

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 1
(TUESDAY 4 MAY 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Hon Attorney General Ms Dawn J Smith and Solicitor General Mrs Jo-Ann Williams-Roberts appeared for various BVI Government Ministers and public officials

Counsel to the Commission Mr Bilal Rawat also appeared

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Those present:

Session 1

Ms Dawn J Smith, Hon Attorney General

Mrs Jo-Ann Williams-Roberts, Solicitor General

Mr Bilal Rawat (attending remotely)

Sir Geoffrey Cox QC, Withers LLP]

Mr Hussein Haeri, Withers LLP] attending remotely

Mr Niki Olympitis, Withers LLP]

Mr Steven Chandler, Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police
Force

Mr Dame Peters, Audio-Visual Technician

P R O C E E D I N G S

SESSION 1

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3 COMMISSIONER HICKINBOTTOM: Welcome to the first
4 hearing of the Commission of Inquiry.

5 Because it is the first hearing, I propose to make a
6 short Opening Statement before we get down to the business of
7 the day.

8 As you are all aware, considering that it would be in
9 the public welfare--that is, in the public interest--on the 19th
10 January of this year, the then-Governor issued a Commission of
11 Inquiry to establish whether there is information that
12 corruption, abuse of office or other serious dishonesty in
13 relation to officials, whether statutory, elected or public that
14 may have taken place in recent years; to consider the conditions
15 which may have allowed any such serious dishonesty to take place
16 and whether they still exist; and, if appropriate, to make
17 independent recommendations with a view to improving the
18 standards of governance and the operation of the agencies of law
19 enforcement and justice in the British Virgin Islands.

20 I was appointed the sole Commissioner; and, since
21 January, with the COI team, quietly but with purpose and
22 determination, I have been fulfilling those Terms of Reference.
23 They require me to report to the Governor with my findings and
24 recommendations by July, but, if necessary, the Governor is able
25 to extend that time to October. Whether an extension may be

1 required is a matter I will consider over the next few weeks.

2 To date, many have come forward with information,
3 through the COI website portal or other means, and by
4 face-to-face and remote meetings. I am grateful to all those
5 who have come forward. I should emphasise that, if anyone has
6 information which they have not yet sent to us, which they
7 consider falls within the scope of the COI and may be useful,
8 that they should contact the COI through the website portal or
9 by any of the other ways set out on our website page which can
10 be found at www.bvi-public-inquiry.uk. Any such information
11 received by the COI will remain strictly confidential.

12 As well as information volunteered in that way, the
13 COI team have made requests for voluntary production of
14 information, mainly from Ministers and other public officials
15 who have provided a substantial number of documents. I
16 understand this has involved public servants putting in a
17 considerable amount of work to respond to the requests. Whilst
18 some have asked for additional time, none has suggested that he
19 or she has been unable to comply fully with the COI requests as
20 a result of lack of resources. I sincerely thank them for their
21 efforts, which I very much appreciate.

22 Much information has been gathered, and much progress
23 made. However, we have now reached a stage where oral hearings
24 are required to ensure further progress can be made, and at the
25 required rate.

1 One of the focuses of the initial hearings will be
2 production of information. As I have said, in response to COI
3 requests for voluntary production, in most instances, the
4 recipient of the request has provided information and documents,
5 with an indication that he or she has fully complied with the
6 request. It is vital that I do have all the information and
7 documents relevant to the Inquiry, and some of these initial
8 hearings will be to give me appropriate comfort that that is,
9 indeed, the case. However, as I indicated at the outset of the
10 COI, I intend to be flexible with regard to the conduct of the
11 Inquiry, including the Hearings, so that we may make progress in
12 an efficient way--and whilst, of course, always ensuring that
13 all are treated fairly.

14 In respect of documents which have been produced,
15 various Ministers through the Attorney General have reserved
16 their position on whether information and documents they have
17 produced--and are continuing to produce--may be made available
18 to the public. Consequently, some of these initial hearings
19 will be held in private; so that, if there is a reference to
20 information or documents in respect of which privilege or
21 confidentiality is maintained, that such issues can be
22 considered before the relevant material is made public.
23 However, at each hearing, having heard any submissions on the
24 point, I will determine whether the Hearing (or part of it)
25 needs to be kept private, or whether it can properly be made

1 public and, if so, how. I have well in mind both the
2 understandable interest that the public has in the COI, and the
3 importance of the principles of transparency and openness.

4 However, in respect of a private hearing such as this,
5 until I make a declaration that the hearing (or part of it) can
6 be made public in some way, everything that occurs at the
7 Hearing will remain strictly confidential. Everyone involved in
8 the Hearing is subject to the obligation of confidentiality.

9 Unless and until I declare otherwise, no one is allowed to
10 publicise any part of it, in any way. If there is any such
11 publicity, then I can--and usually will--investigate the cause
12 of the leak and take appropriate action against anyone who has
13 caused or facilitated the breach of confidence.

14 Further, it is important that I emphasise that no
15 recordings can be made of any hearing--public or private--save
16 for the authorised recording that I am causing to be made. A
17 Transcript will be made of each hearing. If the hearing is
18 private, then a Transcript may be provided to participants on
19 the basis of a confidentiality undertaking. If a hearing is
20 public--or if I direct that a private hearing be made
21 public--then the default position will be that the relevant
22 transcript will be posted on the COI website.

23 In commencing this next stage of the Inquiry, may I
24 again stress that, although I have many of the powers of a High
25 Court Judge, the COI is not a court of law. I am simply

1 conducting an investigation, as required by my Terms of
2 Reference; and the Hearings are not to be adversarial but
3 inquisitorial. I would ask all of those who may be involved in
4 the Hearings to bear that in mind. Counsel to the Inquiry,
5 Mr. Bilal Rawat, is not here to promote any cause: he has been
6 appointed, by the Attorney General on my recommendation, to
7 promote the public interest and to ensure, so far as he can,
8 that the COI complies with its Terms of Reference and for the
9 benefit of all who live in this territory. That, too, is my
10 overarching and primary consideration. I hope, and expect, all
11 witnesses and those who might represent them to share those
12 aims.

13 Thank you. As I said, this is a private hearing, at
14 least at the moment. However, subject to any objections, I
15 propose making my Opening Statement.

16 I will deal the rest of the Hearing where parts can be
17 adopted at the appropriate time.

18 If I may--and I know this is quite tedious, if could I
19 deal with a few housekeeping points. I know some of these have
20 been reviewed already, and I apologise if there is any overlap.

21 Might I stress no recordings can be made. As I have
22 said, audio has been taken and will be transcribed. So long as
23 the Hearing remains private, the obligation of confidentiality
24 will have access to the Transcript, too. Participants will be
25 sent a Transcript subject to any undertaking or confidentiality.

1 And if anybody else not present remotely in this hearing room
2 which should have a transcript, then they should apply to the
3 Secretary with a confidentiality undertaking, and reasons why
4 they wish to have a copy of the Transcript.

5 Next, if I confirm, we're adhering to strict COVID-19
6 measures, the hearing room is COVID-sanitized at the end of each
7 day, and I ask everyone to wear masks when in public parts of
8 this building and when entering and leaving or moving around
9 this room. Whilst seated in the room, you may remove your mask
10 if that that is more comfortable. Each person is properly
11 socially distanced.

12 Next, could I ask all of those who are linked in
13 remotely from outside the hearing room, please to mute their
14 microphones when not speaking. That's simply to avoid noises.
15 But those in the room, I understand on a loop, and they are
16 asked to leave their microphones on. That's the green at the
17 bottom of their microphone. The AV technician again in the back
18 of the room is able to mute anyone if there is a sound problem,
19 but there should not be any of that as a result of the
20 microphones in this room.

21 We are, of course, reliant on technology, as this
22 morning has already shown. Glitches are inevitable. If anyone
23 sees that someone is no longer connected, could you please make
24 that known. The AV technician is keeping a particular eye open
25 for that, and we will stop and connect with those individuals.

1 Further, although this is not a complaint or criticism
2 of anyone about this morning, I think in the future it will be
3 helpful if the Zoom connection were made 15 minutes before the
4 Hearing is due to start. That's simply because, particularly
5 with the number of people we have today linked in, technical
6 problems are not unknown and that will help us keep to the
7 starting time.

8 Could the people please turn their microphones off or
9 at least to silent in this room.

10 And, finally, I have been asked (unclear). Was there
11 anything else before we come to the substantive business?

12 Good. Attorney General, we'll deal with your
13 Application first. I have seen your letter of last night, which
14 says that following your submissions, you wish to give Sir
15 Geoffrey Cox QC, who is linked in, the opportunity to make
16 further submissions. You say that as I understand it on two
17 bases. Firstly, because of your other duties it will be
18 impossible for you to attend every hearing of the COI and,
19 therefore, you need other advocates who are able to appear on
20 your behalf. That's something I fully understand as a general
21 proposition but you are here today and I'm very grateful for
22 your attendance.

23 But the second reason put forward is that you say it's
24 conventional in this jurisdiction for the Attorney General to be
25 represented in these Hearings by counsel of her choice, her

1 designation, and you've designated Sir Geoffrey to represent you
2 at this Hearing. That convention is, as I understand it, the
3 same in England and Wales. But whilst aspects of your
4 application are uncontroversial, subject to anything Mr. Rawat
5 has to say about them, you're pushing an open door. For some
6 aspects of your Application I find clarification would help.
7 And although Sir Geoffrey may be able to assist on some of those
8 points, you are uniquely well-placed to deal with some of the
9 concerns that I have. Indeed, Sir Geoffrey may not be able to
10 deal with all the concerns, and that's why, Attorney, I asked
11 you to attend today, and I'm very grateful for your doing so.

12 If after you've made your submissions anything remains
13 unclear, and it may not because it may all become clear during
14 your submissions, then we can of course consider the best way of
15 dealing with that, one possible way is for Sir Geoffrey to make
16 submissions the other way.

17 I assume that if you consider that the Application is
18 quite clear--and as I said, with your help, that may be the
19 case--it seems the best way going forward is for you to respond
20 to my specific concerns. I don't see any point in making
21 submissions on matters I'm not concerned about. What I want is
22 some help on matters which I do not find clear. But, certainly,
23 you can deal with everything in one go, rather than me raising
24 my concerns, it seems to me that the most efficient way of
25 proceeding would be for Mr. Rawat, which under the COI Rules,

1 subject to my permission in the way that they do, and he can
2 raise any issues that he has with the Application, then we can
3 deal with all of the concerns. Seems to me the most efficient
4 way of going forward.

5 Is that a sensible way of dealing with that?

6 ATTORNEY GENERAL SMITH: Thank you very much (drop in
7 audio).

8 COMMISSIONER HICKINBOTTOM: Let me make sure that is
9 recorded.

10 MR. RAWAT: Sir, I'm sorry to interrupt, and I hope
11 you can hear me. We were unable--I think I wasn't the only one
12 who was linking in remotely. We were all unable to hear the
13 Attorney General's remarks at all.

14 COMMISSIONER HICKINBOTTOM: That may result
15 with--(drop in audio).

16 (Pause.)

17 ATTORNEY GENERAL SMITH: Can you hear me? Testing?

18 COMMISSIONER HICKINBOTTOM: Mr. Rawat, can you hear
19 that?

20 MR. RAWAT: I did--I think I heard the Attorney saying
21 "testing, testing."

22 COMMISSIONER HICKINBOTTOM: Anyone else can't hear the
23 Attorney? Good.

24 Attorney General, sorry about that. But when things
25 come in, it's my fault, and when it comes in, it's not your

1 fault.

2 ATTORNEY GENERAL SMITH: Thank you, Commissioner. My
3 understanding is that you would like me to respond to questions
4 put forward by Mr. Rawat. Is that my understanding?

