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Mr John O'Hara QC
Chairman to the Inquiry
Inquiry Into Hyponatraemia Related Deaths
Arthur House
41 Arthur Street
Belfast
BT1 4GB



Date: 7 February 2012 Our Ref: HYPB04/1 Your Ref: JOH-0198-12

Dear Sir,

**INVESTIGATION INTO THE DEATH OF ADAM STRAIN**

Further to your letter of 2nd February, 2012 and arising out of the preliminary hearing held on 3rd February, 2012, I am writing to formally set out the position of the Belfast Health and Social Care Trust and the Regional Health and Social Care Board in relation to the continued involvement of Mr Forsythe, FRCS, as an independent expert in this Inquiry.

As you are aware, Mr Forsythe, FRCS, was engaged by the Regional Health and Social Care Board to carry out a private and confidential review of renal transplantation services in Northern Ireland. (See 203-002-035, paragraph 4.5, bullet point 3). Mr Forsythe, FRCS, was engaged to carry out this private and confidential review in September, 2010 and his report was completed in February, 2011.

As has already been explained in correspondence dated 1st February, 2012, contrary to what was stated by Mr Forsythe at (ii) of 203-004-072, the report has never been made public and has not been presented to public meetings of the Board or Trust.

In 203-002-035 at paragraph 4.5, bullet point 3, Mr Forsythe stated: "Most of the focus during that review was on the adult renal transplant service but comments were also made about the paediatric service. It is acknowledged that the review was carried out many years following this particular case but some of the comments on the review might be considered to be pertinent."

In 203-004-072, at (iii), Mr Forsythe stated:

- It would seem very strange if one of us had not mentioned involvement in an external review of renal transplantation, which included paediatric transplant services in

Northern Ireland given that this public enquiry concerns the death of a young child during a renal transplant procedure.

- There is a section within that report concerning paediatric renal transplantation. This refers to the difficulty of maintaining a super-specialised service every hour of the year for a small number of patients.

You have now been provided with the two parts of the private and confidential report which specifically deals with paediatric renal transplantation. You will note that both sections are headed "Strictly Private and Confidential – Not for Circulation."

Prior to Mr Forsythe informing you about the existence of this review report and its potential relevance to the Inquiry, he was or ought to have been fully aware of the private and confidential nature of the report. He did not take any steps to ascertain whether the report was in the public domain nor did he take any steps to ascertain whether the duty of confidence which he owed the Board in relation to the contents of the report had lapsed due to publication of the report. As it is now clear, the report was not and has not been published and the duty of confidence owed by Mr Forsythe, FRCS, to the Board in respect of this report remains intact.

Upon being informed of the existence of this report, the Solicitor to the Inquiry requested the DLS to provide a copy of the Report and this request was refused for the reasons set out in the correspondence which has preceded this letter i.e. that the report was private and confidential and that it was carried out in late 2010 and early 2011 and did not have any bearing whatsoever on the provision of paediatric transplant services in 1995. However, in order to facilitate the Inquiry, a decision was taken by the Regional Board to provide you with the portions of the review relating to paediatric renal transplantation.

An issue of some importance now arises from the matters described above. The issue is whether it is appropriate for Mr Forsythe, FRCS, to continue to act as an independent expert witness retained by the Inquiry and whether he should give evidence at the Inquiry, having regard to his previous involvement in the private and confidential review of renal transplant services in Northern Ireland.

It is the view of the Belfast Health and Social Care Trust and the Regional Health and Social Care Board that Mr Forsythe, FRCS, should not continue to act as an independent expert witness retained by the Inquiry and should not give evidence at the Inquiry for two reasons.

1. By giving evidence at this Inquiry, it is likely that Mr Forsythe will have resort to information provided to him in confidence by the Board and Trust during the preparation of the report into renal transplantation services.

2. By accepting an engagement by the Board to carry out a private and confidential review of renal transplantation services in Northern Ireland in late 2010 and early 2011, Mr Forsythe, FRCS, cannot be regarded as sufficiently independent of the parties involved in this Inquiry.

In relation to the first reason, it is quite clear that in providing his report for the Inquiry and in answering queries raised by the Inquiry about his report, Mr Forsythe, FRCS, has already resorted to information provided to him in confidence by the Board and Trust during the preparation of the report into renal transplantation services. The risk of disclosure of confidential information is easy to assess because it has, in fact, already materialised.

