

Alexander Harris solicitors



Our ref: AA/LE/31851/1/9923  
 Your ref:  
 Please ask for: ANN ALEXANDER  
 Direct dial: **Code A**

Mrs Lesley Richards

**Code A**

4 May 2004

Dear Mrs Richards

Please find attached a letter sent to Steve Watts on your behalf.

I will contact you as soon as I hear anything further.

Yours sincerely

**Code A**

ANN ALEXANDER  
 SENIOR PARTNER  
 ALEXANDER HARRIS

**Code A**

*Handling with care*

Alexander Harris, Ashley House, Ashley Road, Altrincham, Cheshire WA14 2DW.

Tel: 08700 778877 Fax: 08700 778876 DX 19866 Altrincham | E-mail: info@alexanderharris.co.uk Website: www.alexanderharris.co.uk

Offices also in **Central London** and the **West Midlands**

**Partners:** David N Harris LLB, Ann Alexander LLB (Hons) MBA (Managing Partner), Lesley Herbertson MA (Cantab), Nicola Castle LLB (Hons) LLM, Richard Follis LLB (Hons), Lindsay Wise BA (Hons), Auriana Griffiths LLB (Hons), Warren Collins LLB (Hons), Yee Fon Sit LLB (Hons), Lesley A Casey LLB (Hons), Jonathan Betts LLB (Hons). **Consultant:** Richard Barr.

Winner 'Best Website 2003'. Alexander Harris is a franchised firm and a member of the Community Legal Service. Regulated by The Law Society.

AA/LE/32099/1/9929

ANN ALEXANDER  
Code A

F.A.O Detective Chief Superintendent Steve Watts  
Police Headquarters  
West Hill  
Winchester  
Hampshire  
SO22 5DB

4 May 2004

Dear Mr Watts

Further to our recent meeting with Gillian McKenzie and Lesley Richards we have been asked to seek clarification from you in respect of a number of points.

I would be grateful if you could advise as to precisely what information has been sent to the experts and if you have chosen not to send any information, what this information is and why have you decided not to send it. In particular, please can you let me know the details of the medical records that have been sent, including the dates covered and from which institutions.

Also, I have noted that both Mrs McKenzie and Mrs Richards are becoming increasingly more stressed with the length of time it is taking for information regarding their case to be given to them and any reassurance you can provide as to when they may receive some more substantive information as to progress would be appreciated.

I look forward to hearing from you.

Yours sincerely

**ANN ALEXANDER**  
**SENIOR PARTNER**  
**ALEXANDER HARRIS**

Code A

## OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC INTEREST

### Keynote

'Subornation' is the same as procuring. This specific section does not appear to add anything to the general offences of aiding and abetting principal offenders (see chapter 2).

### 15.3 Offences Similar to Perjury

#### Offence — False Testimony of Unsworn Child Witness — Children and Young Persons Act 1933, s. 38(2)

*Triable summarily. Punishment as per text of subsection.  
(No specific power of arrest)*

The Children and Young Persons Act 1933, s. 38 states:

(2) *If any child whose evidence is received unsworn . . . wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be liable on summary conviction to be dealt with as if he had been summarily convicted of an indictable offence punishable in the case of an adult with imprisonment.*

#### Offence — False Statements in Criminal Proceedings — Criminal Justice Act 1967, s. 89

*Triable either way. Two years' imprisonment and/or a fine on indictment; six months' imprisonment and/or a fine summarily.  
(No specific power of arrest)*

The Criminal Justice Act 1967, s. 89 states:

(1) *If any person in a written statement tendered in evidence in criminal proceedings by virtue of section . . . 9 of this Act, or in proceedings before a court-martial . . . wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable . . .*

(2) *The Perjury Act 1911 shall have effect as if this section were contained in that Act.*

#### Offence — False Statements in Criminal Proceedings — Magistrates' Courts Act 1980, s. 106

*Triable either way. Two years' imprisonment and/or a fine on indictment; six months' imprisonment and/or a fine summarily.  
(No specific power of arrest)*

The Magistrates' Courts Act 1980, s. 106 states:

(1) *If any person in a written statement tendered in evidence in criminal proceedings by virtue of section 102 above wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable . . .*

(2) *The Perjury Act 1911 shall have effect as if this section were contained in that Act.*

#### Offence — False Statements on Oath — Perjury Act 1911, s. 2

*Triable either way. Seven years' imprisonment and/or a fine on indictment; six months' imprisonment and/or a fine summarily.  
(Arrestable offence)*

The Perjury Act 1911, s. 2 states:

## OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC INTEREST

*If any person—*

*(1) being required or authorised by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding) wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true; . . . he shall be [guilty of an offence].*

### Keynote

The first two offences cover witnesses who tender false statements, either in criminal proceedings themselves (Criminal Justice Act 1967) or in place of depositions at a committal hearing (Magistrates' Courts Act 1980). The third offence covers the making of false statements under an oath which is not sworn in connection with a judicial proceeding.

