

RE THE INVESTIGATION OF DEATHS AT  
GOSPORT WAR MEMORIAL HOSPITAL

*Opinion hereunto*

**Code A**

*20.12.04*

*Addendum hereunto*

**Code A**

*27.12.04*

*Advice hereunto*

**Code A**

*17.1.04*

Hampshire Police Authority,  
Police Headquarters,  
Romsey Road,  
Winchester,  
Hampshire SO22

MICHAEL FORSTER,

**Code A**



## GOSPOT War Memorial

23/4  
3 1/2  
4 1/4  
5 1/2  
3

14.12	3/14	PRP	read conf notes + advise + research
15.	1	PRP	deser for 3rd phis.
15.12	1	CONF	Conf with Nigel Niven
16.12	9:35- 1:10	PRP	NONE conf + read LAF contents + research law
	1:45 5:55	"	----- " ----- " ----- law
17.12	8- 1:25	-	
20.12.04	3:05- 6	-	Finalise advice/opinion Opinion hereafter (email to NW + fax to RR).
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21.12.04	2- 2:20	PRP	Read email from DJ Niven + response.
27.12.04	9.45- 10:45	"	----- " -----

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**17 CARLTON CRESCENT CHAMBERS**

**PROSECUTION CHECKLIST**

**Clerks to Complete**

Name of Case - H.P.A. -V- GOSPORT MEMORIAL HOSPITAL

Counsel and Case Reference Mr Michael Forster / 53646

Date Instructions Received ..... 7.11.14 .....

Nature of Work                      Brief/Instructions for Conference/Instructions to Draft

	Action	Response	Comment
1.	Entered on Computer	<del>Date</del> ✓	
2.	Entered in Diary	<del>Date</del> ✓	
3.	To Do Date		
4.	Acknowledgement Letter Sent	✓ Date	
5.	Fees Agreed	Grad Fee	VHCC Tender
6.	Copy checklist and continuation backsheets for any return of brief out of chambers, and retain copy. Date		

**Barrister to Complete**

After first perusal of papers, is this case properly designated as Standard Fee?

Y/N NR

Notify clerk immediately if case is likely to be a VHCC

Attach this document including continuation backsheets (and any subsequent pages) to the main backsheets in the brief.

See checklist overleaf and complete as appropriate.

All endorsements of work done *and hearings* to be made on continuation backsheets only

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## CROWN PROSECUTION SERVICE

### CRIMINAL WORKING GROUP CHECKLIST

<u>Item</u>	<u>Detail</u>	<u>Check</u>
1.	Check brief to ensure that all documents referred to in the Instructions have been enclosed.	/
2.	Peruse Instructions to ascertain whether any urgent advice has been requested	/
3.	Ascertain the time scale appropriate to the case as set out in the Bar/CPS Service Standard on Pre-Trial Preparation by Counsel and check that the time scale marked on the Form 4 submitted with the brief is appropriate.	NR
4.	If, for any reason, it appears that the suggested time for response is inadequate, contact the designated CPS reviewing lawyer or caseworker and endeavour to agree an appropriate extension. Ensure that any such extension is endorsed on the brief.	NR
5.	Endorse any known PDH date on front of brief if not already marked.	NR
6.	Read and consider the papers within the time limit as specified or as agreed with the CPS.	/
7.	Complete and return the completed Form 4, ensuring that a copy is filed within the brief.	NR
8.	If the response filed on Form 4 indicates that further work is required, ensure that each item is diarised. If a Conference is required, ensure that a suitable date is arranged as soon as practicable.	✓ Advice
9.	Check the Indictment for both substance and form. In particular, check that the evidence supports each of the charges that the dates and amounts specified are factually accurate and that the Indictment is free from typographical errors. In default, prepare an amended draft for service upon those acting for the Defendant and the Court.	NR
10.	Check to ensure that the requirements of the CPS Service Standard on Pre-Trial Preparation by Counsel have been complied with.	

