CITATION: *Huddleston v Northern Territory of Australia* [2012] NTMC 039

PARTIES:	JAMIE HUDDLESTON
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Local Court
FILE NO(s):	21020224
DELIVERED ON:	3 September 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	2 July 2012 (final submissions)
JUDGMENT OF:	Dr Lowndes SM

CATCHWORDS:

DISCOVERY – PRODUCTION AND INSPECTION OF PARTICULAR DOCUMENTS OR CLASSES OF DOCUMENTS – STATUTORY PROHIBITION ON DISCLOSURE – PUBLIC INTEREST IMMUNITY – CONFIDENTIALITY OF DISCIPLINARY HEARINGS

Ombudsman Act ss 95, 117, 118, 119 and 120
Police Administration Act Part IV, S84B
Interpretation Act ss 55, 62A
Holmes& Bolgar v Commissioner of Police [2011] NTSC 108 considered
Project Blue Sky Inc v Australian Broadcasting Authority [1998] 194 CLR 355 applied
Sankey v Whitlam [1978] 142 CLR applied
Liddle v Owen [1978] 21 ALR 286 followed

REPRESENTATION:

Counsel:

Plaintiff:	Mr T Young
Defendant:	Ms S Brownhill

Solicitors:

Plaintiff:	Matthews Legal
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2012] NTMC 039
Number of paragraphs:	163

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21020224

BETWEEN:

JAMIE HUDDLESTON
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

REASONS FOR DECISION

(Delivered 3 September 2012)

Dr John Allan Lowndes SM:

FACTUAL BACKGROUND TO THE INTERLOCUTORY APPLICATION SEEKING PRODUCTION AND/OR INSPECTION OF PARTICULAR DOCUMENTS OR CLASSES OF DOCUMENTS.

1. On 20 February 2012 the plaintiff filed an interlocutory application seeking further and better discovery and inspection of particular documents or classes of documents, arising out of proceedings commenced by the plaintiff in the Local Court for battery and assault and false imprisonment. The causes of action are specifically pleaded and particularised in the Statement of Claim. The defendant's defence is as disclosed in the Notice of Defence.

2. The background to the interlocutory application is as follows.

3. It is alleged that the plaintiff was assaulted by two police officers Constables Sandor Bolgar and Sean Holmes on the night of 7/8 April 2010.

He was allegedly initially assaulted while being taken into protective custody at Coconut Grove. He is said to have been punched in the eye by one of the officers. He was then placed in the rear of a police vehicle and driven towards Fannie Bay. The police officer driving the vehicle braked heavily throwing the plaintiff against the steel cage causing a further injury. The vehicle stopped at Fannie Bay, and the cage was opened to let out two other persons in the rear of the vehicle. The plaintiff fled from the rear of the vehicle, and was pursued by one of the officers on foot, while the other officer remained in the vehicle. It is alleged that the officer driving the vehicle knocked the plaintiff down with the vehicle causing further injuries. The police vehicle was damaged during the incident. The plaintiff was taken back into custody and conveyed to Royal Darwin Hospital, where he received medical treatment. Two lacerations – one above the plaintiff's eye and one on his scalp – were sutured. The plaintiff also suffered abrasions and bruising.

4. There is CCTV footage of the plaintiff and the police officers at Royal Darwin Hospital. The police officers allege that the plaintiff was insulting and aggressive at the hospital. Although neither the plaintiff nor his legal representatives have viewed the footage it has been suggested by others that the footage is inconsistent with the allegations made by the two police officers. The footage was seized by the Northern Territory Police.

5. Subsequently, in the police workshop, the police vehicle was noted to have two dents – one on the front of the bonnet, and a second on the front right guard.

6. The plaintiff made a complaint to the Northern Territory Ombudsman. An investigation into the complaint was carried out by the Ethical and Professional Standards Command (EPSC). This resulted in a report to the Ombudsman under s 95 of the *Ombudsman Act*. The report found that the allegation that the plaintiff was punched in the eye was not sustained due to insufficient evidence. The allegation of assault by heavy braking of the

police vehicle was sustained. The allegation that the plaintiff was assaulted by being knocked down by the police vehicle was also sustained. A complaint about the plaintiff's missing mobile phone, shirt and Larrakia Nation ID was not sustained due to insufficient evidence. The Ombudsman accepted the findings of the s 95 report on 5 September 2011.

7. The Commissioner of Police instituted disciplinary proceedings against Constables Sandor and Holmes pursuant to s 84A of the *Police Administration Act*. The two officers gave preliminary written responses to the allegations. A hearing was held under s 84B of the Act, and evidence was given by the two police officers and other witnesses on 10, 11 and 17 August 2011. On 22 December 2011 the two police officers obtained an injunction in the Supreme Court of the Northern Territory to prevent the continuation of the hearing on the basis that the disciplinary proceedings had been commenced out of time: *Holmes and Bolgar v Commissioner of Police* [2011] NTSC 108. That decision sets out a detailed chronology of events taken from the affidavit sworn by the officers' solicitor, and which included annexures said by the defendant in this case to be privileged or immune: *Holmes and Bolgar* at [7], [8].

8. The plaintiff commenced proceedings against the Northern Territory seeking damages on 7 June 2010. A defence was filed on 22 June 2011.

9. On 5 September 2011 the defendant filed a List of Documents. The defendant objected to discovery of a class of documents not particularised but described as "documents created during an investigation relating to a complaint against the Northern Territory Police which is under the control of the Ombudsman and cannot be disclosed by reason of s 120 of the *Ombudsman Act*."

10. By letter dated 16 September 2011 the plaintiff sought further and better particulars of documents relating to:

    (a) Notices of Breach of Discipline;

(b) Notices of Charge;

(c) Members response to breach of discipline and/or charge (if any);

(d) Copies of the transcript of all evidence given in the disciplinary proceedings.

11. The defendant replied by way of letter dated 13 October 2011, declining to give discovery of documents on the basis that they were not relevant and could not be produced by reason of s 120 of the *Ombudsman Act*.

12. It was that response that prompted the filing of the plaintiff's application for further and better discovery on 20 February 2012.

13. The application for discovery and inspection is opposed by the defendant on the basis of the privilege created by s 120 of the *Ombudsman Act* and more broadly on public interest immunity grounds.

14. As a consequence, the Court is required to adjudicate upon the issues and rule on the orders sought in the application.

THE ORDERS SOUGHT IN THE INTERLOCUTORY APPLICATION

15. The plaintiff seeks the following orders in his interlocutory application:

1. An order requiring the defendant within 14 days from the date of such order to state by affidavit whether it has or has had at any time in its possession, custody or power the specific documents and/class of documents set out in the schedule (attached to the application) or any of them;

2. An order requiring the defendant within 21 days from the date of such order to permit the plaintiff to inspect such of the specific documents and/class of documents set in the schedule or any of them as may be in

the defendant's possession, custody or power, save for any document decided by the Court to be privileged from production;

3. Such further or other orders the Court deems fit.

16. The schedule to the application for specific discovery reads as follows:

Definitions

In this Schedule:

1. **Complaint against the Police** means the complaint made by the plaintiff against police as referred to in the section 95 report;

2. **Decision** means the reasons for decision of Southwood J dated 7 December 2001 in *Holmes & Anor v Commissioner of Police* [2011] NTSC 108;

3. **Disciplinary hearing** means the disciplinary hearing conducted on 10, 11 and 17 August 2011 as referred to in the Decision;

4. **Departmental disciplinary investigation** means the investigation into the conduct of the members of Police in relation to their interaction with the plaintiff on or about 6 an7 April 2010 conducted pursuant to the *Police Administration Act* and/or General Orders, including the directed departmental disciplinary interview conducted referred to on page 10 of the s95 Report, but excluding any investigation conducted pursuant to the *Ombudsman Act*;

5. **Relevant documents** or a reference to a **relevant document** of class of relevant documents means a document that relates to a matter in question between the parties in these proceedings;

6. **Section 95 Report** means the report of investigation by the Ethics & Professional Standards Command pursuant to s 95 of the *Ombudsman Act* dated April 2011 relating to the complaint against police as referred to in the affidavit of James Andrew Matthews filed with this application;

7. **General Orders** means the general orders and instructions and codes of conduct issued by the Commissioner of Police pursuant to s14A of the *Police Administration Act*, and for the purpose of this schedule includes any other relevant written direction, instruction or order of the nature referred to in s76(d) of the *Police Administration Act*.

Class 1

Relevant documents created on or before 7 April 2010 (prior to any investigations into the complaint against police) including:

1. Peter McAulay Centre Restricted Car Park access log referred to in the s 95 report (pages 9 and 26);

2. Notebook entries of Constable Sean Holmes referred to in the s 95 report (page 31);

3. Police Mechanical Workshops report referred to in the s95 report (page 27);

4. CCTV footage from Royal Darwin Hospital referred to in the s 95 report (page 29);

5. Joint Emergency Services Call Centre recordings (and or transcript) referred to in the s 95 report (page 30);

6. Relevant sections of the General Orders including, for instance, any general orders dealing with (a) guidelines of the use of force by police; (b) guidelines for reporting use of force and (c) guidelines for making contemporaneous notes (page 18 of the s 95 report);

7. Policy relating to Deaths in Custody and investigations resulting from contact with the public (referred to on page 19 of the s 95 report).

Class 2

Relevant documents generated as part of the departmental disciplinary investigation including:

(a) the transcript of the directed departmental disciplinary interview with Constable Sean Holmes referred to on page 10 of the s 95 report

Class 3

Relevant documents relating to the disciplinary hearing created after 7 April 2012 (excluding any document prepared as part of an investigation under the *Ombudsman Act*) including:

1. Notices of Alleged Serious Breach of Discipline addressed to Constable Sean Holmes and Constable Sandor Bolgar referred to in paragraphs 13 and 14 of the Decision;

2. Response of Constable Sean Holmes to the Notice of Alleged Serious Breach of Discipline referred to in paragraph 15 of the Decision;

3. Response of Constable Sandor Bolgar to the Notice of Alleged Serious Breach of Discipline referred to in paragraph 16 of the Decision;

4. Notice of Charge of Breach of Discipline served on Constable Sean Holmes as referred to in paragraph 18 of the Decision;

5. Notice of Charge of Breach of Discipline served on Constable Sandor Bolgar as referred to in paragraph 19 of the Decision;

6. Transcript of evidence of the disciplinary hearing;

7. Copies of documents shown to any witnesses at the disciplinary hearing (excluding any document prepared during the course of an investigation under the *Ombudsman Act*).

AFFIDAVIT EVIDENCE FILED IN SUPPORT OF THE APPLICATION AND EVIDENCE IN REPLY

17. In support of the application, the plaintiff relied upon the contents of the affidavit of James Andrew Matthews (solicitor for the plaintiff) sworn on 20 February 2012.

18. Mr Matthews deposed as to his belief that the defendant's List of Documents filed on 5 September 2011 did not disclose all of the documents that are or have been in the defendant's possession, custody or power relating to the matters in question between the parties in these proceedings.

19. Mr Matthews further deposed as to his belief that the defendant has or has at some time had in its possession, custody or power the documents or class of documents specified in the schedule attached to the application. He based his belief on the following grounds:

1. On 27 September 2011 he personally collected a copy of the s 95 report from the office of the Ombudsman, which disclosed the existence of Class 1 and 2 documents;

2. He has read a copy of the relevant decision, which discloses the existence of Class 3 documents.

20. Mr Matthews deposed as to the relevance of the Class 1 documents to the issues raised in the proceedings in the following manner:

1. The Peter McAulay Centre Car Park access is relevant to the injuries sustained by the plaintiff and the timeline of events (including the time the plaintiff spent in custody of police);

2. The notebook entries are relevant to the question of whether or not the defendant was acting lawfully or unlawfully, and its state of knowledge in relation to that issue;

3. The police mechanical workshop report is relevant to the following issues: (a) whether or not the police vehicle sustained damage in the course of the events in question; and (b) the location and extent of any damage to the vehicle;[1]

4. The CCTV footage is relevant to the extent of injuries sustained by the plaintiff, the timeline of events, and the behaviour of the plaintiff and the police members at Royal Darwin Hospital;

5. The Joint Emergency Services Call Centre recordings are relevant to the timeline of events and provide a contemporaneous account by police members of their observations and actions;

[1] In that regard, it is noted that the plaintiff will be providing the defendant with additional particulars of the incidents of the alleged assaults, including an allegation that when the plaintiff attempted to escape custody and evade police, a member of the police pursued the plaintiff and used the vehicle to strike the plaintiff causing him to fall to the ground and sustain injuries.

6. The relevant provisions of the General Orders are relevant to the issue of whether or not the police members were acting lawfully or unlawfully, and if the members were acting unlawfully, whether they were doing so in full knowledge of that fact;

7. Relevant provisions of the policy relating to Deaths in Custody and investigations of serious incidents resulting from contact with the public are relevant to the question of whether of not the police were acting lawfully or unlawfully, and if the members were acting unlawfully, whether they were doing so in full knowledge of that fact.