5 COMMISSIONER HICKINBOTTOM: It will be helpful--if he
6 set out his submissions and you can deal with any points of
7 clarification within the Application. I have some thoughts, but
8 we can then deal with them altogether.

9 ATTORNEY GENERAL SMITH: Right. So, then I would make
10 my submissions and address the points raised by Mr. Rawat?

11 COMMISSIONER HICKINBOTTOM: Yes.

12 And during the course of that, if I have any other
13 thoughts, we could work those into it. Thank you very much.

14 ATTORNEY GENERAL SMITH: Thank you.

15 COMMISSIONER HICKINBOTTOM: Mr. Rawat?

16 MR. RAWAT: Thank you, Commissioner, and good morning.

17 Just for the record, if I just indicate that today at
18 this first hearing there will be two matters before you. The
19 first, as you've just indicated, is the Attorney General of
20 British Virgin Islands' Application for a direction she be
21 permitted to participate in the Commission of Inquiry, both in
22 her own right and on behalf of a number of identified
23 Ministries, Departments and other bodies of the Government of
24 the Virgin Islands. For ease, I will refer to these as
25 "government bodies." But again, for the record, we are

1 scheduled to take evidence from Ms. Sandra Ward, the Cabinet
2 Secretary, who appears in response to a summons issued on the
3 23rd of April 2021.

4 Can I just turn to the Attorney's Application. You
5 will have a copy of that Application. It is dated 28 of April
6 2021 and signed by the Attorney. You had, in earlier
7 correspondence, indicated to the Attorney that you wished to
8 hear from her before considering the scope of Sir Geoffrey Cox
9 QC and his involvement with the COI.

10 And so, for the Transcript, can I just explain that,
11 as we understand it--and by "we" I mean the Commission team--Sir
12 Geoffrey has a role of leading the Inquiry Response Unit, also
13 known as the IRU, a unit which is staffed by Withers personnel,
14 led by two partners, one based here in the Virgin Islands and
15 another based in London, but together also with members of the
16 Attorney's Chambers.

17 What I would like to do as a start is just to outline
18 the basis of the Application. The Preamble to the Application
19 explains that the Attorney applies in her own right and on
20 behalf of certain government bodies. And at Paragraph 4, the
21 Application states that the Attorney has a particular role under
22 the Virgin Islands Constitution Order of 2007. And perhaps, for
23 the record, I'll put in the wording of the Constitution, the
24 Attorney's role is be the principal Legal Adviser to the
25 Government of the Virgin Islands.

1 The point is made in the Application that the
2 Attorney's obliged to act in the public interest, and it then
3 follows at Paragraphs 5 to 15 submissions as to why
4 representation for various government bodies, through the
5 Attorney or through the counsel instructed by her, should be
6 permitted.

7 The bodies for whom representation is currently
8 shown--is currently sought--are shown on an organogram which is
9 annexed to the Application. However, Paragraph 6 of the
10 Application explains that other government bodies may be added.

11 The Application is not entirely clear as to the basis
12 on which the Attorney applies in her own right. There is the
13 reference to the public interest, but the detail seems to be at
14 Paragraph 16 of the Application, which reads: "It is likely
15 that the Attorney General, both as the senior law officer and on
16 behalf of the relevant ministries and departments will be in a
17 position to assist the Commissioner; for example, in fulfilling
18 his responsibility of making recommendation for improving the
19 standards of governance, the operation of law-enforcement
20 agencies, and the administration of justice."

21 With that introduction, can I set out four matters
22 that arise from the Application, and on which, in my submission,
23 you would benefit from the further assistance of the Attorney
24 today.

25 Those four matters are:

1 One, the basis upon which the Attorney applies for
2 participation in her own right;

3 Two, what other individual or bodies could the
4 Attorney come to represent in due course;

5 Three, the basis on which the Attorney has sanctioned
6 disclosure to the Commission of Inquiry; and

7 Four, the role or roles to be undertaken by Sir
8 Geoffrey Cox QC and Withers.

9 With your leave, Mr. Commissioner, what I propose to
10 do is take these matters in turn, set out more detail, but then
11 pause to allow the Attorney to address you on each matter. In
12 that way, we won't lose sight of the issues that I would like to
13 raise.

14 COMMISSIONER HICKINBOTTOM: That makes sense;
15 otherwise, it might get us lost. We will take it in relatively
16 small pieces.

17 ATTORNEY GENERAL SMITH: We can, but I did indicate
18 that I had submissions to make in respect of the Application,
19 and I understood that I would have been given the opportunity to
20 make those submissions, and at the same time address the
21 questions raised by Mr. Rawat.

22 COMMISSIONER HICKINBOTTOM: So, you propose that
23 Mr. Rawat set out all his questions and you deal with them all
24 in one go?

25 ATTORNEY GENERAL SMITH: I think those questions will

1 actually be answered in my submissions which I would like to
2 give comprehensively, and I can--of course, if they have not
3 been adequately addressed, then I come back to those.

4 COMMISSIONER HICKINBOTTOM: You don't know what the
5 questions are though?

6 ATTORNEY GENERAL SMITH: Well, he indicated there were
7 four matters. I'm happy to hear the questions, I was just
8 saying that I understood I would be able to make my submissions
9 and respond. He just said that he would want me to respond
10 after he had gone through each question.

11 COMMISSIONER HICKINBOTTOM: So you are not going to
12 take the questions in turn? Whenever you've made your
13 submissions, you're not going to respond to the questions in
14 turn?

15 Mr. Rawat is going to fill out these four areas of
16 concern.

17 ATTORNEY GENERAL SMITH: Yes.

18 COMMISSIONER HICKINBOTTOM: When you give your
19 submissions, are you going to say, "Well, I'm now going to deal
20 with the basis on which I apply in my own right, or are you just
21 going to make submissions out of which the answer to that
22 question will appear?

23 ATTORNEY GENERAL SMITH: That is what I was proposing,
24 but I was asking you, as Commissioner, what you were comfortable
25 with.

1 COMMISSIONER HICKINBOTTOM: Well, firstly, I don't
2 want to stop you from saying anything you want to say in support
3 of the Application, but what would be most helpful for me is
4 that we hear Mr. Rawat's concerns under these four heads, and
5 then having heard these concerns on the basis on which you apply
6 in your own right, I can either raise concerns or questions or
7 request for clarifications that I have, and then you can simply
8 deal with that. That would be the most helpful at the moment.
9 But if, after he's dealt with all of these questions, there are
10 other submissions you want to make, I won't stop you.

11 ATTORNEY GENERAL SMITH: Thank you, sir.

12 COMMISSIONER HICKINBOTTOM: But hopefully all of the
13 areas in which I feel that clarification will be helpful will be
14 covered under these heads.

15 ATTORNEY GENERAL SMITH: Thank you.

16 COMMISSIONER HICKINBOTTOM: Thank you very much.

17 Yes, Mr. Rawat.

18 MR. RAWAT: Thank you, sir.

19 If I then turn to the first matter that I set out,
20 which was the basis on which the Attorney applies for
21 participation in her own right, there are, in my submission, two
22 aspects to this matter. The most straightforward point and the
23 first one that I would put forward arises from the content of
24 Paragraph 16, which I just read out.

25 In my submission, in the event that you were, as

1 Commissioner, to consider it necessary to seek information from
2 the Attorney on an issue such as the administration of justice,
3 that should not come in the form of submissions from instructed
4 counsel, but rather in the form of evidence directly from the
5 Attorney as the Legal Adviser to Government. And, accordingly,
6 I invite her to address you on this question:

7 Why does the Attorney need to be a represented
8 participant in this Commission of Inquiry in order to provide
9 that kind of information?

10 The second aspect under this head arises from the
11 reference in the Application to the public interest.

12 (Freeze in audio and video.)

13 SIR GEOFFREY COX: I fear that counsel has been
14 frozen, sir.

15 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, I think he
16 has.

17 SIR GEOFFREY COX: Yeah.

18 COMMISSIONER HICKINBOTTOM: Let's wait to try and get
19 him back.

20 SIR GEOFFREY COX: Yes.

21 COMMISSIONER HICKINBOTTOM: Given that Mr. Rawat is
22 frozen, it's on his end, so we may not be able to do much on
23 this end.

24 Right. I suspect he's going and trying to come back
25 in.

1 (Pause.)

2 COMMISSIONER HICKINBOTTOM: We're going to telephone
3 Mr. Rawat to see what the problem is and what he can do about
4 it.

5 (Pause.)

6 MR. RAWAT: Sir, I hope you can see and hear me.

7 COMMISSIONER HICKINBOTTOM: Yes. It's probably your
8 end, Mr. Rawat, because you've come back in.

9 MR. RAWAT: Yes. I have no explanation for why it
10 happened, but--

11 COMMISSIONER HICKINBOTTOM: We are back and we can see
12 and hear you.

13 MR. RAWAT: I apologise to you, sir, and the Attorney
14 for that interruption. Perhaps if I could--

15 COMMISSIONER HICKINBOTTOM: These things are going to
16 happen, I'm afraid.

17 But you just mentioned public interest.

18 MR. RAWAT: Yes.

19 If I pick it up at that point, then, I just had
20 referred to a government press release that referred to the
21 IRU's role in ensuring the public interest is upheld, and the
22 point that I want to make by way of submission is that, in a
23 Commission of Inquiry, the role of representing the public
24 interest falls not to the Attorney General by virtue of her
25 position or indeed to any other participant but rather to

1 counsel to the Commission. So, what special responsibility the
2 Attorney General has to the public interest places her under the
3 obligation simply to ensure that the Commission of Inquiry has
4 all relevant material before it, given that it is, as is plain
5 from its Terms of Reference, a matter of public importance.

6 I can assist with the law on this, if necessary, but
7 for now what I would invite the Attorney to do is to address you
8 on two questions that arise from the reference to public
9 interest in the Application, and the first of these is:

10 Does the Attorney accept the principle that counsel to
11 the Commission represents the public interest? And if not, how
12 does the Attorney reconcile the potential conflict of interest
13 that arises between her representing the public interest and
14 representing ministerial colleagues with whom she sits in
15 Cabinet, who may become the subject of criticism in due course?

16 So, under that head, sir, I have set out three
17 questions, and perhaps the better thing for me to do is to allow
18 the Attorney to address you on those matters.

19 COMMISSIONER HICKINBOTTOM: Yes. Thank you,
20 Mr. Rawat.

21 So, Attorney, the first question is, to paraphrase it,
22 why do you need to be a represented participant because the
23 reason you give for it, which is that you may wish to provide
24 information, evidence, in relation to say recommendations,
25 that's the role you want to ensure that you maintain. That you

1 can do in any event. The Commission of Inquiry have already
2 written to you asking for input in relation to that. You've
3 reserved your position at this stage, but not being a
4 participant doesn't constrain you in any way on that score. It
5 seems to me there is some strength in that.

6 But I can't get excited about the issue because if you
7 consider that you are concerned with the Terms of Reference and
8 indicate in what way you are concerned, then I would certainly
9 be minded to allow you to participate to address those concerns
10 and Mr. Rawat. The concern that you raise, which is
11 recommendations, is not a legitimate concern.

12 So, why do you want to be a participant?

13 ATTORNEY GENERAL SMITH: Thank you, Commissioner.
14 Thank you, Mr. Rawat.

15 What I should say on that is that I am making this
16 Application so that I am in a position as Attorney General to
17 play a constructive and helpful role in the interest of the
18 Virgin Islands, and I will address the issue of public interest
19 a little later on. In fact, in the context of the current
20 political and constitutional realities, I believe that the
21 participation of the Attorney General will add to public
22 confidence in the fairness, impartiality, and independence of
23 the Inquiry.

