INFORMATION COMMISSIONER

Re:

OPERATION MOTORMAN

INSTRUCTIONS TO COUNSEL

Counsel has herewith:

Synopsis of the evidence.

Counsel will be familiar with this matter having advised before as well as being familiar with the matter having had the opportunity of discussing it with a number of members of the Legal Department at the Information Commissioner's Office.

I note from our recent telephone conversation that Counsel was seeking some form of case summary which links in the various exhibits that have been obtained. I enclose a copy of the 'Synopsis of Evidence'. This has been prepared by the Information Commissioner's Investigation Unit ('ICIU') (formerly DPID). Counsel may not be familiar with this document. In the event that Counsel has already had the opportunity of considering it amendments can be made to bring in into the form of a case summary, however, I believe that this would stand as the basis for a case summary at court.

At present there are two matters currently before the court arising out of the various investigations which have taken place. In respect of Operation Glade which is the Metropolitan Police investigation the matter is before Blackfriars Crown Court. One defendant, Paul Marshall, has pleaded guilty to the conspiracy allegation which was levelled against him relating to wilful misconduct in a public office and he still awaits trial in respect of various theft

matters. It is presumed that if he gives evidence against the remaining three defendants (Boyle, King and Whittamore) a re-assessment of the public interest ground in continuing the prosecution against him for the theft matters may result in a change of stance.

Operation Reproof is the matter being investigated by the Devon & Cornwall Police. This matter has had its first hearing at Exeter Crown Court. The matter has been adjourned until November 2004 when the plea and directions hearing will take place. I understand this lengthy adjournment was to enable the defence teams to have three months to consider the paperwork served.

The Operation Reproof case lawyer at the Crown Prosecution Service has indicated that he does not expect the trial to go ahead for somewhere in the region of two years. In addition he has indicated that the unused material disclosure schedule in his case runs to some 350 pages. This would put that case on a par with a small Serious Fraud Office prosecution or a mid sized Customs & Excise diversion/carousel fraud.

In respect of both police investigations applications have been made for leading and junior counsel, the defence using an equality of arms argument in this regard as well as arguing on the complexity of the case. I remain to be convinced of the need for two counsel in our case bearing in mind the narrower issues that we would be dealing with.

Another issue that I feel needs to be addressed, and I would be grateful if you would put thought into it, is that of venue. I appreciate that you are based in Birmingham and we are based in Wilmslow. However I take into account the defendants will all be found to be south of the Watford Gap. In view of this I would propose that a London venue be the most suitable venue. Do you have any observations in this regard?

I have had the opportunity of considering some of the documentation from the investigation and my mind is working towards drawing the matter in and keeping it quite narrow with the aim of disseminating a message to a wider

audience by prosecuting the key players and drawing the attention of the media to those. I hope that by such a course of action the prosecution can be kept smaller in scale and not allowed to grow out of control. To this end I would anticipate that the scale of Operation Motorman in terms of case papers should be somewhere in the region of seven to eight lever arch files in total, dependant upon how we structure our case. However, this does not deal with the issue of unused material to which I will return later.

I would be grateful if you would advise in conference as to how we would bring the prosecution. I see that there are two ways in which the prosecution can be brought. The first is to have a number of smaller cases with no more than, say for example, four defendants in each. The second option is to have a large case with all of the defendants being tried together. I am more attracted to the second option for a number of reasons although I am sure you will agree both methods have their attractions and pitfalls. The attraction of two or three smaller cases is that they would be easier to run; there will be less to organise from a case management point of view, and in addition juries are better able to understand smaller more manageable matters. However, as I see it the downsides outweighs the plusses in that you run the risk of the matters being considered differently by different tribunals, and that there is a risk of anomalous results. Therefore In addition, it is likely that the costs of running two or three smaller trials will be greater than running one larger trial. In addition, the jury may also have some difficulties in comprehending a case if they perceive that people who ought to be in the dock are missing. Whilst they can be directed to put such issues out of their mind it can often be hard to see how they can make such leaps of faith. I am sure that this is something that you have encountered on numerous occasions.

Running one large case will of course be lawyer intensive, for example, more issues are likely to arise in relation to [redacted] and again there will also be a greater impact in respect of disclosure.

Disclosure in itself is likely to be a significant undertaking, however one large case does allow all the issues to be aired before the jury and allows them to

determine all issues, and of course results I am sure you will agree in a greater consistency.

