Police Federation
Of England and Wales

Ffederasiwn Heddlu
Lloegr a Chymru

Established by Act of Parliament

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NATIONAL SECRETARY'S OFFICE

12 August 2020

BB CIRCULAR – 007-2020

To: All Branch Board Chairs & Secretaries
Cc: CAPLO's, National Board Info and Branch Council Admin

Dear Colleague,

Status of police friends and friends' confidentiality

This circular supercedes and replaces JBB circulars 020-2010 and 019-2005, which previously provided guidance on the status of police friends and friends' confidentiality.

In 2010, PFEW obtained Counsel's opinion following a number of occasions when PFEW representatives, acting in the capacity of a police friend, had been asked or ordered to make statements concerning conversations that they as a police friend had had with an officer facing allegations of misconduct or poor performance.

It is PFEW's view that the advice set out in that opinion still remains valid albeit that the references to regulations are now out of date. Therefore, I thought it would be helpful to recirculate a copy of Counsel's opinion (see attached) and to remind you that the Home Office statutory guidance on *professional standards, performance and integrity in policing 2020* now includes detailed guidance on the role of a police friend at paragraphs 5.5 to 5.15.

In particular, paragraph 5.10 of the HOG states that a *"police friend should not be asked to provide an account of the matters under investigation or subject to proceedings, for example*

being cross- examined or called as a witness in relation to their role as police friend or the advice provided to the person they are representing."

Both the attached Counsel's opinion and the HOG confirm that a police friend owes a duty of confidentiality to every officer who seeks their help in the capacity of police friend and that this duty cannot be defeated by an order from Professional Standards Departments or the IOPC. Any challenge to this right of confidentiality can only be determined by a court or competent tribunal.

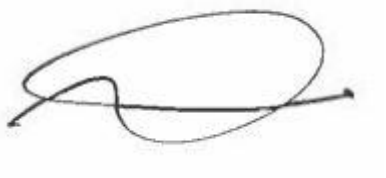
Any police friend who is asked or ordered to make a statement regarding such conversations or communications should follow the advice set out at paragraph 40 of the attached legal opinion, which states:

> *"If a friend is asked/ordered to disclose such communication, he should decline pending (a) seeking 'instructions' from the accused; and (b) taking legal advice: he should inform the requesting/ordering party that 'the Federation has legal advice that all such communications cannot lawfully be disclosed without the express consent of the officer concerned and that, in the absence of such consent, disclosure can only be made if directed by a competent court of tribunal."*

In this regard, it is also PFEW's view that a police friend would have the defence of "good and sufficient cause" to an allegation that they failed to obey a lawful order.
Friends should be confident that they are not obliged to disclose communications with members for whom they are acting as police friend.

If you have any questions about the contents of this circular please email elaine&karen@polfed.org.

Yours sincerely



John Partington
Deputy National Secretary

IN THE MATTER OF
THE POLICE FEDERATION

AND THE STATUS OF POLICE FEDERATION FRIENDS

ADVICE

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1. In January 1997 I was one of a number of practitioners who contributed to a Report by the late Edmund Lawson QC ("the Report") on the the applicability of a species of privilege from communication to third parties similar to legal professional privilege ("LPP") in respect of communications between a Police Officer's Friend "Friend" and an accused/suspected officer.

2. The Conclusions of the Report are laid out in summary at paragraph 3:-

> *3.1 We are agreed that confidential communications made to (or by) a Friend by an accused or suspected officer should be protected from disclosure. That protection should be similar to that which applies under the heading of LPP.*
>
> *3.2 EL advised in 1985 (Annexure 1), in the context of discipline proceedings, that "communications between 'friend' and defendant officer should clearly be treated in the same manner as communications between solicitor and client". That is our current view: we extend it to cover the friend's role in 'hybrid' investigations when it is unknown whether discipline or criminal charges may result.*
>
> *3.3 The 'label' to be attached to the protection is less important than establishing the fact of protection. Under the current law, we see grave difficulty in establishing that the protection is to be described as LPP - not least because (most) friends are not qualified lawyers. The still developing law relating to P11 should, however, in our opinion, extend to provide the necessary protection.*

3. I am asked to advise on whether that approach is still valid taking into account changes in the law since 1997. There is now perceived to be pressure applied to Friends when performing their duties, by an implied assertion by Professional Standards/investigators, that because Friends are serving police officers, they are under a duty enforceable by law[1] to report any matter that passes between themselves and an officer they represent that could possibly be construed as the officer either admitting an offence or putting forward any defence which is not genuine.

