt about the deplorable
9 pejorative intention of that language when the word "inflate" is
10 then used alongside the word "falsify".

11 Now, if one was putting--and I mean, as I say, no
12 intent here to suggest that my learned friend's efforts were not
13 entirely genuine to be balanced, and to some extent perspective
14 was given by his question as was yours, but the real sting of
15 that criticism is that an Auditor General would suggest of
16 senior Public Officers in this Territory that they had falsified
17 claims, that, in our respectful submission is worthy of further
18 exploration.

19 And the Ministers watching on and those who had
20 witnessed this--and there are many--knowing of that language
21 would have wondered why it hadn't been put. Now, it wasn't put
22 because counsel and you, sir, are overwhelmed--well, not
23 overwhelmed, but you are facing an enormous and complex task.
24 But that is why to deprive yourself of the opportunity, the tool
25 that cross-examination can give, properly conducted of course,

1 is, in our submission, a mistake, and it's a mistake, if I may
2 say so, that we've noted--I've mentioned before. I realize your
3 time constraints are tough, but frankly a tool--a
4 cross-examination by another party or by participants is a tool
5 that other Inquiries use from time to time, and we would invite
6 you on this occasion.

7 And let me just enumerate the other areas if I may for
8 the Auditor General.

9 The question of the publication of her Report which,
10 indeed, both you, sir, and Mr Rawat did address, but it's not
11 clear from a review of the evidence she gave whether, in fact,
12 she is now saying her Report was published or was not. One
13 might deduce from the fact that she said that she originally in
14 answering Mr Rawat, she said she publishes her Report on the
15 website when the--if the Minister doesn't do it, when the Annual
16 Statements are published--you may recall this exchange of
17 questioning between you, sir, and the witness--she publish it on
18 the website, but it only emerged a little later in response to
19 Mr Rawat's questioning that, in fact, the website had only been
20 up since early this year.

21 So, the real question is: Was it published or wasn't
22 it published? Now, that is important because, if it wasn't
23 published there is a question as to why the Auditor General said
24 to you--and we say--and I would be putting it to the Auditor
25 General--the effect of her evidence was clear beyond doubt that

1 it had been published. She went as far as to say not only it
2 had been published but that a member of the public had come up
3 to congratulate her upon it.

4 So, we want to know--and this leads to a much more
5 serious point, with respect, because the point is this: She
6 told you, the Auditor General, quite understandably that she was
7 most concerned that reports of that kind should reach the public
8 domain. Indeed, she used the expression "it shouldn't simply
9 sit on somebody's desk". And she went on to say that
10 particularly with "value for money" reports it was important the
11 public knew of it.

12 The question, therefore, arises, sir, what did she do
13 about it? If the Minister didn't publish it--and we now pretty
14 certainly know he didn't--why did the Auditor General--first,
15 what did the Auditor General do? Did she discuss it with the
16 Permanent Secretary who she said at the time to be, I think,
17 Dr Potter? Did she raise it with the Ministry, given the
18 importance of these matters reaching the public domain.

19 And let's not forget that the nature of her findings
20 were very serious.

21 And then that leads on to a further question. If the
22 Minister doesn't publish, and if at that time she wasn't--she
23 didn't have a website, why did she not escalate the matter, as
24 she told you on the 28th of June she could, by treating it as a
25 Section 20 Report?

1 She told you on the 28th of June that she had a
2 perfect discretion to decide that a Section 12 Report should be
3 treated as a Section 20 Report. But it would appear that the
4 Auditor General did nothing to bring that Report to public
5 attention.

6 Now, we are--the Ministers are anxious to understand
7 why not because the Premier, as you saw, was confronted with
8 that Report and had not seen it.

9 COMMISSIONER HICKINBOTTOM: Sir Geoffrey--

10 SIR GEOFFREY: I'm so sorry.

11 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt.

12 There are three other matters you say you want to
13 raise with--

14 SIR GEOFFREY: Yes.

15 COMMISSIONER HICKINBOTTOM: Could you briefly--

16 SIR GEOFFREY: Yes, I can.

17 The next broad heading is the timing of the Report.
18 Questions were asked about the urgency and the rush by you, sir,
19 and by Mr Rawat, but I think the Ministers who instruct me are
20 keen to understand the dates and times on which matters actually
21 unfolded.

22 For example, when did the Governor ask her to audit
23 these pandemic schemes? Was she first aware--did she have
24 discussions with the Governor or anybody else about the
25 timetable in which she should deliver her Report to him? When

1 was he first aware that you, sir, wished to hear her evidence on
2 the 28th of June? And was she informed--to some extent she may
3 have answered this question--of the ground her evidence was
4 required to cover?

5 These are relevant. Let me explain why, if I need to.

6 The Ministers believe that there is a possibility that
7 these reports were commissioned--and there may be nothing wrong
8 with this--directly in anticipation of your Commission of
9 Inquiry, and that the purpose of the Governor in making these
10 requests was to ensure that at the time, that you, sir, were
11 going to hear the evidence from the Auditor General, those
12 Reports would be available to be adduced by counsel to the
13 Inquiry on the record of the Inquiry.

14 Now, if that is so--and it may not be, but those
15 instructing me may wish to explore the matter--if that were so,
16 and if it did play a part in the reason why the Permanent
17 Secretary was declined until the 28th of June to respond, albeit
18 that the Response may have been in effectual, what we say about
19 that is that, if it were a part of her consideration, it would
20 have been fair for the Auditor General to tell the Permanent
21 Secretary that she was governed by a timetable that essentially
22 was looking towards the evidence she was to give before you on
23 the 28th. Why? Because the Premier had made it abundantly
24 plain to the whole of his Government that the priority was to
25 facilitate your Inquiry. It would have almost certainly led to

1 a change of conduct on Dr O'Neal-Morton's behalf, certainly if
2 she'd carried out the Premier's instructions, and it was if it
3 were the case--and I'm not saying as though it was, but the
4 Ministers are obviously, through me, expressing where their
5 concerns lie, if it was not disclosed, then there may be a
6 certain want of candor there, which needs to be canvassed
7 because it may affect your view of the Public Officers'
8 concerned.

9 Now, that's one area. That's that way. I also would
10 like to ask you about the Financial Secretary's view, the former
11 Financial Secretary, Mr Forbes, who you may recall telling you
12 that, in his view, the Auditor General should not generally be
13 involved during the execution of a programme because the risk is
14 that, in making Recommendations, she comes later to audit a
15 programme that she's influenced by those Recommendations.

16 COMMISSIONER HICKINBOTTOM: Is that the fourth?

17 SIR GEOFFREY: That's the next one.

18 The next one, sir, is Cabinet policy. The Auditor has
19 consistently given evidence before you that a change of policy,
20 once approved by the Cabinet, could only properly be affected by
21 the Cabinet. We don't accept that, we say to you--and it may be
22 that you to want hear submissions on it in due course, but it is
23 open to a Minister on good ground to alter aspects of a Policy
24 approved by the Cabinet where, particularly if he believes, and
25 where he believes his colleagues will support the change, and as

1 a political matter, of course, it's appropriate to return to the
2 Cabinet at some stage, we say Section 56 should be interpreted
3 flexibly; otherwise, the business of government just couldn't
4 get done. There are many cases, many cases where a Minister
5 takes a view. We may well discuss it informally with the
6 Premier, the Prime Minister, that a Cabinet policy needs
7 adjusting.

8 Now, in this particular case, how would--if that were
9 so, we would like to explore, sir, with her how it might affect
10 her Report. Because while it's quite understandable that she
11 would look at the Cabinet policy, in this case there was clear
12 that the ministerial conduct--conduct of the Ministry was
13 departing from that policy. In our submission, and certainly at
14 the moment prima facie, we want to ask questions about how she
15 regarded the change in policy, why she felt that it was only the
16 Cabinet could approve a change in policy, and also about
17 churches, that there was a change on the 28th of September.

18 So, the final area relates to some assumptions in the
19 report. Those instructing me found puzzling some of the answers
20 about the schemes themselves. For example, she told you that
21 she would have to--you would have to start such a programme by
22 building up the Department of Agriculture, so her starting point
23 was that the proper way to go about running such a scheme would
24 have been to equip the Department of Agriculture with the
25 infrastructure apparatus and equipment to deliver it. Now, that

1 raises questions about whether or not the assumptions she's
2 applied to what are effectively emergency relief and stimulus
3 schemes are really the opposite in the circumstances of the
4 times.

5 There were other questions that, broadly speaking,
6 there would be an area to do with the evidence of how she had
7 applied assumptions in the produce--production of her Report,
8 and those are the areas I want to cover. Had I been
9 present--and I regret I wasn't--I'm afraid, sir, that on that
10 day I wasn't available and certainly not to rearrange my
11 commitments as late as Friday morning--it may have been
12 difficult in any event at the time you concluded for me to
13 conclude. I would say that probably I have an hour to an
14 hour-and-a-half of questions for the Auditor General.

15 So, that is--that is the Auditor General. And in our
16 submission, they are important to show that the Ministers and
17 the participants that a proper opportunity has been afforded to
18 them to put their concerns and criticisms. It certainly
19 wouldn't have been what would have been necessary had you, sir,
20 and Mr Rawat not embarked on the exercise, which in this case it
21 would have involved substantially longer. But I would invite
22 you for those reasons to permit the cross-examination insofar as
23 the Governors are concerned, of course, I shall have to wait and
24 see how the questioning goes.

25 COMMISSIONER HICKINBOTTOM: Yes.

1 Can I just deal with the Governors first, Sir
2 Geoffrey.

3 SIR GEOFFREY: Yes.

4 COMMISSIONER HICKINBOTTOM: Because I think that's
5 easier or at least short.

6 I agree with that. It seems to me that the
7 appropriate time to hear the application in relation to the
8 Governor and no doubt the former Governor tomorrow is at the end
9 of Mr Rawat's questions, and then you can make submissions as
10 you have now in relation to the--

11 SIR GEOFFREY: The Auditor General.

12 COMMISSIONER HICKINBOTTOM: And we can see, as it
13 were, where we are. So, in terms of the Governor, we will
14 simply park that issue until sometime later today.

15 In relation to the Auditor General--and I will hear
16 Mr Rawat on this, but I'm hoping that we can deal with it fairly
17 shortly. One point I would make but I don't want to enter into
18 a lengthy debate about it, it was very unfortunate that no one
19 from the Attorney General's team was able to deal with this
20 application as an application on Friday because it would have
21 been very helpful to have done it then. Even if--even if--we
22 had not been able to conclude the Auditor General's
23 evidence--hopefully we could have done, but even if we couldn't
24 have done because of the hour--it would have been helpful to
25 know where we were with the Auditor General.

1 Secondly, given where we are in relation to the
2 evidence looked at as a whole, I would be minded to allow you to
3 ask your questions in relation to the matters you've identified.
4 I would restrict that to an hour-and-a-half, and that what I'd
5 propose to do, subject to anything that Mr Rawat wants to say,
6 is to make inquiries of the Auditor General as to when she can
7 come back, and when she's able to deal with your questions, Sir
8 Geoffrey.

9 SIR GEOFFREY: Thank you.

10 COMMISSIONER HICKINBOTTOM: The notice for that may be
11 short, but we will do what we can today to try and identify with
12 the Auditor General when she can come back.

13 SIR GEOFFREY: I wonder, I'm most conscious of your
14 timetable needs to be observed, so if it's not helpful now, but
15 I wondered if I might just raise two ancillary points to give me
16 an idea because it may help me in judging whether I need to ask
17 questions of both Governors.

18 First, is it your intention--it may not be, and I'm
19 not seeking to load this question in any way; it's a genuine
20 inquiry--is it your intention to seek in some form or other
21 final submissions dealing with the Inquiry as a whole and
22 its--the evidence before you either writing or orally or both?
23 In other words, what opportunities will the Attorney have and
24 those representing to me to submit to you their reflections and
25 focused observations on the evidence that you've heard?

1 If you said to me you were minded to do that, of
2 course, it might make a difference to how my judgment about how
3 I should conduct matters over the next day or two because these
4 points may be able to be raised and I may be able to be shorter
5 and I may not, but I'm thinking aloud.

6 Secondly, sir, clearly my decision as to whether or
7 not you were to give me the opportunity to examine the
8 Governors, the Governor and the former Governor, may well depend
9 on how much time is available to me. This is a theme of such
10 central importance to the Elected Ministers that it will be no
11 use my simply being given the opportunity to ask 10 or 15
12 minutes' questions, when I may have for them is considerable
13 longer. But we can address that later, but it would be helpful
14 for me to know if you had--and it may be you haven't reached a
15 decision on this, if you had any mind to how you might, so to
16 speak, round up or complete your Inquiry.

17 I know that the Attorney in particular is conscious
18 that she's simply not had the time but would like to assist you
19 further, you asked her a little time ago on questions of
20 governance whether she had any Recommendations or suggestions as
21 to how matters could be improved, and I think as inevitably as
22 time has marched on and the evidence has become clearer before
23 you, she may well have reflections on that that she would like
24 to submit.

25 COMMISSIONER HICKINBOTTOM: Can I still, before we do

1 that, hear from Mr Rawat.

2 Firstly, in relation to the Governor today and the
3 former Governor tomorrow, I think, the Protocol still applies.

4 SIR GEOFFREY: Yes.

5 COMMISSIONER HICKINBOTTOM: And then, in relation to
6 any questions that you have for the Governor, I would urge you
7 at the end of each section that--of questions that Mr Rawat puts
8 to the Governor, that you raise any questions for the Governor
9 then, through him, through the Protocol, which is still open to
10 you. That's the first point.

11 The second point is this: The Governor has indicated
12 a willingness to be asked questions by me through Mr Rawat in
13 the public interest. He's volunteered to respond to those
14 questions. As you know, the Governor is not compellable.

15 SIR GEOFFREY: True.

16 COMMISSIONER HICKINBOTTOM: He's--because of
17 Section 16 of the Evidence Act, I can't require him. I think
18 uniquely in the Inquiry, I can't require him as a witness to
19 answer any questions, and we'll have to deal with that at the
20 end of his questions. That may be--that may or may not be an
21 issue in respect to any further questions that you may want to
22 put to him.

23 In terms--thirdly, in terms of final submissions, I
24 haven't come to a final view, but I've obviously given this some
25 thought. We've dealt with some of the "final submissions" as

1 we've gone along, and many of them have been very helpful, but
2 we've dealt with certain submissions on certain aspects of the
3 law and evidence as we've gone along. In respect of other
4 aspects, I'm sure that I will request assistance on them, and it
5 may will be that I'll need a little time to consider which
6 areas, but those I can let you know about.

7 What I'm less sure of is what I understand you--the
8 Attorney wants to do, as it were, to make freestyle submissions.
9 And what would be helpful in the course of the next day or so is
10 if you were to let me know, Sir Geoffrey, of the very broad
11 areas that the Attorney may wish to make some submissions on,
12 and it may be simply as broad as she'd like to make submissions
13 on, I don't know, the evidence on governance given by X or
14 something, but that would help me focus on where final
15 submissions could most usefully be made. And as it were, in the
16 usual way, I would expect final submissions to be largely in
17 writing, then with a fallback to oral submission if required,
18 which could then be relatively short.

19 SIR GEOFFREY: Thank you for that.

20 COMMISSIONER HICKINBOTTOM: Does that help?

21 SIR GEOFFREY: Yes, indeed, it does. It helps a lot.
22 Thank you.

23 COMMISSIONER HICKINBOTTOM: We've kept Mr Rawat out of
24 this, Sir Geoffrey, but I'll just ask Mr Rawat if he's got any
25 comments on where we are in relation to these witnesses.

1 MR RAWAT: Can I deal with them in three parts.

2 In terms of the Governors, I agree that we cannot take
3 those any further until my questions, but I would, as you have
4 done, Commissioner, encourage the submission of questions
5 through me. We've done it twice before. It works quite well.
6 A question can be e-mailed to those who sit behind me, and we
7 can then consider, and if need be, there need to be the
8 discussions, then we can--I can take five minutes and discuss it
9 with Sir Geoffrey, if necessary.

10 Taking the Auditor General next, but making the
11 general point, important is that representation and effective
12 representation is not determined by Section 12 of the Act alone.
13 We must always go back to Section 13, because Section 13
14 actually is the foundation for the rules that we have issued in
15 the Protocols that we had issued in terms of--particularly the
16 rules--in terms of the process for questioning witnesses. It is
17 not an unfettered right either to examine or cross-examine, and,
18 in fact, I am bound by it as much as any other counsel involved
19 in this process. It is only so far as you consider proper and
20 on any matter that you deem relevant.

21 Now, in terms of the Auditor General, there are now
22 five matters that Sir Geoffrey wishes to canvass with her. The
23 first is the use of language; the second is the VINPP Report;
24 the third is the timing of the COVID Reports; the fourth is her
25 knowledge of Cabinet policy; and the fifth is certain

1 assumptions in her Report.

2 I'm bound observe that in relation to three of those,
3 they do not form part of the criticisms that we asked others to
4 submit to a witness, and I would be concerned that she's not
5 placed particularly because the Auditor General is not
6 represented particularly because she might have very well, and
7 have been entitled to, have expected that when she came on
8 Friday her evidence would be concluded there and then, and she
9 wouldn't be, as now, is now emerging to be summoned back for
10 more. And there needs to be a way found to make sure that she
11 is alerted to what criticisms are being made of her.

12 The length--difficulty with that, of course, is that
13 she does not know who it is that is making those accusations
14 because they are based upon a report, which we have been calling
15 the "Premier's Office's Report" which I could not tell who the
16 authors are. They are a mix of Officers within the Premier's
17 Office, and to borrow from Dr O'Neal-Morton, the many Members of
18 the IRU.

19 They--it is also a report from, at least in one
20 instance, Dr O'Neal-Morton has resigned, and I am concerned that
21 the Auditor General be treated fairly, which I'm sure you will
22 ensure, Commissioner.

23 But in terms of the ambit of further questioning, what
24 I would explain or set out is this. On the date of the VINPP
25 publication, the evidence that was put in canvass for the

1 Auditor General on the use of language, that was canvassed in
2 two ways: Firstly, in the specific in that the specific
3 criticisms that have been advanced on the--by the Attorney
4 General were put to the Auditor General, but also more widely in
5 terms of her use of language, that was canvassed with her.

6 What I also canvassed with her, not because it was
7 a--it had been advanced by the Attorney General, although I'm
8 bound to say it could well have been and should have been
9 matters, was matters such as the timing of the Report, as I
10 understood it to be being put forward by The Honourable Premier
11 in his evidence. I canvassed with the Auditor General the
12 reason as to why she could not wait before issuing her Report.
13 I put to her Glenroy Forbes' evidence as to the--and
14 Dr O'Neal-Morton's evidence--as to the sequence of auditing that
15 should occur, in his view, and in Dr O'Neal-Morton's view.

16 I caveat that, although we did not put it to the
17 Auditor General for good reason, is that it was accepted by
18 Mr Forbes, and, as I understood it, it was accepted by The
19 Honourable Premier that the Auditor General has a right to
20 initiate a report when she chooses or to embark on a report when
21 she chooses. And the advice of the Attorney to Dr O'Neal-Morton
22 was that there was no basis not to collaborate or cooperate with
23 Auditor General.

24 And so, what the position we've reached, not least
25 because there wasn't anyone here to put questions to her on the

1 Attorney's behalf on Friday, is that--the question is whether it
2 is necessary and proportionate to ask her questions. I hear
3 what you say, Commissioner, as to what you're minded to do, and
4 so I will only add this: That what I hope is the questions
5 don't go over ground that has already been covered and seek to
6 unpick answers that have already been given. What you would be
7 best be assisted by are questions that are intended to further
8 your understanding of a particular issue insofar as you deem it
9 to be relevant to your Inquiry.

10 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

11 Mr--Sir Geoffrey, could I just ask two points that I
12 hope you'll be able to answer to alleviate some of those
13 concerns of Mr Rawat has:

14 Firstly, my understanding from your submission today
15 is that the areas, let's call them "areas of concern" that the
16 Elected Ministers have are those that you've set out today. And
17 I understand Mr Rawat's point that these are not criticisms that
18 have been--not all criticisms that had been previously made, but
19 those are the areas of concern.

20 You're on mute, Sir Geoffrey.

21 SIR GEOFFREY: I do beg your pardon.

22 Yes, exactly, those are the areas I wish to cover.

23 COMMISSIONER HICKINBOTTOM: And in relation to the
24 point Mr Rawat makes about who is making these criticisms of the
25 Auditor General, and the point he makes about a number of the

1 documents which have been lodged by the IRU or otherwise on
2 behalf of the Attorney are not named, which has made life
3 slightly difficult, but my understanding is that these concerns
4 and criticisms are effectively made; they're made by the elected
5 Ministers, et cetera, the "et cetera" being the other
6 individuals, the other--

7 SIR GEOFFREY: Well, as you know, Sir Gary, it's not
8 uncommon in the United Kingdom, for a Ministry to publish its
9 response either to a report, an Inquiry, a select committee
10 report. This represents, in effect, Ministry's response to the
11 Auditor General's Reports.

12 Now, the Premier, as I understand it--I was not, I'm
13 afraid, present for his evidence as I can recall--perhaps I
14 was--but has adopted it and said it represents the Response
15 with--which he has approved as the Minister of that Department.

16 COMMISSIONER HICKINBOTTOM: No, no, I'm trying to make
17 life easier rather than more difficult.

18 SIR GEOFFREY: Yes, yes.

19 COMMISSIONER HICKINBOTTOM: These terms of criticisms
20 are effectively those of the Elected Ministers.

21 SIR GEOFFREY: Well, they're those of the Public
22 Officers and the Ministry, which the Premier presides over, but
23 yes, they are agreed with by the Elected Ministers.

24 COMMISSIONER HICKINBOTTOM: Okay. I mean, A problem,
25 although hopefully it's not going to be--but it isn't going to

1 be insuperable--the problem is that these submissions contain
2 evidence, they contain legal submissions, and it's not always--

3 SIR GEOFFREY: Always legal, I think, with respect,
4 not legal. They are points in answer to. I don't think there's
5 any submissions of law in them, but what there are is
6 expressions of opinion, expressions of view and observations of
7 argument, but they're not necessarily legal argument.

8 COMMISSIONER HICKINBOTTOM: I accept that, but they
9 contain evidence, and they contain, as you say, opinion evidence
10 and views--

11 SIR GEOFFREY: Yes.

12 COMMISSIONER HICKINBOTTOM: --but without any
13 indication as to whose opinion and whose views that they are
14 which makes it--

15 SIR GEOFFREY: Well, ultimately the Minister is
16 responsible.

17 COMMISSIONER HICKINBOTTOM: Well, that's correct.
18 That is correct under Section 56, and that's the way that I've
19 been proceeding in any event. So--

20 SIR GEOFFREY: Yes.

21 COMMISSIONER HICKINBOTTOM: --the short answer is that
22 these concerns and criticisms are effectively those of the
23 Elected Ministers, and where documents have been prepared by
24 Ministries, the Ministers are responsible for those documents in
25 any event.

1 SIR GEOFFREY: Yes.

2 And as you know, Ministers will always be assisted,
3 even if they make an Affidavit in their own name. It's most
4 unlikely that the Minister will visit the filing cabinets or
5 otherwise ascertained for himself the facts. They'll be
6 presented to him by his Public Officers.

7 COMMISSIONER HICKINBOTTOM: But it's--

8 SIR GEOFFREY: So, just as in this case, it was the
9 work of many Public Officers, as the Permanent Secretary said.

10 COMMISSIONER HICKINBOTTOM: I'm not sure that a
11 Minister has actually provided us with an Affidavit, but if a
12 Minister were to provide an Affidavit in respect of the COI,
13 then we could ask him questions of that Affidavit because it
14 would be in his name.

15 Our problem, and I don't really want to debate it
16 because it's not at the moment helpful or constructive, but it's
17 been a problem where we've had very lengthy documents and we
18 haven't known who to ask questions--to whom to ask questions.

19 SIR GEOFFREY: I see, yeah.

20 COMMISSIONER HICKINBOTTOM: We know where these
21 criticisms of the Attorney are coming--the Auditor General are
22 coming from.

23 And finally--and I think this is right--that the
24 application certainly does not make this clear. The application
25 is based upon the Elected Ministers wanting to cross-examine the

1 Auditor General in this case on matters in respect of which they
2 criticise her. That's how the application is made.

3 But my understanding of the application really is that
4 it's in respect of matters which you've outlined today,
5 helpfully, where they see, really, potential criticisms of them
6 and, therefore, they're attempting to defend their position, and
7 that, as I understand it, was another plank of your submission
8 as to why these questions should be--

9 SIR GEOFFREY: Yes. Yes, and, of course, the
10 necessarily cumbersome procedure of criticisms, I mean, one
11 could put them better in some cases at least, certainly with the
12 Internal Auditor's disagreements, not so much criticisms.
13 People can honestly disagree on matters without necessarily
14 wanting to make personal criticism.

15 Now, in connection with the Auditor General, they can
16 be legitimately described, some of them, as criticisms, and yes,
17 there may be criticisms of criticisms made of the Minister, so
18 you're right. To some extent they are defensive.

19 COMMISSIONER HICKINBOTTOM: Well, we'll proceed, Sir
20 Geoffrey, in respect to the Auditor General as I've outlined.
21 I'm quite sure that the Attorney, through you, will deal with
22 his cross-examination responsibly.

23 SIR GEOFFREY: Yes.

24 COMMISSIONER HICKINBOTTOM: Not go over ground that is
25 repetitious.

1 SIR GEOFFREY: No.

2 COMMISSIONER HICKINBOTTOM: We'll deal with the
3 questions in a helpful way, that is helpful to me. And we'll
4 make inquiries now of the Auditor General--

5 (Overlapping speakers.)

6 SIR GEOFFREY: --for--

7 COMMISSIONER HICKINBOTTOM: --may get to last.

8 SIR GEOFFREY: Thank you.

9 COMMISSIONER HICKINBOTTOM: Mr Rawat?

10 MR RAWAT: I raise a--

11 COMMISSIONER HICKINBOTTOM: Yes.

12 MR RAWAT: --matter of practicality. I quite may be
13 wrong, but I believe that Sir Geoffrey is presently outside the
14 jurisdiction.

15 SIR GEOFFREY: Right.

16 MR RAWAT: That may affect timing to some extent but
17 we will try our best to accommodate him.

18 SIR GEOFFREY: I'm grateful.

19 MR RAWAT: It seems to me that want the Auditor--if
20 the Auditor General is going to have to look at documents, then
21 we would be assisted by some indication of what documents she'll
22 be drawn to because we will have to bring her to the hearing
23 room, make sure that the bundles are here. If, for example,
24 she's going to be directed to an answer that she gave which is
25 on the Transcript, we'll need to make sure that's available to

1 her.

2 And I wonder if we could have that information as soon
3 as because it may be that we can try and fit the Auditor General
4 in--

5 SIR GEOFFREY: Quite soon.

6 MR RAWAT: -- as soon as we--soonish that so we can
7 get her dealt with.

8 COMMISSIONER HICKINBOTTOM: Thank you.

9 Sir Geoff, that's clearly sensible. So, if you can
10 identify really as soon as possible or the IRU can identify as
11 soon as possible those documents--

12 SIR GEOFFREY: Yes.

13 I don't think it'll be necessary to go to many, and
14 chiefly the Transcripts of her evidence, but we'll send a list.

15 COMMISSIONER HICKINBOTTOM: But the Transcripts of--

16 SIR GEOFFREY: Of evidence.

17 COMMISSIONER HICKINBOTTOM: No, no.

18 SIR GEOFFREY: Her evidence.

19 COMMISSIONER HICKINBOTTOM: But of which days? Just
20 Friday or when she gave--

21 SIR GEOFFREY: No, the 28th of June and Friday.

22 COMMISSIONER HICKINBOTTOM: Thank you. Well, that, in
23 itself, Sir Geoffrey, is helpful. As I say, we'll make--

24 SIR GEOFFREY: May I make another suggestion?

25 COMMISSIONER HICKINBOTTOM: Yes.

1 SIR GEOFFREY: The transcripts available of my remarks
2 this morning, one possible way of alerting the Witness to the
3 potential criticisms would be to send her a copy of that.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 MR RAWAT: Yes. I mean, we can draw her attention to
6 it. It depends on she may have other commitments. I think what
7 would help, though, is if they were formulated in written form
8 so that they can be given to her in advance so she can have some
9 sense of what she might need to prepare for.

10 In terms of--I mean, it's helpful that Sir Geoffrey
11 has indicated that he may need to take the Auditor General to
12 Transcripts. We have a Neighborhood Partnership Project bundle.
13 We have the COVID stimulus bundles. I'm sure at least one of
14 those will contain the Transcript from the 28th of June, and so
15 we can--we'll just need to make arrangement in relation to the
16 Transcripts.

17 COMMISSIONER HICKINBOTTOM: And that also includes the
18 VINPP Report, the Auditor's Report,

19 MR RAWAT: That's another also, sir.

20 COMMISSIONER HICKINBOTTOM: --that include the various
21 reports on the COVID stimulus grants.

22 MR RAWAT: That's all there.

23 COMMISSIONER HICKINBOTTOM: Good.

24 Finally, Sir Geoffrey, and I think we can deal with
25 this very shortly, with some regret we can go it shortly, and

1 that's the PR application concerning radar barges.

2 SIR GEOFFREY: Yes. This is a matter on which I am
3 going to confess shamelessly that I'm going to ask my learned
4 junior Mr Risso-Gill to deal with, who has had the opportunity
5 to look at the detail on it. I'm afraid I'm not conversant with
6 it. May I invite you to hear from him?

7 COMMISSIONER HICKINBOTTOM: Of course.

8 Can I say just this, Mr Risso-Gill, because I think--

9 MR RISSO-GILL: Yes.

10 COMMISSIONER HICKINBOTTOM: --this very shortly.

11 For one reason or another, and let me make it quite
12 clear that I don't accept that the reason is the fault of the
13 COI, the redactions in respect of the radar barges are simply
14 not available. The application was made--the Attorney General's
15 application for PII, which was made on yesterday is in a form
16 which is incapable of being determined because it doesn't set
17 out the reasons for any of the proposed redactions. The
18 redactions only came in yesterday. And as I understand it, not
19 even the Attorney nor the IRU know the reasons why any
20 redactions are being made and, therefore, the PII
21 application--and this is not the first in relation to this
22 subject matter--these go back to requests made in August, but in
23 any event, the application simply cannot be determined.

24 And, therefore, what I would propose to, do with great
25 regret, is to deal with radar barges in private session. I

1 don't think we have any choice. But I can say this: There will
2 come a point when these issues concerning PII and proposed
3 redactions will have to be dealt with by the Attorney and will
4 have to be dealt with properly. The application for redaction
5 in relation to radar barges has been hanging around for a couple
6 of months. I have never had an application in a form which has
7 been capable of being determined.

