

CITATION: *Morgan v Commissioner of Police*
[2019] NTSC 62

PARTIES: LEE MORGAN

v

THE COMMISSIONER OF THE
NORTHERN TERRITORY POLICE

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 1 of 2019 (21901977)

DELIVERED: 8 August 2019

HEARING DATE: 12 June 2019 and written submissions
concluding 12 July 2019

JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Practice and Procedure – Application for particular discovery – Principles to be applied – Pre-conditions for the making of an order – When documents are relevant to a “question” in the proceedings – Factors relevant to discretionary considerations – Confidentiality of documents – When confidentiality considerations can lead to restriction on production of discoverable documents.

Ombudsman Act ss 4, 65, 66, 80, 120.

Police Administration Act ss 76(b).

Supreme Court Rules (NT) rr 1.09, 29.01(1), 29.08(1A), 29.08(1).

Matzat v The Gove Flying Club Inc. & Ors [1996] NTSC 9.

Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd & Ors [2009] NTSC 68.

Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor [2011] NTSC 53.

Cook v Modern Mustering Pty Ltd & Ors; Savage & Ors v Modern Mustering Pty Ltd & Ors [2013] NTSC 78.

Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor [2014] NTSC 58.

Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru (Italy) [2015] NTSC 32.

Wickham Point Development Pty Ltd v Commonwealth of Australia [2018] NTSC 7.

Mobil Oil Australia Ltd v Guina Developments Pty Ltd [1996] 2 VR 34.

Hearne v Street (2008) 235 CLR 125.

REPRESENTATION:

Counsel:

Plaintiff:	R Murphy
Defendant:	D McConnel

Solicitors:

Plaintiff:	Murphy & Associates
Defendant:	Solicitor for the Northern Territory

Judgment category classification: B

Judgment ID Number: Lup1902

Number of pages: 26

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

Morgan v Commissioner of Police [2019] NTSC 62

No. 1 of 2019 (21901977)

BETWEEN:

LEE MORGAN
Plaintiff

AND:

**THE COMMISSIONER OF THE
NORTHERN TERRITORY POLICE**
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 8 August 2019)

- [1] The substantive proceedings were commenced by Originating Motion. Although initially the current interlocutory summons sought an order that the proceedings continue as if commenced by Writ, that was subsequently abandoned and all that remains for decision on the summons is the application in respect of discovery orders.
- [2] That is relevant because there is no general discovery in respect of proceedings commenced by Originating Motion.¹ The only scope for an order for discovery in proceedings commenced by Originating Motion is by

¹ SCR 29.01(1).

way of an order for particular discovery pursuant to Rule 29.08(1) of the *Supreme Court Rules* (SCR), which by reason of Rule 29.08(1A) applies to all proceedings.

[3] Rule 29.08(1) provides as follows:

29.08 Order for particular discovery

(1A) This rule applies to all proceedings in the Court.

(1) Where at any stage of a proceeding, it appears to the Court from evidence or from the nature or circumstances of the case, or from a document filed in the proceeding, that there are grounds for a belief that a document or class of documents relating to a question in the proceeding may be or may have been in the possession of a party, the Court may order that party to make and serve on any other party an affidavit stating whether the document or any and if so what document or documents of that class is or has been in his possession and, if it has been but is no longer in his possession, when he parted with it and his belief as to what has become of it.

(2) Omitted.

[4] The principles relative to orders for particular discovery are well established. Indeed, there was little reference to Rule 29.08(1) or to any of the authorities in the course of argument which I think is a reflection on the settled and uncontroversial state of the law in respect of such applications.

[5] Notwithstanding that, the following brief summary of the principles will help set the context. The principles have been restated in a number of recent authorities.² Succinctly, where it is established on the pleadings or by

² *Matzat v The Gove Flying Club Inc. & Ors* [1996] NTSC 9; *Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd & Ors* [2009] NTSC 68; *Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor* [2011] NTSC 53; *Cook v Modern Mustering Pty Ltd & Ors; Savage*

evidence that there are grounds for belief that documents relating to a question in the proceedings may have been in the possession of a party, the Court may order that party to make and serve an affidavit stating whether the documents are or have been in that party's possession and, if the documents are no longer in that party's possession, when the party was last in possession of the documents and what has become of the documents.