The offence under s. 38 of the Children and Young Persons Act 1933 will be replaced by s. 57 of the Youth Justice and Criminal Evidence Act 1999, when it comes into force.

The Perjury Act 1911 makes further provision for the making of false statements in relation to marriage licences (s. 3) and the making of false statements in relation to the registration of births and deaths (s. 4). Both sections carry seven years' imprisonment on indictment and are therefore *arrestable offences*.

The 1911 Act also creates offences of making false declarations and of suppressing documents. For a full discussion of these offences, see *Blackstone's Criminal Practice*, 2002, section B14.

## 15.4 Perverting the Course of Justice

### Offence — Perverting the Course of Justice — Common Law

*Triable on indictment. Life imprisonment and/or a fine.*

*(Arrestable offence)*

It is an offence at common law to do an act tending and intended to pervert the course of public justice.

### Keynote

'The course of public justice' includes the process of criminal investigation (see *R v Rowell* (1977) 65 Cr App R 174).

Although traditionally referred to — and charged — as 'attempting' to pervert the course of justice, it is recognised that behaviour which is *aimed* at perverting the course of public justice does just that and the substantive offence should be charged (see *R v Williams* (1991) 92 Cr App R 158).

One way in which this offence is commonly committed is where a prisoner uses a false identity when he/she is arrested. Although the offence of perverting the course of justice may be made out in these — or similar — circumstances in connection with a number of other substantive offences, the Court of Appeal has held that, in many cases, the addition of such a charge is unnecessary and only serves to complicate the sentencing process (*R v Sookoo* [2002] EWCA Crim 800). Where, as in *Sookoo*, a defendant makes an unsophisticated attempt to hide their identity and fails, the Court felt that a

## OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC INTEREST

specific separate count of perverting the course of justice should not be laid. If it was shown that there were serious aggravating features, for instance where a lot of police time and resources had been involved or innocent members of the public had been arrested as a result, a specific charge may be appropriate and could be justified (for the specific offence of wasting police time, **see para. 15.8**).

Perverting the course of justice requires positive acts by the defendant, not merely standing by and allowing an injustice to take place. The offence will include cases where evidence is deliberately destroyed, concealed or falsified as well as cases where witnesses and jurors are intimidated (**see para. 15.5**).

Admitting to a crime to enable the true offender to avoid prosecution would fall under this offence (*R v Devito* [1975] Crim LR 175), as would abusing your authority as a police officer to excuse someone of a criminal charge (*R v Coxhead* [1986] RTR 411). Other examples include:

- making a false allegation of an offence (*R v Goodwin* (1989) 11 Cr App R (S) 194 (rape))
- giving another person's personal details when being reported for an offence (*R v Hurst* (1990) 12 Cr App R (S) 373)
- destroying and concealing evidence of a crime (*R v Kiffin* [1994] Crim LR 449).

It is important that the requisite intention is proved in every case as that intention cannot be implied, even from admitted facts (*R v Lalani* [1999] 1 Cr App R 481).

Where a person makes a false allegation to the police justifying a criminal investigation with the possible consequences of detention, arrest, charge or prosecution and that person intends that the allegation be taken seriously, the offence of perverting the course of justice is *prima facie* made out — whether or not the allegation is capable of identifying specific individuals. This is clear from *R v Cotter and Others* [2002] EWCA Crim 1033 a case involving the boyfriend of a well-known black Olympic athlete who claimed to have been attacked as part of a racist campaign.

### 15.5 Intimidating Witnesses and Jurors

Great care is needed by police officers in handling witnesses. Any behaviour that is seen as interfering with witnesses (or potential witnesses) by promises of favours and rewards or by threats will be a contempt of court (see *R v Kellett* [1975] 3 All ER 468). However, there is no 'property' in a witness. Protecting witnesses is one thing but trying to restrict the way in which defendants and/or their legal advisers obtain evidence for their defence — e.g. by properly approaching witnesses — can also amount to a contempt of court (see *Connelly v Dale* [1996] 1 All ER 224).

There are several statutory measures designed to protect witnesses, jurors and others involved in the judicial process. These can be separated into measures aimed at protecting those involved in *criminal* trials and/or investigations and offences aimed at protecting those involved in other proceedings.

The first measure can be found in the Criminal Justice and Public Order Act 1994.