24 I understand the position that Mr. Rawat is taking,
25 but I cannot see the future. I do not know and understand what

1 is the nature of the assistance that I may be able to provide.
2 As a participant, I understand I would be able, for example, to
3 examine or cross-examine witnesses. I believe in appropriate
4 cases, I may be able to be informed of the particular matters
5 that are happening in advance of any question being posed or
6 witnesses coming before the Commission. That is how I
7 understand it.

8 I also recognize and understand that participants play
9 a very important role in helping the Commission to establish the
10 facts that are relevant to any particular Terms of Reference.
11 So, I think it is important to have the participant status so
12 that I can assist in that way.

13 Now, there is another issue--and I'm not just making
14 this Application on my behalf, but I'm also making it on behalf
15 of a number of named ministries and offices that are in the
16 Application. What I also say there is that I'm very mindful of
17 the Commission of Inquiry Rule 13.6 , which indicates that where
18 participants may have a joint or similar interest, they are
19 encouraged to be represented by a single counsel. And that is
20 why--and not knowing the future, not frankly knowing the full
21 extent of the Inquiry because the Terms of Reference are very
22 wide, being in the position as I am as Attorney General, I think
23 it would be of great assistance to the Commission if I were a
24 participant in my own right.

25 COMMISSIONER HICKINBOTTOM: I'm still not sure

1 why--let's say for the time being that the Ministers, say, and
2 because Section 56 of the Departments for which they are
3 responsible--areas of Government they are responsible--are made
4 participant. And you, then, of course, your law offices,
5 represent the Ministers and, as I say, all below them within the
6 Department.

7 Leaving aside all that for the moment, I understand
8 that, and so you will appear on behalf of the Ministers. They
9 will be participants, and you can ask questions that are
10 relevant and make submissions, if relevant, on behalf of the
11 Ministers. But the point is in the first question: Why do you
12 want to be a participant as the Attorney General? You're not
13 taking instructions from anyone. You say that you are, as
14 Attorney General, concerned. What is your concern? I don't
15 understand it.

16 It may well not make a great deal of difference, but I
17 think when you are there, or when someone appears on your
18 behalf, I just want to be absolutely clear who they are
19 representing. If it's the Ministers, that's fine. We know that
20 because they'll be scheduled, and we will almost certainly know
21 why you're taking an active interest, for example, because a
22 Minister is giving evidence. But I'm still struggling to see
23 why you want to be a participant. I'm not saying that you
24 shouldn't be, but I just want to understand why you want to be.

25 ATTORNEY GENERAL SMITH: And I don't want to sound by

1 any means cheeky, but I struggle why I would not want to be a
2 participant given that my mission as Attorney General is to
3 uphold good governance within the public service and all arms of
4 the Government, so far as I'm aware of any issue and am able to
5 do so. So, I...

6 COMMISSIONER HICKINBOTTOM: You're talking about good
7 governance generally or good governance in your Chambers?

8 ATTORNEY GENERAL SMITH: It is good governance
9 generally. That is the nature of legal advice.

10 Now, you allude to possible conflict, and it comes up
11 in a later question, and I might as well take it now. The role
12 of Attorney General is an important one. The issue of conflict
13 is inherent in the responsibilities given to her under the
14 Constitution. She advises the Government, and there are three
15 arms of government, and all of those arms of government are
16 represented by the Attorney General. That is why the
17 Constitution builds in safeguards to protect her independence
18 and to protect her ability to be independent. So, I see no
19 conflict, as Mr. Rawat puts it, because I sit with the Ministers
20 in Cabinet. I sit there ex officio, not having the same type of
21 portfolio. My origins is not as theirs is. And as long as
22 they're acting as Ministers, as long as they are acting in
23 accordance with the law, as long they're not acting in their
24 individual capacities and on a frolic of their own, it is my
25 responsibility, as a matter of the Constitution, to represent

1 them. As it is to represent public officers acting in
2 performance of their duties and other constitutional actions.

3 COMMISSIONER HICKINBOTTOM: Again, I understand that,
4 that's perhaps--that's probably again to be raised on
5 Mr. Rawat's--

6 (Overlapping speakers.)

7 ATTORNEY GENERAL SMITH: I should also say--and
8 perhaps I need to put this also in context, and I hear what
9 Mr. Rawat says about it being his responsibility to protect the
10 public interest. But with no disrespect at all to him, I
11 daresay I believe that, as Attorney General, as a person who
12 knows quite a lot about this jurisdiction that I may be in a
13 position to assist even him to understand what, in fact, is the
14 public interest in the Virgin Islands.

15 And I would feel, frankly, that it would be very
16 remiss of me in those circumstances knowing that Mr. Rawat, who
17 I understand has not even been admitted to practice in the
18 Virgin Islands, I would feel that I was remiss in my duties to
19 sit back and assume and presume and be settled and satisfied
20 that Mr. Rawat could not be assisted by me--that the Commission
21 could not be assisted by me--in terms of the public interest.

22 Indeed, I would say that, as a participant, having the
23 type of access and what I would anticipate would be a very
24 cooperative and helpful relationship with counsel to the
25 Inquiry, that I would be able, along with him, to assist in

1 safeguarding the public interest and to make sure that it was
2 identified at every critical point. So, that is how I respond
3 to that. I believe that the interest of the Commission would be
4 very well served by my participation in my own right.

5 And I say to my colleagues all the time, I say to my
6 colleagues and say to the Governor, and I make it clear to them:
7 I am independent of both of you. I sit between the chairs. I
8 have a constitutional responsibility, and there are times when
9 it is a difficult role, but it is a role that is put into the
10 Constitution, and I am the one to execute it, and I daresay that
11 persons selected to the role of Attorney General are selected
12 because they are expected to have the ability to make the
13 relevant distinctions, indeed to speak truth to power, whoever
14 the power may be. And I am very comfortable with that. It's
15 not, you know, some days I'm not the best friend of any
16 particular person, but that is why the Constitution is set up as
17 it is. That is why it puts certain constitutional safeguards,
18 around recruitment, under the tenure of the Attorney General.

19 And I want to emphasise and reemphasise--and I don't
20 know if I could say this enough, Commissioner, but my whole
21 purpose of being here is simply to be of assistance. I cannot
22 be Attorney General of the Virgin Islands given the Virgin
23 Islands, that I know the Virgin Islands to be; given the
24 constitutional position, the political realities, the
25 aspirations and expectations of people of this country. I

1 cannot do anything more than to make every effort not merely to
2 sit on the sidelines of the Commission of Inquiry of this
3 magnitude, and that has the potential to a very significant
4 impact of these islands. It would be very remiss of me not to
5 make every effort. I would be a great disappointment to the
6 Constitution. I would be a great disappointment to this
7 jurisdiction if I did not make every effort. I intend to be
8 very helpful.

9 And indeed, I say that, from the very outset of this
10 Commission, I have been very helpful. I have dire resource
11 constraint. I have given every cooperation and assistance that
12 I can, I must say at considerable expense in terms of resources
13 because I do have very dire resource constraints to make sure
14 that the timetable of this Commission keeps on track to ensure
15 that public officers understand what their responsibilities are
16 actually, and ensure that Ministers understand what their
17 responsibilities are; and to try to make them understand that
18 this is a process that the law provides for, and these are
19 responsibilities.

20 So, my purpose of wanting to be here--I know what
21 counsel says about Section 16, but I would hope that to date
22 that my actions in respect of the Commission, notwithstanding
23 what's quite tense political and constitutional reality, should
24 demonstrate that I would be of benefit, that I would assist,
25 that I have quite a wealth of knowledge and understanding of the

1 law of this jurisdiction, of the people of this jurisdiction, of
2 the culture of this jurisdiction, that I daresay again with no
3 disrespect whatsoever that Mr. Rawat would not have, and I say
4 it would be most remiss of me to not to make every effort to
5 make sure that I'm in a position to ensure that you, as
6 Commissioner, are fully and properly informed both in context
7 and in facts of any matters which may be before you.

8 COMMISSIONER HICKINBOTTOM: That's helpful. Thank
9 you, Attorney.

10 Just to go back to the questions, the first question
11 was why do you need to be a participant? I think the
12 answer--correct me if this is wrong--is that you don't need to
13 be a participant to provide information because you could
14 provide information in any event. But you say that, in respect
15 of governance generally, you're responsible for governance?
16 What's your role in governance? My understanding is that, in
17 terms of executives, the Governor is responsible for governance,
18 the good governance.

19 And I appreciate that you are the Legal Adviser to the
20 Governor because you're the Legal Adviser to all the limbs of
21 government, but why are you responsible for governance
22 generally?

23 ATTORNEY GENERAL SMITH: Well, what I would say to
24 that, I see the distinction that you're trying to make with
25 respect to the Governor, but the mission of the Chambers is

1 written there, is to uphold good governance in the public
2 service. That is stated as the mission.

3 COMMISSIONER HICKINBOTTOM: The mission, as I
4 understand it, the Legislature, is to make good laws, but
5 that's--

6 ATTORNEY GENERAL SMITH: Right, but if I dare say so,
7 sir, again, I don't understand when I say it's their
8 responsibility, the law is good governance. That is my
9 responsibility; right? Matters which may contribute to poor
10 governance which may, in turn, lead to breach of laws and
11 matters of that kind. I find it difficult to divorce it from my
12 responsibility. I'm not saying that my responsibility overtakes
13 governance. I'm saying that issues of governance has to be
14 important to the principal Legal Adviser to the Government
15 because, in any legal advice by the essence of law is good
16 governance. It is being able to follow the rules, is being able
17 to understand what is best practice.

18 I say that so I don't know if I'm asked questions on
19 this point.

20 COMMISSIONER HICKINBOTTOM: What you have said is of
21 assistance as to where you see your role. I'm just trying to
22 see why you're a participant. Again, let me try again and
23 reformulate it. I don't want to put words into your mouth. I
24 just want to see why you are concerned with the issues in the
25 Terms of Reference. You focus on governance, perfectly

1 understandable given your position, but

2 Are you saying--and this is not even a vague
3 suggestion of what might be found; it's simply a hypothesis--but
4 if I were to find the governance in the territory was poor, was
5 inadequate, are you saying that you, as the Attorney, would bear
6 some responsibility for that? Others might or the Governor
7 might or the Ministry or Ministries or whatever. You're saying
8 you, simply as Attorney General, you may be criticised for that.
9 Because if that's what you are saying, you may well be a
10 participant. I just want to make sure that's what you're
11 saying.

12 ATTORNEY GENERAL SMITH: Right.

13 I think two things: Number one, I believe I would be
14 responsible for ensuring and for assisting and for participating
15 to make sure that any part of any poor governance in government
16 is rectified, whether it is in assisting in determining what are
17 the relevant standards, what is the law, how it may best be
18 effected, ensuring that laws are passed, ensuring that any
19 protocols or standards of whatever actually exists within the
20 Government. This is something that I do every day.

21 Depending on what you find, it may well be that some
22 of those matters may be under my area of direct responsibility,
23 in which case I would have to answer, I would believe, and give
24 an explanation as to why that was the case.

25 So, while I don't say that--I do not purport to take

1 over the Governor's responsibilities, I respect those, and I'm
2 very much aware and supportive of what those are, but the
3 principal Legal Adviser to the Government of the Virgin Islands
4 is inextricably linked to matters of governance, any issue for
5 governance is going to be addressed to me. It might be a breach
6 of the law. It may be that we need to ensure how the Government
7 operates. See, my role is not only to step up when things go
8 wrong. It's also to step up to ensure as far as possible.

