



The Scottish Parliament
Pàrlamaid na h-Alba

**COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT
COMPLAINTS**

AGENDA

1st Meeting, 2021 (Session 5)

Tuesday 12 January 2021

The Committee will meet at 11.00 am in a virtual meeting.

1. **Declaration of interests:** Stuart McMillan will be invited to declare any relevant interests.
2. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.
3. **Complaints Handling:** The Committee will take evidence from—

Leslie Evans, Permanent Secretary, Scottish Government.
4. **Review of Evidence (in private):** The Committee will review the evidence heard on the inquiry.
5. **Work programme:** The Committee will review its work programme.

Clerk to the Committee on the Scottish Government Handling of
Harassment Complaints
Email: SGHHC@Parliament.Scot

The papers for this meeting are as follows—

Item 2

Paper from the Clerk	SGHHC/S5/21/1/1
Written submission from the former First Minister, Alex Salmond	SGHHC/S5/21/1/2
Correspondence from Deputy First Minister – legal advice	SGHHC/S5/21/1/3
Private paper	SGHHC/S5/21/1/4 (P)

Item 5

Private paper	SGHHC/S5/21/1/5 (P)
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Committee on Scottish Government Handling of Harassment Complaints**1st Meeting, 2021 (Session 5), Tuesday 12 January 2021****Phase 2: Complaints Handling****Evidence session 11: 12 January 2021****Background**

1. This paper has been produced prior to the Committee on the Scottish Government Handling of Harassment Complaints' eleventh evidence session where the Committee will hear evidence from the Permanent Secretary, Leslie Evans.
2. The Permanent Secretary to the Scottish Government is the most senior civil servant in Scotland and is the principal policy adviser to the First Minister as well as secretary to the Cabinet. The Permanent Secretary is the principal accountable officer for the Scottish Government and is personally responsible to the Scottish Parliament for the exercise of their responsibilities.
3. The evidence session will focus on the complaints handling phase of the Committee's inquiry. The purpose of this session is to examine the process followed, not to revisit the criminal trial or consider the substance of the complaints originally made to the Scottish Government.
4. In line with the Committee's [written statement on the handling of information and evidence](#) all participants must comply with the court order made by the Lord Justice Clerk, Lady Dorrian, on 10 March 2020 preventing publication of the names and identity, and any information likely to disclose the identity, of the complainers in the criminal trial.
5. [The Committee's remit and approach to its inquiry](#) is available on the Committee's webpage.
6. A written statement from the Scottish Government, timeline and supporting documents were subsequently received by the Committee on Monday 30 November. The [written statement](#) and [covering letter from the Deputy First Minister](#) have been published on the Committee's webpage, the supporting documents listed in the footnotes of the statement are currently being processed and will be published in due course.
7. The Scottish Government subsequently provided the Committee with an updated written statement on 18 December, along with a further batch of supporting documents. These documents have also been posted on the [Committee's webpage](#).
8. The Deputy First Minister wrote to the Convener on 22 December 2020 providing an update on the Scottish Government's own review of its procedure for the handling of harassment complaints involving current or former ministers. This letter can be found at **Annexe A**.

Previous evidence sessions on the complaints handling phase

- The Committee heard from four Scottish Government Officials: Judith Mackinnon, Head of People Advice; Gillian Russell, Director, Health Workforce; Nicola Richards, Director of People; and John Somers, Principal Private Secretary to the First Minister on Tuesday 1 December.

The Official Report of this evidence session is available [here](#).

The Judicial Review

The Permanent Secretary may also give evidence on the judicial review phase of the inquiry. Following an [agreement with the Scottish Government](#), on 22 December 2020 Committee members were given access in a reading room to a report prepared by the then Director General for Organisational Development and Operations (DGODO) in late December 2018 for the Permanent Secretary. A [redacted version of this report](#) along with an [accompanying letter](#) and [statement](#), as well as a [summary of the Lord Advocates evidence](#) have been published on the Committee's website.

Following this, the Convener [wrote to the Deputy First Minister](#) on 23 December 2020 regarding the Committee's access to legal advice. This letter is included with this paper.

Deputy First Minister and Cabinet Secretary for
Education and Skills
John Swinney MSP



Scottish Government
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ANNEXE A

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

22 December 2020

Dear Linda

Scottish Government Review of its Handling of Harassment Complaints Procedure

I am writing to provide you with an update on the Scottish Government review of its procedure for the handling of harassment complaints involving current or former ministers. Laura Dunlop QC has advised that she is making progress and her review will conclude by Spring 2021. This is in line with our original intentions, as set out in the Permanent Secretary's letter to you of 21 August, where we anticipated that the Review might be concluded by the end of 2020 but that the final timeframe would be decided by the reviewer.

I will provide a further update in February 2021 and hope that this information is helpful to you.

JOHN SWINNEY

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ADDITIONAL REFERENCE MATERIAL**Previous correspondence on complaints handling documents***Written Evidence from the Scottish Government*

9. The Committee asked the Scottish Government to retain all documents which may be relevant to the inquiry in its [letter of 26 February 2019](#).

10. On 3 June 2020 the [Permanent Secretary provided an update](#) to the Committee on the timescales for providing documentation and written evidence, noting a delay in the complaints handling batch of evidence.

11. On 31 August 2020 the Deputy First Minister [wrote to the Committee](#) to update members on the forthcoming batch of evidence relating to complaints handling. This letter noted that a formal objection has been received by the Scottish Government on behalf of an individual which would cause a delay in the provision of these documents to the Committee.

12. On 26 October 2020 the Deputy First Minister [wrote again to the Committee](#) with an update on the progress the Scottish Government was making to provide the material relating to complaints handling.

