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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE AND MARTIN O'BRIEN FOR JUDICIAL REVIEW

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KERR LCJ

Introduction

[1] The Committee on the Administration of Justice (CAJ) is an independent non-governmental organisation. Its purpose is to secure the highest standards in the administration of justice in Northern Ireland and, to that end, it works with domestic and international human rights groups. At the time that these proceedings were launched, Martin O'Brien was its director.

[2] On 15 March 1999, Rosemary Nelson, a well-known solicitor and a member of the executive committee of CAJ, was murdered when a bomb that had been attached to her car exploded. A loyalist paramilitary group, the Red Hand Commandos, claimed that they had carried out this atrocity. Following her murder Mr O'Brien lodged a complaint with the Police Ombudsman's office concerning the failure of the Royal Ulster Constabulary (the RUC) to properly investigate threats made against Mrs Nelson before she was murdered.

[3] Mrs Nuala O'Loan is the Police Ombudsman for Northern Ireland. In the course of her investigation into the complaint she provided certain information to CAJ about the progress of her inquiries. This prompted a request from CAJ that she disclose to them certain material relevant to the investigation into Ms Nelson's murder. CAJ also asked the Chief Constable to provide certain material. Both the Ombudsman and the Chief Constable refused to provide the material sought. By these judicial review proceedings the applicants challenge that refusal.

Background

[4] On 10 August 1998 Paul Mageean, legal officer with CAJ, wrote to Adam Ingram, MP, a minister of state in the Northern Ireland Office, enclosing two documents, in one of which explicit threats to the life of Ms Nelson were made. The other document referred to her in a sinister fashion. Mr Mageean suggested that these documents constituted very definite threats to the personal safety of Ms Nelson. He called on Mr Ingram to investigate these threats and to provide the necessary protection for Ms Nelson. A letter from the minister's private secretary, dated 24 September 1998, in response to Mr Mageean's letter stated that the documents had been passed immediately to the Chief Constable's office for investigation. It also mentioned a scheme run by the Northern Ireland Office by which security measures could be installed in homes at public expense and gave information as to how Ms Nelson might apply for inclusion in the scheme.

[5] The documents enclosed with Mr Mageean's letter were not the first threats that Ms Nelson had received. These had begun after she started to represent clients detained in police holding centres in Northern Ireland. Her case was investigated by the United Nations special rapporteur on the independence of judges and lawyers when he visited Northern Ireland in 1997. In a draft of his report, the special rapporteur referred specifically to Rosemary Nelson as one of a number of lawyers who had complained of police harassment and threats. It is suggested that her name was removed at the suggestion of the Chief Constable on the basis that her safety could not be guaranteed if she was named in the report. On 29 September 1998 Ms Nelson gave evidence to a subcommittee of the United States Congress about threats to her and her family.

[6] On 22 March 1999 two detective officers of the RUC called at the offices of CAJ asking for the originals of the documents that had been enclosed with Mr Mageean's letter of 10 August 1998. They explained that they wished to have the documents tested for fingerprint and DNA traces. On 29 March 1999, Colin Port, the deputy Chief Constable of Norfolk was appointed by Sir Ronnie Flanagan, the Chief Constable of the RUC to take charge of the investigation into Ms Nelson's death.

[7] At a meeting in April 1999 of the Police Authority for Northern Ireland, Sir Ronnie Flanagan was asked whether Ms Nelson had requested or whether she had been offered security protection. According to the minutes of the meeting, Sir Ronnie replied that Ms Nelson had not sought security advice and that, prior to her death, the RUC did not have information to suggest that she was the subject of a specific terrorist threat. When CAJ became aware of this statement they challenged the Chief Constable publicly as to its accuracy. This led to a newspaper article in the Irish Times on 27 May 1999 in which CAJ was quoted as having expressed disbelief at the Chief Constable's

statement. Subsequently a press statement was issued by the RUC which stated: -

> "There is no discrepancy between what the Chief Constable told the Police Authority in 1999 and the correspondence between the CAJ, the Minister's office and the Chief Constable's office in August/September 1998. As a result of the said correspondence, the CAJ was advised by the Minister's office a to how Mrs Nelson might apply to have protective measures installed at her home; how she could contact local police crime prevention officers for advice; and even how she might apply for a personal protection firearm. None of these possibilities was followed through.
>
> The Chief Constable's answers to the Police Authority in April 1999 refer to the fact that the RUC itself did not have information to substantiate a threat to Mrs Nelson's life before her murder. Further in response to a specific question he said he was unaware of any request made to the Prime Minister's office for protection to her."

