

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 120 J.R.]

BETWEEN

PADRAIC McEVoy

APPLICANT

AND

AN GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on 16th day of March, 2015

1. The applicant is a garda currently attached to Ballyconnell Garda Station, County Cavan. In 2007 he was involved in the investigation of an assault upon Mrs. Mary Lynch by Mr. Gerry McGrath, which took place on 30th April, 2007. Mr. McGrath was prosecuted, but while on bail committed two further serious offences, namely the assault and abduction of a child in Tipperary in October, 2007 and the murder of Sylvia Roche Kelly in Limerick in December, 2007.
2. In 2007/2008 Sergeant Maurice McCabe was stationed at Ballyconnell and made allegations concerning the handling of the investigation and prosecution of offences against Mr. McGrath. This led to the establishment of an internal garda investigation headed by Chief Superintendent McGinn. Mrs. Lynch contacted Chief Superintendent McGinn in the course of that inquiry, and her complaint was documented in a report to garda management at a time when Mrs. Lynch had not sought to pursue the matter with the respondent. The matter was first referred to the respondent by garda authorities, arising from the findings of the McGinn investigation and Mrs. Lynch's contact with Chief Superintendent McGinn's inquiry.
3. Correspondence in respect of this matter was received from Assistant Commissioner Kenny by the respondent under cover of letter dated 23rd November, 2010. At this stage the respondent was already dealing with a complaint relating to the investigation of the assault on Mrs. Lynch in the context of an investigation commenced under s. 94 of the Garda Síochána Act 2005, under the direction of Assistant Commissioner Jennings, which was taken over by the respondent under s. 98 of the Act in June, 2010 arising out of a separate complaint made by Mr. Roche Kelly (the husband of the late Sylvia Roche Kelly).
4. By letter dated 12th April, 2011, the applicant was advised that an admissible complaint had been received from both Mr. Roche Kelly and Mrs. Lynch (Complaint No. 1). On 25th October, 2011, the applicant was notified by the respondent that it had discontinued its investigation into this complaint in accordance with s. 93(1)(c) of the Act because it had failed to consider whether the time for admitting a complaint should be extended in accordance with section 84. It did not relate to matters occurring within six months of the making of the complaint and no decision had been made to extend the time. The applicant was informed that the respondent would take "no further action in relation to the complaint of Mrs. Lynch".
5. Complaint No. 1 related to negligence in the conduct of the investigation of the assault on Mrs. Lynch (including the detail of the PULSE record created), a failure to facilitate her attendance in court to give evidence and a failure to keep her updated in respect of the investigation and prosecution of the matter.
6. On 17th May, 2012, the applicant was the subject of a caution from Superintendent Sean Farrell pursuant to Regulation 10 of the Garda Síochána (Discipline) Regulations 2007, relating to his involvement in the investigation of the assault on Mrs. Lynch.
7. Subsequently, on 14th August, 2012, the applicant was informed that a report pursuant to s. 97 of the Act had been forwarded to the Assistant Commissioner, Human Resource Management, An Garda Síochána in respect of the complaint of Mr. Lorcan Roche Kelly. The respondent formed the view that there may have been a "less serious" breach of discipline and recommended that the procedure contained in Regulation 45 of the Garda Síochána (Discipline) Regulations 2007 be followed. By letter dated 3rd January, 2013, the applicant was informed by the respondent that he had not been found to be in breach of Disciplinary Regulations by the member appointed by the Garda Commissioner to investigate the matter.
8. In October, 2012 Mrs. Lynch again contacted the respondent (initially by telephone) to inform it that information had been made available to her which, in her view, confirmed that she had been told untruths by members of An Garda Síochána about the course of the investigation and prosecution of Mr. McGrath, in respect of his assault upon her. A meeting took place between Mrs. Lynch and authorised officers of the respondent in which she disclosed that she had been informed by Sergeant Maurice McCabe that he had recorded a conversation in which he and the applicant discussed the applicant's involvement in the assault investigation. Sergeant McCabe told Mrs. Lynch that the applicant had informed him that he had discussed Mr. McGrath's release with an Inspector B., but that Inspector B. had lied to her by telling her that he was not in Monaghan Garda Station at that time. Mrs. Lynch completed a GSOC Form 1 of complaint, dated 9th January, 2013 (Complaint No. 2).
9. The applicant was informed of Complaint No. 2 which had been formally made on 11th January, on 2nd December, 2013, and that the respondent had deemed that complaint admissible under s. 87 of the Act and that it should be investigated in accordance with section 95.
10. The information provided to the applicant concerning the commencement of this investigation states, *inter alia*:-