- [6] Rule 29.08(1) refers to "... *documents relating to a question in the proceeding...*" and the word "relating" in that phrase requires a relevance connection between the issues in the proceedings and the documents sought. In turn, "*question*" is defined in Rule 1.09 which provides as follows:-

question means a question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the Court, by a party or by a person, not a party, who has a sufficient interest.

- [7] That definition confirms, by the phrase "*by the pleadings or otherwise*", that a question for the purposes of Rule 29.08(1) is not limited to issues or matters raised on the pleadings. That the order is discretionary is evidenced by the use of the word "may" in Rule 29.08(1), hence the circumstances of the case must warrant the exercise of the Court's discretion to order that the documents be discovered. In turn, as with all judicial discretions, it must be exercised with regard to all relevant factors. As for discovery generally, the

& Ors v Modern Mustering Pty Ltd & Ors [2013] NTSC 78; Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor [2014] NTSC 58; *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru (Italy)* [2015] NTSC 32.

admissibility of a document is not determinative of its discoverability pursuant to Rule 29.08(1).

- [8] The following summary of the core background facts will also serve to put the application of the principles and the arguments of the parties into context.
- [9] The genesis of the matter was the Plaintiff's application for promotion to the rank of Superintendent within the Northern Territory Police Force. The process for such promotions involves a number of steps. Firstly, an application by interested persons. Secondly, an initial screening of the applicants by the Police Standards Command (PSC). Thirdly, an interview by the Executive Promotion Deployment Panel (EPDP) and lastly, the placement of applicants on a promotion list in order of merit, coupled with a recommendation to the Commissioner of Police.
- [10] The Plaintiff applied for promotion on 31 May 2018. He was placed on the Superintendent promotion list on 13 September 2018 and ranked in second place. In the ordinary course that meant that the Plaintiff would have been the second person offered a promotion.
- [11] In 2016 the Plaintiff was an Acting Superintendent in Katherine. In that position he was responsible for certifying the standard and completeness of a report to the Coroner into a death. The Plaintiff certified that the death had been fully and properly investigated by Northern Territory Police.

- [12] A complaint concerning that investigation was apparently made on 4 April 2018. Other than the fact of the complaint, there was very little evidence before me in respect of the complaint. The actual complaint document, if it was in writing, was not put in evidence.
- [13] Assistant Commissioner Gallagher (Gallagher) was tasked to investigate the complaint. Likewise, I do not have any evidence as to when his investigation commenced other than that it was obviously after 4 April 2018 when the complaint was apparently made.
- [14] Gallagher's investigation overlapped with relevant events in the timeline of the Plaintiff's application for promotion and his placement on the Superintendent promotion list. As a result of the ongoing investigation into the Coronial matter, Deputy Commissioner Nicholls (Nicholls) suspended the Plaintiff from the Superintendent promotion list on 26 November 2018.
- [15] Gallagher's investigation ultimately cleared the Plaintiff of any wrongdoing and he was subsequently reinstated on the promotion list. By that time the Plaintiff missed the opportunity for promotion and some five promotions of persons on that same promotions list were made in the interim.
- [16] After those promotions were announced and before they were finalised, the Plaintiff commenced the current proceedings and sought interim injunctions restraining the Defendant from completing those promotions.

[17] The interim injunctions sought were refused by Hiley J on 9 January 2019 but the proceedings continue in respect of the alternative relief sought in the Originating Motion. At the date of argument of the current application the Plaintiff had proposed an Amended Originating Motion. Although the Plaintiff has not been granted leave to file that document, the argument proceeded on the basis of the pleadings in that document. That would suggest that the Defendant will not be opposing the grant of leave. Based on that proposed Amended Originating Motion, the relief now sought is a declaration firstly, that the suspension of the Plaintiff from the promotions list was ultra vires and void and secondly, that the Plaintiff has been denied natural justice in respect of the decision to suspend him from the Superintendent promotion list. In conjunction, the Plaintiff seeks an order in the nature of certiorari quashing the decision of Nicholls to suspend him from the promotion list.