## POLICE POWERS AND HUMAN RIGHTS

mistake as to the extent of the gunman's weapons and ammunition when they took the decision to open fire. The Court found that the exceptional requirements of Article 2(2) had been made out and that there had been no violation of Article 2 by the Cyprus police.

### Protecting Life

A further area of importance for the police in Article 2 lies in the second arm — that of protecting the lives of others. This area was considered recently in the case of *Osman v United Kingdom*, *The Times*, 5 November 1998. In this case a man had been killed by a person who had become fixated with him. The dead man's relatives claimed that they had warned the police about the killer's fixation and tried to sue them for negligence in failing to protect Mr Osman. The High Court dismissed the relatives' action on grounds of public policy and they took their case to the European Court of Human Rights, claiming that the State had violated the second arm of Article 2 by failing to protect the life of Mr Osman. Although the Court held that there had been no such violation on the facts of the case, it went on to examine the positive obligation of the State under Article 2.

The Court took the view that it is possible for an individual to show that the State had violated Article 2 by failing to protect his/her right to life under certain circumstances. In order to do so, it would seem that the person must show:

- that the police knew/ought to have known
- of the existence of a real and immediate risk
- to the life/lives of identified individual(s)
- presented by the criminal acts of another, and
- that the police failed to take reasonable measures that were within their powers to avoid that risk.

'Reasonable measures' in such a case would be judged objectively, that is, by reference to the opinion of an objective third party and not the subjective opinion of the police officer(s) concerned in the decision.

### 2.4.2 Article 3 — Torture

Article 3 of the Convention states:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

#### Keynote

Torture was made a specific criminal offence under s. 134 of the Criminal Justice Act 1988 (see **Crime, chapter 9**) but, whereas that offence has a statutory defence of 'lawful authority, justification or excuse', the prohibition contained in Article 3 is absolute. Irrespective of the prevailing circumstances, there can be no derogation from an individual's absolute right to freedom from torture, inhuman or degrading treatment or punishment.

## DISCLOSURE OF EVIDENCE

The court can also order disclosure of material which the prosecution contend is sensitive. In such cases it may be appropriate to seek guidance on whether to disclose the material or offer no evidence thereby protecting the sensitive material or the source of that material (e.g. where informants or surveillance techniques are involved).

The disclosure officer can make disclosure to the defence by either:

- providing copies of the material; or
- allowing the defence to inspect the material.

Where a request is made for copies, the material must be provided unless it is not practicable or desirable to do so. Examples of such occasions are given in para. 10.3. In cases where the material is not recorded in a written format (for instance an audio or video tape) then the disclosure officer has a discretion whether to provide a copy of the item or transcript of what is contained on the tape. This must be certified as a true copy of the tape (para. 10.4).

### 14.4.4 Duties of Investigators

The roles of investigator may involve just one officer or several officers. An 'investigation' may be completed in a very short time, e.g. from stopping a car, discovering it was stolen, arresting the suspect, obtaining a victim statement and charging the suspect.

Alternatively, the case may involve a long, protracted enquiry with several officers and numerous suspects, arrests and interviews.

Irrespective of the type of investigation, para. 3.4 requires investigators to pursue all reasonable lines of inquiry, *whether these point towards or away from the suspect*. To ensure that this duty is performed, it may be appropriate for investigators to meet and review the case and co-ordinate the allocated 'actions'.

What amounts to pursuing all reasonable lines of inquiry will be a question of fact in each case. What is reasonable in a case may well depend on such factors as the staff and resources available, the seriousness of the case, the strength of evidence against the suspect and the nature of the line of inquiry to be pursued.

Where an investigator discovers material that is relevant to the case, he/she must record that information or retain the material (para. 4.1). Once again, this duty to record and retain material relevant to the case includes material that would be regarded as negative to the prosecution case (para. 4.3). This does not just mean witness statements and evidence from inquiries but would include arrest notes, custody records, forensic reports, records of interview and all other material the investigator is aware of that might be relevant to the investigation. To this end, para. 5.1 places a duty on the investigator to retain all relevant material. Often, particularly at the early stages of an investigation (sometimes not until the defence statement is provided outlining the defence case), it will not be possible to know whether material is relevant. If in doubt it should be recorded and placed on the schedule of undisclosed material. Throughout the case, investigators and all others involved should continually review the material in the light of the investigation. Any material which becomes relevant and which has not been disclosed should be disclosed and, where it has not been retained, the OIC should be informed in order that he/she can decide what action to take (para. 5.3).