"In making this complaint, Mrs. Lynch states that in or about October, 2012 she obtained new information which was not known to her previously. As a result of this new information, Mrs. Lynch has now alleged that garda members attached to Baileborough Garda Station lied to her to cover up mistakes they made in the investigation...

According to Mrs. Lynch, Sergeant Maurice McCabe, who was stationed at Baileborough Garda Station at the time, had recorded a conversation he had by telephone with Garda Padraic McEvoy and which he says contains evidence against Inspector B. and Garda McEvoy in relation to this complaint. Mrs. Lynch stated that she did not have a copy of the telephone recording and has only heard part of the recording which Sergeant McCabe played to her. As far as she is aware, Sergeant McCabe retains possession of the telephone recording concerned."

There then follows a recital of Mrs. Lynch's allegations as follows:-

- "1. Inspector B. (now Superintendent) "lied" to Mrs. Lynch when he told her that he was not attached to Baileborough Garda Station. Mrs. Lynch says she now knows that Inspector B. gave the order to release her assailant, Gerry McGrath, on the morning of her assault;
2. Superintendent C. (now Chief Superintendent) "lied" when he agreed with the statement made by Inspector B. (now Superintendent) to Mrs. Lynch and her husband in this regard at their home on 14th January, 2008;
3. Superintendent C. (now Chief Superintendent) "lied" when he said that he could not contact Garda P. S. for five days to find out why Garda P.S. phoned Mrs. Lynch on Saturday 5 January, 2008, to tell her not to attend court as the court case was not proceeding;
4. Garda Padraic McEvoy "lied" when he said that he did not know who gave the order to release Gerry McGrath. Mrs. Lynch now believes that it was Garda McEvoy who went to Inspector B.'s office (now Superintendent) to get J. Sheridan and Superintendent T.M. have failed to provide Mrs. Lynch with the response they promised her in relation to a list of 24 questions she gave to them when they visited her home in early September, 2012. Mrs. Lynch says that to date no one has contacted her in this regard; and
6. Mrs. Lynch is alleging that garda members then attached to Baileborough Garda Station lied to her to cover up mistakes they made in the investigation they carried out into an assault on her in 2007 by a man named Gerry McGrath. Mrs. Lynch alleges that because her case was treated "so disgracefully, a more serious crime was committed" at a later time by Gerry McGrath."

11. By letter dated 20th December, 2013, solicitors on behalf of the applicant wrote to Mr. William Hickey, Senior Investigation Officer to the respondent, requesting confirmation as to when the complaint made by Mrs. Lynch was deemed admissible by the respondent, when the Garda Commissioner was notified and an explanation of the delay in notifying the applicant. The letter also raised issues in respect of the "new information" which it was alleged may have been obtained illegally. It was contended that the complaint was inadmissible and could not meet the requirements of s. 87 of the Act. For that reason and because it was based on illegally obtained evidence, the respondent was requested to close the investigation or set out its reasons for deeming the complaint admissible under section 87.

The Challenge

12. Section 84 of the Garda Síochána Act 2005, provides that a complaint must be made within the period of six months of the date of the conduct said to give rise to the complaint, subject to any extension of time that may be given and good reasons are advanced for so doing. Section 87 provides that on receiving a complaint directly from a complainant, the Ombudsman Commission shall determine whether the complaint is admissible or inadmissible. Under s. 88 the respondent must, on determining that a complaint is admissible, as soon as practicable notify the complainant and the Garda Commissioner of its determination. The garda concerned must then be notified that a complaint has been made and informed of the nature of the complaint and the name of the complainant.

