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Our Reference: DMK/LL/STE039-0003

BY EMAIL

Linda Fabiani & Committee on the Scottish Government Handling of Harassment Complaints

Dear Sir,

Alex Salmond

We have been instructed to write to you directly and are copying in the Convener and Committee Clerk.

This is a very important letter and is sent to you as a result of many months of us and our client, within very limited resources available, seeking to provide as much information as is possible to enable the Inquiry Committee to fulfil its remit in the public interest. That covers not simply the material in our client's possession but also directing you to material known to our client and which will help you to fulfil that responsibility. The Committee's persistence has uncovered much of that Government material but much remains and this goes further than the crucially important and still outstanding legal advice in the Judicial Review. In contrast we provided the Committee with our client's legal advice on which he founded his successful legal action.

Background and overview

It appears not to be in dispute that this is an Inquiry which engages matters of overwhelming public interest. This is not an Inquiry into our client, but into the Scottish Government and the First Minister. This Inquiry goes right to the heart of issues of Government transparency, accountability, public expenditure and, as has become clear, the separation of powers.

The reason for writing to you directly now is borne from real frustration on the part of our client, a former First Minister, who was subjected to an unlawful process by the Scottish Government. He was forced, through the refusal of the Scottish Government to recognise the illegality of its actions, to sue a Government he had previously led. That was a position reached with great reluctance and as a last resort, as he made clear at the time of commencing the judicial review.

It is now a matter of public record that we wrote to the Scottish Government on a number of occasions from early on in the illegal process telling them that they had acted unlawfully. Our client offered mediation and, separately, arbitration. Notwithstanding those warnings and offers of alternative means of resolution, the Government continued until they eventually conceded that they had acted unlawfully nine months after their initial letter to our client, at a cost to the taxpayer well in excess of half a million pounds and at considerable embarrassment to the Government.

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When this Inquiry was established the First Minister pledged to Parliament to provide full Government co-operation with it. It appears, unfortunately, that their modus operandi are continuing in the same vein as the unlawful process and the litigation.

Moving forward – our client's evidence both oral and documentary

Our client has agreed to assist the Inquiry and wishes to ensure that you are aware of his position in relation to his giving evidence and the scope of evidence; a position which may not be fully understood by members of the Committee. We have written to the Committee Clerk and the Convener on a number of occasions setting out our client's position in relation to this issue and we trust Committee members are familiar with all of that correspondence. In particular, we would refer you to our letters of 20, 24 and 28 July; 4, 21 and 27 September; 5, 15, 16, 19 and 21 October; 9 & 25 November; 14 and 21 December (2 letters), all 2020; and 4th January 2021. Our client wishes to reiterate his desire to co-operate fully with the Committee in giving evidence, but it is extremely frustrating to him that he has so far spent – as have we - considerable time and resource (many hundreds of hours) assisting the Inquiry by direction to highly relevant evidence without which the Committee can in all probability not reach any meaningful conclusions on its stated remit. Our client is now effectively being forced into a position of being asked to take an oath to tell the 'truth, the whole truth, and nothing but the truth', but being simultaneously advised by those acting in the name of the Lord Advocate that he would be committing a criminal offence if he does so. That cannot be a tenable position. We respectfully submit that it remains in your power to avoid those two issues. Your recovery of key material from both the civil case and the criminal case would have the dual benefit of allowing our client to give a complete account while eliminating any risk of his breaching court orders inadvertently when giving his evidence. There is no legal reason we can think of which would prevent you from seeking its recovery. Indeed, many following this Inquiry might consider it the duty of the Parliamentary Committee to do so. We have now written on numerous occasions to the Crown to seek their consent to release material sent to us and we have previously advised the Committee Clerk of these attempts. The Crown has remained steadfast in asserting that they cannot and will not consent to release of that material.