## DISCLOSURE OF EVIDENCE

Retention of material applies to documents and other evidence including videos. Failure to retain material could lead to the prosecution losing the case. In *DPP v Ebrahim* [2001] 1 All ER 831, the defendant had been charged with speeding. Police officers had recorded a video of the defendant driving at speed and had showed the video to the defendant prior to charge but had later recorded over it. The defendant contended that he had been intimidated by the plain police car being driven only inches from his rear bumper. The policy of the force was to keep videos for 28 days, unless they recorded an offence, in which case they were kept for 12 months. The court held that the police were under a duty to retain the video tapes at least until the end of the suspended enforcement period, during which time the defendant was entitled to consider whether he wished to contest his liability in court.

The issue of sensitive material is discussed below (see para. 14.5.3). Often it is only the investigator who obtained the evidence who will be fully aware of the sensitive nature of the material. In order to balance the need to protect sensitive material yet give the prosecutor full details of why the material is sensitive, para. 6.14 places the responsibility of informing the prosecutor of details of sensitive material on the investigator. That investigator must take steps to ensure the prosecutor can inspect the material. This does not mean that the disclosure officer or any other officer cannot carry out this function; simply that the investigator must ensure that it is carried out.

### Continuing Duty of Investigators

The continuing duty of disclosure imposed by ss. 7 and 9 of the 1996 Act mean that investigators have a corresponding duty to keep under review the revelation of material which meets the test for disclosure. It is therefore important that investigators are aware of which material might undermine the prosecution case and which might assist the defence case. It is also important therefore that investigators are aware of the content of defence statements provided after primary disclosure.

If investigators do not carry out their function properly, this has an impact on all the others involved in the disclosure process and may lead to disclosure on the defence being defective.

#### 14.4.5 Supervisor of OIC and Disclosure Officer

In all cases there must be an OIC and a disclosure officer. If for any reason, either the OIC or the disclosure officer can no longer perform their respective tasks, para. 3.6 places a responsibility on that person's supervisor to assign another person to take over that role.

### 14.5 Definitions

Paragraph 2.1 of the Code of Practice provides definitions to be used when considering the Code and some additional guidance is provided below.

#### 14.5.1 Relevant Material

The 1996 Act is concerned with the disclosure of material which is obtained during the course of a criminal investigation and which may be relevant to the investigation. Material can be in any form and should be widely interpreted. This applies to any



## DISCLOSURE OF EVIDENCE

material coming to the knowledge of officers involved in the case at any stage of the investigation or even after a suspect has been charged. This is material which the investigator, OIC or disclosure officer consider has some bearing on any offence being investigated or any people being investigated for those offences or any of the surrounding circumstances.

The material will be *relevant* whether it is beneficial to the prosecution case, weakens the prosecution case or assists the defence case. It is not only material that will become 'evidence' (see **chapter 11**) in the case that should be considered; any information, record or thing which may have a bearing on the case can be material for the purposes of disclosure.

What is relevant to the offence is once again a question of fact and will not include everything. In *DPP v Metten*, unreported, 22 January 1999, it was claimed that the constables who had arrested the defendant had known the identities of potential witnesses to the arrest and these had not been disclosed. The court said that this was not relevant to the case as it did not fall within the definition of an investigation in s. 2(1) in that it concerned the time of arrest not what happened at the time the offence was committed.

Paragraph 5.4 gives guidance on items that might be considered to be relevant material in a case (see **appendix 3**).

Relevant material may relate to the credibility of witnesses such as previous convictions, the fact that they have a grudge against the defendant or even the weather conditions for the day if relevant to the issue of identification. It may include information that house to house inquiries were made and that no one witnessed anything.

In cases where officers are in doubt as to whether material should be recorded and retained, the prosecutor should be consulted. If this cannot be done, the material should be retained and recorded. If the material is not in a format that it can be retained (for instance because it was said orally), material should be recorded in a durable and retrievable form (paras 4.1 and 4.2).

### 14.5.2 Material that Undermines the Prosecution Case

Before the Criminal Procedure and Investigations Act 1996, when disclosure was required the prosecution had to disclose all material that was relevant to the case. Under the 1996 Act, while a schedule of all relevant material must be provided, only material that undermines the prosecution case must be disclosed at the primary disclosure stage. There is only limited case law in this area but it is likely that such material will consist mainly of material which raises question marks over the strength of the prosecution case, the value of evidence given by witnesses and issues relating to identification. If officers feel that the material is not relevant to the prosecution case but may be useful to the defence in cross-examination, it may well come within the category of material which undermines the prosecution case.

Disclosure of previous convictions and other matters that might affect the credibility of a witness may 'undermine the prosecution case' as it may limit the value of the witness's testimony. This factor may not be apparent at the time but may come to light after primary disclosure, such as where it becomes known that the witness has a grudge against the defendant. This is one reason why the 1996 Act requires the decision as to