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**CONTINUATION BACKSHEET  
RECORD OF WORK DONE AND TIME SPENT**

A	Written Advice	PRP	General Preparation
ADM	Admissions	PDH	Plea and Directions
AP	Application	REF	Refresher
BF	Brief	R	Research
CL	Discussions with Counsel	SCH	Schedules
CON	Conference	SITE	Site Visit
D	Drafting	TAPE	Listening to tapes
IND	Indictment	VID	Viewing videos
NAE	Notice of Additional Evidence		

Statements	Nos of Witnesses
Exhibits	Tapes/Videos
NAE's	Offence Group

Date	Time	Code	Memorandum	Review Date
			When endorsing hearings state nature of hearing	
	1 hr	PRP	research & Draft Advice	
10.1.05	9.35 5.35	PRP	---	
	9 10.15	u	---	
	10.30 2.15	u	---	
	2.30 3.30	u	---	
2/2 17.1.05	8.30 - 11	u	---	
10 1/2			Advice here with e by email	

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## CONTINUATIONBACKSHEET

<u>Date</u>	<u>Time</u>	<u>Code</u>	<u>Memorandum</u>	<u>Review Date</u>

Continuation backsheet pg .....

Please note that this is a lifetime document and should be retained with the papers for taxation purposes

**RE THE INVESTIGATION OF DEATHS AT**  
**GOSPORT WAR MEMORIAL HOSPITAL**

Herewith: **OPINION.**

Hampshire Police Authority,  
Police Headquarters,  
Romsey Road,  
Winchester,  
Hampshire SO22

MICHAEL FORSTER,

**Code A**

Ref: MF7/HPA/24

20 December 2004





RE: THE INVESTIGATION INTO THE DEATHS OF PATIENTS  
AT GOSPORT WAR MEMORIAL HOSPITAL

**OPINION**

1. I am instructed to advise Hampshire Constabulary (“the police”) as to whether or not requests for disclosure by (i) the Hampshire and Isle of Wight Strategic Health Authority (“SHA”), and / or (ii) Alexandra Harris solicitors, on behalf of a surviving former patient, James Ripley, of material relating to the investigation into deaths of patients at Gosport War Memorial Hospital (“GWMH”), should be voluntarily complied with.
2. I would refer to my previous Opinion dated 4<sup>th</sup> February 2003 for the background and this Opinion should be read in conjunction therewith.
3. This Opinion follows a conference on 15<sup>th</sup> December 2004 and is based on information provided to me then. I have not been provided with any documentation, other than correspondence, though I do not consider it necessary at this stage.
4. The investigation has encompassed the treatment given in approximately ninety cases. It has been focused by means of a preliminary three-tier categorisation by a multidisciplinary panel of medical experts, followed by a review by a medico legal specialist Mathew Lohn. By this method the cases have been allocated as follows:

Group 1: In about nineteen cases the treatment given was appropriate.

Group 2: There are approximately sixty cases which involved sub-optimal treatment.

Group 3: In ten (or possibly eleven) cases there is suspected to be grossly negligent treatment followed by the death of the patient. These cases have been selected for further investigation.

5. There are similarities between the nature of the maltreatment in the group two and three cases, the difference being mainly one of degree.
6. Some of the group three cases have been sent for further independent analysis by medical experts, with a view to obtaining evidence for use in court. There is to be a complete firewall between these medical experts and the initial panel. They have not yet reported in all cases in which they have been instructed. The worst of the category three cases has not yet been sent for opinion. There has been some feedback from the further experts which indicates that they also find gross negligence in the treatment of the deceased patients. Therefore the current situation is that there is an ongoing investigation into potentially very serious matters and there continues to be the possibility that criminal charges will be brought, both against individual health care professionals, and also at a managerial / corporate level.
7. The police intend to send a file to the Crown Prosecution Service shortly.
8. Dr Jane Barton is a central suspect. She is the link between all the group three cases. Dr Barton's practice was subsequently voluntarily restricted by agreement with her governing body, but I am told that she is no longer practising as a doctor and therefore there is no risk to the general public from her. What is more, the Commission for Health Improvement ("CHI") investigated the hospital and gave the current situation a clean bill of health at both individual and structural levels. Therefore, there is no continuing risk to the general public using Gosport at War Memorial Hospital.
9. Information in relation to nineteen of the cases in group two has been disclosed to the General Medical Council ("GMC") and the Nursing and Midwifery Council ("NMC"). Mr. Ripley's case was one of these. The reason for this was the issue of public safety. The police considered, on balance, that it was important to ensure

that the governing bodies of the medical professionals concerned were informed so that they could take any action they deemed appropriate by way of disciplinary proceedings (see Woolgar –v- Chief Constable of Sussex Police [2000] 1 WLR 25 (CA)) because some of the individuals concerned are still practising. The General Medical Council had a hearing in relation to Dr Barton.