[18] The documents that the Plaintiff seeks by way of particular discovery are:-

1. All documents pertaining to the Professional Standards Command (PSC) investigation into the Plaintiffs (sic) purported integrity issue with the allocated file no. IntInv2018-0623/October/2018;
2. All documents relevant to any preliminary investigations into the Plaintiffs (sic) purported integrity issue prior to that investigation being allocated to the PSC for investigation;
3. All Executive Promotion Deployment Panel (EPDP) documents from 31 May to 1 October 2018 pertaining to the EPDP's determination to recommend that the Plaintiff be placed on the superintendent promotion list including the EPDP's report to the Commissioner dated 13 September 2018;

4. All EPDP documents pertaining to the EPDP's determination to suspend the Plaintiff from the promotion list in November 2018, including the EPDP's report to the Commissioner.

[19] The Defendant does not oppose the orders referred to in subparagraphs 3 and 4 above and only the orders referred to in subparagraphs 1 and 2 above are opposed.

[20] Rule 29.08 requires the Plaintiff to either produce evidence to establish a ground for belief that a document or a class of documents relating to a question in the proceeding may be or may have been in the possession of the Defendant or to demonstrate that such a belief is apparent on the pleadings.

[21] For that purpose the Plaintiff relies on the affidavit of the Plaintiff made 7 April 2019 and seeks to rely on inferences claimed to be available based on the matters deposed to in that affidavit. In summary, in chronological order the facts on which the inferences are sought to be drawn are:-

1. On 4 April 2018 the relevant complaint was received and sometime thereafter Gallagher commenced an investigation;
2. On 1 September 2018 Gallagher first spoke to the Plaintiff in respect of the investigation;
3. On 6 September 2018, i.e. five days later, the Plaintiff was interviewed by the EPDP. The panel consisted of Gallagher, Nicholls and the Director of Police Human Resources, Ms Leanne Hulm (Hulm).

4. On 13 September 2018 the EPDP placed the Plaintiff on the Superintendent promotion list and ranked him in second place.
5. On 27 September 2018, Gallagher submitted an application to Nicholls for an extension of time to consider action against the Plaintiff under Part IV of the *Police Administration Act* (PAA). This was required as an investigation of a police officer for breaches of the PAA must be completed within six months unless an extension is granted beforehand. The six-month period in respect of the relevant complaint ended on or about 3 October 2018;
6. On 27 September 2018 Nicholls approved Gallagher's request for the extension;
7. On 26 November 2018 the PSC provided an "integrity report" to the EPDP. What this contained was not the subject of evidence but it at least reported that the Plaintiff was the subject of an active investigation and file number IntInv2018-0623/October/2018 was allocated to it;
8. On the same date the EPDP, this time consisting of Nicholls, Assistant Commissioner Murphy and Hulm, met and determined which of the persons on the Superintendent promotion list would be recommended for promotion for the five Superintendent positions then available. In the course of that meeting Nicholls suspended the Plaintiff from the promotions list based on the integrity report

referred to in the preceding subparagraph and the Plaintiff was not considered for promotion;

9. On 27 November 2018, by email, Gallagher confirmed to the Plaintiff that he was being investigated to determine whether he had breached section 76(b) of the PAA, specifically whether he had been negligent, inefficient or careless in the discharge of his duties in respect of the Coronial matter.