21. As to the relevance of the Class 2 documents Mr Matthews deposed as follows:

> Class 2 documents are firsthand documents given by members of police in circumstances where the members are aware that their conduct is under investigation and the members are attempting to explain what they did and did not do in relation to the events in question. Without limitation, these accounts are relevant to the issue of whether the Police were acting lawfully or unlawfully and if the members were acting unlawfully, whether they were doing so knowingly and or whether the members subsequently admitted or denied any wrongdoing. These issues are relevant to the assessment of damages, including without limitation:
>
> 1. to the extent that s184(3) (c) of the *Police Administration Act* does not prohibit the plaintiff from seeking damages in the nature of exemplary damages (see *Lamb v Cotogno* [1087] HCA 47; (1987) 164 CLR 1 which the plaintiff intends to rely upon as a basis for seeking an award of exemplary damages against the Territory, calculated at a rate to vindicate the plaintiff and assuage the plaintiff's need for revenge;

2. to any application by the plaintiff pursuant to s148F(2) (b) to join members of Police in order for the claim to include a claim in the nature of punitive damages.[2]

22. With respect to the relevance of the Class 3 documents Mr Matthews deposed as follows:

1. The Notices of Alleged Serious Breach of Discipline provide context to the written responses given by the members;

2. The response of the members to the said Notices are relevant in the same manner as Class 2 documents are relevant;

3. The Notices of Charge of Breach of Discipline provide context to the evidence given by the members of Police at the disciplinary hearing;

4. The evidence given by witnesses and members of Police at the disciplinary hearing is relevant to the probability of whether or not the police members acted unlawfully, including, in regards to the reliability and credibility of the representations made by the witnesses and members of police. The evidence given by members of police is relevant in the same manner as the Class 2 documents are relevant;

5. The documents shown to witnesses at the disciplinary hearing provide context to the evidence given by the witnesses and members of police.

23. In his further affidavit sworn 30 March 2012 Mr Matthews annexed a true copy of the s 95 Report that he had collected from the Office of the Ombudsman on 27 September 2011.[3]

24. In that affidavit, Mr Matthews also referred to paragraph 23 of the affidavit of Superintendent Porter sworn on 28 March 2013, which stated as follows:

[2] See paragraph 5 of Mr Matthews' affidavit.
[3] It should be noted that the Court decided not to view the s 95 report, and an affidavit without the annexed report was tendered: see T27-T28 of the proceedings on 30 March 2012.

NT Police policy is that documents which are obtained in or for, or which are produced as part of the process of, disciplinary action against police officers under Part IV of the *Police Administration Act* are confidential and are not published or otherwise disclosed outside of the NT Police.

25. At paragraph 4 of that affidavit Mr Matthews deposed:

> I am aware that in Supreme Court proceedings No 13 of 2006 (20604624) between Mather & O'Connell v NTA, the Northern Territory of Australia gave discovery (including copies of documents) to the plaintiffs of :
>
> 1. Statutory declarations and transcripts of interviews with all police and civilian witnesses obtained as part of a disciplinary investigation;
> 2. Notices of alleged breaches of discipline;
> 3. Members responses to notices of breach of discipline;
> 4. Notice of charge of breach of discipline;
> 5. Notice of determination;
> 6. Transcript of disciplinary hearing.

26. Mr Matthews further deposed that in relation to those documents the Northern Territory of Australia did not make any claim for privilege, although some personal identifying information contained in the transcripts and statutory declarations may have been redacted.

27. In response to the plaintiff's application for discovery, the defendant relied upon the affidavit of Bruce Porter, Superintendent of Police, sworn 28 March 2012. The salient parts of that affidavit are as follows:

(a) Upon receipt of the plaintiff's complaint against the conduct of the two police officers, the Ombudsman categorised the complaint as a "category 1" complaint. Pursuant to ss 66 and 80 of the *Ombudsman Act* the Ombudsman decided that the complaint should be investigated

by a member of the Ethical and Professional Standards Command (EPSC).

(b) On or about 16 April 2010 the Ombudsman forwarded the plaintiff's complaint to the Officer in Charge of EPSC for investigation. The investigation was conducted by Detective Sergeant Shayne Warden.

(c) During course of the investigation the investigating officer, along with other EPSC members, pursuant to ss 82 and 83 of the *Ombudsman Act* sought and obtained the following documents: the Peter McAulay Centre restricted car park access log recording swipe of Constable Sean Holmes on 7 April 2010; notebook entries of the constable; Police Mechanical Workshops 40,000 service report of 29 April 2010 and vehicle accident report form regarding police vehicle 443 dated 4 May 2010; CCTV footage from Royal Darwin Hospital Emergency Department car park and entrance on 7 April 2010 showing police vehicle 443 and the plaintiff; Joint Emergency Services Call Centre recordings and transcript of communications to and from Constable First Class Sandor Bolgar in police vehicle 443 on 6-7 April 2010.

(d) During the course of the investigation a number of witnesses were interviewed, and Detective Sergeant Warden directed Constable Bolgar to participate in an interview, which was conducted on 20 September 2010. Prior to the interview, Detective Sergeant Warden informed Constable Bolgar that a failure to take part and answer questions would be a breach of discipline under s 76(d) of the *Police Administration Act*; that his answers may be used in relation to a Departmental disciplinary investigation and the complaint against police investigation, but could not be used in criminal proceedings against him; and that he could not reveal the matters discussed in the interview to any other person until the completion of the investigation.

(e) During the course of the investigation Detective Sergeant Warden directed Constable Holmes to participate in an interview and answer questions under s 83 of the *Ombudsman Act* . Prior to the record of interview (which was held on 22 September 2010) Detective Sergeant Warden informed Constable Holmes of the matters that Constable Bolgar was advised of prior to the commencement of his interview.

(f) During the course of the investigation Detective Sergeant Warden instructed Constable Bolgar to provide a statutory declaration regarding the events involving the plaintiff, which the constable provided on 27 September 2010. Detective Sergeant Warden also directed Sergeant Adrian Kidney on 6 to 7 April 2010 to participate in an interview and answer questions under s 83 of the *Ombudsman Act. Pr*ior to participating in the interview (which was held on 29 September 2010) Detective Sergeant Warden informed Sergeant Kidney of the matters that Constables Holmes and Bolgar were informed of prior to the commencement of their respective interviews.

(g) Further, during the course of the investigation, Detective Sergeant Warden received on 9 November 2010 a statutory declaration from Dr Rajiv Shinde regarding the plaintiff's treatment at Royal Darwin Hospital on 7 April 2010. He then sought the advice of the Director of Public Prosecutions as to whether Holmes and/or Bolgar would be charged with any criminal offences; and was advised on 11 February 2011 that no charges would be laid. Detective Sergeant subsequently formed the opinion that Constables Holmes and/or Bolgar had committed breaches of discipline under s 76 of the *Police Administration Act* which were sufficiently serious to warrant action being taken under Part IV of the Act.

(h) Detective Sergeant Warden then prepared a written report of the investigation for provision by the Officer in Charge of EPSC to the Commissioner of Police under s 95 of the *Ombudsman Act*. The s 95

report attached and incorporated the following documents: the Peter McAulay Centre Restricted Car Park records, the notebook entries of Constable Holmes, the Police Mechanical Workshop service report and vehicle accident report, the CCTV footage from Royal Darwin Hospital car park and entrance and the Joint Emergency Services Call Centre recordings, transcript of communications to and from Constable Bolgar, Constable Bolgar's statutory declaration and the statutory declaration of Dr Shinde. The report also attached and incorporated transcripts of the various interviews conducted during the course of the investigation.

(i) On or about 19 April 2011 the s 95 report was forwarded by the Officer in Charge of EPSC to the Deputy Commissioner (as the delegate of the Commissioner) pursuant to s 95 of the *Ombudsman Act*. On or about 19 April 2011 the Deputy Commissioner (as the Commissioner's delegate) assessed the conduct referred to in the report and made comments, and forwarded the s 95 report and comments to the Ombudsman pursuant to s 96 of the *Ombudsman Act*. On or about 5 September 2011 the Ombudsman completed an assessment of the s 95 report and provided a written report to the Commissioner pursuant to ss 97 and 101 of the *Ombudsman Act*. On or about 20 September the Deputy Commissioner (as the delegate of the Commissioner) considered the Ombudsman's assessment and report, and gave written notice of his agreement with them pursuant to s 103 of the *Ombudsman Act*, and confirmed that the investigation was complete.

(j) Sections 119 and 120(2) of the *Ombudsman Act* prevent the disclosure of information obtained in the course of or for the conduct of the investigation into the plaintiff's complaint against police by Detective Sergeant Warden. Section 120(4) also prevents a person from using such information to gain some private benefit. These sections appear to prevent the production of the documents which formed part of the s95

report, and which the plaintiff seeks by way of orders for discovery and inspection.

(k) In forming the view that there were reasonable grounds for the belief that Constables Holmes and Bolgar had committed a breach of discipline under s 76 of the *Police Administration Act* Detective Sergeant Warden considered (as contemplated by s 76 (c) and (d)), the following General Orders issued under s 14A of the *Police Administration Act* : (1) General Order – Code of Conduct and Ethics; (2) General Order – Custody Manual; and (3) General Order – Deaths in Custody and Investigation of Serious and/or Fatal Incidents Resulting from Police Contact with the Public.

(l) On or about 28 September 2010 Detective Sergeant Warden sought from the Deputy Commissioner of Police an extension of time under s162(7) of the *Police Administration Act* to commence an action under Part IV in relation to a breach of discipline by a member, which extension was granted on 2 October 2010. The extension was sought to enable Detective Sergeant Warden to complete the investigation.

(m) On or about 17 December 2010 Detective Sergeant Warden sought from the Deputy Commissioner of Police a further extension of time under s 162(7) of the *Police Administration Act* to commence an action under Part IV, which extension was granted on 24 December 2010.

(n) On or about 6 January 2011, Detective Sergeant Warden conveyed the reasonable grounds to the Superintendent, Complaints Division, EPSC who recommended to the Commander EPSC that disciplinary action under Part IV of the *Police Administration Act* be commenced. All disciplinary action against police officers for breaches of discipline (as defined by s 76) is taken under Part IV of the Act.

(o) In the context of – and in conjunction with – the investigation into the plaintiff's complaint against police Detective Sergeant Warden had

Notices of Alleged Breach of Discipline under ss 79 and 84F of the *Police Administration Act* served on Constables Holmes and Bolgar, received responses to the said Notices from both constables, undertook a review of those responses, and had Notices of Charge of Breach of Discipline under ss 84(b) (iv), 84A(1), (3) and 84 F of the *Police Administration Act* served on Constables Bolgar and Holmes on 6 and 10 May 2010 respectively.

(p) No further investigation was directed to be carried out under s 81(3) of the *Police Administration Act* because the investigation conducted by Detective Sergeant Warden was sufficient to find reasonable grounds for the Commissioner's belief to charge the two constables with breaches of discipline under s 84(b) of the *Police Administration Act*.

(q) The hearing under s 84B of the *Police Administration Act* was held on 10, 11 and 17 August 2011. Eight witnesses were called and gave oral evidence at the hearing. The evidence was transcribed. Apparently the only documents put to witnesses during the hearing were documents obtained by Detective Sergeant Warden during the course of or for the purposes of his investigation of the plaintiff's complaint.

(r) Prior to Assistant Commissioner Kershaw completing the hearing or forming any opinion as to the charges, Constables Holmes and Bolgar instituted proceedings in the Supreme Court seeking to prevent the Assistant Commissioner from completing the proceedings. On 22 December 2011 Justice Southwood delivered his judgment that the Notices of Charge of Breach of Discipline had not been commenced within the time required by s 162(6) of the *Police Administration Act*, and that the two constables were entitled to an injunction preventing the disciplinary hearing from proceeding.

(s) NT Police policy is that documents which are obtained in or for, or which are produced as part of the process of, disciplinary action against

police officers under Part IV of the *Police Administration Act* are confidential, and are not published or otherwise disclosed outside of Northern Territory Police. The rationale for the policy is that (a) members are encouraged to be completely honest and candid in responding to allegations of breach of discipline, which would be affected if they understood that, unlike criminal proceedings against them, their responses could be used in civil proceedings; (b) if their identity was to be revealed in civil proceedings, which could lead to their being called as witnesses to give evidence in the proceedings, and to being examined and cross-examined on the information they provide, people may be discouraged from making complaints about police conduct and providing information in an investigation into police conduct; and (c) whatever the ultimate disciplinary action taken in respect of a breach of discipline, the undertaking of the process under Part IV of the Act in respect of a member has serious ramifications for their reputation, career and livelihood.

