RE: HIV LITIGATION

CLAIM TO PUBLIC INTEREST IMMUNITY

ADVICE

THE CLASSES OF DOCUMENTS INVOLVED

1. The documents which I have been instructed to consider fall into 6 different categories for each of which a possible claim to Public Interest Immunity may be made out:-

1. Documents revealing the process by which policy decisions were arrived at, comprising:

(1) Submissions to Ministers and exchanges with Ministers, directly or through their Private Secretaries, relating to the formulation of policy and the making of decisions which can be characterised as "policy" rather than "operational" or alternatively as "non-justiciable" rather than "justiciable";

(2) Exchanges between senior officials specifically forming part of the process by which submissions, draft submissions and policy documents were brought into being;

2. Position papers and similar documents which were prepared by civil servants and directed towards the formulation of future policy and plans, but which were not designed to be placed before Ministers or to form the direct basis for a submission to Ministers;

3. Briefings to Ministers directly relating to Parliamentary questions or debates, and particularly draft Parliamentary Answers and notes in respect of possible "Supplementary" Questions;

4. Briefing notes and draft replies to letters, consisting of:-

(1) Briefing notes to Ministers prior to other meetings at which they were expected to make a statement or declare their views;

(2) Draft answers to be sent by ministers in response to letters received by them;

5. The original unexpurgated versions of documents in or by which doctors and other supplied details of patients' illnesses and/or adverse reactions in confidence to or for the CSM and/or Licensing Authority.

6. Documents forming part of an exchange of information between the UK Government and foreign governments or government agencies, containing information or views expressed by such foreign government on the basis of express or implied confidentiality between governments.

THE SUBJECT-MATTER OF THE DOCUMENTS

2. The subject-matter of the various documents in each category can be summarised as follows:-

1: These fall into two principal groups:

a. Documents relating to decisions which are clearly major matters of policy:

i. Whether to adopt a policy of self-sufficiency in blood products;

ii. What resources to allocate to the implementation of such a policy;

iii. Future planning for the role of the Blood Products Laboratory;

iv. What priority to give and what resources to allocate to the redevelopment and/or refurbishment of the BPL;

v. Whether and how to re-organise the National Blood Transfusion Service or other parts of the NHS.

b. Documents relating to decisions which contain some elements of policy but which are subordinate to major policy decisions of the kind set out above:

i. What approach to take towards the widespread introduction of vaccination against Hepatitis in the light of the AIDS problem;

ii. What warnings to issue to blood donors in

order to discourage those at risk from giving blood, whilst maintaining adequate supplies of blood for the NBTS;

iii. How best to implement a procedure for the screening of blood donations;

iv. Whether, when and how to introduce the use of heat-treated blood products;

v. What steps to take to minimise the risk of hepatitis infection to haemophiliacs and others.

2. This group of documents relates principally to the papers prepared in the mid-1970s to consider the ways of expanding the NBTS in order to implement the declared aim of self-sufficiency in blood products. The majority of these papers involved matters on which a decision by Ministers would be needed in due course if they were to be pursued.

3. The briefings and draft parliamentary answers cover a whole range of topics, as can be discerned from looking at the questions raised and answers given in Parliament. Briefings and drafts will have been prepared for most of these questions. Not all drafts have yet been unearthed;

4(1) This category consists of documents which were prepared for the guidance of Ministers before important meetings, including meetings with ASTMS, the staff of

BPL and representatives of manufacturers. In most cases, minutes of the meeting or other records of what the Minister actually said on the relevant occasion are available and are not privileged.

4(2) This category of documents consists of a variety of draft replies on policy and operational matters, where the minister's response has been prepared by way of draft with comments by the appropriate officials.