[8] On 3 June 1999 Mr O'Brien wrote to the Chief Constable. He referred to the correspondence with Mr Ingram and the two documents enclosed with the letter from Mr Mageean. He asked a number of questions about whether an investigation had been carried out on foot of the information that Mr Ingram's secretary had said had been passed to the RUC and, if so, about the nature of the inquiries conducted. This letter received an acknowledgment from the Chief Constable's office but no substantive reply. Ultimately, it was suggested that a meeting might be a better way to deal with the queries raised and this took place at the Chief Constable's office on 4 October 1999.

[9] Mr O'Brien wrote again to the Chief Constable on 9 March 2000, reminding him that at the meeting on 4 October 1999, he had undertaken to send a "written composite response" to the letters about the Rosemary Nelson case and other matters raised at the meeting. This had not been forthcoming and Mr O'Brien pointed out that Mr Mageean would be giving evidence to a US Congressional hearing on 14 March and that it would be helpful if a written response, particularly in relation to the Nelson case, could be received before that date.

[10] On 14 March 2000 the Chief Constable wrote to Mr O'Brien. On the matter of Ms Nelson, he said: -

> "I explained at our meeting, having called in Colin Port and John Stevens respectively in connection with the investigation of the murders of Rosemary Nelson and Pat Finucane, and having given them such an independent remit, it is much more appropriate for them rather than me to discuss aspects of their ongoing investigations which at this stage are appropriate for discussion. The remit given to them places no obstacle whatever for ongoing interaction between them and your organisation and others. This is something I very much encourage.
>
> In connection with your letter of 3 June 1999 specifically relating to the murder of Mrs Nelson, I explained to you at our meeting that the RUC itself had no intelligence prior to Mrs Nelson's death to indicate a threat of the dreadful atrocity that was to be carried out. In relation to the documents to which you refer, as these remain a matter of ongoing investigation, neither I nor Mr Port believe that it is appropriate to discuss the details you raise while the investigation is current. You should be aware, however, that in relation to the threatening note received by Mrs Nelson, nothing of potential forensic value was lost in the period between the sending of the note and its subsequent forensic examination. At this stage, nothing has been disclosed in the examination which has assisted Mr Port's inquiry."

[11] On 19 October 2000 Mr Mageean wrote to the Chief Constable. Part of that letter is as follows: -

> "… we understand that the investigation in relation to the documents is now complete and that this issue is once again under consideration by your office. In these circumstances, we would be grateful if you could indicate to us the outcome of the police inquiries in relation to the documents. You will understand that we remain concerned to discover what steps, if any, were taken by the police when they received the threatening documents from Minister Ingram's office."

[12] An acknowledgement of that letter was sent from the Chief Constable's office but no substantive reply was received. Mr O'Brien then wrote to the Chief Constable on 20 November 2000 stating that his failure to reply to CAJ's queries about the police investigations had reinforced their suspicions that the threats had not been properly investigated by the Chief Constable's office. He informed the Chief Constable that, in consequence, a complaint had been made to the Police Ombudsman.

[13] The complaint to the Ombudsman outlined the matters set out in summary above. It also dealt in somewhat greater detail with the matters discussed at the meeting on 4 October 1999. According to the complaint document, Sir Ronnie had told the CAJ delegation that the RUC had carried out an assessment of the security risk to Ms Nelson and had concluded that there was nothing to suggest a threat from loyalist paramilitaries at the time (presumably when they received the documents from Mr Ingram's office).

