

[2003–04 Gib LR 35]

**PUBLIC SERVICES OMBUDSMAN v. ATTORNEY-
GENERAL**

SUPREME COURT (Pizzarello, Ag. C.J.): April 17th, 2003

Administrative Law—Ombudsman—role—investigation of complaints against public authorities with power limited to reporting to Chief Minister not judicial function—Ombudsman not an “inferior court or tribunal” eligible for procedural aid from Supreme Court under Civil Procedure Rules, Part 34

Administrative Law—Ombudsman—powers and duties—Public Services Ombudsman Ordinance, s.17 gives Ombudsman powers of Supreme Court in respect of witnesses, oaths and production of documents—may issue own witness summons and determine claim to public interest immunity

Administrative Law—Ombudsman—powers and duties—authorities investigated—may require documents from one authority in investigation of another if both named in Public Services Ombudsman Ordinance, Schedule, as subject to investigation under Part III

Administrative Law—Ombudsman—complaints to Ombudsman—grandmother “person aggrieved” within Public Services Ordinance, s.2 in relation to Social Services Agency’s maladministration involving her grandchildren

The Ombudsman, in the course of an investigation he was conducting, applied for disclosure of a report held by the Commissioner of Police.

A member of the public complained to the Ombudsman about the manner in which the Social Services Agency had carried out an investigation into the ill-treatment of her grandchildren, alleging that the

Agency was guilty of maladministration in failing to consider her concerns. She also lodged a complaint with the police in respect of the same matter. When the Ombudsman discovered that a police officer had made a report on the complaint, he sought its disclosure but the Commissioner of Police refused on the ground of public interest immunity. The Ombudsman therefore applied to the Supreme Court, under Part 34 of the Civil Procedure Rules, for its aid in obtaining the disclosure of the report.

He submitted that (a) he had a wide power to obtain any required information “from such persons and in such manner . . . as he [thought] fit,” under s.16 of the Public Services Ombudsman Ordinance 1998; (b) s.17 of the Ordinance gave him the same powers as the Supreme Court in respect of the production of documents, and so he had the right to call for the evidence under that section; (c) the documents requested were material to his investigation; and (d) the information was not subject to public interest immunity.

The Crown submitted, in reply, that (a) the Supreme Court could not assist the Ombudsman under Part 34 of the Civil Procedure Rules, as it required that the court could only assist “an inferior court or tribunal,” and he was neither; (b) although the police were included in the Schedule as an entity to which Part III (the “Investigation of Complaints”) of the Ordinance applied, the Ombudsman was not investigating the police and he had failed to discharge his obligation to satisfy the court that the report would contain information vital to his investigation; and (c) the weight of public interest was in favour of non-disclosure on the ground of public interest immunity, as protecting the confidentiality of police records was extremely important, and since the Supreme Court would not be able to compel the police to produce the report, neither could the Ombudsman.

Held, dismissing the application:

(1) The Supreme Court’s powers of assistance under Part 34 of the Civil Procedure Rules were limited to assisting an “inferior court or tribunal.” The Ombudsman was neither of these because the essence of a court or tribunal was that it adjudicated between two parties and its decision put an end to the litigation by a formal order. The Ombudsman did not have these functions but merely made a report to the Chief Minister. The court did not therefore have the power to come to the aid of the Ombudsman under Part 34 (paras. 13–14).

(2) Nevertheless, the Ombudsman could obtain the documents, as s.17 of the Ordinance gave him powers equivalent to the Supreme Court in respect of requiring the production of documents. He could therefore issue his own witness summons, which would have to be obeyed in the same way as a subpoena of the Supreme Court, without needing the assistance of the court (para. 14).

(3) The Ombudsman could legitimately request police records for his investigation, even though the main investigation was into another

authority. The police were specifically included within the ambit of the Ombudsman's investigatory powers under Part III of the Ordinance, by being named in the Schedule to the Ordinance which listed the authorities subject to Part III (para. 12).

(4) For the Ombudsman legitimately to have accepted a complaint, the complainant must have been a "person aggrieved" within the meaning defined in s.2 of the Ordinance. In the present case, a grandmother was a "person aggrieved," in respect of a complaint about the treatment of her grandchildren (paras. 10–11).