In Summary

4. There have been changes in the law since 1997, particularly in legislation governing the regulation of police conduct and, since 1999, performance. However the position of the Friend is now, if anything, more important than ever. I will consider those changes below and set out my reasoning in detail but in summary I would advise as follows:-

   (i) The status of a Friend in the 2008 Regulations makes it essential that the officer, absent exceptional circumstances, should be able to rely upon a confidential relationship with the Friend.

   (ii) It is in the public interest that there should be such a confidence; without it any sort of non legal involvement in either performance or conduct matters will become unworkable.

   (iii) We were correct to anticipate that LPP could not be claimed, the law has hardened in that direction.

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1 The criminal allegation would be misconduct in a public office. Under Misconduct it could be "(Disobeying) Lawful Orders" or "Challenging and Reporting Improper Conduct", under the Schedule to Regulation 3 of the 2008 Conduct Regulations.

(iv) Unfortunately there is still no clear advice from the Home Office in Guidance about the desirability of officers being able to rely upon a confidential relationship with his Friend. I have already advised those who instruct me on this and I understand steps are in train to address the omission.

(v) Any Friend who is ordered to disclose the nature of any confidential communication may refuse and in doing so would be entitled to rely upon the following defences to an allegation of disobeying a lawful order:-

(a) That there was "good and sufficient cause" for disobeying the order, or

(b) that he/she reasonably believed that the order was in fact unlawful.

(vi) Any Friend in the same position will have a defence to the criminal offence of misconduct in a public office.

(vii) A Friend, when he agrees to the performance of his duty should be aware that he does owe a duty of confidentiality to the officer. That duty cannot extend to complicity or connivance in criminal offences, no officer is expected to shut his eyes to the obvious. However the Friend is not an arm of the Professional Standards Department/Investigators who take action against the officer he represents. Absent exceptional circumstances, he should not breach the confidence that the officer has a right to expect of him without the express permission of the officer concerned.

(viii) A Friend who is ordered to disclose confidential material should immediately seek legal advice as set out in paragraph 7.7 of the Report. There should be a protocol prepared to provide guidance for the rare case where a Friend feels he must make disclosure of confidential material.

CHANGES IN THE LAW SINCE 1997

The Police Discipline/misconduct system

5. In 1997 proceedings against Police Officers were governed by the Police (Discipline) Regulations 1985. The role and functions of the Friend under those Regulations in 1997 were set out in general terms in the Report (at paragraph 1.4, and at paragraphs 5.1-5.5).

6. Since the Report the discipline/misconduct landscape has been the subject of three substantial changes:-

   (i) The Police (Conduct) Regulations and the Police (Efficiency) Regulations 1999 introduced for the first time performance of duties as part of the discipline framework and did away with the criminal standard of proof,

   (ii) the Police Conduct Regulations 2004

   (ii) the Police (Conduct) Regulations and Police (Performance) Regulations 2008, a "sea change" which introduced a new approach to misconduct in particular, hearings now having a procedure more akin to an employment Tribunal.

7. Although there are still some cases being determined under the 2004 Regulations, I will address this problem from the point of the 2008 Regulations.

8. There is little doubt that the 2008 Regulations, both Performance and Misconduct, have enhanced the role of the Friend in a very clearly marked move away from legal representation in related proceedings[2]. There is an attendant benefit in this for all parties as procedures can be simplified and legal representation kept for where it is needed, the most

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[2] Hence a Friend may represent an individual officer with a grievance or with regard to a problem relating to disability (making reasonable adjustments). They may also represent a member(s) at workplace management meetings, and health and safety meetings, and meet with human resources or personnel staff about issues relating to an officer's sickness.

serious of misconduct/performance cases[3].

