

Letter
from
Penrose Inc.

Dear Dawn,
This letter is in response to Hugh Taylor's letter to the S.E. on
9 February. I have highlighted the paragraph I think is most
important. I've also attached Lord Penrose's Terms of
Reference.

**THE
PENROSE
INQUIRY**

In addition, the Archer Inquiry will
be reporting on Monday 23 Feb also.
A copy was with Safs/Policy on Friday.

TO NOTE

Morven
20.2.09

GRO-C

Edinburgh GRO-C

GRO-C

- Morven
20.2.09

Hugh Taylor Esq.,
Permanent Secretary
Department of Health
Richmond House
79 Whitehall
London SW1A 2NS

I agree with your
points Morven
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Hugh say?

Dear Mr Tay

Dear Dawn,

GRO-C: D. P.

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For the record it is und
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1. The doc... relative to the "Review of
Documentation R... the Safety of Blood Products 1970 - 1985
(Non A Non B hepatitis)" published in May 2007, and

The response to this letter
is still being drafted as
solicitors' advice is being
sought.

I will let you know as
soon as the advice comes
through.

Hugh has not yet seen
this letter nor had any
advice on it.

- Morven.

GRO-C: D. P.

OK.

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Hugh Taylor Esq.,
Permanent Secretary
Department of Health
Richmond House
79 Whitehall
London SW1A 2NS

18 February 2009

I agree with your
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What does
Hugh say?

Dear Mr Taylor

GRO-C: D. P.

A copy of your letter of 9 February 2009 to Dr Kevin Woods has been passed
to Lord Penrose who has asked me to respond to it on his behalf.

Lord Penrose is pleased to note your assurance that all reasonable
assistance will be provided to him in explaining what documents are held by
your Department and in making available any additional documents that he
considers necessary for the Inquiry.

As you will be aware Lord Penrose was only appointed with effect from 12
January 2009. I assume that you are familiar with his Terms of Reference
which may be accessed at the Inquiry website:

<http://www.penroseinquiry.org.uk>

Lord Penrose's investigations are still at an early stage and he has not yet
determined the procedures to be adopted by his Inquiry nor has he formed
any concluded view on the evidence that he will require to fulfil his terms of
reference. There are however certain points in relation to the position of your
Department that can usefully be raised at this stage

For the record it is understood that the documentation so far released by your
Department comprises:

1. The documents produced as relative to the "Review of
Documentation Relating to the Safety of Blood Products 1970 – 1985
(Non A Non B hepatitis)" published in May 2007, and

2. The documents produced as relative to the paper entitled "Self-Sufficiency in Blood Products in England and Wales – A Chronology from 1973 to 1991" published in 2006, including ten further previously unreleased documents on the self-sufficiency initiative dating from 1974 - 75.

It would be appreciated if it could be confirmed that this is the only relevant documentation that has so far been released into the public domain by the Department.

It is noted that some further documents from the relevant period have been identified. Can it be confirmed when it is expected that these will be released? It would indeed be helpful to receive the list of files on blood safety or related issues to which you refer.

It is too early to form a view of the range and types of information that might prove necessary for Lord Penrose fully to carry out the remit Scottish Ministers have set him. Looking forward, he would be anxious to avoid omnibus or unstructured requests for information that could only be satisfied by the Department at disproportionate cost and inconvenience, and result in voluminous material that would in turn impose an insuperable burden on the Inquiry team. His preference would be to target specific areas and to request material that might supplement or complete the available documentation on a particular issue. It would appear from your letter that he can look to the Department for co-operation in the event of such requests becoming necessary. At this early stage, however, there are four points that should be made.