(t) The *Police Administration Act* does not require hearings into charges of breach of discipline to be heard in public (section 84B), and they are always conducted in private. The particular factual findings and report and recommendations (under s 84C(1)(b)) of the member/s appointed to conduct the hearing are not publicised and are only provided to the Commissioner and the member charged. The fact of the making of charges of breach of discipline, and information regarding the disciplinary action ultimately take, are communicated to the public via media release and on the NT Police website, but the identity of the member/s involved is not disclosed.

28. The plaintiff also sought to rely upon a further affidavit sworn by Mr Matthews on 22 June 2012. In that affidavit Mr Matthews deposed to having attended the Supreme Court Civil Registry on 16 April 2012, and then inspected and read Mr Perry's affidavit as referred to in the decision of

Southwood J in *Holmes & Anor v Commissioner of Police* [2011] NTSC 108. Upon inspecting Mr Perry's affidavit Mr Matthews read the following documents, which were annexed to the affidavit:

1. The briefing note referred to in paragraph 8 of His Honour's decision;

2. The memorandum referred to in paragraph 9 of the decision;

3. Notice of alleged serious breach of discipline addressed to Constable First Class Sean Holmes;

4. Notice of charge of breach of discipline addressed to Constable First Class Sean Holmes;

5. Notice of alleged serious breach of discipline addressed to Constable Sandor Bolgar;

6. Notice of charge of breach of discipline addressed to Constable Sandor Bolgar.

THE AMBIT OF THE DISPUTE

29. The defendant objects to production and/or inspection of:

1. the documents listed in Classes 1 (except items 6 and 7[4]) and 2 and Item 7 of Class 3 of the plaintiff's application on the grounds that :

   (a) the documents are subject to public interest immunity; and

   (b) in any event, disclosure of the documents is prohibited by s 120 of the *Ombudsman Act* and

2. the documents listed in Class 3 of the plaintiff's application on the ground that disclosure of the documents is prohibited by Part IV of the *Police Administration Act*.

[4] Items 6 and 7 relate to General Orders and relevant policies.

30. The defendant does not object to the production or inspection of the documents listed in items 6 and 7 of Class 1 as those documents are available to the public.

31. Nor does the defendant continue to object to the production of the Class 3 documents referred to in Mr Matthew's most recent affidavit sworn 22 June 2012. Those documents are the Notices of Serious Breach and Notices of Charge.[5]

32. The plaintiff accepts that no documents meeting the description of item 7 of the Class 3 documents were shown to witnesses during the disciplinary hearing and therefore the application in relation to those documents is not pressed. [6]

33. However, in relation to the balance of the Class 3 documents the defendant continues to resist production and/or inspection on the grounds of inconsistency with the provisions of Part IV of the *Police Administration Act*.

34. The plaintiff does not press its application in relation to the Class 2 documents.[7]

35. Finally, the plaintiff does not seek discovery in relation to the documents referred to in paragraphs 3.1 and 3.2 of Mr Matthew's affidavit sworn 22 June 2012, namely, the briefing note and the memorandum.[8]

[5] See T 3 of the proceedings on 22 June 2012 where Ms Brownhill, counsel for the defendant, says:
" In light of the affidavit and what's contained in it, we concede that the documents no longer have the status of confidential documents because they have been received as evidence in the Supreme Court proceedings and are accessible to anyone who gets the Registrar's consent to view the file".
[6] See T 5 of the proceedings on 22 June 2012.
[7] See T5 of the proceedings on 22 June 2012 where Mr Young said:
" The Class 2 documents are the transcript of the interview with the two police officers involved; the interview that was given in response to an order to participate in interview; in other words a directed interview. We don't seek disclosure of that transcript".
[8] See T 4 of the proceedings on 22 June 2012.

CONSIDERATION OF THE PARTIES' SUBMISSIONS AND ADJUDICATION

A: CLASS 1 DOCUMENTS (EXCEPT ITEMS 6 AND 7)

- **The objection based on s 120 of the *Ombudsman Act***

36. The defendant objects to production and/or inspection of items 1-5 of the Class 1 documents on the basis that disclosure of the enumerated documents is prohibited by s 120 of the *Ombudsman Act*.[9]

37. Section 120 provides*:*

> 1. This section applies to a person who obtains information in the course of or for:
>
> (a) the making of preliminary inquiries or
>
> (b) the conduct of conciliation or mediation of a complaint or
>
> (c) the conduct of the police complaints resolution process or
>
> (d) the conduct of an investigation.
>
> 2. The person must not disclose the information to anyone else.
>
> 3. Subsection (2) does not apply if:
>
> ……
>
> (b) the information is disclosed in:
>
> (i) a report under this Act.

38. The defendant submitted that the Class 1 documents were obtained in the course of or for the conduct of an "investigation" under Part 7 Division 4

[9] Although the defendant originally objected to the production and/or inspection of the documents described in item 7 of the Class 3 documents there is no live issue in relation to those documents as no documents of that class were shown to witnesses during the disciplinary hearing.

Subdivision 2 of the *Ombudsman Act* , being the investigation conducted by Detective Sergeant Warden into the plaintiff's complaint against police.

39. The defendant seeks to argue that the documents sought to be produced and/or inspected are caught by the provisions of s 120 of the *Ombudsman Act* because that provision evinces a legislative intent "to protect the confidentiality of information gathered in the performance of the statutory functions conferred on the Ombudsman by the *Ombudsman Act*".[10] In advancing that argument the defendant relies upon the headings to Part 8 and Division 1 of Part 8 as well as the heading to s 120.[11] Reliance is placed upon ss 55 (1) and (2) of the *Interpretation Act* (NT) which respectively state that a heading to a Chapter, Part or Division, or Subdivision of an Act is part of the Act, and a heading to a section of an Act is part of the Act if (a) the Act is enacted after 1 July 2006 or the heading is amended or inserted after 1 July 2006.[12]

40. In the course of advancing that argument, the defendant stressed the importance of considering the provisions of s 120 in its context, "including where it sits in the Act and what the other provisions say".[13]

41. By way of developing its argument the defendant submits that ss 117 and 118 of the Act deal with removing barriers to the provision of information for an investigation - obligations of secrecy under some other provision do not prevent the disclosure of information to a person who is conducting an investigation.[14]

[10] See [12] of the defendant's written submissions dated 30 March 2012.
[11] See [12] of those submissions. Part 8 is headed "Confidentiality, Offences and Related provisions", while Division1 of Part 8 is headed "Confidentiality and Related Provisions". Section 120 is headed "Confidentiality of Information".
[12] See [12] of the defendant's written submissions dated 30 March 2012.
[13] See T 14 of the proceedings on 22 June 2012.
[14] See T 14 of those proceedings.

42. In furtherance of its argument, the defendant submits that ss 119 to 122 of the Act create barriers to the disclosure of information from an investigation.[15]

43. The defendant relies on the much broader class of persons covered by s 120 relative to s 119:

> Both s 119(1) and s 120(2) obviously apply to any investigating officer, or other member of the Ethical and Professional Standards Command (EPSC) in relation to a particular investigation. Section 120(2) (read with s 120(1)(d)) is worded to apply to a broader class of persons than s119(1), i.e. not just to persons who act or have acted in an official capacity under the Act, but to any person who obtains the requisite class of information.[16]

44. Working from that premise the defendant submits that:

> To be caught by s 120(2), the person's obtaining of the information need not be in the course of or for the conduct of the investigation. If that were so, there would be a temporal limitation on the prohibition against disclosure, i.e. the prohibition would be limited to the period in which the investigation is ongoing and would cease with the cessation of the investigation. But it is clear from the exception in s 120 (3) (c) (iii), which would necessarily occur after the investigation has ceased, that there is no such temporal limitation.
>
> Rather, the prohibition of disclosure in s 120(2) is ongoing (save for disclosure in the circumstances set out in s 120(3)), and prohibits disclosure of the class of information specified in s 120(1)(d), namely information which was obtained "in the course of or for the conduct of an investigation".[17]

[15] See T 14 of those proceedings.
[16] See [15] of the defendant's written submission dated 30 March 2012.
[17] See [16] and [17] of those submissions.

45. During subsequent oral submissions, the defendant invested in the argument that s 120 is directed not to a particular class of people, but to a particular class of information.[18]

46. The defendant submitted that:

> … the reference to a person [in s120] is not limited …to the person who did the obtaining in the course of, or conducting, an investigation. If that were so it would cover the same ground as s 119… It would effectively be redundant because – or it would have extremely little additional scope. It's very difficult to imagine a circumstance in which the person obtaining the information would be someone other than a person performing the scope of their duty. They obtain the information in the course of their investigation and that's done pursuant to the duties they perform under the Act.
>
> In addition… if that were right when the investigation was over all the information would be free to be disclosed, except by the person who had done the obtaining. Again that would be a very limited scope for the provision, particularly when there is no temporal limitation in s 120. There's nothing which says once an investigation is over the provision has no further effect. And it is clear from the provision of subs 3 (c) (iii) that the prohibition continues after the investigation ceases because there's a need for an exception where you have, for example disciplinary proceedings. And they would obviously occur once the investigation had ceased.[19]

47. During its written submissions, the defendant went on to submit that "written and oral statements and/or records of interview of witnesses conducted or interviewed by an investigating officer would be caught by s 120(2) because these comprise information sought and obtained in the conduct of the investigation (not because they comprise documents *prepared*

[18] See T 15 of the proceedings on 22 June 2012.
[19] See T 16 of those proceedings.

during the course of the investigation)." [20] The defendant says that "it matters not, for s120(2), whether the witness was a member of the public, or the complainant, or the member/s whose conduct is the subject of the complaint".[21]

48. In a similar vein, the defendant submits that "records which came into existence contemporaneously with the events the subject of the conduct being investigated, apart from the investigation (such as car park access logs, Royal Darwin Hospital CCTV footage, member's notebook entries, call centre recordings of communications with members etc) are nevertheless information sought and obtained in the course of or for the conduct of an investigation as caught by s 120(2)".[22]

49. As to the relationship between contemporaneous records and the operation of s 120, the defendant made the following submission:

> It might be argued that even if s 120(2) applies to statements or records of interview of witnesses, it does not apply to these contemporaneous records because the former would not have existed but for the investigation, while the latter had a separate and unrelated existence. However, the former are as much a recording of pre-existing information as the contemporaneous records, being the information stored in the minds of the witnesses and extracted in the conduct of the investigation. That information was not *created* by the investigation (and that is not what s 120(1) refers to), but it was sought and obtained *in the course of or for the conduct of* it. The same applies to the contemporaneous records, which would not have been sought or, in many cases, retained, but for the investigation".[23]

50. During the course of subsequent oral submissions on 22 June 2012 the defendant submitted that a number of documents in Class 1 no longer exist

[20] See [18] of the defendants written submissions dated 30 March 2012.
[21] See [18] of those submissions.
[22] See [19] of those submissions.
[23] See [20] of those submissions.

independently of the investigation.[24] The defendant gives as an example the CCTV footage of the Royal Darwin Hospital reception:

> As a matter of course that footage is destroyed after a fairly limited period. It's only because of the investigation that the footage or copy thereof exists today and it is part of the documents that were sought and obtained in the course of the investigation.
>
> To a similar effect is the car park access logs and the call centre recordings. They wouldn't exist in a transcribed form today if it wasn't for the investigation. Those documents… are really just audio recordings and again they're scrapped after a limited period of time. They've only been transcribed for the purposes of this investigation and that's their existence; that's why they exist.[25]

51. In relation to the investigation contemplated by s 120 the defendant made the following submissions at [21]-[22] of its written submissions dated 30 March 2012:

> As required by ss 95, 97 101 and 103 of the OA, the investigation culminated with: (a) the s 95 Report prepared by DA/S Warden forwarded by the Commander EPSC to the Deputy Commissioner and from there, with the Commissioner's comments, to the Ombudsman; (b) the Ombudsman's assessment of the s 95 Report and her report to the Commissioner; and (c) the commissioner's written agreement with the Ombudsman's assessment (Affidavit Porter, paras 8-11).
>
> The s95 Report comprises the Commander, EPSC's summary of all of the information obtained in the course of the investigation, along with their conclusions, opinions and/or recommendations as to the action/s to be taken. The Ombudsman's report under s97 and the Commissioner's response refer to and comment on the information in the s 95 Report. Leaving aside the exceptions in s 120(3), the s 95 Report, the Ombudsman's report and the Commissioner's response would all be

[24] See T 17 of the proceedings on 22 June 2012.
[25] See T 18 of those proceedings.

caught by s 120(2) as information *obtained in the course of or for* the conduct of an investigation. The "investigation" does not end until the Commissioner gives the Ombudsman a copy of the s 95 Report[26] and the Ombudsman considers that the complaint has been adequately dealt with.[27]

52. After dealing with the exceptions to the prohibition on disclosure of information of the requisite class provided for in s 120(3), the defendant made these submissions: [28]

> The failure to include in s 120(3) any reference to a proceeding for a *civil* action in respect of the action or conduct the subject of the complaint, particularly in the context of references to *criminal and disciplinary* proceedings in respect of that action or conduct, proceedings for an offence against the OA itself, or proceedings under s 20, makes clear that s 120(2) extends to disclosures "for" civil proceedings, such as is sought by the plaintiff here.
>
> The exclusion in s 120(3)(b) (i) is a reference to the act of disclosing the information in a report under the OA. Thus, the disclosure of information obtained in the investigation by the investigating officer who prepares the s95 Report, and the provision of that Report to the Commander EPSC (to be given to the Commander as required by s 95) would fall within s120(3)(b)(i), as would any other disclosure of the s 95 Report required or permitted by the OA.[29]
>
> It would be contrary to the purpose of s 120(2), which is generally to protect the confidentiality of information, if all information obtained in the course of an investigation which was summarised, mentioned in, or attached to a s 95 Report could thereafter be disclosed by any person to anyone else in any circumstance. Section 120(3) (b) (i) would have to be

[26] Section 95 permits the Commissioner to direct that further investigation be conducted.
[27] Section 108(1) (b) permits the Ombudsman to refer the complaint to the Commissioner for further investigation.
[28] See [25]-27] of the defendant's written submissions dated 30 March 2012.
[29] The latter would also fall within s 120(3)(a) if it was a disclosure of the s 95 Report itself in the exercise of a power or performance of a function under the Act.