[22] Salient features of some of the documents in evidence are as follows:-

1. Gallagher's application to Nicholls for an extension dated 27 September 2018: This refers to an alleged breach of discipline by the Plaintiff with respect to the Coronial matter. In part it provided "*Inquiries have commenced*" and "*An investigation has now commenced* (*emphasis added*) as to whether or not Mr Morgan has committed a breach of discipline pursuant to section 76(b) of the Act in that he was 'negligent, inefficient or careless in the discharge of his duties'. It did not specify when the investigation had commenced;
2. Email Gallagher to Plaintiff 27 November 2018: Inter alia Gallagher said, "*Since we last spoke about the matter, inquiries have continued* (*emphasis added*) in respect of the death of [name of deceased] in March 2016... I cannot, at this time, go into the specifics of the results of further investigations (which are ongoing) but I am able to say that an issue has arisen as to whether or not you have committed

a breach of discipline as outlined in section 76(b) of the Police Administration Act, that is, whether or not you were ‘negligent, inefficient or careless in the discharge of your duties’... I have not yet determined as to how the allegation against you should be progressed. I am hopeful of making that determination sometime this week...". On the evidence before me the reference in that email to when Gallagher and the Plaintiff last spoke must refer to their discussions in Katherine on 1 September 2018.

3. Email from the Commissioner of Police to the Plaintiff dated 3 January 2019: In this email the Commissioner stated that an initial integrity report was provided by the PSC on 18 June 2018 which identified that there were then no current integrity issues or active investigations in relation to the Plaintiff. The Commissioner also noted that the EPDP relied on that integrity report as part of the process for shortlisting for Superintendent promotions. However, the Commissioner also pointed out that a subsequent integrity report was provided by the PSC on 26 November 2018³ which contained information regarding an active investigation concerning the Plaintiff and due to that report the EPDP recommended, and the Commissioner approved, the Plaintiff's suspension from the promotion list pending the outcome of that investigation;

³ This is the same report as is referred to in sub paragraph 7 of paragraph 21 above.

4. The Transfer and Promotion for Superintendents Instruction⁴:-

73. The EPDP is able to demonstrate that the process was a proper and fair assessment of:

.....

73.4 integrity reports and disciplinary history;

.....

75. Short-listing is a systematic sortation of applicants who present distinguishable claims and demonstrated skill-set against the rank criteria for the rank of Superintendent. It may rest on the applicant's inability to satisfy rank specific essential criteria, or due to being subject to an internal investigation.

85. The Commissioner of Police or delegate may suspend or remove an applicant from the Promotion List or any part of a process relating to placement on a Promotion List if the Commissioner receives information as to the applicants integrity (being information that was not previously considered), or work performance which causes the Commissioner to form the opinion that the applicant is not suitable for promotion.

[23] In relation to the substantive relief sought Mr Murphy, counsel for the Plaintiff argued that the facts supported an inference that Gallagher's inquiry into the Coronial matter had been previously considered by Nicholls and therefore Nicholls could not again consider it for the purposes of suspending the Plaintiff from the promotion list by reason of paragraph 85 of Exhibit P1. It is on that basis that the Plaintiff argues that his suspension from the promotion list was ultra vires. The denial of natural justice is based on the Plaintiff not having been given an opportunity at interview, and prior to the suspension, to address the integrity issue.

⁴

Exhibit P1.

[24] The argument relies on a number of relevant facts. Firstly, that Gallagher was handling the investigation of the complaint regarding the Coronial matter. Secondly, that Gallagher spoke to the Plaintiff concerning that on 1 September 2018. Thirdly, that both Gallagher and Nicholls were members of the EPDP who interviewed the Plaintiff on 6 September 2018. Lastly, that Gallagher applied to Nicholls for the extension on 27 September 2018.

[25] Relevant to establishing the prerequisite for an order pursuant to SCR 29.08 (1), Mr Murphy argued that it could be inferred that Gallagher discussed the investigation into the Plaintiff's handling of the Coronial matter with Nicholls in the lead up to the Plaintiff's interview on 6 September 2018 and thereafter for the purpose of determining if the Plaintiff should be placed on the promotion list.

[26] I consider that such an inference is available given the time frames involved, the stage of the investigation into the Coronial matter and the relative contemporaneity of events with the conducting of interviews for the Superintendent positions. Gallagher had shown the Plaintiff a video that was missing from the Coronial file at the meeting on 1 September 2018. The omission of that video put doubt on the Plaintiff's certification that the subject report to the Coroner was complete. That suggests that the focus was, at least by that time, on the Plaintiff's involvement in that Coronial investigation. Noting that Gallagher's investigation commenced as early as 4 April 2018, all that indicates that Gallagher's discussions with the Plaintiff on 1 September 2018 concerned the Plaintiff's performance in the Coronial

matter and not the integrity of the investigation generally as the Defendant was later to argue.

