



An Roinn Cumarsáide,  
Pólartha agus Acmhalán Mídiúcháin  
Balla Átha Cliath 2.

Department of Communications,  
Energy and Natural Resources,  
Dublin 8.

Meagher Solicitors  
8 Exchange Place  
IFSC  
Dublin 1

4 November 2009

FOI Request Reference: FOI/2009/29  
Your Ref: FF/OBR001/0051

Dear Solicitors,

I refer to your request of 31 July 2009, under the Freedom of Information Acts, 1997 – 2003 (the Acts), for records held by this department and "*pertaining to the Legal Opinion of Richard Law Nesbitt, SC, dated 9 May 2006 and the Sole Member's Ruling dated 25 February 2008 regarding such Opinion*". I also refer to your request for a review (under Section 14 of the Acts), dated 29 September 2009, of the decision conveyed to you, on 1 September 2009, regarding the records you requested.

I have reviewed your request for access to copies of the relevant records and have considered the points that you made in your request for a review. I have also considered legal advice provided to the original decision maker, Mr. John Rice, when he was considering your original request for records. I have decided to uphold the original decision made by Mr. Rice.

You may appeal this decision by writing to the Information Commissioner at the Office of the Information Commissioner, 18 Lower Leeson Street, Dublin 2.

If you wish to appeal, you should do so not later than 6 months after receiving this letter. When writing to the Information Commissioner, making an appeal, please refer to this letter.

Please note that an application fee must accompany all appeals made to the Office of the Information Commissioner regarding FOI requests for non-personal records, and the appeal to them will not be processed until the receipt of fee. The application fee is currently €150. Payment should be made by way of bank draft, money postal order, or personal cheque made payable to "The Office of the Information Commissioner".

Yours sincerely,

Ken Spratt  
Principal



12/10/2009

Meagher Solicitors  
8 Exchange Place  
IFSC  
Dublin 1

**FOI Request Reference: FOI/2009/29**

Dear Sir/Madam,

I refer to the appeal you have made under the Freedom of Information Acts, 1997 and 2003 on the decision taken regarding your recent FOI request concerning correspondence exchanged between the Department and the Moriarty Tribunal


Your appeal was received in the FOI Unit on the 5<sup>th</sup> October 2009 along with the associated fee. You can expect a decision on your appeal by the 27<sup>th</sup> October 2009.

A full and new examination of the matter will be carried out by Mr Kenneth Spratt, Communications Policy Division, 29-31 Adelaide Road, Dublin 2. The Internal Reviewer can be contacted at 01 6783177.

If you are not satisfied with the outcome or if you have not received a reply within the designated timeframe, you are entitled to apply for a further review by the Information Commissioner.

Any further queries please contact the FOI Unit.

Yours sincerely,

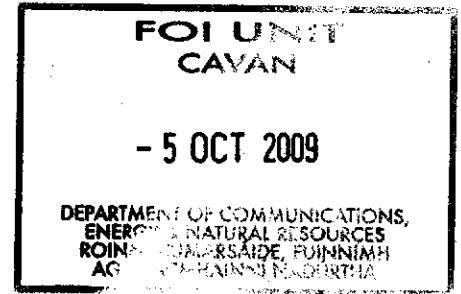
  
Carmel Cosgrove

FOI Unit  
Elm House,  
Earlsvale Rd  
Cavan

Phone: 01 6782902

# Meagher

S O L I C I T O R S



**By Courier**

Mr. John Rice  
Department of Communications, Energy and Natural Resources  
29-31 Adelaide Road  
Dublin 2

29 September 2009

**Our Ref: FF/OBR001/0051**  
**FoI Request Ref: FOI/2009/29**

Dear Sir,

We refer to our request under the Freedom of Information Acts 1997 – 2003 ('the Acts') and your decision therein dated 1 September 2009.

Given the breadth of our initial request we do not see how every record covered by the terms of that request can possibly be exempted.

You will note from our initial request that we are not seeking just primary documentation but also all memos/attendances/correspondence and any other such record held by your Department that refers to the Opinion of Richard Law Nesbitt SC dated 9 May 2006 ('the Opinion'). We would suggest that your original decision is based on a misunderstanding of what was actually requested and we would ask you to more fully consider the scope of our original letter.

Further to our letter of 22 September it is difficult to challenge the categories of exemption you have applied without knowing what records each such exemption is being applied to. We were both disappointed and surprised that you have decided not to furnish us with a schedule of exempted records. We understand that providing such a schedule is standard practice and your own letter states at the seventh paragraph,

'A schedule of the records covered by your request is also attached'.

In this light we would ask you to reconsider your decision which places an undue burden on any party trying to obtain records to which they are entitled under the Acts. It greatly diminishes our ability to properly appeal your decision which is contrary to all standards of fairness and we are thus forced to address that decision in general terms.

You have stated that some records are exempted under Section 22 being "documents covered by legal privilege". This exemption can only cover direct correspondence between your Department and the Office of the Attorney General. It would not extend to internal

Departmental records such as memos of meetings or discussions where the Opinion was discussed by way of just one example. It seems highly unlikely that no such records exist.

You have further stated that some records are being exempted under Section 23 of the Acts on the basis that "the release of documents may be refused on the grounds that release could reasonably be expected to interfere with the fairness of a tribunal's proceedings".

We would submit that denying access to records on this basis is in itself a gross interference with the fairness of such proceedings. The Opinion given by Richard Law Nesbitt was concerned with the awarding of the Second GSM Licence. We act for Mr. Denis O'Brien before the Moriarty Tribunal which as part of its work has investigated the awarding of that Licence to Esat Digifone, a consortium that Mr. O'Brien was part of. Mr. O'Brien has given evidence to the Moriarty Tribunal in connection with the licence process as have senior civil servants involved. The Opinion is a crucial part of that licence process and as such it cannot be fair to deny one party access to records when they are freely available to another.

You might please clarify in what way our access to the records requested would interfere with the fairness of tribunal proceedings.

Finally you have advised that certain records are being exempted under Section 46. In your letter you state that,

'This section excludes all records held or created by the Attorney General and those relating to the general administration of the Office. It also excludes all records held by a Tribunal to which the Tribunal of Inquiry (Evidence) Act 1921 applies.'

We have not sought records held by the Office of the Attorney General or held by a Tribunal. Our requests relate to records held by the Department of Communications, Energy and Natural Resources.

In conclusion we cannot see how every record covered by our original request can be exempted as you have stated. We ask you to reconsider your decision and you may treat this letter as a formal appeal of that decision. We enclose a cheque in the sum of €75 for the purposes of that appeal.

We look forward to hearing from you.

Yours faithfully,

*Meagher Solicitors*  
Meagher Solicitors