In Annexe A of your Remit letter of 7 July 2020, it is clear that the Committee, in fulfilling that remit, sought from all witnesses, including our client, **all records** (our emphasis), unless provided by another individual or organisation. The Annexe makes clear that the list is not exhaustive and includes correspondence of all forms, documentation, meetings, phone calls and logs and, in applying a 'reasonable person test', to provide 'all information you consider relevant'. That annexe also refers to evidence which cannot be released on legal grounds. For the avoidance of doubt, our client is very clear that the Scottish Government can and should release material which it is in its power to do and appears to refuse to do so in furtherance of its own interests. Indeed, it would appear to be an abdication of the Inquiry's responsibilities NOT to seek recovery of that material.

We have now written on numerous occasions to the Crown to seek their consent to release material sent to us and we have advised the Committee Clerk of these attempts. The Crown have remained steadfast in their position that they cannot consent to release of that material. We believe from the Crown that you may have been in dialogue with them about that prior to Christmas, but we are not aware of those discussions. That leaves the Committee, in our client's view, with a clear decision to make: either fulfil its remit responsibly by ensuring that material is recovered; or press on without it. Neither we nor our client can see how it is possible for your Committee to, putting it bluntly, do its job, without that evidence. Our client is entitled to a rational explanation as to why that material has not been sought by the Committee or provided by agencies of the state. So too is the public. The idea that he gives his evidence before that material is produced is highly problematic. Some of it goes right to the heart of the issues your Inquiry faces, including testing the credibility of witness evidence already led. It is also highly relevant material to his evidence and any submissions he makes thereafter. In addition to the Government legal advice which Parliament has asked for disclosure the Committee should be seeking the emails and messages from the Investigating Officer and others after the Judicial Review commenced which were referred to in evidence by Ms McKinnon on 1 December.

Submissions to date

We submitted many weeks ago now a number of documents which have not been published, including most recently our client's submissions made on phases 2 & 4 of your Inquiry. Our client is unsure as to why these documents have not been published. We would be grateful for an explanation.

In addition, we have written a number of open letters which remain unpublished. Our client is insistent that his submissions will be published in full and not redacted or amended. These have been approved by this firm and we see no lawful impediment to them being released. If there is a legal reason for the delay in releasing the material, we would ask for that to be set out so that we can advise our client.

Next submissions

Our client intends to provide a further submission relating to the Judicial Review by 11 January (phase 3 of the Inquiry) despite the non-disclosure of the Government's own legal advice from external counsel.

The Committee should note that our client has never even had sight of an unredacted copy of the "Davidson Report" despite a subject access request of the Scottish Government.

This is again evidence of his desire and intention to assist the Committee, but it will not be his final submission.

Our client cannot make a final submission or satisfy his oath to tell the 'whole truth' without the recovery of relevant material, as set out above. Our client therefore calls on you to take whatever steps necessary to recover that material using all legal means open to you to do so. It is not clear, for example, why the Committee cannot instruct an application to the relevant courts for access to the material? Perhaps you might address that specific proposal directly.

There should be no reason for anyone to object to this, least of all the Scottish Government, a body which indicated at the outset a willingness to be transparent and fully co-operative. Failure to recover that material will only undermine public confidence in the process.

Finally, our client has sent to your Clerk a submission which he has sent to Mr James Hamilton in relation to the potential breaches of the Ministerial Code. We enclose a copy of that for your information. A significant amount of that is highly relevant and should be taken as a submission to phase 4 of your own remit.

Evidence sessions

The above concerns clearly call into question the likelihood of our client being able to give evidence on 19th January. Furthermore, our client has written separately to your Clerk to establish how, realistically, an evidence session in person is going to be possible given current restrictions given that he has an underlying health condition. There would be considerable media attention, as there was at his trial and during the judicial review. Managing that attention in the current health environment will be a matter for careful consideration. These are practical issues which we can discuss with your Clerks, but the priority at this stage is to unlock the very important issues set out above and help the Inquiry reach conclusions on the full evidence.

Yours faithfully,

[Redacted]

David McKie
Levy & McRae