From the Permanent Secretary
Hugh Taylor CB

DH Department of Health

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79 Whitehall
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Baroness Patricia Scotland
Attorney General
20 Victoria Street
London SW1H 0NF

25 JUN 2008

Dear Baroness Scotland,

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

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 a document which is advice from Sir Donald Acheson, the former Chief Medical Officer, to Ken Clarke, the Secretary of State for Health at the time. The document is dated 20 July 1990 **(see Annex A).**

The Department initially favoured release of this document in response to the request and wrote to Ken Clarke to inform him accordingly. However, Ken Clarke does not accept our reasons for wishing to disclose the document and has asked us to withhold it. MoJ and Cabinet Office officials advise that we should withhold the document under Section 36(2)(b)(i) (prejudice to the effective conduct of public affairs), because disclosure "would, or would be likely to, inhibit the free and frank provision of advice." However, your agreement would of course be needed to use Section 36. This letter seeks your agreement to use Section 36 in this case as justification to withhold the document.

Background

Jenny Willott has been campaigning on behalf of patients with haemophilia and has over the past couple of years asked numerous parliamentary questions on issues concerning haemophilia patients, as well as pressing for the establishment of a public inquiry and further compensation.

The HIV litigation to which this FOI request refers 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, the Welsh Office, the Medicines Licensing Authority and the Committee on Safety of Medicines to claim compensation for damages, alleging negligence. The Government denied liability. However, public pressure mounted and so Ministers eventually decided in December 1990 to settle the litigation out of court and to set up a compensation scheme. The Macfarlane Trust continues to provide both financial and advisory support to patients with haemophilia who were infected with HIV.

In recent years, the campaign groups have returned to this issue. They appear to believe that we are withholding information which shows that the Government at the time was negligent in not acting earlier to eliminate the contamination of blood with Hepatitis C and HIV.

In order to demonstrate that there is no reason to believe this is the case, Ministers agreed in 2006 to the release of all the relevant official documents covering the years 1970-1985 when most of the contamination of blood and blood products took place. The introduction of heat treatment in 1985 eliminated the risk of contamination so it was not felt necessary to release any papers beyond that date.

The Department of Health view on this FOI request

The Department had initially favoured disclosure of the document for the following reasons:

- Sir Donald advised in July 1990 that Ministers settle the case on humanitarian grounds. There is nothing in the document to suggest that the Government was negligent in any way and it does not include any information that would support the campaigners' case. However, if we refuse to disclose it, they will inevitably think that we are trying to conceal information that would help their cause.

- The current CMO 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.

- 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 includes a large number of submissions containing advice to Ministers, which had been withheld at the time of the HIV litigation. Former Ministers, including Ken Clarke in his capacity as MS(H) for part of the time, were consulted and raised no objection to 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
- to the Scottish Government Public Inquiry into these issues, chaired by Lady Cosgrove and 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.

Ken Clarke's view

In line with FOI guidance, my officials wrote to Ken Clarke to let him know of our intention to release the document. He was doubtful and was not reassured by our response. His letter is at **Annex B.** Mr Clarke is concerned about this particular case as he feels it does not tell the full story (because other officials did not agree with Sir Donald and that is why Ministers did not accept Sir Donald's advice until almost six months later). But he also has more general concerns that the FOI Act is being used in a way that was not intended. He has asked that we withhold the document, using the argument that the release of the information "might prejudice the formulation of Government policy in future".

Reasons against release given by the MoJ

The advice from officials at Ministry of Justice and Cabinet Office is that we should withhold the information requested. They point out that the 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 nature generated by a previous administration. They further argue that:

- After the release of the Black Wednesday papers and the coverage that followed, Lord Falconer (then Lord Chancellor) and Michael Howard (then leader of the Opposition) agreed that former Ministers must be consulted about the release of any papers relating to them and that their views should be treated with similar consideration to those of existing Ministers.

- The Information Commissioner's Office has agreed that where advice is given in the context of litigation (which this is), that 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. While the present CMO does not share those views in relation to his advice, his view does 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. 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. (However, it should be noted that DH lawyers do not accept this argument and consider that any such claim would be likely to be time-barred since the original litigation took place 18 years ago, although the court does have a discretion to extend the time limit for personal injury cases.)

MoJ officials also point out that this is new territory. There has not yet been an example where a department of state has ignored the wish of their former Secretary of State in relation to advice given to him/her in Government.

The Department of Health, Ministry of Justice and Cabinet Office would therefore welcome your reasoned opinion on the application of s36(2)(b)(i) and (ii) in this case.

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 **Friday 4 July**, if at all possible, would therefore be very helpful.