8 But there will come a point that notably when I want
9 to put in information from these documents into the Report where
10 the Attorney is going to have to make a proper PII application.
11 In relation to the application for this application, as soon as
12 you are properly instructed, I would ask that that application
13 be made so that I can deal with it promptly and properly. But
14 for today's purpose, and no doubt for the purposes of tomorrow
15 and Thursday, I would propose that going into private session to
16 deal with the radar barge issues because, in my view, we simply
17 have no choice.

18 Mr Rawat, do you want add anything before I ask
19 Mr Risso-Gill to respond?

20 MR RAWAT: No, Commissioner. It's safe to say that in
21 my submission, if there is going to be an application for PII,
22 we've now have had to in a form that a count be determined. If
23 there is going to be an application, it has to be made sooner
24 because its--the effect of the PII application as relevant
25 material is not relied upon, and that will inform what use you

1 can make of the material, so I would urge that it be done as
2 soon as it possibly can be.

3 COMMISSIONER HICKINBOTTOM: Yes. Well, Mr Risso-Gill,
4 that simply underscores the importance of getting this
5 application in properly as soon as you can.

6 MR RISSO-GILL: Yes.

7 COMMISSIONER HICKINBOTTOM: Anything else to add,
8 Mr Risso-Gill for--

9 MR RISSO-GILL: The question is--Sir, you've dealt
10 with the first point I was going to make, which was how to go
11 forward, and that makes sense; your proposal that you have made
12 makes perfect sense rather than attempting to deal with the
13 sensitivity of particular items as they arise, which would not
14 be practicable. The second and third things I was going to do
15 was to explain how we'd reached the position and what the
16 position currently is, but it sounds like that would--this would
17 not necessarily be a helpful moment to do that for you.

18 I hear what--and those that instruct me will have
19 heard what you said. Just one point to make.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 SIR GEOFFREY: As I think you know, Sir, this matter
22 is with the National Security Council. We'd hoped to have their
23 decision before now; we don't have it yet, in respect of
24 the--their current approach to redactions, so that's one thing
25 we're waiting for.

1 The second thing is that you may have perceived this,
2 although I notice it has come to you at fairly short notice,
3 there is a difference between the redactions that were sought in
4 September and those that are being sought now. It appears that
5 the National Security Council are able to be less restrictive or
6 feel they are able to be less restrictive, but we--those
7 instructed by the Attorney General and the IRU have not yet had
8 an opportunity to unpick the potential inconsistencies. And
9 really, we take the view that it would be dangerous for us to
10 extrapolate or infer what the National Security Council might
11 have done with the September redactions had they been applying
12 the approach they apply now.

13 So, there's that inconsistency mattered, which I think
14 my learned friend Mr Rawat raised with dealing with this with
15 Mr Haeri in September that it needs to be "ironed out", if I can
16 use that phrase. So, there is both the need for the decision
17 and an indication of the reasons on which the National Security
18 Council wished for redactions, and then--and I underestimate the
19 size of the task. This is a 4,000-page bundle with numerous
20 duplications within it. There needs to be a substantial job of
21 ironing out to be--that must be done to ensure that we have a
22 consistent approach to this.

23 So, I simply outline what needs to be done so that
24 you're aware of that, Sir, in case any of that wasn't apparent,
25 but I shall say no more for the moment, and obviously we'll

1 proceed as you've suggested.

2 COMMISSIONER HICKINBOTTOM: And over and above that
3 workload, I need a properly formulated application.

4 MR RISSO-GILL: Of course, sir, I didn't--yes, I
5 didn't miss that.

6 COMMISSIONER HICKINBOTTOM: That is also an
7 important--

8 MR RISSO-GILL: Of course.

9 COMMISSIONER HICKINBOTTOM: Good.

10 Anything else, Mr Rawat?

11 MR RAWAT: No, Commissioner. We've gone much longer
12 than we expected, but I can ask that you rise for five minutes
13 so that we can set up the room and also give the Stenographer a
14 break.

15 COMMISSIONER HICKINBOTTOM: Yes. We'll have a break
16 now for five minutes, and then we'll move on to the evidence.
17 Thank you very much.

18 (Recess.)

1 Session 2

2 COMMISSIONER HICKINBOTTOM: Thank you. We are
3 ready to proceed.

4 Just before we come to the evidence, Sir Geoffrey
5 in relation to the cross-examination of the Auditor
6 General, that will take place tomorrow at 4:00, maximum
7 time an hour-and-a-half. What I'll ask to be done, and I
8 think this is technically possible--I will ask the
9 Stenographer to expedite the part of this morning's
10 proceedings when you outline the areas because that will
11 then save everyone time, and Auditor General will know the
12 focus of the questions. If you could let us have by
13 4:00 p.m. today any direction in terms of documents that
14 you want to rely on, that, too, would be helpful.

15 But that the Auditor General has indicated that she
16 will be able to come here at 4:00 tomorrow.

17 SIR GEOFFREY: Thank you.

18 COMMISSIONER HICKINBOTTOM: Thank you very much.

19 Next, Your Excellency, Governor, could I just
20 apologise for the delay. I'm afraid we do have delays from
21 time to time, legal submissions, they took a lot longer
22 than we hoped, expected, but we are now ready to proceed.

1 Thank you very much.

2 MR RAWAT: Thank you, Commissioner. Our witness
3 today is the current Governor of the Virgin Islands, John
4 Rankin.

5 BY MR RAWAT:

6 Q. Governor, I understand that you wish to take an
7 oath.

8 A. Yes, I'm happy to do so.

9 Q. Do you have a Bible with you?

10 A. I do.

11 Q. And you have the words of the oath there?

12 A. I do.

13 Q. Could you take the Bible in your hand and read out
14 the words of the oath, please.

15 A. I swear by Almighty God that the evidence I shall
16 give shall be the truth, the whole truth, and nothing but
17 the truth.

18 Q. Thank you.

19 And for the record, could you give the Commissioner your
20 full name, please.

21 A. My name is John James Rankin.

22 Q. And your professional address?

1 A. Government House, Road Town, Tortola.

2 Q. Thank you.

3 You will see that on the table in front of you there are
4 some bundles. I should warn you, they're not the only
5 bundles that I might take you to today, but we will--as we
6 go through your reference, we may need to look at some of
7 the documents contained there.

8 Can I ask you, as I have done with every witness, just
9 to remember to keep your voice up and to speak slowly. It
10 is obviously important that we keep an accurate record of
11 your evidence.

12 Could I start by asking you just to outline your
13 professional background to the Commissioner before you took
14 up your current role as Governor.

15 A. Thank you, yes. I have a bachelor of laws degree
16 from the University Glasgow and a master's degree in
17 international law from McGill University in Montreal.

18 After finishing university studies, I qualified as
19 a Solicitor in Scotland and briefly practiced law there,
20 and taught public law and international law at the
21 University of Aberdeen.

22 I joined what was then the Foreign Commonwealth

1 Office in 1988 and have served in a variety of roles both
2 in London and overseas, including the UK mission to the
3 United Nations in Geneva; the British Embassy in Dublin, as
4 Cultural General in Boston, New England; as British High
5 Commissioner to Sri Lanka; briefly as acting Ambassador in
6 Nepal; and then before coming here, as Governor of Bermuda
7 between 2016 and 2020. And I was honoured to be sworn in
8 as Governor of the Virgin Islands on the 29th of
9 January 2021.

10 Q. Thank you.

11 Before we turn to the role of Governor but dealing with
12 one aspect of it, you chair the National Security Council;
13 is that right?

14 A. That is correct.

15 Q. I understand that you may have been able to hear
16 the earlier proceedings this morning. Is that right?

17 A. That's correct. Yes, I was listening to the
18 proceedings.

19 Q. Can you assist the Commissioner at all in relation
20 to the present state of play in relation to the public
21 interest application that may be made?

22 A. I can provide some information to the

1 Commissioner.

2 I heard the comment that was made from the
3 colleague from, I believe, from Withers.

4 The position is that as regards the latest papers,
5 which I understand may be for consideration by the
6 Commission, I was contacted by the Attorney General late on
7 Friday afternoon with those papers and suggested
8 redactions. I replied to the Attorney General with my
9 view, which was that certain redactions might not be
10 required on Saturday morning, and that is where the matter
11 was left as far as I'm concerned. So, with respect to what
12 was said, there is no paper on this subject in redactions
13 currently before the National Security Council.

14 Let me also may I say with respect that I am
15 concerned about the comments that were made by the IRU in
16 relation to National Security Council because the National
17 Security Council has not authorised the IRU to act on its
18 behalf. The IRU is there to act on behalf of the elected
19 Government, so the advice I take on this matter will be
20 with the Attorney General who, of course, is an ex officio
21 member of the National Security Council rather than with
22 respect with the IRU.

1 Q. Just so that we can clear, is it a concern for you
2 that unredacted material is--from the National Security
3 Council is being shared with the IRU?

4 A. It is certainly the case that the National
5 Security Council has made no decision that that material
6 can be shared with the IRU, and that is not to cast any
7 wrongful aspersion on the IRU, but I am concerned that if
8 that is to be done, it should be done within the Authority
9 of the National Security Council.

10 Q. I don't think I can take that any further at the
11 moment, but can I turn to the role of Governor.

12 You should see, and you may have a copy with you, but
13 there is a bundle, I think, labeled "Constitutional and
14 Legislation Bundle", which possibility is on the other side
15 of the desk.

16 A. It is. Thank you.

17 Q. Yes. And if we turn that up, that contains the
18 Virgin Islands Constitution, and it may be that by
19 reference to that, you could explain the role of Governor.

20 A. Thank you.

21 As Governor, I am empowered and constrained by the
22 Constitution.

1 So, under Section 46(2), subject to the
2 Constitution, the Executive authority in the Territory I'm
3 empowered to exercise as executive authority on behalf of
4 Her Majesty The Queen. That's a general executive
5 authority, but thereafter the functions of the Governor are
6 defined, and therefore, constrained by the Constitution.

7 Section 60, in particular, provides areas for which
8 the Governor has special responsibilities, and they are
9 external affairs; defence, including the armed forces;
10 internal security, including the Police Force; the terms
11 and conditions service of persons holding or acting in
12 public offices, and the Administration of the courts.

13 There are other provisions of the Constitution
14 which are relevant to the Governor's powers, including, for
15 example, under Section 92 of the Constitution, power to
16 make appointments to public offices and to remove and to
17 exercise disciplinary control over persons holding or
18 acting as such officers; vest in the Governor generally,
19 actually in accordance with the advice of the Public
20 Service Commission.

21 And under the Constitution, Section 49, I also
22 Chair a Cabinet.

1 I think in that last context, it's important I
2 should make clear, that although the Governor chairs
3 Cabinet, the Governor is not a Member of Cabinet and does
4 not have a vote in Cabinet, so no decision-making power in
5 Cabinet.

6 So, the consequence is that, even in Cabinet I
7 express a concern over a particular decision which may be
8 proposed, whether it be in relation to appointment to
9 Statutory Board or a procurement or tender waiver issued,
10 some of the issues which I know have been discussed in the
11 Commission, I can advise on such issues. I can caution or
12 encourage on such issue, but I do not have a say in the
13 final decision taken.

14 Two other points, if I may, in line with what's
15 stated in the 2012 White Paper, the good governance of the
16 Territory and supporting and promoting the good governance
17 of the Territory is at the forefront of all that I seek to
18 do as Governor; and so, for example, I seek to support the
19 independent institutions under the Constitution such as the
20 Auditor General or the Director of Public Prosecutions or
21 the Complaints Commissioner so that they can carry out
22 their accountability functions. I certainly, in respect of

1 Section 60 of the Constitution, always seek to support the
2 role of the Virgin Islands Police Force and their work in
3 tackling--crime in the Territory. And, of course, in my
4 work in Cabinet on the soft issue which is I described, I
5 work in Cabinet on the sort of issues which I described as
6 will give those issues as best can to try to provide advice
7 on good governance matters.

8 And then lastly, I also, through my office,
9 administer funds which are provided by the UK Government
10 for programmes and projects which we fund here in the
11 Territory, and the Governor's Office funds a number of
12 programmes in relation to security issues, justice issues,
13 environmental issues, and work to support good governance
14 and to support, indeed, the Public Service.

15 In broad-brush terms and in some specific terms,
16 those are my functions under the Constitution, as I see
17 them, and I, in carrying out those functions, I, as I
18 believe my predecessors would have done, will always seek
19 to work cooperatively with the Government of the day,
20 setting out areas when we disagree but also seeking common
21 ground wherever I can.

22 Q. You've mentioned that you cannot vote in Cabinet.

1 That's a limitation on your role as Governor, but are there
2 any other limitations on that role?

3 A. To give you one example, I am not responsible for
4 the main financial decisions made by Central Government and
5 by the Ministry of Finance. So, the funding which is
6 provided to the work of the Public Service and the
7 budgetary provision is decided by the Government of the
8 day, with the Budget which is approved in the House of
9 Assembly rather than determined by myself as Governor
10 subject to the exception of power under Section 103 of the
11 Constitution toward the payments out of the consolidated
12 fund for certain specified purposes.

13 Q. Can I come back to 103 in due course. But you say
14 you don't have a vote. But can you bring up--we've seen
15 that different Ministers and Ministries will bring a paper
16 to Cabinet. Can the Governor bring a paper to Cabinet?

17 A. Yes, indeed. Yes. So, much as which fall within
18 the Authority of the Governor's Group, which describes a
19 number of matters to which I've referred; also human
20 resources issue; issues related to the Passports Office,
21 for example, I can bring papers to Cabinet on those
22 subjects. I make proposals for Cabinet to consider.

1 Q. We know under the Constitution you have a Deputy
2 Governor, and the evidence that the Commissioner has
3 received is the Deputy Governor is the de facto head of the
4 Civil Service.

5 Can you bring--can you take papers to Cabinet which are
6 prepared by the Deputy Governor's Office?

7 A. Yes, I can, and--

8 Q. Yes. Is--

9 A. --it's quite a regular practice.

10 Q. And what sort of areas would those papers cover?

11 A. Usually matters related to the Public Service. So
12 in relation, for example, to the recent Memorandum of
13 Understanding which I signed on behalf of the UK Government
14 with the Deputy Governor's Office on the training
15 programme, that will go to Cabinet as a paper which has
16 been prepared by the Deputy Governor's Office, and,
17 similarly, work on Public Service transformation which will
18 be coming to Cabinet shortly, actually will be in the joint
19 names there of myself and the Premier, with the Deputy
20 Governor having contributed substantially to it.

21 Q. One of the points that you made in submission on an
22 earlier day when one is looking at the decisions that

1 Ministers take in Cabinet, that what has to be borne in
2 mind is that, firstly, there is a Governor sat there
3 chairing the Cabinet, but also that what was said was that
4 Governors have sat in Cabinet for 20 to 30 years and done
5 nothing, which feeds to a point that I want to explore with
6 you, which is the extent of--to which the Governor or the
7 UK Government has assisted the Virgin Islands.

8 But would you accept that as a fair definition of the
9 Governor's role, to sit there and do nothing?

10 A. No, no, I wouldn't.

11 The job of the Governor outside the areas which
12 fall specifically under his or her responsibilities is to
13 chair Cabinet in a way which supports the UK obligations
14 towards the Territory and supports the wider goal of good
15 governance, which I outlined. And I do that in terms of
16 advice, in terms of support, or in terms of exercising
17 caution or sometimes disagreement, depending on the issue
18 of the day, and discussing those issues in Cabinet, and I'm
19 confident that my predecessors as Governor will have done
20 the same.

21 The Governor does not merely sit as a figurehead in
22 Cabinet but can engage in discussion with Members of

1 Cabinet to hopefully assist in reaching the best interests
2 of the Territory in its decisions.

3 Q. Leaving aside the limitations, it's still right to
4 say, isn't it, that any Governor would have a significant
5 role to play under the 2007 Constitution?

6 A. That is correct, but the Governor's caution or
7 advice can be overridden by Cabinet on any matter which did
8 not fall within the special responsibilities of the
9 Governor.

10 Q. So that's the Section 60 responsibilities.

11 A. That's correct.

12 Q. You say that, so on any other matter outside
13 Section 60, your advice can essentially be ignored.

14 A. Not entirely. So, for example, in relation to
15 Public Service appointments where acting on the advice of
16 the Public Service Commission or the Police Commission,
17 those appointments lie with the Governor. Section 60 is
18 the primary provision in that respect.

19 Q. But to whom would you be accountable as the
20 Governor?

21 A. I'm accountable, well, to Her Majesty, but to the
22 Secretary of State in the United Kingdom for my actions as

1 Governor, and I'm also accountable under BVI law for the
2 actions I take. Governors do not have diplomatic immunity
3 within the overseas territories, so the ordinary law of the
4 Territory applies to me as it applies to anybody else.

5 I'm also accountable under the Diplomatic Service
6 Code and the UK Civil Service Code, and I am bound to
7 comply with those codes. Those are publicly available
8 documents, and if I'm in breach of those Codes, then I'm
9 subject to action under those Codes.

10 I'm also, of course, accountable to the court of
11 public opinion and to a free press, and I support very much
12 the accountability which a free press can bring in any
13 democratic society.

14 Q. But it is right, however, isn't it, that as
15 Governor, there is no obligation on you to come before the
16 House of Assembly to answer questions put by Members of the
17 House?

18 A. That's correct.

19 Q. Nor is there a commission perhaps made up of
20 elected officers and members of civic society, which
21 monitors and evaluates the work of the Governor?

22 A. No, no formal such provision under the

1 Constitution, yes, Mr Rawat.

2 Q. So, does it not follow that there is absence of
3 accountability under the Constitution for those most and to
4 those most affected by the decisions that a Governor can
5 take?

6 A. I'm not sure that's--that's correct. I'm
7 accountable under BVI law. Should I act in any way
8 contrary to my obligations under the Constitution, I would
9 certainly also be subordinate Secretary of State in those
10 circumstances.

11 I also receive letters from those in different
12 positions within the Territory as well as, of course,
13 communications with the Premier and Government Ministers.
14 So, for example, the Speaker has written to me on a number
15 of occasions in relation to powers I've exercised under the
16 Constitution, and I have replied to the Speaker
17 accordingly. So, I think there were different
18 accountability mechanisms which hopefully can keep any
19 Governor following the proper course.

20 Q. Taking you back to Cabinet, then, can Cabinet
21 operate as a forum in which the conduct of a Governor can
22 be challenged by elected officials?

1 A. I can certainly be asked questions in Cabinet
2 and/or the National Security Council about the fashion in
3 which I exercise my role and, indeed, Ministers have asked
4 me about positions I have taken or decisions that have been
5 taken, and I've been happy to try to answer their questions
6 accordingly.

7 Q. And you said--you mentioned finances. Is there a
8 ring-fenced budget for a Governor and for the areas of
9 special responsibility under Section 60?

10 A. There is a budget allocated to my office, the
11 Governor's Office, for my British Virgin Islands Government
12 staff within my office and for the vestments and for some
13 of the functions which we carry out there. And, of course,
14 there are also budgets allocated to the Royal Virgin
15 Islands Police Force, to the Public Service, and to the
16 independent institutions under the Constitution such as the
17 DPP, the Auditor General, the Attorney General, the
18 Complaints Commissioner. So, there are budgets allocated
19 to those different bodies, some of which I have
20 responsibility for under the Constitution.

21 COMMISSIONER HICKINBOTTOM: And do those budgets
22 operate, as we've heard other budgets do within Government,

1 I think probably all budgets to do within Government, that
2 a bid is made, the relevant office goes before the Standing
3 Committee, eventually, I think, the Cabinet decides the
4 Budget which is then approved by the House? Is that
5 similar to the arms of Executive Government under your
6 umbrella?

7 THE WITNESS: Yes, that's my understanding, and
8 that process has actually been going through as we--

9 COMMISSIONER HICKINBOTTOM: Yes.

10 THE WITNESS: --speak, but I think the description
11 you've just made is correct, and ultimately it goes to
12 Cabinet, and then goes to House of Assembly for approval.

13 COMMISSIONER HICKINBOTTOM: Yes, thank you.

14 BY MR RAWAT:

15 Q. Now, you were sent, Governor, a Warning Letter on
16 what the Commission calls a "Warning Letter". There should
17 be a copy of that on the table in front of you.

18 And if I can explain the purpose of Warning Letters.
19 They have been historically described as "Salmon Letters"
20 but we've used the more modern terminology. Their purpose
21 is to draw to the attention of an individual potential
22 criticisms that arise from the evidence.

1 Now, they are just that, and I've told everyone this,
2 that they are just potential criticisms. They do not form
3 either the provisional or concluded view of the
4 Commissioner. In your case, there are no potential
5 criticisms made of you, John Rankin, as Governor, but the
6 Commissioner has a protocol concerning the making of
7 criticisms which allow a participant to make a potential
8 criticism of another, and in this case the Ministers in the
9 present Government have raised criticisms of the UK
10 Government, criticisms of the FCDO, and of previous
11 Governors, and you, as the current Governor and the
12 Representative of Her Majesty in this jurisdiction of being
13 asked to respond to those, and the reason for the letter is
14 to do so, so that you're treated fairly.

15 Now, you have, as others have done, taken the
16 opportunity to provide a response to the Commissioner
17 together with some additional documents. Now, the Warning
18 Letter is confidential, but as to the Written Response, can
19 you confirm that it was provided under cover of a letter
20 from you dated the 14th of October 2021 and carrying your
21 signature?

22 A. I can so confirm, yes.

1 Q. And are you content that that Written Response with
2 its accompanying documents can stand as part of your
3 evidence to the Commission?

4 A. Yes, I am.

5 Q. Now, I would like to take you through the
6 criticisms and the--and your response to them, but I want
7 to do it in a wider way because there are a number of
8 issues that I think need to be canvassed with you. And so,
9 as we go through, if you want to refer the Commissioner to
10 a particular part of your written response, by all means do
11 so, but the first point that I'd like to explore you with
12 is this concept of a modern partnership, which one finds
13 referred to in position statements from different actors
14 interested in governance. You see it in the documents.

15 The starting point, I think I would say should be the
16 Constitution, and do you agree that in exercising your
17 powers as a Governor, you have to keep in mind the Preamble
18 to the Constitution?

19 A. Yes, I do.

20 Q. And in particular, what that Preamble does, does it
21 not, is--we go to it.

22 It recognises, doesn't it, that the people of the Virgin

1 Islands have a free and independent spirit and have
2 developed themselves and their country based on qualities
3 of honesty, integrity, mutual respect, self-reliance and
4 the ownership of the land engendering a strong sense of
5 belonging to and kinship with those islands?

6 A. Yes, it does.

7 Q. It accepts that the Virgin Islands should be
8 governed based on adherence to well-established democratic
9 principles and institutions.

10 And this is the point I most want to draw your attention
11 to, and tell me if you agree or disagree. Affirm--it
12 affirms that the people of the Virgin Islands have
13 generally expressed their desire to become a
14 self-guaranteeing people and to exercise the highest degree
15 of control over their--the affairs of their country at this
16 stage of its development.

17 And then it notes that the United Kingdom, the
18 administering power for the time being, has articulated a
19 design to enter into a modern partnership with the Virgin
20 Islands based on the principles of mutual respect and
21 self-determination.

22 Now, those principles, they may not hold any legal force

1 but they must surely be principles by which you must be
2 guided when doing your work as a Governor.

3 A. Absolutely.

4 I mean, obviously, the Preamble is important
5 context and important for any interpretation of the
6 Constitution. And indeed those provisions are in line with
7 Section 73 of the United Nations Charter, which requires
8 administering powers of non-self-governing Territories to
9 develop self-government according to the particular
10 circumstances of each Territory, and as peoples in their
11 varying stages of advancement.

12 And it also, Article 73, also requires
13 administering powers as to promote the well-being of
14 inhabitants of their Territories and to ensure their just
15 treatment and their protection against abuses; and so I
16 read the Preamble and the provisions of Article 73 as being
17 a consistent whole.

18 Q. And there we have also--or the Commissioner has
19 heard evidence or received evidence in relation to White
20 Papers that were published by the UK Government in 1999 and
21 2012, and you've touched on the 2012 paper. But the
22 substance of those or one important point of those papers

1 is that the UK Government committed to a modern
2 partnership--

3 A. That's correct.

4 Q. --with the Government of the British Virgin
5 Islands--

6 A. Yeah.

7 COMMISSIONER HICKINBOTTOM: I mean, Governor, these
8 strands one can see in the Preamble to the Constitution,
9 but there are a number of strands of that commitment--I
10 will put it that way--in Article 73? There's a--I'm just
11 looking at the Constitution. That's because they're
12 reflected here, but there is a strand that the people of
13 the BVI in these circumstances should be granted as much
14 self-autonomy as they wish to have and are able to have.
15 There's a strand--and I'm not quoting from the Article 73,
16 but there's a strand that steps should be taken to enable
17 the people of a non-self-governing Territory to move
18 towards further self-determination and, if they wish,
19 independence. There are a number of strands within
20 Article 73. As I say, I think they're reflected in the
21 Constitution.

22 And certainly in some of the evidence we've

1 heard--I'm sure Mr Rawat will go through some of this--the
2 commitment of the UK Government and the Governor, from time
3 to time, the commitment of the UK Government and the
4 Governor to those commitments, I think, has been
5 questioned. What is your view about these commitments?

6 THE WITNESS: Well, I agree with the broad
7 description you made, Commissioner, that it is for the
8 Governor and the United Kingdom to promote self-governance
9 and to promote the Territory on that path, and that will
10 sometimes mean defining capacity of the Government in those
11 areas, and as constitutions develop sometimes giving
12 further powers under new constitutions as happened in 2007.

13 It may also mean on occasion disagreeing with the
14 Government of the day because of a UK view that a certain
15 position being taken is not actually in the interest of
16 British self-governance or is not in line with the
17 development of the Territory at that particular point.

18 COMMISSIONER HICKINBOTTOM: So, can I put it like
19 this: The path, as it were, is clear, that the Article 73
20 path is clear.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: But in--is this right,

1 is this a summary of what you just said, Governor: That on
2 going down this path, the UK Government, the Governor, may
3 disagree with the actions of the possibly elected
4 Government, that what they're doing is going down this
5 path? It's not very elegantly put, and may be able to put
6 it better.

7 THE WITNESS: I'm not sure that I can, but yes, I
8 would agree with that, and you will find provisions, I
9 think, to this effect in the 2012 White Paper, if I may
10 just refer to that for one moment.

11 COMMISSIONER HICKINBOTTOM: Yes, yes.

12 Is that in Volume 2, Governor?

13 THE WITNESS: Two, as I've got it at page--Part 1 I
14 have--

15 BY MR RAWAT:

16 Q. In 626.

17 A. Yeah, at page--

18 Q. It starts--at 64 is where it starts.

19 A. The White Paper sets out the principles which,
20 Commissioner, you just described. But it also sets out,
21 for example, at page 634 in the bundle, it's page 9 of the
22 White Paper, where it says (reading): Making Government

1 work better. The Government has responsibilities towards
2 the people of the Territories and of the United
3 Kingdom--this is the BVI Government--to--sorry, let me
4 start again, if I may, please.

5 (reading): The Government has responsibilities
6 towards the people of the Territories and of the United
7 Kingdom to ensure the good governance of the Territories.
8 The Government acknowledges a sensitivity of these areas of
9 work, but believes that those living in the Territories
10 have a right to expect the same high standards of
11 governance as in the United Kingdom, including in the areas
12 of human rights, rule of law, and integrity in public life.
13 The Government expects high-quality public financial
14 management and financial services regulation as important
15 contributors to building resilient economies and providing
16 for the well-being of Territory communities. The UK is
17 determined to tackle corruption in all its forms, and the
18 United Kingdom is committed to working closely with the
19 Territories on these issues.

20 So,, while supporting self-governance, it's also
21 the job of the United Kingdom to also recognise sensitivity
22 sometimes to tackle these areas as well.

1 (Pause.)

2 COMMISSIONER HICKINBOTTOM: Sorry, because I have a
3 question, but we'll break for five minutes so that
4 hopefully the internet can simply be reset and we can
5 proceed on a firm foundation. Thank you.

6 THE WITNESS: Thank you.

7 COMMISSIONER HICKINBOTTOM: Thank you, Mr Peters.

8 (Recess.)

9 COMMISSIONER HICKINBOTTOM: Good. I think we're
10 ready to proceed.

11 Just for people looking by way of live stream,
12 there was some instability in our internet connection,
13 which we hope has now been resolved.

14 Governor, I was just looking at Article 73 and the
15 Constitution, they sort of seem to run in parallel very
16 much and, no doubt, understandably.

17 The Preamble to the Constitution emphasizes the
18 desire of the people of the BVI to become a self-governing
19 people. We know that under Article 73 the UK Government
20 has an obligation to assist them in that, but to do so in a
21 modern democratic way, if I could put it like that, there
22 is a reference in the Preamble to the Constitution to the

1 democratic values and social justice, economic empowerment,
2 and so on and so forth, so that's the context.

3 Some of the questions I know because these are the
4 essential criticisms cast doubt upon the commitment of the
5 Governor from time to time, the UK Government to the
6 obligations really under Article 73 but also under the
7 Constitution, and we will deal with those questions as they
8 come up.

9 But can we start from this as a base point: Do you
10 know of anything--of anything which suggests that you, as
11 Governor and/or the UK Government, insofar as you can speak
12 for the UK Government, do not consider that these
13 commitments are full and unequivocal?

14 THE WITNESS: I agree that those commitments are
15 full and unequivocal.

16 COMMISSIONER HICKINBOTTOM: I mean, as I said, you
17 will be asked questions as to what's happened in practice,
18 but the starting point is that so far as you're aware,
19 though, you and the UK Government are fully and
20 unequivocally committed to these obligations?

21 THE WITNESS: That's correct, certainly the
22 obviously the Article 73 obligations which are legal

1 obligations and the preambular provisions will always guide
2 what I will seek to do as Governor.

3 COMMISSIONER HICKINBOTTOM: Okay. Thank you very
4 much.

5 Yes.

6 BY MR RAWAT:

7 Q. Picking up on that, Governor, it's the reality gap,
8 isn't it, between warm words and action, and what I'm going
9 to take you through is a series of topics which, if the
10 Commissioner accepts other evidence, will lead to the
11 conclusion that the manner in which the UK Government
12 conducts itself in relation to the Virgin Islands, and
13 particularly in relation to elected officials in the Virgin
14 Islands, is not one that is indicative of a modern
15 partnership or, indeed, mutual self-respect.

