

**TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING  
MATTERS AND PAYMENTS**

**Appointed by Instrument of the Minister for the Environment and  
Local Government dated the 4<sup>th</sup> day of November 1997 and as amended  
by Instrument dated the 15<sup>th</sup> day of July 1998-12-18**

**MEDIA DECISION**

**SOLE MEMBER OF TRIBUNAL:  
The Honourable Mr. Justice Feergus M. Flood**

**Friday 18<sup>th</sup> December 1998 at 12.00 noon**

### Establishment of this Tribunal of Inquiry

This Tribunal of Inquiry was established by instrument of the Minister for the Environment and Local Government dated the 4<sup>th</sup> November 1997 pursuant to the provisions of the Tribunals of Inquiry (Evidence) Act 1921 as amended subsequent to the passing of resolutions in that regard by Dail Eireann and Seanad Eireann.

The decision to establish a tribunal of inquiry is an exceptional matter and is made usually where there is a national crisis of confidence in relation to an important matter of public interest. The purpose of a tribunal of inquiry is to make such findings and recommendations as it sees fit in relation to definite matters of urgent public importance. Tribunals of inquiry have a significant range of statutory powers and it is the established practice in the common law world for the Government of the day to appoint a High Court judge as sole member of such tribunal.

The particular subject matter of this inquiry is detailed in the terms of reference of this Tribunal as amended and extended by an additional instrument of the Minister for the Environment and Local Government.

### Nature of the inquiry work

The nature of the inquiry work of a tribunal of inquiry has, not unsurprisingly, been neatly encapsulated by Mr. Justice Hamilton, the Chief Justice, in the judgement of the Supreme Court in **Charles J. Haughey & Others v. Mr. Justice Michael Moriarty & Others** delivered on the 28<sup>th</sup> July 1998. At page 121 of the transcript of that judgement, speaking for the Court, he states:

*"A tribunal of inquiry of this nature involves the following stages: -*

- 1. A preliminary investigation of the evidence available;*
- 2. The determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;*

3. *The service of such evidence on persons likely to be effected thereby;*
4. *The public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons effected thereby;*
5. *The preparation of a report and the making of recommendations based on the facts established at such public hearing."*

This Tribunal is currently carrying out a preliminary investigation in private in relation to certain aspects of its work. The Supreme Court in the recent **Haughey** case, at page 122 of the transcript, has made clear that if the inquiry work during the preliminary investigation stage " ... were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby".

#### **Information, documentation and evidence**

The Tribunal depends, in the first instance, upon the voluntary co-operation and assistance of those persons or entities concerned with the subject matter of this inquiry to gather relevant information, documentation and evidence. Where co-operation is genuine the work of the Tribunal can be greatly accelerated both in relation to assembling evidence and in relation to closing off particular lines of investigation. It is only where voluntary co-operation is not forthcoming, for whatever reason, that a Tribunal must then go on to consider using its compulsory powers of production and discovery under the provisions of the Tribunals of Inquiry (Evidence) Acts 1921 to 1998.

This Tribunal is concerned to establish the true facts and circumstances of the matters detailed in its terms of reference. The experience of inquiries in the common law world is that from time to time certain persons or entities attempt to avoid, delay or frustrate a given inquiry in an effort to conceal or distort material facts or circumstances relevant to that inquiry.

To discharge its mandate a tribunal of inquiry must have the confidence of the general public, the appropriate support of the Oireachtas and the Government, and the assistance of the Courts in speedily resolving the inevitable legal disputes associated with this form of inquiry.

### **Confidential information**

It is essential to the proper functioning of this phase of the work of this inquiry that, where appropriate, the confidential nature of inquiries being made and the confidential nature of information and documentation coming into the possession of the tribunal be respected. This Tribunal, in common with past tribunals of inquiry, took the step of publishing at a public sitting a protocol detailing the manner in which the tribunal would treat confidential information and documentation. The Tribunal considers all documentation and information concerning its inquiry work, whether emanating from, or received by, the tribunal as confidential information. The Tribunal also considers that any such documentation or information is generally confidential in nature, as well as the fact of having been communicated in circumstances importing an obligation of confidence.

### **Unauthorised disclosure of confidential information**

The Tribunal is seriously concerned that confidential information connected with the Tribunal is being deliberately and systematically drip fed to elements of the media. The Tribunal has, in the course of its inquiry work, circulated to a limited category of person's confidential information in which they have an appropriate legal interest. It is a fact that in particular instances, subsequent to its circulation, this information, has subsequently been published in whole or part by the media.

The Tribunal in the ordinary course would have been required to formally prove in evidence at a public sitting the content of the articles concerned and the confidential nature of aspects of that documentation. This undoubtedly could have had the result of compounding the problem sought to be resolved. The Tribunal wishes to express its thanks to each member of the media represented at this hearing for the honourable manner in which

they waived their right to have the published material formally proved. This position has greatly assisted the Tribunal in seeking to deal with the kernel issue of seeking to prevent future disclosures of confidential information.