9 COMMISSIONER HICKINBOTTOM: If I might say, that's
10 really, really helpful. It's very clear.

11 It's broken down into two parts. I think you
12 mentioned firstly that there may be areas for which you are
13 directly responsible, governance possibly, but also law
14 enforcement and justice system, so there may be areas where it's
15 possible you could be, depending on what the information is,
16 criticised directly, but also you could be criticised if the
17 governance was poor and not rectified. It also depends on the
18 circumstances. There may be lots of circumstances where there
19 is poor governance, and that has nothing to do with you. That
20 is at least a potential area of potential criticism. That's
21 very clear and very helpful.

22 Just moving on, then, to the second question--and you
23 dealt with this to a certain extent, and that is the public
24 interest.

25 I mean, you've appointed Mr. Rawat to his statutory

1 role. Just take it in stages: Do you accept that it is his
2 role to act in the public interest? I mean, just while you're
3 thinking about it, I have to say that seems to me apparent his
4 role.

5 ATTORNEY GENERAL SMITH: I think, Commissioner, to be
6 quite frank, that would be my answer. In fact, I was going to
7 say that I couldn't envisage that part of his role would not be
8 the public interest, given the nature of what an inquiry is,
9 given that the legislation expressly makes provision for him to
10 be appointed, and also that the appointment would be given to me
11 because--and I would say this, because a recommendation was made
12 for Mr. Rawat to be appointed, but I addressed my mind to that
13 appointment to satisfy myself that I thought that he would be
14 jurisprudential, quite impressive, and I thought it was fitting
15 that somebody of his stature would be here.

16 COMMISSIONER HICKINBOTTOM: That's very fair and, with
17 respect, I think, correct.

18 Now, what you say, though, is that the public interest
19 is also an integral part of your role when you do participate in
20 the COI or, alternatively--well, when you would participate in
21 COI since they alternatively ultimately represent Ministers who
22 participate. How does that work? You're representing
23 Ministers. How does the public interest and representing the
24 Ministers, how does that work together, and how is that not in
25 conflict?

1 ATTORNEY GENERAL SMITH: Yes. I think that's a very
2 good question, Commissioner, and I'm happy to address you on it.

3 Ministers are part of the Government structure.
4 Unfortunately, they're also politicians. As a result, it is
5 often difficult, I found, certainly in the context of Virgin
6 Islands law, people to understand that they're not merely
7 politicians. They are Ministers, and the responsibilities
8 attached to a Minister comes from the Constitution. It's a very
9 serious role that they may must play.

10 And I can put it like this: Sometimes I'm
11 disappointed that people dismiss Ministers as politicians as if
12 it is an excuse for them not to be able to or not to have to
13 work for us in all consciousness to dismiss them from a
14 particular standard or expectation of the behavior. And I think
15 it's very important to make that distinction. Ministers are an
16 important part of the Government established. When you sit with
17 a ministerial title, when you sit in the ministerial office, you
18 are carrying out constitutional responsibilities, and I think it
19 is important--and I'm not saying it as if, I think,
20 Commissioner, you didn't understand it, but I think it's a very
21 important point to make because, in my responsibility--in my job
22 every day, I see people not being able to make that distinction
23 between the politician and the person who has been entrusted for
24 the particular period of time with a very high level of
25 confidence under the Constitution and a high level of

1 responsibility over and above any other elected representatives
2 who do have specific portfolios to the people of this country.

3 COMMISSIONER HICKINBOTTOM: But why is there not a
4 conflict when you're acting in the public interest and--

5 ATTORNEY GENERAL SMITH: Let me put it this way, sir.
6 I think I see where you are going. There may well be a
7 conflict, but it is a conflict that the Constitution enshrines,
8 and I go back again to say that is why the Attorney General is
9 the Attorney General because you have to be able to step back
10 from everything. You have to be able to hold your own head.
11 You have to be able to not be anybody's friend because there are
12 times like that.

13 And for me, this is a great honor, and I wouldn't say
14 there is a conflict because the conflict that the Constitution
15 itself prescribes. It is a conflict that a person holding the
16 Office of the Attorney General must be able to navigate.

17 And it is inherently a conflict, but it is one
18 that--that is what the rules say so.

19 COMMISSIONER HICKINBOTTOM: If I may, that's very,
20 very helpful.

21 Now, I think, Attorney, that is clear with all of the
22 points that Mr. Rawat made.

23 Let me check with Mr. Rawat, if that's the case, and
24 he could move on to his second head.

25 MR. RAWAT: Yes. I think I will--I heard what the

1 Attorney has said, and if I could just respond briefly on a
2 couple of points.

3 Firstly that, of course, the Commission will welcome
4 her assistance in every aspect. I recognise that she has a
5 degree of knowledge about the Virgin Islands that neither myself
6 nor Sir Geoffrey have. My point in relation to the public
7 interest was not about myself as counsel to the Commission but
8 simply about the role that any counsel to the Commission must,
9 as a matter of law and convention, play. But I don't think
10 there is much difference now between myself and the Attorney on
11 that point.

12 The conflict point, without belaboring, is much more
13 prosaic. The Attorney explained in eloquent terms her position
14 in terms of good governance, and ultimately it may be a matter
15 for the Attorney, but it comes down to this: If you have a
16 Minister in the course of this Commission who is subject to a
17 criticism, turn around and say to you, "Don't blame me. The
18 Attorney told me to do it or advised me or did not advise me."
19 It puts the Attorney who is at that point instructed on behalf
20 of that Minister in a difficult position, but I say no more than
21 that. I'll leave it there and, if I may, just move on to the
22 second head.

23 COMMISSIONER HICKINBOTTOM: Yes, yes, thank you very
24 much, Mr. Rawat.

25 MR. RAWAT: I hope I can take that a little bit more

1 shortly because, in fact, some of this has been touched upon in
2 the exchanges that have occurred between yourself and the
3 Attorney.

4 I put the second, it comes down to, who is the
5 Attorney General acting for in this Commission of Inquiry? And
6 it goes to the second basis on which such representation is
7 sought in the Application. And with great respect to the
8 Attorney, I must observe that it has not always been entirely
9 clear what role the IRU is playing and on whose behalf. I
10 appreciate from the Application that a number of government
11 bodies are identified, but nonetheless, given the importance of
12 ensuring the progress of this Inquiry, clarifications from the
13 Attorney as to who she and, therefore, Sir Geoffrey and the IRU
14 represents as well as who she does not will be welcome.

15 And I link back to a point that the Attorney made
16 earlier, which is that she has the responsibility as the Legal
17 Adviser to the three elements of governance in these Islands.
18 And it is perhaps that's where the most clarification would be
19 helpful, and that is, what is the Attorney's position in terms
20 of representing individual Ministers, Members of the House of
21 Assembly as opposed to the House of Assembly itself, and the
22 Governor in this Commission of Inquiry?

23 The last point I would invite the Attorney to assist
24 you on is this: We have--the Attorney has shared with the
25 Commission the guidance that has been issued under her name from

1 the IRU, and it may be helpful for you to know what the position
2 would be for a public official who does not wish to be
3 represented by the IRU but who does want to be legally
4 represented to the Commission.

5 Thank you, that's all I have to say. I hand back to
6 the Attorney, I think.

7 COMMISSIONER HICKINBOTTOM: Thank you very much,
8 Mr. Rawat.

9 Attorney, if you could break this down a bit--some
10 bits are easier than others--the first category of people that
11 Mr. Rawat mentioned was Ministers. And subject, I don't find
12 this difficult because a fundamental element of your job is to
13 represent Ministers, and under Section 56 that means Ministers
14 and the area of government which they--to which they have been
15 assigned which includes the departments and Ministers and really
16 the things on the organogram, so it's something that you say.
17 It seems to me that you do wish to represent Ministers under
18 Section 56 and everything under them. That's the basis of the
19 whole Application. Am I right, or have I misunderstood it?

20 ATTORNEY GENERAL SMITH: The question is whether do I
21 intend to represent Ministers?

22 COMMISSIONER HICKINBOTTOM: Yes.

23 I'm sorry to interrupt quite so soon, and why it's
24 sort of very pointed, very important that in terms of the
25 question of information of summonses, summonses aren't issued to

1 Ministries. They issued often to Ministers or other
2 individuals, so it's important that we know the people you say
3 you represent, we got the full scope, so yes.

4 ATTORNEY GENERAL SMITH: Right.

5 I'm actually hoping that Mr. Rawat can give me a bit
6 more explanation as to what he means when he says "who does the
7 IRU represent and not represent?"

8 COMMISSIONER HICKINBOTTOM: Certainly we could ask
9 Mr. Rawat that, but as I understand it, his questions, his
10 initial questions, who do you represent? Because we know, I
11 think, the IRU doesn't represent anybody that you don't, which
12 makes sense, because the IRU actually is through you. So,
13 perhaps we'll come on to the IRU.

14 But in respect of your position, am I right in the
15 assumption that you do act for Ministers? Consequently,
16 they're Ministers in the part.

17 ATTORNEY GENERAL SMITH: Yes, that is correct, but I'm
18 not sure that I understand the difficulty.

19 COMMISSIONER HICKINBOTTOM: The difficulty is
20 that--sorry, may not be a difficulty. I may be making up
21 difficulty, and I apologise if I am, but generally speaking,
22 constitutionally and under the BVI Constitution, areas of
23 Government are assigned to Ministers as they are in your
24 Constitution Section 56, and they are responsible for that area
25 of Government. As I understand it--and tell me if it's

1 controversial; we don't have to raise it today, but something
2 that is uncontroversial--that the Minister of any department,
3 Department X, is responsible for his department under
4 Section 56. Now, that doesn't make it say that he is
5 responsible for somebody going off on a frolic on their
6 own--we've covered that point--but he is responsible for the
7 workings of his department.

8 And, consequently, in terms of the list of people--we
9 call them "entities" in Application, but in terms of what the
10 person who you wish to represent, my own view is Ministers are
11 probably number one, is Ministers and consequently their
12 ministries and departments.

13 ATTORNEY GENERAL SMITH: Right. So, I represent the
14 Government, and there may be an inherent ambiguity in the term
15 "Government" for the purposes of this Commission of Inquiry
16 because it is extensive. It covers areas that I'm not aware of
17 the way it starts, the way it stops. Only you, Commissioner and
18 Mr. Rawat, would have more insight at this point in time.

19 COMMISSIONER HICKINBOTTOM: But in the Application, in
20 the diagram, you list the "entities" that you will represent,
21 and they're in blue, and some are not in blue, and yet you're
22 not--

23 ATTORNEY GENERAL SMITH: Let me take a look at that.

24 (Pause.)

25 ATTORNEY GENERAL SMITH: I am not sure--well, I can

1 tell you why they are in blue. The ones that are in blue at the
2 moment are the ones that I know have received communication from
3 the Commission. Those ones are currently the subject of this
4 Application.

5 COMMISSIONER HICKINBOTTOM: That's what we see. Thank
6 you.

7 ATTORNEY GENERAL SMITH: Yes.

8 COMMISSIONER HICKINBOTTOM: You're applying on behalf
9 of all of these entities that are in blue (drop in audio). In
10 the Application you find your own whites and for the ministries'
11 offices and departments and other entities of the Government a
12 schedule (drop in audio)--

13 ATTORNEY GENERAL SMITH: At moment, yes, sir.

14 COMMISSIONER HICKINBOTTOM: There may be others in the
15 future.

16 ATTORNEY GENERAL SMITH: There may be others.

17 COMMISSIONER HICKINBOTTOM: You say that, but the
18 other point with regard to Ministers is that take any Minister,
19 the Minister of Social Development, constitutionally, Honorable
20 Carvin Malone, he's the Minister. The Constitution is
21 responsible for that Minister.