16 And to start that off, if you look, please, at page 111
17 in that bundle.

18 A. The--

19 Q. 111?

20 A. Recovery Development Agency?

21 Q. Yes, paragraph 16 at the top.

22 A. Yes, sir, thank you.

1 Q. What I have taken you to is a page in the Position
2 Statement of the Elected Ministers which you will have
3 received and you have provided a response to. I'm drawing
4 your attention in particular to paragraph 16 to 21 what
5 you're familiar with, but I want to summarise it.

6 But it is an immediate example of what may be said to be
7 a lack of commitment to a modern partnership because what
8 that Position Statement sets out is that when offering a
9 loan guarantee in the aftermath of the hurricanes of 2017,
10 the UK did so by imposing conditions on the BVI, conditions
11 which were suited the UK Government's interests but placed
12 unnecessary constraints on what the BVI could do.

13 Are you familiar with the circumstances in which the
14 loan guarantees were offered?

15 A. Not directly familiar because I obviously wasn't
16 in office at the time, but I'm aware through the papers of
17 some of the background to that issue, yes.

18 Q. But would you accept that there is substance to the
19 argument that, in offering that loan guarantee, the UK
20 Government essentially put itself first rather than the
21 interest of the BVI?

22 A. No, with respect, I wouldn't accept that

1 proposition. What the UK Government was seeking to do was
2 to further assist BVI in the Hurricane recovery process.

3 So, immediately after Hurricane Irma, the UK
4 provided a very large amount of support to the Territory,
5 both in terms of immediate military assistance and policing
6 assistance that was given, and then in relation to the
7 wider recovery programme to help restore electricity, to
8 help restore water, to help to provide emergency housing
9 and emergency preparedness for the Territory.

10 And I can give you figures on that, if wished, on
11 the brought about of expenditure, Sir Gary and Mr Rawat.

12 Q. Can I come back--

13 A. As regards the loan guarantee, the purpose of the
14 loan guarantee was to allow BVI, as part of its
15 self-governance, to be able to have more favorable terms
16 than it would otherwise have in borrowing money on
17 international markets for the recovery phase. And by
18 having that UK backing on the loan and a guarantee that in
19 any case of default, UK would guarantee that role, that
20 would have allowed BVI to obtain a loan at lower interest
21 rates up to the offer of a 300 million loan.

22 The conditions which were placed on that loan

1 guarantee were absolutely standard, there are the same
2 conditions on all guarantees as the UK Government has
3 provided in other circumstances, they are standard terms
4 and conditions. They were not exceptional or made
5 exceptional for the British Virgin Islands. And it was,
6 ultimately, of course, for the BVI to decide whether or not
7 to accept that offer of the loan guarantee, and the
8 Government has to date not accepted that offer. My
9 understanding is that the Government did go out and seek a
10 loan on the international markets. It got that loan at
11 approximately 4 percent interest rate. I think it would
12 have been possible to get a lower interest rate at that
13 time had the loan guarantee been taken up, but I'm glad to
14 say that the Government has since refinanced that loan and
15 been able to take advantage of the lower interest rates
16 currently available on the market, thus making some saving,
17 I think an earlier savings could have been made had the
18 Government chosen to take out the loan guarantee, but that
19 was a choice for the British Virgin Government to make, not
20 for the British Government to dictate.

21 Q. With respect, Governor, that may be said to be a
22 rather rosy impression of what happened. Because if one

1 looks at the detail of the Position Statement, there are a
2 number of things that flow from that. Firstly, for
3 example, the creation of the Recovery Development Agency,
4 so you have the creation of a Statutory Board in which all
5 recovery funds will go irrespective of where they come
6 from, they will go there. And that Board, perhaps uniquely
7 when one compares it to other Statutory Boards in the BVI,
8 that Board had UK Government input on it. UK Government
9 could appoint people to it, UK Government could influence
10 what direction it went. So, that's one example.

11 Take another one, Protocols for effective financial
12 management. The effect of that was that the BVI Government
13 found itself between a rock and a hard place because if
14 they wanted to borrow, they could--they would need to--they
15 would be breaching the protocols for effective financial
16 management, at least for some temporary period. But the
17 attitude of the British Government was that things were
18 non-negotiable, that the conditions that were imposed from
19 the beginning were non-negotiable.

20 And take one more. I want to take you please to 176 in
21 the bundle. Now, what I'm taking you at 176 is to what's
22 described as the high level framework for UK support to BVI

1 Hurricane recovery, so that formed the initial framework by
2 which discussions were held in relation to this loan
3 guarantee. And even though the loan guarantee was never
4 taken up, the RDA was put in the place.

5 And one of the other features that the UK Government
6 demanded, you go at 177, at the bottom there, divestment of
7 public assets which sit better in the private sector.

8 Now, look at those three together: UK Government wants
9 all funds in one place and wants to exert control over it.
10 UK Government essentially takes the stance that it's a take
11 it or leave it stance--this is not negotiable--and you will
12 have to work within the Protocols for Effective Financial
13 Management. And then UK Government is telling the BVI you
14 have to sell off your assets, which collectively, or even
15 in isolation, amount to a fundamental encroachment on the
16 BVI's autonomous and financial and economic policy, doesn't
17 it? The kind of conditions that the Government, your
18 Government, did not need to impose on the BVI?

19 A. We certainly provide a framework within which the
20 UK Government was asking the BVI to operate if the UK
21 Government was to provide that loan guarantee. So back to
22 the Protocol for Effective Financial Management, that

1 protocol--similar protocols are replaced with a number of
2 Overseas Territories, in fact, I think I'm correct in
3 saying in this region, all with the exception of Bermuda,
4 and those are Memorandum of Understanding, which are
5 entered into voluntarily by both sides to assist the
6 Territory in maintaining debt ratios and maintaining liquid
7 assets which keep a sustainable economy.

8 The Recovery and Development Agency provisions were
9 designed to set up an executive body at which would
10 specialize in the recovery development of the Virgin
11 Islands, and the UK Committee to co-fund it. The whole
12 operation of the RDA for a two-year period up until
13 March 2021 of this year and has done so to the tune of I
14 think I'm correct in seeing \$5.8 million.

15 But in terms of a loan which the United Kingdom was
16 going to also offer in addition to the help which has been
17 given, in addition to some £13 million's worth of project
18 which be developed through the RDA was subject to certain
19 conditions, and yes, I accept that is a framework which the
20 UK Government was seeking to require of that loan where to
21 be given, if the counter-proposition that Mr Rawat is that
22 the UK Government should have offered the loan with no

1 conditions, then if a denied of that is a denial of
2 self-governance, then I think is--which obviously has its
3 limitations, it would be reasonable for any government
4 providing loan money to have provisions around it which
5 would ensure the proper use of those funds.

6 Q. But doesn't it take us back to two things:
7 Fundamentally, that in this partnership, however modern you
8 want to describe it, the UK Government has the upper hand.
9 You said earlier that when responding to questions from the
10 Commissioner about the road to self-governance, but at any
11 point, any step of that road, the UK Government can say,
12 no, you can't do that. That's the sort of trump card in
13 the back pocket, isn't it, that you can have, as you do in
14 the BVI, a vibrant political process, political parties
15 that campaign in the open, elections that people can win or
16 lose, and people who come into Government and can point to
17 a mandate. And yet, whatever they wish to do, there is
18 always an element of the big brother, there is always an
19 element of someone who can say at any point you can't do
20 that because we don't think that amounts to good
21 self-governance.

22 A. Well, subject to an overriding part of

1 inter-legislation in the UK or an Order in Council, it's a
2 Constitution which governs the relationship, and the
3 elected government is self-governing in all the areas under
4 the Constitution save those which are reserved for the
5 Governor, so this Territory has a large degree of
6 self-governance. That level of self-governance varies
7 between different Overseas Territories, so Bermuda and
8 Cayman are perhaps the most self-governing of the Overseas
9 Territories and I hope BVI can move down the road towards
10 further self-governance, but at the moment the Constitution
11 sets out the limits of where that self-governance lies, but
12 it is a largely self-governing Territory, and my job as
13 Governor is to support that self-governance, and it was the
14 job of the UK Government and my predecessor to support BVI
15 following the horrors of Hurricane Irma, to help to support
16 the recovery of this Territory, and the UK has done so, to
17 a considerable extent, and the loan guarantee was intending
18 to assist BVI in borrowing funds to move favorably into the
19 international market, which I believe would be in the
20 interest of the Territory, but it was for the Territory, as
21 a self-governing Territory to choose, ultimately, whether
22 to accept it or not, and it chose not to do so.

1 Q. I want to press you on this because the point is
2 that it takes us back to the point you said to the
3 Commissioner, that leave loan guarantees aside, that the
4 BVI can proceed along the road to self-governance, you've
5 described it as a Territory that has a large degree of
6 self-governance already, but it's right, isn't it, and you
7 can say whether it's under the Constitution or not, but at
8 any point the decision as to whether something is a good
9 piece of self-governance or a good step to take on the road
10 to self-determination, is the final words sits with the UK
11 Government, doesn't it?

12 A. No, I think it is constrained by the Constitution,
13 Mr Rawat, so there are steps taken by the elected
14 government, many of which I support and welcome but on
15 occasion there may be steps taken which I do not welcome
16 and which I do not welcome and which I do not think are
17 necessarily in the interests of further development of the
18 capacity of the Territory, and in those circumstances all I
19 can do is to advise on the matter. I cannot override, and
20 it would require a unilateral change in the Constitution or
21 a legislative act from the UK to prevent that--to prevent
22 that happening, so I think that does create a limit on what

1 the UK Government does save in extraordinary circumstances.

2 COMMISSIONER HICKINBOTTOM: So, in terms of the
3 Constitution. There are two aspects I think from that
4 answer: Firstly, the elected government have their areas
5 of function under the Constitution, and that's for them to
6 deal with. That's the area of self-government. There may
7 be issues that the Government or the UK Government impinge
8 on those areas, but that's a different question. But the
9 elected government have its areas of responsibility, which
10 you accept cannot be properly infringed.

11 The other way in which I suppose that the UK
12 Government could prevent movement down the road towards
13 further self-determination would be not to allow a new
14 Constitution, which would increase this area of
15 self-governance?

16 THE WITNESS: I think that's right, Commissioner,
17 so the Premier of the Government has proposed a
18 constitutional review, and certainly I, as Governor, and
19 I'm confident, the UK Government, will be happy to consider
20 that review to see whether there are further areas in the
21 Constitution which could be revised further down that road
22 of self-governance, so where they are, they would certainly

1 have my support.

2 COMMISSIONER HICKINBOTTOM: One of the elements of
3 the constitutional review, which I suspect is going to be
4 quite sophisticated, but one element will be to look again
5 at the relationship between the elected democratically
6 accountable elected government on the one hand and the
7 Governor/UK on the other?

8 THE WITNESS: That's right. There are some common
9 provisions which are found within the Constitutions of
10 virtually all of the Overseas Territories, so they will
11 tend to reserve to the Governor ultimate authority for
12 security and for External Relations, save in its specified
13 areas, and the Constitutions will seek to guarantee the
14 independence of the courts. But otherwise, within those
15 set limits, I think there is room for discussion and room
16 for development in the interests of self-governance.

17 COMMISSIONER HICKINBOTTOM: And on the path to
18 self-determination, that is something that I guess is going
19 to happen from time to time for any Territory, there would
20 need to be a discussion as to where the Territory was on
21 the path and whether now is an appropriate time to readjust
22 that relationship to move further down that path?

1 THE WITNESS: That is correct, so there would be
2 missing adjustments to the Cayman Constitution, for
3 example, in line with what you just said, Commissioner.

4 COMMISSIONER HICKINBOTTOM: Thank you.

5 BY MR RAWAT:

6 Q. The other point I wanted to pick up on is that,
7 isn't there an inherent difficulty--

8 A. I'm sorry?

9 Q. --inherent difficulty for any government because
10 you are, for want of a better phrase, the FCDO's man on the
11 ground, but at the same time it falls to you, I assume, to
12 represent the interests of the BVI to the UK Government.

13 A. (Witness nods.)

14 Q. But doesn't it logically follow that those are just
15 two mutually incompatible positions, one must prevail, and
16 what prevails is always the position of the UK Government?

17 A. Well, being a Governor isn't always easy because
18 you're absolutely correct on the one hand I am sometimes
19 representing a view from the FCDO to the Territory here,
20 and on the other hand, I back for the Territory in its
21 interests where I can do so.

22 So, for example, in relation to the island's

1 Financial Services which are vital to the economy of this
2 country. I, of course, support the need for the Financial
3 Services here just like any other jurisdiction to comply
4 with international requirements and to meet modern demands
5 for transparency. But I will also defend to the hilt that
6 where BVI's Financial Services are meeting best practice
7 and where they are complied with international Regulations,
8 then we need to support the Financial Services in this
9 Territory, and I will certainly make representations to the
10 UK, if I believe that a proposal is being made which would
11 act against legitimate interests of the Territory.

12 So, yeah, it's sometimes said that Governors wear
13 two hats, but I am certainly prepared to go for bat for
14 this Territory, and so, you know, for example, in relation
15 to the cruise ship sector and developing further tourism in
16 this Territory, to the extent it's largely a default area
17 but to the extent that I can assist in that matter as
18 Governor which will help the economy and help employment in
19 this country, I will always do so.

20 Q. Picking up on point of financial Section, one area
21 of concern that has been flagged up to the Commissioner is
22 the position on publicly accessible Registers of beneficial

1 interest. Because the point that has been made in Position
2 Statements put before the Commissioner is that the UK
3 Government has required of the BVI and of other Overseas
4 Territories a standard which requires them to go above and
5 beyond the standards currently in place and operating
6 across the world. I mean, that is indicative, isn't it, of
7 yet again UK Government over-reaching?

8 A. I think you're referring to possibly the
9 Parliament rather than UK Government because the amendment
10 to I think Section 18 of the Anti-Money-Laundering Act was
11 one that was passed by the UK Parliament and was not one
12 that was proposed by the UK Government, and that refers to
13 the preparations of a Draft Order and counsel which would
14 require publicly accessible Registers by 2023.

15 I'm pleased to say that all of the Overseas
16 Territories, although BVI was last to the table on this,
17 have given undertakings in this respect which has meant
18 that the UK Government has not legislated in that area, but
19 I believe it was a wise decision of the BVI to come forward
20 in this area because of the critical demands for publicly
21 accessible Registers which aren't going to go away.

22 I know the reference you've made to a Global

1 standard, Mr Rawat. I'm aware that the statements made by
2 the BVI Government refer to that Global standard, but I
3 nonetheless believe even short of a wholly Global standard,
4 which the UK is advocating that would be a wise move not
5 least because I believe the publicly accessible Registers
6 will be required under the EU Theft and
7 Anti-Money-Laundering Directive, and if BVI and other
8 Overseas Territories don't move in that direction, I
9 believe it will have adverse consequences for the
10 Territory.

11 But in terms of batting for the BVI, what I will
12 continue to point out and what I have continued to point
13 out, is that, under the information under the exchange of
14 notes with the United Kingdom, Government and under the
15 so-called "BOSS system", BVI is possibly best in the world
16 in terms of sharing information with law-enforcement
17 agencies when they're making inquiries into
18 anti-money-laundering initiatives.

19 So, I back for the BVI in best practice in that
20 area but also encouraging the BVI to accept the
21 requirements of greater transparency for publicly
22 accessible Registers. So, it's a good demonstration of the

1 two hats the Governor has to wear.

2 Q. Take the first. You say you commend the BVI for
3 exchanging information under the BOSS initiative, but
4 the--and that is--that is sharing information so that law
5 agencies in different jurisdictions can better tackle
6 things like money-laundering. That's one thing. That
7 doesn't require a publicly accessible Register, does it?
8 It requires mechanisms by which you effectively share
9 information between different jurisdictions?

10 A. That is correct.

11 Q. But on the other side, the point I'm trying to make
12 to you, to take you back to the question, is that requiring
13 the BVI to go further than necessary is an example of UK
14 over-reach because it's not allowing the BVI to decide for
15 itself that it will take this step. Is he saying because
16 we have determined what transparency should be, you must
17 now take this step. And it's not holding a carrot over
18 their head but holding a stick over their heads.

19 A. Well, let me repeat, this was a decision of the UK
20 Parliament rather than the UK Government, and I think it's
21 a pertinent distinction here because it is the Government
22 that has the obligation, for example, under Article 73 of

1 the Constitution.

2 Secondly, I don't think it's so much a matter as
3 holding a stick over the head of the Government but rather
4 supporting BVI and encouraging BVI to meet the relevant
5 standards, and even if it's not become a Global standard,
6 it is a job, I think, of myself as Governor, and I have
7 done this in discussions with the Financial Services sector
8 here, as to say, I recognize you don't like this, and there
9 is some opposition to it.

10 I need to be circumspect here, Mr Rawat, because I
11 know there may be an internal legal challenge, a domestic
12 legal challenge here on this issue, and my frank advice has
13 to be the demand for publicly accessibly Registers
14 irrespective of the position of the UK Parliament is not
15 going to go away, and it's not in the interest of the BVI
16 to find itself black-listed by the European Union under the
17 Theft and Anti-Money-Laundering directive.

18 So, while I recognize this is not a popular
19 position to be taken, I think it is my job as Governor to
20 recommend to the BVI that we move in the direction which is
21 sought by the UK Parliament.

22 COMMISSIONER HICKINBOTTOM: Governor, you've raised

1 the distinction between the UK Parliament and the UK
2 Government, which obviously I understand, but this stick,
3 if it was a stick, was an act of the UK Parliament.

4 THE WITNESS: That's correct.

5 COMMISSIONER HICKINBOTTOM: And I put this bluntly,
6 and you may put it more elegantly than this, so effectively
7 you had no choice in the matter because it was the UK
8 Parliament, which is ultimately--ultimately responsible for
9 the Territory.

10 THE WITNESS: That is correct. And so long as--

11 COMMISSIONER HICKINBOTTOM: I'm sorry, but as I
12 understand your evidence, you have--you see--you see the
13 advantages, there may be disadvantages, too, but you also
14 see the advantages of compliance because it is the UK
15 Parliament no choice, really. Is that fair?

16 THE WITNESS: Ultimately that's correct, that an
17 order in counsel could be made under the sanctions and
18 Anti-Money-Laundering act which could require this of the
19 BVI, subject to any legal challenge that might be brought
20 on the matter, and that, if you like, is a sequence of BVI,
21 meaning an Overseas Territory of the United Kingdom because
22 the sovereignty lies with the UK Parliament and the Members

1 of the UK Parliament. That is a position so long as the
2 status of Overseas Territory remains and applies in
3 relation to all Overseas Territories.

4 COMMISSIONER HICKINBOTTOM: Yes, thank you.

5 MR RAWAT: Commissioner, before I move on to the
6 next topic, I have been asked to put a question to the
7 Governor on this issue.

8 COMMISSIONER HICKINBOTTOM: Yes.

9 BY MR RAWAT

10 Q. Governor, can you address this. On what basis does
11 the imposition of a publicly accessible Register of
12 beneficial ownership, on what basis is the imposition of a
13 publicly accessible Register of beneficial ownership
14 appropriate for the BVI in a sphere of devolved
15 responsibility?

16 A. Thank you, Mr Rawat.

17 I'm again aware there is a legal challenge on this
18 issue, so I will be circumspect in what I say, but to the
19 extent that this is becoming a requirement in the European
20 Union, in the OECD and internationally, the UK has an
21 obligation to support the BVI in meeting international
22 standards.

1 Q. And just give us a sense of the timeline. Have you
2 spoken of the EU more than once. What is the timeline for
3 them beginning to blacklist countries, if that's what
4 they're going to do.

5 A. I'm not entirely up to speed on the precise
6 timetable, Mr Rawat, this issue which I dealt with in
7 greater detail in my last I now dealt of late here because
8 I have other matters but I believe that by 2023 publicly
9 accessible Registers have not been introduced, then the
10 risk of the EU taking decision to blacklist certain
11 jurisdictions who have not done so will increase.

12 And we know that there are certain EU Member States
13 you have the Overseas Territories in their sites as well as
14 other jurisdictions, and I want to do all I can to help
15 avoid that happening, and therefore the moves in this area,
16 I think, will be of assistance to the BVI. And that is
17 certainly my advice to those with whom I've engaged in this
18 Territory.

19 COMMISSIONER HICKINBOTTOM: In respect of the
20 question Mr Rawat asked about this actually being a
21 decision within that devolved responsibility of the BVI
22 elected Government, and this is a perfectly reasonable

1 question, and you say that you have to be sensitive because
2 this may be a subject of a legal challenge, but if that may
3 be right, if UK Parliament in this case makes a decision
4 that impinges upon a properly devolved area, that
5 presumably then would be a matter just hypothetically, that
6 would be a matter for the courts to determine.

7 THE WITNESS: That's correct.

8 COMMISSIONER HICKINBOTTOM: Just as a general
9 principle.

10 THE WITNESS: That's correct.

11 My own view is that UK Parliament has this--has
12 this authority, but if it were challenged, it would be for
13 the courts.

14 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

15 BY MR RAWAT:

16 Q. Before we move on, Governor, can you just
17 breakdown, in terms of--you touched upon UK support in the
18 immediate aftermath of the hurricanes, but I don't want
19 that to get mixed up with the loan guarantee which I
20 canvassed with you. In the immediate aftermath of the
21 hurricane, can you give the Commissioner a figure, firstly,
22 a figure for how much support the UK provided and the

1 different ways in which you say the UK provided support to
2 the BVI?

3 A. Yes, I can.

4 If you give me a moment to check my notes, please,
5 Mr Rawat.

6 (Pause.)

7 A. Thank you. If I may preface my answer by saying
8 that I, myself, visited BVI after Hurricane Irma, and saw
9 for myself the devastation which had been caused by--caused
10 to the Territory and the clear need for support after what
11 had occurred. And I can give you--I can give you some
12 figures.

13 So, in terms of the immediate regional support to
14 the Territories which had been damaged by Hurricane Irma
15 and subsequently by Hurricane Maria--and that was the BVI,
16 Anguilla and Turks and Caicos Islands--the overall
17 immediate recovering funding provided by the UK amounted to
18 some £72 million, including the cost of the military
19 deployment, and the support that was given for policing to
20 help restore law and order after the hurricanes had hit.

21 In addition to that £72 million of original
22 funding, it's difficult to break that down precisely

1 between the different Territories, the UK provided more
2 than £13 million directly for projects in the BVI including
3 emergency housing repair programme, rebuilding the
4 electricity grid, water and sewerage, repairs to the
5 provision--repairs to the prison and provision of a
6 temporary Magistrate's Court.

7 And since then, specifically for the Recovery
8 Development Agency, the UK had provided in addition to the
9 Projects we funded to which I've just referred provided--I
10 think I already said 5.8 million. Let me correct that
11 please, \$5.1 million in relation to the running costs of
12 the Recovery Development Agency between its establishment
13 in April 2018 until March 2121.

14 Q. It was 13 million?

15 A. 13, one-three.

16 Q. 1-3. And was this a grant or an award, or was this
17 a loan?

18 A. No, that was direct spent, direct spend by the UK
19 either in physical support given, but in terms of funding
20 of projects for electric grid, water/sewerage and a number
21 of RDA projects which the UK has helped to fund and we
22 continue to help to fund projects in that area.

1 Q. What period of time are we talking about here?

2 A. The immediate support was spent in the immediate
3 months after Hurricane Irma to respond to the immediate
4 devastation. That £13 million programme has continued over
5 a longer period of time. I can't break it down for you
6 exactly at the moment, Mr Rawat, but I could get you more
7 details if required.

8 MR RAWAT: Commissioner, I've noted the time. I'm
9 moving on to a different topic. So, it's convenient.

10 COMMISSIONER HICKINBOTTOM: We can certainly break
11 for lunch, Mr Rawat. We've had one or two breaks this
12 morning for one reason or another.

13 We will break now, Governor, and we will try and
14 come back at around five past 2:00, and you needn't stay
15 here.

16 THE WITNESS: Thank you. I think I've got a
17 sandwich in the room next door, Commissioner. Thank you.

18 COMMISSIONER HICKINBOTTOM: We will resume at five
19 past 2:00.

20 MR RAWAT: Thank you, Commissioner.

21 COMMISSIONER HICKINBOTTOM: Good. Thanks very
22 much.

1 (Recess.)

2 MR RAWAT: Thank you. I just wanted to raise three
3 matters with Sir Geoffrey, if I may.

4 We circulated yesterday an additional bundle for
5 today's Hearing which was a bundle of additional material
6 that had been provided by the Elected Ministers, and this
7 morning the IRU confirmed that there were three documents
8 over which privilege is not waived, and you may want some
9 clarification on this, Commissioner, because they may
10 become relevant as we go through the course of today and
11 certainly the next two days.

12 COMMISSIONER HICKINBOTTOM: Yes.

13 MR RAWAT: The first--and this is what we're
14 calling bundle 3, but the first document appears at
15 page 18.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 MR RAWAT: And keeping it high-level, so to speak,
18 it's a draft note of a meeting between the Governor and the
19 Premier in 2019, so it's not the current Governor but his
20 predecessor. Privilege is asserted over that, and it's not
21 quite clear as to the Commission the basis on which
22 privilege is asserted.

1 The second document we find at page 162. That is a
2 legal opinion dating September 2020 addressed to The
3 Honorable Premier.

4 Now, that has privilege asserted over it, but if we
5 turn through the bundle to page 169.

6 COMMISSIONER HICKINBOTTOM: 168?

7 MR RAWAT: Yes. 168 is a letter--

8 COMMISSIONER HICKINBOTTOM: Yes.

9 MR RAWAT: --to Baroness Sugg, which again, dates
10 from September 2020, and if turn over to 169, you see two
11 paragraphs up from the bottom, there is reference to legal
12 advice which is then enclosed with the letter to the
13 attention of Baroness Sugg. And if you go to page 170, the
14 letter is copied to the Governor of the Virgin Islands, all
15 Members of Cabinet and Cabinet Secretary.

16 So, in circumstances where there has been a waiver
17 of privilege, certainly to the Baroness, and presumably,
18 therefore, to the Foreign Commonwealth and Development
19 Office, it would be helpful to know the basis on which
20 privilege is now asserted.

21 The last document I draw everyone's attention to is
22 at page 218, which is again a legal opinion dating from

1 December 2020. Now, that has privilege asserted over it,
2 but if we go back to our main bundle, which to page 890,
3 please.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 MR RAWAT: It appears there in disclosure that was
6 provided to the Commission previously and which has been
7 disclosed to all parties and over which privilege was not
8 asserted at that point in time. So, I appreciate Sir
9 Geoffrey may want a little time, but it would be helpful if
10 we could clarify the position as quickly as possible.

11 SIR GEOFFREY: Yes. May I say, Mr Commissioner, I
12 will find out why privilege is asserted, if it is still and
13 return swiftly as we can.

14 COMMISSIONER HICKINBOTTOM: Good, thank you very
15 much.

16 SIR GEOFFREY: Today.

17 COMMISSIONER HICKINBOTTOM: Yes, yes.

18 SIR GEOFFREY: While we're going.

19 COMMISSIONER HICKINBOTTOM: Thank you.

20 Is that it, Mr Rawat?

21 MR RAWAT: Yes, Commissioner. I am going to move
22 on if I may, Commissioner and Governor to--

1 COMMISSIONER HICKINBOTTOM: We will need to get the
2 live stream going.

3 MR RAWAT: Yes.

4 COMMISSIONER HICKINBOTTOM: Thank you. Just to
5 update the people who have just joined us on live stream,
6 we have just been discussing in private session, three
7 documents over which privilege has been asserted, and Sir
8 Geoffrey Cox is going to check as to why privilege is being
9 asserted in respect of those documents and whether it's
10 been maintained, but we're now ready to proceed with the
11 evidence.

12 Thank you, Mr Rawat.

13 BY MR RAWAT:

14 Q. Governor, can I turn to the next topic that I want
15 to canvass with you, which is the responsibility that are
16 due to a Governor under the Disaster Management Act of
17 2003, which is a piece of BVI legislation.

18 Now, the Act is not in the bundles in front of you, but
19 it's right, isn't it, that it imposes certain obligations
20 on a Governor to take steps during a disaster?

21 A. That's correct.

22 Q. If I could just take you through some documents

1 just for purposes of setting the chronology and the
2 background to what appears to be a dispute between, let's
3 call it the Governor's Office and the Elected Ministers.
4 If you go--and we will be jumping between bundle 1 and
5 bundle 3, but if you go to, please, page 885 in that
6 bundle.

7 A. 885 in bundle 1?

8 Q. Yes, please.

9 A. Thank you.

10 SIR GEOFFREY: I'm sorry, Commissioner, I didn't
11 watch the reference. I wonder if Mr Rawat can repeat it.

12 THE WITNESS: 885, Sir Geoffrey.

13 SIR GEOFFREY: I'm most grateful, thank you.

14 BY MR RAWAT:

15 Q. Thank you. I've taken you to a letter from
16 Augustus Jaspert, your predecessor as Governor on the 4th
17 of December 2020. And he sets out there--it's a letter
18 addressed to The Honourable Premier--that his
19 disappointment at not being consulted at the proposed
20 machinery of Government changes, namely the movement of the
21 Department of Disaster Management from the Governor's Group
22 to the Premier's Office before they appeared in the Budget,

1 and he writes this is not a partnership approach to
2 governance.

3 But what Mr Jaspert then continues is that, he says as
4 the law stands, the Governor's responsibility for disaster
5 management is made abundantly clear by the Disaster
6 Management Act of 2003, under which coordination of the
7 Government's general policy of the disaster management is
8 ultimately for the Governor, and he says it's the
9 Governor's duty to prepare a comprehensive Disaster
10 Management Plan, make preparation for disasters and that
11 provides therefore under the Act for the Governor to be the
12 person that appoints and supervises the director of the
13 department of the disaster management.

14 The argument that is made by Mr Jaspert is that this
15 falls within special responsibility for internal security
16 under the Constitution.

17 If we go in the same bundle to 199?

18 A. 199?

19 Q. Yes. Give me one moment.

20 (Pause.)

21 Q. Not in that bundle but in the third bundle,
22 apologies.

1 COMMISSIONER HICKINBOTTOM: Thank you.

2 BY MR RAWAT

3 Q. We find on the 9th of December, The Honorable
4 Premier's Reply to Mr Jaspert and he makes clear that he
5 insists that we proceed with the administration of the
6 Department for Disaster Management by the locally elected
7 government. The Premier then refers to Section 60 being
8 clear in limiting the powers of the Governor to those
9 subjects in Section 60, and he makes clear his view to
10 Mr Jaspert that deviation from this constitutional
11 prescription constitutes a breach of the Constitution and
12 violation of the partnership between the UK and the people
13 of the Virgin Islands, and he refers in support to
14 international obligations under Article 3 of the United
15 Nations charter. And you, yourself, point that out.

