CONFIDENTIAL

FROM: D A LAVERY
CENT SEC
7 October 1996

C	PS/Secretary of State (B&L)	В
	PS/Michael Ancram (B&L)	В
	PS/PUS (B&L)	В
	PS/Sir David Fell	В
	Mr Thomas (B&L)	В
	Mr Bell	В
		В
	Mr Leach	В
	Mr Watkins	
	Mr Stephens	В
	Mr Maccabe/	В
	Mr Whysa	В
	Mr Jagerman	В
	(without enclosures)	

Mr Hill (B&L)

REQUEST BY SOLICITORS REPRESENTING THE REVEREND WILLIAM MCCREA MP FOR MINUTES OF THE PLENARY ON TUESDAY 10 SEPTEMBER

- 1. This is to let you see the advice I have given to Martha Pope in relation to a request received from a firm of solicitors representing the Reverend William McCrea MP for the release of the minutes of the plenary held on 10 September.
- 2. At your suggestion, I had obtained a copy of the letter (dated 26 September from Messrs Millar, Shearer & Black, Solicitors) from Kelly Currie and had undertaken to obtain 'independent' legal advice for the Office of the Independent Chairmen.
- 3. Denis McCartney (Deputy Departmental Solicitor, DFP) has now provided the attached note (dated 7 October) in response to my letter of 3 October (copy enclosed).
- 4. As you will see, our firm advice is that there is no legal obligation to make this material available at this stage, although there is a possibility that a court could order its disclosure in due course. If the Office of the Independent Chairmen were minded

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to make the material available voluntarily, it would be prudent for them to seek the express authority of the Talks participants for doing so.

5. I have offered to assist the Office of the Independent Chairmen further as this issue unfolds. In the meantime, you may wish to note the advice I have provided.

[Signed DAL]

D A LAVERY SC 28196

525/96

TO:

W 63:01

Mrs Evans

HOLAB

FROM:

Denis McCartney

Departmental Solicitor's Office

7 October 1996

aug REQUEST FOR CHAIRMEN'S NOTES

I attach, as discussed, a draft of my reply to David Lavery's letter of 3 October, also (with enclosures) attached. I look forward to any comments you may have, but can I mention that I have undertaken delivery by mid-morning today!

D MCCARTNEY

Encs

525/96

To: Mrs Evans HOLAB

FROM:

Danis McCartney

Departmental Solicitor's Office

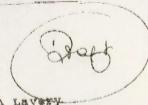
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D MCCARTNEY

01232251235



TO:

44P 84:21

Mr D A Lavery Central Secretariat

FROM:

Denis McCartney Departmental Solicitor's Office

7 October 1996

REQUEST FOR CHAIRMEN'S NOTES

- 1. I am replying to your letter of 3 October.
- 2. The 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 the 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 of 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), they right to obtain documents through the legal process of 7 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



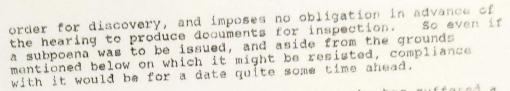
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- Is there a duty to release the notes?

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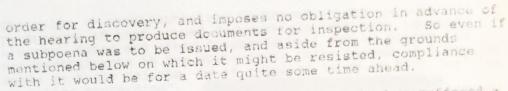


- There are circumstances in which a person who has suffered a wrong can obtain an order of the court to compel the 7. disclosure of information about the identity of a wrongdoer from a person, who, although himself without fault, has become embroiled in the wrongful act, so as to enable the appropriate 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 sacking clarification of what was alleged rather than who had But even if identification is at they root of the request, the line of cases relevant to third made the allegations. 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 they court has been made.
- In summary, in the circumstances in which regal 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.
- 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 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.

If I am right that Mr McCrea is unlikely to be able to obtain 10. 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.



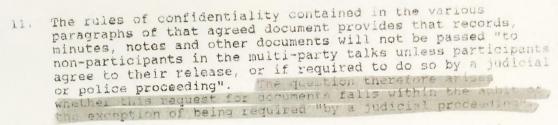
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936 09:51



- 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. is an exception to the rule of confidentiality, and thereis should properly be applied restrictively. / "Required" can, remanably be interpreted as meaning required by the cours in the interests of justice, rather than merely required by a litigant.
- 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. It there is any doubt about the application of the exception to the circumstances in y which is Mccrea's solicitors seek the notes then the Chaliner 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.
- In summary: in the absence of a court order which Mr McCrea would find difficult in the circumstances to obtain, 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 ither a duty nor a right to respond positively to the request from Mr. McCrea's solicitors for release of their notes.

D MCCARTNEY

DMC/MCM 830

- 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 amplitude the exception of being required "by a judicial proceeding".
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- 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 note; 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 no ither a duty nor a right to respond positively to the reduced from Mr McCrea's solicitors for release of their

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