22 ATTORNEY GENERAL SMITH: Yes.

23 COMMISSIONER HICKINBOTTOM: Leaving aside people going
24 off on their own because that's the constitutional position.

25 ATTORNEY GENERAL SMITH: Yes.

1 COMMISSIONER HICKINBOTTOM: As I understand it, you
2 will be representing the Ministers and, consequently, their
3 ministries and departments and all these other--

4 ATTORNEY GENERAL SMITH: Insofar as they are acting in
5 their official capacity, yes.

6 COMMISSIONER HICKINBOTTOM: Correct.

7 ATTORNEY GENERAL SMITH: So, it may well be, sir--I
8 mean, the Terms of Reference are very wide. The potential for
9 this to get messy is there, but we can handle it, I believe,
10 because it may be that persons in various sections of
11 Government, whether in the House of Assembly or the Judiciary,
12 might well say, "The A.G.'s basis going forward. I think we
13 might get more attention given particular constraints of this
14 particular inquiry to identify and select and ask a particular
15 counsel to represent my Ministry or represent my Office in the
16 Commission". I don't think that's necessarily the conflict. It
17 may well be what needs to be done to ensure that the Commission
18 is properly assisted, and that they are, in their own right,
19 properly represented.

20 So, I don't know at this stage, certainly given my
21 level of knowledge, that we can say this never happened or that
22 would never happen. All I know is, on an ordinary day, I
23 represent all the people in this room. They may very well come
24 to me and say, "Well, Attorney General, given my role perhaps in
25 the institution of the Commission of Inquiry, given that you

1 representing the Ministers and I know what I know when I listen
2 to the Commission of Inquiry, I would prefer not to be
3 represented by the Attorney General and her team in this
4 matter," and I don't think that's a problem. And I respect
5 different persons, which is why I did not, as a blanket, without
6 asking, say that I'm coming here to represent any and every
7 Ministry. I've had interaction with all these Ministers, with
8 Department Secretaries, and with the Cabinet Officers as well to
9 ensure that we identify and transmit the documents and answer
10 any queries that come before.

11 COMMISSIONER HICKINBOTTOM: So, in relation to the
12 blue boxes, as I understand it, you are acting for the Minister
13 and you're acting for the area of Government which they're
14 responsible, and that is, of course, individuals, Permanent
15 Secretary but all sorts of individuals that know them.

16 ATTORNEY GENERAL SMITH: If I understand what you're
17 saying, I guess I believe that's the case, yeah.

18 COMMISSIONER HICKINBOTTOM: I don't think that you
19 wish to act for--and I don't think that's particularly difficult
20 and that the Ministers in different areas of Government that
21 they represent, not the ones in white--

22 ATTORNEY GENERAL SMITH: No, not the ones in white.

23 COMMISSIONER HICKINBOTTOM: The ones in blue?

24 ATTORNEY GENERAL SMITH: Yes, the ones in blue.

25 COMMISSIONER HICKINBOTTOM: In respect of House of

1 Assembly members, you do you represent them? Individual
2 Assembly members?

3 ATTORNEY GENERAL SMITH: I'm not making that
4 Application here today. And, to be quite frank with you, I am
5 aware that these things on my plate is too full, and that making
6 steps to secure their own representation as members of the House
7 of Assembly in their official capacity, so I could be very
8 candid that I understand that, and I understand that.

9 COMMISSIONER HICKINBOTTOM: That's fine. It's not
10 part of the Application.

11 ATTORNEY GENERAL SMITH: No, it's not.

12 COMMISSIONER HICKINBOTTOM: You're going to represent
13 them?

14 ATTORNEY GENERAL SMITH: Yes.

15 COMMISSIONER HICKINBOTTOM: That's coming further down
16 the line?

17 ATTORNEY GENERAL SMITH: Yes.

18 So that is why I am comfortable saying that I know
19 there may be different permutations when it comes to
20 representation, and that happens when you have a very big
21 client.

22 COMMISSIONER HICKINBOTTOM: That's fine.

23 Mr. Rawat is, I think, that individual has Assembly
24 members as opposed to acting for the House--advising the House
25 of Assembly, advising individual Assembly members on those

1 specific issues may not fall within your reach.

2 ATTORNEY GENERAL SMITH: May not fall within my reach.

3 COMMISSIONER HICKINBOTTOM: We don't have to decide
4 that today?

5 ATTORNEY GENERAL SMITH: We don't have to decide that
6 today, and I should be clear about that because you will have
7 seen in the Guidance Notes that have been disclosed that I have
8 been very clear to the members of the House of Assembly of the
9 limits to which I can assist them. If you have personal concern
10 account acting in their personal capacity, that is not for the
11 Attorney General but to secure their own legal representation.

12 COMMISSIONER HICKINBOTTOM: I see.

13 ATTORNEY GENERAL SMITH: And I believe the
14 Commissioner will recall that I have taken in some cases that
15 certain matters were matters of an official nature as opposed to
16 matters of a personal nature, and I have corresponded to the
17 Commission accordingly.

18 COMMISSIONER HICKINBOTTOM: That's good.

19 And what about the Government?

20 ATTORNEY GENERAL SMITH: If I may speak candidly,
21 Commissioner, I know that the Government was supposed to
22 institute the Commission of Inquiry, and I saw, as would have
23 been expected, I assisted them in preparing the instrument of
24 appointment, appointing counsel to the Inquiry and so on.

25 Naturally, I believe that the--Commissioner, the

1 reality, as I said before, that this is speaking for the
2 background of political and constitutional tensions that
3 manifest themselves sometimes in conflicts between the Governor
4 and the elected government. And I think it is fair to say that,
5 in this particular case, I understand not to be represented by
6 Sir Geoffrey and the Withers team. He hasn't gone so far as to
7 say, "I do not want to be represented by you," but I understand
8 the reservation that he will have. So, if it is, he's welcome
9 to be represented by the team that I have constituted for the
10 purposes of this Inquiry, but I do know he has some
11 reservations.

12 COMMISSIONER HICKINBOTTOM: Because it seems to me
13 that it's likely that we'll be asking the Governor questions
14 (drop in audio) of the Constitution. Do you see any conflict
15 between that and representing the Minister?

16 ATTORNEY GENERAL SMITH: Absolutely, absolutely no
17 conflict, sir. It anything to be called a conflict, it's an
18 inherent conflict because I believe--this is not an adversarial
19 matter. It is a matter of an inquiry. You would be asking him,
20 I believe, particular types of questions. I would be seeking to
21 ensure that the proper context around any answers that he gives
22 is provided, that any relevant facts that he may have omitted to
23 mention that I'm aware of and see are relevant to what the
24 Commission has to do I brought to your attention. It is not
25 something that is difficult for me. It is a role that I play

1 every day.

2 But, you know, he may well feel because those tensions
3 are very real, and those tensions again is one of the reasons
4 why I think it's so important for the Attorney General to be
5 seen, to be involved, and from that for me that is for the
6 Attorney General to be involved. Because those conflict exists
7 and create certain perceptions around the Inquiry that I would
8 myself hope to be in a position to assure members of the public
9 that they don't need to be so concerned about, but, you know, if
10 I'm not myself giving that assurance and it is not a message I
11 can easily give.

12 But I don't see that there is a conflict between the
13 Ministers carrying out their responsibilities under the
14 Constitution and the Governor carrying out his responsibility
15 under the Constitution and as to how he does it, because every
16 day I advise both of them what these responsibilities are.

17 And we cannot ignore the tensions, but at the same
18 time we did not allow it to break down what the Constitution
19 envisages, that they would be able to work together. The
20 Governor has his responsibilities being the elected
21 representatives as Ministers have their responsibilities, but
22 ultimately it is one Government inasmuch as there is that
23 conflict in ambiguity and how it would operate in a jurisdiction
24 such as the Virgin Islands because of the nature of the
25 relationship to the United Kingdom.

1 COMMISSIONER HICKINBOTTOM: The Government.

2 ATTORNEY GENERAL SMITH: Yes.

3 COMMISSIONER HICKINBOTTOM: Because you've reserved
4 your position and you may well want to make recommendations, but
5 how am I going to know whether the recommendations are yours--if
6 you may be a participant, whether they're the Ministers--if
7 you're representing Ministers in the COI, or the Governors--who
8 you may or may not be representing in the COI. And the
9 recommendations may not be the same.

10 ATTORNEY GENERAL SMITH: They may not be the same, but
11 I would say to you that they're not mine. If these are
12 recommendations being made as Attorney General, they're being
13 made as recommendations for COI. If they're being made by the
14 Governor, they're being made for the Agency. If they're being
15 made by the Minister, then may have already been said, and
16 certainly I would not purport that any recommendations which
17 were not mine that they were, as good as they will be.

18 COMMISSIONER HICKINBOTTOM: You said sort of inherent
19 conflict.

20 ATTORNEY GENERAL SMITH: Yes.

21 COMMISSIONER HICKINBOTTOM: And there may be different
22 views, let's put it that way, but in putting them forward, you
23 or they will make it clear whose views they were?

24 ATTORNEY GENERAL SMITH: Yes. Oh, absolutely, yes.

25 COMMISSIONER HICKINBOTTOM: Okay. I think that covers

1 the second.

2 Mr. Rawat, does that cover the second head adequately?

3 MR. RAWAT: Yes, sir. I hope you can hear me, still.

4 I think what I understand from the Attorney's position
5 is that--and she asked earlier for some clarification as to the
6 point about the IRU and Sir Geoffrey--what we understand the
7 position to be is that, for purposes of this Commission, the
8 Attorney General, on behalf of Government, has instructed IRU
9 and Sir Geoffrey, so all the correspondence and, indeed, public
10 statements have been that the IRU and Sir Geoffrey act on behalf
11 of Government.

12 The position at the moment is that they are instructed
13 to act on those government bodies that are named and shaded in
14 blue in the Application. The one observation I would make is
15 that a Letter of Request from the Commission of Inquiry is not
16 what triggers or should trigger an Application. It's to be
17 represented. It should be that you come within Section 12 of
18 the Act, and follow the protocol that you have issued, sir.

19 The point is where I'm perhaps struggling in
20 understanding the Attorney's position is that if I take the
21 starting point she's the Legal Adviser of Government, and she
22 has instructed the IRU and Sir Geoffrey to act on behalf of
23 Government, then every element of Government is covered. The
24 position I think we are left in at the moment is there may be
25 elements of Government who decide because the Attorney, to

1 borrow her phrase, has too much on her plate to be represented
2 by others.

3 But the Attorney, herself as Attorney, does not see
4 any conflict with her representing and, therefore, Sir Geoffrey
5 representing and the IRU representing the members of the House
6 of Assembly in their official capacity and the Governor in his
7 official capacity. I think that's the point we have reached on
8 that thing, and I think there is nothing further we could do
9 with it today.

10 COMMISSIONER HICKINBOTTOM: Subject to what the
11 Attorney says, I think that's right. From what the Attorney has
12 said, the position of her being instructed is reactionary, and
13 she has--she is instructed by those Ministers on the organogram
14 in blue because they have been served with summonses, she does
15 not represent in the COI anybody else, any of the boxes in
16 white, so she does not represent the whole of the BVI
17 Government. She simply represents the Ministers and not all of
18 them. That's the current position.

19 ATTORNEY GENERAL SMITH: At the moment, sir.

20 COMMISSIONER HICKINBOTTOM: The Attorney General has
21 confirmed that.

22 So, it's wrong to portray the IRU as representing the
23 Government. It represents--because you can't represent anything
24 more than the Attorney represents, and that is--

25 ATTORNEY GENERAL SMITH: But let me be--let me confirm

1 that I understand what you're saying, sir.

2 This is an Application in respect of the boxes in
3 blue.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 ATTORNEY GENERAL SMITH: Right.