16 And then The Honorable Premier goes on to make a number
17 of points. He rejects the suggestion this should be a
18 matter for the upcoming constitutional review. He points
19 out that management of a catastrophic event is not solely
20 and wholly a security matter. Making the point that
21 comparing COVID-19 to the hurricanes is not appropriate,
22 they're different types of disasters.

1 And then says that while the UK Government has provided
2 support to the BVI during catastrophic events and for this
3 we're grateful, the BVI's ultimately responsible for our
4 own preparedness, management of the situation, and
5 recovery, and something he says that was made very clear by
6 Baroness Elizabeth Sugg during the COVID-19 pandemic.

7 Now, we then go to--back to bundle 1 to 888, please.

8 A. Yes.

9 Q. And there Mr Jaspert responds and says that his
10 position remains unchanged on the Department of Disaster
11 Management. This is a letter dated 18th of December 2020.
12 He says: "Under the Constitution, the Disaster Management
13 Act of 2003, the Governor's responsibility is clear", and
14 then points to, "given the position under the current
15 Constitution and law, DDM and the subject of disaster
16 management shall be presented correctly in the Budget
17 estimates as being under the remit of the Governor's
18 Group".

19 Now, can you clarify, just to help us a little bit with
20 what that means in terms of, as I understand it, the DDM
21 sat under the Governor's Group, and, therefore, the
22 Governor had responsibility for its budget.

1 A. That's correct.

2 Q. It was a proposal to move it to a different
3 Ministry, if you like. And what Mr Jaspert is arguing is
4 it should remain under the Government's group; is that
5 right?

6 A. That's my understanding, yes.

7 Q. Now, if we go back to bundle 3, we will see that at
8 216, this is a letter from The Honorable Premier to
9 Mr Jaspert on the 18th of December 2020, the Premier
10 responds and says that his position on the rightful and
11 constitutional alignment of the Department of Disaster
12 Management under the Administration of the Territorial
13 Government remains unchanged, and that the necessary
14 legislative changes to support this alignment--realignment
15 of the remit of the House of Assembly. They're not
16 dependent on or contingent on a constitutional review, but
17 that the legislative changes to ensure alignment with the
18 current housing of DDM are before the House of Assembly.

19 We then go in the same bundle, please, to 203?

20 A. 203?

21 Q. Yes. Bundle 3, we are still there.

22 The Premier then on the 14th of December copying in all

1 Ministers and junior Ministers seeks legal advice from the
2 Attorney General on the question of where the Department
3 for Disaster Management should sit and who has
4 responsibility for it from a constitutional point of view.

5 Now, I won't go into the detail of that advice for
6 reasons that privilege may still be asserted over it, but
7 if we go to 889 in bundle 1, we see that the current Deputy
8 Governor but in the role of acting Governor on the 22nd of
9 December 2020 writes on a memorandum: "I've assented to
10 the Appropriation Act of 2021"--sorry, I will read that
11 again.

12 "I have assented to the Appropriation 2021 Act 2020 to
13 clarify that, in doing, do not endorse any purported
14 regroupings or movement to financial controls within the
15 Budget estimate unless in line with current governance
16 structures and until these are also through a proper lawful
17 process, including where necessary are sent to legislation
18 or reallocating responsibility".

19 So, could you just explain what the purpose of this
20 memorandum was, please, if you can.

21 A. Obviously before the period that I became
22 Governor, my understanding was that this was essential

1 without prejudice statement by the Acting Governor, so he
2 was willing to assent to the Appropriation Act, but that
3 was without prejudice to the view on where the Budget
4 should lie, immediately to disaster management and where
5 responsibility for disaster management should lie.

6 Q. Now, this does come across your desk. If we go to
7 page 249 in bundle 3.

8 A. Yes.

9 Q. 18th of February 2021, you write to The Honorable
10 Premier, and you write, you say, refer the thoughts about
11 what is now the Disaster Management Act of 2021, but not an
12 act, as I understand it, to which assent has yet been
13 given; is that right?

14 A. That's correct.

15 Q. You say: "I believe we agree disaster management
16 is crucial for the Virgin Islands and it's important the
17 effective coordination exists between all parties with
18 response for the decision-making and delivery in this
19 area".

20 You continue that "whilst it's an issue for all parts of
21 the BVI Government, and you support a collaborative whole
22 of government approach, it's ultimately the responsibility

1 of the Governor to ensure the safety and security of the
2 Territory. Disaster management impinges on internal
3 security and external affairs which are the
4 responsibilities for the Governor set out in Section 60.
5 Therefore, I believe it is necessary that a number of key
6 Disaster Management Policy areas should continue within the
7 Governor's Group in order that I am unable to fulfill those
8 constitutional responsibilities. The DMA 2021 represents a
9 whole scale transfer of policy away from the Governor's
10 Group".

11 You then mention that the Governor's Group was not
12 involved in any consultation on the Act.

13 You go on on the next page to point to the
14 significant constitutional issues involved, the key
15 importance of ensuring responsibilities for effective
16 disaster management are properly delineated, and you
17 suggest that the matters raised in the Act would best be
18 considered as part of the overall issues under the proposed
19 constitutional review.

20 If we then go to the first bundle of 898, please.
21 We are now on the 23rd of April 2021, again concerned with
22 the Disaster Management Act, and you are following up on

1 your letter of the 18th of February 2021.

2 Just, would the Commissioner be right to assume
3 that you hadn't received a response to that letter of the
4 18th of February 2021?

5 A. I believe not.

6 Q. You point again to the importance for effective
7 disaster management. You refer to working in a
8 collaborative fashion, the need for effective coordination
9 joined up working and you say you're committed to
10 maintaining that approach to best meet the Territory's
11 needs. You then refer again once to the responsibility of
12 the Governor to security of the Virgin Islands, and you say
13 disaster management clearly involves internal security and
14 external affairs which come under Section 60. And you then
15 continue by repeating what you said before about the
16 importance of it staying with the Governor's Group. You
17 conclude that the Act represents a major transfer of policy
18 and power of direction away from the Governor's Group and
19 you say: "Accordingly I would not be able to assent to the
20 Act as currently drafted". And then you refer again to the
21 opportunity that's provided by the constitutional review
22 and ask the Premier to agree that the Act be redrafted as

1 appropriate following the constitutional review.

2 You then say: "Should you not be willing to agree to
3 that approach, I will reserve the question of assent to the
4 Foreign Secretary for his consideration".

5 Last letter in the sequence, if we look at page 253 in
6 bundle 3, the Premier responds to you. He begins by
7 saying: "I'm sure you would agree that the UK Government
8 should see it as a privilege to assent to a piece of
9 legislation debated by Members of the House of Assembly,
10 elected by the people and for the people and who represent
11 the pure interest of Virgin Islanders and which legislation
12 has gone through the legislative process, inclusive of the
13 scrutiny of the Attorney General and Cabinet".

14 He continues by saying: "Whilst it's clear that the UK
15 Government and the Government of the people of the Virgin
16 Islands have differing views on major areas of policy and
17 how they should be handled and where the balance of power
18 between the Governor's Group and the elected Territorial
19 Government should lie", but he then says "this matter is
20 not about transferring power away from the Governor's Group
21 but ensuring that elected policy makers are put in charge
22 of policy and preparing the Territory for facing any

1 disaster that comes. As Governor you should see the
2 advantage of this and be happy to assent to the express
3 wishes of the House of Assembly".

4 And then he goes on in the next page by saying that what
5 not assenting to this bill really means for the Virgin
6 Islands will be unfolded?

7 He points out in his letter that he sees no difficulty
8 with the Act as passed by the House of Assembly. It
9 advances the Virgin Islands on the journey towards
10 self-determination, and the letter points to Article 73 and
11 the Constitution. And the Premier explains that, in the
12 process, this would gradually transfer power from the UK
13 Government and the Governor's Group back to the independent
14 spirit of the Virgin Islands people should be seen as an
15 impetus rather than an obstacle". The letter points out
16 that the passage of the Act was a decision of the
17 legislators of the House of Assembly expressing individual
18 and collective will of the elected representatives.

19 And the Premier says it would not be prudent for me
20 to exercise any actions that conflict the express will of
21 the legislative arm without first obtaining the consent of
22 that arm especially since constitutionally the Premier is

1 accountable to the Parliament and not the other way around.

2 He then concludes: "As relates to your request for
3 the Act to be redrafted following the impending
4 constitutional review in order to avoid the unfortunate
5 situation of Governor exercising his prerogative and
6 declining assent while having to place a final decision for
7 assent at the feet of the Foreign Secretary is not a
8 decision I'm prepared to make on my own as a responsible
9 leader. I cannot speak for the legislative branch".

10 And then the Premier says that where historically
11 the position of the Governor is usually upheld by the UK
12 Government, I'm inclined to seeking the guidance of the
13 House of Assembly on a way forward with respect to your
14 express position on the Disaster Management Act of 2021 and
15 your recommendation.

16 Now, your recommendation was that the status quo
17 should be maintained until the constitutional review.
18 What--that was in April 2021. What's the present position
19 in relation to the Disaster Management Act?

20 A. The present position is that the Act has not been
21 assented to by myself as Governor and I have received no
22 further correspondence from the Premier in response to his

1 inclination to seek the guidance of the House of Assembly
2 on the way forward. So, the current situation that it was
3 at the end of April continues.

4 Q. You appear in terms of your analysis of the
5 Constitution and a Governor's role in disaster management
6 to have adopted the same stance as your predecessor; is
7 that right?

8 A. Yes, it is. But let me be clear, for me,
9 Mr Rawat, it is not argued by me nor I think by my
10 predecessor, that the Disaster Management Act is
11 unconstitutional. What is argued, is that it impinges on
12 the responsibilities of the Governor for security and
13 external affairs and then, therefore, falls within the
14 interests of the Governor, it evolves those
15 responsibilities--I use that word "involves" particularly
16 given the wording of Section 41(c) of the Constitution,
17 though it's a matter which involved matters which I'm
18 responsible under Section 60, and so in exercising my
19 decision whether or not to assent, I consulted duly with
20 The Honourable Premier.

21 Q. But returning to a point I was making before the
22 lunch break--I mean, what Section 60 does not do is refer

1 in terms to disaster management, does it?

2 A. That's correct.

3 Q. And so, is this not a matter of interpretation
4 between yourself and The Honorable Premier? Leave aside
5 whatever legal advice you might have been given or you
6 might receive, but isn't the point that has been reached
7 that your analysis of Section 60 is that, by combining
8 external affairs and internal security, disaster management
9 falls within the purview of the Governor?

10 A. No, that's not--with respect, that my position.

11 The Disaster Management Act which has been assented
12 to in the previous Disaster Management Act, assigns
13 responsibility to put disaster management to the Governor.
14 The new legislation would involve a whole scale transfer of
15 that responsibility from the Governor to the relevant
16 Minister. And so Director of Disaster Management would
17 fall under the policy direction of the Minister rather than
18 the Governor. And that transfer of direction means those
19 elements of disaster management which relate to security
20 and external affairs for which the Director is carrying out
21 day-to-day responsibilities would be placed under the
22 policy direction of the Minister.

1 I have seen nothing to suggest that the position
2 taken by my predecessor and myself is unconstitutional.
3 It's a policy, it's a policy discussion, Mr Rawat.

4 Q. But although it was a whistle-stop tour of the
5 correspondence, but when we looked at that correspondence,
6 the point that was being made by yourself and your
7 predecessor was Section 60?

8 A. That's correct.

9 Q. And so, when one reads that, well, actually there's
10 a starting point at Section 60, I see Section 60 as
11 covering external affairs and internal security. That
12 encompasses disaster management, it should be for the
13 Governor to lead on this?

14 A. My view is that disaster management so greatly
15 involves responsibility for security and external affairs
16 that, for the time being, it should remain the
17 responsibility of the Governor.

18 Q. But if we look at it through the other lens, the
19 Premier's position is--or it could be interpreted as when
20 one looks at Section 60, it makes no reference to disaster
21 management. When you appreciate that in a disaster there
22 may be more than one Ministry involved, and when you

1 appreciate the importance of allowing autonomy and allowing
2 the Government of the BVI and the people of the BVI to
3 exercise as much control as possible over their own
4 affairs, it is logical, isn't it, for disaster management
5 to sit under one of the Ministries?

6 A. I think, Mr Rawat, this has been a somewhat
7 unfortunate debate because certainly I, as Governor, and
8 I'm sure my predecessor, are committed to a partnership
9 approach in disaster response. And indeed, the current
10 structure of the National Disaster Management Committee
11 provides for that partnership approach, which is jointly
12 chaired by myself and the Premier, and involves a host of
13 government Departments, many of which the Governor does not
14 have responsibility for, including Public Works, for
15 example, a health and fire and safety.

16 So, it's essential that if disaster management is
17 going to be coordinated properly, that involves a
18 partnership and a whole-of-government approach, and that's
19 certainly what I am confident and also for my predecessor
20 have always sought to do with the structure of the
21 Committee which oversees this as a partnership, as a
22 partnership approach.

1 But, I, unfortunately, have some responsibility or
2 engagement in disasters previously. I was in Nepal as the
3 acting Ambassador when the earthquake hit in 2009 which
4 killed 9,000 people. We faced hurricanes, fortunately not
5 disasters during the time I was in Bermuda. And of course
6 I saw what happened in Hurricane Irma.

7 What I do know is when you face a disaster as great
8 as Hurricane Irma was, first of all, it conveys serious
9 security issues. Prisoners came out of the prison, there
10 was a degree of looting. There was a need to restore order
11 following Hurricane Irma, so it involves security issues.
12 And external support was required in terms of the British
13 naval and Ministry of Defence, response from policing which
14 came from Bermuda and Cayman.

15 So, the responsibilities of the Governor in that
16 disaster response for security and external affairs were
17 intimately involved.

18 And my view is that moving policy direction away
19 from the Governor to the Minister would not be in the
20 interest at this point in furthering disaster management in
21 the Territory. Now, I don't rule out there's room for
22 debate in that area. That's a matter for discussing in

1 negotiation. My understanding is that the Disaster
2 Management Act, the legislative decision, the current
3 Governor was not consulted in any detail--sorry, the
4 previous Governor was not consulted in any detail on that
5 legislation.

6 And as part of a constitutional review going
7 forward, I recognize this is for discussion, but it's not
8 something to be rushed. It's not something to be done
9 without a great deal of careful consideration.

10 And to be frank, I have discussed this issue since
11 I came into the Territory with others much involved in
12 disaster management, and the view and advice I have
13 received is that this stage I believe it would be better
14 for the overall policy responsibility for management to
15 rest with the Governor rather than be transferred at this
16 point of development, but I don't rule out further
17 discussion in that matter. I'm not arguing this would be
18 anti-constitutional. I'm arguing that at the moment
19 because it so much involves responsibilities for security
20 and external affairs, that it would be wisest for that
21 overall responsibility to be moved with the Governor while
22 working in close partnership with the Premier, elected

1 Government and Government Departments for which the
2 Governor does not have direct responsibility. That's my
3 best judgment of the matter.

4 COMMISSIONER HICKINBOTTOM: That's helpful,
5 Governor.

6 Just to confirm the constitutional position so far
7 as you're concerned, not the constitutionality of the Act,
8 but you're not assenting to the Act, my understanding from
9 your evidence today is that you consider it falls under
10 Section 41(c) of the Constitution; is that right?

11 THE WITNESS: No. With respect, no, Commissioner,
12 that simply tainted my duty of consultation because you
13 will see that Section 40(1) provides the Governor shall
14 consult the Cabinet in all of the functions conferred on
15 him by the Constitution except, and then little C which
16 indicates, which in his or her opinion involves a matter
17 for which he or she is responsible under Section 60 and to
18 determine as being important, but in exercising my
19 priorities at least to paragraph C, the duty is to consult
20 the Premier, which I actually did.

21 COMMISSIONER HICKINBOTTOM: Sorry, Section 40
22 simply is to explain why you consulted with the Premier and

1 not the Cabinet?

2 THE WITNESS: That's correct. Although the Cabinet
3 were aware of my position.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 BY MR RAWAT:

6 Q. But it takes us back to what I've put to you as an
7 imbalance in the modern partnership, which is that you can
8 withhold assent to a Bill, and you can also refer it to the
9 Foreign Secretary, who, if one takes the Premier's letter,
10 is more likely than not to side with his Governor, and so,
11 that is again, the ultimate sanction that sits with the
12 Governor?

13 A. That's correct. That's correct. The Premier, in
14 his letter of 28th April to me and he cited Article 73 in
15 this context, and he said that, in the process, this would
16 gradually transfer power from the UK in the Government's
17 group back to the Virgin Islands people.

18 And I think that word "gradual" is important. The
19 difficulty with this piece of legislation is that it would
20 involve a whole scale transfer of power, and therefore it
21 needs, I think, to be thought about very carefully, and we
22 should be subject of greater debate and consultation that

1 was possible for the legislation which is adopted by the
2 House of Assembly.

3 So, I do not rule this out for the future, but I
4 think it needs to be very carefully considered, and I think
5 that, frankly, there needs to be greater capacity-building
6 before that transfer would be wise, but I recognize there
7 will be differing views for discussion on the issue.

8 Q. Just to elaborate, what do you mean by greater
9 capacity-building?

10 A. At the moment, if we were hit again--and I hope we
11 are never not--by an Irma-type hurricane, I believe that
12 that would need to further engage the Governor's
13 responsibility under Section 60 for security and external
14 assistance and beyond the areas of external assistance
15 which are already devolved to the Government under the
16 Constitution. And after Hurricane Irma, the Governor had
17 to play a very strong leadership role in that Response and
18 had to proceed with the Director of Disaster Management.

19 And my judgment is that at the moment that position
20 continues to apply.

21 And I say that whilst I also maintain my commitment
22 to a partnership approach because there has to be a

1 partnership approach. The Governor can't do this alone.
2 It has to be working together, but that doesn't mean this
3 complete transfer of power as it seems to be proposed.

4 Q. You mentioned earlier that having spoken to senior
5 or to others with an interest in disaster management, their
6 view was that the Disaster Management Department should sit
7 under the Governor's Group. Who were these others that
8 you've spoken to?

9 A. If you forgive me, I think it best if I not name
10 names, but I have spoken to people who fall within disaster
11 management other Government Departments who have key
12 responsibilities, and in my discussions the view has been
13 that for the time being they would defer the responsibility
14 to continue to lie with the Governor.

15 Q. Is the sort of present state of affairs that the
16 Department sits under a Ministry at the moment, but you
17 still have obligations under the 2003 Act? Is that the
18 position we've reached?

19 A. Disaster Management Team is part of the Governor's
20 Group, and I retain overall responsibility under the
21 legislation.

22 Q. I see.

1 So, there hasn't, in fact, been a transfer?

2 A. No. The position remains as it was prior to the
3 legislation being passed.

4 Q. Thank you.

5 Now, in relation to this--if you pick up your written
6 response, please, Governor?

7 A. Yes.

8 Q. This is one of the criticisms that was--you were
9 asked to address and you have done so. I don't intend to
10 read it out, but before I move on, it's at your page 1.

11 Is there any other matter in that Response that you wish
12 to draw the Commissioner's attention to?

13 A. I think paragraph 1.5, my understanding is that it
14 is not contended that I have been in breach of the
15 Constitution in not asserting to the Disaster Management
16 Act. I have not seen any contention to that effect. So, I
17 believe it was a policy debate, but I believe that I have
18 acted within the Constitution in the position I have taken
19 on that--on that matter. Thank you.

20 Q. Well, if we move on, the another--next matter that
21 I want to canvass with you is this: And that is the issue
22 of who chairs Cabinet in the absence of a Governor.

1 Now, I think before we go through this, let's start off
2 with the Constitution because if you turn to I think in the
3 Constitution it's going to be Section 36.

4 Now, Section 35 creates the position of Governor. 36
5 creates the position of Deputy Governor, and
6 Section 37(1) (a) provides that during any period when the
7 Office of Governor is vacant or the Governor is absent from
8 the Virgin Islands or is for any other reason unavailable
9 to perform the functions of his or her office, the Deputy
10 Governor shall during Her Majesty's pleasure, act in the
11 Office of Governor and she will perform the functions of
12 that office accordingly.

13 Section 38 sets out the functions of a Deputy Governor,
14 but 39 then says Deputy--it's headed Deputy Governor. It
15 says: "Whenever the Governor has occasion to be absent
16 from the seat of government but not the Virgin Islands, has
17 occasion to be absent from the Virgin Islands for a period
18 in which he or she has reason to believe it will be a short
19 duration, or is suffering from any illness, which he or she
20 has reason to believe will be of short duration, the
21 Governor may, acting in his or her discretion, by
22 instrument under the public seal, appoint the Deputy

1 Governor or if the Deputy Governor is not available, any
2 other person in the Virgin Islands who is a Virgin
3 Islander, to be his Deputy during such absence or illness
4 in that capacity and in that capacity performance on his or
5 her functions--behalf such as the functions of the Office
6 of Governor as may be specified in that instrument".

7 We then have--if you go through to Section 49--give me a
8 moment.

9 (Pause.)

10 Q. Section 49, you have--the question is who chairs
11 Cabinet, and 49(1) states that the Governor shall so far as
12 practicable attend and preside at meetings of the Cabinet.
13 And then in the absence of the Governor, they shall preside
14 at any meeting of Cabinet the Premier or in his or her
15 absence, the Deputy Premier.

16 So, there is no reference in Section 49 to a Deputy
17 Governor. I think there is common ground that if, as the
18 Constitution provides, you have an acting Governor, then
19 that person can chair Cabinet in the absence of the
20 Governor, and that's provided for, we didn't look at it,
21 but it's provided for by Section 39, which allows--or we
22 did look at that--but allows for someone to act in place of

1 the Governor.

2 But the situation seems to be or that we've reached
3 is that where there isn't a Governor present or where there
4 isn't an acting Governor, then it's for the Premier to
5 chair Cabinet, and the criticism that is made, not just of
6 yourself but of previous Governors, is that there has been
7 a practice in the absence of the Governor, a Deputy should
8 Chair, and there has never been in reality a situation
9 where the Premier chairs Cabinet.

10 Now, just clarify for the Commissioner what your
11 position is on that?

12 A. Thank you.

13 Well, first, I welcome the fact that it appears to
14 be accepted equivocally that where the Governor is absent
15 from the Territory, that the acting Governor can preside
16 over Cabinet in accordance with Section 49 of the
17 Constitution, and that seems to have been accepted
18 equivocally, and I welcome that.

19 The difficult issue relates to the Deputy to the
20 Governor under Section 39 of the Constitution. And as I
21 understand it, that was a practice that, the Deputy to the
22 Governor would chair Cabinet when the Governor was absent

1 for a short period but on the Territory.

2 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
3 Governor, but that deals with chairing the Cabinet but over
4 and above that, various things have to happen before a
5 Cabinet Meeting. For example, the Cabinet Secretary, the
6 Governor and the Premier, as the Cabinet Steering Group,
7 set the Agenda of the Cabinet. If the Governor is not
8 available for the reasons we're talking about, this is now
9 acting Governor, does the Deputy Governor do that?

10 THE WITNESS: The issue has not arisen since I have
11 been here as Governor, but depending on the interpretation
12 on adopting of the Constitution, the Deputy to the Governor
13 could be empowered to do that.

14 Yes, thank you.

15 COMMISSIONER HICKINBOTTOM: No, thank you.

16 THE WITNESS: As I understand it, the issue came to
17 a head in May 2020 of last year, when a challenge was made
18 to the practice of allowing the Deputies to the Governor to
19 chair Governor--to chair Cabinet when the Governor is in
20 the Territory but for one reason or another enable to
21 chair.

22 And Governor Jaspert did what he should have done.

1 He sought advice on the subject from the then-Attorney
2 General. And the then-Attorney General advised on 20th of
3 May that the Governor could by instrument under seal
4 authorize the Governor to perform all of his functions,
5 including the chairing of Cabinet, so that is the advice
6 which the Governor received at the time from the Attorney
7 General and acted on it.

8 There is, of course, I'm aware, a subsequent device
9 from the current Attorney General in her advice to the
10 Premier of 13th of January of this year, where the Attorney
11 General takes a different view of the matter in
12 paragraph 12 of that letter, although with respect, I think
13 the current Attorney General's reasoning on that point
14 wasn't made out quite as fully as the reason which was set
15 out by former Attorney General Aziz.

16 Now, the--so, that's the situation I face as
17 Governor with those conflicting pieces of advice.

18 I'm also aware of the advice that was given by
19 former Commonwealth Officer Legal Counselor Susan Dixon on
20 this subject in 2008, which I think should be in the
21 bundles, Mr Rawat.

22 Q. It's at page 881 in bundle 1.

1 A. Thank you.

2 Q. I may have tried to take it too fast, Governor, but
3 perhaps if we--just so that we've got the timeline, if you
4 look at 883 on the 24th, you have a letter on the 24th of
5 April 2007, which is from Dr Orlando Smith then as Chief
6 Minister, and it's as part of the work that was coming up
7 to confirming or finalising the--what became the 2007
8 Constitution, and what was agreed--and there is an exchange
9 of letters, one on the 23rd of April from Ian Hendry on
10 behalf of the Foreign Commonwealth Office which is at
11 page 184, and then one from Dr Orlando Smith on the 24th of
12 April 2007, and they both agree that the position is that
13 when there is a reference to the Governor chairing Cabinet,
14 it encompasses the person who acts as Governor in absence.

15 What you have is as 881, and you referred to it, is an
16 opinion by Susan Dixon, Legal Counselor at the Commonwealth
17 Office in March 2008, and tell me if I have misunderstood
18 this, but in her view, constitutionally there is nothing to
19 stop a Governor appointing a Deputy Governor to perform all
20 of the functions of a Governor.

21 A. That's correct.

22 Q. And that includes the function of chairing Cabinet.

1 A. That's correct.

2 Q. But what she does point to is that, from the
3 exchange of letters that it was--that we've referred to,
4 that it appears to have been the intention of the two
5 governments that where there was no Governor or acting
6 Governor to preside, then the Premier would preside?

7 A. That's correct.

8 Q. So, that's I think the position we reach in 2008.
9 You have referred to a legal advice from The Honourable
10 Bubba Aziz, the previous Attorney General, and you have
11 produced that advice to the Commissioner.

12 MR RAWAT: Commissioner, it's amongst the documents
13 that the Governor has provided, and it's at page 1.

14 BY MR RAWAT

15 Q. And this is a memorandum dated April 2019, and
16 again, tell me if I'm oversummarising, but the effect of
17 that was that Bubba Aziz's view as Attorney General was
18 that a Deputy could chair Cabinet.

19 A. That's correct.

20 Q. But as you point out, the current Attorney General
21 has reached a different view, and I think the opinion from
22 Mr Aziz was sought by the Deputy Governor, but, as you've

1 said, the current Attorney General's view is different, and
2 that is that she makes two points, firstly, is that a
3 Deputy cannot sit in Cabinet, so a Deputy Governor cannot
4 sit in Cabinet. But secondly, also--and this relates
5 perhaps also to a different issue, that that is that a
6 Governor can chair a Cabinet remotely?

7 A. Yes.

8 Q. Now, that's the position in terms of legal advice.
9 But in terms of practicalities and the reality, what is
10 your position in terms of what your understanding of who
11 can chair Cabinet in your absence?

12 A. Thank you.

13 Well, I mean, first of all, it would--it does
14 require a degree of patience and wisdom to try to reach
15 differing opinions on this matter.

16 The first and I think the most important point, if
17 I may, is that in the papers which have been submitted to
18 the Commission, it is claimed that the previous Governor
19 acted in breach of the Constitution in this matter, and I
20 believe that's incorrect. I think the advice of Susan
21 Dixon in 2008 right back at the beginning of this was
22 accurate, that the Constitution does not preclude the

1 Deputy Governor from presiding at Cabinet meetings, and
2 there is a Constitutional and legal basis for the Deputy so
3 to preside, so I do not believe that, as has been suggested
4 that there was any breach of the Constitution in this
5 matter.

6 Secondly, I note that despite the understanding
7 that was set out in the exchange of letters between the
8 former Chief Minister and Mr Hendry, the practice appears
9 to have been, despite that understanding, that the Deputy
10 to the Governor chaired Cabinet, and that was a practice
11 which the current Governor inherited.

12 In terms of my own position going forward, and in
13 light of the wording of Section 49 of the Constitution, in
14 light of that exchange of letters, I do not preclude
15 circumstances where the Premier would be asked by me to
16 chair Cabinet, but I would expect them to be few and far
17 between, first of all, because, as Governor, I intend
18 whenever I'm on the Territory to be available to chair a
19 Cabinet.

20 And secondly, I think that the advice given by the
21 current Attorney General is most helpful in that respect.
22 Her advice was, actually, COVID-19 context, it was possible

1 for the Governor to Chair Cabinet remotely, but I think
2 that also by extension, if I may, would mean that if, for
3 example, the Governor were on official business in Virgin
4 Gorda or Anegada, then the wonders of modern technology
5 which probably were not envisaged in 2007 and 2008 would
6 allow for the remote chairing of those circumstances.

7 So, I don't rule out in line with that exchange of
8 letters, Mr Rawat, that there would be circumstances in
9 which the Premier might Chair Cabinet, but I would expect
10 those circumstances to be few and far between.

11 I should say also that I would expect if the
12 Premier were chairing Cabinet that consult in advance of
13 that to the extent possible, and I think if there were
14 matters pertaining specifically to the Governor's
15 responsibilities before Cabinet, obviously that
16 consultation would even be more important, I think I would
17 be proposing in those circumstances if I could not
18 physically attend there would be--which obviously I could
19 not--the Deputy Governor might be able to attend that part
20 of the discussion in Cabinet, but I don't rule out that
21 possibility for the future, Mr Rawat.

22 COMMISSIONER HICKINBOTTOM: So, as I understand

1 your evidence, Governor, by those means--because there is a
2 difference in legal opinion.

3 THE WITNESS: Exactly.

4 COMMISSIONER HICKINBOTTOM: But as I understand
5 your evidence, you don't envisage any insuperable problem
6 with this in the future because it can be dealt with in one
7 way or another by practical means, remote attendance, the
8 Premier chairing Cabinet after consultation or whatever.

9 THE WITNESS: That's correct.

10 There could be an issue if the Governor was
11 seriously ill, and was seriously ill that he or she were
12 not able to even remotely chair a Cabinet. But subject to
13 my health prevailing, Commissioner, I hope this situation
14 isn't going to materialise.