5. There are comparatively few documents in this category, and most relate to cases of hepatitis rather than AIDS.

6. There are apparently no more than 2 documents in this class, which I have not as yet seen.

THE PUBLIC INTEREST WHICH IS AT STAKE

3. In my view, and having discussed the position in some detail with Andrew Collins QC, the public interest which is at stake in respect of each category and the mischief which a claim for PII would be designed to prevent can be summarised as follows:

1(1) and 1(2) The documents referred to in Paragraph 2.1(a) above fall within the class of policy-making documents in which (1) there is a need for effective, candid and uninhibited advice to Ministers and discussions between Ministers and their senior advisers and (2) there is a

public interest in protecting from possible critics the inner workings of government in the formulation of important government policy. However, although the documents referred to in Paragraph 2.1(b) may be said as a matter of principle to fall within the same class, they are in reality much more closely concerned with operational matters, and one could make out a case that they do not concern the type of major policy-making which the court has in the past protected by public interest immunity, so that the only residual ground for claiming P.I.I would be that it is in the interests of good government to allow ministers and civil servants to communicate freely with each other on all aspects of the decision-making process, without the risk that such communications might subsequently come under scrutiny in the context of litigation brought by private individuals.

2. This category requires protection in so far as the working papers are designed as preparatory steps in the formulation of possible policies and strategies which in due course will be developed into submissions and briefings to Ministers. However, in so far as they represent merely papers concerned with how to implement existing policies, I do not consider that they should enjoy protection or that a claim for public interest immunity should be made for them.

3. The third category is particularly important since it

provides the means by which Ministers can be provided with information to give official answers and statements in Parliament. What is actually said in Parliament is of course available and it can be argued that it would be highly undesirable if litigants and critics of governments were able to look behind those public utterances in order to analyze and comment adversely on the differences between drafts and actual responses. This would tend to devalue the significance of public utterances of Ministers and their disclosure would threaten the effectiveness of the system of briefing of Ministers;

4(1) and 4(2) The arguments for protecting this class are much less obvious except in cases where the briefing notes contain references to policy-decisions which are still under consideration. However, these documents do represent direct exchanges with Ministers and it may be considered appropriate to seek protection for them if it is felt that the process by which ministers communicate with their senior civil servants should be protected from disclosure.

5. The fifth category is one which has already been the subject of a claim for privilege in the Whooping Cough vaccine and Opren cases, although the claim was not eventually challenged in either case. The interest to be protected is that of our voluntary reporting system for adverse reactions, which is much envied but which depends on the willingness of medical practitioners to provide

information about their patients in the cause of the improvement of medical knowledge, in the clear belief that the information provided will be kept in the strictest confidence and will not be passed to third parties in any form by which their patients might be identifiable.

6. It is clearly important that foreign governments should feel able to impart confidential information to British government agencies without any concern that those documents will subsequently be disclosed in litigation. Otherwise, there must be a real risk that a loss of confidence will deprive the government of important material.

DISCUSSION

4. It is clear from the authorities that where documents are protected by public interest immunity, the department or person concerned has no discretion but is under a duty to claim the privilege. It is then a matter for the court to decide whether the balance of the competing public interests lies in favour of or against disclosure. There is nothing in the documents that I have seen which I would expect to have any significant adverse effects on the case to be put forward on behalf of the Central Defendants in this litigation. Indeed, many of them may be helpful in explaining the careful consideration which was given to various matters at the time. However, that is not the point.

Category 1

5. By far the most difficult issues are raised by categories

1(1) and 1(2) which will stand or fall together. In **Conway v Rimmer [1968] AC 910**, the claim for privilege of such documents was somewhat deprecated. However, the views expressed by Lord Wilberforce in **Burmah Oil Co ltd v Bank of England [1980] AC 1090** at 1112 were echoed and supported by Lord Fraser in **Air Canada v Secretary of State for Trade and another (No 2) [1983] 2AC 394**, and it now seems beyond doubt that documents relating to the formulation of policy will attract such privilege. However, such protection does not extend to briefings and exchanges relating to policies already in existence (documents in that class were disclosed on discovery in **Williams v Home Office [1981] 1 All ER 1151** and expressly excluded from the Minister's certificate). In addition, it is clear from the authorities and in particular **Air Canada** that the degree of protection will depend on the importance of the policy concerned and the level at which any decision is made to which the documents relate (see in particular the dicta of Lord Wilberforce at the outset of his speech).