10. The issues in the cases in group two are similar to those in the group three cases, though the latter are more serious as a matter of degree and therefore more likely to be at the centre of any criminal prosecution because they exhibit gross negligence. Because of this similarity of issues, it was felt that disclosure of only of the group two cases was appropriate because this would alert the governing bodies to the nature of the problems without potentially compromising the core of the investigation which lies in the more serious group three cases. This was with a view to, as far as possible, preserving necessary confidentiality in the investigation to prevent contamination of evidence and possible prejudice to any defendant on the one hand, balanced against the need to protect the general public from malpractice on the other.
11. Because of the similarity of issues there remains the possibility that the facts of the cases within group two might be relevant and admissible evidence on charges relating to the group three cases as evidence of system under the “similar fact” doctrine (see DPP –v- P [1991] 2 AC 447 (HL)). This might also be highly material evidence in relation to corporate responsibility. It is however difficult to advise unequivocally without having had access to all the material with a view to assessing the overall position and the likely potentiality of the group two cases within in that context.
12. A copy of the deceased's medical records has been sent to each family, and a letter sent to each family in the group one and two cases has been sent, stating that the result of the police investigation in those cases is that there is no evidence of criminal conduct, though those in the category two cases have been informed that there are found to be some areas of concern.

13. The material which has been disclosed to the GMC and the NMC in relation to the nineteen cases in group two is (1) a copy of the individual's medical records, (2) Key issues documents (which includes medical assessment by the key clinical team (email from DCI Williams to Lisa Elkin of Alexander Harris dated 3<sup>rd</sup> August 2004), and (3) A précis or synopsis prepared by Mr Lohn, in relation to each case (I have not had sight of any of this documentation).
  
14. The material which has been disclosed to the professional bodies was disclosed subject to certain fairly stringent restrictions, inter alia, in relation to use of the material for private proceedings, restrictions on publicity, and requiring notification of an intention to approach any witness. These conditions are set out in an email from DCI Williams to Louise Povey of the GMC dated 17<sup>th</sup> August 2004 and a letter to Elizabeth McAnulty of the NMC, dated 12<sup>th</sup> October 2004. This measure was plainly designed to safeguard, as far as possible, when balanced against the needs of public safety, any future prosecution. On this basis, the conditional disclosure of the nineteen cases in group two to the GMC and the NMC was not considered to be likely to compromise the ongoing investigation (see email from DCI Williams to Lisa Elkin of Alexander Harris, on 17<sup>th</sup> August 2004) whilst satisfying the public safety aspect. These conditions have been significantly eroded by the NMC (see letter from Elizabeth McAnulty of the NMC dated 20<sup>th</sup> October 2004). There is no suggestion that any of the material disclosed to the NMC has got into the public domain or that there has been any adverse publicity.
  
15. Some other dissemination of information has occurred. The Chief Medical Officer, the SHA, and other interested parties, including family group members, have been notified from time to time as to the progress of the investigation by the circulation of relatively anodyne bulletins which are intended to keep them up to date with general developments. Specific developments in relation to particular cases have been notified to the individual family. There is therefore some dissemination of limited information but there has been no dissemination of the specific findings of the multidisciplinary medical panel.

The Strategic Health Authority

16. The SHA has made a written request for disclosure of the material in relation to the group two cases, to ensure that the SHA has “full information where issues of patient safety and / or clinical governance are concerned” which would be treated in the “strictest confidence, in line with our own internal policies over the handling of patient identifiable data” (see letter from SHA to the police dated 4<sup>th</sup> November 2004). It seems that there has already been some discussion about the progress of the investigation. In his letter in reply to the SHA, dated 21<sup>st</sup> November 2004, Detective Superintendent Williams states that the senior investigating officer, Detective Chief Superintendent Watts, is minded to pass the information subject to ensuring that any criminal prosecution is not compromised. I am asked to advise on whether there is any risk of compromise and whether the information should be disclosed.
17. The first point is that it is difficult to advise unequivocally without having had access to all the material with a view to assessing the overall position and the likely potentiality of the group two cases within in that context. This said, as a matter of principle, if there is an ongoing investigation into corporate manslaughter, it might well be prejudicial at this stage to disclose such material, because the SHA and or it’s employees in managerial positions might be suspects in such investigation. Alternatively, they may well be material witnesses (see paragraphs 12 and 13 of my Opinion dated 4<sup>th</sup> February 2003).
18. Access by suspects / witnesses to the expert evidence produced by the investigation, namely that produced by the medical experts in the initial analysis / screening process, might taint or allow for the manipulation / concealment of evidence. There is therefore in my opinion the potential risk of prejudice to the investigation and or contamination of evidence on these grounds. There is also a possibility of contamination of witnesses’ evidence, or at least a perception of the same (see below).

