[2015] JMSC Civ 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03522

		CLAIMANT
BETWEEN	**COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	
AND	**THE COMMISSIONER OF THE JAMAICA CONSTABULARY FORCE**	**FIRST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

IN OPEN COURT

Shawn Wilkinson and Rhona Morgan for the claimant

Susan Reid Jones and Vanessa Blair instructed by the Director of State Proceedings for the first and second defendants

February 3 and 17, 2015

STATUTORY INTERPRETATION - INDEPENDENT COMMISSION OF INVESTIGATIONS ACT – INTERPRETATION OF SECTION 4, 12 AND 21 OF THE STATUTE – WHETHER INDEPENDENT COMMISSIONER CAN OBTAIN DOCUMENTS UNDER ANY OF THOSE PROVISION

SYKES J

Context

[1] This case is all about statutory interpretation. The provisions for interpretation are sections 4, 12 and 21 of the Independent Commission of Investigations Act ('the Indecom Act'). The Commission for the Independent Commissions of Investigations ('COI') wants the Commissioner of Police ('COP') to give him access to a number of documents. The COP is resisting handing some of the documents because he is of the view that some of them may be subject to public interest immunity and even if they are not, they may contain very confidential information. The COI says that the statute gives him the legal authority to ask for and receive those documents.

[2] Affidavits have been filed. It must be emphasised that what is about to stated has not been proven in a court of law. The affidavit evidence has not been subjected to judicial examination and is, at this time, the untested word of persons who are said to be informants and witnesses. None of those persons has provided an affidavit. What is before the court from the COI is largely what the COI said he was told by persons. According to the COI he is investigating allegations that police officers in Clarendon were selected 'to commit murders of civilians' ('The Clarendon Investigations'). The officers so selected were members of a unit called the Street Crime Unit and Proactive Investigations Team. The information available to the COI is that 'police officers within the JCF's Clarendon Division [Jamaica Constabulary Force] conspired to conduct and conceal extra-judicial killings in the parish of Clarendon.' This information is said to have come from 'co-conspirators, statements of witnesses and the actions of other suspected persons.' According to the COI, senior police officers including the Divisional Commander selected these police officer for the specific objective of murdering civilians.

[3] A police officer or former police officer is one of the main sources of information. This informant also said that the team of officers were not operating from any police station but from a car which they were given. He has also said that these police officers were given a list of names of persons to be killed. The list was supplied, it

is alleged, by the intelligence unit for the police division in which they were operating, that is to say, the Clarendon Police Division. The COI says that the information available to him indicated that the members of the unit were given firearms to be planted at the scene of a number of fatal shootings. The informant added that the officers were given advice on how to write their post-incident statements and were assured that the review process would be organised and conducted in such a manner that they would quickly return to duty.

[4] The informant reported to the COI that whenever there was a change in Divisional Commanders in Clarendon, the new Commander told the police officers that the COP was aware of their role and wanted them to continue. In other words, the policy of killing civilians was not peculiar to a specific Divisional Commander but all Divisional Commanders who took up office in the Clarendon Division continued this policy after the policy was brought into effect.

[5] The affidavit evidence is that after each shooting a post-incident review took place. This was known as an administrative review. However, it is said that this review process was not a genuine review. The informant to the COI said that the review process was distorted to such an extent that the officers would not be penalised. The COI also states that the informant was, at one point, suspended for alleged misconduct. According to the COI, in his opinion, the informant had such a poor record that he (the informant) would not be fit for duties where he was not closely supervised. The nature of the record was not disclosed and so what is here is the COI's personal view.

[6] The informant also stated that another member of the team had been previously charged with a notorious police-involved killing. This notorious incident was not stated and neither was it stated whether this incident was investigated, and what was the outcome of that allegedly 'notorious police-involved killing.'

[7] The COI stated that a team of his investigators were given the task of investigating (i) the criteria for selection to this unit and (ii) the conduct of the review of incidents involving the police unit.

[8] For the purpose of his investigation the COI established the following terms of reference:

(i) whether the deceased persons' right to life was breached;

(ii) whether the supervisors breached the deceased persons' right to in the selection of the team, their supervision, the review and planning of operation;

(iii) whether the administrative review process was corrupted;

(iv) whether recommendations ought to be made as to formation, training, selection and review of special and proactive units especially with treatment of officers with multiple shootings;

(v) whether the JCF human rights and police use of force and firearms policy was breached.

[9] It is said that many of the fatalities in which the police officers were allegedly involved were planned operations. It is also said that international standards and the policy of the police require that planned operations have recorded plans and therefore the records of the police concerning these operations are needed so that they can examined by the independent investigator to determine whether the plans conform to right to life principles.

[10] The use of force policy and international human rights standards, it is said, call for an assessment of the conduct of commanding officers who would be evaluated by examining what they knew or ought to have known and therefore an examination of service and administrative review records would assist with the investigation.

[11] All this led the COI to write a letter to the COP requesting:

(i) a report on the mission and operating structure of the Street Crime Unit and Proactive Investigations Team in the Clarendon Division between 2009 and present. This must include copies of all documents, orders, instructions and memoranda establishing both formations and articulating their remit;

(ii) a list of members of the Clarendon Division's Street Crime Unit and Proactive Investigation Team between 2009 to present to include (sic) its hierarchical structure and reporting obligations;

(iii) copies of documents pertaining to the disciplinary records of the members of the [unit] [prior to their joining these formations and thereafter] (the second square brackets are in the affidavit). This must include details of the making and resolution of complaints against them, suspensions from duty, criminal charges;

(iv) notes from the administrative review of the incidents in this schedule to this letter to include the panel that conducted the review, what was taken into account and the decisions of the panel; and

(v) copies of operational plans for these incidents.

[12] The letter stated that the request was being made pursuant to sections 4, 12 and 21 of the Indecom Act. The information has not been forthcoming hence the COI is seeking declarations that the sections identified give him the power to request the documents he seeks.

[13] Understandably, the COP takes issue with the allegation that the Divisional Commander and other senior officers selected police officers 'to commit murders of civilians.' The COP rejects the allegation of formation of a squad in Clarendon whose remit is the extra judicial killing of civilians.

[14] The COP states that street crime units were established in all police divisions with the mandate to focus on illegal drugs, breach of intellectual property rights, cash for gold operations and extortion.

[15] It is the view of the COP that proactive investigations targeting higher level criminals and financiers of criminal activity may well lead to violent confrontations because the police are seeking to 'separate criminals from their ill-gotten gains.'

[16] The COP also stated that the administrative review conducted after an operation is not a punitive one. It is a tool designed to determine whether the use of force was excessive, whether there are any gaps in training, what is the state of mind of the police officers involved in the operation, and whether it is appropriate for him to return to front line duty. The COI takes the view that an officer should not be permitted to return to full duties whilst under suspicion of having misconducted himself in circumstances that caused death.