6 Because we asked of you that the acts
7 concerned--because we have been receiving requests. I heard
8 Mr. Rawat say that, because they received requests, that doesn't
9 mean that they are concerned.

10 COMMISSIONER HICKINBOTTOM: Sorry, just to stop you,
11 what he said was they can't be concerned because they received
12 the requests.

13 ATTORNEY GENERAL SMITH: Right.

14 COMMISSIONER HICKINBOTTOM: They must be concerned or
15 not, irrespective of whether they received a summons.

16 ATTORNEY GENERAL SMITH: Right, but why I can assist
17 you with why they are concerned. I don't know if he was
18 saying--by making that statement that he was saying that they
19 ought not to be represented, and I wanted to be careful about
20 that.

21 COMMISSIONER HICKINBOTTOM: When you say "they," who
22 do you mean?

23 ATTORNEY GENERAL SMITH: The persons listed in blue.

24 COMMISSIONER HICKINBOTTOM: Not saying they shouldn't
25 be represented, but at the moment you represent those in blue?

1 ATTORNEY GENERAL SMITH: Yes, as purposes of making
2 Application on behalf of those in blue.

3 The Inquiry Response Unit is at the disposal of the
4 entire government, and any statutory body who they feel that
5 they need assistance. In most cases, statutory bodies have
6 said, "Well, you have your own representation," and so on and so
7 forth.

8 COMMISSIONER HICKINBOTTOM: I'm sorry, you represent
9 those in blue--as the Attorney General, you represent those in
10 blue. You do not represent, for the purposes of the COI, those
11 in white.

12 ATTORNEY GENERAL SMITH: For the purpose of being a
13 participant. I'm not asking for that status on behalf of those
14 in white. I don't know if we're on the same page.

15 COMMISSIONER HICKINBOTTOM: I'm not sure we are.

16 ATTORNEY GENERAL SMITH: Yeah.

17 COMMISSIONER HICKINBOTTOM: You represent those in
18 blue.

19 ATTORNEY GENERAL SMITH: Yes.

20 COMMISSIONER HICKINBOTTOM: In the COI, you don't
21 apply to represent those in white.

22 ATTORNEY GENERAL SMITH: That is correct.

23 COMMISSIONER HICKINBOTTOM: You represent those in
24 blue?

25 ATTORNEY GENERAL SMITH: Yes.

1 COMMISSIONER HICKINBOTTOM: For the purpose of the
2 COI, the IRU, which can't represent more than you represent,
3 represent those in blue?

4 ATTORNEY GENERAL SMITH: At the moment, yes.

5 COMMISSIONER HICKINBOTTOM: In the future.

6 ATTORNEY GENERAL SMITH: But it may well be that those
7 other ministries at some point may have to make the Application.

8 COMMISSIONER HICKINBOTTOM: That's fine. And then you
9 will make an Application more straightforward with this.

10 ATTORNEY GENERAL SMITH: I do, sir, yes.

11 COMMISSIONER HICKINBOTTOM: But you'll make an
12 Application and they will probably add it, but at the moment--at
13 the moment--you act for those in blue and you act for those in
14 blue. You don't act for those in white, and the IRU doesn't
15 represent those in white. The IRU can't represent anyone that
16 you don't represent.

17 ATTORNEY GENERAL SMITH: Yes, but outside--this is why
18 I want to be careful about this point because I don't want to
19 miss it because if somebody from one of those Ministries pose
20 questions of the IRU, that will be answered.

21 COMMISSIONER HICKINBOTTOM: And then--

22 ATTORNEY GENERAL SMITH: So, at the moment I do
23 represent them, but I'm not speaking--I'm not seeking that they
24 be made participants on this Application.

25 COMMISSIONER HICKINBOTTOM: But you don't represent

1 them because they haven't asked you to represent them. You
2 can't represent them willy-nilly. If the Minister of Education,
3 for example, wants you to represent him as a participant in the
4 COI, they will ask you, and you will say "yes, but," and then
5 the IRU will represent it. But at the moment he hasn't.

6 ATTORNEY GENERAL SMITH: So, what is the way in which
7 you're using the term "IRU"?

8 COMMISSIONER HICKINBOTTOM: It's a tool that you set
9 up.

10 ATTORNEY GENERAL SMITH: Okay.

11 COMMISSIONER HICKINBOTTOM: The IRU is a team you set
12 up and we know very little about it, but you've set it up, and
13 you've described it as a team of members of Withers and the
14 Attorney General's Chambers led by Sir Geoffrey Cox.

15 ATTORNEY GENERAL SMITH: Right.

16 COMMISSIONER HICKINBOTTOM: So the work could
17 continue.

18 I mean, it's not a very startling proposition. All
19 I'm saying is that the IRU cannot represent anyone that you
20 don't represent because the representations through you, and at
21 the moment things may change in the future. But at the moment,
22 it's the blue Ministers you represent and the ones that are not
23 in blue that you don't represent at the moment.

24 ATTORNEY GENERAL SMITH: Not in the Inquiry.

25 COMMISSIONER HICKINBOTTOM: Not for this Inquiry.

1 ATTORNEY GENERAL SMITH: But I hope you--

2 COMMISSIONER HICKINBOTTOM: No, I think we are. When
3 anyone says that in the Inquiry you act for the BVI
4 Government--I mean, I know it's a shorthand. It's not a
5 criticism.

6 ATTORNEY GENERAL SMITH: Yes.

7 COMMISSIONER HICKINBOTTOM: But it's a shorthand.

8 ATTORNEY GENERAL SMITH: Yes.

9 COMMISSIONER HICKINBOTTOM: It's in blue, and then--

10 ATTORNEY GENERAL SMITH: Yes.

11 COMMISSIONER HICKINBOTTOM: Okay. Again, sorry that
12 was a lengthy but again helpful answer. Thank you.

13 Mr. Rawat. Moving on the third head.

14 MR. RAWAT: But I have noticed the time.

15 COMMISSIONER HICKINBOTTOM: So have I. It's certainly
16 hasn't been an interrupted morning. Subject to everybody else,
17 we should have a break at some point, but the next head is, I
18 think, quite a short one.

19 MR. RAWAT: Well, yes, if you're happy to continue,
20 sir, I am, and I will try to finish shortly.

21 COMMISSIONER HICKINBOTTOM: Yes we will see where we
22 are at half past 1:00, but we should have a break certainly for
23 those who are Linked-In remotely. These hearings are very
24 tiring, I know from experience, so we will give everybody a
25 break, but do you want to set out three?

1 MR. RAWAT: Yes.

2 Just to remind the Attorney, it was the basis on which
3 she authorises disclosure to the COI because, to give it some
4 context, very recently, on the 20th of April 2021, the Premier
5 of the Virgin Islands gave the House of Assembly an outline of
6 the extent of the response of Government to requests from the
7 COI. You will remember, sir, that the COI has in place a
8 two-stage process in relation to disclosure, which means that,
9 in the first instance, it is made to the Commission alone.

10 Now, hitherto, our understanding had been, and you
11 referred to this in your opening remarks, that the Attorney
12 General has instructed the IRU to disclose on the basis of a
13 provisional waiver of legal professional privilege and of public
14 interest immunity. The Premier's statement to the House of
15 Assembly has given rise to the impression that this may no
16 longer be the case. And, in fact, the Government, no doubt with
17 the hope of promoting a transparent inquiry, will no longer be
18 asserting privilege or public interest immunity.

19 And can I just, I think, take the point--the point I
20 want to raise to ask the Attorney today to clarify the position.
21 Is it that legal professional privilege and public interest
22 immunity have been waived permanently, or is it that there is
23 still a provisional waiver in place?

24 COMMISSIONER HICKINBOTTOM: If you might.

25 ATTORNEY GENERAL SMITH: If I may, Commissioner, can

1 Mr. Rawat please direct me to that portion of the Premier's
2 statement, please?

3 MR. RAWAT: Well, you wouldn't have it in your bundle
4 or have it you with. It was on YouTube, and it has been
5 reported in, for example, the BVI Beacon. It's not--if it may
6 help the Attorney, it's not a big point. It's really seeing
7 clarification as to her position at the moment on disclosure.
8 We had understood to be that, in terms of professional privilege
9 and public interest immunity, this was a provisional waiver.
10 The impression has been given that this may be now a permanent
11 waiver, and she's the best-placed person to assist us whether
12 that position has changed or is, in fact, still the same.

13 ATTORNEY GENERAL SMITH: Thank you, Commissioner. If
14 I understand correctly, there is no absolute waiver.

15 COMMISSIONER HICKINBOTTOM: Right.

16 ATTORNEY GENERAL SMITH: There is no absolute waiver.
17 It's still me making disclosures on a provisional basis. And
18 I'm unclear as to which portion of the Premier's statement that
19 impression would not come from.

20 COMMISSIONER HICKINBOTTOM: Let's leave whatever
21 Premier said aside at the moment, and we can probably find it--I
22 think Mr. Rawat is asking for what the actual position is, if
23 it's been misunderstood or even misrepresented, that doesn't
24 matter for the moment. So, the position with legal professional
25 privilege or any sort of privilege or confidentiality is

1 documents will be disclosed so the Commission, as it were,
2 confidential in the sense that the Commission will not publish
3 any of the documents without reference back to you, and then
4 there will be a second stage in which any issues of privilege
5 which need to be dealt with will be dealt with.

6 Is that generally the position?

7 ATTORNEY GENERAL SMITH: Yes.

8 COMMISSIONER HICKINBOTTOM: There might be exceptions,
9 but is that the default position?

10 ATTORNEY GENERAL SMITH: Yes. The default position
11 still exists, and I believe that every disclosure that was made
12 to the Commission, those restrictions as set out, so no
13 restriction that has been indicated in correspondence to the
14 Commission has been changed or modified or waived absolutely so.

15 COMMISSIONER HICKINBOTTOM: That's clear.

16 In relation to a recent e-mail, the commercial
17 contract with Withers.

18 ATTORNEY GENERAL SMITH: Yes.

19 COMMISSIONER HICKINBOTTOM: Legal professional
20 privilege has been raised as, I think, a reason rather than the
21 reason for not disposing those documents. I think that's the
22 only--in the documents in which the points have been raised.

23 Why has it been raised in respect of that commercial
24 contract?

25 ATTORNEY GENERAL SMITH: Yeah, so that's a contract

1 that arose after the Commission of Inquiry was established.

2 COMMISSIONER HICKINBOTTOM: Yes.

3 ATTORNEY GENERAL SMITH: And it arose as a direct
4 consequence of the establishment of the Commission of Inquiry,
5 and it just seemed inappropriate at the time. I believe that
6 issues of privilege--legal professional privilege, yes--I am--

7 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
8 but what privilege is it, it's not your privilege, but whose
9 privilege is it? Who holds legal privilege?

10 ATTORNEY GENERAL SMITH: To--

11 COMMISSIONER HICKINBOTTOM: You say that there are
12 issues of privilege in respect to these contracts, who holds the
13 privilege and asked to waive it?

14 ATTORNEY GENERAL SMITH: Has the Government been
15 asked--

16 COMMISSIONER HICKINBOTTOM: Whichever the Government
17 may be.

18 ATTORNEY GENERAL SMITH: Well, there are contracts
19 with the Government.

20 COMMISSIONER HICKINBOTTOM: When you say "the
21 Government," be a little more precise. Who do you say holds the
22 privilege? Who have you gone to and said, "Can I waive the
23 privilege?", and they said "no"?