19. In my opinion when weighing the countervailing public interest in disclosure to protect public safety; it is arguable that this is of less weight because, on the face of it, there is no immediate public safety aspect because the SHA is not concerned with individuals but merely the managerial aspect ie clinical governance. This aspect, so far as GWMH is concerned, has already been considered by the CHI which has identified past problems but given the hospital a clean bill of health in a previous enquiry. What is more the material has been disclosed to professional bodies to take appropriate action at an individual level. The doctor at the centre of the investigation is no longer in practice. Therefore, there is no immediate risk to public safety, which has not already been catered for, which might be met by disclosure to the SHA.
20. In Woolgar –v- Chief Constable of Sussex Police [2000] 1 WLR 25 (CA) it was held that whilst in each case the question was one of balancing competing public interests, and that “at least arguably in some cases the reasonableness of the police view may be open to challenge”<sup>1</sup> on application for judicial review, the primary decision as to disclosure should be made by the police.
21. Until the investigation is complete, it is impossible to say categorically that there will or will not be prejudice / contamination sufficient to outweigh any public interest in disclosure. But in my opinion, if there is an ongoing investigation into corporate manslaughter in respect of which the SHA and / or its employees are likely to be prime suspects, it is at least arguable that there is the possibility that any investigation into their activities might be prejudiced by disclosure. It is also in my opinion arguable as a matter of general principle that a risk of contamination of evidence, or at least the perception of the same by others, might arise in the event that a witness obtained access to expert evidence. It is difficult to see what conditions restricting dissemination of the material would be efficacious, bearing in mind that an internal fire wall is likely to be viewed with some suspicion. If this is correct, then the public interest lies in non-disclosure, at least at the present.

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<sup>1</sup> Se the judgement of Kennedy LJ, p36, para H

Alexander Harris Solicitors

22. Alexander Harris requested production any expert reports relating to category two cases (see email dated 6<sup>th</sup> September 2004). Their express purpose was to save expense and duplication<sup>2</sup>. They are generally investigating the merits of civil action and say that they are eager to progress because of limitation problems (by section 11 of the Limitation Act 1980, the statutory limitation period is three years from date of accrual (ie injury) or date of knowledge if later). This request has been declined<sup>3</sup>.
23. This was followed by a more specific request for a copy of “the police file”<sup>4</sup> in respect of a patient called James Ripley who survived treatment. I am told he was removed from the hospital at the insistence of his wife. Mr. Ripley’s case has been allocated to group two. I am instructed to advise whether material produced by the expert screening panel relating to Mr. Ripley should be voluntarily disclosed.
24. The police are of the view that the medical evidence they have obtained would not be suitable for use in a personal injury action because its purpose is merely to categorise the cases. I am not able to assess this because I have not had access to the material, but I advise on the basis that the material might provide some material assistance to Mr. Ripley in pursuit of a civil claim because it allocates his case to a “sub optimal” category which prima facie tends to indicate that the treatment he received was to some extent inappropriate.
25. The case of Green, R -v- The Crown Prosecution Service [2002] EWCA Civ 389 (26th March 2002) (CA) concerns material, both eyewitness statements and expert evidence, which had been obtained during an investigation by the Police Complaints Authority into an allegation that an officer had tried to kill the applicant by deliberately running him over with a police car. The court (Simon Brown LJ) held that there was a general rule that “complainants (be they victims

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<sup>2</sup> See email dated 6<sup>th</sup> September 2004

<sup>3</sup> See letter dated 1<sup>st</sup> October 2004

<sup>4</sup> See letter dated 20<sup>th</sup> October 2004

or next of kin) are not entitled to the disclosure of witness statements in the course of a police investigation, until at the earliest, its conclusion”<sup>5</sup>. Lady Justice Hale ruled that disclosure should not take place until it had been decided not to prosecute or any prosecution had been completed<sup>6</sup>. The reason for this was because of the risk of contamination of evidence.