[17] The COP stated that some aspects of the review involve confidential discussions between the chaplain, who is part of the review panel, and the police officer. The COP's concern is that police officers would no longer trust that their conversations with the chaplain would remain confidential. The question of whether these conversations are immune from production to the COI will be addressed later in these reasons for judgment. The COP takes issue with the statement that many of the deaths occur in planned operations. In the final analysis the COP took the view that the courts should decide the issue between him and the COI. This led to the present claim being filed in which the COI seeks the following remedies:

A. *A declaration that sections 4, 12 and 21 of the Independent Commission of Investigations Act empowers the claimant to have access to all material relevant and pertaining to:*

(i) *administrative reviews and disciplinary procedures within the Jamaica Constabulary Force including notes from the administrative review, the panel who conducted the review, the relevant factors considered by the panel in making recommendations, the recommendations made;*

(ii) *details of the making and resolution of complaint, details of suspensions from duty, details of any criminal charges and details of any administrative charges against members of the JCF;*

(iii) *disciplinary records of members of the JCF;*

(iv) *operational plans for incidents falling within the mandate of INDECOM pursuant to the INDECOM Act;*

B. *A declaration that the phrase 'document or thing in connection with the investigation' in section 21 (1) of the Act includes the personal disciplinary records of the members of the JCF involved in the subject of the investigation;*

C. *A declaration that the claimant is entitled to the information and/or documentation requested by letter from the claimants to the first defendant dated 5th May 2014 pursuant to sections 4, 12 and 21 of the INDECOM Act specifically.*

(i) *a report on the mission and operating structure of the Street Crime Unit and Proactive Investigation Team in the Clarendon Division between 2009 and present. This must include copies of all documents, order, instructions and memoranda establishing both formations and articulating their remit.*

(ii) *a list of the members of the Clarendon Division's Street Crime Unit and Proactive Investigation Team between 2009 and present to include its hierarchical structure and reporting obligations.*

(iii) *copies of documents pertaining to the disciplinary records of member of the Clarendon Division's Street Crime Unit and Proactive Investigation Team prior to their joining these formations and thereafter. This must include details of the making and resolution of complaints against them, suspensions from duty, criminal charges and administrative charges.*

(iv) *notes from the administrative review of the incidents in the schedule to this letter to include the panel that conducted the review, what was taken into account and the decision of the panel.*

(v) *copies of the operational plans for these incidents.*

D. *An order that the first defendant produce and/or deliver to the claimant the information and/or documentation itemised above.*

[18] The COI relied on the following provisions. Other provisions will be referred to where necessary.

[19] Section 2 of the Indecom Act has a number of important definitions. One of the important definitions for present purpose is the definition of document. At this early stage, notice should be taken of the breadth of the definition. Section 2 states:

> *document means*
>
> *(a) any written information relating (directly or indirectly) to a complaint;*
>
> *(b) any record generated in any manner whatsoever, including any record generated by an automated recording device or programme required to retrieve information in usable form*

[20] Section 4 reads:

> *(1) Subject to the provisions of this Act, the functions of the Commission shall be to -*
>
> *(a) conduct investigations, for the purposes of this Act;*
>
> *(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable –*
>
> *(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;*
>
> *(ii) periodic reviews of the disciplinary procedures applicable to the Security Force and the specified officials;*
>
> *(c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.*
>
> *(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to –*

(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

(b) require the Security Force and specified officials to furnish information relating to any matters specified in the request; or

(c) make such recommendations as it considers necessary or desirable for

(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled –

(a) upon the authority of a warrant issued in that behalf by a Justice of the Peace –

(i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;

(ii) ... (iii) ...

(b) to retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which in the opinion of the Commission, is relevant to any matter being investigated under this Act.

[21] Section 12 states:

Where the Commission is satisfied that an incident is of such an exceptional nature, that it is likely to have significant impact on public confidence in the Security Forces or a public body, the Commission shall require the relevant Force or the relevant public body to make a report of that incident to the Commission, in the form and containing such particulars as the Commission may specify.

[22] Section 21 provides:

> *(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce*
>
> *any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.*
>
> *(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.*
>
> *(3) ...*
>
> *(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.*
>
> *(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*
>
> *(6) Section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.*

The primary principle of statutory interpretation

[23] Counsel for the COI sought to say that in interpreting the relevant legislation this court must have right to life principle as its primary consideration. It was also submitted in the context of this case the most important consideration is that serious, multiple alleged breaches of the right to life by Jamaican state agents have been alleged. In aid of this submission counsel cited **Regina v Her Majesty's Coroner for the Western District of Somerset and another ex parte Middleton** [2004] 2 AC 183 and **R v Secretary of State for the Home Department ex parte**

Amin [2004] 1 AC 653. Respectfully, those case were ones in which the primary focus of the court was not on the interpretation of the wording of domestic legislation but whether the procedural framework for the investigation of deaths occurring while the person was in the custody of state met the minimum requirements of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention became a part of English law by virtue of being a schedule to the Human Rights Act. The only point of statutory interpretation was that the House of Lord in **ex parte Middleton** held that the word 'how' in section 11 (5) (b) (ii) of Coroners Act 1988 and rule 36 (1) (b) of the Coroners Rules 1984 should mean 'by what means and in what circumstances' and not simply 'by what means.' Both judgments recognised that there was not one way for the United Kingdom to meet its obligations under the Convention provided that the minimum standards as set out in the Strasbourg jurisprudence were met.

[24] From this court's perspective, the most important starting point is the words used in the statute to be interpreted. This is so and must be so even if the statute was enacted to give effect to international obligations. This approach recognises the separation of powers doctrine. The executive branch has the authority to conclude international agreements but under our system of government those agreements are not self-executing and do not automatically become part of Jamaican domestic law. The legislature must pass legislation to give effect to the international agreement.

[25] Under the separation of powers doctrine, Parliament is one of the means by which the executive is held accountable. Parliament is the institution which represents the collective will of the Jamaican people. Its enactments are, at least in theory, taken to be the expression of the will of the people. It is entirely within the power and authority of Parliament to decline to pass legislation to give effect to any agreement the executive entered into. Parliament may accept part of the agreement and reject other parts. Parliament may enact the legislation but do so

in a manner that minimises or enlarges the scope of the agreement. The choice Parliament makes will be reflected in the words actually used and therefore those words are the most important ones.

[26] This court accepts that there is a principle that where a statute is enacted to give effect to the country's international obligations then the statute, where possible, should be interpreted to be interpreted to advance the obligation. That principle is subject to the actual words used. This must be so because the executive branch of government concludes international agreements but under the separation of powers doctrine it is the legislature which decides the content of legislation that is enacted to implement the obligation.

[27] Sometimes the legislature seizes the moment to address a whole range of issues in a particular statute thereby expanding the scope of the legislation to cover matters that were not part of the initial problem sought to be solved or policy sought to be effected through legislation. At other times, Parliament enacts a narrow targeted statute.

This was noted by Lord Wilberforce in **Maunsell v Olins** [1974] AC 373 at 387:

> *My Lords, it frequently happens that legislative changes are made in order to reverse decisions of the courts: sometimes, indeed, the courts themselves invite the change. The decision is then the occasion of the enactment. The question may, consequently, arise whether the new enactment is confined to dealing with the particular situation with which the court was concerned or whether it goes further and covers a wider field, and, if so, how much wider. There is no general rule or presumption as to this. Often Parliament, or its expert advisers, may take the opportunity to review the whole matter in principle and make broad changes: see, for example, Smith v. Central Asbestos Co. Ltd. [1973] A.C. 518 as to the Limitation Acts. Legislative time is a precious commodity and it is natural that opportunities, when they arise, will be used. Or, and this happens in the fiscal field, the draftsman, faced with some loophole in a taxing Act which the courts have recognised, will not merely close the particular loophole but will use general language extending much more widely, sometimes so as to sweep the honest and conscientious taxpayer up in the same net as the evader. On the other hand, there may be cases where Parliament takes a narrow and piecemeal view of the matter: time may not admit of an extensive review which may involve wide policy questions, or*

necessitate consultation with other interests. All these possibilities must be taken into account by courts in assessing the legislative intention.