13. The applicant obtained leave to apply for judicial review (Peart J.) on 3rd March, 2014, seeking, *inter alia*, an order of *certiorari* quashing the decision of the respondent deeming the complaint made against the applicant on 11th January, 2013, admissible under section 87. A number of declarations are sought that the respondent acted *ultra vires* and in breach of the Act in the manner in which the complaint was deemed admissible, acted in breach of natural justice in purporting to reopen an investigation into the complaint when it had already been investigated or the subject of disciplinary sanction in respect of his handling of the investigation of the assault on Mrs. Lynch on 30th April, 2007, that the respondent had been guilty of inordinate and inexcusable delay in the admission of the complaint and in notifying the applicant thereof, and that the respondent acted in breach of fair procedures in extending the time for the admissibility of the complaint or in deciding to investigate the complaint based on improperly or illegally obtained, or hearsay evidence. Other related declarations are sought, including the declaration that the respondent is *functus officio* in respect of the complaint made against the applicant, and a further order is sought restraining the respondent from any further steps in the investigation of the applicant.

14. The factual basis upon which the application is brought is not contested by the respondent in the statement of opposition. The respondent contends that the admissibility of Complaint No. 2 was considered carefully between January and September, 2013. A delegated officer recorded an admissibility determination in respect of five allegations (one of which concerned the applicant) on 10th September, 2013. The relevant allegation against the applicant is noted at p. 2 of the determination as follows:-

"Garda Padraic McEvoy "lied" when he said he did not know who gave the order to release Gerry McGrath. Mrs. Lynch now believes it was Garda McEvoy who went to Inspector B.'s office to get permission to release McGrath."

15. The determination notes that Complaint No. 2 is a fresh complaint based on:-

"new information which is relevant and which was not previously available to or known by her at the time that she made her first complaint to the Garda Ombudsman. Mrs. Lynch states that she obtained this new information in or around October, 2012 and that she first indicated her wish to make a renewed complaint when she met GSOC investigation officers that same month.

Mrs. Lynch subsequently detailed her new complaint in a GSOC 1 Form which she signed and dated 9th January, 2013. This form was received in GSOC on 11th January, 2013, which is the date her new complaint was recorded."

16. It was noted that four of the five allegations made by Mrs. Lynch related to conduct which occurred in 2007 and 2008, but only one allegation related to garda conduct which occurred more recently in late 2012. The senior case officer was satisfied to extend the time limit in relation to the four allegations because Mrs. Lynch was claiming that the information grounding her complaint, which was not within her power to know or procure, had only come to light after the six month time limit provided for in the Act had expired. It continued:-

"I also note that Mrs. Lynch says she is now aware that there is recorded evidence to substantiate the allegations she is once more making to the Garda Ombudsman. In my view, these allegations disclose conduct which if proven would amount to garda misbehaviour as contemplated by the 2005 Act."

The allegations were, therefore, deemed to be admissible complaints.

17. In a replying affidavit Mr. O'Doherty, the senior case officer dealing with the complaint, states that he "reflected very carefully on the admissibility decision in respect of the complaint and consulted with colleagues within the respondent to canvass perspectives on the validity of the complaint under the terms of the 2005 Act". Following his initial decision on admissibility, he had "some discussion" with the investigation team during which concerns were raised that he had "not captured in the manner in which I had formulated the admissible allegations in my initial admissibility decision, that part of the complaint that alleged cover-up". Therefore, he recorded an additional admissibility decision on 28th November, 2013 "for the sake of clarity and because a concern about cover-up was clearly at the heart of the new complaint". The formulation of the second admissibility determination is dated 28th November, 2013, and contained a number of additional elements. It states:-

"When first considering this complaint from Mrs. Mary Lynch for admissibility, I noted that she is making an allegation that members of Bailieborough Gardaí lied to her to cover-up mistakes they made in the investigation they carried out into an assault on her in 2007 by a man named Gerry McGrath...Having now reviewed the original admissibility determination which I made on 10th September, 2013 in this case, I am satisfied that the allegations which I admitted for further investigation did not adequately reflect or include the particular allegation of a "cover-up" being made by Mrs. Lynch. I accept that this particular allegation is an integral part of Mrs. Lynch's complaint and is of equal importance insofar as it relates to the other allegations which are already being investigated by GSOC in this case.