> read that way to authorise the disclosure of the document sought by the plaintiff. That construction is not to be preferred.[30]

53. By way of further opposition to the plaintiff's application the defendant relies upon the provisions of s 120(4) of the *Ombudsman's Act*:

> Section 120(4), read with s 120(1)(d), prohibits a person who obtains information in the course of or for the conduct of an investigation from making improper use of the information, which means to use the information to gain some private benefit or to benefit or cause harm to someone else(s 120(5). If this is done intentionally, the person commits an offence with a maximum penalty of 2 years imprisonment.
>
> Even if the production of the documents to the plaintiff for his inspection (or that of his legal advisers) was not prohibited by s 120(2), s 120(4) would prevent the plaintiff (or his legal advisers) from using the information in the documents sought for the purposes of pursuing the remedies he seeks in the proceedings as they are a "benefit" within the meaning of s 120(4).[31]

54. During oral submissions the defendant argued that the s95 Report was caught by the prohibition imposed by s 120 of the Act because the report was a summary of "all of the information obtained in the course of, or for the conduct of the investigation".[32] The defendant said the report was "the culmination of the investigation and to the extent that it be disclosed, it may be only because of subs (3)".[33] The defendant went on to submit:

> ….if the person and the information fall within subs(1) then any disclosure to any person, anyone else, is caught by subs (2) unless the disclosure falls within subs (3)…subs (3)…only excludes from subs (2) the acts to which it refers; not the information disclosed by one of the acts.

[30] See *Interpretation Act* (NT) s 62A.
[31] See [28] and [29] of the defendant's written submissions dated 30 March 2012.
[32] See T 18 of the proceedings on 22 June 2012.
[33] See T 18 of those proceedings.

> …if one looks at subs (3) (c) (iii) the act of disclosing the information for a proceeding for an offence or a breach of discipline is excluded from the prohibition in subs (2). But doesn't then render the information freely disclosible for any other purpose by any other person. That would again defeat the confidentiality intention of the provision and in effect it would mean that wherever there's a report, which is most of the investigations there's always a report one way or another, you wouldn't need anything in subs 3 other than (b)(i). And once the information had been disclosed in a report it would then be freely available, But that's not what sub 3 prescribes…[34]

55. The defendant orally submitted that subs (3) "applied to the act of disclosure rather than the information disclosed and the guiding principle…is the legislative intention of the protection of information".[35]

56. The plaintiff takes issue with the defendant's construction of s 120:

> The affidavit of Bruce Douglas Porter deposes that the documents listed at paragraph 6 (a) were "sought and obtained" pursuant to an investigation under s 120 *Ombudsman Act* If it is suggested that the original documents existing independently of and prior to the investigation are themselves protected that suggestion must be dismissed. It is absurd to suggest that the defendant is a person who has obtained information in the course of or for the conduct of the investigation. The Northern Territory is in possession of the relevant documents entirely independently of any investigation. It might be argued, applying the High Court's decision on documents subject to legal professional privilege in *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 that the copies (as opposed to originals) of the documents obtained for the investigation are covered by s 120. However, it is not the copies of the

[34] See T 18-19 of those proceedings
[35] See T 19 of those proceedings.

documents that are sough to be discovered. The obligation of discovery relates to the original documents.[36]

57. During oral submissions made on 30 March 2012 the plaintiff made submissions to the following effect:

- Documents pre-existing any investigation – and created independently of and prior to any investigation - are not caught by s120;[37]
- Such documents were not created for the investigation and are not "information" caught by s 120;[38]
- The relevant information is sought by reason of it being in the possession of the Northern Territory;[39]
- The Northern Territory is not a person who has obtained information in the course of an investigation – the Territory obtained the information by reason of its existence as a police force;[40]
- The purpose of s 120 is to maintain "the confidentiality and integrity of the investigation process";[41]
- The prohibition in s 120 applies to a person who obtains information in the course of an investigation, and has no application to the Northern Territory if it has that information independently of the investigation;[42]
- Consistent with the reasoning underpinning the decision in *Commissioner Australian Federal Police v Propend Finance* the

[36] See [16] of the plaintiff's Outline of Submissions on Discovery dated 29 March 2012.
[37] See T 10 of the proceedings on 30 March 2012.
[38] See T 10 of those proceedings.
[39] See T 11 of those proceedings.
[40] See T 11 of those proceedings.
[41] See T 12 of those proceedings.
[42] See T 14 of those proceedings.

plaintiff seeks production of the original documents – not copies thereof which may have been obtained in the course of an investigation.[43]

58. In the plaintiff's supplementary submissions dated 2 July 2012 it was submitted that s120 is " a penal provision directed at a person who obtains information in the course of or for an investigation and other conduct" and "the disclosure of that information, other than in specified circumstances, is subject to penalty".[44] The plaintiff went on to make these submissions:

> The section is silent about any secondary or further distribution of that information by a person who comes into possession of the information other than in the course of or for an investigation.
>
> The words of a penal provision are to be adhered to strictly and will not be extended beyond a strict application of their words even where it appears the legislature has acted inadvertently: Pearce and Geddes *Statutory Interpretation in Australia* 7th edition at [9.9] and [9.10]. There is no basis for seeking to extend the ambit of the section in the way that defendant urges (and one can imagine that the legislature might wish to avoid penalising the persons in a potentially almost endless chain of transmission of that information). The assertion by the defendant that the extension is necessary to satisfy the "underlying purpose" of the provision, even if that were correct, is not enough.
>
> The second point to be made is that s 120 of the *Ombudsman Act* is not directed to the quality of the information itself but rather the manner in which it is obtained. Section 120 does not create a category of

[43] See T 14 of those proceedings. The defendant countered this argument at T 18 of the proceedings on 22 June 2012: My learned friend said in his oral submissions …."Well we don't want the copies that were obtained in the investigations. We want the originals"… some of the originals no longer exist anyway. But it's artificial in the extreme to distinguish between copies and originals. The protection of documents under s120 would be defeated if one could say "Well we'll protect the copies because they were obtained in the course of the investigation but the originals that are out there, they're freely accessible". They must all have the same life and the same nature.

[44] See [6] of those submissions.

> confidential information (notwithstanding the heading of the section) that retains its confidential character down a chain of transmission. The classic example of this kind of information is the information protected by equity such as a trade secret or personal information. The information, particularly the information sought in Class 1 of the plaintiff's summons, is simply not of that kind. The information in Class 3 of the summons, including documents shown to witnesses and the transcript of the hearing, is not confidential information of the kind protected by equity and section 120 does not transform it into such information.[45]

59. Whether or not the Class 1 documents are caught by the provisions of 120 is a matter of statutory interpretation. What is the meaning and effect of s 120, and how does the provision relate to the documents sought to be produced and inspected?

60. The purposive approach to statutory interpretation has assumed dominance in recent times – and this is reflected in s 62A of the *Interpretation Act* (NT):

> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

61. Despite the dominance of the purposive approach, Geddes and Pearce identify a number of common law principles of statutory interpretation that are helpful in divining the legislative intent of a statutory provision, without impinging upon the core purposive approach.[46]

62. Adopting what is, in effect, a purposive approach to the construction of s 120 of the Act, the defendant contends that on a proper construction of the provision the information contained in the Class 1 documents was obtained

[45] See [6] –[9] of the plaintiff's supplementary submissions dated 2 July 2012.
[46] See Pearce and Geddes *Statutory Interpretation in Australia* 7th edition at [2.23] The common law principles are discussed at [2.24] – [2.43] of the text.

in the course of or for the conduct of an investigation; and for that reason is protected from disclosure.

63. Adopting a similar approach to the construction of the section, the plaintiff argues that on a proper construction of s 120 the information contained in the Class 1 documents was not obtained in the course of or for the conduct of an investigation, because it came into existence independently of and prior to the conduct of the investigation. The plaintiff says that it was not the legislative intent that s 120 would prohibit disclosure of information of that nature. Therefore there is no impediment to the disclosure of the information contained in the Class 1 documents.

64. The starting point is the provision itself and its relationship to other related provisions of the Act. It is important not to focus merely on s120, but to consider the provision in its proper context.[47] This usually requires the relevant Act to be read as a whole.

65. Of particular relevance is the following observation made by Pearce and Geddes:

> The apparent scope of a section may also be limited by other sections in the Act. The courts have said that different sections must be read in such a way that they will fit with one another. This may require a section to be read more narrowly than it would if it stood on its own: *Ross v R* (1979) 141 CLR 432 at 440; *Commr of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479; *Chikonga v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 49 at 51. Or more broadly: *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181 at 191 where it was said that if certain sections were not read subject to another section, the latter "would have very little work to do".[48]

[47] See *K & S Lake City Freighters Pty Ltd v Gordon &Gotch Ltd* (1985) 60 ALR 509 at 514. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.
[48] See Pearce and Geddes n 46 at [4.3].

66. The learned authors proceed to discuss the significance of "context" where an Act is divided into Parts – as is the case with the *Ombudsman Act*:

> It seems that the interpretation of words should start by deriving their meaning from the Act as a whole. However, this approach will be modified if it is apparent that Parts into which an Act is divided are self – contained. Then it can be plausibly argued that the scope of the words is to be derived from the Part and not from the Act as a whole.[49]

67. It is also important to bear in mind the order in which the provisions of a piece of legislation are to be read:

> …I see no reason why the Act should not be read in the ordinary way in which a document is read, that is, from the beginning onwards. In the ordinary course of reading, s 4, although of course it must be read with both what precedes it and follows it, it must be read after s 3 and further, in the ordinary course it seems to me that it must be read in the light of s3. It is preposterous, in the literal sense, to read s 4, make assumptions concerning its purpose based on its language, without reference to what has preceded it and then to read s 3 in light of the purpose thus discerned in s 4. A much sounder way of reaching what the draftsman's purpose was is to read his Act in the sequence in which he wrote it.[50]

68. Although Pearce and Geddes observe that this is consistent with the rule that in the event of a conflict between two provisions in an Act, the later section prevails, it is "something of a rule of last resort".[51] Drawing upon the observations made by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 the learned authors state:

[49] See Pearce and Geddes n 46 at [4;4].
[50] See *Patman v Fletcher's Fotographics Pty Ltd* (1984) 6 IR 471 at 474 cited by Pearce and Geddes n 46 at [4.5].
[51] See Pearce and Geddes n 46 at [4.5].

> …it will often be necessary for a court to determine from the context of an Act which are its leading and which [are] its subordinate provisions.[52]

69. Section 120 is amongst a number of provisions that appear in Division 1 of Part 8 of the *Ombudsman Act*. Part 8 is headed "Confidentiality, Offences and Related Provisions", while Division 1 thereof is headed "Confidentiality and Related Provisions". As to the use that may be made of the headings to Parts and Divisions of an Act as an intrinsic aid to interpretation, Pearce and Geddes have this to say:

1. Headings to Parts and Divisions are part of an Act and cannot be ignored;[53]

2. The headings will be disregarded if they conflict with an otherwise unambiguous provision in a statute. Where the enacting words are clear and unambiguous the headings must give way and full effect must be given to the enactment;

3. The issue of the effect of a heading usually arises in one of two contexts. The first is where the heading is regarded as too narrowly stated to encompass the effect of the sections in the Part of the Act. Where the words of a section are expressed unambiguously and in general terms it is inappropriate in the context of the Act to confine them by reference to the heading.[54] The other context in which problems occur is where a section expressed in general terms is included in a Part in a way that could limit its operation. The issue is complicated further if other sections in that Part fall within the description contained in the heading. Although, prima facie it would appear that the general section should be confined by its context, the context of the Act as a whole may demonstrate that this was not the intent;

[52] See Pearce and Geddes n 46 at [4.5].
[53] See ss 55(1) and (2) of the *Interpretation Act* (NT).
[54] However, in some circumstances the heading can constrain the scope of a section.