6. It may be that the nature of the test has evolved to some extent in the light of the decision in **Rowling v Takaro Properties Ltd [1988] AC 473 [PC]**. There the emphasis shifted away from the traditional distinction between policy and operational decisions towards an objective analysis of the justiciability of an act, in deciding whether or not a duty of care was owed by a minister or government department. It seems possible that the Courts would now take the view that if the policy decision was one which on analysis was to be treated as giving rise to a duty of care, then documents relating to its

formulation would not be protected by public interest immunity, on the grounds that a decision-making process which can be the subject of civil proceedings is unlikely to be made more difficult in future if the documents showing how such decision was reached are disclosed on discovery. The point is of course that if the public interest would be threatened by disclosure, there is a strong argument that as a matter of public policy such decision-making should not give rise to a claim in tort by a private individual. On the other hand, it may be possible and appropriate to claim privilege for documents relating to decisions which are more in the operational sphere but which do not give rise to any duty of care, if there is a real public interest in protecting such documents from disclosure. It is for that reason that I have described the first category in a slightly different way from usual.

7. So far as the documents described in Paragraph 2.1(a) are concerned, these appear to me to fall squarely within the class of documents which ought to be protected unless there is a stronger countervailing public interest. They concern important questions of policy and in particular the policy decisions which arise when there are difficult balances to strike between competing demands for scarce resources.

8. However, the second group described in Paragraph 2.1(b) fall within a different class. In my view, the questions of policy involved are minor in comparison with the "operational" element. Thus, decisions as to what warnings to give to blood donors

involve difficult decisions about what emphasis to place on homosexual behaviour and its risks and how far to raise concerns which may lead to unnecessary panic and to a significant reduction in the level of donations. But the essence of the decision is an operational response to a particular problem, where there is clearly a need for some action and the only question is what, when and how. It is also an area where it is most likely that a Minister and his Department will owe a duty of care, if any duty is owed in the performance of a public function such as this. I would expect a court to hold that the documents in the second group relate to comparatively minor issues of policy and that, if they are protected by PII at all, it will require much less by way of countervailing public interest to justify ordering production. Therefore, before a decision is taken to claim privilege, it would be appropriate to confirm whether it is in fact the view of the Department that these are true policy questions which they wish to protect by claiming public interest immunity.

9. The second category is at the fringes of privilege. In one sense, there must be large quantities of documents in a similar class, where government departments and bodies are considering the future management of their own and subordinate organisations. For this reason, unless such documents are prepared in direct contemplation of a future submission to ministers on policy, rather than in contemplation of decisions to be taken by officials or purely administrative or "operational" decisions to be made by Ministers, I consider that the better course is to

disclose them. However, there is a group of documents relating to the future of the BPL which do seem directly related to the formulation of future policy and I have included them in the group of documents for which privilege may be claimed.

10. I consider that considerable weight attaches to the third category, since draft parliamentary answers involve matters at the heart of our parliamentary system, namely the means by which Ministers report to Parliament. The Plaintiffs will have the benefit of the actual answers given and that should be enough. However, it may be that the Department and/or Ministers will have a different view of the importance of claiming privilege for such documents. Equally, this is a situation which is likely to have arisen in other litigation and it is obviously important to maintain a consistent approach. The Plaintiffs are likely to be particularly interested in the notes for supplementary questions.

11. The fourth category is rather more difficult. Ordinary briefings which do not relate to policy-formulation are in my view matters which ought to be disclosed, where their relevance and prima facie likelihood of assisting the Plaintiffs' case are established. However, if individual documents disclose information about the policies currently under consideration, there is a good case for considering these documents as a sub-category of the first category. The same applies to drafts of letters unless it is considered appropriate to protect all direct communications between Ministers and their senior civil servants from disclosure. It follows that this is a category for which

I consider that privilege should only be claimed after careful thought. I see no objection to disclosing these documents if that is considered appropriate.

12. I have no doubt that there is a very strong case for protecting documents in the fifth category and indeed I believe that it is unlikely that the Plaintiffs will seek to obtain disclosure of these documents provided that they have access to the expurgated copies, as occurred in the Opren and Whooping Cough litigation.