[14] The complaint also detailed a meeting that the CAJ and other groups had with Mr Port on 21 March 2000. It stated that Mr Port had indicated a definite line of inquiry in relation to one suspect who, it was believed, had been the author of one of the documents that had been sent to Mr Ingram's office by CAJ. This prompted the suggestion that had a proper investigation of these documents and the originals been undertaken sooner, this person might have been identified and Rosemary Nelson's death might have been avoided. The complaint also referred to the publication in a local newspaper on 7 May 2000 of a section of the diary of Billy Wright, a loyalist paramilitary murdered in HM Prison the Maze in December 1997. This extract should have raised serious concerns about possible attack on Ms Nelson, CAJ claimed. It was suggested that the RUC must have had access to the diary after Mr Wright's murder and that Ms Nelson ought to have been warned about these risks. Moreover, the existence of the diary cast further doubt, CAJ claimed, on the Chief Constable's statement to the Police Authority that he was unaware of any terrorist threat.

[15] The complaint document outlined a number of steps which, it suggested, the Ombudsman's office should take. Among these was the submission that several documents should be obtained and that CAJ should also be given sight of these. The documents were: -

1. The RUC report documenting the actions that the RUC took or failed to take in connection with the threats against Rosemary Nelson that Minister Ingram forwarded to the Chief Constable's office;

2. Mr Port's review of the RUC report;

3. The original letter from the Minister to the Chief Constable and all subsequent related correspondence;

4. A copy of the RUC's security assessment on Rosemary Nelson;

5. A copy of any guidance which exists for carrying out security assessments;

6. A copy of any relevant pages in Mr Wright's diary;

7. A copy of any reports documenting the RUC's investigation of the threats made against Rosemary Nelson in Mr Wright'

[16] On 24 April 2001 Mr O'Brien wrote to the Police Ombudsman asking for a "general update" on the progress of the investigation and posing a number of specific queries. The letter also asked that the Police Ombudsman provide CAJ with a number of documents associated with the investigation. David Wood, director of investigations in the Police Ombudsman's office replied on 30 April 2001, answering the queries raised but making it clear that documents obtained in the course of the investigation could not be provided to CAJ. The letter ended with this passage: -

> "I hope this information is of assistance to you; the investigation is now well under way after the initial difficulties. I would hope that all documentation will have been inspected within the next two weeks but I am obviously in the hands of the RUC. I will be as open as I can with you in respect of the conclusions reached but you must understand that confidential documents secured by us during the course of an investigation must remain confidential. You are, of course, free to request the documentation to which you refer from the RUC but it must be a matter for the Chief Constable as whether he discloses it to you. We are given extremely strong powers to require such documentation in order that the public can be satisfied that in the investigation of complaints we can achieve such access to ensure all aspects are properly investigated. You can thus be assured that all apparent avenues of investigation will be pursued."

[17] Further correspondence was exchanged between Mr O'Brien and Mr Wood on 17 May and 4 June 2001 with Mr O'Brien renewing his claim to see material obtained by the Police Ombudsman in the course of the investigation and Mr Wood resisting that claim and pointing out that documents were received by his office on a confidential basis and it was for the owners or makers of the documents to decide whether to release the material to CAJ.

[18] A meeting between representatives of CAJ and Mr Wood and Mrs O'Loan took place on 22 June. After that meeting, on 10 July 2001, Mr O'Brien wrote a long letter to Mr Wood raising a number of points that emerged during the meeting and returning to the theme of the production of documents. The following documents were specified: -

1. The correspondence between the Northern Ireland Office and the RUC following the dispatch of the material by CAJ to Mr Ingram;

2. The internal review of the RUC investigation and the report of Mr Port on that review;

3. Documents relating to the assessment by the RUC of the risk to Rosemary Nelson's life;

4. The criteria for the risk assessment.

[19] Mr O'Brien's letter claimed that recent jurisprudence in the European Court of Human Rights supported his claim that CAJ was entitled to see this material. On 20 July 2001 Mr Wood replied. He rejected the request for disclosure of the materials sought. He referred to recent judicial authority in Northern Ireland which, he said, supported the stance that the Police Ombudsman's office had taken on the matter of disclosure but stated that the office did not operate a blanket policy of refusal to disclose. Each case was treated on its merits but documents supplied on a confidential basis would generally not be disclosed.

[20] On 25 September 2001 Mr O'Brien wrote to the Chief Constable informing him of the request that CAJ had made of the Police Ombudsman for disclosure of the documents enumerated in the letter of 10 July and of her refusal to disclose them He then asked that the Chief Constable agree to produce the documents for CAJ. Superintendent Hamill replied on behalf of the Chief Constable on 18 October 2001. He stated that the Chief Constable considered that these documents were confidential and he refused to disclose them.