(5) It was for the Ombudsman to decide whether the information sought was material to his investigation and whether or not it should be subject to public interest immunity. In the present case, he had already decided that it was material. He had also balanced the public interest of protecting the confidentiality of public service records against the public interest in resolving the alleged maladministration, and had come to the conclusion that the claim to public interest immunity failed. Confidentiality would in any case be preserved as s.19 of the Ordinance imposed a duty of confidentiality on the Ombudsman and any decision he made would of course be subject to judicial scrutiny by way of judicial review (paras. 15–16).

(6) Consequently, although it was not possible to aid the Ombudsman under Part 34 of the Civil Procedure Rules as he had requested, the court would instruct the Commissioner of Police that he was under a duty to disclose the information to the Ombudsman (para. 17).

Cases cited:

- (1) *Air Canada v. Trade Secy.*, [1983] 2 A.C. 394; *sub nom. Air Canada v. Trade Secy. (No. 2)*, [1983] 1 All E.R. 910, considered.
- (2) *British Columbia Dev. Corp. v. Friedmann*, [1984] 2 S.C.R. 447, considered.
- (3) *Complaint against Liverpool City Council, In re*, [1977] 1 W.L.R. 995, considered.
- (4) *Conway v. Rimmer*, [1968] A.C. 910; [1968] 1 All E.R. 874, considered.
- (5) *Subpoena, Re (Adoption: Commr. for Local Administration)*, [1996] 2 F.L.R. 629, considered.

Legislation construed:

Public Services Ombudsman Ordinance 1998, s.2: The relevant terms of this section are set out at para. 10.

s.13: The relevant terms of this section are set out at para. 2.

s.16: The relevant terms of this section are set out at para. 5.

s.17: The relevant terms of this section are set out at para. 5.

s.19: "Information obtained by the Ombudsman or a member of his staff in the course of, or for the purposes of, an investigation under this Ordinance, shall not be disclosed except—(a) for the purposes

of the investigation and of any report to be made thereon under this Ordinance; or (b) for the purposes of any proceedings under this Ordinance; and the Ombudsman or members of his staff shall not be called upon to give evidence in any proceedings, other than such proceedings as aforesaid, of matters coming to his or their knowledge in the course of an investigation under this Ordinance.”

Schedule: “All Gibraltar Government departments and agencies, including, but without prejudice to the generality of the foregoing, the Royal Gibraltar Police.”

Civil Procedure Rules, r.34.4(1): “The court may issue a witness summons in aid of an inferior court or of a tribunal.”

N. Cruz for the claimant;

A.A. Trinidad, Senior Crown Counsel, for the defendant.

1 **PIZZARELLO, Ag. C.J.:** A lady, to whom I shall refer as “the grandmother,” being aggrieved at the manner in which Social Services carried out an investigation regarding the ill-treatment of her grandchildren by their mother, complained to the Ombudsman about the lack of action taken by the Social Services Agency over the allegation and alleged the Agency was guilty of maladministration in failing properly to consider her concerns for the safety of her grandchildren.

2 The Ombudsman accepted her complaint and decided to initiate a formal investigation pursuant to the powers conferred upon him by the Public Services Ombudsman Ordinance 1998 (“the Ordinance”) to investigate any administrative action taken by or on behalf of any authority to which Part III of the Ordinance applies. The powers to investigate are contained in s.13 of the Ordinance, which reads:

“(1) Subject to the provisions of this Part, the Ombudsman may investigate any administrative action taken by or on behalf of any Authority to which this Part applies in any case where—

- (a) a written complaint is duly made to the Ombudsman by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and
- (b) the Ombudsman considers that it is right and proper to conduct an investigation in respect of such complaint.

(2) In determining whether to initiate, continue or discontinue an investigation, the Ombudsman shall, subject to the provisions of this Part, act in accordance with his own discretion; and any question whether a complaint is duly made under this Ordinance shall be determined by the Ombudsman.”

3 It appears that the grandmother lodged a complaint on or about the same time with the Royal Gibraltar Police in respect of the same facts of which she had complained to the Social Services Agency. It came to the Ombudsman's knowledge that a report had been compiled by a police officer, whose identity is disclosed in the correspondence, in respect of the grandmother's complaint to the police. The Ombudsman sought disclosure of that report.