26. Whilst the rationale behind this is primarily aimed at eye witness statements being disclosed to other eye witnesses, in my opinion it is arguable that disclosure of expert evidence might have the effect of contaminating Mr. Ripley’s evidence because he is an eye witness, his views might be changed deliberately or even subconsciously influenced, because of importance attached to particular events by the experts<sup>7</sup>. This point might be a point of general applicability beyond Mr. Ripley’s case, because family members might themselves be eye witnesses, for example, to the physical condition of the patients on admission, what treatment was administered to their deceased relatives and what if anything they were told about it. This would have to be assessed on a case by case basis.
27. Additionally, it is difficult to see what enforceable conditions could be placed on disclosure to individual families which would prevent further dissemination. Further, if the material were deployed in open court during a civil action it would be in the public domain, though the point is not as strong as in relation to direct disclosure to an eye witness.
28. Therefore, with regard to the request on behalf of Mr. Ripley in particular, I would conclude that because he is potentially a material witness (though I do not know if a witness statement has been obtained from him) as to the treatment he received at GWMH disclosure should not be made to him at this point. Whilst his case has been allocated to group two, there is none the less the possibility that such evidence will be relevant / admissible as “similar fact” or on the issue of system. It might be important to the defence at any trial if certain procedures were not carried out in relation to him, if the prosecution case depends on system. If there is

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<sup>5</sup> para 58

<sup>6</sup> para 82

<sup>7</sup> See para 30



a possibility that evidence might be contaminated there is obviously a concomitant impact in the administration of justice and a consequent risk of any subsequent criminal proceedings being stayed as an abuse of process, or evidence being excluded under Section 78 of the Police and Criminal Evidence Act 1984.

29. Such risk must be weighed against the express objective of Mr. Ripley's representatives which is merely to save their client expense. There is no aspect of public safety concerned here. Whilst the police would doubtless wish to be as helpful to a member of the general public as possible, this should not be at the risk of a very large investigation, in particular whilst the extent of that risk remains unquantifiable because the investigation has not concluded. The medical records have been supplied and therefore the solicitors would be in a position to obtain independent medical expert advice in relation to the case. Mr. Ripley is therefore at liberty to pursue a civil claim should he so choose.
30. What is more, it is arguably unfair to disclose to Mr. Ripley, who seeks to pursue a civil claim against Dr. Barton, without equal disclosure to the latter, which cannot be undertaken during the investigation when she is a prime suspect, at least unless and until this was required as pre interview disclosure (though the question of disclosure by the GMC to Dr. Barton for the purposes of any disciplinary proceedings would need to be investigated in relation to this point).
31. I have considered the possibility of an argument based on Articles 2 and / or 3 of the European Convention on Human Rights on disclosure in Mr. Ripley's case<sup>8</sup>. However, his case concerns medical treatment, rather than punishment or the consequences of actions of law enforcement agencies, he has suffered only sub optimal rather than grossly negligent care, there has been an effective investigation, and there could be disclosure when any prosecution has been completed or it has been decided not to prosecute.
32. The Civil Procedure Rules provide only for orders for disclosure of documents against a non-party after the commencement of proceedings (See CPR25.1(1)(j))

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<sup>8</sup> See para 19 in the judgement in Green

and CPR31.16). Therefore, unless proceedings are commenced on behalf of Mr. Ripley, his only remedy will be an application for Judicial Review.

### Conclusion

33. Whilst there is a possibility of prejudice to the ongoing investigation and / or any subsequent proceedings, having taken account of the public interest factors set out above, I am of the opinion that the disclosure sought by the SHA and on behalf of Mr. Ripley should not be given at this stage.

34. The question of disclosure to the families in general could be reconsidered at the conclusion of the investigation. Detailed consideration of the precise nature of the medical material in context of the specifics of the criminal investigation / proceedings could then be undertaken and the extent of the risk of any prejudice / contamination etc more accurately assessed. Such detailed consideration is likely to be required in the event that the requests are pursued further.