9. An officer can suffer important consequences without any right to legal representation. Under the Performance Regulations the officer is not entitled to legal representation at the first two stages, but is entitled to representation by a Friend (Regulation 5(2)(b) and 6(1)). If the proceedings reach the third and final stage an officer is only entitled to legal representation if he is accused of gross incompetence. Although not all of the sanctions are available if an officer is not legally represented, the Friend still has responsibility for representing an officer in peril of what once was regarded as sanction requiring legal representation.[4]

10. Under Conduct Regulation 12, "Assessment of Conduct" lays out a sensible framework which identifies that at the initial stages cases may be clearly criminal, clearly misconduct only (in the sense of not being criminal) or "hybrid" cases where it is not clear whether they will be one or the other, in practice the great majority of cases. That stage is vital yet it is not anticipated that an officer will be represented by a lawyer, making it more important than ever for an officer to have confidence in the Friend who does represent him.

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3 Performance cases under Regulation 6(1) or cases of alleged gross misconduct where there must be a hearing under Regulation 19(4).

4 The officer may be dismissed with a minimum period of 28 days' notice, or reduced in rank. Under the 1999 Regulations an accused officer could elect to be represented by counsel or a solicitor in any circumstances at an inefficiency hearing (the equivalent of the third stage).

11. Another example of the Friend's status is provided by Regulation 14B(3) (as added by the Police (Complaints and Misconduct) (Amendment) Regulations 2008[5]) whereby a Friend may represent an officer in the investigation stage of a complaint to the Independent Police Complainants Commission (IPCC). They may provide relevant documentation to the investigator, accompany the officer to any interview, make representations to the Commission concerning any aspect of the proceedings and generally advise the officer throughout.[6]

LPP and Confidentiality

12. The advice in 1997 that communications between officers and Friends would be unlikely to attract LPP can be put more firmly. The application of *ex parte* B[7] by subsequent Courts makes that clear, see Three Rivers District Council and others v. Governor and Company of the Bank of England (No.6)[8].

13. Recently the Administrative Court, for example, rejected an attempt to imply LPP by analogy to Chartered Accountants giving advice on tax law R. (on the application of Prudential PLC) v. SS Commissioner of Income Tax[9].

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5 S.I. 2866 of 2008

6 Other important examples include:-
- (i) A Friend can also assist officers involved in the 'local resolution' process. Under the Police Reform Act 2002 (Schedule 3, Part 1, Section 8) local resolution is intended to provide a flexible and simple procedure for dealing with complaints of a minor nature which would otherwise attract the full length and formality of the investigation process. This role is especially important given that the IPPC in 2005 estimated that more than half of all complaints made against the police are dealt with by local resolution
- (ii) A Friend may make representations on behalf of an officer at any review hearings following a suspension under regulation 10(7)
- (iii) A Friend may represent an officer at a Police Appeal Tribunal; Rule 15.1, Police Appeal Tribunal Rules 2008,

7 [1996] 1 AC 487

8 [2005] 1 AC 610

9 [2009] EWHC 2494 (Admin) at paragraph 27.

14. The Report suggested that it would be appropriate to claim that communications between officers and Friends were covered by PII on the reasoned basis that there was public interest in officers being able to rely upon the confidential relationship with their Friend. I advise that this is still soundly based and will provide a basis on which a Friend may reasonably decline to reveal that which has come into his possession in confidence.