4 After an exchange of correspondence, the Ombudsman wrote on November 20th, 2002, in the following terms:

"I have sought legal advice and my advisers are of the opinion that the disclosure of this report would not be subject to public interest immunity.

I would hope that in the light of this you will disclose this report to me in confidence . . .

Please be advised that if you decline to disclose the report I will take legal action to secure its disclosure."

The Commissioner of Police refused. He wrote on November 27th, 2002:

"After consultation with the Attorney-General's Chambers, the decision has been taken not to release such document as it is considered within the head of public interest immunity."

5 The Ombudsman applied to the Supreme Court on December 11th, 2002, seeking disclosure of the report because he considered that the said report might be important for the investigation of the grandmother's complaint. For his power to obtain that information from the police, the Ombudsman relied on s.16, which reads:

"(1) Every investigation pursuant to a complaint under this Ordinance shall be conducted in private, but except as aforesaid, the procedure for conducting an investigation shall be such as the Ombudsman considers appropriate in the circumstances of the case.

(2) Without prejudice to the generality of subsection (1), the Ombudsman may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and may determine whether any person may be represented by counsel, solicitor or agent, in the investigation.

(3) The conduct of an investigation under this Ordinance shall not affect any lawful action taken by the Authority concerned, or any power or duty of that Authority to take further action with respect to any matter subject to the investigation."

For his right to call for that evidence the Ombudsman relies on s.17, which reads:

“(1) For the purposes of any investigation under this Ordinance, the Ombudsman shall have the same powers as the Supreme Court in respect of the attendance and examination of witnesses, including the administration of oaths or affirmations and the examination of witnesses abroad, and in respect of the production of documents.

(2) No person shall be compelled, for the purposes of an investigation under this Ordinance, to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before the Supreme Court.”

6 Mr. Trinidad, for the Attorney-General, on behalf of the Commissioner of Police submits that although the Royal Gibraltar Police is included in the Schedule to the Ordinance as an entity to which Part III (“Investigation of Complaints”) applies—

(a) in respect of the allegations laid by the grandmother, the Ombudsman is not investigating the Royal Gibraltar Police; and

(b) the Ombudsman is not entitled to that which he seeks by virtue of the provisions of s.17(2).

7 In respect of para. 6(b), Mr. Trinidad submits that in the Supreme Court, the police would not be compelled to produce the report in question. It is a report, one of the many reports which are compiled by an officer in charge of any particular criminal matter. It is a report sent up to the Commissioner for his reference and record. Reports of this nature involve an account of the facts of the case as they have been alleged and of the progress the pertinent investigation has made, including any difficulties which are being encountered by the officer in relation to evidence and otherwise, the names of witnesses and informants, the officer’s assessment of any witness, the reasons why the officer considers charges should or should not be proceeded with, all matters which contain sensitive information and in respect of which it is necessary to secure freedom and candour of communication and information within the service so that decisions can be taken on the best advice and on the fullest information. It is necessary that the persons giving information and advice should know that he/she is doing so in a confidential manner and that that confidence will not be broken. The law is that public interest immunity attaches to the disclosure of the contents of a particular document which would injure the public interest and it will also attach to a document which falls within a class which the public interest requires to be withheld from production to protect the proper functioning of the public service, to which class he submits this report appertains. Mr. Trinidad concedes that a police report may be produced in a criminal trial but this is very much the exception and there is an unacceptable risk that disclosed police reports would interfere with the freedom and confidence

of the police in getting information about crime and suspected crimes. This application, he submits, is nothing less than a fishing expedition. *Conway v. Rimmer* (4), which held that a document in issue should be produced for inspection by a judge for his adjudication as to the prejudice to the public interest or that the possibility of such prejudice was insufficient to justify their being withheld, shows the balancing exercise a judge has to carry out. Mr. Trinidad also refers to Lord Fraser's speech in *Air Canada v. Trade Secy.* (1), in which Lord Fraser says ([1983] 2 A.C. at 435):

“The weight of the public interest against disclosure will vary according to the nature of the particular documents in question . . . The most that can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be ‘deprived of the means of . . . proper presentation’ of his case . . .”

