



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

5 March 2021

Dear Convener

Further to my previous letters of this week, we have today published on the Scottish Government website further legal documents from the judicial review.

With these documents we have now disclosed all of the formal written advice notes received from external Counsel during the judicial review which we have identified, as well as a number of other relevant previously legally privileged documents.

As set out in my letter of 1 March 2020 to the Committee, we have agreed to disclose this legal advice given the exceptional circumstances in which the integrity of the Government, Parliament and other key institutions were being challenged. Scottish Ministers' view is that the documents clearly contradict the allegations that have been made, that there was a malicious and concentrated effort to damage Mr Salmond's reputation, or that the Scottish Government sought in any way to inappropriately delay or pause the judicial review to allow the criminal proceedings against Mr Salmond to proceed first. We have identified no evidence to support Mr Salmond's allegations.

As set out in my letter of 2 March, the legal documents need to be considered within the context of the Scottish Government's written statement and timeline for the judicial review, the oral evidence provided by the Lord Advocate and the submission of 29 December 2018 prepared for the Permanent Secretary by the then Scottish Government Director General of Organisational Development and Operations (DGODO) summarising the progress of the judicial review, in particular from late October, which informed the decision to concede the case on a single ground.

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For completeness, we have published today a supplementary note of 18 September from Counsel on reporting restrictions, additional to the note of 17 September already shared with the Committee. We have published a joint note from Counsel of 26 September 2018 on the prospects of success in the judicial review. This predates the very similar note of 27 September on prospects already shared with the Committee, setting out answers to each of the grounds in Mr Salmond's original petition for the judicial review.

We have published the two notes of advice received from Counsel on 3 November and 5 November 2018<sup>1</sup>. (N.B. Redactions have been made to these documents because of the risk of jigsaw identification or because matters are out of scope.) These two notes follow Counsels' written advice in the note of 31 October, already shared with the Committee, highlighting the issue of prior contact, and a consultation meeting held with Counsel on 2 November. Following the consultation, the written notes of 3 and 5 November reflect the immediate process of adjustments to answers being made. Revised answers were lodged with the Court on 6 November, the day of a procedural hearing. A further consultation, with Counsel involving the First Minister and Permanent Secretary took place on 13 November. Further adjustments were made to answers on 14 November.

During the Committee's oral evidence session on 3 March 2021, Members asked about any minutes of consultations with Counsel, in particular on 2 and 13 November 2018. Although the attendees are known, and the Committee is aware of these, we do not hold any minutes of these meetings. The products of these meetings were adjustments to the Scottish Government's legal position that followed these consultations and have already been shared with the Committee as they are reflected in the pleadings already provided.

The written note of 3 November 2018 from Counsel confirms that once adjustments were made by the Government to disclose the issue of prior contact, the petitioner, Mr Salmond, would be given the opportunity to answer these adjustments and to seek the permission of the Court to revise his note of argument. As set out in the Scottish Government's written statement and timeline, this process of adjustments to the grounds and answers continued during the remainder of November and into December.

In order to assure ourselves and the Committee that we have provided all meaningful material, Senior Counsel for the Scottish Government from the judicial review has recommended that, in addition to a written note of advice, the Scottish Government should also share with the Committee two email chains, all from the period from early December 2018 up to immediately after the Commission hearing in late December, when the Scottish Government's case became no longer stateable. One email is from 7 December 2018. This follows from the note on prospects from Counsel on 6 December 2018, already shared with the Committee. This focuses on the issue of prior contact and the interpretation of paragraph 10 of the Scottish Government procedure. This was ahead of the consultation with Law Officers on 10 December 2018 at which it was determined that there were public policy reasons for continuing to defend the judicial review and seeking a determination from the Court on the procedure.

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<sup>1</sup> The written note of 3 November 2018 indicates at para 11.2 that Ms A and Ms B were given sight of the draft procedure. Ms B has confirmed that she does not recall having been given sight of the draft.

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The joint written note of 17 December 2018 reflects the continuing concerns of Counsel on a number of points immediately prior to the Commission hearing. The email from Counsel of 22 December 2018 is the so called “watershed” email, in which Counsel concludes that, following the Commission hearing, the case was no longer stateable. Law Officers and SGLD agreed this opinion. The Permanent Secretary quickly commissioned the note from the then DGODO that then led to the judicial review being conceded on the single ground of the perception of bias.

The comments in the emails and note from Counsel reflect their views based on their understanding at the time. As set out in the Scottish Government’s covering note to the DGODO submission, the circumstances leading up to and during the Commission hearings of 19 and 21 December 2018 arose from a collective failure within the Scottish Government to collate, identify the significance of, and pass on information in an effective and timely manner, including information and documents provided in November 2018 ahead of the hearing by the Investigating Officer about the issue of prior contact.

The Scottish Government has now published all of the written notes from Counsel received during the judicial review, which we have identified, as well as other written documents and the unredacted submission by the former DGODO. These documents set out the progress of the judicial review from the initial assessment of prospects in September 2018, up to the Commission hearing in December 2018, after which the case was assessed as no longer stateable.

Mr Salmond has claimed that there was a “malicious and concerted attempt” to damage his reputation. The Scottish Government does not believe that the legal advice published from the judicial review provides any evidence to support or justify that allegation. We recognise, of course, that the Committee will form its own view.

On the 8 January 2018, the Scottish Government provided a statement to Parliament setting out the circumstances in which Mr Salmond raised the judicial review and the reasons why the case was ultimately conceded. The Scottish Government apologised, in particular to the two women, that an error in the application of its procedure and in the work that was undertaken within Government to collate and share relevant documents during the judicial review resulted in the case being conceded. Those circumstances were and remain regrettable. The Scottish Government believes that nothing in the evidence that has been shared with the Committee, by the Lord Advocate, the DGODO submission or the published legal advice has contradicted that initial presentation of the facts.

As requested, in addition to the legal advice, we are sharing with the Committee, through the normal arrangements, a copy of the draft letter prepared, but not sent, to former First Ministers advising them of the procedure.

## JOHN SWINNEY

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