**Code A**

MICHAEL FORSTER

20 December 2004

**RE THE INVESTIGATION OF DEATHS AT**  
**GOSPORT WAR MEMORIAL HOSPITAL**

Herewith: **ADDENDUM.**

Hampshire Police Authority,  
Police Headquarters,  
Romsey Road,  
Winchester,  
Hampshire SO22

MICHAEL FORSTER,

**Code A**

Ref: MF/HPA/24

27 December 2004



RE: THE INVESTIGATION INTO THE DEATHS OF PATIENTS  
AT GOSPORT WAR MEMORIAL HOSPITAL

**ADDENDUM TO OPINION DATED 20<sup>th</sup> DECEMBER 2004**

1. Further to my Opinion, dated 20<sup>th</sup> December 2004, Detective Inspector Niven has subsequently supplied two points by way of correction / clarification of the information provided to me in conference on 15<sup>th</sup> December 2004.
2. Firstly, whilst Dr Barton does not and cannot work at the GWMH, she does still practice as a GP. She is however subject to a voluntary and verified regime preventing her from administering or prescribing opiates or the like. Secondly, Dr Barton did not personally administer diamorphine to patients, she prescribed it. The actual administration was undertaken by nurses on the basis of her prescription.
3. The only matters subject to the investigation with regard to Dr Barton, relate to the GWMH and not any other areas such as her general practice. The investigation centres on the inappropriate use of syringe drivers and administration/prescription of diamorphine. Whilst there are perhaps less important subsidiary failings in areas such as record keeping, diamorphine usage is the only area which might present a direct threat to the welfare of a patient. That Dr. Barton no longer practices in a hospital, and the voluntary and verified regime of non-prescription addresses this concern. Therefore, the police take the view that the concern over public safety has been addressed.
4. In light of the fact of the previous investigation by CHI, disclosure to the GMC and the NMC, and the verified restriction on Dr. Barton's practice, the further information with which I have been provided does not indicate that there is any current direct threat to patient safety which might necessitate immediate disclosure when weighed against the risk to the investigation / administration of justice set out in my previous Opinion. Therefore, my advice remains unchanged.

**Code A**

MICHAEL FORSTER

27 December 2004

RE: THE INVESTIGATION INTO THE DEATHS OF PATIENTS AT  
GOSPORT WAR MEMORIAL HOSPITAL

Herewith: **ADVICE.**

Hampshire Police Authority,  
Police Headquarters,  
Romsey Road,  
Winchester,  
Hampshire SO22

**Code A**

Ref: MF/HPA/24

17 January 2005



RE: THE INVESTIGATION INTO THE DEATHS OF PATIENTS  
AT GOSPORT WAR MEMORIAL HOSPITAL

ADVICE

1. Further to my Opinion, dated 20<sup>th</sup> December 2004, and Addendum dated 27<sup>th</sup> December 2004 (with which this Advice should be read in conjunction), I am now asked to review my advice in light of the general right of access to information under section 1(1) of the Freedom of Information Act 2000 (“FOIA 2000”) which has subsequently come into force on 1<sup>st</sup> January 2005.
2. The police have received a letter dated 16<sup>th</sup> December 2004 intimating a potential request for disclosure by the relatives of a deceased patient (Alice Wilkie) whose case has been assigned to category two. The police are concerned that disclosure of the key issues and précis documents<sup>1</sup> prepared in light of the initial investigation by the key clinical team (“the material”), might prejudice the investigation or any subsequent criminal proceedings. I am asked to provide general advice in relation to the achievement of an investigative position because the police anticipate further similar requests.

The FOIA 2000

3. Whilst the FOIA 2000 is now of some vintage, the coming into effect of section 1(1) is very recent, and there are, so far as I am aware, no decided cases giving guidance to its meaning.
4. The FOIA 2000 applies to the police as a public authority, by virtue of S3(1)(a)(i) and Schedule 1 of the Act. Section 84 of the FOIA 2000 defines “information” rather unhelpfully, and probably very broadly, as meaning “..... information recorded in any form”, except in sections 51(8) and 75(2) where it includes “unrecorded information” for the purposes of those sections which are not relevant here. The Shorter OED defines “information” as (amongst other things) “knowledge or facts communicated about a particular subject, event, etc; intelligence, news.” This is of extremely broad ambit. Therefore, I conclude that

the material is likely to constitute “information” within the ambit of the FOIA 2000.