In order to clarify this issue, and for the avoidance of any doubt in the matter, I am now adding an additional allegation to my determination so that Mrs. Lynch's complaint can be fully and thoroughly investigated by GSOC."

The additional allegation was as follows:-

"Mrs. Lynch is alleging that members of Bailieborough Gardaí lied to her to cover up mistakes they made in the investigation they carried out into an assault on her in 2007 by a man named Gerry McGrath. Mrs. Lynch alleges that because her case was treated "so disgracefully, a more serious crime was committed" at a later time by Gerry McGrath."

In the determination Mr. O'Doherty further states that he was:-

"satisfied given the nature of the particular allegation being made in this instance that the matter can be considered as ongoing and I therefore accept it as being made within the statutory time limit as applies in this case. On that basis, I determine the allegation outlined...above to be an admissible complaint which, if proven, would reveal offences or breaches of discipline."

18. Counsel for the respondent informed the court that the recording of the telephone conversation between Sergeant McCabe and the applicant was not made available by Mrs. Lynch to the respondent until 7th November, 2013, postdating the first admissibility decision and pre-dating the second.

19. The respondent addresses each of the grounds upon which leave was granted in the statement of opposition from which it emerges that the following are the issues between the parties:-

(a) The applicant contends that the respondent failed to determine the admissibility of a complaint upon its receipt. Furthermore, it is claimed that the respondent failed to comply with ss. 88(3) and 103(1)(ii) of the Act in that he was not furnished with any notification or information concerning the complaint for a period from 11th January, 2013 and 2nd December, 2013. He said this excessive delay gave rise to general prejudice to the applicant having regard to the antiquity of the matters the subject of the complaint, the frailty of human memory and the availability of witnesses. The respondent contends that the statutory obligation to notify the applicant is triggered by the notification of an admissible complaint to the Garda Commissioner in November, 2013 and consequently, there was no obligation on the respondent to notify the applicant of the admitted complaint until it did so on 2nd December, within days of the additional admissibility decision. The respondent contends that the obligation to provide information on the progress of the investigation in s. 103(1)(ii) arises post admissibility, and not before.

(b) The delay in considering the admissibility of the complaint until September and November, 2013 is explained in the affidavit of Mr. O'Doherty. He sets out in detail at paras. 14 – 23 and 31 – 33 of the affidavit. He outlines a number of steps taken following the initial telephone call received in October, 2012 from Mrs. Lynch.

(i) A meeting was held with Mr. Lynch attended by Mr. John Leeman, Senior Investigating Officer, and Louise O'Meara, Assistant Investigating Officer of the respondent. They were informed of the existence of the tape recording made by Sergeant McCabe.

(ii) It became clear that the complainant wished to make a further or second complaint on the basis of this information, which was formalised in the complaint of 9th January, 2013.

(c) It is accepted that there is a delay following the receipt of the second complaint in determining its admissibility which was longer than usual, but arose primarily from the particularly complicated nature of the case.

(i) The file was assigned to Mr. O'Doherty for admissibility decision on 2nd April, 2013.

(ii) Mr. O'Doherty examined the complaint and was anxious to identify what was different or new in the second complaint. The new complaint was based on new information which Mrs. Lynch discovered three months previously and which she did not know at the time of her original complaint to GSOC. He was conscious that there was a time issue in the case and that he had to consider the explanation for the delay in referring the matter, and the issue of an extension of time.

(iii) Mr. O'Doherty contacted Mrs. Lynch and spoke to her on a number of occasions by telephone "to clarify the parameters of her new complaint and to distinguish it from her earlier complaint". This proved difficult for reasons explained at para. 20 and, he said, "placed a greater onus on me to be precise and scientific in relation to the identification of elements of the matters she was complaining about which were new". He also had to identify when the new information she relied upon had come to her knowledge.

(iv) Mr. O'Doherty then reflected on the admissibility decision in consultation with colleagues "to canvass perspectives on the validity of the complaint under the terms of the 2005 Act". He then made the decision of 10th September, 2013, to admit the complaint in respect of the five allegations previously set out.

(v) He then had further discussions "with the investigation team" following his initial admissibility decision which led to the additional element of the cover-up included in the "additional admissibility decision" on 28th November, 2013.