The Tribunal suspects that the systematic nature of these unauthorised disclosures is a conscious and deliberate attempt to damage in advance of any public hearing the reputation of particular individuals, and also to undermine the work of this tribunal.

The Tribunal has already made a formal complaint to An Garda Siochana in relation to specific unauthorised disclosures of information confidential to the Tribunal. An Garda Siochana has assured the Tribunal that a criminal investigation under the leadership of senior members of that force is being urgently undertaken.

### **Interested persons**

The Tribunal has received complaints from certain persons who have an appropriate legal interest in the confidential information circulated to them by the Tribunal in relation to the unauthorised disclosure of that information by the media. In other instances persons from whom documentation or information has been sought have attempted to use the fact of these media disclosures as a reason to decline to co-operate with this inquiry. Again I must express my thanks to the members of the media represented at this public hearing for not insisting on the identification, by way of evidence, of the persons who made these complaints.

It appears to be uncontested by all persons in this hearing that the category of interested persons referred to have continuing rights under the Constitution to their good name and to fair procedures.

### **Steps taken**

The Tribunal is not only concerned to identify the persons or entities responsible for the past unauthorised disclosures of information confidential to the Tribunal. The Tribunal also intends to take effective steps to prevent future unauthorised disclosures.

To that intent and end the Tribunal wrote to individual members of the print and broadcast media seeking their voluntary assistance and co-operation to the effect that they would not allow themselves to be used as a potential instrument of harm to the constitutional rights of others and to the effective working of the Tribunal.

In each instance, although for differing reasons in certain cases, no member of the media is willing to voluntarily assist the Tribunal in the manner requested.

The Tribunal subsequently wrote to particular members of the media and indicated that the Tribunal, in view of their negative response, was required to consider taking compulsory steps in relation to preventing future unauthorised disclosures.

Legal representatives for *The Irish Times Limited* and *Independent Newspapers Plc.* met separately with the Tribunal, in private, and requested that consideration by the Tribunal of making any order against them under the Tribunals of Inquiry (Evidence) Acts 1921 to 1998 should, exceptionally, be carried out at a public sitting of the Tribunal. The Tribunal acceded to that request in view of the circumstances in which the matter arose, the exceptional nature of the order being considered, and the clear public interest associated with that step.

The Tribunal, in consequence, published a public notice advertising the fact of a public sitting to consider making an order restraining the disclosure or publication of documentation or information confidential to the Tribunal.

### Role of the media

The Tribunal readily accepts both the importance and the role of the media in educating and influencing public opinion. This role is specifically acknowledged in the language of Article 40.6.1.i of the Constitution. The media enjoys a continuing right to freedom of expression that to be any way meaningful must include a right to report, comment and criticize. This Tribunal in common with any other public entity in this State can legitimately be the subject of adverse media comment. The Tribunal does not make any case that it is immune from the ordinary course of media reporting, comment and criticism.

The media, in common with every other person or entity in this State, is not above the law. The media cannot suggest that because of the important nature of their journalistic work they are, in some way less accountable in a constitutional democracy than any other citizen.

### Representation

The Tribunal heard and granted orders for representation to *The Irish Times Limited*, *Radio Telefis Eireann*, *Independent Newspapers Plc.*, *Ireland on Sunday*, *The Sunday Tribune*, and *TV3 Television Network*. *The Examiner* newspaper had a solicitor attend with a "watching brief". Other media entities written to directly by the Tribunal, including *The Sunday Times* and *The Sunday Business Post*, did not appear before the Tribunal.

### Submissions

For convenience the Tribunal intends to deal first with the legal submissions of the media, excepting *Independent Newspapers Plc.* At the outset the Tribunal wishes to complement the excellence of the written and oral submissions made by Mr. Gordon, SC on behalf of *The Irish Times* and Mr. Trainor, SC on behalf of *RTE*. Their approach expedited the course of the public hearing and focused on the essential legal issues to be considered by the Tribunal. This decision does not recite the detail of the written submissions provided to the Tribunal by the media but the Tribunal wishes to emphasize that those submissions have been fully taken into consideration by the Tribunal. In particular the Tribunal accepts that these media interests recognise the legitimate concern of the Tribunal to protect the integrity of its procedures, and that they are conscious of their responsibilities in law as well as their rights. This group of media interests, however, declined to provide the Tribunal with an undertaking not to disclose or publish documentation or information confidential to the Tribunal.

The approach of this group of media interests was to submit that the Tribunal had no statutory power under section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 to make an

order preventing any future disclosure or publication of documentation or information confidential to the Tribunal. This was followed by a submission that even if the Tribunal had jurisdiction to make such an order the Tribunal should not do so for a variety of constitutional and legal reasons.

### Independent Newspapers (Ireland) Limited

For facts or reasons that have not been made clear to the Tribunal *Independent Newspapers Plc.* have adopted an approach different from other media entities to this tribunal. This company has on a number of occasions published documentation and information confidential to the Tribunal. *Independent Newspapers Plc.*, which rightly prides itself on its access to 24-hour prestige legal advice, cannot credibly submit that the contents of a sworn affidavit or various witness statements provided in confidence to the Tribunal do not constitute confidential information. Yet they do so.