[28] This very statute in this case is an excellent demonstration of this dictum if Mrs Wilkinson's submission about giving statute a meaning based on the idea that it was giving effect to principles of right to life. As will be shown below, the statute authorises the COI to investigate a whole range of allegations from those involving death to allegations involving property damage. He can investigate allegations of sexual assault, allegations regarding the taking of money. He can even investigate matters not falling within the specifically enumerated categories if he is of the view that a person's rights may have been violated. Thus if Parliament had in mind right to life issues then clearly it seized the moment to extend the statute to non-fatal allegations and allegations involving property damage. Obviously, the statute cannot mean one thing if allegations of death are involved and something else if non-fatal allegations are being investigated.

[29] All this points to the need to start with the words actually used. This is the primary and fundamental principle and that means starting with the literal or coventional meaning unless the context suggests otherwise. The courts take their cue from Parliament which means that the duty of the court is not enquire into the wisdom of the statute but to interpret it and give effect to it according to terms. Parliament is the highest law making body and it does so subject only to the Constitution of Jamaica. There is no international law that can proscribe what the Jamaican Parliament can do. The only question is whether the law passed is consistent with the Jamaican Constitution. Parliament has the power to reverse judicial decisions. Judges cannot invalidate or disapply legislation unless it infringes the Constitution. In Jamaica a special court consisting of three judges is convened for striking down legislation on the ground of incompatibility with the Constitution. This is the only ground on which judges can strike down legislation.

[30] One of the difficulties of statutory interpretation is that the long history of interpreting statutes has generated innumerable cases. Some persons have come to think that there are so many principles that they conflict with each other. This is

not so. The judges may emphasise a particular rule that is applicable to the particular case. The fact that judge may refer to one rule as opposed to another does not mean that the judge is necessarily ignorant of the rule not cited. It is more likely to be the case that the judge focussed on the more applicable rule for that case while being aware of the other rules.

[31] This problem was stated by Viscount Simonds in **Attorney General v Prince Ernest Augustus** [1957] AC 436, 461:

> *Since a large and ever-increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that in a matter so complex the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.*

[32] Part of the problem is labels. We speak of the literal rule, the mischief rule and the golden rule as if they exist in splendid isolation from each other. Then there are said to be 'cannons of interpretation' such as where an expression is defined by the common law and that expression is used in a statute then the common law meaning is intended unless the statute says otherwise. If truth be told every statute has some 'mischief' in mind. It may be to remedy some perceived ill. It may be to reverse a judicial decision. It may be to create new rights and remedies. It may be seeking to govern how a particular government programme is administered. The mischief rule is simply a common sense rule. Since every statute has some objective in mind then clearly, sheer common sense would tell the intelligent reader that the statute should be interpreted in such a manner, if the language actually used permits, that the objective is met. But that does not mean that when the statute is read the literal rule is jettisoned.

[33] We always begin with the literal rule and only move from that rule if the context shows that ordinary sense of the word is not the one intended. There is no sensible person who picks up any document and starts of by giving the words an odd or unusual meaning. This is just common sense.

[34] The golden rule is another common sense rule. The literal meaning is given to words unless the outcome is absurd. Even stating it in this way recognises that mere inconvenience or a hard result does not mean that the literal meaning is absurd.

[35] Along with all these general rules there are additional rules that come into play depending on the type of statute. Hence, if the statute is creating a criminal offence, the default position is that mens rea is to be part of the definition of the offence unless the words show otherwise. The statute may be a consolidating statute and may use words that have been interpreted in a particular manner for eons. Common sense tells us that the words used in such a statute would be expected to be used in the way that they were understood before the consolidating statute was passed unless there is something to suggest otherwise. Another common sense principle is that if there is a general provision and a specific provision the specific prevails.

[36] The point is that the principles and cannons do not exist in individual silos. They are interconnected. When a statute come up for interpretation, all the principles and cannons are available for use. None is automatically excluded. As the judge reads and studies the statute, he or she begins with the literal rule. Further examination may suggest that the literal rule is adjusted to give room to other rules. Other principles come into play depending on the nature of the statute. The judge comes up with a prima facie meaning but continues the process of examination of the statute to see whether that prima facie interpretation holds true. All this is going on in the mind of the judge. When the judge settles on an interpretation the judge then sets out the principles and cannons that led to the particular interpretation.

[37] A judgment dealing with statutory interpretation is not a shortened form of Bennion on Statutory Interpretation or Maxwell's. The judgment is responding to the statute in the particular case. A judge cannot be expected to refer to just about all major principles of statutory interpretation every time a case is heard. The judge proceeds on the basis that all concerned appreciate the core principles and how they work along with what is called the cannons of interpretation.

[38] In **Rowell v Pratt** [1938] AC 101 Lord Wright gave this insight at page 105:

> *Now it is true that if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is just, reasonable and convenient, while the other is not, the Court will prefer the former. But if the words properly construed admit of only one meaning, the Court is not entitled to deny to the words that meaning, merely because the Court feels that the result is not in accordance with the ordinary policy of the law or with what seems to be reasonable. The Court cannot mould or control the language. This is particularly true of legislation in these days, when Parliament has established so many new institutions and bodies, and has imposed on individuals so many duties and disabilities for which in the former law no precedents can be found. A statute must be construed as a whole and with some regard to its apparent purpose and object. The language of one part may help to interpret the language of another. On the other hand, it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction, each statute, like each contract, must be interpreted on its own merits.*

[39] Lord Wright was here saying that are general rules of interpretation of statutes.

[40] It is important therefore to start with very basic understandings. It has been said that the interpreter is to find out the intention of Parliament. What does this mean? The answer was provided by Lord Reid in **Black-Clawson International Ltd v Papierwerke Waldorf-Aschaffenburg** [1975] AC 591. His Lordship stated at page 613:

> *We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.*

[41] The expression ‘the intention of Parliament’ does not mean the subjective views of the promoter of Act or the subjective intentions of the individual members but the meaning of the words actually used by the legislature. It is an objective approach.

[42] What is the methodology for finding the intention of Parliament? Viscount Simonds points the way at page 460 – 461 in **Prince Ernest Augustus:**

> *For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.*

At page 463 Viscount Simonds added:

> *On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.*

[43] To the same effect is Lord Reid in **Black-Clawson** at page 613 – 614:

> *One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself 'in the shoes' of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind.*

[44] These passages tell us that the words are read in their context. Implicit in the first passage from Viscount Simonds is that context means the immediate context

where the words appears as well as the statute as a whole. Context, for Viscount Simonds, includes the existing state of the law, other statute in pari materia, common knowledge or published information of which knowledge can be imputed to the legislature.