Mr. Trinidad submits that the Ombudsman has failed to discharge his obligation to satisfy the court that the police report, which involves a criminal investigation and which has nothing to do with any administrative action of the Social Services Agency, will contain information which is vital to his investigation. On the other hand, he argues, the production of this document would be extremely prejudicial to the public interest and create a precedent that police reports (which have traditionally remained confidential) are now open to public inspection, and the possible injury to the public service is so grave that no other interest should be allowed to prevail over it.

8 It seems to me that the Ordinance is an original legislative enactment in Gibraltar and so the presence of an Ombudsman in Gibraltar is only less than half a decade long. The Ombudsman is a statutory creation and it is fundamental that the nature and extent of the jurisdiction which may be exercised by the Ombudsman turns upon the interpretation to be given to the specific language of the Ordinance. An overview of an Ombudsman's role is to be found in the case of *British Columbia Dev. Corp. v. Friedmann* (2), in the Supreme Court of Canada to which I was referred. Dickson, J. said ([1984] 2 S.C.R. at 450):

“The Ombudsman (in original form ‘justitieombudsman’, a Swedish word meaning ‘Procurator for Civil Affairs’, but translated loosely as ‘citizens’ defender’) is an office typically provided for by a legislative body and headed by an independent public official with power to receive complaints about, inquire into, and report upon, governmental abuses affecting members of the public. Any analysis

of the proper investigatory role the Ombudsman is to fulfil must be animated by an awareness of this broad remedial purpose for which the office has traditionally been created.”

Shortly put, the legislation is intended to enable the citizen to request that a complaint of unjust conduct on the part of the government be investigated by the Ombudsman so long as the impugned conduct relates to a matter of administration.

9 It is not usually safe to rely on authorities which derive from another jurisdiction but I can do no better than to refer once again to the judgment of Dickson, J. in the before-mentioned case, for an historic overview which seems to me to be not inappropriate to have in mind (*ibid.*, at 458–461):

“I do not think the remedial nature of the *Ombudsman Act* could fairly be doubted. The objects of the legislation and the degree to which it should receive a large and liberal interpretation can best be understood by examining the scheme of the statute as well as the factors that have motivated the creation of the Ombudsman’s office.

(b) *Historical Development*

The need for some means of control over the machinery of government is nearly as old as government itself. The Romans, as long ago as 200 B.C., established a tribune—an official appointed to protect the interests and rights of the plebians from the patricians. They also had two censors—magistrates elected approximately every five years to review the performance of officials and entertain complaints from the citizenry. And the dynastic Chinese had the Control *Yuan*, an official who supervised other officials and handled complaints about maladministration.

The office of the Ombudsman and the concept of a grievance procedure which would be neither legal nor political in a strict sense are of Swedish origin *circa* 1809. The constitution which established Sweden as a democratic monarchy, and created the Swedish Parliament, also provided for parliamentary oversight of the bureaucratic machinery through a new official called the *Justitieombudsman*.

As originally conceived, the Swedish Ombudsman was to be Parliament’s overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman’s main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.

The institution of Ombudsman has grown since its creation. It has

been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p.15, as ‘one of the dilemmas of our times’ namely, that ‘[i]n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic power—if it is not properly controlled—is itself destructive of democracy and its values.’

The factors which had led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them. See L. Hill, *The Model Ombudsman* (1976) at pp.4–8.

The traditional controls over the implementation and administration of governmental policies and programs—namely, the legislature, the executive and the courts—are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. The demands on members of legislative bodies is such that they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue. See Powles, *Aspects of the Search for Administrative Justice* (1966), 9 Can. Pub. Admin. 133 at pp.142–3.

The limitations of courts are also well known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.

H. W. R. Wade describes this problem and the special role the Ombudsman has come to fill:

‘But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country.

...

The vital necessity is the impartial investigation of complaints... What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. Nothing of this kind existed in our system before 1968, except in very limited spheres. Yet it is a fundamental need in every system. It was because it filled that need that the device of the Ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature. (See Wade, *Administrative Law* (5th ed.) pp.73–74.)’