When the Tribunal wrote to this company in relation to this matter the elementary courtesy of an acknowledgment was beyond them. When they met with the Tribunal in relation to a consideration by the Tribunal as to taking compulsory steps in relation to their media disclosures of confidential information their legal representatives indicated that they had not been briefed with the Tribunal's earlier correspondence. The Tribunal then wrote to them and indicated in clear terms that at the public hearing the Tribunal intended to inquire into this situation. In the afternoon of the day before the public hearing a minimal explanation was advanced in correspondence.

This company adopted the legal submissions of the other media interests. The Tribunal must treat them in the same way as the other media interests in relation to those submissions.

*Independent Newspapers Plc.* also made a number of remarkable additional submissions. These included the submissions, for example, that they had a concern that the Tribunal might come into possession of confidential information which may not be considered relevant to the terms of reference of the Tribunal with the risk that newsworthy information would not be published; or the concern that they may have confidential Tribunal information in their possession which they are unaware is confidential. This type



of argument is less than persuasive and it was no surprise that they declined the opportunity to adduce any evidence or assert any facts in support of these submissions.

There was one submission with which the Tribunal undoubtedly agrees with *Independent Newspapers Plc.* In response to a direct inquiry from the Tribunal as to their position in the event of a competent finding of fact that the Tribunal had a property interest in a confidential affidavit furnished to it *Independent Newspapers Plc.* submitted that they "... would be in some trouble..."

When pared back to its essentials the position of *Independent Newspapers Plc.* appears to be as follows: -

1. the fact and the contents of the articles published by them are admitted,
2. They do not accept that any of the content of their articles contained confidential information,
3. They do not accept that the Tribunal has any property interest or right in any of the content of the articles concerned,
4. They admit that they have in their possession a photocopy of an affidavit furnished to the Tribunal but decline to voluntarily provide that document to the Tribunal because one of their employees is concerned that this would disclose the identity of the person who provided the copy affidavit although readily admit that they have no basis in fact for this concern,

Whether intended or not, *Independent Newspapers Plc.*, in contrast to the other media represented here, give an impression that they consider themselves in some fashion to be above the law. If this is the position then it is most regrettable.

### Decision

The principle duty of this Tribunal is to discharge its mandate in as effective a manner as is reasonably practicable. The fact or threat of inappropriate disclosure or publication of confidential Tribunal information is potentially damaging to this inquiry and to the rights of the persons affected. The Tribunal seeks to take steps to prevent any disclosure or publication of confidential Tribunal information.

The media as a group interest will not voluntarily agree to refrain from publishing confidential Tribunal information.

The legal duty of a Tribunal of Inquiry in these circumstances is clearly set out in the judgment of Mr. Justice Blayney in **Kiberd and Carey v. Mr. Justice Hamilton** (1992) IR 257 where he states: -

*"It is perfectly understandable that some people would be reluctant to make material available to the Tribunal if they thought there was a risk that it could appear in the public press before being put in evidence at a hearing of the Tribunal. And if witnesses were dissuaded from coming forward with material relevant to the inquiry, then clearly the Tribunal would be hampered in carrying out its functions in that it would be deprived of the opportunity of hearing witnesses and considering material which might be of assistance to it. Apart from this, it seems to me that the Tribunal had to take steps to ensure that no further articles would be published based on material submitted in confidence to the Tribunal. If it did nothing about the articles which had appeared in The Sunday Business Post, there would be a risk of recurrence."*

The media have declined the request to voluntarily refrain from publishing in the future material submitted in confidence to this Tribunal. If the Tribunal makes an order under section 4 of the 1979 Act and it is disregarded the Tribunal must apply to the High Court to seek to enforce that order. The media, on the other hand, have properly indicated their view that if such an order is made they will themselves seek to quash that order in the High Court. One way or another the jurisdiction of the Superior Courts is clearly necessary to effectively resolve this matter.

In these circumstances the Tribunal has decided to take three distinct steps: -

**First:**

The Tribunal wishes to use this public hearing to clearly reiterate its view that all documentation and information concerning the inquiry work of the Tribunal, whether emanating from, or received by, the Tribunal is to be treated as confidential information save to the extent that any documentation or information is disclosed in a public hearing of the Tribunal.

**Second:**

The Tribunal intends to consider making an order under the Tribunals of Inquiry (Evidence) Acts 1921 to 1998 against *Independent Newspapers Plc., its servants or agents*, directing the production to the Tribunal of all copies of a document said to be an affidavit sworn by James Gogarty and all copies of documentation said to be statements of persons made to the Tribunal in the course of its inquiry work. The Tribunal will hear any submissions which *Independent Newspapers Plc.* wish to make in relation to this proposed order either today, or in private on Monday next at 9.30 am.

**Third:**

The Tribunal intends instituting proceedings in the High Court in an effort to prevent any further unauthorised disclosure of confidential Tribunal information.