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M-8/10

TO: Mr D A Lavery  
Central Secretariat

FROM: Denis McCartney  
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ASST SEC 02 58/10  
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David

REQUEST FOR CHAIRMEN'S NOTES

1. I am replying to your letter of 3 October.
2. Two issues seem to arise from the request by Reverend McCrea's solicitors for copies of the Independent Chairmen's notes of the proceedings of the all-party talks on 10 September: first, has Mr McCrea a right in law to obtain those notes, and if not, then second, have the Chairmen a right voluntarily to release their notes? Or, to put it another way; is there a duty to release the notes, or a duty not to do so?
3. Is there a duty to release the notes?

At the stage we are at, the answer can unequivocally be "no". Mr McCrea's solicitors advise in their letter of 26 September that they act for him "in relation to possible libel proceedings"; there is no general duty in law which obliges any person to release documents or give information to another, whether in the context of prospective litigation or otherwise.
4. Even if the possibility of libel proceedings had been realised, and proceedings had been commenced (I am assuming against persons other than the Independent Chairmen), the right to obtain documents through the legal process of discovery is as a general rule restricted to those who are parties to the proceedings.
5. There are of course some exceptions to that rule (you mention discovery of documents from third parties in personal injury actions) none of which is relevant here, other than that exception which I mention in paragraph 7 and that by which a stranger to litigation can be compelled by subpoena duces tecum to produce documents at the actual trial of the action.
6. The possibility of a subpoena cannot of course be dismissed, but such an order of the court could only be made in the course of the libel proceedings. A subpoena is not like an



order for discovery, and imposes no obligation in advance of the hearing to produce documents for inspection. So even if a subpoena was to be issued, and aside from the grounds mentioned below on which it might be resisted, compliance with it would be for a date quite some time ahead.

7. There are circumstances in which a person who has suffered a wrong can obtain an order of the court to compel the disclosure of information about the identity of a wrongdoer from a person, who, although himself without fault, has become embroiled in the wrongful act, so as to enable the appropriate proceedings to be taken against the wrongdoer. It does not however seem to me that that is the purpose of the request for the notes, in that Mr McCrea's solicitors are seeking clarification of what was alleged rather than who had made the allegations. But even if identification is at the root of the request, the line of cases relevant to third party discovery on this ground indicate that if there is any doubt about whether the disclosure should be made, then disclosure can properly be resisted until an order of the court has been made.

8. In summary, in the circumstances in which legal proceedings remain simply in contemplation, there is no duty on the Independent Chairman to comply with the request for the notes, and that is so even if, as seems unlikely, without access to the notes Mr McCrea could not embark on the intended libel proceedings.

9. If Mr McCrea did seek such an order of disclosure against the Independent Chairmen would the court be likely to grant it?

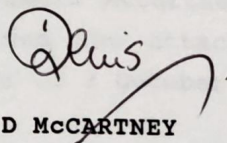
There would be very good arguments against disclosure which I think would be premature to discuss here in advance of knowing the grounds on which disclosure would be sought, but essentially disclosure would be resisted on public interest grounds: that the public interest in these particular processes of the talks remaining confidential outweighed the public interest in the proper administration of justice - in this case the public interest in Mr McCrea being put in a position to proceed with his libel action.

10. If I am right that Mr McCrea is unlikely to be able to obtain an order for disclosure of the notes, can the Independent Chairmen nonetheless voluntarily release them?

It must be very doubtful that they could do so without breach of the confidentiality agreement which is contained in the "Points of Agreement and Questions for Discussion" circulated on 29 September, which you tell me has been approved by the participants. Point 5 expressly provides that the rule of confidentiality applies to the two Governments and the Independent Chairmen as well as to the participating political parties.



11. The rules of confidentiality contained in the various paragraphs of that agreed document provides that records, minutes, notes and other documents will not be passed "to non-participants in the multi-party talks unless participants agree to their release, or if required to do so by a judicial or police proceeding". The question therefore arises whether this request for documents falls within the ambit of the exception of being required "by a judicial proceeding".
12. That is rather oddly put, but I take it to mean something more than simply a subjective view that the notes might assist legal proceedings, whether actual or prospective. It is an exception to the rule of confidentiality, and therefore should properly be applied restrictively. "Required" can reasonably be interpreted as meaning required by the court in the interests of justice, rather than merely required by a litigant.
13. I suggest that if the Independent Chairmen wished to facilitate Mr McCrea, and so take a less than strict view of the application of that exception, they would be best to protect themselves from the charge of breach of confidentiality by seeking the consent of the participating parties, as the various rules on confidentiality set out in the agreed document envisage. If there is any doubt about the application of the exception to the circumstances in which Mr McCrea's solicitors seek the notes then the Chairmen would be well advised to seek the consent of participants to their release, so avoiding a charge that they have breached confidentiality. All the more so as there must be some doubt that the notes of the all-party negotiations on 10 September have any real relevance to Mr McCrea's grievance.
14. In summary: in the absence of a court order, which Mr McCrea would find difficult in the circumstances to obtain, the Independent Chairmen have no obligation in law to release their notes, and voluntary release, without the consent of participating parties, would be likely to be a breach of the obligations of confidentiality which they owe to those parties. In my opinion, the Independent Chairmen have neither a duty nor a right to respond positively to the request from Mr McCrea's solicitors for release of their notes.

  
**D MCCARTNEY**

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