[45] Within recent times purposive interpretation has emerged as the way to go for judicial analysis of statutes. Counsel for COI is advocating this approach. Counsel's suggestion and written submissions reflect the dangers of this approach: the meaning of the words may vary according to the level of generality with which the purpose of the statute is expressed. The higher the level of generality the wider the meaning of the words because the goal is to make the words fit the level of generality rather than have the words of the statute indicate the purpose.

[46] The caution of Justice Antonin Scalia and Bryan Garner should be borne in mind. The authors point out in their text, **Reading Law: The interpretation of texts** (2012) (Thomson/West) at pages 18 - 19.

> *Any provision of law or of private ordering can be said to have a number of purposes, which can be placed on a ladder of abstraction. A law against pickpocketing, for example, has as is narrow purpose the prevention of theft from the person; and then, in ascending order of generality, the protection of private property; the preservation of a system of private ownership; the encouragement of productive activity by enabling producers to enjoy the fruits of their labor; and, finally, the furtherance of the common good. The purposivist, who derives the meaning of text from purpose and not purpose from the meaning of text, is free to climb up this ladder of purposes and to 'fill in' or change the text according to the level of generality he has chosen.*

[47] The injunction here is that meaning and purpose should be derived from the text.

[48] The other problem with the approach suggested by Mrs Wilkinson's written submissions is that they omit to take note of the undeniable fact that in many instances the legislature has multiple options open to it whenever it is seeking to resolve a particular issue or give effect to a particular policy. The legislature does not give effect to all possible solutions or pursues a particular solution at all costs. In Jamaica today, in some instances, the legislators (not just the executive branch)

have experts appear before them who answer questions posed. Arising from these answers the legislature may disagree with what is proposed by the executive thus forcing the promoter of the bill to change course. The legislature narrows down the selection and indicates this by the words chosen, the syntax and the grammar that it uses. The legislature can only indicate its choice by words chosen.

[49] Words have no inherent meaning. Their meanings are assigned. What we call words are really symbols that are given a primary meaning by those of a particular community that uses the symbols. Some symbols are so specialised that those outside of that community are not exposed to symbols and the meaning ascribed to them. Thus elements on the periodic table are written in a special and unique way. Ordinary language is not so constrained. The meaning of words in ordinary language shifts and changes over the passage of time. This is why the originalists say that one must try to find the meaning of the words used by their author at the time they were used. Let us not forget that we today are not the only persons who are experts in using words. In the same way we can narrow and expand meaning by word choices so too did older generations.

[50] A symbol is a sensible sign (that is perceived by the senses) that has a meaning imposed on it by convention or nature. Unless the writer of the symbol and the reader of the symbol understand what the symbol means effective communication is impossible. In the case of words, the meaning is imposed by convention, that is, the understanding that the word has acquired is such that when it is used, the meaning is known to the user of the word, and if effective communication is take place, the meaning is also known, or at least knowable, to the reader. It is on this basis that the draftsman chooses one word over another to express the thought intended to be communicated. The legislature proceeds on the basis that the interpreter, and in particular, judges, will understand the word used in the same manner the legislature intended. This is the whole basis for saying that when one is interpreting a statute, one starts with the literal meaning, that is to say, the meaning that is ordinarily ascribed to the words at the time they are used. It is a

starting point and not necessarily the end point. Contrary to what some have said, those who advocate starting with the literal approach are not saying that no other approach is possible. It is simply a common sense proposition which means that we start with the meaning that the words carry and we stick with that meaning unless there is some reason to adopt another meaning.

[51] As the interpreter reads the statute it may become apparent that some word is being given a more nuanced meaning or even an unconventional meaning than that which is ordinarily conveyed. To arrive at this position, the interpreter would need to read the word or phrase under consideration in their immediate context, the context of the provisions before and after the word or phrase being considered and then in the context of the whole. As this is going on, the interpreter has in mind the core principles of interpretation as well as cannons that all work together to assist the interpreter to arrive at an acceptable interpretation. This means that the interpreter is not locked into any preconceived idea of the choice of solutions for the issue that the legislature had made but at the same time his mind is that of a blank slate. If this is not done, then the danger is that the interpreter tries to make the interpretation fit the preconceived idea rather than let the text indicate the idea. For all these reasons this court cannot accept the proposition that 'the most important consideration for this Honourable Court to take into account in consideration of the issues herein will be that it involves serious, multiple alleged breaches of the right to life by agents of the Jamaican state.' The most important consideration must be the words used by the legislature to address the issue or issues under consideration.

[52] The approach Mrs Wilkinson commended to this court was not embraced by the Court of Appeal of Jamaica in **The Independent Commission of Investigations v Digicel (Jamaica) Ltd** [2015] JMCA Civ 32. In that case both at first instance and in the Court of Appeal the COI advanced the proposition now being advanced by counsel, namely, that the provisions of the very statute now under consideration ought to be given a wide meaning because right to life issues are important and

Jamaica has to meet international standards of investigating complaints resulting in death. The facts were that the COI wished to have Digicel, a telecommunications provider, give him information that he thought relevant to an investigation. The COI issued a notice under section 21 of the Indecom Act but gave no reason for requiring the information. Digicel formed the view that it could not be compelled to produce the information requested because the Telecommunication Act and the Interception of Communications Act precluded it from supplying the information. Negotiations between the parties did not lead to a resolution. Both parties agreed to submit the matter to the court. Mangatal J, at first instance, held that Digicel was not compellable under section 21 (1) of the Independent Commission of Investigation Act to provide the information sought.

[53] In the Court of Appeal Brooks JA had the following submissions to deal with. One of the submissions advanced was 'the need for an independent investigator, and the constitutional underpinnings of that need' and therefore these facts 'required interpretation which favours and conforms to the enforcement of fundamental human rights, particularly the right to life "recognised in the Constitution and by public international law" ' (para 18 of judgment). In a very broad sense statutes are not to be interpreted so as to conflict with the Constitution but that is not the same thing as saying that a statute should be read in such a manner so as make it say something that it plainly does not say and having regard to the actual words used, cannot say, if one uses the conventional meaning of the words. As can be seen, the submission was classic purposivistic interpretation where the meaning of the statute is not sought in the actual words used but rather that the meaning to be given to the statute is be determined by 'the enforcement of fundamental human rights.'

[54] In rejecting that proposition Brooks JA held at paragraph 21:

> *... the position advocated by Mr Williams cannot withstand close scrutiny. It contradicts the primary principle in statutory interpretation which stipulates that provisions must be given their ordinary and natural meaning. Parliament, in its wisdom, has restricted the specific officers that it trusts to*

> *be able to have access to information that impinges on the constitutionally guaranteed right to privacy of communication (section 13 (3) (j) (iii) of the Constitution of Jamaica).*

[55] As this passage shows Brooks JA was saying that the words of the statute must prevail and not some pre-conceived notion of what the statute is purporting to deal with and then mould the meaning to meet that notion. Needless to say, the words of the statute did not create in prima facie conflict with the Constitution. The COI was asking the court to widen the categories of persons who could obtain information under the relevant provision even though the statute had specifically stated who should have access to the information and the words used did not include the COI.