15. However even where there is a public interest, the claiming of PII has more practical limitations than LPP which, when it applies, is absolute. A good analysis of the distinctions between the two (and the limitations of PII) are set out by Charles J. in the *Prudential* case and give a fair indication of the approach of any reviewing Court, see paragraphs 31(8) and (9):-

> *(8) The path taken by the common law in respect of material covered by LPP is therefore different to that taken in respect of other communications where it has been said that candour and confidentiality are essential, necessary or important if an adviser is to be able to give advice and assistance on a properly and fully informed basis, or decision makers are to be able to reach decisions on such a basis. For example, the law on the disclosure of confidential communications with doctors, bankers and other professionals, and the law on PII, have taken different paths to that on LPP. In such cases there is no right to refuse disclosure unless it is conferred by statute. Rather when the competing public interests for and against disclosure are strong enough to warrant it a balancing or judgmental exercise to determine which will prevail will generally have to be carried out in the context of litigation (e.g. PII), and in other contexts. But historically (and I include that caveat because I have not investigated the impact, if any, of Articles 6 and 8) in the context of legal proceedings the public and private interests in preserving confidence in respect of relevant communications with a professional adviser that are not covered by LPP generally give way to the public interest in the court having all relevant material before it (and thus in such cases the aspect of the public interest in promoting the administration of justice in favour of disclosure prevails).*
>
> *(9) In formulating the common law on LPP, on the one hand, and on PII and confidentiality on the other, the courts have therefore given different weight and effect to competing aspects of the public interest relating to the proper administration of justice and other matters. In the case of LPP, the public interest against disclosure has been given predominance so as to create a right that is exercisable by the client when disclosure is sought for the purposes of litigation and other for other purposes.*

16. LPP and Litigation Privilege ("LP") can serve to bar a person from using material they have which may already have been disclosed to them. PII is not like this, it is a privilege against disclosure. Arguably it cannot be waived, although daily officers of the Crown take decisions as to disclosure without troubling the Courts. PII cannot provide privilege from disclosure retrospectively; once material has been disclosed PII no longer applies. This is of great practical importance here.

17. The Report at paragraph 6 drew some support from the approach of the Military, see paragraphs 6.2 and 6.3. I do not think that this can still be safely relied upon. Since 1997 the three separate systems of Military law have been conjoined under a Tripartite system by the Armed Forces Act 2006. There is now a right to legal representation[10] and the provisions referred to for Defending Officers to be accorded the same privilege (because "justice would seem to require" it) no longer exist[11]. The new conjoined Manual of Service Law deals with privilege at page1-10-9, paragraph 40. However while dealing with, amongst others, the confidentiality of communications with chaplains, it is silent on communications with defending officers.

The problems that could arise for Friends

18. In 1997 the perceived problem was Friends being put in jeopardy by being ordered to disclose their confidential communications with the Officer they represented. However the spectre of Authorities obliging Friends to disclose "the secrets of the confessional" has turned out to be largely illusory. We are not aware that any Friend has ever had to argue that being ordered to provide material was subject to a PII claim.

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10 I assume in order to make Court-Martial Convention compatible.

11 Although the "Defending Officer" still exists, see para. 53(2) to the Courts-Martial (Army) Rules (SI 2007 no. 3442), his appointment is mandatory and his role is to "assist the accused to prepare and conduct his defence unless the (accused declines)". Because there is normally legal representation he is presumably subject to litigation privilege although query the position if the accused wants to represent himself.

19. The 1997 advice on that point remains good. Any Friend ordered to give information about confidential communications between himself and an officer that they represent under the Regulations would have a good and sufficient cause for refusing to obey the order. By the Schedule to Regulation 3 of the 2008 Regulations the failure to comply with standards would come under the following:-

> **"Orders and Instructions**
> Police officers only give and carry out lawful orders and instructions.
> Police officers abide by police regulations, force policies and lawful orders."

20. I do note that the 2008 Regulations do not include the words "good and sufficient cause that the 2004 Regulations[12] (and earlier versions) contained. I advise that this omission is not material as the Home Office Guidance for the 2008 Regulations makes it very clear that the defences of "having good and sufficient cause" or "reasonably believing the order was in fact unlawful" are preserved, see paragraph 1.41:-

> *There may however be instances when failure to follow an order or instruction does not amount to misconduct. This may be for example where the police officer reasonably believed that a lawful order was in fact unlawful or where a police officer had good and sufficient reason not to comply having regard to all the circumstances and possible consequences.*