15 COMMISSIONER HICKINBOTTOM: In sort of
16 impracticalities, so I understand that, but if there
17 were--and we have dealt with this I think before, but if
18 there were a difference of legal opinion as to what the
19 Constitution meant, which there is here, is there a
20 mechanism for resolving that? In some Constitutions there
21 is a mechanism whereby there's sort of a declaratory relief
22 can be sought from some court or another, but is there any

1 mechanism whereby that can be resolved? It may be a
2 question for Sir Geoffrey rather than you.

3 THE WITNESS: I suspect it might ultimately have to
4 be the courts.

5 I haven't talked to this office--

6 COMMISSIONER HICKINBOTTOM: Exactly.

7 THE WITNESS: But there is conflicting legal advice
8 on this, but what I am confident of is I don't think there
9 has been any breach of the Constitution involved in this,
10 and that's my fundamental position.

11 COMMISSIONER HICKINBOTTOM: Because the previous
12 Governor was really following the Attorney's advice.

13 THE WITNESS: That's correct, yes.

14 COMMISSIONER HICKINBOTTOM: Okay. Thank you.

15 BY MR RAWAT:

16 Q. But is it a sort of peculiarity of the Constitution
17 that you cannot under Section 39 now on the latest advice
18 that you've received, you can't by instrument allow your
19 Deputy Governor to perform all of your functions, including
20 Cabinet, but under Section 37, your Deputy Governor
21 automatically acts as the Governor in your absence?

22 A. That's correct, in terms of the latest advice on

1 the position of Deputy to the Governor. It's a question of
2 whether one prefers the advice given by Ms Dixon and
3 Attorney General Aziz on the one hand and the legislative
4 advice given by the current Attorney General on the other,
5 and there may be differing views on which advice is to be
6 preferred.

7 Q. But putting advice aside, returning to the theme
8 that I have been seeing you with, which is the importance,
9 and you acknowledged it, of every effort being made to
10 ensure that that the BVI is able to act with autonomy and
11 able to have control over its own affairs, isn't a
12 convention whereby when the Governor is absent the Premier
13 should be the Chair, one that should be pursued?

14 A. My view is that the Constitution is quite clear
15 that the Acting Governor exercise his power on behalf of
16 the Governor all of the functions of Governor, and that's
17 Section 2(3) of the Constitution, where the conjunction
18 with Section 38(2). So, Section 2(3) makes clear that
19 reference to the holder of any office shall be construed as
20 including a reference to any person who is for the time
21 being performing the functions of that office. And Section
22 38(2) provides that the Governor may authorize the Deputy

1 Governor to exercise for and on behalf of the Governor in
2 any or all of the functions of the Governor, so the acting
3 Governor is the Governor, and hence has the power to
4 preside over Cabinet in accordance with Section 49(1).

5 And the exception in Section 49(2) is when we don't
6 have an acting Governor in place when the Premier may
7 Chair.

8 Q. All right. I follow. Thank you.

9 A. Thank you.

10 I think that point is clear. I believe that point
11 is accepted by the Government, and I welcome it. I don't
12 know if that has been a helpful exception of that basic
13 position.

14 Q. I follow you. Thank you.

15 If I could ask you to turn to page 825, I want to the
16 move on to--

17 A. 825?

18 Q. Yes.

19 A. Thank you.

20 Q. Although before I do, again this was a potential
21 criticism that we raised with you, Governor, so--which is
22 at your page 3. If there is any other matter that you want

1 to draw the Commissioner's attention to, please do so now.

2 A. I suspect that we have discussed that particular
3 issue sufficiently, Mr Rawat. Thank you.

4 Q. I want to just move on to the third criticism,
5 which is in effect that the Governors have taken an
6 approach that inconsistently--inconsistent, really, with
7 the proper constitutional position and proper convention in
8 that they take the view that requests for information from
9 Ministries do not need to be carried out through the
10 Premier's Office. I would like to start off by taking you
11 back to your own Position Statement to the Commissioner,
12 and at page 825 of that, please, if you have it.

13 A. Thank you, yes.

14 Q. It's paragraph 64 and 65 that I want to draw your
15 attention to, Governor.

16 You say there that "the Public Service contains many
17 dedicated and well-qualified officials, but their
18 confidence appears to have been eroded by perceived
19 attempts to exert undue political influence on their work
20 while creating uncertainty over lines of authority. Under
21 Section 56 of the constitution, Ministers have direct and
22 control of their Department, including directing the

1 implementation of government policy as it relates to that
2 Department. But unless otherwise agreed between the
3 Governor and the Premier, the Department is under the
4 supervision of a Permanent Secretary who is a Public
5 Officer. Moreover, the power specified in Section 56 is
6 without prejudice to the Governor's responsibility of
7 beyond Section 60 of the Constitution for the terms and
8 conditions of the Public Service, the role of the Public
9 Service Commission and the making of public appointments
10 and the ultimate responsibility of the Governor for the
11 disciplinary control of Public Officers and/or their remove
12 from Office. Such powers vest and should continue to vest
13 in the Governor, not Ministers".

14 You continue: "Confidence of the Public Service also
15 risks eroded by attempts to limit interaction by the
16 Governor's Offices with Ministries, e.g. by insisting that
17 all such contact be carried out through the Premier's
18 Office. Such attempts run contrary to Section 56(7) of the
19 Constitution, whereby the Governor acting in his or her own
20 discretion may at any time request from a Minister any
21 official papers or seek any official information, subject
22 to informing the Premier of any such request. They also

1 cut across Section 68 of the Constitution which allows the
2 Governor to direct others, not just Ministers, in the
3 exercise of their functions where they involve or effect
4 any matter for which the Governor has special
5 responsibility under Section 61 of the Constitution".

6 Now, if you then, Governor, turn up, please, page 917 in
7 the same bundle. Paragraph 55, to begin with, this is the
8 Response or the Reply of the elected Ministers to your
9 Position Statement, and they point to--the Reply points to
10 the two paragraphs I've just read and continues, "the
11 Governor asserts without particulars that confidence in the
12 Public Sector has been eroded because political Ministers
13 have made 'perceived attempts' to exert undue
14 influence--undue interference on the work of Public
15 Officers and created uncertainty"--

16 COMMISSIONER HICKINBOTTOM: Undue political
17 interference.

18 MR RAWAT: Yes, I'm sorry. I'll read that again.

19 --"to exert undue political interference on the
20 work of Public Officers and created uncertainty over lines
21 of authority, inter alia by insisting that interaction by
22 the Governor's Office with their Ministries should be

1 carried out through the Premier's Office. This is a highly
2 lopsided perspective and illustrates the problem to which
3 we previously averted in the Position Statement".

4 At 58, it continues, I will read what 56 does is
5 draw attention Section 56 of the Constitution, and then at
6 paragraph 57 the Response continues: "A Minister therefore
7 has both a legitimate interest in and a right to be
8 consulted on the suitability and performance of senior
9 Public Officers in his Ministry or Department. He's
10 entitled to express his opinion both to his Permanent
11 Secretary and to the Deputy Governor on such matters. This
12 is not to be construed as undue political interference, but
13 it does require good leadership of the Public Service to
14 manage possible tensions together with modern systems of
15 training and management. The Ministers fully accept that
16 the Governor, pursuant to Section 56(7) of the
17 Constitution, has the right to request official papers
18 'from a Minister' or seek from him any official information
19 or advice available to that Minister with the respect to a
20 matter for which that Minister is responsible.

21 "It is or should be a normal and basic courtesy to
22 the Minister, however, to address such a request to him or

1 his private office so that he's aware of the request.
2 Furthermore, it is a legal condition of the Governor's
3 request that he should inform the Premier of it. It has
4 been the experience of Ministers that neither the courtesy
5 nor the duty has always been observed, and that direct
6 contact has been made by the Governor's office. Sometimes
7 quite junior officials to demand information or action of
8 which the Minister and Premier are unaware. In addition,
9 the Governor's suggests the Ministers' insistence that his
10 Office should interact with Ministers through the Premier's
11 Office cuts across his power, pursuant to Section 60 of the
12 Constitution to direct any personal or authority in
13 exercise of function where he determines that function
14 'would involve or affect' any matter for which the
15 Governor's responsible under Section 61. However, that
16 power may only be exercised after consultation with the
17 Premier. Once again, it has been the experience of
18 Ministers that the Governor's Office has issued directions
19 to officials in the Ministries and Departments without
20 observing that direction".

21 So, the point is a mixed one because it is--it goes
22 to a lack of courtesy and respect for the position of

1 Ministers and, indeed, the Premier, because your Office
2 essentially and the Governor's Office, shall we say, goes
3 direct to sometimes even junior officials. It reflects a
4 failure to really understand the Constitution because
5 the--and the role that Ministers play in administering
6 their Department. And it again goes to the point that the
7 Governor, as the Representative of the UK FCDO can and does
8 interfere in the workings of ministerial Departments when
9 there is no need to do so.

10 BY MR RAWAT:

11 Q. Now, I know it's a bit of a compendious point, but
12 could you just deal with that, firstly by just explaining
13 what you meant when you referred to "undue political
14 interference"?

15 A. I think that there's a challenge over the meaning
16 off the word "control" in Section 56 of the Constitution.
17 It's absolutely correct that Elected Ministers produce that
18 policy. That's what they've been elected to do, in matters
19 which are devolved to the BVI Government under the
20 Constitution is entirely for elected Government to set that
21 policy and direction.

22 And clearly, Ministers will wish to speak to their

1 senior officials and Permanent Secretaries to ensure that
2 they have clear directions as regards that policy, but
3 there should be limits to the extent to which Ministers can
4 properly direct or control officials as to the advice they
5 give back to Ministers, and the amount that they might
6 control how they act under their relevant legal
7 obligations. And I'm not going to into details, Mr Rawat,
8 but I believe there have been occasions where pressures may
9 have been placed on public official which would have
10 stepped over whatever they think to be the appropriate mark
11 in that area.

12 Q. Well, deal, please, then, with the second aspect of
13 the evidence that arises from your Position Statement,
14 which is that attempts to limits--the attempts to limit
15 interaction with Ministers by insisting all contact be
16 carried through the Premier's Office.

17 A. Yes, thank you.

18 Well, first of all, let me say that, on the wider
19 point, I, of course, recognise that the Governor should be
20 keeping the Premier and his or her Ministers informed of
21 matters that the Governor's engaging on with his
22 Departments, and I'm not aware of any significant issue

1 since I've been here as Governor where that has not been
2 the case. But I'm afraid that there have been attempts, in
3 my view, to go beyond what the Constitution provides in
4 terms of the Governor exercising his powers.

5 So, both in terms of correspondence from the
6 Premier to my predecessor, and then since I've been here,
7 there has been a proposal which would require the
8 Governor's Office only to engage through the Premier's
9 Office and that engagement with individual Ministers would
10 have to be through the Premier's Office, and, indeed, I
11 have forwarded to the Commission a draft Cabinet Paper
12 which would provide precisely for that.

13 And that, with respect, runs contrary to the
14 Constitution because Section 56(7) provides expressly that
15 the Government act--the Governor act in his or her
16 discretion may at any time request from a Minister any
17 official papers or seek any official information or advice
18 available to that Minister with respect to a matter for
19 which that Minister is responsible--so that's the power of
20 the Governor under the Constitution--and shall inform the
21 Premier of any such request. So, there is an obligation to
22 inform the Premier of that request but the obligation is

1 not to go through the Premier's Office in making that
2 request, so the request can be made directly to the
3 Ministers concerned.

4 Secondly, such an approach would rather cut across
5 Section 60(8) of the Constitution, which provides that the
6 Governor may, after consultation with the Premier, direct
7 others, not just Minister, so it could include officials,
8 in the exercise of their functions where the overall effect
9 is special responsibilities under Section 60(1). So, the
10 Governor, under the Constitution, has a right to go
11 directly to Ministers, provided he informs the Premier he
12 is doing so, and after consultation with the Premier, also
13 has the power to direct officials in the exercise of his
14 functions under Section 60, and I've certainly always
15 sought to comply with those requirements, but the proposal
16 that all engagement by the Governor must be going through
17 the Premier would run contrary to those provisions.

18 There's one other practical point here, which is
19 that is clearly right on significant issues that the
20 Governor should seek to work in consultation with the
21 Premier and the Premier hopefully should seek to
22 consultation with the Governor as well, but there are

1 day-to-day practical matter on which officials will
2 necessarily engage with each other.

3 To give you the current example of the COVID-19
4 response, the support that the UK Government is giving to
5 BVI in terms--and has given--in terms of provision of
6 personal protective equipment, of ventilators, of test kits
7 and now 36,000 vaccines has been done in full consultation
8 with the Premier and, indeed, with the Minister for Health
9 but the practical logistics for that, which are rather
10 detailed in terms of what precisely needs to be supplied,
11 how it can be transported, when it's going to be
12 transported, how best it can be stored safely so the
13 vaccines can be used properly actually requires expert to
14 expert discussion between my team, the Governor's Office,
15 and health officials and indeed between Public Health
16 England and health officials here, and it would be simply
17 impractical if were argued that all of that needs to be
18 done on every occasion through the Premier's Office, the
19 Minister's office is simply impractical to meet the needs
20 of the Territory. But I do accept as Governor I should
21 seek to inform Ministers of what I'm doing on matters which
22 affect their responsibilities and inform the Premier as

1 necessary.

2 Q. But the--I mean, looking at the draft paper that
3 you provided, the rationale is to revert back to what might
4 be described as the status quo because what's said is that
5 the original approach was that a Governor's office would
6 liaise through the Chief Minister's office within--

7 A. With respect, I don't--I'm informed that has never
8 been the status quo.

9 Q. So, just clarify what you base that piece of
10 evidence on.

11 A. My understanding of speaking to publish officials
12 here is that Governors, since 2007 Constitution, have
13 regularly engaged with individual Ministries as well as
14 just to the Premier's Office.

15 Q. And your position is that you are entitled to do
16 that under the Constitution.

17 A. That is correct, yes. And that is with no
18 disrespect to The Honorable Premier. I will always seek
19 to, you know, keep him informed on these important, vital
20 issues, as I believe I do, but I don't think the
21 Constitution requires me to always go through him when I
22 meet with Ministers.

1 And indeed--and, in fact, the Ministers contact me,
2 not every day of the week but, you know, various Ministers
3 will contact me direct to ask me questions or raise an
4 issue with me, and that's not done through the Premier's
5 Office either, but I don't think, in either case, it's
6 involving major issues of which the Premier should rightly
7 be aware as the elected head of Government working with the
8 Governor.

9 Q. Again, returning back to where the balance lies, if
10 it is the--I mean, you have, yes, significant but detailed
11 and specific responsibilities under the Constitution, and
12 particularly your Section 60 responsibilities, but
13 everything arguably that falls outside Section 60 falls on
14 the elected Government. And surely, if the elected
15 Government considers that in terms of delivering its
16 services to those people who elected it in terms of
17 effective government and good governance, this is an
18 approach that should be adopted, that your interaction as
19 the Governor with various Ministries should be with the
20 Premier's Office, which has been described to the
21 Commissioner as the coordinating Ministry.

22 Surely, irrespective of what the Constitution says, and

1 having regard as you said you do to the need to promote a
2 route and develop self-governance, surely it's incumbent on
3 any Governor to go along with it.

4 A. I think it's a matter for judgment and perhaps
5 legitimate different opinions as to whether having
6 everything centralized through the Premier's Office is or
7 is not the best way of moving forward governance in the
8 Territory, but I, as Governor, need to speak to the
9 responsible Minister who, under the relevant legislation,
10 for example, may have the decision-making power, and
11 particularly when one needs to move speedily on a matter,
12 than going direct to the relevant Minister seems to me to
13 be the preferred approach of keeping the Premier informed,
14 of course. The Premier can speak to his Ministers if he or
15 she so wishes.

16 Q. And in terms of how the Governor's Office
17 communicates with the BVI public, how is that or what
18 proposals have been made in relation to how that's dealt
19 with?

20 A. In terms of communication with the public, I, of
21 course, occasionally make speeches or issue statements, and
22 my team in the Governor's Office are involved in numerous

1 events on the island in support of, you know, charitable
2 organisations or in sort of other activities in the
3 Territory. So, you know, at the moment we're engaged on
4 COVID matters. We're engaged on organizing the external
5 security review of the prison, which falls under my and NSC
6 responsibilities and my official work in that regard.

7 As regards communication, we have a Facebook page
8 in which we can give details to the public of what we are
9 doing. I think we probably also have an Instagram page,
10 but I confess I'm not as aware of certain aspects of social
11 media as I should be.

12 But there has been an issue, Mr Rawat, over the
13 formal dissemination of statements from the Governor and
14 the Governor's Office, and this is in relation to, again,
15 correspondence with my predecessor, and in relation to a
16 paper which has been proposed to Cabinet which would
17 restrict the work of the Government Information Service in
18 relation to the Governor's Office and provide the
19 Government Information Service wouldn't regularly or
20 automatically approve communications to the Governor's
21 Office, but they would be decided on a case-by-case basis
22 in consultation with the Premier, and it's claimed in the

1 paper that that again is in line with past practice, and
2 again my understanding is that is not the case. The
3 Government Information Service has always hither to issued
4 statements from the Governor's Office from the Governor
5 because it is the Governor Information Service and the
6 Governor is part of Government, and GIS has always done
7 this in the past.

8 Now, I hasten to add, and I should lightly add that
9 in both in relation to the paper on communication only
10 through the Premier's Office and the paper in relation to
11 limiting involving Government Information Services would
12 play, I should say that neither of those papers has been
13 brought to decision in Cabinet, and I have sought to find a
14 practical way forward on this issue with the current
15 Premier, and I will continue to do so, but I would be very
16 concerned if either of those papers were to come to a
17 decision, because the first would be contrary to the
18 Constitution, and the second would be contrary to what the
19 Government Information Service should provide, but for the
20 main part, hopefully we'll be able to find a practical way
21 forward, and I hope that will continue.

22 Q. You said that in relation to the point you made

1 about the Government Information Service, that what's been
2 communicated to you is the purpose of the Government
3 Information Services is not what's communicated in this
4 draft paper doesn't accord with what you've been told by
5 others?

6 A. Of the past practice, that's correct.

7 Q. Yeah, and in terms of that, those others, is that
8 people who have worked in Public Service?

9 A. Yes, it is.

10 Q. One point that I note is made is that it should not
11 be part of the Government Information Services' role to
12 promote the UK Government or the FCDO.

13 A. Correct.

14 Q. So, from--aside of the Governor having a role in
15 Government, what is its job in terms of putting out
16 material from the Governor's Office?

17 A. Well, there's a degree of judgment required here.
18 If the FCO government policy is to supply each of the
19 Overseas Territories free of charge all the vaccinations
20 that the Territories need in a COVID-19 response, that is a
21 UK Government policy. What is clearly directly relevant to
22 BVI, and my view in those circumstances, it would be

1 appropriate for Government Information Service to publish
2 that information. If, on the other hand, we're talking
3 about a, let's say, a wider Government, UK Government
4 statement let's say in relation to Brexit or international
5 arms control negotiations, which--well, actually Brexit
6 does have relevance to BVI--but let's say international
7 arms controls negotiation which would have obvious direct
8 information, then I recognize there that Government
9 Information Services may not see that as particularly
10 pertinent to their work, so there's truly judgment
11 involvement here, but what I frankly would find difficult
12 would be a view to the case-by-case basis. It is for the
13 Premier to decide what HIS should issue.

14 Now, I say in fairness, I--we offer a new way
15 forward on this, but I think there's a distinction to be
16 roughly the slightly imprecise area which I have outlined
17 to you, Mr Rawat.

18 Q. What I note from the draft paper was that what the
19 Premier had requested of the Governor is that your
20 predecessor was to receive communications from the
21 Governor's Office and the FCDO prior to such being issued
22 to the public. The point that is made is the Premier, as

1 leader of this Overseas Territory, must be aware beforehand
2 and not learn of information from the public domain. Is
3 that something that might be suggested, Commissioner? It's
4 an eminently sensible proposal, isn't it?

5 A. I would always seek to inform the Premier
6 of--well, let me rephrase that for me, please. In most
7 circumstances, I would seek to inform the Premier of
8 announcements before they were made which were of a
9 significant nature, but if, for example, I am asking GIS to
10 put out announcement of the support I gave last weekend to
11 the Lyons Club of the British--of Tortola and support the
12 BVI National Culinary Team who are going to a Caribbean
13 culinary competition in Florida in the summer, I don't
14 think that's a point which I would judge it was necessary
15 for me to inform the Premier of; otherwise--in fact, I did
16 so in discussion this morning, but I don't think that was
17 necessary for me to do so.

18 Q. Does the communication work both ways? Is the
19 Governor's Office made aware in advance of communications
20 that the Premier may make to the public, either as Premier
21 or Ministry of Finance?

22 A. On occasion, but I wouldn't say on a regular

1 basis.

2 Q. If you can turn up page 918, please. I want to
3 just take you to another part of the response of the--this
4 is the Response of the elected government to your Position
5 Paper--

6 A. Um-hmm.

7 Q. --on governance, and it points to, at paragraph 62,
8 two examples of which, if the Commissioner accepts the
9 evidence, would qualify, I'd suggest to you, as
10 particularly significant examples of FCDO overreach.

11 The first--I'm going to paraphrase, but the first is the
12 Blue Belt Programme, and to summarise it, that this was a
13 programme, voluntary programme, in which the UK and
14 Overseas Territories would seek support for marine
15 protection and sustainable management of the marine
16 environment. That was launched in 2016. No agreement was
17 reached in terms of the Virgin Islands joining that
18 Programme, and they did not do so.

19 But it notes that at paragraph 64 what the FCDO did on
20 the 3rd of April 2021 was to issue a press release,
21 announcing the world's first network underwater camera race
22 has been rolled out across the British Overseas

1 Territories, including the Virgin Islands, as part of the
2 UK Government Blue Belt Programme. And a statement was
3 issued on Twitter that the British Virgin Islands would be
4 part of the Blue Belt Programme.

5 And what's noted is that despite correction by the
6 Department of Agriculture and Fisheries, neither the press
7 release nor the Government's tweet has been withdrawn or
8 amended. Now, I think that--I'm not sure whether that's a
9 reference to--yes, it is the Governor who issued a
10 statement, so it's the Governor tweeting.

11 It then goes on to give the second example, which is
12 that the Virgin Islands' participation in the International
13 Convention for the Conservation of Atlantic Tuna, and in
14 1998 following the European Committee now EU's ascension to
15 that Convention, the UK became use of the USAF delegation
16 and the Virgin Islands with other Territories formed a
17 separate delegation. Those Territories had, therefore, a
18 separate catch limit for albacore tuna up to a threshold of
19 200 tons per annum, which they could then allocate amongst
20 themselves.

21 The effect of the UK's withdrawal from the European
22 Union, however, was they ended up with one delegation, not

1 two, both the UK and the OT's are allocated one single
2 catch limit, and this time it was 434 tons, and the effect,
3 again summarising, was that there was a change in the quota
4 of tuna that the Virgin Islands could catch with DEFRA
5 proposing to the Department of Agricultural and Fisheries
6 here an allocation of 10 tons is the catch limit for the
7 Virgin Islands. What's noted by the--in the Response is no
8 agreement on that was reached, and then it continues
9 (reading): Even although discussions on the division of
10 the quotas were not completed, on 28th June 2021, the
11 Governor's Office wrote to officials at the Virgin Islands
12 Department of Agriculture and Fisheries stating, "if we do
13 not hear from yourselves by the 30th of June, I will inform
14 DEFRA that the proposed allocation of 10 tons is
15 acceptable. "

16 And what's pointed out is that such a statement by the
17 Governor's Office is inconsistent with Section 56(5) of the
18 Constitution. We can look at that, if you need to. It
19 notes that fishing policies for the Minister and Cabinet to
20 decide and therefore it was not for you, as Governor, to
21 agree to the allocation, and you shouldn't have made a
22 communication to official. So, it takes us back to the

1 points we were looking at earlier, without informing the
2 Minister or Premier or raising the issue in Cabinet.

3 And the point that's made--and again, it takes that to a
4 point I've put to you already, Governor, which is UK
5 Government's priorities triumph over the Virgin Islands'
6 Government's priorities, and this is an example of that
7 because the point that is made is that whilst the UK
8 Government may consider that its allocation, so 10 tons to
9 the Virgin Islands, to be a fair assessment, doing that in
10 a unilateral fashion is inconsistent with a partnership
11 based on consultation and mutual understanding. And
12 it's--it connotes again back to, I think, a point that I've
13 made again, a lack of respect for the Virgin Islands, and
14 particularly so because the Commissioner has heard evidence
15 about how--the importance that is placed on the fishing
16 industry, and has heard evidence about efforts that are
17 intended to expand and promote that--the fishing sector,
18 not least from the perspective of food security.

19 So, if taking those in turn, firstly, and there's a
20 number of themes I'm trying to explore with you, but the
21 Blue Belt Programme, first of all, you have a situation
22 where the Virgin Islands doesn't sign up to it and yet

1 Press Releases from the FCDO, from the Governor's Office
2 saying that they do.

3 A. Thanks, Mr Rawat.

4 Well, on the first point in relation to the
5 underwater camera rigs, and these are underwater cameras
6 designed to, as I understand it, track fish movements and
7 help actually both fishing and conservation in this area,
8 it is correct that, when that announcement was made that
9 BVI ministerial level had not at that point agreed to it,
10 and, therefore, I think it's unfortunate that the Press
11 Release was issued by the FCDO. It wasn't done
12 deliberately to overcome BVI views, but it should not have
13 issued in that way at the time. It was an oversight, and I
14 made clear my regret for that oversight.

15 But there were official discussions going on in
16 relation to underwater cameras, but they'd not got
17 ministerial sign-off. So this criticism to me in that
18 area, I accept that. I accept that criticism.

19 Q. And who did you make your regret clear to?

20 A. I made my regret clear to the Minister for Natural
21 Resources, and I believe in Cabinet as a whole. It was
22 raised; I made my regret clear on that. So I accept the

1 point--I accept the point there. I think it's the only
2 such example that's been given.

3 As regards the international convention for the
4 conservation of--

5 Q. Before you go on, what is the current position in
6 relation to the Blue Belt Programme?

7 A. My understanding--and I've--further information
8 has been provided to the Government, but my understanding
9 is that, as yet, the BVI Government has not chosen to
10 accept these underwater cameras which would be provided
11 from the UK for use--

12 (Overlapping speakers.)

13 A. --and actually it would be owned by the BVI
14 Government, but for the time being the Government decided
15 not to accept them, which is their choice.

16 Q. And so, your evidence on this is that the FCDO
17 issuing a press release, and indeed, the Governor--that's
18 you, issuing a statement on Twitter--were just matters of
19 oversight.

20 A. It was premature. It was premature. It should
21 have been checked before it came out. I accept that.

22 Q. Well, could you deal with the albacore tuna point,

1 please?

2 A. Yes, thank you, as best I can because I would not
3 claim expertise in this area. But it is correct that,
4 prior to Brexit, there was a separate small harvesters'
5 threshold, which was available to the Overseas Territories
6 as a whole with the threshold of up to 200 tons per annum,
7 which could be allocated amongst the Overseas Territories.

8 But that has changed because of Brexit and we now
9 have Metropolitan UK, including Scotland, Wales, Ireland
10 and England and the Overseas Territories, as--and I think
11 the Crown dependencies as a single entity under the
12 convention, and so the UK receives a single UK pot as
13 opposed to what was previously a divided pot, and the UK is
14 responsible for determining the division of that pot.

15 And so, the aim of the Department for Environment,
16 Food & Rural Affairs (DEFRA) in the UK is to provide the
17 Overseas Territories and the different jurisdictions in the
18 UK with sufficient quantities of albacore quota this year,
19 based on the historic activity in this fishery and based on
20 their specific needs and capacities to use those quotas.
21 And because there's limited amount, not everybody may be
22 able to get all that they would wish.

1 And the proposal that was made to the Virgin
2 Islands was an allocation of 10 tons of albacore tuna as
3 the catch limit. And the belief based on all the evidence
4 available to DEFRA is that would be more than adequate to
5 meet any likely need in BVI. Indeed, BVI has reported
6 zero tons of northern albacore catches in recent years.
7 So, either BVI has not reported correctly its catch or
8 there is very limited need for albacore tuna and the belief
9 of DEFRA is that an initial amount of 10 tons will greatly
10 exceed recent catches. If of course, that catch should
11 rise in future years, then the possibility of a higher
12 allocation applies.

13 So, that was a proposal that was put to the
14 Territory here. No agreement was reached, no response was
15 being received in relation to that, and so ultimately
16 recently my office had to say, if we don't hear from you,
17 we'll assume it's acceptable.

18 And that was the position that we reached. And of
19 course, ultimately the consequence--sorry, the reason this
20 has arisen is because it is for the UK for ensuring
21 compliance with the development of international
22 convention, we have to work within the allocations that

1 we've been given, and so we have to make sure that the
2 allocations which are given to the different jurisdictions
3 of the UK and the different Overseas Territories do not
4 exceed our quota and just need to give a realistic limit,
5 but my belief is that the allocation proposed of 10 tons is
6 more than adequate to meet any likely need in the BVI for
7 the coming year.

8 MR RAWAT: Commissioner, I think I've been going on
9 for a bit, and I think Mr. Kasdan could probably do with a
10 break so...

11 COMMISSIONER HICKINBOTTOM: I'm sure that's right.
12 Governor, we have to have breaks as you probably
13 have seen for the Stenographer after about an hour. We've
14 been going a very good hour, so we'll break now for five
15 minutes, Governor.

16 THE WITNESS: Thank you, Commissioner.

17 (Recess.)

18 COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat.

19 MR RAWAT: Thank you.

20 BY MR RAWAT:

21 Q. Governor, I would like to now turn to another
22 criticism, and I think probably the best way of dealing

1 with that is at least initially to just summarise what the
2 criticism is, and indeed set it all out. It goes to the
3 fact that the responsibility that the Governor holds for
4 the Public Service, and it's this: The Governor is
5 constitutionally responsible for Public Service reform that
6 has neglected this responsibility, for example, (1) there
7 is a lack of human resources and structure in place to
8 allow policy development, (2) the current pay structures
9 are a significant cause of problems in recruiting to the
10 Public Service, and (3) record-keeping is a matter for the
11 Governor and is in a parlous state, (4) no proposal for the
12 desperately needed transformation of the Public Service was
13 forthcoming from successive Governors and Deputy Governors
14 until late 2017.

15 Now, that's the context, but just to take us back to the
16 Constitution, this is one of your responsibilities under
17 Section 60, is it not?