5. Section 1(1) of the FOIA 2000 provides:

- (1) Any person making a request for information to a public authority is entitled-
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

6. Therefore, any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request [“the duty to confirm or deny”], and (b) if that is the case, to have that information communicated to him.
7. A “request for information” is a precondition of entitlement and is defined by section 8 as a request which is (a) in writing, (b) states the name of the applicant and an address for correspondence, and (c) describes the information requested.
8. Point (c) is important, because the request might well limit the ambit of what is sought and therefore defines the extent of the duty under section 1, though doubtless, in the main, such requests will deliberately be phrased as broadly as possible.
9. The duty under section 1 is subject to a number of exemptions, which are either absolute, or subject to a public interest test under section 2(1)(b) & (2)(b). The exemptions which are relevant here are contained in sections 30 (investigations), 31 (law enforcement), and 42 (legal professional privilege) which are subject to the public interest test by virtue of section 2(3).

#### Public Interest Test

10. With regard to information within sections 30, 31, and 42, the duties under section 1(1) do not apply where the public interest in maintaining the exclusion of the

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<sup>1</sup> See paragraphs 13 – 15 of my Opinion dated 20.12.04.

duty to confirm or deny / disclose the information outweighs the public interest in disclosing whether the public authority holds the information / disclosing the information. In other words, where information is exempt under the above sections it must be disclosed unless it is not in the public interest to do so.

### Section 30 (Investigations)

11. Section 30(1) provides (so far as is relevant): Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of – (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained – (i) whether a person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it.
12. In my opinion it is likely that the material will fall within section 30(1)(a)(i).

### Section 31 (Law Enforcement)

13. The situation is however complicated by Section 31 which provides so far as is relevant:
- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
    - (a) the prevention or detection of crime,
    - (b) the apprehension or prosecution of offenders,
    - (c) the administration of justice
14. Section 31 is expressly mutually exclusive of information within section 30, otherwise it would plainly cover a lot of the same ground. As I am of the opinion that the material is likely to be within section 30(1)(a)(i), section 31 is not relevant. If I am wrong in this, section 31 does however seem to provide a higher threshold in that it would have to be shown that disclosure of the material “would, or would be likely to” prejudice one of the specified items. This must mean that it would have to be established that it is more probable than not. This would have ramifications in relation to Operation Rochester because at present it is not



possible on the information available to me, and for the reasons previously set out, to say whether it is probable that disclosure would prejudice the investigation and / or any subsequent proceedings, merely that it is possible that this would be so<sup>2</sup>. Fortunately, there is no such criterion in section 30, but one must bear in mind the potential impact of this on the public interest test in section 2(1)(b) & (2)(b) (but see section 10 below).

### Section 42 (Legal Professional Privilege)

15. Section 42 provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
16. Legal professional privilege is not defined by the FOIA 2000, and therefore the common law rules must be considered. It may be arguable that the material falls within the category of legal professional privilege which arises “if litigation was contemplated when they were made or came into existence”<sup>3</sup>.
17. If the material has come into the public domain it would cease to be subject to privilege<sup>4</sup>. Any category two material which has been released to the GMC or the NMC may not be in the public domain because of the restrictions imposed on dissemination. Further, it has been held that disclosure for a limited purpose does not, without more, constitute a general waiver or loss of privilege (see B-v-Auckland District Law Society [2003] 2 AC 736 (PC)<sup>5</sup>).

### The Public Interest

18. I would reiterate that it is difficult to advise unequivocally without having had access to the material and all the evidence in the case with a view to assessing the overall position and the likely potentiality of the group two cases within that

<sup>2</sup> See in particular paragraph 33 of my Opinion dated 20.12.04.

<sup>3</sup> See White Book 2004, CPR31.3.5 & 31.3.12-13.

<sup>4</sup> 31.3.21

<sup>5</sup> White Book 2004, 31.3.5 (Supplement 2)

context. I am unable to express any opinion in an individual case without access to the information and the evidence in the case.