4. The law as to the relevant rules is helpfully summarised in *Ragless v Prospect District Council* [1922] 299 at 311:

   (a) If the language of the sections is clear, and is actually inconsistent with the headings, the headings must give way;

   (b) If the language of the sections is clear, but, although more general, is not inconsistent with the headings, the sections must be read subject to the headings;

   (c) If the language of the sections is doubtful or ambiguous, the meaning which is consistent with the headings must be adopted.[55]

70. Section 117 of the *Ombudsman Act*, which is the first provision appearing in Division 1 of Part 8, deals with information disclosure and privilege. It is a general provision which provides that:

   1. an obligation to maintain secrecy or other restriction on the disclosure of information obtained by or given to officers of a public authority, whether imposed by any law of the Territory or otherwise, does not apply to the disclosure of information for preliminary inquiries or an investigation.[56]

   2. in the making of preliminary inquiries or conduct of an investigation, the Territory or a public authority is not entitled to any privilege that would apply in a legal proceeding to the production of documents, or the giving of evidence, for the inquiries or investigation.[57]

71. Section 117 also provides that, subject to Part 8, an individual has, for the giving of information and the production of documents or other things for preliminary inquiries or an investigation, equivalent privileges to the privileges the person would have as a witness in a proceeding in a court.

[55] See also *Napier v Scholl* {1904] SASR 73.
[56] This is subject to the provisions of s 117(3).
[57] This is also subject to the provisions of s 117(3).

72. Section 118 of the Act specifies the circumstances in which the Ombudsman must not require a person to give particular information, answer particular questions or produce particulars documents or things. It is a provision which prohibits the disclosure of particular matters that would be contrary to the public interest or prejudicial to the investigation or detection of an offence against a law of the Northern Territory.

73. Section 119 prohibits a person who acts or has acted in an official capacity under the Act from being called to give evidence in any civil, criminal or disciplinary proceeding about any matter coming to the person's knowledge while acting in that capacity.

74. As submitted by the defendant, the words "disciplinary hearing" in s 119(1) must include procedures under Part IV of the *Police Administration Act*: see the definition of "disciplinary proceedings" in s 4 of the *Ombudsman Act*

75. The next section appearing in Division 2 of Part 8 of the Act is s 120. The combined effect of ss 120 (1) (d) and (2) is to prohibit a person who obtains information in the course of or for the conduct of an investigation from disclosing the information to anyone else. However, that prohibition is subject to a number of exceptions. For present purposes the exception provided for in s 120(3)(b) (i) is relevant. The combined effect of that subsection and the preceding two subsections is that a person who obtains information in the course of or for the conduct of an investigation must not disclose that information to anyone else unless the information is disclosed in a report under the Act.

76. Although s 120 is headed "Confidentiality of Information" that heading is not determinative of the meaning and effect of the provision: it is not determinative of the purpose and intent of s 120.

77. The provision prohibits a person who obtains information in the course of, or for the conduct, of an investigation from disclosing that information to any one else. Contrary to the submission made by the defendant, the phrase

"in the course of, or for the conduct of, an investigation" establishes a temporal connection between the obtaining of the information and the investigation. I respectfully adopt the natural and ordinary meaning attributed to the phrase "in the course of…" by the court in *Re R (WF: Paternity of Child)* [2003] 2 WLR 1485 at 1492. The meaning accorded to that phrase was "during or at a time when". In my opinion, the words "in course of an investigation" designate a period of time running from when the investigation commences to the time it ceases.

78. Similarly, the words "for the conduct of an investigation" impart a temporal dimension to the operation of s 120. The section requires that the information must be obtained for the purposes of – or in respect of - the conduct of an investigation.

79. The word "obtain" as appears in s 120 is of critical importance to the operation of the provision. The natural and ordinary meaning of the word "obtain" is to acquire or to come into possession of something.

80. The prohibition on disclosure imposed by s 120 has only limited operation. First, the prohibition only extends to the person who acquired or came into possession of the requisite class of information. Secondly, the prohibition only covers information obtained by that person in the course of or for the conduct of an investigation. Outside those parameters the section has no operation.

81. Section 120 implicitly acknowledges that the information obtained in the course of or for the conduct of an investigation may already be in existence prior to the commencement of an investigation. For that very reason the provision does not prohibit the disclosure of information that pre-existed an investigation, notwithstanding that very same information was subsequently obtained by a person in the course of or for the conduct of an investigation.

82. In the present case, all the Class 1 documents were in existence prior to the commencement of the investigation, and of course prior to the time they

came into the possession of the investigating officer and members of the EPSC. The documents had a separate and unrelated existence. Indeed, all the documents – except for the CCTV footage at Royal Darwin Hospital – were already in the defendant's possession, either actual or constructive. The documents were already in the possession of the defendant as a police force operating in the Northern Territory.

83. Section 120 does not place a blanket prohibition on the disclosure of information once a person obtains that information in the course of or for the conduct of an investigation – which is the defendant's contention.

84. An important distinction must be made between information which is confidential per se and information which is required to be treated confidentially. Section 120 recognises this important difference. Section 120 simply binds the person – namely the investigating officer and members of EPSC- who obtained the information to confidentiality in relation to that information. Section 120 does not render the information itself confidential – the section merely requires that the person who obtained the information treat the information in confidence. The clear purpose of the section is to preserve the integrity of the investigative process. In order to ensure that objective s 120 operates as a penal provision.

85. Notwithstanding that s 120 is headed "Confidentiality of Information", the words of the section are clear and unambiguous and to the extent that the heading might suggest a broader application of the section – namely to render information of the requisite class confidential per se – the heading must give way to the words of the section.

86. Section 120 of the Act has only limited operation as stated above. It only prohibits disclosure in specified circumstances, that is disclosure by a person under particular circumstances. The section does not prohibit disclosure by a person in other circumstances.

87. In my opinion, the Northern Territory, having possession of the Class 1 documents, is bound to produce the documents and make them available for inspection.

88. I now turn to deal briefly with the other arguments made by the defendant which have not yet been dealt with.

89. In my opinion, the defendant's argument that the broader class of persons to whom s 120 applies serves the interests of protecting the confidentiality of the requisite class of information cannot be sustained.

90. Section 119 has little, if no, influence on the proper construction of s 120 and the ambit of its operation. Section 119 is concerned with the non-compellability of witnesses. The provision speaks for itself. It is concerned with the specific matter of officials giving evidence in certain proceedings. Section 120 is concerned with an entirely different matter, namely, the prohibition on a person obtaining information in the course of or for the conduct of an investigation under the Act from disclosing that information to any other person. It goes beyond disclosure in a court of law.

91. As referred to earlier, the defendant argued:

> The failure to include in s 120(3) any reference to a proceeding for a *civil* action in respect of the action or conduct the subject of the complaint, particularly in the context of references to *criminal and disciplinary* proceedings in respect of that action or conduct, proceedings for an offence against the OA itself, or proceedings under s 20, makes clear that s 120(2) extends to disclosures "for" civil proceedings, such as is sought by the plaintiff here.

92. However, in my opinion, s 120 does not preclude disclosure in civil proceedings in circumstances that exist outside the parameters of, and the preconditions for the operation, of the section.

93. Finally, I do no accept the defendant's contention that the provisions of s120(4) of the Act would prevent the plaintiff from using the information in the Class 1 documents of the purposes of pursuing the remedies he seeks in the current proceedings as they are a "benefit" within the meaning of the section. In my opinion, the plaintiff's pursuit of a lawful remedy by way of civil proceedings could in no way be considered to be an improper use of the information with a view to gaining some private benefit.

- **The public immunity interest argument**

94. The defendant also objects to documents listed in Class 1 (except items 6 and 7) and item 7 of the Class 3 documents on the grounds that the documents are subject to public interest immunity.[58]

95. The documents in question are those identified at [11] of the defendant's written submissions dated 30 March 2012:

(a) the transcript of the directed interviews of Constable Holmes, Constable First Class Bolgar and Sergeant Kidney and the statutory declaration of Bolgar which he was directed to provide (affidavit Porter paras 6 (c), (d), (e) and (f)) (this includes the document at Class 2);

(b) the Section 95 Report including all the attachments thereto (this includes the documents at items 1-5 of Class 1) (affidavit Porter, para 7); and

(c) any other internal reports (i.e. internal to EPSC and the Ombudsman) which relate to the investigation (affidavit Porter paras 8-11).

96. In advancing that argument the defendant relies upon the statements made in *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 concerning public immunity interest .The relevant statements are set out at [6] of the defendant's written submissions dated 30 March 2012:

[58] As previously noted , the plaintiff accepts that there are no documents meeting the description of item 7 of the Class 3 documents, with the result that the public immunity interest claim is only relevant to the Class 1 documents.

- the general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it;

- it is the duty of the court to decide whether the public interest which requires that the document should not be produced outweighs the public interest that a court in performing its functions should not be denied access to relevant evidence;

- the court must weigh the one competing aspect of the public interest against the other and decide where the balance lies;

- a claim to withhold documents because of the class to which they belong (irrespective of the contents of the particular documents) will be upheld if it is really necessary for the proper functioning of the public service to withhold documents of that class from production.

97. The defendant also relies upon the decision of the Supreme Court of the Northern Territory in *Liddle v Owen* (1978) 21 ALR 286. The effect of that decision was that:

(a) reports made by police officers as a result of a departmental inquiry into a complaint by the plaintiff (who sought damages for personal injuries in the proceedings before the Court) of assault by the defendant police officer, which reports flowed from (and referred to) statements obtained from the defendant, another police officer, and other non-police officers; and

(b) statements made by the defendant and another police officer to investigating officers pursuant to lawful directions compelling them to make the statements,

were not be produced to the Court because they were of a class that should be kept secret in the public interest.[59]

[59] See [7] of the defendant's written submissions dated 30 March 2012.

98. According to the defendant, the ratio decidendi of the decision (set out at 291 -292) is as follows:

(a) the provisions and purposes of the *Police and Police Offences Ordinance Regulations* made hereunder caused the documents to fall into a class of evidence the exclusion of which is demanded by the public interest because that legislation intended the most unreserved communications to take place in the investigation of complaints against the police, and that intention would be infringed and the public interest injured if those communications were subject to be produced in court at the suit of an individual;

(b) internal police documents have been recognised to be in a peculiar position and covered by public interest immunity;

(c) the statements given by the defendant and the other police officers under sanction of disciplinary action belonged, for that reason alone, to a class of documents excluded on public policy grounds.[60]

99. Anticipating the plaintiff's argument that the Court is not bound by the decision in *Liddle v* Owen, the defendant made the following submissions:[61]

Notwithstanding subsequent developments in the law, including:

(a) the expression by the High Court of Australia of the scope and nature of public interest immunity and how such claims are to be determined in *Sankey v Whitlam* (1978) 142 CLR 1 (which was not inconsistent with the decision in *Liddle v Owen*);

(b) the overruling by the House of Lords in *Reg v Chief Constable, West Midlands; Ex parte Wiley* [1995] 1 AC 274 of three English Court of Appeal decisions holding that internal police disciplinary/investigation

[60] See [8] of those submissions.
[61] See [9] and [10] of those submissions.

documents are, as a class protected by public interest immunity (i.e. part of the ratio in *Liddle v Owen*)[62]; and

(c) the apparent endorsement of the decision in *Wiley* by the WA Court of Appeal in *Middleton v Western Australia* (1996) 17 WAR 201 at 212,223.

the ratio of the decision in *Liddle v Owen* is binding on this Court.

The *Police and Police Offences Ordinance* referred to in *Liddle v Owen* was replaced in 1979 by the PAA, particularly Part IV dealing with discipline [63] and the provisions of the OA dealing with the investigation into complaints against police (esp. Division 4, Subdivision 2 of Part 7). The legislative intention for unreserved communications identified by Gallop J in *Liddle v Owen* is now expressed in s 83 of the OA, as well as in the compulsion on a member to follow a direction (to answer questions), which is now found in s 76(d) of the Act.