[21] On 12 December 2001 Mr O'Brien wrote to Mr Wood after they had met some short time before in order that CAJ representatives be shown the draft

report of the Police Ombudsman into the CAJ complaint. A number of matters are dealt with in the letter that are not directly relevant to the issues that arise in this application. Two specific items are germane. Mr O'Brien complained that the report failed to set out what changes had been made to procedures as a result of the internal RUC review. He suggested that CAJ could not determine what these changes were because they had not been supplied with the relevant documents. He also protested that CAJ was placed at a disadvantage because they were unaware of the changes suggested by either the internal review or the review conducted by Mr Port. Apart from these specific complaints, however, the letter contained a long commentary on, and, at places, critique of the draft report. It also made a large number of suggestions as to the amendment of the report and lines of inquiry that might be pursued.

[22] On 21 December 2001 Mr Mageean wrote to Mrs O'Loan and the Chief Constable asking them to reconsider their refusal to disclose the documents sought in the letter of 10 July 2001, advising them that CAJ had received counsel's opinion that there were grounds to challenge the decision not to disclose these documents by way of judicial review. On 17 January 2002 Superintendent Hamill replied maintaining the Chief Constable's position as outlined in the letter of 18 October 2001. Mrs O'Loan replied on 13 February 2002 confirming her refusal to disclose the documents.

The judicial review application

[23] The Order 53 statement seeks an order of certiorari quashing the decisions of the Police Ombudsman and the Chief Constable refusing to disclose the requested material to the applicants, together with a declaration that the applicants are entitled to the documents sought and an order of mandamus compelling their disclosure. A declaration is also sought against both respondents that they are acting incompatibly with the applicants' rights under article 2 of the European Convention on Human Rights and Fundamental Freedoms and that they are therefore in breach of section 6 of the Human Rights Act 1998.

[24] The grounds on which the relief against the Ombudsman is sought are that the decision is contrary to article 2 of ECHR and section 6 of the Human Rights Act and to various sections of the Police (Northern Ireland) Act 1998; that she fettered her discretion in adopting a policy of non-disclosure; that she failed to give sufficient weight to the request made in respect of each document sought; that she erred in law in considering that the consent of the original source of the documents was required before it could be disclosed; that by her refusal to provide the documents the Ombudsman was failing to promote the policy and objects of the Police (Northern Ireland) Act; and that she failed to give sufficient weight to the statutory provisions outlined above, the effect that non-disclosure would have on the applicants' ability to

contribute to the investigation, to the identity of the complainant, to the subject matter of the complaint and to the benefit that would flow from their having sight of the documents sought.

[25] In relation to the Chief Constable, the applicants claim that he too acted incompatibly with their article 2 rights; that he fettered his discretion; that he erred in deciding that confidentiality was a sufficient reason for non-disclosure and in believing that his supplying the Ombudsman with the requested material absolved him of the duty to consider the applicants' request for disclosure; that in reaching his decision not to disclose the documents requested the Chief Constable failed to have sufficient regard to the applicants' rights under article 2 of the convention and to the merits of the request for disclosure; that the decision was "unfair, unreasonable and unlawful"; and that adequate reasons for it had not been given.

The arguments

[26] For the applicants Mr Treacy QC submitted that the Chief Constable's refusal to disclose the documents, based as it was on a sweeping claim that confidentiality countermanded this, could not be sustained. With the exception of the correspondence passing between the RUC and the Northern Ireland Office, confidentiality did not attach to any of the material sought. In any event, no conceivable harm could come even from the disclosure of that correspondence. It was not suggested that public interest immunity attached to the documents sought or that any consideration had been given to their production in a redacted form. Moreover, it was not claimed that the disclosure of the correspondence between the Northern Ireland Office and the police or the internal police reviews would have any prejudicial effect. Absent any detrimental effect to individuals or to the investigation generally, the duty to disclose to the complainant was, Mr Treacy said, clear.

[27] In advancing the case against the Ombudsman, Mr Treacy pointed out that Mrs O'Loan in her affidavit suggested that each request for disclosure "was considered on its own individual merits against the background of eh restriction on disclosure contained in section 63 of the 1988 [Police (Northern Ireland) Act". In fact, Mr Treacy argued CAJ was an agency to whom, by virtue of section 63, disclosure should be made.