21. I also note the standard in the 2008 Regulations of "Challenging and Reporting Improper Conduct"[13] but this adds no additional responsibility on any police officer. Whilst the concept of "whistle blowing" is comparatively new, this standard is, in fact, quite well established. Under the 1985 Regulations (*para.17 of Schedule 1)* it was an offence to be an accessory to a Disciplinary Offence. The offence was committed by an officer who *".....incites, connives at or is knowingly an accessory to any offence against discipline".* Taking the

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12 Code of Conduct, paragraph 6 "*Lawful orders*"
> *"The police service is a disciplined body.* ***Unless there is good and sufficient cause to do otherwise****, officers must obey all lawful orders and abide by the provisions of Police Regulations. Officers should support their colleagues in the execution of their lawful duties, and oppose any improper behaviour, reporting it where appropriate."*

13 "Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour."

word "connive" at its ordinary English meaning[14] it can be seen that this standard actually imposes no new duty upon any police officer.

22. The concern that a police officer could be guilty of a criminal offence if he, in good faith, refuses to disclose confidential communications is, in my opinion, not soundly based. The offence would presumably be that of misconduct in a public office.

23. See Attorney General's Reference (No. 3 of 2003) (C.A.)[15] for consideration of the offence and its constituent parts. For a conduct offence, the threshold is high, *per* Pill LJ, at paragraph 55 (emphasis added):-

> *There must be a breach of duty by the officer. It may consist of an act of commission or one of omission. The conduct must be wilful, in the sense already considered.*
> *56. The approach in Three Rivers also demonstrates the many-faceted nature of the tort, as of the crime. It supports the view expressed in the criminal cases, from Borron to Shum Kwok Sher, that there must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring* ***conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice****.*

24. On the 2nd March 2010 the Court of Appeal handed down judgment in the case of R. v. W[16]. The case provides important assistance on this prevalent offence[17] and underlines the kind of conduct it is aimed at when endorsing the ancient case of Borron[18]

> *"...the question has* ***always*** *been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case,*

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14 "To pretend ignorance of or fail to take action against something one ought to oppose".

15 [2004] 2 Cr.App.R. 366, see Archbold [2010], paragraph 25-381

16 Neutral Citation Number: [2010] EWCA Crim 372.

17 Rarely used up to 2000 it now appears to be a "catch all" for just about every conceivable form of misconduct by a police officer.

18 [1820] 3B and Ald 432, *per* Abbott CJ.

alone, they have become the objects of punishment. " (Our emphasis)

25. I advise that any Friend accused of declining to breach the confidence given to him by an officer that he represents would not be misconducting himself under this heading.

The Friend who volunteers information

26. This is far more problematic. In two recent cases[19] a Friend has intervened in the proceedings by volunteering information given in the course of a confidential discussion between the officer and the Friend while he was exercising his function as prescribed by the Regulations. This information was then produced by the Presenting Officer as evidence against the officer in the proceedings.

27. In such a case PII will not apply because disclosure has been made, hence my comment in paragraph 15 *supra*. The matter becomes a question of admissibility[20]. In such cases, once disclosure has been made, practitioners will know that the chances of a Misconduct Meeting/Hearing at first instance acceding to such an application are slim, as was seen in the two recent examples.

28. The most troubling aspect in these cases is the fact of an individual Friend making his/her own judgment about where the line should be drawn, between dispensing confidential advice and feeling that in the course of his/her duty as a police officer they should report an offence or misconduct. No lawyer ever finds themselves in this position. LPP is a head of privilege which automatically bars disclosure almost

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19 The West Mercia case of Otun and the Metropolitan case of Ghatauray

20 That it would be "unfair" to allow the admission of the evidence under the well known advice in Merrill v. Chief Constable of Merseyside [1989] 1 WLR 1077:-

"Unfaimess" in this context is a general concept which comprehends prejudice to the accused, but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both."

an application with some similarities to a section 78 PACE` application in crime.

without exception save where the client consents.[21]

29 In both cases referred to at paragraph 26 above there was no record of the discussion between the Friend and the Officer. The Officers disputed the precise contents and the inflexion to be put upon them. This is always likely to be the case unless all conversations are recorded. As there was no agreement about what was actually said there was presumably the unedifying spectacle of the Officers' counsel cross examining the (former) Friend. Where an Officer was unrepresented (as he could be) the situation would be practically impossible to regulate fairly.