13. The claim for the sixth category is also a strong one, provided that the documents were in fact provided on the basis of express or implied confidentiality. However, this may be a class where the Judge will wish to inspect the documents in order to establish their sensitivity for the purposes of balancing competing public interests.

14. In a case such as the present, I would expect the court to find a strong public interest in favour of the disclosure of all but the most sensitive documents and none appear to fall within this class. However, it is clear from **Air Canada** that before obtaining even an order that the documents should be produced for inspection by the Court, the party seeking them must at least "satisfy the Court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be deprived of the means of proper presentation of his

case" [per Lord Fraser]. It follows that the Plaintiffs here should be required to show that these documents are likely to contain additional material which will assist them in their case. In the case of the fifth category, it seems unlikely that they will be able to do so, and in the case of the third category, it will be a matter of speculation.

15. There is one additional factor which I believe is relevant. Where there is a strong public interest in retaining the confidentiality of the documents, as with the more important documents in the first category and those in the third, fifth and sixth categories, especially, it must be relevant to consider not merely whether the other party has raised an issue in its pleadings to which these documents are relevant and whether they may assist that party in preparing its case, but also whether that part of their case is one which stands any real chance of success. In other words, the party seeking production should be required to make out a prima facie case that it has a cause of action in respect of the relevant issue. Where, as here, the Plaintiffs raise adventurous and novel arguments about the duty of care of ministers and the justiciability of decisions relating to resource allocation, I consider that it is quite reasonable to invite the Court to consider whether the Plaintiffs have made out a case that this is a cause of action which stands any real prospect of success in the light of the authorities. If the claim is hopeless in law, then the importance of the evidence to the issue and the public interest in doing justice to the Plaintiffs should not be allowed to outweigh a legitimate public

interest in the confidentiality of the material of which production is sought. In other words, although the matter is not elevated to the status of a preliminary issue, the Plaintiff may reasonably be asked to set out its case on these adventurous issues for scrutiny by the Court. It is only if the Court concludes that a prima facie case has been made out in law that the Court should go on to consider the competing public interests and other tests advocated in Air Canada.

16. Since the documents span two administrations, it is more appropriate that the Certificate should be signed by the Permanent Secretary rather than the Minister, but there may perhaps be some limited value in a Minister signing a certificate for the documents relating to this administration, if that is preferred.

17. The documents will need to be listed, once a substantive decision has been taken as to the precise classes for which protection is to be sought, and it would be useful to have a supporting affidavit, setting out the background and drawing attention to the novel aspects of the Plaintiffs' case.

CONCLUSIONS

18. Subject to the approval of John Laws, I would advise that the following approach should be taken to the question of claiming public interest immunity:

1. A claim should be made for those documents in Categories 1(1) and 1(2) which fall within the descriptions in Paragraph 2.1(a) above;

2. Either no claim should be made in respect of those documents falling within Category 1 concerning the matters referred to in Paragraph 2.1(1) above or a claim should be made but the Certificate should make it clear that this is a class claim which the Department is under a duty to make but that in the circumstances of this case it does not consider it appropriate to make any strong case that the Judge should not order disclosure.

3. A claim should be made in respect of those documents in category 2 which are closely involved with future policy decisions, such as the options for the future growth of the Blood Products Laboratory, but not for other documents in this category.

4. A claim should be made in respect of the documents in category 3 unless documents of this class have been consistently disclosed in earlier litigation or it is felt inappropriate to claim protection for them on the grounds that I have outlined.

5. No claim should be made in respect of the documents in Category 4 unless it is felt that either or both sub-category needs protection on the grounds set out above in

order to assist in the proper and effective dispatch of government business.

6. A claim should be made in respect both of the documents in Category 5 and those in Category 6.

7. In relation to the Category 1 claim for documents in Paragraph 2.1(a), the Certificate should include reference to our contention that the Plaintiffs' claim is hopeless or at least most unlikely to succeed, as a matter of law.

19. In the event that no concluded view has been reached by Friday 6th July, I suggest that the attached Schedule should be served with an indication, as previously given to the Court, that the list will not be extended in any Certificate but may possibly be reduced after further consideration by senior officials and Ministers.

GRO-C

JUSTIN FENWICK 4th July 1990