(vi) Mr. O'Doherty claimed that he was satisfied that the first and second Lynch complaints were different. He states that he took significant trouble to satisfy himself in that regard at the admissibility stage stating:-

"If suffices simply to compare the notification of the original complaint with the notification of the further or new complaint to appreciate that the complaints are very different in their terms, albeit that they arise in relation to the garda handling (up to the present day) of events occurring in 2007/2008".

It is noted that his involvement in the investigation was confined to the admissibility decision and that Mr. William Hickey, Senior Investigating Officer, and Mr. James Butler, Investigating Officer, have been designated to investigate the complaint which was in train when these proceedings were commenced.

(d) The applicant claims prejudice by reason of the delay and the respondent claims that no specific prejudice has been alleged.

(e) The applicant claims that having been disciplined by Superintendent Farrell on 17th May, 2012, in relation to aspects of this matter, and having been exonerated in relation to the complaint made by Mr. Roche Kelly and having regard to the discontinuation of the investigation of Complaint No. 1, the respondent was estopped from admitting the complaint or engaging in an unfair and oppressive procedure by submitting the applicant to the possibility of further disciplinary sanction. It is contended that after two years the applicant was entitled to have finality in the ultimate determination of the Roche Kelly complaints and Complaint No. 1, and/or that he had a legitimate expectation following formal assurances that the investigation of the complaint of Mrs. Lynch was at an end. The respondent contends that the reasons given for extending the time and/or admitting the complaint were based on new information not known to Mrs. Lynch previously from which the allegations of lies and cover-up emerged. The telephone call is identified as the new evidence. The respondent contends that the new complaint and evidence were not the subject of the previous investigation or determination and it is not, therefore, estopped or prevented from investigating the complaint. It is said Complaint No. 2 is different from Complaint No. 1.

(f) Insofar as the applicant claims that the admissibility of the complaint is based on illegally obtained evidence, the respondent contends that this is not a consideration which arises in the context of an admissibility decision. In any event, it is contended that the recording of the telephone call was not illegal.

Discovery

20. The applicant seeks discovery of:

"all documents in the power, possession or procurement of the respondent relating to, recording and/or touching upon the Lynch Complaint No. 2 up to the date of the second admissibility decision of the respondent made on 28th November, 2013."

21. The letter seeking voluntary discovery dated 9th July, 2014, is based on the following reasons:-

(a) The applicant contends that he requires discovery of the Lynch Complaint No. 2 file up to the time of the second admissibility decision in order to examine the similarities between the subject matter of Complaint No. 1 and Complaint No. 2.

(b) The affidavit evidence discloses that prior to the determination of the admissibility of Complaint No. 2 the respondent had a number of communications with Mrs. Lynch, including:

(i) telephone discussion in October, 2012,

(ii) meeting on an unspecified date(s) with Mr. John Leeman and Mrs. Louise O'Meara, and

(iii) telephone contact on several occasions between Mrs. Lynch and Mr. O'Doherty.

Furthermore, the evidence indicates discussions within the investigation team in respect of concerns raised that an alleged "cover-up" had not been captured in the complaint set out in the admissibility decision of September, 2013.

(c) The applicant claims that discovery will allow the applicant to advance the case that delay was inordinate and in breach of his rights to fair procedures and will assist on understanding the chronology of events in respect of that delay.

(d) The letter confined the application to those documents "solely to the documents surrounding a decision by the respondent to admit the Lynch No. 2 Complaint".

22. The request for voluntary discovery was declined by letter dated 24th July, 2014. It is asserted that the parameters of the complaint admitted in Complaint No. 2 were set by the terms of the admissibility decisions and the notification of the complaints to the applicant. It is contended that the complaints asserted are clearly different from Complaint No. 1 on their face. A Dissimilarity in respect of Complaint No. 1 and No. 2 may be advanced by reference to those documents. It is said that it is not understood why the documents regarding contact between Mrs. Lynch and the respondent and the internal discussions that led to the addition of the

"cover-up" allegation were of any relevance to the issues in the proceedings. It is contended that documents which may indicate what was done during the period of delay were not relevant to the issue raised in respect of delay, the period of which was not disputed. The respondent also sought to rely on s. 81 of the Garda Síochána Act which imposes a duty upon members or officers of the respondent not to disclose information obtained in carrying out duties under the Act "if the disclosure is likely to have a harmful effect". Section 81(2) sets out the circumstances which are deemed to give rise to a harmful effect, but s. 81(4) states that subs (1) does not prohibit a disclosure of information if the disclosure "(c) is made to a court or (g) is otherwise authorised by law".