The relevant authorities *Meat Corporation of Namibia Limited -v- Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch) at paragraph 39 and *A Lloyds Syndicate -v- X* [2011] EWHC 2487 (Comm) at paragraphs 32 and 34 refer to the likelihood of the use of privileged or confidential information as being test to be applied in relation to whether the "expert" should be permitted to give evidence. It is clear that Teare J in the *Lloyds* case did not consider that it was necessary to show the inevitability of the use of privileged or confidential information but described the test to be applied as whether it was likely that such information might be resorted to.

Not only is it likely that such information might be resorted to by Mr Forsythe, FRCS, but it is clear that such information has already been resorted to and in such circumstances in an adversarial context, the Court would have a duty to intervene.

In relation to the second reason, it has been stated by you in your letter of 2nd February, 2012 that you "do not see anything in his engagement to conduct the review which undermines his ability to be independent in his statements to the Inquiry. In any event he can be questioned at the public hearings on this topic, either by Inquiry counsel, your counsel or those representing other parties. I will then decide what weight to attach, if any, to the totality of evidence which he and Dr Rigg provide on the circumstances surrounding the treatment and care of Adam in 1995."

In the *Meat Corporation* case, Mann J stated at paragraphs 45 and 46:

45. "The general principles which should be applied in cases of challenged independence are conveniently set out by Nelson J in *Armchair Passenger Transport Ltd -v- Helical Bar plc* [2003] EWHC 367, as followed by Aikens J in *Gallaher International Ltd -v- Tlais Enterprises Ltd* [2007] EWHC 464 (Comm) Nelson J said (at paragraph 29):

> "The following principles emerge from these authorities:

(i) It is always desirable that expert should have no actual or apparent interest in the outcome of the proceedings.

(ii) The existence of such an interest, whether as an employee of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection that matters, not the mere fact of the interest or connection.

(iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.

(iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.

(v) The questions which have to be determined whether (i) that the person has relevant expertise; and (ii) he or she is aware of their primary duty to the court if they give expert evidence and willing and able despite the interest or connection with the litigation or party thereto, to carry out that duty.

(vi) The judge will have to weigh the alternative choices openly if the expert's evidence is excluded, having regard to the overriding objectives of the CPR.

(vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."

46. I shall apply that approach, though I add a qualification of my own. In some circumstances it might not be possible to determine with sufficient clarity whether an expert has a disqualifying connection at an interlocutory stage. The facts may be in dispute; or the real extent of the interest or connection may not be sufficiently clear. In such cases (and as will appear, the present case is one of them) the court may not be able to resolve the question of independence at the interlocutory stage, because the real facts and interest may require some teasing out in evidence. In those cases it may not be possible to determine the matter at the pre-trial stage. It is obviously desirable to do so if at all possible so as to avoid the prospect of a party's important evidence being ruled out at the trial, with possible consequential adverse effects on the trial process or even unfairness in the decision-making process. But it may not be possible. So I would not rule out the prospect of having to decide the point at a trial."

It is important to remember that the test set out above, is the test to be applied in the context of adversarial proceedings before an independent judge who can assess whether any challenges to the independence of the expert witness have sufficient substance to either rule out his or her participation in the proceedings or to reduce the weight to be attached to his or her evidence.

Whether such an approach is also applicable in an inquisitorial Inquiry where the expert whose independence is impugned has been appointed by the Inquiry is open to question. The independence of an expert appointed by the Inquiry is clearly relevant to the issue of the independence of the Inquiry itself and it is clear that when one is considering the issue of the independence of a tribunal, the appropriate test is that applied in *Porter -v- Magill* [2002] 1 All ER page 465 at paragraph 103. The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.

It is submitted on behalf of the Board and the Trust that the application of this test would preclude Mr Forsythe, FRCS, from having any further involvement in this Inquiry.

Even if the test to be applied is as described by Mann J in the *Meat Corporation* case, it is clear that the judge in that case envisaged the issue of lack of independence of the expert witness being probed and explored by cross-examination of the expert. However, the protection offered by the ability to cross-examine effectively on this issue is clearly going to be minimal in circumstances where such cross-examination, to be effective, would have to delve into issues arising out of and relating to a private and confidential report, the contents of which are not in the public domain. The right to cross-examination will not offer any real protection in the present case.

It is submitted on behalf of the Board and Trust that the recent and intimate involvement between the Board and Trust and Mr Forsythe, FRCS, in the conduct of a private and confidential review of renal transplant services in Northern Ireland is an interest or connection of such a nature and extent as to preclude Mr Forsythe's further involvement in this Inquiry.

Yours faithfully

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