18 A. Certain aspects of Public Service are my
19 responsibility under Section 60, that's correct.

20 Q. That's fair enough.

21 I mean, what it says is the terms and conditions of
22 service of persons holding or acting in public offices

1 without prejudice to Section 92, and Section 92 takes us to
2 the role of the Public Service Commission in
3 appointing--providing advice to you as Governor when
4 appointing Public Officers.

5 Now, you say in your Position Statement--and this is at
6 page 815 of the bundle.

7 A. 825?

8 Q. 825, please.

9 A. Thank you.

10 Q. Takes us back to paragraph 64, but you explain
11 there that the Public Service contains many dedicated and
12 well-qualified officials, and that they are or they fall
13 within your responsibility. So, please, first of all,
14 outline what you understand to be the responsibility of the
15 Governor under the 2007 Constitution for the Public
16 Service.

17 A. Thank you.

18 Well, strictly then, Mr Rawat, the position is as
19 set out in Section 60(1) on the terms and conditions of the
20 service of persons who were holding public office and then
21 the appointment form the recommendations of the Public
22 Service Commission, so that's what the Constitution says,

1 and then we have the provisions on the respective powers of
2 Ministers and Permanent Secretaries in relation to the
3 direction, control, and supervision of their Departments.

4 Q. Are you referring to Section 56?

5 A. Yes.

6 But beyond that, that being the Governor or Deputy
7 Governor's Office in particular has been seen as
8 responsible for the overall management of the--of the--of
9 the Public Service, and I certainly do not want to
10 dissociate myself with that view of the function of the
11 Deputy Governor's Office, which played a coordinating role
12 in the management of the Public Service, and there are
13 certain bits of the Public Service which fall directly
14 under what's called the "Governor's Group" from human
15 resources to Citizenship and Passport issue; and then, of
16 course, liaison with the different independent institutions
17 under the Constitution, which will be coordinate through
18 HR, for example, in the Governor's Group.

19 So, all of those responsibilities I fully accept;
20 and, in that respect, I think that the--some of the
21 correspondence I have seen that the sole responsibility is
22 in relation to terms and conditions of service doesn't

1 reflect the full picture. But that doesn't mean that sole
2 responsibility for the Public Service rests with the
3 Governor and the Deputy Governor, and that's for two
4 reasons:

5 One is because the Budget for the Public Service
6 comes from the Ministry of Finance and the elected
7 government and the Budget which is approved, so all the of
8 Budget for pay and for training and offices and equipment
9 subject to what may be provided by the Governor's Office to
10 our individual programmes, that budget comes directly from
11 the Government. I take it in the Direction and Control
12 Departments comes from Ministers under Section 56.

13 So, in terms of responsibility to the Public
14 Service, I fully accept my responsibilities there, but need
15 to be exercised in a way which is coordinated with the
16 Government's responsibility for providing adequate budget
17 for facilities, equipment, and pay and training of the
18 Public Service, so it needs to be a modern shared
19 partnership.

20 Q. If I just ask you just to turn up 119, please.

21 A. In the--

22 Q. In the bigger bundle.

1 A. In the bigger bundle.

2 Q. So this is bundle 1.

3 A. 119. Thank you.

4 Thank you. I may come back to the point you made,
5 Mr Rawat, about proposal on you said Public Service
6 transformation since 2017.

7 Q. I will give you an opportunity to deal with that,
8 Governor, but if I could just give you some context of the
9 question that I'm going to ask you because I'm taking you
10 back to the Position Statement from the Elected Ministers,
11 and if I draw your attention to paragraph 48, it refers--it
12 begins by referring to the way--the difference between the
13 1976 Constitution and the 2007 Order because it makes the
14 point that responsibility for policy formulation in all but
15 reserved matters was conferred on the newly created
16 Cabinet, and then says yet, as the PAI Report shows, no
17 corresponding human resource systems and infrastructure
18 were put in place to make that task an effective reality,
19 despite the growing complexity and volume of the
20 Government's responsibilities.

21 Now, the PAI Report we will find at page 242 in the same
22 bundle. Can I, before returning back to paragraph 48, ask

1 you just about that. Is that a report of which you were
2 aware?

3 A. Yes. Indeed, not only am I aware for it--of it,
4 but that Report--and this is part of the larger report--was
5 actually commissioned and paid for by my office, so it was
6 the Governor's Office who paid for this Consultant to come
7 and identify where there were weaknesses and challenges in
8 the Public Service and make recommendations and how they
9 might be addressed, so that was commissioned as part of my
10 responsibilities towards Public Service.

11 Q. Now, given a project number there which ends in
12 2018, so was that when it was commissioned--PAI were
13 commissioned to do the work?

14 A. I think so, Mr Rawat. I cannot swear to it, but I
15 think that's right.

16 Q. And you say it's part of a larger report. What was
17 the larger report?

18 A. Well, the PAI consultants worked on different
19 aspects of governance within the Territory of the Public
20 Service, and this was one which was then brought before the
21 Commission.

22 Q. I see.

1 So, it was commissioned by the Governor's Office in
2 the BVI to work on various aspects of the Public Service.
3 Did it produce one single report or a number of reports?

4 A. I think I have seen it in a number of different
5 reports, Mr Rawat, but I have reached that point, thank
6 you.

7 Q. And were those Reports then shared with the
8 Premier's Office or with other Ministries?

9 A. They had been shared with others, yes.

10 Q. I see.

11 But at the behest of the Governor's Office?

12 A. Quite a lot of this is before my time, Mr Rawat.
13 I believe so, but I would need to go back and look at the
14 papers in order to be able to absolutely confirm I didn't
15 want to mislead you with something I cannot, without
16 checking myself, confirm.

17 Q. But nonetheless, if we go back to paragraph 48, I
18 mean, it's used by the Elected Ministers to show that
19 essentially a lack of resources, as I've pointed out. If
20 you go over to 49, what the point is then made that you
21 have a void in policy development planning and
22 coordination, which there is no doubt a strong temptation

1 on the part of the Governor's Office and the FCDO to fill
2 by means that can appear to be coercive, that in turn leads
3 to further tension and distrust and debilitating effects on
4 the Public Service of which mention has been made.

5 If you look in the same document at paragraph 132, the
6 point is made there that in the Virgin Islands, the
7 Programme to design and introduce a modern framework for
8 the Public Service only commenced in October 2017, when in
9 the immediate aftermath of the hurricanes Cabinet was asked
10 to approve the launch--and this is the Public Sector
11 Transformation Plan proposed by the Deputy Governor and
12 Director of human resources, and the FCDO gave financial
13 support for the recruitment of an external consultant to
14 help with its design. That must be a reference to the PAI?

15 A. Yes.

16 Q. It appears that the Deputy Governor has received
17 little additional FCDO assistance in the implementation of
18 reform, yet these are matters effectiveness capacity and
19 management of the Public Service for which the
20 constitutional responsibility and right of the initiative
21 lies exclusively with the Governor and ultimately with the
22 UK Government.

1 Just again to--I would just like to ask you to turn up
2 page 144, please.

3 This is the Supplementary Note that was submitted on
4 behalf of the Elected Ministers, and at paragraph 26 it
5 points yet again to a central problem with good governance
6 in the Virgin Islands which shows condition and chronic
7 neglect of the Public Service and its critical policy
8 development functions, for that neglects successive
9 governments and the UK Government which promised support
10 for the Public Service it has not appeared to have
11 delivered cannot be exempt from criticism.

12 So, I'm just trying in summary to set out some of the
13 points that have been made in support of an argument which
14 is that there has been chronic neglect, and chronic over
15 years with the effect that it undermines the ability of the
16 elected government to function because it means that policy
17 formulation is delayed. It's inadequate. It's
18 insufficient for the elected officials' needs, and that
19 consequence is Government cannot move at the speed that an
20 elected administration may want to move with, and they may
21 not be able to achieve the outcomes that they wished to
22 achieve.

1 Now, I will give you an opportunity to respond to all of
2 that, but can we start with the General Orders.

3 Now, these govern--these are the terms and conditions of
4 the Civil Service, are they not?

5 A. Yes.

6 Q. The information that's available to the
7 Commissioner is they have not been updated since 1982; is
8 that right?

9 A. I believe there has not been a comprehensive
10 update since then. You'll be aware that there are current
11 efforts to having a Public Service Management Code which
12 are sitting, I believe, the Attorney General's Chambers at
13 the moment, so there has been no comprehensive review since
14 then.

15 Q. When you say "comprehensive", are you suggesting
16 that there has been some updating?

17 A. I believe there has been some updating as Public
18 Service has changed, but I would need to check the point to
19 confirm it, Mr Rawat.

20 Q. But the fact that you have--that civil--Public
21 Officers are working to a set of orders that were or at
22 least that have the date 1982 on them, isn't that itself

1 indicative of years of neglect?

2 A. I'm not sure it necessarily is because that Code
3 is based on central requirements of integrity and honesty
4 and impartiality, and those are central to any good Public
5 Service. They're reflected in the Code of the Public
6 Service here, and they should always be reflected in that
7 Code, so I think those central tenets remain valid. But
8 that's not to say there can't be some useful updating.

9 But, first of all, I recognize there are challenges
10 in the BVI Public Service. It's perhaps not unheard of for
11 Elected Ministers to complain about their Public Service,
12 and I myself have been a Public Servant in the UK for many
13 years and watched these things happening. But I don't
14 bring perfection on the part of the BVI Public Service.
15 There are many fine first-class Public Servants would match
16 what would be available in the UK and elsewhere, but there
17 are areas which require development. And, indeed, the PAI
18 paper which we referred to was paid for by my office
19 specifically to help identify some of those concerns.

20 But to suggest that there has been no attempt at
21 Public Service transformation until 2017 is inaccurate,
22 with respect, and I have submitted to the Commission in my

1 papers a table provided to me by the Deputy Governor's
2 Office which proposed it sets out various initiatives which
3 have been taken since 1999, i.e. before the current
4 Constitution, to the present time to develop the Public
5 Service, the Public Service Development Programme which
6 indeed was launched in 1999; HR reform in 2000;
7 establishment of the Complaints Commission that looks at
8 maladministration within the Public Service in 2003; the
9 fiscal management legislation which developed in 2013; and
10 since 2013 also worked on improving service deliverance by
11 the Public Service.

12 So, the current Public Service Transformation Paper
13 is a continuum of what has been attempted in the past.
14 Now, illustrating to me is like all this to impart the
15 Public Service I do not see, so it's a continuous journey
16 to use that analogy to again get the best performance that
17 we can.

18 Public Service Transformation Paper itself, it's
19 been a bit held up by what in my view has not been an
20 entirely fruitful debate. You will see the correspondence
21 that one point the Premier took the view that his
22 department should be responsible for Public Service

1 transformation, and on the other hand we have current
2 correspondence that he said he should be responsible for
3 this, and other correspondence saying actually all of this
4 should lie at the door of the Governor's Office. The
5 answer needs to be a shared approach.

6 And I'm glad to say that my predecessor wrote to
7 the Premier proposing a shared approach and taking forward
8 Public Service transformation, and that has now been
9 agreed, and the paper will shortly come to Cabinet, which I
10 hope can make further progress in particular areas of good
11 governance, including establishing the Policy and Planning
12 Unit within the Premier's Office, digital transformation of
13 the Government, customer service improvement and
14 improvements in public administration and human resources
15 management, so I hope we could make progress in that area,
16 but it is incorrect to suggest that work in this area only
17 started in 2017.

18 Q. But I will come back to the Public Service
19 Transformation Programme, but the--just in terms of funding
20 this process, though, you say that it hasn't been--or it's
21 been ongoing since 2017. What efforts have been made to
22 support the Public Service been funded?

1 A. Thank you.

2 Well, the UK Government has funded training in
3 various areas for different elements within the Public
4 Service. The total funding--and this is beyond the Irma
5 response funding just under 13 million to which I referred
6 to earlier, Mr Rawat, which the British Government has
7 spent since 2018, the start of 2018, on numerous contracts
8 within the Territory, is £14.28 million, and the projected
9 spend for this financial year of £17.656 million, and not
10 all of that is by Public Service.

11 COMMISSIONER HICKINBOTTOM: Are those pounds or
12 dollars, Governor?

13 THE WITNESS: Pounds. I'm sorry.

14 £14.218 million spent so far since 2018, and the
15 forecast of £17.76 million.

16 Now, that has been on various items, some of them,
17 for example, environmental projects to solar par, tackling
18 stony choral, tissue-loss disease, providing assistance in
19 maritime law enforcement, but some elements of that money
20 has been specifically related to Public Service
21 capacity-building and training. And although it's
22 difficult to disaggregate these figures and define what is

1 precisely training and what is wider work for the Public
2 Service, I estimate specifically related to
3 capacity-building and training a figure of
4 £2.14 million would be attributable to that.

5 BY MR RAWAT:

6 Q. Over what period?

7 A. Since the beginning of 2018.

8 With a variety of different programmes, but these
9 involve, for example, Public Finance Management training.
10 It involved IT information and management kit provision,
11 work on International Health Regulations, work on child
12 exploitation online protection, work for disaster
13 management capacity-building, all elements of Public
14 Service responsibility.

15 Now, if I may, with respect, contrast that service
16 and support from the UK Government with the training
17 budgets for the Public Service which had been provided by
18 the BVI Government. Since 2016, there has been a steady
19 decline in the budgetary provision for training of the
20 Public Service.

21 In 2016, \$138,000 was provided for local training
22 of the Public Service. \$138,000. And then there was

1 additional money for scholarships.

2 In 2021, the provision in the BVI budget for
3 training of Public Servants is \$25,000. \$25,000 for almost
4 3,000 officials. And with respect, I would suggest that is
5 an inadequate sum, and that is why I say that while I
6 accept my responsibilities for Public Service and I want to
7 do all I can to assist the Public Service in providing what
8 we all need and what Ministers need and the public need, it
9 requires more financial investment from the Government as
10 well as whatever assistance the UK can provide.

11 Q. How many Public Officers were there in 2016, then?

12 A. I suspect it was--I suspect it was slightly larger
13 than it is now because it was high emphasis put on
14 positions left vacant, but I don't know the exact number,
15 Mr Rawat, but I suspect it was slightly larger.

16 Q. Just before we leave the Public Service
17 transformation, and you referred to correspondence from the
18 Premier, if you take the larger bundle and go to page 446.

19 A. Certainly.

20 Q. I think this was what may have been, if I suggest,
21 you were referring to perhaps a delay in progressing the
22 Public Service Transformation Plan. It's a letter dated

1 16th of October 2020 from The Honorable Premier to the
2 Governor, and I'm going to let you speak to it, but what
3 the point is made is that whilst the human resource
4 functions of the Governor's Group do form part of the
5 Public Service transformation agenda, the vast majority of
6 the exercise pertains to the reform of the practices,
7 processes, and procedures to enhancing the administrative
8 functions within the various Ministries to improve the
9 effectiveness of the delivery of services by the Ministries
10 to their clients, the public, in accordance with the
11 national vision. Ministers report to the Premier. The
12 national vision is the remit of the elected Government,
13 which is determined and executed by the Premier and his
14 Ministers, and the Premier that appoints to again the
15 Constitution. And hence any programme for the execution of
16 the Government's agenda that related to the Administration,
17 therefore, lies clearly with the Premier as the head of the
18 elected Government.

19 So, as I understand the point you're making is the
20 Premier's view was that Public Service Transformation Plan
21 should sit under his Ministry?

22 A. That's correct, yes.

1 Q. And not under the Governor's Group because your
2 goal was human resources, not the sort of day-to-day
3 dealing of Public Service delivery.

4 A. That's correct. And specifically terms and
5 conditions to the Public Service under the correspondence.

6 Q. So, the Premier took a narrower view of Section 60
7 than perhaps the then-Governor did. Would that be a fair
8 characterization?

9 A. That's correct, yes.

10 Q. And what he points out in the letter is that there
11 are areas that based on the current allocation of
12 ministerial responsibility there are areas within the
13 Public Sector Transformation Plan that are inadvertently
14 listed for execution by the Governor's Group and which need
15 to be restored under the Ministry where they substantially
16 reside. These include matters pertaining to the BVI
17 Tourist Board, which is a portfolio under the Premier's
18 Office; the public Eye programme, which is a television
19 product established under the Premier's Office where GIS is
20 a programme.

21 And he then refers to the Archives and Record Management
22 Act is another area that is inadvertently being referred to

1 as the responsibility of Governor's Group, which ought
2 probably to reside with the Government Ministries, namely
3 the Premier's Office. Archives and records management is
4 indelibly linked to the cultural identities of the people
5 of the Virgin Islands which is the essence of the Virgin
6 Islander, encompasses the political advancement, economic
7 empowerment and historical and economic connection to the
8 British Virgin Islands and its people, not the Governor's
9 Group.

10 But this is not the Premier wanting to take over the
11 Transformation Plan for take-over stake, is it? It's the
12 Premier approaching this on the basis that there are
13 functions that more properly sit under the Ministries and
14 not underneath the Governor's Group. Would you accept
15 that?

16 A. Thank you.

17 I think it partly depends on what the Public
18 Service Transformation Programme encapsulates, but the
19 broad programme would indeed involve such responsibilities
20 of Ministers as well as responsibilities of the Deputy
21 Governor's Group, which I think a shared approach is a
22 sensible way forward.

1 Q. If we turn to the smaller bundle to page 180--

2 A. Smaller bundle--

3 (Overlapping speakers.)

4 Q. Yes.

5 I just want you just to clarify this for the
6 Commissioner, but this is a further letter from the Premier
7 to your predecessor, 19th of November 2020, and this is
8 again on Public Service transformation. The Premier makes
9 the point that his Government and himself are also very
10 much eager to proceed with Public Service Transformation
11 Plan, but he refers to the Constitution which he says is
12 clear on how the responsibilities of Government are divided
13 between the Governor's Group and elected Virgin Islanders'
14 Government. As such, my position on the administration of
15 the Public Service Transformation Plan is not a matter of
16 personal preference but one with compliance for the
17 Constitution, and makes the point that we must always
18 strive not to find ourselves setting dangerous precedents
19 through circumventing of the Constitution.

20 What the letter then goes on to say is the Constitution
21 is clear that the remit of the Governors only for matters
22 within the scope of Section 61 with respect to the Public

1 Service is confined to the terms and conditions of service
2 of persons holding or acting Public Officers. Section
3 47(3) clarifies all matters outside of the scope of
4 Section 61 of the remit of the Government and outside the
5 responsibility of the Governor and Governor's Group.

6 And then at the bottom, what the Premier's letter
7 addresses is the leadership partnership model proposed by
8 the Deputy Governor, which the Premier says is inconsistent
9 with the written word of the Constitution but with deeply
10 offend the basis on which the Constitution was framed
11 because what's advocated is an arrangement where the Deputy
12 Governor is Chair and the Permanent Secretary in the
13 Premier's Office is Deputy Chair, and the Premier makes the
14 point that that is not a leadership partnership because it
15 is in an arrangement that in effect puts the Governor's
16 Office in charge of responsibilities that is outside of the
17 Governor's constitutional scope and above the Premier's
18 Office, not on equal footing.

19 So, I will summarise it again, but there is a clear
20 distinction drawn by the Premier between what your role in
21 terms of terms and conditions should be as a Governor and
22 other functions of the Public Service which more properly

1 rest with the elected Government, and that then informs his
2 view that if there is a leadership partnership model it
3 should not be chaired by a representative of the Governor's
4 Group.

5 So, first question is: What is the present status of
6 the leadership partnership model?

7 A. The present status of the leadership partnership
8 model is that the paper, which will go to Cabinet to which
9 I believe the Premier referred in his evidence the other
10 day, and I think could probably refer to it, in joint names
11 of myself and the Premier and the Deputy Premier and the
12 Permanent Secretary in his office will have shared
13 responsibilities in this area with respect to each other's
14 responsibilities on a day-to-day basis.

15 To go back to your early point on terms and
16 conditions of service, if the suggestion is that the
17 Governor is solely responsible for what grade an individual
18 is at and what they're paid for their job, and I think
19 that's to narrow an understanding of terms and conditions
20 of service, the Governor is responsible within those terms
21 and conditions to ensuring that we have an independent
22 professional well-qualified Public Service with

1 developmental opportunities for Public Servants, with
2 training for Public Servants, with good performance paid
3 for Public Servants and procedures for dealing with those
4 who are not performing so well.

5 But all of that requires in terms of the training
6 and pay and the equipment and IT with which Public Servants
7 work and need to do their jobs, requires an adequate budget
8 being provided for that, and in the training area to which
9 I have drawn attention to, I think it's been a real back
10 there, so we need to work together, and the Deputy
11 Governor--sorry, my predecessor proposed to the Premier
12 that partnership approach.

13 And despite that correspondence we see here, I hope
14 we have now found a practical way forward because the
15 interests neither of myself as Governor nor the interests
16 of Government not to move on in this area, so we need to
17 move forward, and not to lay further over this sort of
18 argument.

19 Q. Just to delay you a little bit longer, one view of
20 that correspondence is that the view of the Premier was
21 that you aren't restricted to dealing with terms and
22 conditions. Your responsibility is the contractual

1 arrangement, if nothing else, but you're saying actually
2 the role of Governor is wider than that. It's about
3 producing a professional independent Public Service.

4 A. Correct. And I need to work in partnership with
5 the elected Government to achieve that goal.

6 Q. But that then takes us back to the point, because
7 if that is--if that is the purpose of what Governors do,
8 how do you answer the charge that for years the Public
9 Service has been neglected by Governors and neglected by
10 the FCDO and neglected by the UK?

11 A. I don't think that's correct. You will see I
12 referred to the programme since 1999 attempting to improve
13 in various areas of working for the Public Service and what
14 they delivered to the country, and I have given you the
15 figures since 2018 which the UK Government has provided in
16 those areas.

17 Now, if the suggestion is there is more that can be
18 done, well, there could always be more that could be done
19 in this area, but it needs to be done by the elected
20 Government here as well as by the Governor's Office to
21 achieve what we hope to achieve, so a modern partnership
22 approach is required.

1 And I think to lay all blame at the foot of the
2 Governor's Office is simply not a proper reflection of the
3 position.

4 Let me also make one further point, if I may, that,
5 in terms of the ability of Ministers to develop policy,
6 first of all, it's the responsibility of Ministers to give
7 policy direction under the Constitution, but I recognised
8 they need Public Servants to assist them in that respect.
9 And there had been failings in Public Service and
10 improvements can be made, then I'm happy to try to work to
11 address those failings.

12 But any inadequacies which may be considered to
13 apply within the Public Service do not excuse failures or
14 failures to obey the law in matters which are clearly the
15 responsibility of Ministers, and that is the responsibility
16 of Ministers rather than the responsibility of the Public
17 Service.

18 Q. Just turn up page 913, please, in the larger
19 bundle.

20 A. 913 in the large bundle.

21 Q. Yes.

22 A. Thank you.

1 Sorry, give me just a moment, Mr Rawat.

2 Q. Of course.

3 A. Yes.

4 Q. I just want to ask if this is part of the Response
5 of the Elected Ministers to your Position Statement, in
6 that paragraph 24 the point is made that, first, the FCDO
7 has consistently pressed the Government to reduce the size,
8 growth, operating costs and wages billed to the Public
9 Service. No doubt because of that pressure, an external
10 recruitment freeze in the Public Service was proposed to
11 the Cabinet by the then-Governor in 2010, which was
12 implemented until 2012, and the further freeze on external
13 recruitment was proposed to Cabinet by the former Governor
14 in the Cabinet Paper dated 28th of May 2018 and
15 subsequently adopted. Annual performance increments have
16 not been paid since 2016-'17.

17 I will come to the paper that your predecessor presented
18 in a moment, but the point is made at 25 that these
19 policies have led to serious difficulties within the Public
20 Service, and Minister consider a different and more
21 balanced approach is necessary, and that the point is made
22 that the Elected Ministers have approved the payment of

1 annual performance increments for the Year 2016-'17 and
2 2017-'18.

3 Breaking that down a little, firstly the FCDO has
4 consistently pressed the Government in terms of the size of
5 the Public Service because that is, I would suggest to you,
6 a very serious point, Governor, because it is not--it's a
7 clear example, is it not, of FCDO overreach?

8 A. I think it's perfectly legitimate for the FCDO to
9 press the Government in this area, but the decision lay
10 with Government.

11 Q. But on what basis is it legitimate for a Ministry
12 of another Government to come to the BVI and say your
13 Public Service is too big?

14 A. Because the FCDO has the responsibility for the
15 good governance of the Territory, and has potential
16 contingent liability for the economy of the Territory. And
17 if the view was that we had a Public Service which was
18 larger than was required for the Territory, I think it was
19 legitimate for the FCDO to express that view. The word
20 "crest" is a word that's used by the Government. I don't
21 know what was happening back in 2010, but I can see nothing
22 to suggest that FCDO ought to attempt to enforce this from

1 the Government, the past Government.

2 Q. So, your point is that whatever the FCDO said it
3 would ultimately be the decision of the Government of the
4 day?

5 A. Well, to some extent that's correct because to
6 some extent it depends on the budget which was then by the
7 Public Service.

8 Q. I mean, you may not know the circumstances in which
9 this is said to have arisen because you would not have been
10 here, but have you independently come across information
11 that the FCDO consistently press the Government to reduce
12 the size of the Public Service?

13 A. No, I have not.

14 Q. Were you aware of the external recruitment freeze
15 proposed in 2010?

16 A. Yes, I have seen papers to that effect. This, of
17 course, was a consequence which happened public services
18 all over the world in the 2008 world economic crisis and
19 the austerity measures which were required, and so there
20 was a hiring freeze put on external recruitment.

21 Q. If you take up the second bundle, which we haven't
22 looked at yet, but we will find the paper that is cited

1 there of May 2018.

2 A. What page, sir?

3 Q. Page 528.

4 This is a memorandum dated the 28th of May 2018.

5 A. Thank you.

6 Q. From the then-Governor, and it's seeking this
7 decision. I'm just going to read the first one, but decide
8 to cease non-essential external hiring, and then proposes
9 other measures in relation to filling posts within the
10 Public Service.

11 But it then sets out in detail background information
12 referring, of course, to March 2010 a paper called "Growth
13 in the Public Service", which was precipitated by a rise in
14 expenditures such as personal emoluments and the costs of
15 pensions. And it says it was recognized that controlling
16 growth, size, and operating costs of the Public Service was
17 of critical importance and if not addressed could result in
18 the inability of government to develop the public
19 infrastructure of the Territory, pay operational expenses,
20 and eventually pay its employees. During the hiring
21 freeze, there was stability in the cost of personal
22 emoluments. However, the freeze was lifted in 2012 and

1 employment costing climbed. In 2017, Cabinet considered
2 the Cabinet Paper Memo entitled "Reintroduction of the
3 External Hiring Freeze", which was followed by Cabinet
4 Information Paper entitled "Public Sector Reform Cost of
5 Public Service 2009-2016". Cost of the Public Service
6 remains critical following the impact of the hurricanes on
7 the Territory's economy. It's therefore recommended that
8 voluntary measures are taken to cease non-essential hiring
9 in the service and to stabilising employment costs to
10 redirect savings to the areas of highest priority, and to
11 avoid payless paydays.

12 And I can ask your predecessor about this, but just in
13 relation to this, why is it the role of the Governor to
14 bring matters like this to Cabinet?

15 A. To the extent, first of all, that these issues may
16 affect the day-to-day work of Public Servants or their pay
17 under the terms and conditions of their contracts, I
18 believe that's the responsibility of the Premier and, of
19 course, the wider review that the Public Service falls
20 under the Deputy Governor and Governor in their work, and
21 that has been their view in the matter and which I suspect
22 and maintain.

1 But it's also clear from this paper which it would
2 require agreement of the Cabinet as a whole because of the
3 number of decisions proposed in it would require agreement
4 from Finance in terms of financial allocations, and that's
5 not untypical that a paper coming from the Governor's Group
6 would also require commitment from others within Cabinet to
7 certainly be an effective policy.

8 Q. So, is your position that ultimately the size of
9 the Public Service, whether there is a recruitment freeze,
10 whether whatever steps are taken lies with elected
11 Government?

12 A. No, I think the Budget available for the Public
13 Service lies with the elected government. Within that, I
14 think policies in relation to hiring, for example, are
15 ideally decided on the partnership approach. Somehow our
16 decisions will be specifically for the Governor alone to
17 make, others I think should be made in consultation with
18 the relevant Minister.

19 Q. Would your Permanent Secretary be an example of one
20 that should be made in consultation with a relevant
21 Minister?

22 A. The appointment is ultimately for the Governor

1 with the recommendation to the Public Service Commission,
2 but it would be normal for there to be some degree of
3 consultation with the Minister on such appointments.

4 Q. Taking you slightly off tangent but going back to
5 56, the two key figures in the Ministry are the Permanent
6 Secretary and the Minister. What support is there
7 presently in place for Permanent Secretaries and other
8 Public Officers so that they can maintain their
9 independence?

10 A. The Civil Service Code, which sets out the
11 criteria by which they should operate; the support which
12 the Deputy Governor can give to them if they have a concern
13 that there is unduly appropriate influence of interference
14 in their work, and of course the ability of the Deputy
15 Governor referring that matter to myself as Governor, so
16 that's the--ultimately where the power of protection would
17 lie.

18 It's quite difficult because I think that, under
19 the 2007 Constitution, is what I have been told by Public
20 Servants, that division of responsibilities has become
21 somewhat blurred, and that word "control" under Section 56
22 has been used in ways which has made it difficult for

1 Public Servants to know where they--where they stand.

2 Now, Mr Rawat and Commissioner, if I may say so, I
3 emphatically need await the outcome of your findings and
4 recommendations you may make, and emphatically I do not
5 wish to pre-judge them in any way, but I think there has
6 been a difficulty there for Public Servants, and I hope we
7 can find a constructive way forward in supporting Permanent
8 Secretaries in being able to give that independent
9 professional advice. I speak truth to power, including no
10 doubt to Governors, when required.

11 Q. Taking you back, Governor, to 913, please, can I
12 just ask you to look at paragraph 26.

13 Now, this is a response to your Position Statement.
14 What's said at paragraph 26 is there are no particulars
15 given to any occasion on which a request to provide
16 financial support for serious credible and coherent plan
17 for transformative change in the Public Service has been
18 declined by the existing or any previous Cabinet.

19 Do you know of any instances where there has been such a
20 refusal?

21 A. Well, I do know that there has been an attempt to
22 move forward with the Public Service Transformation Plan

1 since 2017, and clearly there have been challenges in
2 getting that agreed, but I cannot speak to a period before
3 then.

4 I think there had been serious proposals in how to
5 tackle records management issues which have not been given
6 funding which they should have been given.