[56] An allied and equally unsuccessful submission was advanced. It was submitted that ' "the court could interpret section 47 (2) (a) of the Telecommunications Act and section 2 of the [Interception of Communication Act] to bring it [sic] into conformity with the Constitution by inserting the Commission of Indecom as an authorised person" ' (section 23). In effect, the Court of Appeal was being asked to ignore the words of the legislature, ignore fundamental principles of statutory interpretation and accept an interpretation which the words used could not bear. The court was being asked to be an unelected legislator and usurp the function of Parliament. It is not clear whether any authority was cited for the proposition but his Lordship did not refer to any relied on by the COI for the submission. Brooks JA had this to say at paragraph 23:

> *That submission should also fail. There is no basis for inserting words into a statute which is clear in its terms.*

[57] What Brooks JA was doing was affirming the fundamental principle that the words used in the statute are the primary source for interpreting the statute and where the words, understood in their usual and conventional sense, are clear then there is no need to give the words any strained or unusual meaning.

[58] Brooks JA had made reference to certain provisions of the Constitution of Jamaica in the passage cited earlier at paragraph 48. To give complete context and meaning to his Lordship's reference the section of the Constitution will be cited as well as the surrounding context is set out. Section 13 (1), (2) and 3 (j) (iii) states:

> *Whereas*
>
> *(a) the state has an obligation to promote universal respect for life, and observance of, human rights and freedoms;*
>
> *(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and*
>
> *(c) all persons are under a responsibility to respect and uphold the rights of others recognised in this Chapter*
>
> *the following provisions of this Chapter shall have effect for the purpose of affording protection to the right and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.*
>
> *(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*
>
> *(3) The rights and freedoms referred to in subsection (2) are as follows –*
> *(j) the right of everyone to*
>
> *(i) ... (ii)*
>
> *...*
>
> *(iii) protection of privacy of other property and of communication;*

[59] Brooks JA was issuing the reminder that there is now an express right to privacy of communication guaranteed by the bill of rights. All organs of the state (this necessarily includes the COI) and the courts must respect these rights. How his

request interfaces with the right to privacy may become an issue at the time of disclosure of the relevant information in this case. The point is the COI must respect the rights of others including police officers when he is conducting an investigation. It may be that litigation may be needed to define the boundaries or content of the rights claimed in the face of action taken by the COI.

[60] Brooks JA had one further matter to address. The bench of the Court of Appeal were also told that one of the consequences of giving the COI the powers of a judge was that the COI was 'entitled to require any person to provide the information it requires.' It was also submitted to the court that another consequence was that 'any person who provides the information to [the COI] has immunity from any claim or action arising from the testimony or information given' (para 26). Brooks JA disposed of the submission in this way at paragraph 46:

> *…it must be said that the powers of a judges having been given to INDECOM, did not entitle it to compel the breach of a statutory provision for confidentiality and against disclosure. The fact that a court may compel disclosure and the fact that a person testifying in court is afforded absolute privilege by virtue of public policy, does not entitle the court to ignore statutory prohibitions against disclosure.*

[61] The consequence of this just cited dictum and his Lordship's reasoning in general make it abundantly clear that the Court of Appeal was not embracing the notion that because the COI was investigating matters involving the death of or serious injury to persons and because the state was endeavouring to establish an independent body to conduct such investigations fundamental principles of statutory interpretation were to be jettisoned in favour of giving the words in the Indecom Act a meaning they could not reasonably bear or implying words into the statute in order to provide an outcome that COI regarded as more satisfactory to him.

[62] In an attempt to advance her case of taking the position Mrs Wilkinson relied on the long title to the statute which reads:

> *An Act to repeal the Police Public Complaints Act; to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons; and for connected matters*

[63] The following judgment of Donovan J in **R v Bates** [1952] 2 All ER 842, 844 deals with long titles:

> *I agree that the long title is a legitimate aid to the construction of s 12(1), and I take the same view, in this case, of the cross-heading. When Parliament proclaims what the purpose of an Act is, it would be wrong to leave that out of account when construing the Act—in particular, when construing some doubtful or ambiguous expression. In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title. I take the same view about the cross-heading. Instances, indeed, abound where Parliament, proclaiming in an Act that its purpose is to prevent people doing such and such a thing, has caught people who never had any intention of doing it. The patch, in other words, has been larger than the hole. A neat example is s 21 of the Finance Act, 1922, which has been held to apply to persons altogether innocent of the mischief which Parliament said it intended the section to prevent. The section has frequently come under review in the House of Lords without that construction ever being questioned by their Lordships.*

[64] This passage has been criticised as stating the point too narrowly but the fundamental principle emerging from it which cannot be eroded is that the long title while an aid to construction of the statute cannot alter the meaning of the enacting words of the statute even if the enacting words extend further than the long title suggests or are more restrictive than the long title indicates. In other words the long title cannot carry the same weight as the enacting words.

[65] The law on the use of long titles and preambles is the same. In the following passage from Lord Norman in **Prince Ernest Augustus** a more authoritative

pronouncement if found. It relates to the status of preambles but it applies to long title.

At pages 467 – 468 his Lordship said:

> *When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail. The courts are concerned with the practical business of deciding a lis, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.*

[66] It all comes down to the words used.

[67] The court now addresses the interpretation of the provisions by beginning with an examination of the structure of the Indecom Act.

The structure of the Indecom Act

[68] The court will go into a fair amount of detail regarding the structure of the legislation in order to show that the main purpose of the statute was to establish an independent body which was given powers to obtain documents, records, information and things in order to conduct its investigations.

[69] The Indecom Act has a particular flow and internal logic which are apparent once the entire statute is read and understood. In sections 3 and 4, the office of the Independent Commission of Investigations and its functions are established. The qualifications for appointment are stated in section 3. The functions and some powers are stated in section 4. It is a Commission of Parliament. In order to preserve its independence section 5 (1) states that subject to the Constitution the COI 'shall not be subject to the director or control of any other person or authority.' This phraseology is not new. It borrows from section 94 of the Constitution which deals with the office of the Director of Public Prosecutions. As wide as those words are in section 5 (1) it does not mean that the COI is not subject to judicial authority. He is a creation of statute and therefore is subject to judicial review. Any citizen, including the COP, can seek to challenge any power exercised under the legislation. This is confirmed by section 34 which provides that nothing in 'this Act shall be construed as limiting or affecting any remedy or right of appeal, objection or procedure given to any person by any other provision of law.'

[70] Thus far it is clear from the actual provision examined that the COI was intended to have significant independence.

[71] The statute recognises that the COI personally could not do everything and so the statute provides for senior staff and others to assist the COI. Section 7 establishes the offices of Directors of Complaints and their responsibilities. The COI is empowered to appoint and employ persons for the purposes under the legislation. In section 9 the COI and the staff take an oath of secrecy.

[72] In order to ensure that it could carry out its functions effectively the statute provides for absolute privilege 'in the same manner as if the investigation were proceedings in a court of law' regarding 'information supplied or document or thing produced by any person for the purpose or in the course of, any investigation carried out under this Act' (section 27 (2)). This is supported by section 27 (1) which states that the COI cannot be the subject of proceedings for anything said or done in the performance of his functions under this Act. Section 2 defines functions to include

'powers and duties.' A secrecy obligation is imposed by section 28. These provisions are there to encourage persons to give full and frank disclosure to the COI without the fear of a defamation suit. Section 27 (1) when read along with section 5 (1) strengthens the independence of the COI.