The first is that Lord Penrose's preferred approach can only succeed if the documents that are made available are complete and allow one to be confident that the inquiry's investigations are effective. Much of the material produced by the Department has been heavily redacted, inter alia by the deletion of the names of individuals referred to in documents such as correspondence and the minutes of meetings. Lord Penrose will be giving consideration to the question as to whether reliance on such heavily redacted material would enable him to fulfil his Terms of Reference. To the extent that the Terms of Reference require the investigation of specific deaths compliance with Article 2 ECHR will be required on the part, not only of Lord Penrose and the Inquiry team, but also on the part of public authorities dealing with requests for evidence. It is open to question whether such compliance could be achieved on the basis of redacted material. At this stage Lord Penrose wishes the Department to provide copies of the documents already available in un-redacted form.

As the Department will be aware, Lord Penrose's terms of reference have taken account of the observations of Lord Mackay of Drumadoon in the case of Kennedy & Black –v- Scottish Ministers and the Lord Advocate [2008 CSOH 21] [<http://www.scotcourts.gov.uk/opinions/2008CSOH21.html>].

Lord Mackay was of the view that the families of the deceased were entitled to an Article 2 compliant inquiry that would provide for practical and effective investigation of the facts relating to the deaths of Mr [GRO-A] and Mrs [GRO-A], 'holding to account' those who might be found responsible for the deceased becoming infected with blood-borne disease. It is unlikely that this aspect of the remit could be disposed of satisfactorily without access to the identities of responsible officials and scientific advisers.

It is assumed that, when putting this material into the public domain, the Department undertook the redaction to give effect to its interpretation of the exemption for personal information in terms of section 40 of the Freedom of Information Act 2000 which cross refers to the Data Protection Act 1998 and in particular the first data protection principle. For disclosure of personal data to be fair, there must be identified a lawful basis from those conditions set out in Schedule 2 to the 1998 Act. It appears to me that the sixth condition would provide such a basis. Lord Penrose's "legitimate interests" arise in the context of a statutory public Inquiry investigating a matter of significant importance. This is rather different from those arising in terms of a simple Freedom of Information request. In assessing the general requirement of fairness to the individuals concerned, it has to be remembered that these are individuals who were acting in an official capacity. Moreover, it is also likely that these individuals were in senior positions within their organisations. These factors would tend to indicate that disclosure would not be unfair, which is consistent with the views expressed by the Information Commissioner in his guidance on section 40 of the 2000 Act. The arguments for production, albeit on a voluntary basis, of unredacted material to a statutory public inquiry such as this, appear to be strong

This paragraph concerns me as it does seem to indicate a point regarding the redacted documents. I think we need to keep an eye on how this is dealt with.

In the second place Lord Penrose's terms of reference specifically require him to investigate the systems in place in Scotland for the licensing of blood and blood products. Such investigation is likely to be necessarily incidental to the investigation of the specific deaths as also required. While it has not yet been possible to examine in detail all of the material released by the Department into the public domain it does not appear to include any documents relating to such licensing over the relevant period. For the purposes of the Inquiry, that period starts on 1 January 1974 but the investigation of specific issues before that date may be required. Lord Penrose would like me to explore with you what material relevant to this aspect of his Terms of Reference is held by the Department and to seek your assurance that such material will be provided on request.

In the third place the material produced by your Department all appears to be related to hepatitis C and to blood products. Lord Penrose's Terms of Reference require his investigations to extend both to hepatitis C and HIV as well as to both blood and blood products. It may be that the position will be clearer after we have had sight of the file list which you have offered to produce but it is assumed that, in so far as relevant to the Terms of Reference, you will be able to produce material related not only to hepatitis C and to blood products but also to HIV as well as to blood and its components.

Finally, it is noted that the documents already produced by your Department appear to relate to the period 1970 to 1985. Lord Penrose's terms of reference require him to consider events to date. I should be grateful, therefore, if you would confirm that your Department will provide access to materials that relate to the period from 1985 onwards in the event that Lord Penrose considers that such material is required to enable him to fulfil his terms of reference.

Yours sincerely

Douglas Tullis

Solicitor to the Inquiry

Direct: **GRO-C**

Email: Douglas.Tullis@ **GRO-C**

Inquiry website: <http://www.penroseinquiry.org.uk/>