As I see it the biggest negative to running the matter as one large case is that of the state of the indictment. Judges, I have found, do not like overloaded indictments. It is likely anything over 30-35 counts would be considered overloading the indictment. This means that if we had, for example, 9 people in the dock then it is likely that no more than five or six counts could relate to each person allowing for overlaps of person I disclosing to person 2 having obtained it.

There is an alternative as I see it to the overloading problem which is to lay a global conspiracy count. This has some attractions. Firstly, it makes the matter indictable only and takes the matter straight to the Crown Court. This reduces the cost of the lower court proceedings but does little more than 'front end load' the case with regard to the preparation of the evidence. I find the idea of bringing a conspiracy case very attractive as it enables the magnitude of the case to be brought out properly to the jury. However, if we are to bring a conspiracy then there will of course need to be clear evidence. I note that you have already advised that there is sufficient evidence to sustain such a charge, and I would be grateful if you would illustrate to me when we meet where you consider that our strength in this area lies. The bringing of the conspiracy charge would, to my mind, not affect sentence save for enabling the Judge to bring a greater sentence that he could on a number of substantives. I am mindful of the decisions and sentencing guidelines that only allow a sentence to reflect the guilty pleas or verdicts and not necessarily the underlying criminality.

However, I am sure you would agree that the use of a conspiracy allegation is more elegant than laying thirty or so informations against Whittamore and also against each of the others. I consider the use of the conspiracy to be good from a presentational perspective as it would enable us to pick ten or so transactions to go through in complete detail with the others being scheduled.

The use of the conspiracy would of course allow sentencing to be at the upper end of the spectrum rather than the lower which may on the face of it seem more appropriate in the instances where there are only three or four minor substantives.

I note from the file of papers that I have seen that there has already been some talk of who should and should not be prosecuted. To my mind any gaps in the dock enable those who are being prosecuted to blame those who are absent. This is not something that I would want to risk on a case that is likely to be as high profile as this. However, I am alert to comments that have been made that there is little to be gained in prosecuting someone who is, for example, already standing trial on a conspiracy to corrupt a public official allegation as that complaint could result in them receiving a custodial sentence, whereas any punishment that could be handed down in respect of a Data Protection Act offence is monetary only. However, there are issues that for the sake of completeness the relevant offenders should be prosecuted.

Disclosure

Disclosure is, as I have previously mentioned, a major point in this case it is also something that it think needs to be considered at an early stage. This affects both exhibits and unused material. Each page of Whittamore's workbook reveals an immense amount of data about people, both ordinary members of the public and those with 'celebrity' status. I therefore would be grateful if you would advise as to whether or not there needs to be any heavy redaction of the details on each page that are not relevant to the subject matter of the charge in order to preserve the data of the other people who appear on the page. Do you consider that this needs to be the subject of a judicial order? Is it something that should be falling within the scope of PII?

I am mindful of the fact that two other prosecutions are up and running in respect of material which was obtained by our investigators and for this part our investigators appear to be some of the main witnesses for the Crown. I would be grateful for your opinion as to whether or not these investigations

would be the subject of disclosure in our case and whether or not our case will form to be disclosed in their unused material. Bearing in mind the broad nature of the term 'The Crown' I consider that we would need to consider the material held by the Metropolitan Police and the Devon & Cornwall Police as being disclosurable per se and that our material is disclosurable by them in their cases. Do you agree with my feelings in this regard or is it possible for the matter to be kept on a more restricted basis?

There are a number of other issues that I propose to address in no particular order. It should be noted that Gunning is continuing with his criminality and that his most recent attempts may need to be reflected in the case and this could be possible, should you agree that it is appropriate, by way of substantive counts against him over and above any conspiracy allegation that might be brought.

In relation to Taff Jones's interview, I note on the eighth page he states that he would like to take legal advice but the interview was not terminated at that point. Do you foresee admissibility arguments arising in that regard?

Accordingly, I would be grateful if Counsel would advise initially in conference and potentially in writing should be need arise, on the following issues:-

1. What further steps are considered necessary to bring the matter to court?
2. What charges should be preferred?
3. Who should be the subject of the prosecution?
4. Suggestions as to venue.
5. Issues relating to disclosure.
6. The form of any schedules that would need to be prepared to demonstrate the events that have taken place.

7. Whether or not there needs to be any forensic evidence brought (for example, telephone data).

8. The issue of unused material and PII.

9. The involvement of the Crown Prosecution Service material.

Should Counsel wish to discuss the matter prior to the conference I can be reached on [redacted] or [redacted]

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Information Commissioner's Office

THE INFORMATION COMMISSIONER

Re: OPERATION MOTORMAN

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