[73] Having established the COI and given it certain protections to enable it to act impartially and effectively, the statute turns its attention to addressing the initiation of investigations. In summary, as will be seen, the statute solves this problem by (a) permitting persons to make complaints; (b) imposing a duty of some persons to reports and (c) authorising the COI to initiate investigations on his own without any report or complaint being made to him. Consistent with what has been said about legislative choices and emphasising the importance of the words used, it is obvious that Parliament chose these methods of securing an initial report that could generate an investigation. Other methods may well have been available but these were the ones chosen by the legislature. All the information received by these means is called 'complaint.'

[74] So the COI can receive complaints. Section 2 defines complaint in the following manner:

> *'complaint' means any complaint referred to in section 11, about the conduct of a member under of the Security Forces or a specified official and includes a report section 12 or 13.*

[75] Section 10 (1) states that the COI may receive complaints about the conduct of any member of the Security Force (defined in the statute to include the Jamaica Constabulary Force and the Jamaica Defence Force) or any specified official which:

(i) *resulted in the death of or injury to any person or was intended or likely to result in such death or injury;*

(ii) *involved sexual assault;*

(iii) *involved assault (including threats of harm, reprisal or other intimidatory acts) or battery by the member or official;*

(iv) *resulted in damage to property or the taking of money or of other property;*

(v) *although not falling within paragraphs (a) to (d) is, in the opinion of the Commission an abuse of the rights of a citizen*

[76] This is subject to a limitation period with a discretion given to the COI to undertake the investigation even if the time limit is breached. Thus section 10 (4) and (5) state:

> *(4) Subject to section 40 (1) (b) and subsection (5), a complaint may not be acted upon by the Commission unless it is made not later than twelve months from the day on which the complainant had notice of the conduct alleged (hereinafter called the limitation period)*
>
> *(5) The Commission may act upon a complaint made outside of the limitation period if, in its discretion, it considers that the circumstances make it just to do so.*

[77] Section 40 (1) (b) reads:

> *Notwithstanding the repeal of the Police Public Complaints Ac (hereinafter referred to as the 'repealed Act') –*
>
> *(a) …*
>
> *(b) any complaint which immediately before the date of commencement of this Act, is pending before or otherwise being dealt with by the Authority, may as from that date be continued by the Commission.*

[78] It must be stated that no functionary can exercise his discretion given under a statute for a purpose foreign to the statute. This discretion can only be used to advance the object of the statute (**Padfield v Minister of Agriculture** [1968] AC 997).

[79] In addition to receiving complaints under section 10, the statute, in section 11, imposes a duty on certain state officials to make a report to the COI in certain

circumstances. Section 10 is directed at voluntary reporting while section 11 is directed at mandatory reporting by specific state officials.

[80] Section 11 states in relevant parts states:

> *(1) The responsible head or the responsible officer, having been made aware of an incident which involves the relevant public body or the relevant Force, shall make a report to the Commission of the incident*
> *…*
>
> *(2) …*
>
> *(3) a member of the Security Forces or a specified official who, in the course of his duties –*
>
> *(a) becomes aware of; (b)*
>
> *is involved in,*
>
> *any incident, shall take the steps as are necessary (including reporting the facts thereof to the responsible head or the responsible officer) to ensure that report is made to the Commission in accordance with subsection (1).*

[81] It should be noted that section 11 (3) does not preclude any member of the Security Forces from making a report under section 10. Thus if the member of the Security Force is uncomfortable with making the report through the established reporting structure, he or she may report directly to the COI who is under an obligation of secrecy.

[82] The expressions 'responsible head' and 'responsible officer' have been used in section 11. They are defined in section 2 by the statute. They mean:

> *'responsible head' means the head of a Security Force;*
>
> *'responsible officer' means the officer in charge of a relevant public body;*

[83] Section 2 defines public body is defined to mean:

> *(a) a Ministry, department or agency of Government;*
>
> *(b) a Parish Council, the Kingston and St. Andrew Corporation;*

(c) a statutory body or authority;

(d) a company registered under the Companies Act, being a company in which the Government or an agency of Government, whether by the holding of shares or by financial means, is in a position to influence the policy of the company.

[84] Section 11 (1) uses the expression 'relevant Force.' Section 2 defines 'relevant Force' to mean:

any one of the Security Forces –

(a) Involved in an incident; or

(b) in relation to which a complaint is made, or an investigation is carried out, under this Act;

[85] From what has been said the function of the COI is not limited to incidents that involve the physical person but extends to physical property and rights.

[86] Sections 10 and 11 facilitate complaints and reports being made to the COI by members of the public and state official. Parliament appreciated that there may be instances where no complaint has come in to the COI. The words used tell what the solution to that possibility is. This is where sections 12 and 13 come in. Although set out above section 12 is repeated here for convenience of reading without going back to the earlier citation. It reads:

Where the Commission is satisfied that an incident is of such an exceptional nature, that it is likely to have significant impact on public confidence in the Security Forces or a public body, the Commission shall require the relevant Force or the relevant public body to make a report of that incident to the Commission, in the form and containing such particulars as the Commission may specify.

[87] Section 13 states:

An investigation under this Act may be undertaken by the Commission on its own initiative.

[88] Sections 11 and 12 used the word 'incident' and not 'investigation' or even occurrence. 'Incident' is defined in section 2 as follows:

'incident' means any occurrence that involves misconduct of a member of the Security Forces or of a specified official –

(a) resulting in death of, or injury to, any person or that was intended or likely to result in the death of, or injury to any person;

(b) involving sexual assault;

(c) involving assault or battery;

(d) resulting in damage to property or the taking of money or other property;

(e) although not falling with paragraphs (a) to (d), is, in the opinion of the Commission, an abuse of the rights of a citizen.

[89] The definition of incident is perhaps unfortunate in that it says that 'incident' means any occurrence involving misconduct. Misconduct as a designation of conduct can only be arrived at properly after a fair, balanced and impartial investigation. Be that as it may, that is the word used. It should be noted that it follows the same order as that found in section 10 (1).

[90] Up to this point the words of the statute tell us that the legislature set out an independent body to investigate complaints received from members of the public. In order to enhance its effectiveness the COI was given immunity for certain law suits. Parliament gave the COI the power to investigate matters even if he did not receive a complaint. He may also act up on a report provided by the head of a Security Force or head of a government agency, department, parish council, or company. He has the power to investigate a wide range of matters and it not restricted to matters involving death.

[91] It should be noted that the definition of complaint includes reports made under sections 12 and 13. This is an example of the legislature giving an ordinary everyday word an unusual meaning. Complaint usually means that A is making some kind of voluntary communication to B about something adversely affecting A or someone else.

Whereas section 10 deals with voluntary complaints and whereas section 11 deals with mandatory complaints, sections 12 and 13 empower the COI to ask for a report or act on his own initiative without a report being made to him. Why was this done? The answer seems to lie in the investigative powers given to the COI. Parliament intended all the powers in the statute to be available to the COI regardless of where the base information came from that triggered the investigation and hence the meaning given to complaint in section 2.