30. These are difficult and complex issues. What is surprising is the lack of advice available to Misconduct Meeting/Hearings, and indeed to Friends, who find themselves in this position. Notwithstanding the major role that any Friend will play in any proceedings, it is striking that there is no advice whatsoever in Home Office Guidance about the fact that a Friend is the confidential advisor of the officer he represents[22].

31. There are many references in the Guidance to Friends all of which underline their important function as a person on whom the officer can rely but nothing about the nature of the role a Friend should have with an officer. Perhaps the Home Office took the view that this should be obvious from the confidential nature of the relationship[23].

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21 For example; where the communications are themselves in furtherance of a criminal enterprise, the *Cox v. Railton* exception.

22 *Police Misconduct, Complaints and Public Regulation*, Beggs & Davies, Oxford University Press, (2009) is not helpful; paras.. 7.36 and 7.37 identify the position but do not go beyond describing it as "contentious".

23 However what some might consider axiomatic could be construed as a considered omission. In the Otun case the Panel apparently took comfort from the fact that there is no mention in Guidance about privilege or confidentiality.

33. An indication of the correct approach is provided in the guidance at para. 2.117 (emphasis added):-

> *The police officer or his or her police friend, **acting on the police officer concerned instructions**, is encouraged to suggest at an early stage any line of enquiry that would assist the investigation and to pass to the investigator any material they consider relevant to the enquiry.*

This emphasises that information passed to the investigation by a Friend should only be on his officer's instructions.

34. In 1997 I drafted the proposal which is at Appendix 5 of the Report for the (then) Guidance to Chief Officers. That said:-

> *14a The Police Discipline procedures recognise the special status of the "friend" of the accused officer. It is contemplated that the "friend" should be available to assist accused officers at every stage in an investigation and in cases where the officer is not liable to the punishments of dismissal, requirement to resign or reduction in rank it is entirely within the spirit and intent of the Regulations that an accused officer may have no other assistance in dealing within the allegations against him.*
>
> *14b Any communication between the accused officer and his lawyer will, prima facie, be protected by legal professional privilege. Because a "friend" is not legally qualified it is unlikely that legal professional privilege applies to similar communications between him and an accused officer. In order to maintain the position and status of the "friend" there is a compelling interest in protecting any communications made by the accused officer to the "friend" from disclosure. This particularly applies if those same communications would have been subject to legal professional privilege had they been made to a lawyer.*

35. The Police Federation have communicated the concerns set out above to the PABEW Sub-Committee on Police Disciplinary Arrangements which met on the 17th March 2010. I understand that there was general agreement amongst the various stakeholders that some positive action is necessary to prevent the Friend's role being compromised.

36. I do not necessarily suggest that my 13 year old draft is used unamended. However it is essential that some practical advice about the relationship is given to parties who find themselves in this position

because there is, at present, no proper advice for any Misconduct Meeting/Hearing that need to rule on the admissibility of such material in a correct fashion.

37. Such advice could also put into a proper context what the actual function of a Friend is. It would also give Friends confidence in the performance of their duties

38. The performance of those duties should not be impossible. No police officer has ever been expected to stand by and watch criminal/misconduct offences committed or connived at. Such instances, which will not be usual, have never caused any problem and can be left to the individual discretion of the Friend involved. I have seen an example of very sensible advice given to prospective Friends[24]:-

> *If a friend believes there are limits to the confidentiality he can promise then he is duty bound to make the officer who seeks his advice aware of those limits before the relationship starts. For example, if a friend was to take the view that he could keep confidential any advice sought and given on a conduct matter, but not a criminal matter, then the friend should tell the officer at the outset so that the officer could seek advice from a lawyer knowing that it would be covered by legal professional privilege.*

39. That advice is sensible and pragmatic and I would endorse it.

What if a Friend is ordered to disclose confidential information?