[28] Mr Treacy suggested that the Ombudsman had misunderstood the reason that CAJ wanted to have the material. She appeared to believe that this was for the purpose of monitoring her investigation. This was not the case. CAJ wished to have the material in order to nullify any disadvantage that would otherwise accrue to them in contributing to the full and thorough investigation of their complaint.

[29] On the human rights issues Mr Treacy argued that CAJ was a victim for the purposes of section 7 of the Human Rights Act 1998. He pointed out that article 34 of the convention provides that the ECtHR may receive applications form any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of any of the rights set out in the Convention. To qualify as a victim CAJ need only show that it is itself directly affected by the decision that it challenges. Alternatively, the applicants qualified as indirect victims. Ms Nelson was a member of CAJ and it is affected by her death; CAJ is the complainant in relation to the Ombudsman's investigation; and its pursuit of the documents is supported by Ms Nelson's mother. In the further alternative Mr Treacy argued that CAJ was entitled to bring these proceedings and to rely on article 2 in a representative capacity.

[30] Mr Treacy argued that the disclosure of the material was necessary in order to fulfil the respondents' obligations under article 2 of the Convention. The procedural obligations arising under this article require that the applicants should not be placed at a disadvantage vis-à-vis the Chief Constable. There needed to be a "sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".

[31] For the Chief Constable Mr Morgan QC submitted that there was a public interest in preserving a confidentiality dimension to the type of investigation undertaken by the Ombudsman. If documents such as were sought by CAJ were disclosed this would have an inevitable impact on the efficacy and success of inquiries such as she conducted into the complaint in the present case. There was a public interest in recognising this in order that others would not be discouraged from making complaints or in co-operating with investigations.

[32] Mr Morgan also argued that the applicants were not entitled to the victim status that was prerequisite under section 7 of the Human Rights Act to enable them to rely on Convention rights. He submitted that the applicants were not entitled to advance a claim based on article 2 unless they could show that they were directly affected and this clearly did not arise.

[33] for the Ombudsman Mr Brian Fee QC claimed that so far from seeking to obstruct the applicants' participation in the investigation she and her staff had gone to considerable lengths to facilitate it. She was bound, Mr Fee said, to abide by the constraint contained in section 51 of the Police (Northern Ireland) Act. She was obliged not to release the information unless she was satisfied that by doing so she would further the objectives therein contained.

The relevant statutory provisions

[34] So far as is relevant section 51 of the Police (Northern Ireland) Act 1998 provides: -

> "**51.** - (1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.
>
> (2) …
>
> (3) …
>
> (4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure-
>
> (a) the efficiency, effectiveness and independence of the police complaints system; and
>
> (b) the confidence of the public and of members of the police force in that system."

[35] The relevant parts of section 63 of the Act are: -

> "**63.** - (1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies except-
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> (a) to a person to whom this subsection applies;
>
> (b) to the Secretary of State;
>
> (c) to other persons in or in connection with the exercise of any function of the Ombudsman;
>
> (d) for the purposes of any criminal, civil or disciplinary proceedings; or
>
> (e) in the form of a summary or other general statement made by the Ombudsman which-

(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to-

(a) the Ombudsman; and

(b) an officer of the Ombudsman."

[36] Section 7 of the Human Rights Act 1998, so far as is relevant, provides: -

"**7.** - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

…

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

Confidentiality

[37] In *Taylor and others v Serious Fraud Office* [1999] 2 AC 177, documents generated by a Serious Fraud Office inquiry were disclosed to the solicitors of defendants in a criminal trial. The solicitors in turn disclosed them to the first plaintiff who issued proceedings for libel. The House of Lords held that an

implied undertaking applied to material disclosed by the prosecution in criminal proceedings. Lord Hoffman said at 208: -

> "The implied undertaking in civil proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others."
>
> and at page 211: -
>
> "Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information, or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected."

[38] In *Re A's application* [2001] NI 335 I said of these passages: -

> "These passages identify the public interest in maintaining confidentiality for police investigations unless the interests of justice require otherwise. Unless it can be demonstrated that there are compelling reasons for disclosing the contents of a police investigation file, its vital confidentiality should be preserved."