This problem is also addressed by Professor Donald C. Rowat, in an article entitled ‘*An Ombudsman Scheme for Canada*’ (1962), 28 Can. J. Econ. & Poli. Sc. 543 at p.543:

‘It is quite possible nowadays for a citizen’s right to be accidentally crushed by the vast juggernaut of the government’s administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress.’

The Ombudsman represents society’s response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman ‘can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds’: *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.Ct.) *per* Milvain, C.J., at pp.192–193. On the other

hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.”

I should end this historical survey with a reference to *Re Subpoena (Adoption: Commr. for Local Administration)* (5), where Carnwath, J. says ([1996] 2 F.L.R. at 636–637):

“The 1974 Act contains its own code designed to ensure that confidentiality is maintained so far as consistent with the proper exercise of the commissioner’s function. It is particularly significant that, following the *Liverpool* case to which I have referred, Parliament changed the law so as to ensure that documents of the sensitive kind there in issue were not immune from production to the commissioner, but were subject to strict control in relation to further disclosure. That is a clear indication of the importance that Parliament attached to the commissioner having the fullest possible access to the relevant records even in sensitive areas such as those relating to the care of children. The reasons for this are not far to seek. It is vital to public confidence in the role of the local commissioner that he should be able to carry out a full investigation, so that he can tell those affected that he has had full access to all relevant documentation, even if for reasons of confidentiality he cannot disclose the results to them.”

10 As I have said, the Ombudsman is the creature of legislation and his application in this matter may only succeed if he is properly seised of the complaint and if this court has jurisdiction. The start-off point is a complaint and that complaint, having regard to the provisions of s.13, has to be a written complaint. I am prepared to assume this is the case. Secondly, the complaint has to be made by any person aggrieved. The expression “person aggrieved” is defined in the interpretation section, s.2 of the Ordinance, as a “person who claims to have sustained such injustice as is mentioned in section 13(1)(a), or is entitled to make a complaint on behalf of the person aggrieved under the provisions of section 11(2) . . .”

11 The question that arises is, is a grandmother a person who can legitimately complain to the Social Services Agency relating to children who are her grandchildren? A meddling busybody might not be a person aggrieved in a matter of administration by the Agency but in my opinion the Ombudsman was correct in this case to have accepted the complaint

of the grandmother as the person aggrieved by the action of the Social Services Agency to which she had legitimately made a complaint. I am assuming further that the complaint by the grandmother was filed within the time limits set by s.12 of the Ordinance.

12 Once the investigation is under way, the conduct of the investigation is controlled by s.16. Sub-section (2) is in very wide terms; the Ombudsman “may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit.” Those are very wide words, and far-reaching rights are given to the Ombudsman by the legislature and are only circumscribed as far as I can ascertain by ss. 17 and 18. I had some reservations that operational records of a police force should come within the purview of the long title to the Ordinance, but those reservations have been resolved by the inclusion of the Royal Gibraltar Police in the Schedule to the Ordinance. It seems to me that if the Royal Gibraltar Police may be the subject of scrutiny by the Ombudsman in a matter of administration, there is no principled reason why that body should not be amenable to an enquiry from the Ombudsman in relation to his investigation of some other authority. So, do the submissions of Mr. Trinidad stop the Ombudsman from (a) looking at the record; and (b) using that information?

13 Sub-section (2) of s.17 is framed in the negative: “No person shall be compelled . . . to give any evidence . . .” Who can compel that person? This can only be the Ombudsman himself or the Supreme Court in its jurisdiction (if any) in aid of the Ombudsman. The Supreme Court’s jurisdiction in aid is contained in Part 34.4 of the Civil Procedure Rules, which for this purpose is the same as it was under the Rules of the Supreme Court 1965. This is headed: “Witness summons in aid of inferior court or of tribunal.” I do not consider that it is applicable because the Ombudsman is neither a court nor a tribunal. I am aware that application to the High Court is the avenue taken in England in similar circumstances of fact and law (see for instance *In re Complaint against Liverpool City Council* (3) and *Re Subpoena (Adoption: Commr. for Local Administration)* (5)) where the legislation under consideration was similar to the Ordinance, being the Local Government Act 1974. The Parliamentary Commissioner Act 1967 is also similar.