100. The plaintiff contends that the claim of public interest immunity in respect of any documents cannot be maintained:[64]

> Consideration of a claim of public interest immunity involves a weighing process and attention must be directed to the "particular nature of the proceedings in which the claim…arises in order to determine what other relevant aspects of public interest which are to be weighed and what is to be the outcome of the weighing process": *Sankey v Whitlam* .[65] The private right involved might be of such magnitude as to require consideration as part of the public interest[66] and "those who urge Crown privilege for classes of documents regardless of particular contents, carry a heavy burden".[67] The argument that immunity is required for public service

[62] Those cases were *Neilson v Langhorne* [1981] QB 736; *Hehir v Commissioner of Police of the Metropolis*[1982] 1 WLR 715 and *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 ALL ER 617.
[63] See s 3 *Police Administration Act*.
[64] See [17] – [23] of the plaintiff's outline of submissions on discovery dated 29 March 2012.
[65] (1978) 142 CLR 1 at 60.5 per Stephen J.
[66] *Sankey v Whitlam* at 60.7.
[67] *Sankey v Whitlam* at 62.9.

"candour" is no longer tenable[68] and any similar argument in respect of encouragement of police officer candour during investigation should be dismissed.

In *Attorney –General for NSW v Stuart* [69] the precise categories of public interest immunity identified under the general heading of "maintenance of social order and peace" were: protection of the identity of police informers; something used by police in the pursuit of criminals which may give useful information concerning continuing inquiries to those who organise criminal activities; or something that may impede future police activities.

The documents that the defendant refuses to produce do not come within any accepted class of public interest immunity.

As is well known, General Orders are frequently referred to in criminal and coronial proceedings and it seems unlikely that the immunity can arise in one proceeding and not others. Limited parts of General Orders for which production is sought are relevant to the conduct of the police officers at the relevant time. It appears from the s 95 report that the officers failed to obey relevant parts of General Orders, in particular those relating to the use of force, the reporting of the use of force and the taking of contemporaneous notes.[70]

The documents containing the responses of the officers to the Notices of Alleged Breach do not come within any accepted class of public interest immunity.

The transcript of the internal disciplinary hearing does not come within an accepted category or class of documents subject to public interest immunity. The status of an internal investigation report was considered in detail by the Supreme Court of Western Australia in *Middleton v Western Australia*.[71] The Court concluded an internal investigation report was not

[68] *Sankey v Whitlam* at 63.1.
[69] (1994) 34 NSWLR 667 at 675B, 675C.
[70] It is noted that the objection to production of the General Orders was abandoned by the defendant.
[71] (1996) 17 WAR 201 at 216.

> a class of document to which public interest immunity applied. However, it may be that a claim in relation to the content of a particular document may attract the immunity. In this case there is nothing in the affidavit of Bruce Douglas Porter to suggest any basis for a content claim of immunity.
>
> There was no point taken in the Supreme Court proceedings that the transcript of the hearing (or at least the part referred to) or the responses of the officers to the Notices of Alleged were subject to public interest immunity. Public interest immunity is not a discretionary matter and must be acted on by a court whether or not it is raised by a party.[72]

101. The plaintiff elaborated upon these written submissions during the course of oral submissions.[73]

102. The plaintiff submitted that the decision in *Liddle v Owen* has been overtaken by subsequent law in other jurisdictions, and no longer represents good law.[74] The plaintiff submitted that the decision is not binding on this Court.[75]

103. The plaintiff urged the Court to take a narrow view of the ratio decidendi of the case:

> A narrow view of its ratio decidendi should be adopted…that is it was relating to other legislation no longer in existence, secondly it doesn't apply to strictly any of the categories we're seeking discovery of. We're not seeking discovery of reports as between police officers and we're not seeking discovery of the transcript of a directed interview.
>
> So we say that its ratio ought to be seen narrowly and should not be seen to bind….this court. Particularly in circumstances where the philosophy behind the decision has been seen to be wrong in the United Kingdom, and the philosophy behind the decision was considered by the House of Lords

[72] *Sankey v Whitlam* at 68.
[73] See the transcript of the proceedings on 30 March and 22 June 2012.
[74] See T 16 of the proceedings on 30 March 2012.
[75] See T 16 of those proceedings.

in…*Ex Parte Wlley.* A decision that's been followed by the Court of Appeal in Western Australia.

So there is high authority inconsistent with *Liddle v Owen*. And it's for those reasons that its ratio should be construed as narrowly as it can.[76]

104. The plaintiff went on to make the following oral submissions:

The documents that we seek are the notices of alleged breach – disciplinary breach, the responses – in relation to the documents…in Class 1, that is the access logs, the notebook entries, workshop reports, CCTV footage and the call centre recordings – there is no case that suggests those …type of documents should have the public immunity applied to them. Or even documents of a similar nature. And one might …consider it surprising that it's argued that the immunity applies to such documents…

The other documents that we seek, the disciplinary documents, the notice of alleged breach, the response of the officers and the transcript of the internal hearing, are the kind of documents that were previously thought to be documents in respect of which the immunity could arise…but nothing in *Liddle v Owen* …would have contemplated that the documents in Class 1…would come within the immunity.[77]

105. The plaintiff made the following further submissions in relation to the decision in *Liddle v Owen*:

…the reasons that Gallop J held that the first class of documents, that is the reports between police officers and senior police officers, were subject to the public interest immunity are as set out at page 290 of the decision in *Liddle v Owen*, and it appears that his Honour was satisfied of two things:

(a) the documents included statements obtained from persons outside the police force and should be protected from disclosure on that basis; that is they were police sources. And there's a

[76] See T 17 of those proceedings.
[77] See T 17 of those proceedings.

recognised class of immunity for essentially an informer or an informant's immunity but that's not relevant in this case and

(b) they were documents made at a time when disciplinary – or reports made at a time when disciplinary proceedings were threatened against a police officer.

Now in this case that's no longer the case because the police officers here, Holmes and Bolgar, are no longer subject to disciplinary proceedings because of the outcome of *Holmes and Bolgar v Commissioner* where his Honour, Southwood J, granted a permanent stay of the disciplinary proceedings.[78]

106. It should be noted that at page 5 of the transcript of the proceedings on 22 June 2012 the plaintiff accepted that *Liddle v Owen* had been properly decided in relation to the Class 2 documents (that is the transcript of the directed interview) and conceded that document attracted class immunity.

107. In response to the plaintiff's oral submissions, the defendant made oral submissions which may be summarised as follows:

- The present case is factually similar to the situation in *Liddle v Owen*: an action for damages against police officers for assault; a complaint made to police, a departmental inquiry into the allegations; and an application for the production of reports made to superior officers as a consequence of the inquiry and also for statements made by various witnesses to the police conducting the investigation;[79]

- In *Liddle v Owen* Gallop J held that as a class both sets of documents should not be disclosed;[80]

[78] See T 7 of the proceedings on 22 June 2012.
[79] See T 10 of those proceedings.
[80] See T 10 of those proceedings.

- Gallop J found that both categories of documents came into existence in an atmosphere of confidentiality in the same way as the documents under consideration in the present case came into existence;[81]

- Gallop J referred to the provisions and purposes of the *Police and Police Offences Ordinance* and regulations: "that caused the documents to fall into a class of evidence, the exclusion of which is demanded by the public interest because of the intention that there be the most unreserved communications taking place, which intention would be infringed and the public interest injured if the communications were to be produced in court at the suit of an individual";[82]

- Police documents occupy a peculiar position: see for example *Conway v Rimmer* [1968] AC 910, endorsed by the High Court in *Sankey v Whitlam*; [83]

- It is not correct to say that the ratio of *Liddle v Owen* is limited to the directed interview documents as a class;[84]

- In excluding both sets of documents as a class, Gallop J made no reference to the particular contents of the documents and excluded them on a class basis;[85]

- Candour in the public service remains a tenable basis for a public interest immunity claim;[86]

- *Liddle v Owen is* binding on this Court;[87]

- The argument that the decision in *Liddle v Owen* can be distinguished on the basis that the decision dealt with now repealed legislation cannot

[81] See T 11 of these proceedings.
[82] See T 11 of those proceedings.
[83] See T 11 of those proceedings.
[84] See T 11 of those proceedings.
[85] See T 11 of those proceedings.
[86] See T 11 of those proceedings.
[87] See T 12 of those proceedings.

be sustained because "the legislation has been replaced by very similar legislation which hasn't changed in its substance, in relation to the desire of the legislative intention for unreserved communications between persons and police officers in such investigations";[88]

- The repealed legislation has been replaced, particularly by Part IV of the *Police Administration Act*, which includes s 76D which is the provision that says it will be a breach of discipline if a police officer refuses to answer a directed question. The defendant also relies upon Division 2 of Part 7 of the *Ombudsman Act*, and in particular s 83. All of those provisions make the present case indistinguishable from the situation in *Liddle v Owen*.[89]

108. The defendant made the following further oral submission:

> …applying *Liddle v Owen* …[the Court] is bound to firstly refuse the disclosure of the directed interviews, and this is accepted by [the plaintiff]; Secondly, to refuse disclosure and/or the use as evidence in the proceedings of the s 95 report. The s 95 report is the internal report created as a result of the investigation, just as the report the subject of the decision in *Liddle*.
>
> …the s 95 report actually contained as attachments… It contains the documents and materials that were obtained as part of the investigation and that includes a number of documents that are sought within Class 1. Those documents are referred to in the body of the s 95 report and they are protected from disclosure just as the s 95 report itself is because they are referred to, and attached to, that protected document. They are…the culmination, the substance of the investigation; what was sought, what was obtained and then what were the views and opinions referred to in the s 95 report are based on those documents. [90]

[88] See T 12 of those proceedings.
[89] See T 12 of those proceedings.
[90] See T 12-13 of those proceedings.

109. The defendant submitted that if the s95 report were disclosed that would "defeat, in the public interest, that protection of what's in the report itself".[91]

110. Finally, the defendant made the following submission as to the effect of prior disclosures:

> There's a reference made to a number of prior disclosures… in the context of a public interest immunity claim the continuing confidentiality of the documents is an important factor but not a decisive factor. That's well recognised.
>
> …confidentiality isn't a black and white concept. For example the fact that a document has been disclosed to one person doesn't mean it's not confidential because it's not disclosed to the world at large. If that one person's use of the document is constrained the document could still be said to be confidential. Similarly, if a document is posted on a web site it might no longer be confidential because it's available to the public at large. But if the evidence was that no one had actually looked at the web site since it was posted, and then it was removed, it may well still be confidential. So you can't simply say "One person saw it, person Y saw it, person X saw it, therefore it's no longer confidential" It's not that simple.
>
> In this respect the s 95 report has been disclosed to the plaintiff as the complainant. We say that doesn't deny its confidentiality. Under the *Ombudsman Act* s 105(2) the Ombudsman is required to inform a complainant about the outcome of the investigation into their complaint. In this case the Ombudsman gave to the plaintiff's solicitor a copy of the s95 report, although redacted… to some respects, and the copy provided did not include all of the attachments that are referred to in the report.
>
> …that disclosure doesn't render the s95 document no longer confidential… Similarly there is the disclosure of certain documents to the Supreme Court which have been referred to by my learned friend in

[91] See T 13 of those proceedings.

> relation to the public interest immunity aspect of the case …but the documents that were disclosed to the Supreme Court are not the subject of the claim for public interest immunity. They are treated in a different way. And what's clear from Mr Matthew's affidavit… is that none of the Class 1 documents, for example, were disclosed or received as evidence in the Supreme Court proceedings. So they maintain their confidential status.[92]

111. The public interest immunity claim made by the defendant gives rise to a number of issues, of varying degrees of complexity. The starting point is the decision in *Liddle v Owen* for the defendant says that the decision which binds this Court is determinative of the claim, while the plaintiff says it is not binding on this Court, and no longer represents good law.

112. The facts in *Liddle v Owen* were that Liddle brought an action against a member of the police force claiming damages for assault. Liddle had made a complaint to the police officer's superiors and a departmental inquiry was conducted. At the trial of the action Liddle served a subpoena upon the Commissioner of Police calling for the production of reports made as a consequence of the inquiry, and for statements made by the police officer concerned and another officer, both of whom were present at the time of the alleged assault. Both officers had been interviewed by a police sergeant and had been compelled to answer questions pursuant to Regulation 31 (ii) of the *Police Regulations*, under the *Police and Police Offences Ordinance* 1923-1971. The Commissioner claimed privilege for these documents on the ground that they were of a class that should be kept secret in the public interest.

113. It needs to be made absolutely clear the nature of the documents in respect of which the privilege was claimed. The documents were:

    1. Reports between police officers and more senior police officers as a result of a departmental inquiry into the allegations made by the

[92] See T 13- 14 of those proceedings.

plaintiff. These reports flowed from the fact that various statements had been obtained within the department from the defendant and other persons.

2. Statements made by the defendant and the other police officer (who was present at the time of the alleged assault) respectively which were made to investigating superior police officers, pursuant to lawful orders from those superiors to those respective officers requiring them to make the statements.[93]

114. It is also important to have regard to the relevant statutory provisions which came into operation in the case.

115. Under the now repealed s 8 of the *Police and Police Offences Ordinance* the Commissioner of Police was charged and invested with the general control and management of the police officers of the Northern Territory. Section 10 of the Ordinance provided that a member who commits an offence against any provision of the Ordinance or of the Regulations may be charged with having committed an offence against that provision and may be dealt with and punished in such manner as is prescribed. Regulation 31 provided that a member shall not disobey or disregard a lawful order given or transmitted to him by a senior member in the course of his duty.