[27] Further, in Gallagher's email to the Plaintiff of 27 November 2018,⁵ Gallagher stated that inquiries 'have continued' since he spoke with the Plaintiff, referring in my assessment, to the discussion on 1 September 2019. In turn that satisfies me that the discussions on 1 September 2018 were for the purposes of an investigation of the Plaintiff as opposed to the overall police performance. As the discussions on 1 September 2018 occurred only five days before the Plaintiff's interview by the EPDP, and as both Gallagher and Nicholls were members of that panel, given the obligation on the EPDP to consider integrity issues and disciplinary history,⁶ for all of these reasons I agree that it was likely that the investigation into the Coronial matter had been considered by Nicholls before he suspended the Plaintiff from the promotion list.

[28] I consider that inference to be a strong one and in the absence of any evidence from the Defendant to contradict it, I am prepared to draw that inference. The only evidence that the Defendant submitted on the application was a Police General Order titled Complaints Against Police.⁷ That is a protocol to deal with investigation of complaints against Northern Territory Police Force members⁸ but that was put in evidence to support the

⁵ Annexure LM5 to the Plaintiff's affidavit made 7 April 2019 see subparagraph 2 of paragraph 22 above.

⁶ Paragraph 73 of Exhibit P1.

⁷ Exhibit D2.

⁸ Paragraph 2 of the General Order.

Defendant's confidentiality argument (see below), and does not provide any basis to challenge the availability of the inference.

- [29] Mr McConnel, counsel for the Defendant argued that none of the events leading up to the Plaintiff's suspension from the Superintendent promotion list were matters which had been previously considered within paragraph 85 of Exhibit D1. He did not provide any direct evidence from relevant persons. Instead he argued that based on an interpretation of the wording in some documents which were in evidence. He argued that those showed that Gallagher's investigation was an investigation into how the Police overall had handled the Coronial matter, rather than specifically the conduct of the Plaintiff in that matter. In part Mr McConnel relied evidence of the Plaintiff where the Plaintiff states that Gallagher spoke to him on 1 September 2008, "*.. concerning an investigation that he was conducting into a coronial file that had concluded in 2016 (the [name of deceased] coronial file).*"⁹ There is nothing in that paragraph which conclusively indicates that Gallagher had told the Plaintiff that he (Gallagher) was then investigating the Plaintiff's handling of that matter as opposed to the overall police conduct.

- [30] I think that argument overly relies on isolated and relatively ambiguous terms in correspondence and imprecise choice of wording in the Plaintiff's affidavit and interprets both in an overly formal way. The Defendant could better have made its case by providing clear and direct evidence from persons in the Defendant's camp, such as Nicholls and Gallagher. Likewise,

⁹ Paragraph 6 of the affidavit of the Plaintiff made 7 April 2019.

the Defendant could have provided pertinent documents to provide a basis to challenge the inferences.

- [31] Mr McConnel also submitted that the Plaintiff's role in the relevant Coronial matter had not become an integrity issue in respect of the Plaintiff until much later and specifically, contemporaneously with the suspension of the Plaintiff from the Superintendent promotion list when Nicholls considered the integrity report on 26 November 2018. No evidence about this was led by the Defendant, which evidence would clearly be available to the Defendant, so that submission was an unsupported one. More importantly it is inconsistent with the bulk of the evidence, such as Gallagher's application for an extension dated 27 November 2018¹⁰ where Gallagher refers to the investigations 'continuing', and the timing of Gallagher's visit to the Plaintiff on 1 September 2018 relative to the interview of the Plaintiff by the EPDP, where both Gallagher and Nicholls were panel members and were obliged to consider integrity issues.