7 Q. Could you elaborate on that a little more, please.

8 A. Sure.

9 Because one of the statements had been made by the
10 Government is that records management and records are in a
11 parlous state. I think there are challenges in records as,
12 indeed, there may be in archives which I know is the
13 responsibility of the elected Government rather than the
14 Governor's Group, a distinction has been made between
15 archives and records.

16 But funding requests have been made to address the
17 public records challenge and been put to Cabinet since
18 2010, but have been pretty consistently refused.

19 So, in 2010, a paper was proposed with a plan for
20 enterprise--electronic records management in Government,
21 the Cabinet noted recommendations but said it needed to be
22 put on hold until the financial situation allowed. A draft

1 Cabinet Paper was sent in February 2011 to advance
2 reconstruction of the Virgin Islands Archive Depository and
3 Records Center Building, but funding was not advanced.

4 Similarly, there was a paper in May 2011 where
5 Virgin Islands Archives and Repository Records Building
6 architectural design funding was not advanced. A
7 computerized records management improvement project was
8 proposed in 2016 to Cabinet but was not funded. And in
9 2017 and 2018, there were proposals again for the
10 architectural design for the Archives Repository and
11 Records Center, and for Archives and Repository Building
12 were not returned.

13 Now, I recognize the funding concerns, and I
14 recognize that not all money can be provided for every
15 project, but there is an example of where the Deputy
16 Governor's Office has been trying to take forward work and
17 improving records management, which for one reason or
18 another the Cabinet of the day has declined to provide.

19 Q. Just--

20 A. So, that's why we need a partnership approach. It
21 needs to be the Governor's Group, the Deputy Governors and
22 Government to provide the money working together to tackle

1 some of these issues.

2 Q. You say Government to tackle the money. Does it
3 follow that you--the emphasis should be on the BVI
4 Government funding rather than the UK Government funding?

5 A. Well, in fact, the UK Government has funded some
6 assistance in this area, and indeed have done so very
7 recently. Just give me one moment, please, I can refer to
8 this in my paper.

9 (Pause.)

10 A. It will be one moment, please, Mr Rawat.

11 (Pause.)

12 A. But the capacity-building programme which has just
13 been agreed 16th of September with UK funding to tune of
14 \$147,554 will support, amongst other things, training in IT
15 which can assist in records management. It's also
16 providing training in other areas and human resources,
17 electoral processes, and support for software development
18 in the DPP's office in the Estates Programme.

19 So, support has been provided in this area, but
20 further support is required.

21 Q. I mean, the point I'm trying to make is that, if
22 the Commissioner accepts the submission that there has been

1 years of neglect, then isn't it incumbent on the UK and on
2 the FCDO to do more? That, you know, if you take the point
3 that you're not just there for terms and conditions but the
4 purpose of the Governor's role behind which stands the FCDO
5 behind which stands the UK Government, that role is to
6 support, develop a Public Service that's fit for the 21st
7 century, it's not good enough, is it, to say, well, you
8 know, at some point the local governments are going to have
9 to front up and put some more money into it. What should
10 be said is that, you know, we haven't done enough for many
11 years, and now is the time to actually step in and do more
12 and do much, much more.

13 A. I think it's a balance to be struck here.

14 This is a large self-governing territory with a
15 financially devolved area, and this is a territory which
16 while it faces the challenges of the global economic
17 downturn in terms of Hurricane Irma, has economy which
18 overall has managed to stay within sound ratios, and
19 self-governance means many funding decisions are for the
20 BVI Government to make. The UK has stepped in and provided
21 very substantial assistance, as I demonstrated in my
22 evidence to the Commission, in relation to both the

1 Hurricane Irma response and in relation to COVID-19, and I
2 could give you more details on the COVID-19 costs if you
3 wish as well as the projects and training programmes which
4 I have outlined if your question is could the UK do more?
5 Yes, more could always be done, but the primary budgetary
6 responsibility lies with the BVI Government, I believe.

7 Q. The other aspect over which you exercised primary
8 control is the Police. Can you, for the Commissioner just
9 outline the ambit of your responsibilities as Governor over
10 the Police.

11 A. Yes. I'm responsible for appointing the senior
12 ranks within the Police Service on the recommendation of
13 the Police Service Commission. The Commissioner of Police
14 reports to me, although day-to-day operation decisions are
15 for him to make and for him to make alone.

16 And then the National Security Council, which is
17 covered by Section 57 of the Constitution, receives from
18 the Commissioner of Police regular briefings on matters of
19 internal security, including the Police Force.

20 And, of course, my wider responsibility for
21 security on the Territory includes responsibility for
22 tackling crime, tackling organized crime or any other

1 threat to the security of the Territory working with the
2 Royal Virgin Islands Police Force.

3 Q. If you turn up, please, Governor, page 196 in the
4 first bundle, that's bundle 1. If I draw your attention to
5 paragraph 45, this is again returning to the Response of
6 the Elected Ministers to your own Position Statement, that
7 attention is drawn to what you say there about the
8 challenges facing the role the Virgin Islands Police Force
9 and the DPP in terms of recruitment, vacant slots and
10 training. I will come back to the DPP in a moment. You
11 quoted the outgoing Commissioner of Police in his 2020
12 report noted that the Royal Virgin Islands Police Force's
13 regularly allocated budget falls far below the reasonable
14 costs required to maintain competencies and highly skilled
15 requirements and demands in investigating crime and
16 bringing offenders to justice. The Royal Virgin Islands
17 Police Force currently has 67 roles unfilled, approximately
18 one fifth of the total workforce, funding for vital repairs
19 and maintenance of Police vessels is obviously needed.

20 You then speak to the independence of the DPP and the
21 Commissioner of Police being important, strengthened system
22 of good governance, but that their effective functioning

1 depended on adequate financial resources been provided for
2 their work, which decision lies with the Ministry of
3 Finance and Cabinet subject to due powering the Governor
4 under Section 103 of the Constitution and ordering payments
5 out of the consolidated funds.

6 And this is the point I want to draw attention to
7 because what is said is Ministers are unaware of any
8 requests by the outgoing Commissioner of Police for
9 additional resources for recruitment that they have
10 declined. Indeed, during the last budgetary discussions
11 the outgoing Commissioner of Police was specifically asked
12 what was need to finance the Police, and his wishes were
13 followed.

14 So, the issue is taken with the suggestion that where
15 funding has been requested for proper expenditure, it has
16 not been refused, but you seem to be saying the opposite.

17 What do you base your position on?

18 A. It has to do with the way the Budget and release
19 of the Budget works, Mr Rawat, so the Budget is allocated
20 in the Police Force, and that budget may be sufficient to
21 cover the complement of total slots which exists within the
22 Police Force.

1 But when the slot becomes vacant because someone
2 retires or resigns, it is not under the current
3 arrangements within the power of the Police Commissioner
4 himself to go ahead and advertise that slot and have funds
5 released to him to pay for that slot. My
6 understanding--and I think well-advised on this--is that
7 permission to go ahead and advertise those slots and have
8 the money released for those slots lies with the Ministry
9 of Finance.

10 A similar issue is seen in Governor Jaspert's
11 response to the Premier of 27th July 2020 identifying
12 vacancies not just in the Police but in the Magistracy and
13 the Attorney General's Chambers. And the Governor there
14 had to write to the Premier noting that the ability to go
15 out and recruit for the gaps which were existing had been
16 held up by the Ministry of Finance by them not giving the
17 requisite permissions.

18 So, in answer to your question, the Budget is
19 purely allocated under the Budget, but if the relevant
20 head, in this case the Police Commissioner, wishes to go
21 ahead and fill that slot, then permission is required from
22 the Ministry of Finance.

1 And my understanding is that permission isn't
2 always given, and former Commissioner Matthews has informed
3 me that last September he went to the Premier and Ministry
4 of Finance colleagues to discuss vacancies, and he was not
5 given permission to recruit all the specialist officers
6 which are required. He was given--he was sanctioned to
7 recruit a small number of regulars and auxiliaries.

8 So, the current system does not in effect give the
9 Police Commissioner independence over that use of that
10 budget to fill the slots.

11 COMMISSIONER HICKINBOTTOM: Governor, we've heard
12 evidence from other Public Officers in relation to this,
13 and I think this is what others have said--I think you've
14 said it too; this is to confirm what you said--you get the
15 looked budget, and it's there. In a sense, it's paper
16 money.

17 THE WITNESS: Yes.

18 COMMISSIONER HICKINBOTTOM: But you've got that
19 budget.

20 But if you lose somebody for any reason and have to
21 get that place filled, you have to go back to the Ministry
22 of Finance.

1 THE WITNESS: Correct.

2 COMMISSIONER HICKINBOTTOM: And I think it were get
3 the money again under a different process.

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: And it's that,
6 rather--everybody wants more people anyway in the Budget,
7 but it's that that is the real issue, I think, according to
8 the Commissioner of Police has given evidence but also
9 other Public Officers who are in the same position and are
10 understaffed. They haven't got a full complement. And as
11 I understand it, it's not because they haven't got the
12 Budget; it's because they can't go out and get the people
13 when they need it.

14 THE WITNESS: I think that's a good description,
15 Commissioner. My understanding is this was developed in
16 the 10 months that I have been here as Governor, and I
17 thought first of the Budgets it's there, but it's not quite
18 the reality of how it operates. And I think again that's
19 something which certainly I as Governor would look forward
20 to seeing if we could find a solution through that.

21 And as it happens, what is happening is that the UK
22 Government has stepped in to provide some additional

1 Officers for the Police Commissioner.

2 BY MR RAWAT:

3 Q. When did the UK Government step in?

4 A. Has done it within the past calendar year.

5 And so we have helped to pay for some specialist
6 officers for inquiries, which Police Commissioner is
7 undertaking.

8 We have also provided funds in relation to maritime
9 capacity funding to improve the cruise bays and get some
10 vessels back in the waters so the police can come on to the
11 waters better, so the UK Government has provided funds for
12 that purpose.

13 \$530,000 in the last financial year, in this
14 financial year to date, additional Police and investigative
15 support.

16 Q. The point that is made, however, by the Elected
17 Ministers is that the issue is wider than this. And if you
18 look at their paragraph 48, what's said there is a
19 long-standing issue of recruitment in the Police Force for
20 many years, so that's not because of a lack of willingness
21 to allocate the necessary public expenditure. What the
22 Response says is they reside, and the established pay

1 structure is not keeping up with needed expectation, low
2 morale, a damaged reputation, and a lack of candidates
3 wishing to take up the role. There has also been a lack of
4 succession planning for a time and inevitable departures.
5 These matters lie under the superintendence of the
6 Governor. If money was the sole solution, successive
7 Governors had available to them the power under Section 103
8 of the Constitution to direct the expenditure needed.

9 Park 103 for a moment.

10 What the Elected Ministers' response go to is a much
11 more systemic issue, which is that the organisation of the
12 Royal Virgin Islands Police Force is something out of their
13 hands, but the way it has been managed again for year after
14 year after year has actually created the organisation that
15 exists today, which is one where you have recruitment
16 issues; where you have low morale; where you have, as they
17 say, a damaged reputation; and that lies at the feet of the
18 Governor.

19 A. Some of the responsibilities, of course, may lie
20 with the Governor and the Police Commissioner, but if it is
21 not a description I recognize as a whole, Police Force as a
22 whole who I believe have done some tremendous work since I

1 have been here, particularly in terms of crime
2 investigation from the arrest of those responsible for
3 murders to drug seizures, all of which point to some of the
4 very good things that the Police do.

5 I think that some of the problems do also go back
6 to that budgetary point, so I understand from the Police
7 Commissioner, for example, which as well as the problem of
8 getting permission to fill positions when someone is
9 promoted, say, from Constable to Sergeant, the additional
10 money for that promotion also needs to be referred back to
11 the Ministry of Finance for filling. If there is
12 underpayment in that area--and I believe there is
13 underpayment in that area--that could obviously cause low
14 morale as well.

15 So, again there is some shared responsibility
16 involved in addressing those issues, but I don't accept
17 that overall description of the current Police Force, from
18 all of my experience with it. There are clearly challenges
19 within the Police Force, and there have been examples of
20 corruption, which both the immediate past Police
21 Commissioner and the current Commissioner have dealt with,
22 with in my support, but there are many fine Police Officers

1 who have good morale.

2 Q. But that leads to the next question, doesn't it,
3 Governor, because there are significant issues with acts of
4 the Police, are there not? It might be suggested to the
5 Commissioner that if he wants to find corruption and abuse
6 of office and other serious dishonesty, he should not be
7 looking toward Ministries but looking to the Royal Virgin
8 Islands Police Force.

9 A. And he is, and the Police Commissioner has taken
10 very determined action to both suspend Officers who may
11 have been involved in any wrongdoing, and in referring
12 those cases to public prosecutions for prosecutions to be
13 taken, so the current Police Commissioner has been very
14 firm indeed in that respect as was his predecessor in the
15 short time as I worked with him.

16 Q. But by "Commissioner", I was referring to the this
17 Commissioner.

18 A. Oh, I apologize. I'm sorry.

19 COMMISSIONER HICKINBOTTOM: The answer is probably
20 still the same.

21 THE WITNESS: I'm sorry, Mr Rawat, I misunderstood
22 the question. It's that point in the afternoon. I

1 apologize.

2 BY MR RAWAT:

3 Q. But the point is--the point is that the--an
4 organisation that has had reputational issues, an
5 organisation that has recruitment issues, those point to
6 systemic issues that aren't just, you know, something that
7 arises over a matter of months but arise over a matter of
8 years. Being blunt, it also should come back to the
9 Governor, isn't it? It's the Governor that's responsible
10 for the Police, and so it's the Governor that should
11 take--accept that those infrastructure difficulties in the
12 Police and even more demonstrations of criminality amongst
13 the ranks of the Police, the finger has to be pointed at
14 the Governor's Office, doesn't it?

15 A. I do accept that, Mr Rawat. I'm responsible for
16 security in the Territory. I take that responsibility very
17 seriously, and I don't shy away from it, and so together
18 with the Police Commissioner, I want to ensure a top-class
19 Police Force, which is carrying out its responsibilities to
20 the people of the Territory. And in that respect, I fully
21 support the action which this Commissioner and his
22 immediate predecessor have taken in rooting out any bad

1 apples in the Police Service.

2 What I am saying is that I don't recognize that
3 characterization of the Police Force as being a wholly
4 accurate characterization, and secondly I think some those
5 issues where there have been challenges do relate to my
6 test which are beyond the Governor's control subject to the
7 Section 103 point because they relate to budgetary-related
8 issues of filling of slots and adequate pay, for example,
9 when staff are promoted. So, it's a shared responsibility,
10 but I do not shy away in any way from my overall
11 responsibility for security of the Territory.

12 Q. We heard from the current Attorney General, the
13 Commissioner has also heard from the Director of Public
14 Prosecutions about the challenges they face.

15 A. Yeah.

16 Q. Those are both constitutional roles. We've spoken
17 about the responsibilities you have with the Police, the
18 responsibility you have for the Public Service.

19 To what extent do you have responsibility for the
20 Attorney General and the DPP?

21 A. They all fall within what's known as the
22 "Governor's Group", and I see, you know, rule of law is

1 fundamental to good governance, and so I see myself as
2 having responsibility for ensuring to make sure they have
3 resource they need to take forward their jobs, and both the
4 DPP and the Attorney General as well as the Police
5 Commissioner would raise with me concerns about their
6 staffing.

7 COMMISSIONER HICKINBOTTOM: And they did here
8 before me, too, Governor.

9 THE WITNESS: Yeah.

10 COMMISSIONER HICKINBOTTOM: But what's your
11 response to the Section 103 point? And that is that, okay,
12 the Elected Ministers are responsible for money and you're
13 not, but you have got a trump card in Section 103. What is
14 your response to that?

15 THE WITNESS: Well, if I may, Commissioner, just
16 tell you what I have done, and what I have done is to, as
17 you know, there is an overall review of composition of the
18 Public Service has been launched, but I, in agreement with
19 the Premier, agreed to a separate accelerated, if you will,
20 compensation for legal and court staff within the
21 Government because I was particularly concerned this went
22 to rule-of-law issues, so this is a separate accelerated

1 compensation of duty--

2 Q. Was that something you initiated, Governor?

3 A. Yes, I had representations made to it. I put to
4 the Premier, and we agreed on it, so that was very much my
5 initiative. I had a particular concern there.

6 Secondly, where the recruitment processes are
7 taking place, and the recruitment system needs to go
8 through human resources and then to, for example, the
9 Judicial Legal Services Commission, shall I say I have
10 tried to hurry along the system while making sure proper
11 procedures are complied with.

12 But ultimately, Commissioner, if I may come to your
13 question, it is correct that, ultimately under Section 103
14 of the Constitution, I could order payments out of the
15 consolidated funds--a fund for in order to discharge my
16 responsibilities under Section 60 of the Constitution which
17 could apply to certainly Royal Virgin Islands Police Force
18 and all arguably could apply to--sorry, not our arguably,
19 but could apply to the DPP, for example, in relation to
20 wider rule-of-law issues related to security. That was a
21 power that was exercised by Governor Duncan in 2017.

22 Hendry and Dixon in their book on Constitutional

1 Law of the Overseas Territories cite that example. That
2 power exists under the Constitutions of Bermuda and BVI,
3 and I think it's also registered within the powers of the
4 Turks and Caicos. It's not a constitutional power. I
5 didn't exercise that power in Bermuda, and I'm not aware
6 that it's been exercised ever by the Government of Bermuda
7 and I think 2007 here. It's only be exercised by Governor
8 Duncan, and Hendry and Dixon described it as a power of
9 last resort, and it is a power of last resort, and I do not
10 rule out that I could use it in the future, good uses in
11 the future, but at the moment as regards to the AG's Office
12 and the DPP's Office, I have taken the action I described.

13 And as regards the Police Force, you will have seen
14 the Police Commissioner's letter to the Premier of I think
15 I said in my further written evidence since the 11th of
16 October, in fact it's 7th of October 2021, the Police
17 Commissioner has written to the Premier in relation to
18 unfilled vacancies, and I hope the Premier and Minister of
19 Finance may be of assistance in that area.

20 Should that not happen and should these problems
21 continue, then I recognize in the extreme situations
22 Section 103 can be used.

1 Q. Thank you.

2 A. But it was used by Governor Duncan in 2017. I
3 think it was not without some local controversy.

4 Q. But one final point, and I think you have addressed
5 levels of pay in the Public Service, and as I understand
6 it, there is--you say--and it is 5th of March Cabinet
7 accepted a paper from the Deputy Governor's Office to
8 review the pay structure of the Public Service which will
9 commence shortly, and that is separate from the pay review
10 in relation to the--

11 A. That's correct. I thought it was a--I'm not
12 saying there were not particular problems in the other bits
13 of Public Service because of my responsibility for rule of
14 law and for the courts. I thought that was an absolute
15 priority to be addressed. I heard the representations from
16 the Attorney General and the DPP and, therefore, took an
17 initiative the Premier agreed, and that's moving forward
18 with the Deputy Governor's Office taking forward, that
19 accelerated review.

20 Q. Before I move on, Governor, we have been looking at
21 issues around your responsibility for the Public Service
22 and overall which we obviously moved into the area of

1 responsibility of the Police, but is there any matter in
2 your Written Response that you want to draw the
3 Commissioner's attention to?

4 A. I would simply say, as I said in paragraph 4.10 of
5 my response to the potential criticisms that UK Government
6 funds can be accessed to support elements of the
7 Transformation Programme going forward, particularly those
8 related to good governance, so I hope very much my office
9 can support further work in those areas beyond what is
10 already been agreed in the MOU which was signed on 6th of
11 September 2021, and beyond the support that has been given
12 of which I have given evidence since 2018.

13 REALTIME STENOGRAPHER: Can we take a short break,
14 please?

15 COMMISSIONER HICKINBOTTOM: Certainly, Mr Kasdan.
16 Certainly it's due, Mr Kasdan.

17 How long would it be?

18 THE WITNESS: Not very much longer. Once we resume
19 after the break, I should be done very shortly.

20 COMMISSIONER HICKINBOTTOM: Good. Thank you.
21 Mr Rawat.

22 We will have another five-minute break, Governor.

1 THE WITNESS: Thank you, Commissioner.

2 (Recess.)

3 COMMISSIONER HICKINBOTTOM: Mr Rawat, we're ready
4 to proceed. Thank you.

5 MR RAWAT: Thank you.

6 BY MR RAWAT:

7 Q. Governor, can I move away from governance and just
8 ask you some questions about some discrete matters. Could
9 I ask you, please, just to take up what should be the
10 Part 2 of the Belongership Bundle, which should be on your
11 right, and turn to page 1270.

12 A. Yes.

13 Q. I have taken you to a memorandum dated the 13th of
14 May 2021 from the Ministry of Natural Resources, Labour and
15 Immigration, and it's headed "Applications for Certificates
16 of Residence status January-March-April 2021". It is
17 dealing with applications which are done under the standard
18 procedure. We've heard of the fast-track programme that
19 was initiated in 2019. But this is one where the Board of
20 Immigration is still in play. We know from evidence that
21 the Board makes recommendations. It does not make
22 decisions, and all of the applications will end up before

1 Cabinet. Some of the Board will have recommended, and some
2 of the Board will not.

3 And if we look at page 1271, please, and it's been
4 redacted, but I'd ask you to take care not to mention names
5 or any details, including the offense, if you know it, but
6 what's said is an applicant was not recommended. The Board
7 recognized that although that person had resided in that
8 Territory for over 20 years, criminal record exists, and
9 the offenses are set out.

10 And then it said, as stipulated in Section 18(1)(a), a
11 person receiving Certificate of Residence should be of good
12 character and, therefore, these persons could not hold any
13 criminal record within the Territory, and then what's
14 attached is--what's attached is the details in particular
15 of the Police Record of the individual concerned.

16 If you look at 1272, under "Legal Obligation", and this
17 is the input from the Attorney General's Chambers, they say
18 they have reviewed the paper and discerned no adverse legal
19 implications which would arise if Cabinet is minded to
20 decide in accordance with the decision sought.

21 Now, we don't have the minutes of Cabinet, but what we
22 do have is the decision that was made, and we see that at

1 page 1288, so it's the same memorandum number. And so it
2 records that Cabinet grants residence to 188 persons, but
3 if you turn through, Governor--

4 A. Sorry, Mr Rawat, with respect, I think you do have
5 minutes of the Cabinet Meeting. It was in the papers I
6 submitted.

7 Q. I see.

8 A. Sorry, it may not be pertinent to what you were
9 going to say, but I just wanted to put that in the record.

10 Q. That's helpful. I'll sure look at that.

11 Let's do it in stages. We trust with these papers and
12 maybe we could deal with it like that, but what you have in
13 terms of this decision--and it starts at 1288, that's the
14 record of the decision itself.

15 A. Yes.

16 Q. And going to 1298, what Cabinet decided to do was
17 not to accept the recommendation of the Board of
18 Immigration, which that recommendation being the
19 Certificate of Residence should not be given to this
20 individual because they were not of good character as
21 required by the section of the Immigration and Passport
22 Act, and so Cabinet decided that they should have a

1 Certificate of Residence.

2 Now, presumably you were the person--you chaired that
3 meeting, did you?

4 A. I did, yes.

5 Q. And what was your position in relation to that
6 meeting and in relation to that particular application?

7 A. Thank you.

8 Well, the Cabinet Paper which the Attorney General
9 has gone is a waiver for submission to the Commission
10 records my position. He obviously accepted to the tune of
11 redactions in the Cabinet Paper, but I was appalled by the
12 decision that was reached. The Board of Immigration had
13 made a clear recommendation that a Certificate of Residence
14 should not be granted in this instance. Without again
15 going into detail, one of the offenses was not a minor
16 offense, and I made very clear in Cabinet my view that in
17 light of that offense and the recommendation of the Board
18 of Immigration that the Certificate of Residence should not
19 be granted, but Cabinet took a different view, so that is
20 an example that goes right back to the beginning of today's
21 session where the Governor advises and cautions, but
22 contrary to that advice and caution Cabinet took a

1 different decision, but I thought it was a poor very
2 decision, indeed.

3 Q. What was the rationale for you saying that it was a
4 poor decision?

5 A. Because it was contrary to the criteria which
6 would normally be applied and contrary to the
7 recommendation made by the Board of Immigration, but I
8 recognize the Legislation Cabinet had discussion in this
9 area, so it was a decision which Cabinet could within the
10 terms of their discretion take what I thought was a very
11 poor decision, indeed.

12 Q. So, if you turn up page on the main bundle, the
13 Belongership Bundle, page 1441.

14 A. Yes, Mr Rawat. Thank you.

15 Q. This is the Immigration and Passport Act which
16 provides that subject to the other provisions of this
17 section, the Cabinet may, after consultation with the
18 Board, grant a Certificate of Residence to any person who
19 applies for the same in the prescribed manner and who is
20 (a) is of good character, and (b) in his or her application
21 has stated an intention to reside permanently in the
22 Territory.

1 So, the requirement is that the person should be of good
2 character?

3 A. Yes.

4 Q. Was it your understanding that that was because
5 this individual was not a good character that the Board
6 recommended the Certificate of Residence not be granted?

7 A. Yes.

8 Q. And did you conclude on the documents that were
9 before you that the person was not of good character?

10 A. Yes.

11 COMMISSIONER HICKINBOTTOM: I mean, page 1271,
12 which we already looked at, which is the Cabinet Memo for
13 this, it says "as stipulated in Section 18(1)(a), the
14 person saying the Certificate of Residence should be of
15 good character and therefore these persons should not hold
16 any criminal record within the Territory".

17 THE WITNESS: Yeah.

18 And I recognize there may be some very minor
19 offenses, let's say very minor traffic offense, which may
20 not necessarily go to the character of the individual, but
21 that was not the situation which wholly applied in this
22 instance.

1 BY MR RAWAT:

2 Q. If we look at the documents that you have provided
3 to the Commissioner with your Written Response, that is at
4 page 47 where we find the deliberations of Cabinet.

5 A. Yes.

6 Page 47 in the--

7 Q. In the material that you provided to the
8 Commission.

9 A. Yes, thank you.

10 Q. Without going into the detail of it, it appears
11 that you raised concerns that the individual concerned had
12 clearly been convicted of an offense and, therefore, was
13 not of good character, but is it my understanding from the
14 discussion that ensued in Cabinet that the Cabinet
15 proceeded on the basis that they wanted to give this person
16 a second chance?

17 A. Thank you.

18 Yes. I think it would have been appropriate for me
19 to discuss individual views expressed by Members in
20 Cabinet, but that was the overall position of Cabinet.

21 Q. And the understanding given to you was that Cabinet
22 had the discretion to do that?

1 A. The advice given by the Attorney General would
2 seem to indicate that there was scope for Cabinet to take
3 the decision that it did.

4 Q. Thank you.

5 A. Because I suppose it ultimately depended on the
6 definition of "good character".

7 Q. If I move on to a different topic, please, we have
8 taken evidence as to Statutory Boards and the role they
9 play in the life of the BVI.

10 Now, seeing where we looked at the Constitution, there
11 are some entities for which you have responsibility in
12 terms of recruiting personnel to those bodies. Could you
13 just remind the Commissioner which bodies you would have
14 some involvement in recruiting individuals to?

15 A. I think the Statutory Boards to which I make
16 appointments include the Recovery and Developing Agency
17 Board because I make some of the appointments to that
18 Board; the Parole Board, together with the Premier, I
19 believe the Chairman of the Firearm's Advisory Committee.
20 And there are also Boards for Old Government House Museum,
21 and I believe the Virgin Islands Cadet Corp Board, so there
22 were a number of Boards for which I had responsibility.

1 Most of those are statutory.

2 And also appoint the Chairman of the Public Service
3 Commission and the Chairman of the Police Service
4 Committee.

5 Q. And in terms of recruiting for the posts to which
6 you appoint, what is the process that you adopt?

7 A. Well, for some of them yet myself as Governor come
8 to in terms of the process that I will adopt, but for
9 the--I can tell you, Mr Rawat, is that for the Chair of the
10 Public Service Commission, the Chair of the Police Service
11 Commission, are two very important positions under the
12 Constitution. Those positions are advertised publicly.
13 And similarly in relation to the positions such that the
14 Commission of the Police and the DPP and Auditor General to
15 send on recommendations for those bodies, those positions
16 are also advertised.

17 And in relation to the Recovery and Development
18 Agency Board in the most recent recruitment, there was
19 advertising for the Recovery Development Board. But that
20 hasn't been always been done on a consistent basis, and I
21 welcome the initiative which the Premier has taken in
22 relation to advertising for Statutory Boards which fall

1 under his remit and going forward where we could perhaps
2 advertise further than we have not publicly in the past.

3 Q. And does that include advertising more widely for
4 posts, for example, on the Public Service Commission beyond
5 that of the Chairman?

6 A. I think it would be benefit of doing that, yes.

7 I think there may be some very specialist bodies
8 where operative advertising we has its limits, for example
9 the Firearm's Advisory Committee with a very clear criteria
10 for need to be appointed, so we advertise to a very
11 specialist audience rather than generally. But yes, I
12 think there is much to be said for moving to greater
13 advertisement taking place to, so I welcome the initiative
14 in that regard.

15 MR RAWAT: Thank you.

16 Commissioner, I have reached a point where I'm in
17 terms of the final questions we may need to deal with them
18 in private, so this may be a good time for you to hear from
19 Sir Geoffrey.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 Sir Geoffrey, we're coming to the end of the
22 questions, just have some questions on matters for reasons

1 I have explained earlier today, which we will go into
2 private session for.

3 Sir Geoffrey, what about your application to
4 question the Governor?

5 SIR GEOFFREY: I'm usually only up this late,
6 Commissioner, when I'm watching a horror show. It's 11:00
7 at night here, 6:00 your time, and I'm extremely reluctant
8 to lengthen the Governor's stay this evening, even in the
9 Virgin Islands. It's 6:00. However, I am, I'm afraid, I
10 think, obliged to pursue my application.

11 COMMISSIONER HICKINBOTTOM: Yes.

12 SIR GEOFFREY: But I fear that I will have
13 certainly something approaching an hour, possibly a little
14 longer than that to canvass--certainly it's been shortened
15 considerably by Mr Rawat's questions, and I really wonder
16 whether you think it's appropriate for me embark upon it
17 this evening. I have to say that personally at this time
18 of night, even at 6:00, I would be reluctant to engage,
19 partly because I'm quite convinced the press could be
20 shorter and I'm also anxious not to start these things when
21 tired for that very reason, so I would submit to you, sir,
22 that the most appropriate and, if I may say so, fair thing

1 would not to request me to do it this evening, but if
2 possible to do it on another occasion which would, of
3 course, give me an opportunity to collect and focus in any
4 event, but, of course, I'm aware that the Governor is an
5 extremely busy man, and it would be a considerable favor if
6 he were to be able to return for a short time.