24 ATTORNEY GENERAL SMITH: Well, I don't know that I
25 have gone to anybody and said will you waive the privilege.

1 COMMISSIONER HICKINBOTTOM: Okay.

2 ATTORNEY GENERAL SMITH: But I have been asked to
3 consider on their own behalf the circumstances in which
4 privilege could be waived provisionally because generally my
5 advice to them would be that we are--their privilege is their
6 privilege, so what I go back and I say is we are not disclosing
7 this for this reason or for that reason. That is my--the way we
8 normally operate.

9 So, when I say it's privileged--and, frankly,
10 privilege is not the only reason--I just thought it was
11 inappropriate at this particular point in time given that the
12 situation arose after the Commission had been established and
13 directly as a consequence of the establishment of the Commission
14 of Inquiry. I didn't think that it would have any bearing on
15 the matters in the Commission because at the time the Commission
16 came into being, it was not there.

17 If you would--I did not think that it was appropriate.
18 I really did not.

19 COMMISSIONER HICKINBOTTOM: Right.

20 But, I mean, when you say "appropriate," I think you
21 mean "relevant"? But relevance, of course, is a matter of
22 course for me.

23 ATTORNEY GENERAL SMITH: I meant appropriate.

24 But what I'm say is, at the time the Commission of
25 Inquiry was established to inquire into particular events that

1 existed; right? Naturally, this issue will be sensitive of the
2 retention of counsel, their terms and conditions, et cetera, et
3 cetera, et cetera.

4 COMMISSIONER HICKINBOTTOM: What do you mean by
5 "sensitive"?

6 ATTORNEY GENERAL SMITH: "Sensitive" in the context of
7 the Virgin Islands, sensitive-sensitive.

8 COMMISSIONER HICKINBOTTOM: With respect, there are
9 lots of things that are disclosed to the Commission are
10 sensitive in that sense. Lots of contracts have been disclosed
11 to the Commission of Inquiry, and some of them--

12 ATTORNEY GENERAL SMITH: Yes, so is the Commission
13 saying they would like to have these documents on a provisional
14 basis?

15 COMMISSIONER HICKINBOTTOM: I was just asking why they
16 have not been disclosed.

17 ATTORNEY GENERAL SMITH: I thought it was
18 inappropriate, and that is the answer to that question. I
19 thought it was inappropriate.

20 COMMISSIONER HICKINBOTTOM: We don't have to waste
21 time--

22 ATTORNEY GENERAL SMITH: And I can assure you those
23 are the only documents like that because this is really about
24 the Inquiry.

25 COMMISSIONER HICKINBOTTOM: Because we've got so

1 little time, I don't want to spend too much time on this, but
2 perhaps you could write to us setting out precisely why these
3 documents have not been disclosed or disclosing them.

4 (Overlapping speakers.)

5 COMMISSIONER HICKINBOTTOM: Or (drop in audio). That
6 would be helpful. That will deal with that point.

7 Mr. Rawat wanted to know whether the person whose
8 privilege it was has been passed in respect of waiver, but I
9 think possibly not. I'm not--again, no criticism at the moment
10 because you are going to take instructions on that, which is
11 fine.

12 Mr. Rawat, in respect of that head, is that all on
13 that head?

14 MR. RAWAT: Yes. May I move to the last one that I
15 wish to raise?

16 COMMISSIONER HICKINBOTTOM: Because the last one may
17 take longer than 10 minutes. Should we have a 10-minute break
18 now--I think that's probably a good idea--and come back at about
19 half past 1:00?

20 MR. RAWAT: Thank you, sir.

21 COMMISSIONER HICKINBOTTOM: I think that would be
22 helpful. And I think the technician here can mute everybody and
23 then come back, and hopefully we will all still be here.

24 ATTORNEY GENERAL SMITH: Okay.

25 COMMISSIONER HICKINBOTTOM: We stand adjourned until

1 half past 1:00. Thank you very much.

2 (Recess.)

3 COMMISSIONER HICKINBOTTOM: Good. I think we're all
4 back and hopefully all connected.

5 Mr. Rawat, do you want to present your fourth head?

6 MR. RAWAT: Thank you, sir.

7 I think the fourth head was headed the role to be
8 undertaken by Sir Geoffrey and by Withers. And if I could begin
9 by just giving some background, on the 21st of April 2021, a
10 tweet appeared on the official Twitter account of the Government
11 of the Virgin Islands, and I would like to read that tweet into
12 the record in its entirety.

13 It says as follows: "The Attorney General has asked
14 Sir Geoffrey Cox QC to carry out an independent and objective
15 review of the matters that are the subject of the COI in order
16 to assist the COI in due course." And it then had the following
17 hashtags: "Working together," "BVI," "COI," "collaboration,"
18 and "HOA."

19 This was followed on the 26th of April with a press
20 release from the Government which reads as follows: "The
21 Attorney General, on behalf of the Virgin Islands Government,
22 has asked Sir Geoffrey Cox QC to carry out an objective internal
23 review of all aspects"--sorry, "of all aspects of the governance
24 of the Virgin Islands, including areas of Government activity to
25 which the COI's requests have in the main been addressed, and to

1 advise the Government of his conclusions. This work will, among
2 other things, enable the Attorney General to better assist the
3 Commission of Inquiry in the coming months and draw relevant
4 matters to its attention. Sir Geoffrey will also, where
5 appropriate, represent the Attorney General and the Government
6 at the forthcoming oral hearings before the Commissioner. Sir
7 Geoffrey Cox QC, who is currently in quarantine, intends to hold
8 a series of meetings with Government Ministers in the next few
9 weeks initially virtually and then on completion of quarantine
10 in person, and will visit ministries and departments to explore
11 relevant issues in detail with policy and decision-makers."

12 I will stop reading there from the press statement.

13 Sir, you will also have noted in Paragraph 5 of the
14 Attorney's Application that it was not until the 28th of April
15 that Cabinet resolved that Sir Geoffrey should represent
16 Government entities. In any event, the two public statements
17 that I have just read out will, in my submission, give the BVI
18 public the unequivocal impression that the Attorney General has
19 instructed Sir Geoffrey to undertake the review in parallel to
20 your own investigation. Indeed, the work of this review may
21 have already begun.

22 It prompts a series of questions which, in my
23 submission, are fundamental:

24 The first is the review is described as "independent."
25 Who is it independent of?

1 The second is on whose behalf is Sir Geoffrey
2 instructed to undertake this review? The Attorney General, as
3 she eloquently explained, is the law officer for the whole of
4 Government, and that under the Virgin Islands Constitution
5 includes the Governor. The BVI public may consider it a strange
6 turn of events for the Governor to seek an internal review,
7 having established this Commission of Inquiry.

8 The third question is: What are the Terms of
9 Reference of this review, and when will it be completed? The
10 public statements contemplate that its product will be fed into
11 the COI.

12 The fourth is that while it is said in these public
13 statements that a review will enable the Attorney to draw
14 relevant matters to the COI's attention, why does the Attorney
15 consider that it falls to her to determine relevance for the
16 COI?

17 My next question is to ask whether the Attorney will
18 be giving the COI access to documents on the same basis that Sir
19 Geoffrey will see them, which presumably is wholly unredacted.

20 Next, will the conclusions of Sir Geoffrey's review be
21 published or otherwise put into the public domain? The public
22 statements are that the conclusions will be presented to
23 Government. And I think it might assist us to know in what form
24 they will be presented to Government. If they're presented to
25 Cabinet, then the results of the outcomes of Cabinet meetings

1 are published in summary.

2 My next question is, I think, the most important one
3 here and the one most deeply concerning. If Sir Geoffrey's
4 review is going to go over ground that falls within the scope of
5 your Terms of Reference, and it appears from the public
6 statements that that is the very intention behind this review,
7 if he's going to speak to witnesses from whom you wish to hear,
8 then why should the product of that review, and even the
9 evidence that it is based on, not be provided to you? That is
10 the normal convention in England and Wales. It's routine where
11 you have an internal review or a review by a regulatory body,
12 then the product of that gets fed into any inquisitorial process
13 that has been set up.

14 I said that it's a particularly important question,
15 and the reason is that what is mentioned is that Sir Geoffrey
16 will be interviewing Ministers, and that goes to the question
17 again of whether he will have access to information or documents
18 that will not be provided to the COI or, if provided, will be in
19 a very different form.

20 If I conclude in this way, sir, the culmination of
21 these questions is that now Sir Geoffrey is instructed to
22 undertake a review and to reach conclusions on the governance of
23 the Virgin Islands, then he becomes someone--and I need to make
24 as plain as possible, but he becomes someone from whom you may
25 wish to hear. And it follows now that having announced this

1 review, or having been said publicly to have announced the
2 review, the Attorney needs to explain to you why there is no
3 potential conflict of interest here, not just in relation to Sir
4 Geoffrey, but also in relation to any other lawyer who may be
5 assisting in this review.

6 I'll stop there, if I may, and hand over to the
7 Attorney to respond.

8 COMMISSIONER HICKINBOTTOM: Thank you, Mr. Rawat.

9 There are a number of questions there, Attorney.
10 Possibly the place to start is on whose behalf is the review has
11 been conducted? I think the statement says you had called for
12 the review. I assume you haven't done that entirely on your own
13 behalf.

14 SIR GEOFFREY COX: Mr. Commissioner, I'm afraid we
15 can't hear you. I wonder if there is a problem with your
16 microphone.

17 COMMISSIONER HICKINBOTTOM: Thanks, Sir Geoffrey.

18 (Pause.)

19 COMMISSIONER HICKINBOTTOM: Is that better?

20 SIR GEOFFREY COX: Still quite faint, sir, but I think
21 we probably can hear you, but it's quite faint.

22 COMMISSIONER HICKINBOTTOM: Okay. Is that better, Sir
23 Geoffrey? The microphone.

24 (Sound interference.)

25 SIR GEOFFREY COX: Thank you.

1 COMMISSIONER HICKINBOTTOM: Do let me know if you
2 can't hear me.

3 I was just saying to the Attorney a number of
4 questions there, but perhaps the starting point was, I think,
5 the second question Mr. Rawat made, on whose behalf is the
6 review to be conducted. It's said to be by the Attorney
7 General, but I assume, that it's not entirely off her own bat.
8 She will tell us.

9 ATTORNEY GENERAL SMITH: Thank you, Commissioner,
10 thank you, Mr. Rawat.

11 I think there is about ten questions.

12 COMMISSIONER HICKINBOTTOM: I've got seven but there's
13 quite a few there.

14 ATTORNEY GENERAL SMITH: I wonder, Commissioner, I
15 have not had--I didn't have advance notice of the questions. Of
16 course, I'm very happy to answer to the best of my ability, but
17 I wouldn't want to answer in a way where I have not fully
18 considered the precise question. From my point of view, as I
19 said before--I would and I hope that by nodding you're
20 agreeing--that I may have an opportunity to complete my
21 submissions to be in writing, so that right might be because I
22 think it would be of great assistance. I am very keen that we
23 are very clear on these points because my sole objective is to
24 be helpful.

25 I agree with Mr. Rawat that relevance is for you, and

1 I don't want that word to be misconstrued. I think in my mind I
2 think you may find it relevant, but you may choose not to
3 consider it, but it is absolutely important to me, as Attorney
4 General and representing my client or my clients as we see it,
5 that I do take full and proper instruction, and that's in any
6 case with which I'm involved. That doesn't mean that there is
7 some in-depth discussion and consideration of the matter that in
8 any particular case I am trying to wrap my head around for
9 whatever purposes.

10 So, I would be very grateful, sir, if you would permit
11 me to have the opportunity to properly consider these questions
12 and bring them back to you with some answers.