[92] The report furnished under section 11 could hardly be expected to be a very detailed account of the incident. The wording of section 11 (1) confirms this. It says that the responsible head or responsible officer, having been made aware of an incident resulting in death or serious injury, shall 'forthwith' make a report (section 11 (1) (a)). 'Forthwith' is a well-known expression which means immediately or without delay (**Shorter Oxford English Dictionary** (6th) (2007)). So immediate must the report be that the responsible officer or responsible head is to make the report once he or she is made aware of the incident. In other words, the responsible officer or responsible head is not required to make a detailed investigation of the matter before the matter is reported to the COI in cases of death or serious injury. In cases other than death or serious injury, the responsible head or responsible officer must make the report within twenty-four hours (section 11 (1f) (b)).

[93] Section 12 speaks to the COI requiring the relevant force or public body to make a report of an incident to him. The COI has the authority to state the form and content of the report.

[94] Based on sections 10, 11 and 12, once the COI receives the complaint he now as the information sufficient to determine how the incident is to be dealt with. Depending on the nature of the complaint, it may be resolved informally (sections 15) or through mediation or alternate dispute resolution proceedings (sections 16).

[95] From this court's examination of the statute, sections 10, 11 and 12 are not designed or worded to suggest that intrusive powers are contemplated under those provisions.

[96] What powers are given to the COI for carrying out his investigations? For this one turns to sections 4 and 21. Those sections are directed at securing records, documents and information relevant to the investigation that the COI is carrying out.

Before looking at these section more must be said about section 12.

[97] The COI, in this case, seems to be of the view that section 12 authorises him to request all sorts of documents. It is the view of this court that section 12 does no such thing. When it speaks to the report 'containing such particulars as the Commission may specify' it is unlikely that those words meant that all sorts of documents and records were expected to be part of the report. If that were so much of sections 4 and 21 would not be needed. Section 12 is directed at enabling the COI to have enough information to make an informed decision about whether the matter needs to be investigated and how it should be investigated. In other words, the power under section 12 is not a substitute for the powers under sections 4 and 21.

[98] Section 12 is not designed to be used as an ongoing-investigative tool. Once the COI gets the information then he makes his analysis and then he uses the powers given to him under sections 4 and 21 to secure additional information. The logic and structure of the statute does not envision using section 12 to keep going back for more and more information. It is not designed for that purpose. That is why it does not have any of the provisions found in sections 4 and 21. The omission to place the powers found in sections 4 and 21 in section 12 must mean something. The most likely reason is that section 12 was not designed for extracting more and more information after an initial report was made. If more information is needed then the COI has sections 4 and 21. What do sections 4 and 21 authorise the COI to do?

[99] Section 4 (1) states that the COI's functions 'shall be to' (a) 'conduct investigations for the purposes of this Act' and (b) 'carry out in furtherance of an investigation and as the Commission considers necessary or desirable' (i) inspections, (ii) periodic reviews. These investigations are triggered as already noted by complaints made under sections 10, 11, 12 and 13.

[100] Section 4 (2) of the statute goes further to say that in carrying out the statutory functions the COI 'shall be entitled to have access to all records, documents or other information regarding all incidents and all other evidence relating thereto.' Entitle is a strong word. 'Entitle' means, in this case, to confer on a person a rightful claim to something or a right to do something (**Shorter Oxford English Dictionary** (6th) (2007)). There are several meaning listed but this is the most appropriate one. In the context of this statute, this must mean that the COI has the legal right to have access to the records, documents or other information that may be in existence. He also has the right to require the Security Forces and specified officials to furnish information relating to any matter specified in the request. The word 'request' makes its appearance for the first time in the statute in section 4 (2) (b). The context is plain that the COI gives effect to his entitlement by making the request. Request means ask to be favoured with or to be given a thing (**Shorter Oxford**). The combination of entitle and request suggests that the COI is not engaged in pleading and begging. Compliance is expected unless there is some lawful reason not to meet the request. The COI has the right to ask for what he wants. If that fails, section 4 (3) authorises the COI to obtain a search warrant to get the documents he wants.

[101] Document, as noted earlier, is defined widely in the statute. If one keeps in mind the breadth of the definition of complaint one can see that the COI is entitled under section 4 (2) to a wide range of documents.

[102] Having said this, the point must be made that the COI can only use his powers under the statute for the purposes of the statute. He cannot, for example, use his powers to extract records and documents under the guise of an investigation under

the statute when the real reason is that he wants the documents for some other purpose.

[103] Section 4 (2) also speaks to reports or other information. When these words are coupled with 'documents' and the wide definition of documents is kept in mind one can see that the legislature gave the COI entitlement to an extremely wide range of material without limitation. In addition to entitling the COI to have access to 'reports, documents and other information' the COI is entitled to ask the Security Forces and specified officials 'to furnish' information. This court concludes that is not much that the COI is not entitled to under section 4 (2) (a) and (b). All this can be gleaned from the words of the statute without any need to refer to any international obligations whatever those may be.

The court now addresses section 21.

[104] In section 21 the COI may require anyone to 'furnish a statement of such information and produce any document or thing.' Again, the wide definition of document should be kept in mind. In addition to 'document' and its wide definition the legislature uses the word 'thing.' This is a word of exceptionally wide import. 'Thing' means, in this context, an inanimate material object which is not specified by name (**Shorter Oxford**).

The words 'document or thing' are qualified by the word 'any.' In this context 'any' means some no matter which or what (**Shorter Oxford**). It is not a word of limitation but of great width implying 'without limitation or qualification.' According to Stroud's Judicial Dictionary (4^{th}) (1971) any is a word which excludes limitation or qualification (**Duck v Bates** 12 QBD 79 Fry LJ) or 'as wide as possible' (**Beckett v Sutton** 51 LJ Ch 433, Chitty J).

[105] There is in section 21 (1) the expression 'in connection with.' The expression means touching and concerning; relevant to. The disciplinary records of the police officers allegedly recruited for the purpose of committing murders in the parish of Clarendon would be relevant to the investigation. The records touch and concern

the investigation in so far as they may confirm or dispel the allegation made by the informant to the COI.

[106] After the words of wide import, section 21 (1) contracts the seeming breadth by using the phrase 'the investigation.' Thus the COI's power to require persons 'to furnish a statement of such information and produce any document or thing in connection with' it limited to 'the investigation.' The COI must be carrying out an investigation in order to rely on section 21 (1). The investigation must arise in the manner contemplated by the statute, that is to say, he must be investigating an incident or occurrence arising from a complaint as defined in section 2. Finally, the records, documents, thing or information sought must be relevant to the investigation. For example, in this case the COI is investigating incidents involving police officers who were attached to the street crime unit. On the face of it he would not be entitled to anything concerning police officers who were never ever part of that unit. The reason is that such information would be irrelevant to the investigation. The COI therefore must demonstrate some relevance to any investigation he is conducting before the entitlement to the documents, records, things or information can arise. Wide power is not a synonym for unlimited power.

[107] Despite the breath of power given to the COI his power is not unlimited. One of the principles of statutory interpretation is that there is an assumption that well embedded principles and privileges in the law are not lightly taken to have been abrogated by a statute unless the statute says so expressly or by very, very, very necessary implication. The more fundamental the right the stronger the implication must be before the court concludes that such fundamental rights are taken away or removed by ordinary words.