40. In this case I would repeat the advice at paragraph 7.7 of the Report:-

> *If a friend is asked/ordered to disclose such communications, he should decline pending (a) seeking 'instructions' from the accused; and (b) taking legal advice: he should inform the requesting/ordering party that 'the Federation has legal advice that all such communications cannot lawfully be disclosed without the express consent of the officer concerned and that, in the absence of such consent, disclosure can only be made if directed by a competent court or tribunal.'*

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24 "Miscellaneous Advice" by Scott Ingram to the Police Federation dated 5 March 2010.

What if a Friend feels he/she must disclose confidential information?

41 In the case of Friends who feel that something has occurred which causes them to consider disclosure of any information imparted to them in confidence, I suggest that a protocol be drafted which sets out steps to be taken before disclosure is made. This will be a sensitive exercise and could involve, for example, immediate contact with the Joint Branch Board who could arrange for legal advice on the matter for both the Friend and the officer. Hopefully such cases will be rare. I suggest that this is a matter that can be considered by my professional and lay clients, perhaps in consultation.

What can Friends be told in addition?

42. The task of a Friend is a singularly important one and the first task for any responsible Friend is to ask themselves the simple question: what am I here for? The answer is equally simple: to assist the officer to the best of his ability, consistent with behaving properly. Without being too brutal, Friends need to understand that the officer is not seeking the assistance of someone from the same camp as those who seek to sanction him. It should not be overlooked that Friends often play an important role in advising officers to admit their mistakes and short-comings. How can they perform this function if they begin every case on the basis that the officer must be completely blameless, and if the officer is not, then the Friend's first duty is to report that to those investigating?

43. It is useful to remind oneself of the reason litigation privilege exists at all, see the comments of Lord Rodger in the *Three Rivers District Council* case which here have a practical application:-

> *Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as*

> *possible without the risk that his opponent will be able to recover the material generated by his preparations. In the words of Justice Jackson in Hickman v Taylor (1947) 329 US 495, 516, "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."*

44. Friends are potentially in a position of real power because their role under the statutory scheme means that they are privy to confidential information. Lawyers are in the same position but LPP provides a complete answer, their only ultimate safeguard is to withdraw from the case. Where, as here, LPP does not apply, considerable care is required to protect any officer from the Friend who either intervenes before he should, or who has misinterpreted an Officer's alleged admission.

The effect of any erosion of the Friend's role

45. If investigators or Professional Standards were to utilise the fact that Friends may be serving officers, to make them an arm of the investigation into misconduct by implying that at the first sign that the Officer may have problems the Friend should feel duty bound to report such matters, that would be a significant departure from the intended and prescribed framework of (disciplinary) proceedings[25].

46. If procedures under the 2008 Regulations are applied in this way then it will undoubtedly reduce the relevance and the role of Friends in the current disciplinary structure.

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25 To use the words of Lord Donaldson in the *Merrill* case

47. Should that occur, I would (sadly) advise the Police Federation that it would be their duty to advise their members that if they are to be represented by a Friend, they will receive a substantially poorer level of representation than if they elect to have a lawyer involved.[26]

48. I am sure that that is a consequence which all parties should seek strenuously to avoid. The only possible answer to such an erosion will be to seek to protect the position of the Police Federation's members by either increasing the involvement of lawyers or for the Police Federation to give consideration to appointing persons under Regulation 6(1)(c) who are not serving police officers.

Michael Egan QC

6 May 2010

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[26] I am told by counsel in the Otun case that Counsel for the Presenting Officer submitted to the Board, in answer to objections as to the admissibility of the material, that the Friend should have cautioned the accused officer at the start of the consultation making some kind of warning that anything said may be reported. Compare that to the (then slightly tongue in cheek) draft warning drafted by EL in the Report at paragraph 5.5. I would suggest that such a warning would have to be given by the representative of the party taking action against the officer as the Friend actually has a role under the Regulations.