The Law

23. The relevant legal principles applicable to an application under O. 31, r. 12 of the Rules of the Superior Courts in judicial review proceedings are based on well established authorities, including *Ryanair Plc v. Aer Rianta* [2003] 4 I.R. 464 and *Framus Limited v. CRH Plc* [2004] 2 I.R. 20 which are, in turn, based on the "primary requirement for discovery" as stated by Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* [1882] 11 Q.B.D. 55:-

"The documents to produce are not confined to those which would be evidence either to prove or to disprove any matter in question to the action...it seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences."

24. These principles also apply to discovery in judicial review proceedings, as discussed in *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 36, *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 5 I.R. 528, *Kilkenny Communications v. Broadcasting Commission* [2004] 1 ILRM 17, and applied in a number of High Court decisions including *MacAodhain v. Eire* [2004] IEHC 20 and *Fitzwilton v. Judge Mahon* [2006] IEHC 48.

25. The issue of discovery in judicial review is to be approached on the following basis:-

- (1) An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case in the sense indicated by Brett L.J. in the *Peruvian Guano* case:
- (2) The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings:
- (3) A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.
- (4) Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.
- (5) Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery:
- (6) If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached:
- (7) Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is *prima facie* evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which ought not to have been seen before a decision was made, was considered:
- (8) The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence (per Laffoy J. in *Fitzwilton* cited above. But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker.
- (10) An applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit.

26. The respondent submits that the discovery sought is not relevant or necessary for the resolution of the issues between the parties, since the issues clearly defined in the pleadings may be readily determined on the documents already exhibited in the affidavits submitted in the case, and any further documentation could not possibly assist the court in determining these issues. In addition, the respondent claims that as a matter of public policy documentation generated prior to the determination of the admissibility of Complaint No. 2 should not properly be the subject of a discovery order because, though documents generated in the investigation of the complaint are not always exempt from disclosure, there is a public interest in maintaining "confidentiality" in respect of the documents sought in this case. Persons dealing with an inquiry of this kind, it is said, must be allowed to do so on a confidential basis. This contention is supported by reference also to s. 81 of the 2005 Act.

Public Policy

27. Reliance is placed on *Leech v. Independent Newspapers (Ireland) Limited* [2009] 3 I.R. 766, and the earlier decision of *Director of Consumer Affairs and Fair Trade v. Sugar Distributors Limited* [1991] 1 I.R. 225. In *Sugar Distributors Ltd*, the plaintiff carried out an investigation and instituted proceedings against the defendant for alleged anti-competitive behaviour and breach of statutory order as a result of complaint made by a third party. The defendant sought discovery of documents relating to the complaint. An order for discovery was made but a further motion followed because the plaintiff claimed that he was not, as a matter of law, required to permit inspection of certain relevant documents in his possession which had been obtained as part of the complaint made to him by the third party alleging breaches of restricted practises legislation, and that he was not required to permit inspection in circumstances

in which they had come into his possession as part of that complaint made to him by a member of the public. This submission was upheld by Costello J. (as he then was) on the grounds that there was a public interest in preventing and detecting crime. The learned judge stated:-

"I am satisfied that it is in the public interest that the court should protect the effective functioning by the Director of his statutory powers. I am further satisfied that to enable him to exercise his powers effectively he must be able to assure complainants that information given to him (and, indeed, in certain circumstances the names of complainants) will be treated in confidence and not disclosed as otherwise complaints may not be forthcoming and breaches of ministerial orders are likely to go undetected. The requisite protection should embrace all documents forwarded by a complainant with a complaint.

But the immunity granted cannot be an absolute one.