7 COMMISSIONER HICKINBOTTOM: Which are the areas
8 that you would wish to ask questions of the Governor, Sir
9 Geoffrey?

10 SIR GEOFFREY: I could say those fairly easily.
11 It's chiefly the Public Service, and there are aspects of
12 the Ministers' concerns, which although Mr Rawat did a
13 valiant job of not being, I think, canvassed to the point
14 where I think some of the questions and answers that I can
15 address to the Governor might very well help you. Apart
16 from that, I think there may be one or two other areas that
17 may revolve on the budgetary questions about which the
18 Governor gave evidence very helpfully. We haven't seen
19 those figures before, although I think those instructing me
20 wrote to the Governor's Office requesting that information.
21 I'm not sure if they got the material back. They may well
22 have done and I have simply missed it, but it will be, I

1 think generally in the areas of the Public Service, the
2 Budgetary provision and arrangements made. There may be
3 one or two questions, if I have an opportunity to focus my
4 thoughts on the earlier part of the questioning to the
5 Governor, which revolves around the appropriate conduct and
6 the constitutional comity between the Governor's Office and
7 the elected institutions, but that will be relatively
8 short.

9 COMMISSIONER HICKINBOTTOM: But I will come to the
10 Governor in a moment, but if we were not to start now but
11 to start fresh at some other point--

12 SIR GEOFFREY: Yes.

13 COMMISSIONER HICKINBOTTOM: You would focus, you
14 would be narrow, and those are the sorts of issues.

15 SIR GEOFFREY: That's exactly it, yes.

16 And may I say that, given a little extra time,
17 maybe I can focus it even more sharply.

18 COMMISSIONER HICKINBOTTOM: I will come to the
19 Governor now, particularly because the Governor is not
20 compellable.

21 SIR GEOFFREY: Of course, that's why I said it was
22 a favor.

1 COMMISSIONER HICKINBOTTOM: And he's not been
2 obliged to answer any questions today, but I'm very
3 grateful that he has.

4 Governor, you've heard from Sir Geoffrey Cox. I
5 think ultimately under Section 13 it's a matter for my
6 discretion, but it may be sensible to canvass your views
7 but there are some questions that he would like to put to
8 on you on behalf of the Elected Minister and you've heard
9 how long they will take and the areas to be covered.

10 THE WITNESS: Thank you, Commissioner. Well, of
11 course, I will be guided by your ruling on the matter, but
12 I have questions beyond those which have been asked by
13 Mr Rawat, I have no objection in principle to trying to ask
14 further questions from Sir Geoffrey who is acting on behalf
15 of the Attorney General in this matter. But I would wish
16 to review myself of legal representation in those
17 circumstances. I did not ask for legal representation for
18 questions put to me by the Commission, but I would wish to
19 avail myself for legal representation if I'm going to be
20 examined. Of course, normally the Attorney General would
21 be my legal advisor but these questions will be put on
22 behalf of the Attorney General, and so, I think I need

1 separate representation. So, that may take a little bit of
2 time to organize, but if that can be done. I'm actually
3 hoping to go away for a few days next week, Commissioner,
4 but subject to that, of course, I will be happy to assist
5 as best I can.

6 COMMISSIONER HICKINBOTTOM: And in terms of legal
7 representation, the length of time that it will take just
8 so that we can organize your coming back to give further
9 evidence, about how long will that take, Governor?

10 THE WITNESS: I would hope we could do it not next
11 week but the week after would be my hope, Commissioner.

12 COMMISSIONER HICKINBOTTOM: Sort of a couple of
13 weeks.

14 THE WITNESS: A couple of weeks, yes. If that
15 would be acceptable to yourself and the others involved
16 because I want to give the best evidence I can.

17 COMMISSIONER HICKINBOTTOM: Okay.

18 MR RAWAT: Commissioner, may I suggest a way
19 forward.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 MR RAWAT: Firstly, I think you may need a slightly
22 better formulated application to determine. It may be that

1 the first step that can be done is for Sir Geoffrey to set
2 out in a letter perhaps with a little more detail the areas
3 that he wishes to cover with the Governor.

4 You can then determine that on paper, and that will
5 resolve that issue. That doesn't preclude the Governor now
6 putting steps into place in order to secure legal
7 representation.

8 We will need to ensure that whoever is appointed
9 receives the bundles, and in that sense having assistance
10 from Sir Geoffrey as to the areas that he wishes to cover,
11 with your permission, may also help us.

12 So, I'd suggest that as a next step, and then what
13 we will have to do is find a convenient time that suits
14 everyone where we can conclude this.

15 COMMISSIONER HICKINBOTTOM: Okay, that's helpful,
16 Mr Rawat.

17 Sir Geoffrey, I think Mr Rawat makes a good point
18 about the areas in which you would like to--

19 SIR GEOFFREY: I'm very happy to sketch them out in
20 writing. I would--I mean, I hesitate to say that the
21 Governor has nothing to fear from me. This will be a very
22 temperate and careful exercise. It really is a question of

1 elucidation, nothing more on matters that, in some cases
2 have already been well covered, but I completely understand
3 his desire, and I shall set it out in writing if that would
4 be helpful.

5 My only concern, sir, is that the timing of the
6 return, if it's as long as two weeks away, could place me
7 in a difficulty because I'm due, I regret to be in a
8 completely different time zone for some time, and I'm a
9 little worried about that, but if it really is necessary, I
10 wonder if next week was too soon because it's not going to
11 be a lengthy examination by me.

12 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, a couple
13 of points.

14 SIR GEOFFREY: Yes.

15 COMMISSIONER HICKINBOTTOM: Firstly, although we
16 will obviously have fairness to the Witness is at the
17 forefront of my mind.

18 SIR GEOFFREY: Right.

19 COMMISSIONER HICKINBOTTOM: It wasn't a concern
20 about fear on the Governor's part about facing questions
21 from you. In terms of better outlining the areas, there
22 were a lot of documents, we have a lot of documents, and it

1 would be very helpful to us all if we could focus on the
2 areas and therefore focus the relevant documents.

3 SIR GEOFFREY: Yes, I can certainly do that. I'm
4 just a little anxious about the timing as I mentioned
5 because, next week would be--if next week would be
6 possible, I would urge that we could conclude it then.

7 COMMISSIONER HICKINBOTTOM: Next week, as I
8 understand it is impossible for the Governor because the
9 Governor--

10 SIR GEOFFREY: Ah, I didn't hear it.

11 COMMISSIONER HICKINBOTTOM: --is going away.

12 THE WITNESS: Until the 1st.

13 (Overlapping speakers.)

14 MR RAWAT: --to provide us with his availability
15 and a sense of the time difference that may exist. We can
16 try and see if we can slightly moving pieces around the
17 chessboard.

18 THE WITNESS: And avoid a late horror show, I hope.

19 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, if you
20 could let us have both the areas.

21 SIR GEOFFREY: Yes.

22 COMMISSIONER HICKINBOTTOM: And dates that

1 are--dates and times that are convenient for you. We will
2 certainly take those into account and do what we can to--

3 SIR GEOFFREY: I'm most grateful, sir, as I say,
4 say, it may be that I just have to do it from the Eastern
5 hemisphere where I'm going at whatever the time difference.

6 COMMISSIONER HICKINBOTTOM: I'm afraid you may.

7 SIR GEOFFREY: Yes, sir.

8 COMMISSIONER HICKINBOTTOM: Because I have already
9 mentioned briefly the possibility of--well, I've mentioned
10 briefly, we briefly discussed Closing Submissions.

11 THE WITNESS: Yes, we have.

12 COMMISSIONER HICKINBOTTOM: And it may be that this
13 additional hour can be at the same time at the same hearing
14 as any oral submissions in closing.

15 THE WITNESS: Yes, indeed, sir. Thank you.

16 COMMISSIONER HICKINBOTTOM: Probably to be in two
17 or three weeks' time, I guess, so that may all sort of fit
18 together, but if you could let me have those details and
19 times.

20 SIR GEOFFREY: I will.

21 COMMISSIONER HICKINBOTTOM: Today is Tuesday, but
22 if you could let me have those by, say, the end of

1 Thursday, Sir Geoffrey, that would be very helpful.

2 THE WITNESS: Yes. I'm due to be you with
3 tomorrow. I shall try my best to do the end of Thursday,
4 except that I shall also with you on Thursday, so it might
5 be a little difficult for me to do it while I'm, so to
6 speak, paying close attention to the proceedings.

7 Could we leave it like this, sir, I will do my best
8 to get it ready for you by Thursday. It may have to pop
9 into Friday if that weren't too long for you.

10 COMMISSIONER HICKINBOTTOM: That would be fine in
11 terms of the areas.

12 SIR GEOFFREY: Yes.

13 COMMISSIONER HICKINBOTTOM: Have your convenient
14 dates and times as soon as you can.

15 SIR GEOFFREY: Yes.

16 COMMISSIONER HICKINBOTTOM: That will just organize
17 things from a practical point of view, that's all.

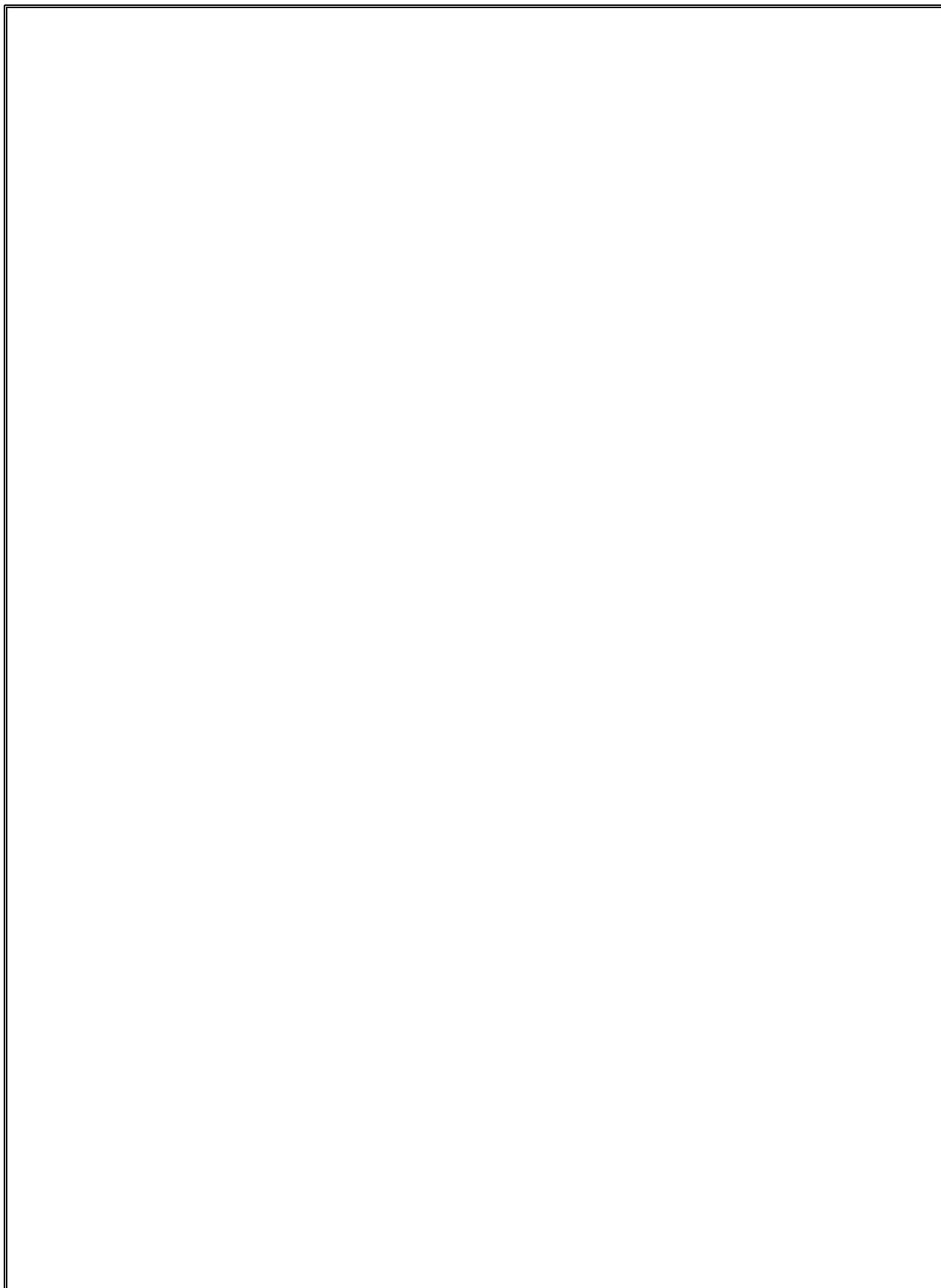
18 SIR GEOFFREY: Yes, thank you very much, thank you.

19 COMMISSIONER HICKINBOTTOM: Good. Now, I think
20 that that is all in terms of the open session. We have to
21 deal with radar barges for which we're going into a private
22 session, and so I will just pause for a moment while that

1 happens, and then we will conclude the business of the day
2 in private session.

3 (End of open session. Private session begins.)

1



1 PRIVATE SESSION

2 Session 3

3 COMMISSIONER HICKINBOTTOM: So, now Governor, we are in
4 private session. We are not in live stream. This video will
5 not go out. We will have a transcript which this part of which
6 will be redacted as necessary, but everybody is, as it were,
7 still here.

8 THE WITNESS: Thank you.

9 COMMISSIONER HICKINBOTTOM: Mr Rawat.

10 MR RAWAT: Thank you, Commissioner.

11 BY MR RAWAT:

12 Q. Governor, for our last topic, can I ask you just,
13 please, to first of all, if we return to bundle 1 on governance
14 in your position statements.

15 A. Yes, thank you. My first position statement, thank
16 you.

17 Q. If we go to page 824, please. Part 1, 824.

18 Drawing your attention paragraph 61.

19 A. Yes.

20 Q. You say "there have been a number of occasions on which
21 Cabinet has agreed to waive tenders in awarding contracts which
22 in my view have not involved exceptional circumstances

1 justifying departure from the general procedures under the
2 Public Finance Management Act", and then you continue at 62, "on
3 other occasions it's not clear that Contracts have been awarded
4 under any proper procedure or with any cost benefit analysis,
5 for example, the EZ Shipping radar contract which to the best of
6 my knowledge was not agreed by either the Joint Task Force or by
7 the National Security Council prior to signature".

8 Now, where you say "best of my knowledge", you're presumably
9 referring to historical information that was provided to you?

10 A. That's correct, and for the papers which were
11 available to me.

12 Q. Because if we turn, please, to the radar barges folder,
13 it might be on the other side, if you go to Part 4.

14 A. Um-hmm. Thank you.

15 Q. The circumstances in which you had direct involvement
16 with radar barges is at 4014.

17 A. 4014. Yes.

18 Q. And this is the last contract for EZ Shipping where
19 Cabinet was invited to approve a new contract for two barges
20 with a total cost of \$360,000. That's \$12,000 per day, running
21 from the 23rd of December 2020 to the 22nd of January 2021. So
22 in these circumstances, I think by the time Cabinet met, the

1 Contract had reached an end. But on the 17th of February 2021,
2 the paper was presented to Cabinet by the Minister of Finance,
3 and you made various observations questioning whether Government
4 was getting value for money with this platform as it seemed to
5 be an expensive venture.

6 And you added that you were less impressed with the
7 statistical report provided by the Joint Task Force, JTF, and EZ
8 Shipping's daily charge for barges to serve as radar platforms
9 for securing the Territory's borders, you said you saw EZ
10 Shipping's detection rate of vessels as really low, and you
11 asked whether the Cabinet was satisfied there was value in this
12 venture.

13 You supported moving ahead to a full radar system to ensure
14 marine security, noting it would take a few months for
15 implementation.

16 And then if we look over the next page, you noted that the
17 paper was requesting a retroactive payment. There will be
18 additional months for which coverage would be needed, you were
19 told that this was the last Contract for EZ Shipping and you
20 asked what coverage would be in place if this was EZ Shipping's
21 last month, and you were told that the Joint Task Force would
22 develop a proposal and recommendation for implementation of a

1 government-owned platform.

2 Now, that's the background. I think the Report which you
3 saw must have been, I'm going to suggest, one which we find in
4 the Part 3 radar barges bundle.

5 A. One second.

6 I've got it, yes.

7 Q. You if turn to page 2042, please.

8 A. 2042?

9 Q. Yes.

10 This is a joint border patrol monthly report. It's said to
11 be August 24, 2021 through to 31 of January 2021, but that looks
12 to be--it's a summary of a number of reports, but certainly for
13 the period with which you were concerned, which we see at the
14 bottom, you've got in December, one vessel detected, three
15 vessels intercepted, none fined, no court proceedings. In
16 January, 16 detected, 16 intercepted, one fined and detained and
17 no court proceedings. I won't cite the others but does this
18 look like the sort of Report that was in front of you at the
19 time?

20 A. I think, Mr Rawat, the Report that I had at the time
21 of this meeting in February, I think that the figures I had
22 before me were the figures for November, December, and January.

1 I'm not sure that I had the figures for August, September,
2 October. I would need to doublecheck them. My memory is it was
3 over the last three months.

4 Q. If we just read the figures for November, then it was
5 12 vessels detected, four vessels intercepted, none detained and
6 fined, and no court proceedings.

7 We set out this sort of factual background, but just to deal
8 the detail and returning back to the Minute, what were the
9 concerns or what was the substance behind your concern or your
10 question as to whether Government was getting value for money?

11 A. I had obviously prepared for this meeting. I would
12 look at such past papers as were in the Government's office on
13 this subject. I, of course, consulted my staff within the
14 Governor's Office, and so I was aware of the concerns of my
15 predecessor's Governor and the Police Commissioner as to whether
16 the harm to the barges constituted value for money. They were
17 expensive compared to alternatives of using small boats, which
18 consist in radar detection, I think the total cost of the barges
19 amounted to over \$2 million in the total expenditure, and I was
20 unconvinced from what I had seen and advice from colleagues and
21 from the Police Commissioner that there couldn't be systems
22 which would be at least as effective which would cost less.

1 Q. Now, in terms of your position, you obviously, as
2 you've explained, can advise, can raise concerns.

3 A. Yes.

4 Q. But you cannot vote, and this went through.

5 But in terms of what subsequently has happened to that, has
6 there been and please don't give details, but have there been
7 steps to implement an alternative to the use of radar barges?

8 A. Yes.

9 What we're working on--and I don't think this involves
10 any oversensitive matter, is indeed, moving ahead in the
11 proposal to try and have a proper radar system put in place for
12 the Territory.

13 COMMISSIONER HICKINBOTTOM: A fixed radar system?

14 THE WITNESS: Well, it depends on what's chosen, but
15 yes, it will be a fixed radar system or systems.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: Which would assist in the Territory.

18 And the UK Government has offered assistance in the
19 proper procurements to assist beyond there. In the meantime
20 we're supporting, for example, better training of the Maritime
21 Police to improve their capacity as well.

22 BY MR RAWAT:

1 Q. When you say "we are supporting", who is the "we"?

2 A. The Governor's Office.

3 Q. And is that with UK funds?

4 A. Correct.

5 Q. I see.

6 A. With support from the Ministry of Defence, a colleague
7 of naval, a colleague providing training in this area, he
8 provided assistance in Bermuda when I was there to improve the
9 maritime capacity of the Royal Community Regiment and he's
10 assisting in the capacity of the Maritime Police here.

11 Q. In that regard, can I ask you just to go back to
12 bundle 3?

13 A. Which bundle is that?

14 Q. I'm sorry, it's now back to the Governor's bundle 3, so
15 the small one we were looking at. I will ask you one question
16 about a letter, a memorandum that you provided.

17 A. Please.

18 Q. If you go to page 251, please.

19 A. Yes.

20 Q. So, it's a memorandum from yourself dated the 8th of
21 April 2021 to the Financial Secretary.

22 A. Yes.

1 Q. Headed "coastal surveillance system for the British
2 Virgin Islands tender process".

3 Is this what you're speaking of when you speak of the
4 efforts that are being made?

5 A. Yes, it is.

6 Q. You say that "at the discussion with the Deputy
7 Governor Chaired on 22nd of March 2021, I understand it was
8 agreed that a paper would be submitted to the National Security
9 Council setting out the agreed approach to procurement of a
10 coastal surveillance system. I would like this to be a decision
11 rather than Information Paper".

12 You then suggest that the best procurement approach is that
13 recommended by the Maritime and Coast Guard agency of a two
14 separate procurement process, separate and design-build to two
15 separate tender activities rather than design-build. This is
16 best practice for procurement of this type of sophisticated
17 technological system. Helps mitigate any design compromise or
18 unsuspected contract variation.

19 So, where you refer to the Maritime and Coast Guard
20 agency, are you referring to the UK's Maritime and Coast Guard
21 agency?

22 A. Yes.

1 Q. You then go on, on the next page, to refer to support
2 that can come from International Association of Marine Aids to
3 Navigation and Lighthouse Authorities, which could facilitate a
4 risk assessment, ensure all contractors and suppliers are
5 recognised. You say to access much of the support, BVI would
6 need to be a Member of IALA. The UK's willing to fund BVI's
7 membership as membership is important to help ensure BVI meet
8 international standards. Membership would also enable BVI to
9 take advantage of IALA's extensive range of capacity-building
10 programmes, support tools and training. My team set up a
11 meeting with IALA and the GOVI team to discuss membership
12 options in the risk assessment, but I understand this was
13 postponed.

14 So, in terms of this, as a decision, it goes first through
15 the NSC and then to Cabinet or is it something where the NSC can
16 make the decision?

17 A. The contractual arrangement I think was ultimately
18 made by Cabinet, assuming it involves financial expenditure but
19 it would go first to the National Security Council, and it would
20 make a recommendation as necessary to Cabinet.

21 Q. And in terms of the funding from the UK, the letter
22 speaks of funding membership to the IALA, but above and beyond

1 that, what are the other areas where UK is providing funding
2 here, if at all?

3 A. Well, Maritime security were providing substantial
4 funding for the--that was included in the overall figures I gave
5 you from 2018 onwards. We were providing, in particular,
6 maritime training for the Police, and we've also provided
7 assistance in getting some of their vessels back up and working,
8 the "Intersula" (phonetic) in particular, which is the main
9 police vessel which was not working, has been repaired and is
10 back on the water, and UK funds have helped pay for that.

11 Q. I see.

12 Could I just ask you one last matter, which is perhaps
13 returning where we started, which is Section 60. I just want to
14 ask just a question about Section 68. "Where the Governor
15 acting in his or her discretion determines that the exercise of
16 any function conferred on any other person or authority other
17 than the House of Assembly would involve or affect any matter
18 mentioned in subsection (1), the Governor may, acting after
19 consultation with the Premier, give directions as to the
20 exercise of that function and the person or authority concerned
21 shall exercise the function in accordance with those
22 directions".

1 I just wanted to ask if you could assist the Commissioner
2 with this. In what circumstances do you envisage as a Governor
3 having to make such a direction?

4 A. Thank you.

5 May I just read the subsection again, Mr Rawat?

6 Q. Of course.

7 (Pause.)

8 A. I have not sought to resort to that provision since I
9 have been Governor, and I'm not sure to what extent my
10 predecessors have resorted to that Section, but I think it's
11 something of a safeguard power in the words "revolver effect"
12 are used here. So, if person falling outside the normal
13 authority of the Governor wishes to carry out a function which
14 could involve or affect special responsibility of the Governor,
15 then the Governor can give directions as to the exercise.

16 So, I haven't quite answered your question, Mr Rawat,
17 but say, for example, there was a wish by Customs or others to
18 purchase a radar system for the security of the Territory, and I
19 felt that that system would not suffice to protect our security,
20 or, you know, could in some way be detrimental to our security,
21 then I suppose I could give a direction in those circumstances
22 but I give that to you as a hypothetical example, not as an

1 example which has so far been acquired in practice.

2 Q. And where it says "after consultation with the
3 Premier", do read that as with the agreement with the Premier or
4 merely that you have to consult with the Premier?

5 A. You really have to consult. There's very clear case
6 law that the term "consultation" in relation to Overseas
7 Territories is that consultation does not imply agreement.

8 Q. Thank you.

9 MR RAWAT: Commissioner, if I could have a moment,
10 please.

11 COMMISSIONER HICKINBOTTOM: Sure. Thank you.

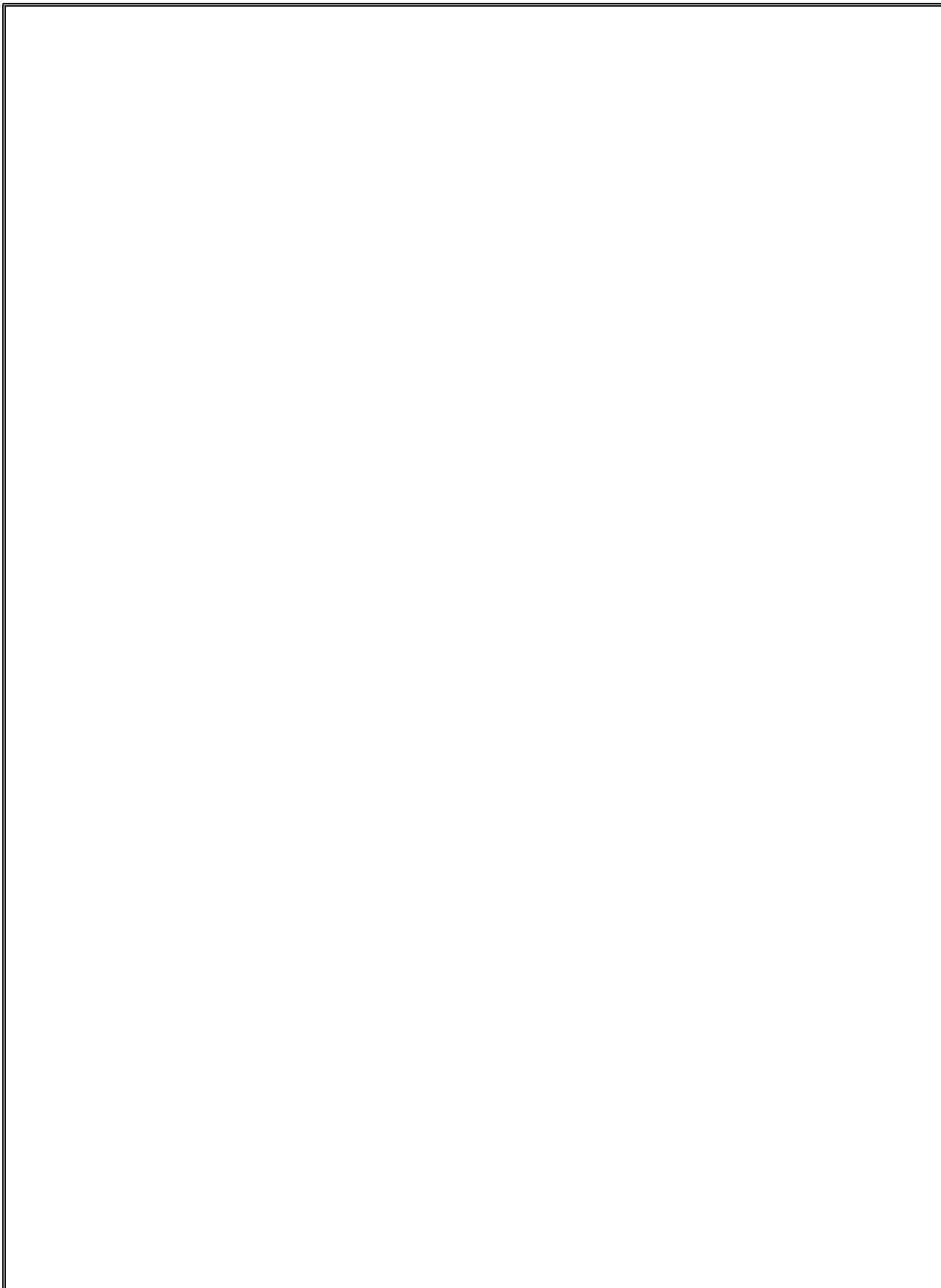
12 (Pause.)

13 MR RAWAT: Commissioner, I have reached the end of my
14 questions.

15 COMMISSIONER HICKINBOTTOM: What I propose to do, I
16 think, is we will go back to live stream just to clear the
17 business for the day.

18 (End of private session.)

1



1 OPEN SESSION

2 COMMISSIONER HICKINBOTTOM: If we can go back to live
3 stream. We're back now on live stream.

4 Can I just say that we have now concluded the matters
5 that we needed to deal with in private session.

6 Sir Geoffrey, what I suggest is that when the
7 Transcript of today is available, then if the Attorney can let
8 us have any redactions from the part that has been in private
9 session that she considers are necessary, then hopefully we will
10 be able to publish some, if not all of the private session, but
11 that's the way we will deal with that.

12 Mr Rawat.

13 MR RAWAT: Commissioner, just to say that I have
14 concluded my questions, and can I thank the Governor for coming
15 to give evidence today. We started a little later than he
16 perhaps expected, and we have also possibly finished a little
17 later than he perhaps expected, but we're grateful to him for
18 making himself available, but can I also thank him, not just for
19 being here but for the way in which he has given his evidence.

20 COMMISSIONER HICKINBOTTOM: And can I echo that,
21 Governor, particularly as you're not a compellable witness, and
22 therefore you are here voluntarily. Thank you for your time,

1 which is slightly longer, as Mr Rawat said, than we had perhaps
2 hoped. Thank you for your time and thank you for the evidence
3 that you have given, very helpful. And thank you for agreeing
4 to come back to have some questions put by Sir Geoffrey within
5 the next couple of weeks or so, and we will make arrangements
6 for that. Thank you very much.

7 THE WITNESS: Thank you, Commissioner. Thank you,
8 Mr Rawat.

9 SIR GEOFFREY: May I also thank the Governor for
10 agreeing to come back, and I think if I may say on behalf of the
11 Elected Ministers, I think the exercise has been extremely
12 valuable. I address the Governor in saying this. I think it
13 has been most helpful. Thank you.

14 COMMISSIONER HICKINBOTTOM: Thank you, Sir Geoffrey.
15 And tomorrow, Mr Rawat?

16 MR RAWAT: Tomorrow we start with another witness.

17 COMMISSIONER HICKINBOTTOM: At 9:00?

18 MR RAWAT: 9:00.

19 COMMISSIONER HICKINBOTTOM: Okay. We will close now
20 until 9:00 tomorrow. Thank you.

21 MR RAWAT: Thank you.

22 (End at 6:30 p.m.)

CERTIFICATE OF REPORTER

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

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

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

DAVID A. KASDAN