[108] One of these rights is legal professional privilege and the other is public interest immunity. The court notes that section 21 (5) of the Act indicates that a person cannot be compelled to give evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

[109] Section 21 (5) occurs in a section that speaks to giving evidence and asking someone to give a statement and 'produce any document or thing in connection with the investigation'. The provision says nothing about whether the COI can take any document or thing that may be subject to legal professional privilege or public interest immunity under a search warrant or any other compulsory process from any person.

[110] Thus an argument could be made that if the legislature intended the same protection in section 21 (5) to extend to search warrants and other compulsory process and to section 4 then the legislation would have said so. This is why it is necessary to make the point that legal professional privilege and public interest immunity are so embedded in Jamaican law that it would take explicit language or exceptional language before this Act would be interpreted to override those immunities.

[111] This court relies on the decision of **Daniels Corporation International party v Australian Competition and Consumer Commission** 213 CLR 543. In that case the High Court of Australia reversed the decision of the Federal Court which was that a statute authorising the investigative body to ask for documents had overridden legal professional privilege. In that case the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ held at page 553:

> *Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to Potter v Minahan, was the foundation for the decision in Baker v Campbell. It is a rule which, subject to one possible exception, has been strictly applied by this Court since the decision in Re Bolton; Ex parte Beane. Cases in which it has since been applied include Bropho v Western Australia, Coco v The Queen and Commissioner of Australian Federal Police v Propend Finance Pty Ltd. The possible exception to the strict application of that rule was the decision in Yuill.*

[112] While public interest immunity is not described as a fundamental common law right nonetheless it recognises that the government or state agencies will have information that it may not be desirable to disclose.

[113] This court therefore concludes that no compulsory process under the Act authorises the COI to take document or things subject to legal professional privilege and public interest immunity. The words used in the statute do not expressly override legal professional privilege and public interest immunity. Neither is there any compelling necessary implication for that conclusion having regard to the words actually used in the statute. The court also adds the right to privacy under section 13 of the Charter of Rights may be implicated. With this interpretation the court is now able to address the specific declarations sought.

The declarations

[114] The court now turns to the declarations sought at paragraph 17. The declaration at A as framed is too wide and vague. The court agrees with Mrs Reid Jones that the declaration sought is simply too broad. There is no automatic right to the items named in that paragraph. The COI cannot get any records, documents or information simply because he wants it. The COI can only gain access to documents when he is exercising powers in relation to an investigation or complaint under the Indecom Act. He cannot use the statute as a device to get records, documents, information or things unless he is acting within the boundaries of the statute. The declaration as framed is not attached to any pending issue; it is simply a request for a declaration that he is entitled to the things sought. Courts must always be wary of granting declarations in the abstract. The declaration sought at A is not granted.

[115] The court now addresses the declaration at B and C in paragraph 17. The context here is that the COI has stated in his July 13, 2015 affidavit at paragraph 18 that he is investigation 40 incidents involving 60 deaths. These deaths were allegedly caused by

police officers who were part of the street crime unit named earlier in this judgment. Thus on the face of it only the disciplinary records of those members of the unit involved in the 40 incidents would be relevant. It has been alleged that the unit was formed from police officers with unexemplary disciplinary records. This means that the COI is entitled to have access to disciplinary records of all members of the unit between 2009 and February 17, 2016.

[116] The relevance of disciplinary records to an investigation of this type was shown by the Privy Council case of **Attorney General of British Virgin Islands v Hartwell** (2004) 64 WIR 103. In that case the claimant sued the Attorney General for giving a firearm to a police officer who had previously disciplinary incidents. The claimant sued in tort alleging both direct liability in negligence and vicarious liability. The vicarious liability claim failed but the direct liability in negligence succeeded. The reasons for success are important. The crucial question was whether the 'authorities knew or ought to have known that [the police officer] was not a fit and proper person to be entrusted with a gun' (paragraph 18). In answering that question the Board and all the courts below had the disciplinary record before it. There was no discussion of how it got before the court. The point being made was that the police authorities were negligent because they failed to ensure that the police officer in question was a fit and proper person to whom a firearm should be entrusted in light of his disciplinary record. The disciplinary record was a factor in that assessment.

[117] In addition to what has been said in **Hartwell**, the information is relevant in order to determine whether there is any truth to the allegation by the COI's informant that the personnel were specially selected because their unexemplary disciplinary record commended itself to the Divisional Commanders of Clarendon and other senior officers who were involved in the selection process. This is in the context of an allegation by the COI that 'a team of police officers within the JCF's Clarendon Division conspired to conduct and conceal extra-judicial killings in the parish of Clarendon' (para 19 of July 13, 2015 affidavit). The disciplinary records of the police officers who were involved in the 40 incidents as well as those who were not involved in the 40 incidents but who were

members of the unit between 2009 to the time of the incidents under investigation would be relevant.

[118] From what has been said in relation to declarations B and C so far, it is clear that declaration A is far too wide and lacked sufficient specificity. What the COI was seeking there is court-sanctioned (via a declaration) that he is entitled to 'disciplinary records of members of the JCF.' Declaration A has no context. The declaration did not even say that the COI was entitled to the disciplinary records of members of the JCF when conducting an investigation under the statute. The declaration simply said sections 4, 12 and 21 of the statute 'empowers the claimant to have access to all material relevant and pertaining to' and then it lists the sub-paragraphs. This court does not accept the idea that the COI is entitled to disciplinary records of the members of the JCF simply because he wants them which is what the declaration at A suggests. He must show that he is acting within the boundaries of the statute and he needs the records for a purpose authorised by the statute and that the need has arisen in the context of an investigation of a complaint as defined in the statute. If it were otherwise then the COI may well abuse and misuse his powers.

[119] In respect of declaration B this court takes the view that COI is entitled to the disciplinary records of all police officer allegedly involved in the 40 incidents resulting in the 60 deaths. These records would be relevant to determine whether the unexemplary disciplinary records of members of the unit made them more likely to be selected for the unit. The disciplinary records of police officers who were part of the unit but not necessarily involved in the 40 incidents would be relevant in order to determine whether they too were recruited because they had questionable disciplinary records. The records were also relevant to determine whether complaints against any or all of these members were made and how those complaints were resolved. These records can be obtained under section 4 (2) (b) or (c) or section 21 (1) but not under section 12.

[120] In respect of declaration C the information there requested can be obtained under sections 4 (2) (a) or (b) or 21 (1) but not under section 12. The information sought is

restricted to the officers of the unit allegedly involved in the 40 incidents resulting in the 60 deaths.

[121] The court was not addressed on the COI's power to retain records, documents and other material. The court is not sure why this was the case. The court therefore declines to address this matter any further.

[122] Finally there is the declaration at D. In light of what has been said already the declaration at D is granted. The COP has 120 days to comply with the order.

[123] The COP had mentioned that some of the documents or information requested is confidential. It is not entirely clear whether the COP was making a privacy claim under the Charter of Rights.

Conclusion

[124] The declaration at A is refused. The declarations at B, C and D are granted in the terms suggested in these reasons for judgment. The declarations are subject to legal professional privilege, public interest immunity and any other legal obstacle to complying with the request including any constitutional right to privacy that may be raised. The parties are to submit a draft order to give effect to the reasons for judgments. No order as to costs.