



John Swinney BPA/MSP

Linda Fabiani MSP  
Convener – Committee on the Scottish  
Government Handling of Harassment Complaints  
c/o Clerk to the Committee  
Room T1.03  
The Scottish Parliament  
Edinburgh  
EH99 1SP

29 January 2021

Dear Convener

Thank you for your letter of 22 January asking that, in addition to the confidential sharing of the summary of the legal advice it received for the judicial review raised by Mr Salmond, the Scottish Government makes a general waiver to allow further legally privileged material to be made public. I have considered the Committee's request carefully.

Both the Lord Advocate and I have set out clearly the very strong reasons of public policy for Government to be able to seek and receive confidential and candid legal advice. The assertion of legal professional privilege by Government, as for other clients of legal advice, is based in common law and is routine. Successive Scottish Government administrations since 1999 have been subject to robust parliamentary scrutiny and committee inquiries without requiring a general waiver over legally privileged information. As I set out in my letter of 1 December 2020, there is potential, in reaching a decision on this specific matter, to create a new precedent that would undermine the ability of not just the current Government, but future Scottish Governments, to receive legal advice with necessary candour, including in the context of adversarial litigation.

As I have also set out, the Scottish Government takes seriously the role of the Committee and the will of Parliament. We have already taken unprecedented steps to provide the Committee with access to relevant information to allow it to fulfil its remit. We have provided extensive written evidence from the judicial review process, including the Open Record of the pleadings setting out the Scottish Government's legal position. The Lord Advocate, the former interim Director of Legal Services and the Permanent Secretary have all provided hours of oral evidence.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire  
Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh [www.lobbying.scot](http://www.lobbying.scot)

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The Lord Advocate, as the Government's principal legal adviser, has confirmed that the Government was content that the case could appropriately be defended and the matters put to the court for determination, up until the events of the Commission hearings on 19-21 December 2018. The Permanent Secretary has set out, most recently in her letter of 21 January 2021, the factors that were taken into account in the decision to concede the judicial review.

As you know, exceptionally, the Government has, also provided the Committee with access to a contemporaneous summary of the legal advice on the judicial review on a confidential basis. The Committee has, therefore, been able to consider the confidential legal advice alongside the information already provided on the Scottish Government's legal position and to ask further questions in line with the Agreement established in December 2020. Also in line with the Agreement, we are content to provide access again to the summary of the legal advice, in confidence, under the same reading room arrangements, if requested by Committee members. As set out in my letter of 8 January 2021, I am confident, therefore, that the Committee has access to the necessary information to enable it to fulfil its remit.

**JOHN SWINNEY**

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