- [32] The Defendant's position is not strong and is only barely arguable. In the same way, the Commissioner pointed out in his review of the Plaintiff's suspension from the promotion list that the initial integrity report confirmed the Plaintiff was not then subject to any active investigation but that an issue had arisen by the time of the second integrity report. Although when looked at in that way it can be argued that the second report is a new matter,

¹⁰ Annexure LM5 to the affidavit of the Plaintiff made 7 April 2019, see subparagraph 2 of paragraph 22.

with respect, that is simplistic and looks at the two integrity reports in isolation and without regard to the plethora of other surrounding facts which supports a finding that the integrity issue had already been considered.

[33] Therefore, on the evidence before me, I accept the Plaintiff's submission in respect of those documents and I am prepared to draw the necessary inference. That establishes the prerequisite for enlivening the discretion under Rule 29.08(1).

[34] Relevant to the exercise of discretion, Mr McConnel raised confidentiality arising from the Police General Order¹¹ and argued that the Plaintiff should not therefore be provided with those documents. In addition, and very late in the hearing, just before concluding his case, Mr McConnel raised, for the first time, the statutory prohibition in section 120 of the *Ombudsman Act* (“OA”). The application of that section was raised as an afterthought and was not properly developed in the very brief submissions by the Defendant on that point. The Plaintiff was taken by surprise by this latter point and understandably was unable to contribute to the discussion.

[35] After the hearing had concluded and after I had commenced considering my reasons, I formed the view that it was unsatisfactory for the Defendant to simply raise the application of section 120 of the OA without proper consideration of the issue and without proper submissions. I was also

¹¹ Exhibit D2.

concerned that the Plaintiff had not been on notice and had not had an opportunity to address the point. Therefore I called for written submissions.

[36] Dealing first with the confidentiality argument. Mr McConnel argued that as the Police General Order (Exhibit D2) makes matters concerning a complaint against a Police member confidential, by analogy that also applied to complaints in respect of internal disciplinary provisions and therefore the documents sought were confidential. I do not accept that analogy. There are good reasons why different considerations might apply in the case of a complaint by a member of the public compared to an internal police matter but for now, I will accept that for the purposes of argument.

[37] Although I accept that in appropriate cases, such as cases between trade competitors where discoverable documents may be commercially sensitive, confidentiality can result in restricted production or inspection of documents. However that is not the nature of the confidentiality claim that has been made in the current case. I also accept that confidentiality, however arising, can be a factor relevant to the exercise of my discretion under Rule 29.08(1). The exercise of the discretion requires regard to be had to all relevant factors and involves a balancing exercise. In favour of the Plaintiff are the apparent relevance and importance of the documents to his case.

[38] Overall, I think the balance favours the Plaintiff. The position may have been different had the documents been sought by a member of the public in

a matter involving a complaint by a member of the public as opposed to an internal disciplinary investigation based on performance of duties. There could be many reasons why there should be restrictions on disclosure to members of the public of police enquiries regarding complaints. A different position however presents in the current case as it is an internal disciplinary matter and particularly so where the officer has subsequently been cleared of wrongdoing, after an apparently thorough investigation, yet has been detrimentally affected by the process and there remain ongoing issues which the requested documents could address.

- [39] It is recognised that confidentiality alone is not a sufficient basis to deny production of an otherwise discoverable document to an opposing party.¹² That is because in most cases the rule that documents may not be used except for the purposes of the litigation affords sufficient protection to the party producing the documents.¹³ When a party is compelled by a rule or order of a Court, or otherwise, to disclose a document the party provided with the document is subject to an implied undertaking given to the Court which prevents the document obtained on discovery being used improperly. The party who obtains the document in that way cannot, without the Court's leave, use it for any purpose other than that for which disclosure was

¹² *Wickham Point Development Pty Ltd v Commonwealth of Australia* [2018] NTSC 7.

¹³ *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34.

given.¹⁴ I believe that this will be sufficient protection in the current case given the circumstances and the nature of the confidentiality claim.

[40] Dealing next with the statutory prohibition pursuant to the OA. As already stated, this arose very late in the course of argument and clearly that had not been considered by Mr McConnel to any great extent before that time. I think that explains the absence of the evidence which I consider to be necessary to establish whether the OA applies to the current case.