19. I do not think that an inflexible all embracing investigative position can be applied to the FOIA 2000. In my opinion, the balancing exercise in section 2(1)(b) & (2)(b) precludes this. The use of the words “if or to the extent that” in section 2(2) in my opinion dictate that it is necessary to weigh the public interest when considering the exclusions under Sections 30, 31, and 42 in each individual case and this means that it is potentially requisite to consider individual pieces of information separately in light of the test. The Hampshire Constabulary web site<sup>6</sup> indicates that “In order to ensure that these public interest issues are fully considered, all applications for information concerning investigations will be considered on a case-by-case basis in accordance with the requirements of the Act”.
20. Therefore, on receipt of a “request for information” the range of possible responses from no disclosure, through partial disclosure of parts of an individual document, to full disclosure should be considered in light of the public interest factors in each individual case, rather along the lines of an application to withhold information on grounds of public interest immunity in a criminal trial, though the threshold for non disclosure is likely to be higher in that situation.
21. With the above caveats in mind, for the reasons set out in previously, it is likely to remain arguable that disclosure of the material by way of communication of information under section 1(1)(b) of the FOIA 2000 at this stage of the investigation is not likely to be in the public interest, though I can see nothing which might countervail the duty to confirm or deny in the event that a qualifying request is received.

## Section 10

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<sup>6</sup> FOIA – Information Classes – Information Concerning Police Investigations

22. Section 10 may also justify non-compliance with a request for disclosure where the information might come within section 2, but the situation is unclear.
23. Section 10(1) provides a time limit of twenty working days for response, but section 10(3) provides that if (and to the extent that) the duty to confirm or deny, or to communicate information under section 1(1)(a) or (b) “would not apply” if the condition in section 2(1)(b) or (2)(b) (public interest in maintaining the exemption / exclusion outweighs the public interest in disclosure) “were satisfied”, the public authority need not comply with section 1(1)(a) or (b) until “such time as is reasonable in the circumstances”; but this subsection does not affect the time by which any notice under section 17(1) (notice of grounds for refusal) must be given.
24. Whilst the meaning of this subsection is not altogether clear, this might cover a situation where the public interest cannot be immediately weighed because there is insufficient information available and it is not practicable to investigate and respond within the statutory period. This might apply to the public interest test during an ongoing investigation as in Operation Rochester because before charges are brought (or a decision is made not to prosecute) and until evidential decisions are made it is not practicable to measure the likely extent of potential prejudice etc and therefore balance the competing public interests.
25. Therefore I am of the opinion that non disclosure of the material may be justifiable for some time, possibly up until the conclusion of the investigation on the basis of section 10(3), though it would probably be necessary to show that the investigation is being conducted as expeditiously in relation to the reasonableness test, should such decision be challenged.

### Conclusion

26. Whilst the FOIA 2000 creates a positive obligation to disclose information and each request must be considered individually, this does not alter my previous opinion that it is likely that it is not currently in the public interest to disclose the material.

27. With regard to the letter dated 16<sup>th</sup> December 2004 from Emily Yeates with regard to her grandmother Alice Wilkie, a number of points arise:
28. Miss Yeates may be a material witness. She says that at no point was palliative care discussed. She also speaks of her grandmother's physical condition on admission. This might be relevant evidence on a "similar fact" basis (see paragraph 28 of my Opinion dated 20<sup>th</sup> December 2004).
29. Miss Yeates says that the relatives will not give permission for disclosure to the GMC or NMC until satisfied that no criminal process available to them. It is axiomatic that disclosure is incompatible and implicit that this is because of potential prejudice. Miss Yeates is plainly not aware that her grandmother's case might be relevant evidence in relation to other cases.
30. In the last substantive paragraph, Miss Yeates asks for assistance with a formal request for information. There is a duty under section 16 to provide reasonable assistance.
31. If a request for information is refused under sections 2(1)(b) or (2)(b), section 17(1) and (3) of the FOIA 2000 requires that a notice containing specified information / reasons should be given. Such notices will probably have to be request specific and depend in part on the precise nature of the information itself.
32. If a request for information is refused under section 10(3), section 17(2) of the FOIA 2000 provides that the notice must indicate that no decision has been made as to the application of section 2(1)(b) or (2)(b) has been reached and specify an estimate of the date by which it is expected that such a decision will have been reached.

**Code A**

MICHAEL FORSTER

17 January 2005

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