Yours sincerely,

GRO-C

HUGH TAYLOR
PERMANENT SECRETARY

Cc: Frances Logan, DH
Richard Heaton, DH

16/150

Philip

1. MS(H)

2 Secretary of State

From: Chief Medical Officer

Date: 20 July 1990

Copy:

HAEMOPHILIACS: AIDS LITIGATION

I hope Secretary of State will take account of my view that the problem of HIV infection in haemophiliacs can in fact be regarded as a unique catastrophe. The key feature which is not brought out particularly well in the memorandum of the Directors of Public Health is that HIV infection in addition to almost inevitably causing a very unpleasant progressive illness and death results in a substantial proportion of cases in infection of the female sexual partner and also on average one quarter of the subsequently conceived children. In both wife and children the infection will also prove fatal; in the case of the children fatality takes place in infancy. The only remedy which will certainly prevent the transmission by sexual contact is the invariable use of a condom throughout the partnership. Unlike the position in Hepatitis B which can occur as the result of a therapeutic accident, there is no vaccination available to protect the sexual partner. Furthermore, in Hepatitis B the outcome is only rarely fatal and infectiveness is present in a small minority of cases.

In summary, therefore, when one takes account of the fact that haemophiliacs in the first place have a serious hereditary disease and in the second place when infected with HIV will die young after an extremely unpleasant disease, have a significant chance of infecting their wives* and some of their children the tragedy goes beyond anything which has ever been described as a result of a therapeutic accident and is very likely indeed never to occur again.

I hope therefore, that for humanitarian reasons the Government will find some way to make an ex gratia settlement to the infected haemophiliacs in relation to this unique tragedy. I cannot personally see how this could be regarded as implying any responsibility for other accidents such as benzodiazepine dependence, cerebral palsy following obstetric misadventure etc.

GRO-C

E D ACHESON

* Footnote: So far we know of 35 infected spouses and another 3 who have AIDS. The numbers are inevitably incomplete and probably represent about one third of the actual total. There have also been some infected children born.

From: The Rt. Hon. Kenneth Clarke, QC, MP

HOUSE OF COMMONS

LONDON SW1A 0AA

Ms E. Woodeson,
Director of Health Protection,
Department of Health,
Richmond House,
79 Whitehall,
London SW1A 2NL

3rd June, 2008

Dear Ms Woodeson,

Thank you very much for your letter about the proposed release of Sir Donald Acheson's Memorandum under the Freedom of Information Act. I am sorry that I am only just able to reply, but I have been abroad for most of the last fortnight.

My difficulty is that I do not know when I can find the time to start working through all the documents which you hold on this subject, although I do recall that you offered to make them available to me. I am also in the dark about the points being raised at the public inquiry that Lord Archer has been chairing and I have had no direct dealings of any kind with Lord Archer and his Committee. My concern remains that the release of the Chief Medical Officer's advice and only his advice in 1990 gives a very unbalanced picture of the general body of advice that was going to Ministers at the time. My recollection, which may be imperfect, is that the Department's other officials were putting in strong and compelling advice against the case for settling the claim because of the risk that it would increase the steady flow of claims that we were receiving for compensation for medical accidents. I seem to recall that the argument was that a settlement made in response to pressure by one group of claimants would encourage other groups of claimants to believe that campaigning would enable them to receive compensation from the taxpayer, despite their lack of any evidence of negligence on the Department's part. In the event, the settlement that was eventually made did not produce such a flood. However, Ministers and senior officials, apart from Sir Donald, were, so far as I can recall, fairly united in resisting this for some time. I seem to recall that the eventual settlement and the creation of the Macfarlane Trust was something of a political move, following the change of Prime Minister, in order to establish a new and more sympathetic image of the Government, although my memory may be playing tricks with me there.

I cannot see that the release of all the documents from 1990, which might shed more light on all this, would serve the public interest or satisfy any of the campaigners. It would not alter the basic situation that the Government believed and continues to believe that there was no legal liability upon the Government or the Department of Health arising from these

From: The Rt. Hon. Kenneth Clarke, QC, MP

HOUSE OF COMMONS

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tragic events in the 70s and 80s. I am concerned, however, that the release of this one document gives a totally misleading impression of the Department's opinion at the time. I assume that that is why it is the only document that is being sought by people who are presumably trying to demonstrate that there was more official support for their claim for payment than was actually the case at the time.

I do not think that the fact that the Department has already released thousands of documents covering the years from 1970 to 1985 is really relevant when it comes to the release of one isolated document from 1990 which is so out of context with the other documents which, no doubt, are still in existence from that time.

Quite apart from this case, I consider that the Freedom of Information Act is being stretched in its application further and further by campaigners, politicians and lobbyists of all kinds. I would still prefer that you should withhold the Chief Medical Officer's advice, citing the examples in the Act which do permit the withholding of information in circumstances where it might prejudice the formulation of Government policy in future. I am quite certain that if these rules become relaxed and partial disclosure of this kind becomes future practice, then future Governments will conduct all discussions of these sensitive policy issues in private and without written record. It is not possible for everyone to place their candid views on record, knowing that they are likely to have to defend them in controversial circumstances, at later stages in their careers and in circumstances which they cannot possible foresee.

I hope, therefore, that you and your colleagues will reflect on this and will decide that you cannot properly release one document which, if my recollection is correct, gives a totally misleading impression of the balance of the advice which Ministers were receiving at the time.

Yours sincerely,

GRO-C

The Rt. Hon. Kenneth Clarke, QC, MP

cc. Sir Liam Donaldson KB, Chief Medical Officer
Hugh Taylor CB, Permanent Secretary, DoH
Sir Gus O'Donnell, Cabinet Secretary