When a claim is made... that it is not in the public interest that relevant documents... should not be inspected, the court should examine the documents. If satisfied that they form part of a complaint made to the Director by a member of the public that a breach of the restrictive practices legislation or orders made thereunder has occurred inspection should not be allowed unless the court concludes that the documents might tend to show that the defendant had not committed the wrongful acts alleged against him."

Having inspected the documents on this motion for further and better discovery, Costello J. concluded that the documents were all forwarded as part of the complaint made by the third party in respect of breaches of restricted practice, but did not tend in any way to show that the defendant was not guilty of the wrongdoing alleged against it. The inspection was, therefore, refused.

28. In *Leech v. Independent Newspapers (Ireland) Ltd* further and better discovery was sought against a third party in defamation proceedings brought against the defendant arising out of a series of articles which addressed the manner in which public contracts were awarded to the plaintiff's company, and to her. An inquiry was held into the awarding of the contracts and the defendant sought discovery between the inquiry and departmental officials, including notes and memoranda in respect of the workings of the inquiry and interviews conducted by it together with observations of interviewees on the draft version of the report produced. Assurances of confidentiality had been given to those who participated in the inquiry. O'Neill J. stated:-

"In this case it is argued that confidentiality underpinned the other public interest in the effectiveness and viability of *ad hoc* tribunals. For reasons of practicality, such tribunals are a useful if not essential tool in public administration in circumstances where it is necessary to conduct a public inquiry into a matter of public concern, but where for reasons of time constraint or otherwise in the interest of justice or proper expedition, it may not be appropriate to establish a public inquiry under the Public Inquiry Acts. In order for *ad hoc* tribunals to work, I am satisfied that invariably confidentiality will be essential. If it were the case that material given to such a public inquiry was capable of being disclosed later, it would, in my opinion, deter persons with relevant evidence from co-operating with the inquiry and as the inquiry would not have legal powers to compel attendance of witnesses or the production to it of documents, clearly the inquiry would fail as an effective method to establish the truth. This would result in a serious damage to the public interest in the use of this model of inquiry as an important if not essential tool of public administration."

O'Neill J. was satisfied that the viability of such a public inquiry would "almost certainly be defeated if there was a risk of disclosure, where confidentiality had been sought from and granted by the person conducting the inquiry. In contrast, the public interest in the administration of justice would not be defeated by the denial of the contested documents, in circumstances where the defendant and indeed the plaintiff, have available to them considerable resources of evidence, including *inter alia*, the completed...report". Objection to production of the documents was, therefore, upheld.

29. The court notes that the respondent does not make a claim on affidavit of the general kind dealt with in these two cases, but relies extensively on the provisions of s. 81 of the Act which it is claimed provides a statutory basis on which the respondent may refuse discovery of documents or material furnished by complainants, or which come into existence in the course of the investigation of a complaint.

30. Section 81 does not deal directly with the public policy immunity or privilege claimed in *Sugar Distributors and Leech*. It imposes certain duties on members or officers of the Ombudsman Commission not to disclose information obtained in carrying out their duties "if the disclosure is likely to have a harmful effect". Section 81(2) provides that disclosure of information does not have a harmful effect unless it:-

"(a) impedes an investigation under Part 4 or otherwise prejudices the effective performance of the Ombudsman Commission's functions,

(b) results in the identification of a person -

(i) who is a complainant or the subject of a complaint, and

(ii) whose identity is not at the time of the disclosure a matter of public knowledge,

(c) results in the publication of information that -

(i) relates to a person who is a complainant or the subject of a complaint or who has given evidence to the Ombudsman Commission, and

(ii) is of such a nature that its publication would be likely to discourage the person to whom the information relates or any other person from reporting a complaint or giving evidence to the Ombudsman Commission, or

(d) results in the publication of personal information (as defined in the Freedom of Information Act 1997) obtained in the course of an investigation and constitutes an unwarranted and serious infringement of a person's right to privacy."

Section 81(3) provides that for the purpose of the section a person is presumed, unless the contrary is proved:-

"to know that disclosure of information referred to in subsection (1) is likely to have a harmful effect if a reasonable person would, in all the circumstances, be aware that its disclosure could have that effect."

Section 81(4) provides that subs (1) does not prohibit a person referred to in that subsection from disclosing information if the disclosure is made to a number of named individuals or organisations or:-

"(c) is made to a court,...