14 But these two Acts are not quite the same as each other and not the same as the Ordinance. I repeat again that the Ombudsman is governed by the statute that creates him and that legislation has to be interpreted within its parameters. The Ombudsman, I repeat, is neither an inferior court nor a tribunal. The essence of a court or a tribunal is that it adjudicates in a matter where there are two parties or more ranged on either side and the court’s or tribunal’s decision puts an end to the litigation by way of giving effect to a formal order. The Ombudsman does

not have these functions; he merely reports and even then there is power in the Chief Minister by s.23 to prevent the disclosure of information in reports. In my opinion, the Supreme Court does not have the power to come to the aid of the Ombudsman under Part 34 of the Civil Procedure Rules, under which the present application is made, and I doubt, because the Ombudsman is created by statute, that there is any inherent jurisdiction of the court. I am of the opinion that the Ordinance vests this power in the Ombudsman in s.17:

“[T]he Ombudsman shall have the same powers as the Supreme Court in respect of the attendance and examination of witnesses, including the administration of oaths or affirmations . . . and in respect of the production of documents.”

This it seems to me is clear authority for the Ombudsman to issue his own witness summons which has to be obeyed in the same way as a subpoena of this court.

15 This being my view, the last question is who decides whether the report is subject to public interest immunity. Following on from what I have said, I consider this must be for the Ombudsman himself. He will stand in the position of a judge. He will look at the document on which public interest immunity is claimed. He will have to resolve the issue. I would refer to the remarks of Lord Widgery, C.J. in the *Liverpool City Council* case (3), which seems to me to be apt and which may give guidance to the Ombudsman ([1977] 1 W.L.R. at 998–999):

“This is a situation which of course can produce a conflict of public interest. It can be said in such cases that on the one side it is being argued that the records of such a kind are confidential and that they should be retained in a relationship of confidence for a variety of good reasons, not least of which is that only by such means will people writing up these records express themselves with candour. We are told, and I do not doubt it for a moment, that these records are often extremely intimate, and certainly they are records of a kind which want to be written freely and without any inhibitions about the future. It can be argued, and indeed has been argued in the present case, that records of this kind ought to be kept confidential.

On the other side there is the argument never previously heard in the courts, but goodness knows powerful enough, and that is that when the local commissioner was appointed with the functions and duties which I need not state in detail it is in the public interest that he should be given access to all of the documents and enabled to make a full investigation of the particular topic which has been referred to him. Thus you get a tug of war or conflict between two matters of public interest: the public interest of the city’s records which

requires them to be confidential and the public interest in making the commissioner's duties work which requires them to be published at all events to him."

For "city's records" read "police records" in the present case. And the last sentence of the quotation gives the lie to Mr. Trinidad's suggestion that the Ombudsman is engaging in a fishing expedition. What the Ombudsman seeks in his investigation is a publication to him in confidence and he needs to know the contents of the document to see, consider and decide (a) whether it is material to his investigation; and (b) if he is then to exercise a judgment on the public interest immunity position.

16 It is true that the Ombudsman has not taken a judicial oath; it is true that to the extent that he wishes to see something upon which he is intimately involved as an investigator, albeit impartial, it may be perceived that he might want to advance his investigation—perhaps to the detriment of all the considerations which the Attorney-General is anxious to preserve. But there is a remedy for this event and that is that the Ombudsman's decision would itself be the subject of judicial scrutiny by way of judicial review. Mr. Trinidad's fears that giving the Ombudsman such power would lead to the breakdown of police confidentiality, are in my view baseless. In any case, it is what the legislature intended on the proper construction of the Ordinance. The Ombudsman is governed by s.19, which is headed: "Duty not to disclose information." Furthermore, this power is a power that only he can exercise. It is to be remembered that he acts in private. It has not to be forgotten that the Ombudsman is not a minor official: his status is high and it is interesting to note from the Canadian case that in Canada he receives the salary of a Supreme Court Judge, as does (as far as I can ascertain) the Parliamentary Commissioner for Administration and the Local Commissioner in England.

17 While I shall, therefore, not grant the application for the reasons given, I make it plain that the Commissioner of Police should make the relevant report available to the Ombudsman for his perusal.

18 This matter came before me in my private office but, because of the importance of the issue, I consider it appropriate to deliver the judgment in open court.

Application dismissed.