13 COMMISSIONER HICKINBOTTOM: I think that's very fair
14 and very proper. If I say so, your submissions today have been
15 very helpful, and I think--I think--in respect of all of the
16 other matters, you're going to write on that one privilege
17 question, but we dealt with the matters to a conclusion, I
18 think. But these issues are very important. There are at least
19 two broad issues which concern me:

20 One is the conflict-of-interest point, which Mr. Rawat
21 is made. That is a concern, or that's primarily a concern for
22 you and Sir Geoffrey, but it is a concern of mine.

23 And, secondly, the integrity and timing of the
24 Commission of Inquiry, which is vital to me, it is potentially
25 adversely affected by some of these issues, and that is a great

1 concern. If a report--and this is just one of many hypotheses
2 that could be drawn, but if a report was to be produced the day
3 before I was due to report on the COI, that would be very
4 unhelpful indeed, or indeed the day after I produced the Report.

5 So, these go to some fundamental issues, I think, of
6 the Commission of Inquiry, and I think it's absolutely right
7 that you have time to consider them before making your final
8 submissions, which can certainly be made in writing.

9 And this is intended to be an open question, not a
10 leading one. There are some of these matters, such as on whose
11 behalf is the review to be conducted, which we might make a
12 start on today, or would you prefer to put that in writing?

13 ATTORNEY GENERAL SMITH: I would prefer to put it in
14 writing. I have an answer in my head, but I think I should be
15 careful in responding to you so as not to mislead you in any
16 way.

17 COMMISSIONER HICKINBOTTOM: Yeah. As I say, your
18 submissions have been very helpful, and no doubt these
19 submissions in writing would be equally helpful.

20 ATTORNEY GENERAL SMITH: I don't know if it would be
21 helpful for another matter, but I would like to clarify that my
22 understanding is that, in terms of the scope of the Government's
23 involvement in the Commission that once concerned in any way the
24 matter under inquiry which we say that the person should be
25 entitled to be represented at the whole of the Inquiry, and I

1 would like to indicate to you that we accept that that phrase
2 implies a right to representation to the extent and of the
3 nature that it is proportionate and fair. In reflection of
4 these interests or any specific part of proceedings.

5 So what we would anticipate is a flexible case-by-case
6 judgment by yourself as to the Government's involvement in
7 issues of fact that may arise at the hearing. And, in our
8 thinking, it's in the interest of the Government we are required
9 at the appropriate time when the Government would have access to
10 the evidence and material before the Inquiry, which can be
11 relied on and which might be considered by you in influencing
12 the findings and conclusions in your report.

13 COMMISSIONER HICKINBOTTOM: Yes.

14 ATTORNEY GENERAL SMITH: And that we are permitted to
15 make submissions or submit evidence; right? It may not
16 require--and I think it's important for me to say--that the
17 Government be present at every oral examination. I can
18 appreciate that. Sometimes this might not always be practical,
19 might not be convenient or efficient.

20 COMMISSIONER HICKINBOTTOM: Or necessary.

21 ATTORNEY GENERAL SMITH: Or necessary. But if it
22 would be fair that Government should be present, then we would
23 say that the government should be present.

24 COMMISSIONER HICKINBOTTOM: I will deal with some of
25 these points now.

1 In relation to this final topic, you would like to put
2 in written submissions; I understand that. How long would you
3 like, Ms. Attorney, to do that?

4 ATTORNEY GENERAL SMITH: I'm looking at the Solicitor
5 General. I think by Friday we should be--

6 COMMISSIONER HICKINBOTTOM: Friday?

7 ATTORNEY GENERAL SMITH: Yes, sir.

8 COMMISSIONER HICKINBOTTOM: That would be fine, and I
9 couldn't expect more. That's very helpful.

10 Let me just make sure that Mr. Rawat doesn't have
11 anything else to say before I deal with the other point you've
12 got.

13 Mr. Rawat, anything else--any other submissions to
14 make?

15 MR. RAWAT: No, sir. I mean, I think the last issue--

16 COMMISSIONER HICKINBOTTOM: You now have gone very
17 weak.

18 MR. RAWAT: All right. I hope you can hear me now.

19 COMMISSIONER HICKINBOTTOM: Yes.

20 MR. RAWAT: All right.

21 In relation to the last matter that I raised, it is
22 obviously complicated, and I would endorse your view that the
23 Attorney thus make her submissions in writing, so I have no
24 further submissions to make, save to thank the Attorney for the
25 open and helpful way in which she made her submissions today.

1 COMMISSIONER HICKINBOTTOM: I certainly adopt that.
2 You've been really, very, very helpful.

3 So, if those submissions could come in by Friday.

4 ATTORNEY GENERAL SMITH: Yes, sir.

5 And if you don't mind, I would like to resolve the
6 right facts to clarify anything under the other topics, not to
7 unduly burden you, but I would like also--

8 COMMISSIONER HICKINBOTTOM: I was going to determine
9 the other matters but not obviously if you don't want me to.

10 ATTORNEY GENERAL SMITH: Well, if you are going to
11 determine them in my favor, then I'm considering what I want to.

12 COMMISSIONER HICKINBOTTOM: But I was considering it,
13 but if you're going to try to persuade me that I shouldn't, then
14 I'll give you time.

15 ATTORNEY GENERAL SMITH: I believe you should, sir, if
16 you are inclined to decide in my favor then I would have nothing
17 more to say.

18 COMMISSIONER HICKINBOTTOM: Can I say what I'm minded
19 to do, and you can let me know.

20 I'm minded to make a direction now because the
21 Commission of Inquiry needs to press on, and you need to know
22 where you stand. I propose to make a direction that--and this
23 is not drafting--I will come on to drafting in a moment--that
24 you as Attorney General, I think under the rules under the Act
25 it's actually a declaration that you're entitled to those

1 things, but I declare that you are concerned for the purposes of
2 Section 12 for the matters in the Inquiry, and consequently are
3 entitled to participate in the whole of the Inquiry, and
4 that--and then we will need to draft this--but Government
5 Ministers and the areas of Government which have been assigned
6 to them, which will include ministries, offices, departments,
7 other government entities, and other individuals within all of
8 those shall also be similarly entitled, and that they be
9 represented by or through you as the Attorney General. I can't
10 go further than that because I think we need to see your
11 submissions in relation to the IRU, Sir Geoffrey's role and with
12 his role before we go further than that. But I think it's right
13 that I make that direction.

14 What I propose to do is I can give reasons for that
15 later, once we've got two things. The Transcript and hopefully
16 the Transcript of this part of the hearing will be available by
17 Friday, possibly Saturday or Sunday, but hopefully Friday, and
18 also your other submissions in relation to the fourth topic
19 which I can then cover too, and I will do that ruling as quickly
20 as I can, but the direction we made for you appear for Ministers
21 and other Government persons as identified in blue on your chart
22 in the forthcoming hearings.

23 Now, that will give you the right to participate in
24 the whole of the Inquiry. That, as I understand it, will give
25 you the right to appear in hearings unless for any reason--I

1 can't think of a reason at the moment, but unless for any reason
2 I make a direction you can't appear for any particular reason,
3 you'll have the right to appear in any hearing, not necessarily
4 ask questions but the right to attend.

5 And in relation to--that will obviously mean that you
6 will have the right to represent Ms. Ward this afternoon. No
7 problem at all. And I know there is an associate from Withers
8 to attend. Irrespective of my decision after I've seen your
9 submissions, I have no problem with her being present
10 (overlapping speakers) that's fine because the Solicitor General
11 may ask questions that need to be asked. So I don't have any
12 problem with that, and that will simply hold the, not the status
13 quo, simply will hold matters until I've seen your submissions.

14 In terms of the way in which you proposed to approach
15 representation at a particular hearing, can I very much endorse
16 your comments? You said that you would adopt a flexible
17 approach to representation. You will, in the most part, be
18 representing witnesses. You may have very few questions for us,
19 some or any of the Witnesses. I think it's very important that
20 investigation is scaled and proportionate to that role because
21 it's important that we all approach all of these issues in a
22 proportionate way. At the moment, I will simply rely upon your
23 intent to make sure that the representation is proportionate.

24 Now, is there anything that I have forgotten to ask?

25 ATTORNEY GENERAL SMITH: Commissioner, I don't believe

1 that I'm missing anything, and I'm looking at Sir Geoffrey and
2 (inaudible) to see if I'm missing something, but what I would
3 like to conclude by saying is really to reassure you,
4 Commissioner, that my objective and the objective of the
5 Government albeit these are difficult circumstances is to be
6 supportive to the Commission, to respect your timeline, and to
7 do all that we can do to ensure that you are afforded the
8 greatest possible assistance in carrying out this Commission.

9 COMMISSIONER HICKINBOTTOM: Good. As I said, thank
10 you again for your submissions today.

11 I will come on to drafting the direction, but
12 Mr. Rawat, have you got anything else in response to this part
13 of the hearing?

14 MR. RAWAT: Nothing. Thank you, sir.

15 COMMISSIONER HICKINBOTTOM: Okay. Just two points.

16 Firstly, in terms of drafting, I think it would be
17 easier if I produced the first draft of the direction, I will
18 send it to you and send it to Mr. Rawat and we can make sure
19 that the direction is an appropriate direction.

20 And lastly, I think lastly, in terms of this part of
21 the hearing, is there any reason why this part of the hearing
22 should not be made public?

23 Before you answer, let me say what I would propose to
24 do, if it were made public, and that is to make the Transcript,
25 once it's available, available on the website.

1 ATTORNEY GENERAL SMITH: Yes.

2 Could I also submit on that?

3 COMMISSIONER HICKINBOTTOM: Yes, absolutely.

4 ATTORNEY GENERAL SMITH: Thank you, sir.

5 COMMISSIONER HICKINBOTTOM: Yes.

6 ATTORNEY GENERAL SMITH: Yes.

7 COMMISSIONER HICKINBOTTOM: You're going to make
8 submissions on that?

9 ATTORNEY GENERAL SMITH: Yes.

10 COMMISSIONER HICKINBOTTOM: Do you want to submit them
11 now or make them in writing?

12 ATTORNEY GENERAL SMITH: I will submit them in
13 writing.

14 COMMISSIONER HICKINBOTTOM: That's fine. I tell you
15 why that's fine because I don't think we're going to get the
16 Transcript before Friday. That's fine.

17 And this is not a pre-judgment--I won't say anything.
18 Let's see your submissions, and make any submissions, Mr. Rawat,
19 and I'll make a ruling.

20 SIR GEOFFREY COX: I wonder if I--given that my name
21 has been taken frequently in vain in the submissions of Mr.
22 Rawat and your observations, if I might make one very brief
23 observation in connection with his latter point without
24 preempting the submissions.

25 May I assure you, Mr. Commissioner, that anything I

1 undertake in this jurisdiction will not be designed to impede,
2 frustrate, obfuscate or obstruct your fulfillment with complete
3 impartiality and independence of your mission here. And so, no
4 such review, if it's correctly to be called such a thing, has
5 yet been commenced, nor would it be if you had any concerns,
6 qualms, or other reservations because it's absolutely clear that
7 my presence here in this island, together with those whom I have
8 the privilege to lead, their sole focus is on ensuring that you
9 can discharge your functions as you would expect to do.

10 COMMISSIONER HICKINBOTTOM: Thank you, Sir Geoffrey.

11 I've got the submissions, and we will see where we go,
12 but thank you for that final submission. I don't think that
13 there is anything else, then, in respect of this part of the
14 hearing. What I propose to do simply, so everybody can
15 reconstitute the room, is we will simply stop now.

16 Ms. Ward, I think, has been put off, at my direction,
17 until 2:30, so we will start at 2:30. If Ms. Ward is here
18 before then, we will start before then.

19 Good. Thank you all very much.

20 ATTORNEY GENERAL SMITH: Thank you.

21 COMMISSIONER HICKINBOTTOM: Thank you, Ms. Attorney.

22 (End of Session 1.)

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