116. The next step is to closely examine the decision made by Gallop J and his line of reasoning.

117. His Honour was satisfied that by reason of the terms of the Ordinance and Regulations, the Commissioner had a duty to investigate the complaint. His Honour found that the investigation resulted in the creation of the documents in respect of which the privilege was claimed. His Honour

[93] *Liddle v Owen* (1978) 21 ALR 286 at [30]-[35].

further found that the orders given by the police sergeant to the officers requiring them to answer his questions were lawful, or, at least, not shown to be other than lawful.

118. His Honour then proceeded to deal with the claim of privilege in light of the relevant law:

> In this case it is contended that the claim of privilege ought to be upheld on the grounds that it would be contrary to the interests of the Public Service and the Northern Territory Police Force in particular, and therefore contrary to public policy to have the documents made public. Production of a document may be withheld in the public interest either on the grounds of its contents, or else because it belongs to a class which, on the grounds of public policy, must as a class, be withheld from production: *Duncan v Cammell Laird & Co Ltd* [1942] AC 624. The principles have also been stated in a different way by Mason J in *Australian National Airlines Commission v Commonwealth* (1975) 49 ALJR 338 at 343… as follows: "Thus to sustain the claim of privilege it must appear that the public interest will be prejudiced because (1) the contents of the document are such that disclosure will have this effect, as for example, the information the publication of which would injure national defence or diplomatic relations with other countries…or (2) the document is of a class that should be kept secret in the public interest, as for example, Cabinet minutes, communications passing between departmental heads or a departmental head and his minister, notwithstanding that the contents are not such that their publication would injure the public interest…[94]

119. His Honour went on to observe that the claim was identical in respect of both sets of documents, namely that they were of a class that should be kept secret in the public interest.

120. With respect to the first class of documents, his Honour stated:

[94] (1978) 21 ALR at [10] – [30].

> So far as the first class of documents are concerned, I was told that they were reports which flowed from the fact that various statements had been obtained within the department from the defendant and other persons (meaning private individuals outside the Service). The rule that certain evidence is privileged on the ground that its adduction would be contrary to the public interest has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material. A court will proprio motu exclude evidence, the production of which it sees as contrary to public interest, particularly where it falls into a class the exclusion of which has already received judicial recognition, such as sources of police information: see per Lord Simon of Glaisdale in *Rogers v Home Secretary* [1973] AC 388 at 407…That sources of police information have long been held to fall into the class of documents which will be withheld on the ground of public policy unless their production is required to establish innocence in a criminal trial is demonstrated by *R v Hardy* 24 State TR 199……
>
> In *Conway v Rimmer* [1968] AC 910… Lord Reid pointed out the peculiar position of the police and said at 953: "It has never been denied that they are entitled to Crown privilege with regard to documents, and it is essential that they should have it". At p 954 he said: "It would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution."[95]

121. His Honour went on to note that although it was clear that no criminal proceedings had been commenced against the plaintiff (and any such proceedings would now be out of time), his Honour was not satisfied that "the internal inquiry may not yet result in some disciplinary proceedings against the defendant ……"[96]

122. In relation to the second group of documents, His Honour stated:

[95] (1978) 21 ALR at 290.
[96] (1978) 21 ALR at 290.

…such documents have in the past been held to belong to a class of documents which should be excluded on the grounds of public policy….[97]

123. Gallop J's decision in relation to the claim for privilege is to be found at 291 -292 of the decision:

I therefore uphold the Commissioner's claim for the following reasons:

The provisions and purposes of the *Police and Police Offences Ordinance* and *Regulations* made hereunder caused the documents to fall into a class of evidence the exclusion of which is demanded by the public interest. As Lord Lindhurst said in *Smith v East India Co* (1841) 1 Ph 50 at 55: "…looking to the Act of Parliament, it is quite clear that the legislature intended, that most unreserved communication should take place…but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications… they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests"…

I was satisfied that the documents came into existence in an atmosphere of confidentiality, and that the claim for privilege based upon the effective functioning of the Police Force of the Northern Territory was properly based.

The peculiar position of the police has been previously recognised in this field of law and internal reports have been held to be covered by a claim of privilege.

With regard to the second category of documents they were not routine reports but records of interview taken from the defendant and Constable Thorn under the sanction of the disciplinary provisions of the Police Regulations.

[97] (1978) 21 ALR at [10].

124. Notwithstanding the contrary view expressed in England and in *Middleton v WA*, I agree with the submission made by the defendant that this court is bound by the ratio decidendi in *Liddle v Owen*. I do not accept the submission made by the plaintiff that the decision no longer represents good law – and therefore is not binding on this court.

125. The ratio decidendi of the decision is as advanced by the defendant. The reports made by police officers as a result of a departmental inquiry and the statements made by the defendant and another police officer to investigating officers pursuant to lawful directions attracted public interest immunity on the basis that internal police documents have been recognised to be in a peculiar position and as a class covered by public interest immunity.

126. However it does not follow that items 1-5 of the Class 1 documents sought to be produced in the present case attract public interest immunity on the basis that they fall within a class of documents covered by the immunity.

127. It is helpful to consider the observations made by O'Leary J in *R v Robertson* (1983) 21 NTR 1 at 20 - 22 in relation to a claim for public interest immunity for a class of documents, regardless of their contents:

> The question is therefore is whether the documents in the possession of the police relating to their investigation of a crime, which may compendiously be called "police documents, constitute a class of documents that are immune from production within the principles discussed above.
>
> It seems to me that police documents do not form a homogenous class, all members of which must be treated alike, anymore than what Gibbs ACJ called "state papers" form a homogenous class: *Sankey v Whitlam* supra (at 42): "The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from

production, no matter what they individually contain": ibid; see also *Tipene v Apperley* (1978) 1 NZLR 761 at 768.

Obviously, the range of documents that may come into the possession of police or which may be brought into existence by police in the course of an investigation into an offence will be very wide; as I have said, it may range from statements of persons interviewed, reports, memoranda, notes of investigations made, statements of forensic experts and a variety of other documents. Again, those documents may be concerned with nothing more serious than a street accident, or they may relate to the investigation of highly sophisticated and dangerous criminal activities. The public interest in the protection of some of those documents and that information may well be very small; the public interest in the protection of others will undoubtedly be very great: see *Conway v Rimmer* [1968] AC 910 per Lord Pearce at 985-6 and Per Lord Upjohn at 995.

And so it is clear, I think, that some police documents will be of a kind that are entitled to immunity; others will be of a kind that are not….it is well established that there are certain kinds of police documents or police information which, either because they belong to a particular class or because of their contents are protected from disclosure. Perhaps the longest recognised kind of information that is so protected is information which tends to disclose the channels by which the police obtain their information: see *R V Hardy* (1794) 24 St TR 199….

And Lord Upjohn said (at 995): "No one can doubt that a police report dealing with a suspected crime or with matters which might be of conceivable use to the underworld must be privileged,,,,

It seems to me, therefore, that if the privilege from production is to be claimed for police documents or for some particular police documents, whether on the ground that they belong to a particular class of documents or because of their contents, it is necessary that the person claiming privileged "condescend to some particularity", that he describe the nature of the class or of the document, and give reasons why the documents should not be disclosed: see *Re Grosvenor Hotel London (No 2)* 3 WLR

992 at 1015, 1016. If the claim is for class privilege, having regard to the heavy burden of proof on any authority which makes such a claim, that authority must satisfy the court that the withholding of the documents is really "necessary for the proper functioning of the public service": *R V Lewes Justices; Ex parte Home Secretary* [1973] AC 388, per Lord Reid at 401.

128. Whilst the s 95 Report (a document not sought to be produced) clearly falls within the class of internal police reports attracting public interest immunity,[98] the defendant has failed to discharge the heavy burden of satisfying the Court that the documents in Class 1 - as distinct from the s 95 report, which includes as attachments items 1-5 of the Class 1 documents – fall squarely within a protected class of documents.

129. The defendant has failed to discharge that burden for the following reasons:

1. Unlike the situation in *Liddle v Owen,* the documents sought to be produced were neither created nor generated as a result of the investigation of the plaintiff's complaint against police. Those documents were not created for the purpose of the investigation.

2. Unlike the position in *Liddle v Owen*, the documents in question did not come into existence in "an atmosphere of confidentiality". The documents pre-existed the investigation, and hence enjoyed an existence independent of the police investigation.

3. In *Liddle v Owen* Gallop J stressed the importance of the element of "confidence".[99] Although the element of "confidence" is not determinative in upholding a claim for public interest immunity it is a significant element of the immunity. In the present case there was no

[98] It squarely falls within the immune class of "results of internal police inquiries": see *Conway v Rimmer* [1968] AC 910 per Lord Reid at 953.

[99] Gallop J at 290 stated:

" Both categories of documents in respect of which the claim is made came into existence in an atmosphere of confidentiality, but this alone would not be a proper ground for upholding the claim of privilege. Though confidence is not to be equated with public interest, it is frequently a significant element of public interest: see *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 199….."

element of "confidence" in relation to the documents in question. As discussed in *Glare v Birtels* (1991), unreported decision of the Supreme Court of Victoria per Nathan J, the documents were not created in the atmosphere, or as a result, of "unreserved communication between police officers", particularly between inquirer and interviewee within the police force.

4. Consistent with the approach taken by O'Leary J in *R V Robertson* that there are different classes of police documents, the documents sought to be produced do not fall with a class of documents that are immune from disclosure.

5. The documents sought to be produced do not fall within the contemplation of the rationale for public interest immunity – with particular reference to reports between police officers and police officers and other interested bodies. The immunity exists to ensure the proper functioning of the Police Force in the performance of its investigative functions and to promote candour and frankness within that context by allowing investigating officers to discuss relevant matters in question and to express their opinions via internal reports. The immunity ensures that complaints against police officers be fully and properly investigated, and that the conduct of such inquiries not be inhibited by the disclosure of material gathered in the course of such inquiries. Disclosure of items 1-5 of the Class 1 documents could in no way prejudice the proper functioning of the Northern Territory government – in particular the Northern Territory Police Force. The documents per se stand independently of any discussion, commentary or expression of opinion regarding the contents of those documents.[100] It is difficult to see how disclosure of any of the documents sought by the

[100] In *Liddle v Owen* Gallop J referred to the decision of Hogarth J in *Blundell v Guerin* [1968] SASR 38. In the latter case his Honour drew a significant distinction between "the report proper in which the officer discussed the matter in question and expressed his opinion, and the statements of witnesses which accompany it".

plaintiff could be injurious to the public interest under the umbrella of a class of documents attracting public interest immunity.

6. Neither the provisions of the *Ombudsman Act* nor the inquiry conducted hereunder caused the subject documents to fall into a class of documents the exclusion of which is demanded by the public interest.

130. For all of those reasons the documents sought to be produced do not fall within a class of documents that are immune from disclosure.

131. It is noted that the defendant did not seek to argue that the contents of the documents were immune from disclosure on the basis of "contents" public interest immunity. In any event there is insufficient material before the Court to render the documents immune from disclosure on that basis.

132. I accept that minds may differ as to whether the decision in *Liddle v Owen* is binding on this Court. In the event that I have erred in finding that the decision of Gallop J binds this Court - and should have applied the law as articulated in *Middleton v Western Australia*[101] for the purposes of determining the claim for public interest immunity in the present case - then it must follow that the documents sought to be produced do not belong to a class of documents that are immune from disclosure on the basis of public interest immunity. As pointed out by the plaintiff, in *Middleton v Western Australia* the Supreme Court of Western Australia concluded that an internal investigation report was not a class of document to which public interest immunity applied.[102] Although that decision does not preclude a claim of public interest immunity in relation to the contents of a particular document, I agree with the plaintiff's submission that in the present case there is no basis for a content claim of immunity.[103]

[101] (1996) 17 WAR 201 at 216.
[102] See [22] of the plaintiff's outline of submissions on discovery dated 29 March 2012.
[103] See [22] of those submissions.

133. Therefore, even if I have erred in finding that the decision in *Liddle v Owen* is binding on this Court, the result would remain the same, namely the documents sought to be produced are not immune from disclosure on the basis of either class or content public interest immunity.

B: CLASS 3 DOCUMENTS: OPPOSITION ON THE GROUND THAT DISLCOSURE OF THE DOCUMENTS IS PROHIBITED BY PART IV OF THE POLICE ADMINISTRATION ACT

134. The defendant objected to production and/or inspection of the documents listed in Class 3 of the plaintiff's application on the ground that disclosure of the documents is prohibited by Part IV of the *Police Administration Act*.