(g) is otherwise authorised by law."

Contravention of subs (1) is an offence.

31. The respondent submits that s. 81 requires it to withhold confidential information obtained in carrying out its duties if the disclosure is likely to have a harmful effect. It is submitted that this reflects the policy of the 2005 Act in preserving the privacy rights of complainants and encouraging members of the public to report complaints against members of An Garda Síochána or to give evidence to the respondent. The evidence indicates that the Commission offers assurances on its website that it will not disclose personal data to third parties except:-

"to the extent that it is required to do so by law, and/or in compliance with the 2005 Act, and/or to the extent that there is consent to this disclosure."

The Commission advises on its website that it may share information with the Garda Commissioner in accordance with s. 81 of the Act and having regard to a memorandum of understanding, protocols and agreements on operational matters. It offers assurances that personal data is held on secure servers. The respondent acknowledges that while some information may be in the public domain, this was not at the instigation of the respondent and cannot justify a breach of what it regards as its duty under section 81. It is accepted that s. 81 does not prevent disclosure of information under court order, however, it is submitted that the section and its purpose are matters which the court ought to consider in deciding on the request for discovery and in assessing the strength of the reasons advanced to demonstrate its relevance or necessity.

32. The court is satisfied that it is open as a matter of law to the respondent to assert a claim of privilege in respect of documents generated in the making of a complaint or the conduct of an investigation under the 2005 Act on the grounds of public policy in order to protect the effective functioning of the respondent in receiving and investigating complaints made against members of An Garda Síochána. In many cases, it would be impossible for the respondent to conduct its affairs, receive complaints or carry out effective investigations without being able to assure the complainants and/or witnesses of confidentiality in appropriate circumstances. This is recognised under s. 81 and is a matter which may be taken into account when privilege is asserted over any documents or material in the course of judicial review proceedings. However, I do not accept that this issue is to be determined on an initial application for discovery as submitted by the respondents. It should follow the normal course. If an order is appropriate under the rules relating to discovery in judicial review, it is open to the respondent to assert in the affidavit of discovery that certain documents or material are privileged, and if that claim is challenged, the court will determine the issue pursuant to a motion for further and better discovery in the normal way. The court is satisfied that the respondent's assertion of a privilege in cases of public policy is premature.

Decision

33. The application for discovery is confined to the issues concerning events which occurred and are relevant to the consideration of the admissibility of Complaint No. 2 between 9th January and 28th November, 2013. Complaint No. 2 is based upon and prompted by new information which became available to the complainant from Sergeant Maurice McCabe in October, 2012. There are two alleged fresh elements to the complaint as now formulated: firstly, that Garda McEvoy lied to Mrs. Lynch when he said that he did not know who gave the order to release Mr. McGrath and secondly, that Inspector B. is now alleged to have directed Garda McEvoy to do so. Furthermore, it was also alleged that there was a cover-up of mistakes alleged to have occurred in the processing of Mr. McGrath, part of which involved lies told to Mrs. Lynch. The chronology of the events at the core of the issues between the parties has already been set out earlier in this judgment. The court is satisfied that the documents sought by the applicant are relevant to the issues in the case, in particular whether Complaint No.2 differs from Complaint No. 1, why the extension of time was granted, the alleged prejudice suffered by the applicant in re-opening the complaint which had already been investigated and determined, and the process whereby the further admissibility of the complaints was considered following a process of consultation by the respondent. I am also satisfied that discovery is necessary for the fair hearing of this case. It is important that the procedure and process engaged in by the respondent is clear to the court and that all cards are "face up" at the hearing. The applicant considers that he had fully addressed Complaint No. 1 and was entitled to finality on the matter. The respondent contends that this aspect of the issue was considered and that the "cover-up" issue was included as part of the complaint following a consultation process over a prolonged period which, in the court's view remains somewhat opaque. In order to ensure that the court is fully apprised of the nature, reasons and dynamic of the decision, the identity of those who contributed to it and the extent of their contribution, it is necessary for a fair hearing that the relevant documents be discovered. Accordingly, the court will make an order in the terms of the notice of motion.