[41] Relevant sections of the OA are now set out:-

4 Definitions

In this Act:

complaint means a complaint made under Part 5, and includes part of a complaint.

conduct, of a police officer, see section 7.

investigation means an investigation under:

- (a) Part 6, Division 4; or
- (b) Part 7, Division 4, Subdivision 2; or
- (c) Part 7, Division 5, Subdivision 2.

police complaint means a complaint about conduct of a police officer.

65 Notice of complaint to Ombudsman

(1) If a police complaint is made to a police officer, the officer must:

- (a) immediately refer it to the officer in charge of the Police Standards Command; and
- (b) comply with any general orders or instructions issued under

¹⁴ *Hearne v Street* (2008) 235 CLR 125.

section 14A of the *Police Administration Act 1978* relating to the referral of a police complaint.

- (2) The officer in charge of the Police Standards Command must give the Ombudsman:
 - (a) written notice of the complaint; and
 - (b) if:
 - (i) the complaint was made in writing – a copy of the complaint; or
 - (ii) the complaint was made orally – a copy of the statement of particulars of the complaint prepared by the police officer to whom the complaint was made.
- (3) In the notice, the officer in charge may make a recommendation about the decision the Ombudsman should make under section 66 on the complaint.

66 Ombudsman to assess and decide how to deal with complaint

- (1) The Ombudsman must assess a police complaint (whether made to the Ombudsman or a notified police complaint) and decide how to deal with it, or to decline to deal with it, under this Part.
- (2) The Ombudsman must decide:
 - (a) under section 67, to decline to deal with the complaint; or
 - (b) under section 69, to deal with the complaint by conciliation; or
 - (c) under section 78, to deal with the complaint by the police complaints resolution process; or
 - (d) under section 80, to deal with the complaint by investigation by a Police Standards Command member for which:
 - (i) the Commissioner reports to the other parties to the complaint; or
 - (ii) the Ombudsman reports to the parties to the complaint; or
 - (e) under section 86, to deal with the complaint by an Ombudsman investigation.
- (3)-(4) Omitted

120 Confidentiality of information

- (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.
- Fault element: Recklessness as to the disclosure of the information.
- Maximum penalty: 400 penalty units or imprisonment for 2 years.
- (3) Subsection (2) does not apply if:
- (a) the information is disclosed for:
 - (i) the exercise of a power or performance of a function under this Act; or
 - (ii) formulating a report, or recommendations for a report, under this Act; or
 - (b) the information is disclosed in:
 - (i) a report under this Act; or
 - (ii) an agreement for the resolution of a complaint that, under section 44(5), is binding on the parties to the complaint; or
 - (c) the information is disclosed for:
 - (i) a proceeding under section 20; or
 - (ii) a proceeding for an offence against this Act; or
 - (iii) a proceeding for another offence, or breach of discipline, constituted by the action or conduct the subject of a complaint; or

- (d) the information is disclosed to the Ombudsman of the Commonwealth or a State for exercising a power or performing a function:
 - (i) under a law of the Territory, the Commonwealth or a State; or
 - (ii) under an arrangement made under section 148; or
 - (e) the information is disclosed in consulting a legal practitioner or, with the Ombudsman's consent, someone else.
- (4)-(5) Omitted.

[42] A number of things are evident from section 120. It establishes a prohibition against disclosure in section 120(2) in the circumstances prescribed by section 120(1). There are four such circumstances. On the evidence before me, only the basis set out in section 120(1)(d) can apply to the current case namely, if the information relates to the conduct of an "*investigation*".

[43] The term "*investigation*" is defined in section 4 by reference to investigations under various Parts, Divisions and Subdivisions of the OA. An investigation under subparagraph (a) of that definition cannot be applicable and only investigations falling within subparagraphs (b) and (c) of that definition, can apply to the circumstances of the current case. However, I have no evidence to enable me to decide whether either of those parts of that definition apply to the current case.