[39] I consider that these remarks hold true for the investigation of a complaint by the Ombudsman. It is not difficult to identify the public interest that is at stake here. The nature of the investigations conducted by the Ombudsman is such that great sensitivity may be required. Confidentiality

can promote rather than detract from the effectiveness of an inquiry. If witnesses are aware that their statements will be inspected by other agencies, their incentive to candour may be diminished. Mr Treacy's arguments focussed on the avowed lack of need for confidentiality in relation to these particular documents but that, as it seems to me, misses the point. The effective investigation of complaints must depend to some extent at least on the knowledge of participants in inquiries such as this that their contributions can be made confidentially.

[40] Different considerations would of course apply if it could be demonstrated that by keeping confidential documentation generated by the investigation a less effective inquiry was likely to ensue. But that is not the case here. On the contrary, the Police Ombudsman's office has been assiduous, not to say painstaking, in informing the applicants at every stage of the inquiry of the state of its progress and it has provided a draft report and received extensive comment on it. There is no reason to question the assertions of the office that it has conscientiously pursued every legitimate line of inquiry.

[41] In *R (on the application of Green) v Police Complaints Authority* [2004] UKHL 6 the claimant lodged a complaint alleging that he had been deliberately knocked down by a police officer driving an unmarked police car. The complaints authority supervised the investigation of the complaint by another police force. It sent a list of all the witness statements and documents that it would be taking into account. The claimant asked for disclosure of everything in the list. The authority replied that it was unable to accede to that request as section 80 (1) (a) of the Police Act 1996 prohibited the disclosure of any information received by the authority in connection with its functions (but with certain specified exceptions), and the relevant exception in section 80 (1) (a), did not apply, as the disclosure was not necessary "for the proper discharge of the functions of the authority". The House of Lords held that the main aim of the authority in carrying out its functions in supervising the police investigation of alleged misconduct on the part of police officers was to satisfy the legitimate interests both of complainants and of the wider public that the investigation of complaints, and any decisions on taking disciplinary proceedings should be, and should be seen to be, independent and thorough. In the proper discharge of its functions, the authority might judge that it was necessary to disclose certain information derived from an investigation to claimants if their legitimate interests and those of the wider public were to be met.

[42] At paragraph [73] of his opinion Lord Rodger of Earlsferry dealt with the need for confidentiality in relation to witness statements obtained in the course of an investigation into a complaint against the police as follows: -

> "The other factor considered by the Court of Appeal was the desirability of maintaining the confidentiality of statements given by witnesses. They did not consider that, in itself, this was a sufficient reason for never disclosing witness statements. I agree: if disclosure were indeed necessary for the proper discharge of the authority's functions, then the statements would have to be disclosed, whether or not they were regarded as confidential. But it should be recognised that the starting point of section 80 is that information provided to the authority is to be kept confidential. This mirrors the position with both the police and the prosecuting authorities. As a general rule, this appears to be entirely appropriate. Of course, witnesses who give evidence to the police must expect that, whether favourable or unfavourable to the potential accused, it will be disclosed and become public in the event of a trial. But, subject to that, they may have good reasons for being anxious that it should not be revealed—for example, if it tends to cast doubt on a complainer's trumped-up allegation against a police officer. The potential risks to such a witness are obvious. Parliament recognises this legitimate concern in section 80 (1) (c) which allows information to be disclosed in the form of a summary that does not identify the person from whom the information was received. Similarly, in complaints against the police, as in many other cases, the statements will often show individuals, including the witnesses themselves, in a bad light—behaving, especially through drink, in ways or in circumstances that they would be ashamed to see made public. So witnesses will be understandably concerned that their evidence about their own or others' misdemeanours should be kept confidential unless there is a trial. The concern will be shared by the other people involved. The police and prosecutors are expected to respect that concern."

