

Draft letter

Annex A

Mr Vivek Kumar
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xx June 2008

I am writing to you as the qualified person under the Freedom of Information Act ("FOIA") to seek your reasoned opinion on the application of s36(2)(b)(i) and (ii) in response to an Freedom of Information (FOI) request received by my Department.

FOI request

Ed Webber (a researcher to Jenny Willott MP) has requested the *"advice from the Chief Medical Officer given to the Secretary of State for Health in August 1990 regarding the litigation over the infection of haemophiliacs with HIV through contaminated blood products"*.

We have located the document from Sir Donald Acheson, the former Chief Medical Officer (CMO). The document is dated 20 July 1990 (**see Annex A**).

Background

Jenny Willott has been campaigning on behalf of patients with haemophilia and has over the past year asked numerous parliamentary questions on issues concerning haemophilia patients, this includes the establishment of a public inquiry and compensation.

The HIV litigation took place in the late 1980s/early 1990's. The litigation involved around 770 haemophilia patients who were infected with HIV through contaminated blood products, and 190 of their partners and close relatives who took legal action against the Department, Welsh Office, the Medicines Licensing Authority and Committee on Safety of Medicines to claim compensation for damages, alleging negligence. The Government denied liability. Ministers agreed in December 1990 to settle the litigation.

Ministers took the decision in 2006 to release a significant number of official documents covering the years 1970-1985, when most of the contamination of blood products took place. The introduction of heat treatment in 1985 eliminated this risk. This was done under the terms of the FOI but the number released far exceeded what we would normally release. This document was not considered for release because it was outside the time period of the papers reviewed.

This Department has considered the public interest test and favours disclosure for the following reasons:

Reasons for disclosure:

- The advice to Mr Clarke from the former Chief Medical Officer (CMO) does not contain any new information that is not already in the public domain. For your information, it was reported in The Guardian on 3/8/90 that Sir Donald was urging Ministers to offer an out of court settlement.
- Sir Donald advised in July 1990 that Ministers settle the case on humanitarian grounds. However, at the time Ministers agreed with the balance of their advice that the Department had a strong legal case and that litigation should continue. However, the public pressure continued and it was decided in December 1990 to agree an out of court settlement. Payments were made through the Macfarlane Trust (Special Payments) Trust. The Macfarlane Trust continues to provide support, both financial and advisory to patients with haemophilia who were infected with HIV.
- The current CMO considered this request and is in favour of release. He considers that disclosure of the advice from the previous CMO, would be unlikely to inhibit the candour of his own advice in future. The CMO indicated that he gives his view 'without fear or favour', irrespective of whether the communication is internal or external. Furthermore, there have been a number of occasions where the CMO's advice to Ministers has been made public. In light of the CMO's view, the Department considered that the public interest favoured disclosure in this case.
- The Department has already released thousands of documents, in line with the FOI Act, covering the years 1970-1985 when most of the contamination of blood took place. This included a large number of submissions containing advice to Ministers, which had been withheld at the time of the HIV litigation. Former Ministers, including Kenneth Clarke MP in his capacity as MS(H) for part of the time, were consulted and raised no objection for this release.
- These papers have been made available:
 - to the independent inquiry into contaminated blood and blood products, chaired by Lord Archer of Sandwell
 - on the Department of Health website and the Scottish Government Public Inquiry into these issues, Chaired by Lady Cosgrove, which is due to start proceedings any time now.
- We feel that it is almost inevitable that if we withhold the document then Lady Cosgrove's inquiry will request it.

- The documents are nearly twenty years old. Jurisprudence on FOI has established that the harm of disclosure in most (though not all) instances decreases with the passage of time.

In line with FOI guidance, my officials wrote to Kenneth Clarke MP (the recipient of the advice) to let him know of our intention to release the document. Mr Clarke has subsequently written (his letter is attached at **Annex B**) to ask the Department to reconsider our decision to release the information. Mr Clarke has concerns, more generally of the way the FOI Act is being used. He has asked that we withhold the document, using the argument that the release of information “might prejudice the formulation of Government policy in future”. This is covered by Section 35 (1) (a) of the Act (formulation of government policy).

The advice from officials at Ministry of Justice and Cabinet Office is that we should withhold the information requested. You should be aware that Government is running appeals before the Information Tribunal where some of the disputed information is over 10 years old and contains advice to Ministers. While requests should be considered on a case-by-case basis, it would be difficult to reconcile an approach whereby government litigates against the release of information generated by the present administration, but discloses information of a similar in nature generated by a previous administration.

Reasons against disclosure

- The Information Commissioner’s Office (“ICO”) has agreed that where advice is given in the context of litigation, then a particular weight is given to the public interest in withholding the information.
- The advice of the CMO to Ministers is in a different league to that of most other advice Health Ministers will receive - something that should be given significant weight when considering the prejudice and public interest. It is a unique role and one on which ministers are particularly reliant for independent and expert advice. The value of the CMO and his/her advice could be affected if advice has to be tailored for public consumption. MOJ have said that while the present CMO does not share those views in relation to his advice, those views do not necessarily account for previous and future CMOs.
- Although this document is almost 18 years old, these issues are still relevant today and campaigners continue to push for greater sums of compensation. MOJ have advised that voluntary disclosure of its own documents could result in further legal action being brought against the Department in relation to this matter. It is clear that campaigners seek to gain legal ground from disclosure, evidenced in the Guardian's article where “[campaigners] had hoped data from the [Government policy] documents would bolster their case that the Government was negligent”. However, DH lawyers consider that any such claim would

be likely to be time-barred and that the courts are unlikely to extend the time-limit on the basis that it is “just and equitable” to do so where the original litigation took place 18 years ago. Further, a significant number of documents have already been released and so far, no further legal action has been brought. There is however the possibility that disclosure could increase political pressure for more compensation to be paid but, there is nothing in the CMO’s advice to indicate what level of compensation is appropriate.

MOJ and CO therefore agree with Mr Clarke’s assessment.

If disclosure is favoured, MOJ suggest that the document could be partially redacted, so that the words such as “unique catastrophe” and “unique tragedy” are redacted. However DH consider that the suggested redactions are central to the advice given to the Secretary of State and that this approach could simply fuel speculation.

The Department of Health, MOJ and CO would therefore welcome the reasoned opinion of the Attorney General in the application of s36(2)(b)(i) and (ii).

Unfortunately, we have already exceeded the time to reply to this case, and we have already issued three Public Interest Test extension letters. A reply by **xxx** would be helpful.

{date to be inserted}

HUGH TAYLOR