135. In the final analysis, the defendant objected to the production and/or inspection of only the following documents listed in Class 3:

1. Response of Constable Sean Holmes to the Notice of Alleged Serious Breach of Discipline referred to in paragraph 15 of the Decision;

2. Response of Constable Sandor Bolgar to the Notice of Alleged Serious Breach of Discipline referred to in paragraph 16 of the Decision;

3. Transcript of evidence of the disciplinary hearing.

136. After outlining the procedure for disciplinary action under Part IV,[104] the defendant conceded that Part IV of the Act "does not contain any express restrictions upon the disclosure of information obtained, or documents produced, in the course of or for disciplinary action taken thereunder".[105]

137. Notwithstanding that concession, the defendant made the following written submissions as to the police officer's responses to the allegations;

[104] See [31] of the defendant's written submissions dated 30 March 2012 which makes reference to *Holmes & Bolgar v Commissioner of Police* [2011] NTSC 108 at [45] per Southwood J.
[105] See [30] of those submissions. In its submissions, the defendant pointed to the general prohibition upon the unauthorised publication or communication of information, without reasonable cause, by members or former members (s155).

> …under Part IV, the s 79 notice and the member's response may or may not lead to a disciplinary hearing and/or disciplinary action being taken against the member. Because these documents are kept confidential by EPSC (see Affidavit Porter, par 23) and because of the significant adverse consequences which could follow for a member's reputation and professional standing upon service of a s 79 notice, it is implicit in Part IV that the s 79 notice and the member's response be kept confidential and not be published or disclosed. Similarly, the notice of charge of breach of discipline may or may not lead to disciplinary action being taken, and service of a notice of a charge of could have similar adverse consequences for the member, hence it is implicit in Part IV that the notice not be published or disclosed. Additional support for these propositions is found in the fact that disciplinary hearings under Part IV are held in private (see below).[106]

138. The defendant went on to make the following written submissions in relation to the "hearing documents": [107]

> …unlike the disciplinary hearings of some other bodies charged by statute with responsibilities in relation to professional discipline and the maintenance of proper professional standards,[108] hearings into charges of breach of discipline under Part IV of the PAA are not required to be held in public (s84B). As a matter of practice, they are always held in private (Affidavit Porter para 24).
>
> Because Part IV does not require public hearings, it is implicit, at least where the member/s appointed to conduct the hearing determine/s that it be held in private (s84B(10(d)), that the Act requires that the proceedings

[106] See [32] of those submissions.
[107] See [33] –[37] of those submissions.
[108] See for example, an inquiry conducted by an inquiry committee appointed by the Teachers Registration Board of the NT: *Teacher Registration (Northern Territory) Act* s62(7); an inquiry conducted by the Building Practitioner's Board: *Building Act* s 34L; and an inquiry for the purposes of disciplinary action conducted by the Agents Licensing Board: *Agents Licensing Board* s 84B.

during the hearing, particularly the evidence given by witnesses at the hearing, be kept confidential and not published or disclosed to anyone.[109]

It would defeat the purpose of permitting hearings to be held in private, i.e. to properly and equitably consider the matters before the member/s hearing the charge (s84B91)(d)), if what occurred and was heard during the hearing could be freely disclosed.

On this basis, the documents at items 6 and 7 of the plaintiff's application (the transcript of evidence given and documents put to witnesses during the hearing) would be precluded from disclosure to the plaintiff by Part IV of the PAA.

Also on this basis, the documents at items 1-5 of Class 3 (the s 79 notices of alleged breach of discipline, the responses of the members to the s 79 notices, and the notices of charge of breach of discipline) would be precluded from disclosure because they are preconditions for a private hearing and, if disclosed, would reveal the substance of what occurred and was heard during the hearing, so there is the same implicit prohibition on disclosure as for the recordings of evidence.

139. It seems to follow from these submissions that the defendant does not seek to claim public immunity privilege with respect to the officer's responses and the transcript of the internal disciplinary hearing.

140. As Cross on Evidence points out, although there is no general class public interest immunity applying to documents created for the purpose of police disciplinary proceedings and the use of information contained in them, there may be immunity for particular documents by reason of their contents.[110] However, no such content claim is made by the defendant. In any event, there is no material, or sufficient material, before the Court to justify the Court extending the immunity (on that basis) to the documents sought to be produced.

[109] Save for the purpose of an appeal to a Disciplinary Appeal Board under s 94 (s95(2)).
[110] See Cross on Evidence at [27.109].

141. In response to the defendant's argument, the plaintiff submits that there is no prohibition – either explicit or implicit - in Part IV of the *Police Administration Act* on the disclosure of the documents sought to be produced and/or inspected.

142. More particularly, the plaintiff says that although there is no statutory requirement for a disciplinary hearing to be held in public, nor is there any requirement that a hearing be held in private.[111] The plaintiff further argues that the fact that, as a matter of practice, such hearings are held in camera, does not imbue such hearings with a sufficiently confidential status to render the documents sought to be produced immune from disclosure.[112] The plaintiff also relies upon the fact that there is nothing in the Act that restricts access to a transcript of the disciplinary proceedings.[113]

143. The starting point is the statutory regime that governs disciplinary hearings under the *Police Administration Act*.

144. Division 3 of Part IV of the *Police Administration Act,* which deals with disciplinary powers and proceedings, is silent as to whether hearings in relation to charges of breach of discipline conducted under s 84B of the Act are to be held in public or private. There is neither a requirement that such hearings be held in public nor a requirement that they be held in private.

145. In those circumstances it cannot, in my opinion, be properly said that hearings under s 84B (1) (d) are implicitly to be held in private.

146. Given that there is no general right to privacy and in light of the statutory equivocation (as referred to above), it is apposite to apply the guiding principle that judicial proceedings and quasi-judicial proceedings (conducted under statute) should be open to the public.[114]

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[111] See T 21 of the proceedings on 22 June 2012.
[112] See T 21 of those proceedings.
[113] See T 20 of those proceedings.
[114] See *Kalaba v Commonwealth* [2004] FCA 763; *Giller v Procopets* [2004] VSC 113 at [187]-[189].

147. In my opinion hearings under s 84B(1) (d) are of sufficient character to attract the description of "quasi-judicial proceedings" for the following reasons:

1. There is provision for legal representation;

2. The proceedings are to be heard and determined according to a recognised legal standard of proof, namely the civil standard of proof – on the balance of probabilities.

3. Although the rules of evidence are not binding the rules of natural justice (or procedural fairness) apply; and

4. There is a requirement that the proceedings be a matter of record: the hearing is to be electronically recorded.

148. Many statutory disciplinary bodies have a discretionary power to conduct hearings in private, or to limit the publication of proceedings. However, it is difficult to divine a legislative intent that members conducting a hearing under s 84B were to be invested with a discretion as to the openness or otherwise of such hearings.

149. If the legislature had intended to confer a discretion as to the openness or otherwise of a hearing conducted under s 84B it was entirely open to the legislature to say so - in much the same way as s 31(1) of the *Independent Commission Against Corruption Act* 1988 provided:

> A hearing may be held in public or private, or partly in public and partly in private, as decided by the Commission.[115]

150. However, there is nothing under s 84B or elsewhere under the Act that approximates a provision of that substance and effect.

[115] See the decision in *ICAC v Chaffey* (1993) 30 NSWLR 21 where the section was considered.

151. In my opinion, s 84B(1) (d)[116] falls short of conferring a general discretion upon those members conducting a hearing to decide whether the hearing should be conducted in public or in private.

152. The phrase "the hearing shall be at the discretion of the prescribed member or members" is far too vague or imprecise to confer such a general discretion in view of the guiding principle that quasi judicial proceedings – like those conducted pursuant to s 84 B of the Act – are to be open to the public. In my opinion, the phrase was intended to govern the actual conduct of a hearing rather than to relate to any decision on the part of the presiding members to determine whether or not the hearing should be conducted in public.

153. However, if I have erred in the view I have taken of s 84B(1)(d) and that, in fact, the subsection does confer a discretion as to whether hearings are conducted in public or private, it follows that disciplinary hearings are not necessarily conducted in an atmosphere of confidentiality. It also follows that the production of the documents sought to be produced are not implicitly prohibited from being disclosed by Part IV of the *Police Administration Act* because of the private and confidential manner in which s 84B hearings are conducted.

154. It is also clear that in the event s 84B(1)(d) confers such a discretion, the discretion, in the present case, was not exercised, or properly exercised, as the evidence shows that hearings conducted under s 84 are automatically conducted in private.

[116] The section provides as follows:

> Subject to this section, the hearing shall be at the discretion of the prescribed member or members conducting it and shall be conducted with as little formality and technicality as possible, given the need to properly and equitably consider the matters before the prescribed member or members.

155. If such a discretion exists, then it must follow that some hearings will be open to the public, while others will be held in private. Whether or not a hearing is held in private will depend on all the circumstances, and should be decided case by case. Furthermore, confidentiality could only attach to those hearings determined to be held in private – akin to a "closed court".

156. So even if s 84(1) (d) does confer a discretion in the relevant sense, the failure to exercise, or to properly exercise, that discretion in the particular circumstances of the present case would have to weigh heavily against according confidential status to the documents sought to be produced.

157. The fact that a hearing under s 84B must be electronically recorded is a matter of some significance, which does not sit comfortably with the notion that disciplinary hearings are to be conducted in private. As pointed out by one commentator, "tribunals are not generally required to make a transcript or notes of evidence, but any records they do compile are discoverable in related court proceedings."[117] The requirement that the proceedings be electronically recorded not only enhances the discoverability of the record of the proceedings but also the accessibility to the information contained in that record. This is particularly so as there is no provision in the *Police Administration Act* prohibiting disclosure of the contents of a transcript. Nor is there any provision restricting access to the transcript and its contents. In short, there is no restriction on the publication of proceedings.

158. In advancing its argument that the documents sought to be produced are protected from disclosure on the basis of the confidentiality of disciplinary proceedings under the Act, the defendant relied principally upon the fact that hearings conducted pursuant to s 84B are always conducted in private. Although that may in fact be the case, that habitual practice does not preclude the production and/inspection of the documents in question. Whether or not the documents are immune from production depends on a

[117] See Forbes *Justice in Tribunals* at [12.6] citing *Carr v Queensland Newspapers Pty Ltd* [1975] Qd R 169.

proper construction of the relevant provisions of the Act, and whether or not those provisions either explicitly or implicitly prohibit disclosure of the subject documents. For the reasons given above the Act neither explicitly or implicitly prohibits production of the documents in question.

159. It needs to be noted that the defendant no longer seeks to argue that disclosure of the various notices issued and served on the two police officers are implicitly prohibited from disclosure because of the adverse consequences on the reputation and professional standing of the police officers, in the event that notices do not lead to disciplinary action being taken. That is because they were received as evidence in the Supreme Court in *Holmes & Bolgar v Commissioner of Police* and the notices are available for inspection with the Registrar's consent. That only leaves the responses of the police officers and the transcript of the disciplinary proceedings.

160. In my opinion, the fact that the responses of the two police officers may affect their reputation and professional standing does not provide a sufficient basis for imposing an implicit prohibition on the disclosure of those responses in subsequent court related proceedings. If that were a matter of concern then one would have expected the legislature to have dealt with the matter in an explicit and direct manner by requiring disciplinary hearings to be conducted in private. Furthermore, nowadays many disciplinary tribunals or bodies are required to conduct disciplinary hearings in public or have a discretion as to whether a hearing is conducted in public or private. That tends to suggest a shift in public policy away from protecting the reputation and professional standing of those who are subject to disciplinary proceedings.

161. The end result is that I do not accept the defendant's submissions as to the confidentiality of the disciplinary process embarked upon under the relevant provisions of the *Police Administration Act*, and hence do not consider that the responses from the two police officers or the transcript of the

disciplinary hearing conducted under the provisions of the Act should be protected from production and/ or inspection.

RULING ON THE PRODUCTION AND INSPECTION OF THE SUBJECT DOCUMENTS

162. My ruling on the plaintiff's application is as follows:

1. Items 1-5 of the Class 1 documents are not caught by s 120 of the *Ombudsman Act* and are therefore not prohibited from being disclosed. Those documents should be produced and made available for inspection by the plaintiff.

2. Items 1-5 of the Class 1 documents do not attract public interest immunity. Those documents should be produced and made available for inspection by the plaintiff.

3. In relation to the Class 3 documents, the responses of Constables Holmes and Bolgar to the Notice of Alleged Serious Breach of Discipline and the transcript of evidence of the disciplinary hearing are not prohibited from being disclosed by Part IV of the *Police Administration Act*. Those documents should be produced and made available for inspection by the plaintiff.

163. I will hear the parties in due course as to any further orders that are necessary to dispose of the plaintiff's application.

Dated this 3rd day of September 2012.

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Dr John Allan Lowndes

STIPENDIARY MAGISTRATE