[43] It appears to me that the starting point in this case should likewise be that information provided to the Ombudsman should be kept confidential and that, generally, it should only be revealed where necessary for the proper discharge of her functions. The same considerations apply to the need for the

police to hold confidential materials that they supply to the Ombudsman for the purpose of her investigation. It could not be right that the need for confidentiality of those inquiries could be disregarded in the debate as to whether the Chief Constable should be required to produce the material requested. The question whether he should be compelled to hand over these documents to CAJ cannot be isolated from the efficacy of the Ombudsman's investigations. If it is right (as I believe it to be) that she should be entitled to guard the effectiveness of her investigation by withholding those documents, it could not be right that it should be imperilled by the release of the information from another source. It is, of course, true that the Ombudsman's office has pointed out that the Chief Constable could have waived any claim to confidentiality and one may take it from this that she would not have objected if he had chosen to do so. But the effectiveness of her investigations must depend on witnesses being able, if they choose, to refuse to reveal documents that they have supplied for the purpose of the inquiry.

The statutory incentive to confidentiality

[44] The need for confidentiality is, in my view, frankly recognised in the statutory provisions that deal with the issue. This is underscored not only by section 63 of the 1998 Police Act but by section 51. The former of these provisions forbids the disclosure of information received in the course of the inquiry to others than those specified. I do not accept Mr Treacy's argument that CAJ is included within this group. His argument appeared to rest on the proposition that CAJ came within the category of "other persons in or in connection with the exercise of any function of the Ombudsman". Their claim to be included in this group depended on their status as complainant but I do not consider that this is a remotely viable argument. CAJ plays no part in the performance of the Ombudsman's functions.

[45] Section 51 requires the Ombudsman to exercise her powers in a way that will secure the efficiency, effectiveness and independence of the police complaints system; and the confidence of the public and of members of the police force in that system. Her judgment that this is best achieved by keeping confidential material disclosed to her in the course of her investigations is, in my judgment, unimpeachable. In this connection it is to be noted that section 80 of the 1996 Act is in strikingly similar terms to those employed in the 1998 legislation.

The human rights arguments

[46] The first argument to be addressed in this context is the claim of the applicants to be entitled to rely on the Convention. In my judgment, that argument can be disposed of simply. Underpinning all the various formulations advanced on behalf of the applicants must be the proposition

that they are directly affected (in the way that phrase has been used in Convention terms) by the asserted violation of article 2.

[47] In *Klass v Germany* (1978) 2 EHRR ECtHR dealt with the question of victim status in paragraph 33 as follows: -

> "33. While Article 24 allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 [now article 34], claim "to be the victim of a violation . . . of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 – where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application – Article 25 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of *Ireland v. United Kingdom*, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation."

[48] An applicant may claim to be an indirect victim, for example when he or she is a close relative (such as a spouse or parent) of the affected person – see, for instance, *McCann v United Kingdom* (1995) 21 EHRR 97, and *Campbell and Cosans v UK* (1980) 3 EHRR 531 at 545. But a colleague or friend does not come within such a category and absent any direct effect on such a colleague or friend, victim status is not established. It is clear that no direct effect either on CAJ or Mr O'Brien has been established. I must conclude, therefore, that

they are not entitled to rely on an asserted violation of article 2 of ECHR for the purpose of these proceedings.

[49] Even if I had decided that it was open to the applicants to rely on article 2, I would not have found that the respondents' decision to withhold the material that was sought constituted a violation of the provision. Much of the Strasbourg jurisprudence relied on to promote that claim has been usefully reviewed by Lord Bingham of Cornhill in *R* (*on the application of Amin*) *v Secretary of State for the Home Dept* [2003] 3 WLR 1169. At paragraph [20] of his opinion, Lord Bingham said: -

> "While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 [*Jordan v UK* (2001) 11 BHRC 1 (para 121)], there must 'be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.' …
>
> The European Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure. But it is 'indispensable' that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force."

[50] To rely on article 2 to advance their claim to be entitled to see the requested documents the applicants would have had to show that the investigation by the Ombudsman was not sufficiently thorough to achieve these aims. I am satisfied that they have not done so. As I have said the Ombudsman's office was prepared to go to significant lengths to involve the applicants at all material stages of the investigation; they have been open to suggestion and comment and have met representatives of CAJ on a number of occasions. This approach betokens a willingness to listen and to reassure. Judged objectively, I consider that it constitutes "proper procedures for ensuring the accountability of agents of the state".

Conclusions

[51] None of the applicants' claims has been made out. The application for judicial review must be dismissed.