[44] The application of the OA overall depends on the interplay between a combination of various sections of that Act. In relation to complaints involving police the OA could only apply if there is a "*complaint*", in respect of "*police conduct*" within the meaning of those terms in the OA. A

“*complaint*” by the definition, is a complaint pursuant to Part 5 of the OA. That Part refers to complaints concerning “*a police officer*”,¹⁵ which I read as referring to a particular police officer and not applying to a complaint against police generally.¹⁶ As the particular complaint is not in evidence, other than commentary, there is no evidence to indicate the nature of the complaint. Therefore I am unable to find that the relevant complaint amounts to a complaint to which the OA applies.

- [45] It was submitted in the brief written submissions of the Defendant that a notification to the Ombudsman was made on 8 October 2018. There is no evidence before the Court to support that, something which is not surprising given when the question of the OA was first raised by the Defendant. To the extent that the application of the OA is dependent on such a notification, the absence of that evidence means that the application of the OA to the circumstances of the current case has not been established.
- [46] In any case assuming for the purposes of argument that the complaint is one to which the OA applies, then if the notification to the Ombudsman was made on 8 October 2018 then on my reading of the OA, that notification would have been given pursuant to section 65 of the OA. I can only presume that as the Defendant’s submissions do not deal with that nor do I have any evidence of the notification. On that assumption however, once the Ombudsman has been notified, section 66 requires the Ombudsman to

¹⁵ See ss 21(1) and 21(2).

¹⁶ See s 21(3).

determine how to deal with the complaint. The options available to the Ombudsman are set out in section 66(2). Of those I think only the option in section 66(2)(d), namely to deal with the complaint pursuant to section 80, could apply on the evidence before me.

[47] Section 80 provides for the Ombudsman to decide that the PSC should investigate the complaint. If notice to the Ombudsman was not given until 8 October 2018, then I doubt that the complaint of 4 April 2018 could be a “*complaint*” for the purposes of the OA until at least that date. I am unable to properly decide this as the whole issue was not properly addressed by the Defendant, but if I am correct then there would need to be some retrospectivity in play before the prohibition in the OA would apply to documents or information preceding the notification. The position is entirely unsatisfactory and without the necessary evidence and without adequate submissions from the Defendant, I am not prepared to speculate on that.

[48] Although overall the position is unsatisfactory, on the available evidence I am left to find that what Gallagher was investigating was not a “*complaint*” to which the OA applied.

[49] Despite that, had it been established that the OA applied, I am of the view that the exemption in section 120(3)(c)(iii) would apply in any case. That relates to “*breaches of discipline*”, a term which is not defined in the OA but is the same phrase used by Gallagher.¹⁷ I have no doubt that the

¹⁷ Exhibit LM2 and LM5 to the affidavit of the Plaintiff made 7 April 2019.

investigation into the Plaintiff was an investigation of a breach of discipline. That is clear from the evidence of Gallagher's email of 27 November 2018¹⁸ and the Notice Of Alleged Serious Breach Of Discipline served on the Plaintiff on 15 January 2019, which contained the allegations against the Plaintiff.¹⁹ The remaining prerequisite is that the breach of discipline must be constituted at least by the conduct the subject of a "*complaint*" as defined in section 4. It is both problematic and circular that I am unable to establish that this is such a complaint, but again, accepting that for the purposes of argument, if it is one to which the OA applies, then the prerequisite is clearly satisfied on the available evidence before me.

- [50] Either way, the prohibition against disclosure in section 120 of the OA does not apply on the evidence before me.
- [51] Accordingly I make an order pursuant to Rule 29.08(1) of the SCR in respect of the documents described in paragraph 3 of the Summons filed 12 April 2019 with one proviso. That is in respect of the PSC documents relative to the first integrity report. Nothing before me establishes the relevance of that first integrity report to the issues as pleaded, or in evidence on the application. For the avoidance of doubt, the order I make in terms of subparagraph 1 of paragraph 3 of the Summons excludes the PSC documents relative to the first integrity report.

¹⁸ See subparagraph 2 of paragraph 22.

¹⁹ Exhibit LM8 to the affidavit of the Plaintiff made 7 April 2019.

[52] I will hear the parties in respect of ancillary orders, including the question of leave to file and serve an Amended Originating Motion, and as to costs.