13. Following this letter, the Convener [wrote to the Deputy First Minister](#) on 6 November 2020. This letter noted that, notwithstanding the legal issues related to the documentation, the Committee wished to receive from the Scottish Government as soon as possible, a timeline or written submission giving information on the process undertaken by the Scottish Government in investigating the complaints. The Deputy First Minister [responded to this letter](#) on 13 November 2020, noting that the Scottish Government will look to provide material as soon as possible.

14. On 12 November 2020, the [Convener wrote to the Deputy First Minister](#) informing him that the Committee was considering beginning hearing oral evidence on the complaints handling process in the absence of relevant documentation. This letter noted that, in the absence of this documentation, Scottish Government officials would need to spend more time in Committee covering matters in person that should have been covered by the Scottish Government's written statement and associated documentation. The letter also noted the Committee has evidence from the inquiry phases on the development of the procedure and the judicial review and other sources of information it can draw upon to inform these sessions.

15. In a [letter to the Committee on 19 November 2020](#), the Deputy First Minister indicated that he could not agree to Judith Mackinnon and Gillian Russell appearing before the Committee on 24 November due to the risk of jigsaw identification caused by the fact that the Scottish Government had not finalised the timeline and statement for this phase of the inquiry. The Convener [responded to this letter](#) on 19 November 2020.

16. The Deputy First Minister subsequently [wrote to the Convener on 24 November 2020](#) updating the Committee on the timescales for the production of relevant material from the Scottish Government, noting that he was prepared to allow the witnesses to appear before the Committee with certain mitigations.

Previous evidence sessions on other phases of the inquiry

17. The Committee agreed to conduct its inquiry in phases. It has previously taken evidence on the development of the handling of harassment complaints policy and on the Judicial Review as follows:

Development of the procedure on the handling of harassment complaints

- The Permanent Secretary gave evidence on 18 August. The *Official Report* is available [here](#).

Following this evidence session, the Permanent Secretary submitted further written evidence, this letter can be found [here](#).

- Senior Scottish Government Officials James Hynd; Head of Cabinet, Parliament and Governance Division, and Nicola Richards; Director of People gave evidence on 25 August 2020. The *Official Report* is available [here](#).

Following this evidence session, James Hynd and Nicola Richards submitted further written evidence. The letter from James Hynd can be found [here](#) and Nicola Richard's letter can be found [here](#).

- Dave Penman, General Secretary, FDA; and Malcolm Clark, Convenor of the Council of Scottish Government Unions and PCS Scottish Government Group President gave evidence on Tuesday 1 September. The *Official Report* is available [here](#).

Following this evidence session, Dave Penman submitted further written evidence, this can be found [here](#).

- The Permanent Secretary was asked to give further evidence on policy development on 8 September 2020. The *Official Report* is available [here](#).

Following this evidence session, the Permanent Secretary submitted further written evidence, this can be found [here](#).

- Sir Peter Housden, former Permanent Secretary; and Barbara Allison, former Director of People at the Scottish Government, gave evidence on 15 September. The *Official Report* is available [here](#).

Following this evidence session, Barbara Allison sent two letters to the Committee which can be found [here](#) and [here](#).

The Committee [wrote to Sir Peter](#) to follow up on his evidence session. This letter and [Sir Peter's response](#) have been published on the Committee's webpage.

18. Documentation, information and relevant correspondence related to the policy development phase of the inquiry can be found [here](#).

The Judicial Review

- The Committee held an exploratory session with the Permanent Secretary and the Lord Advocate on the Judicial Review as part of its evidence session on 8 September. The Official Report is available [here](#).
- Judith Mackinnon, Head of People Advice; and Barbara Allison, former director of people, at the Scottish Government, gave evidence on 27 October. The *Official Report* is available [here](#). Prior to this evidence session, Barbara Allison wrote to the Committee, this letter can be found [here](#). Following this evidence session, Judith Mackinnon wrote to the Committee, this letter can be found [here](#).
- Paul Cackette, former Director of Legal Services at the Scottish Government; and Sarah Davidson, former Director General Organisational Development and Operations at the Scottish Government gave evidence on 3 November. The *Official Report* is available [here](#).
- The Lord Advocate and Permanent Secretary gave evidence on 17 November 2020. The *Official Report* is available [here](#). Following this session, both the [Lord Advocate](#) and [Permanent Secretary](#) wrote to the Committee.

19. Documentation, information and relevant correspondence related to the Judicial Review phase of the inquiry can be found [here](#).

Ministerial Code phase

20. The Committee heard from Peter Murrell, Chief Executive of the Scottish National Party on 8 December 2020. The Official Report of this evidence session is available [here](#)

[Note from the Clerk – redactions have been made by the Parliament, the basis for the redactions was not supported by the former First Minister]

SUBMISSION TO COMMITTEE ON LATEST DOCUMENTS RELEASED BY SCOTTISH GOVERNMENT AND PREVIOUSLY UNDISCLOSED DOCUMENTS

INTRODUCTION

The Committee has asked if I could assist with a submission on the latest documents sent by the Scottish Government to the Committee. Some of these had remained previously undisclosed, despite the Judicial Review and criminal disclosure process.


I am happy to do so and will repeat these comments in summary form in my full submission.

My legal team have thus far identified 46 of the near 400 documents in the recent Scottish Government data release, which have not previously been seen by us in either the civil or the criminal process. These are listed using the Scottish Government notation at Footnote 1. Many other relevant documents in this data release had not been disclosed prior to the search warrant served on the Scottish Government of autumn 2019.

Of these, some are of limited interest but many are crucial and could have been significant in both the civil and criminal proceedings. Given that the Judicial Review was won and I was cleared of all charges in the criminal case, it might be asked what does this matter now. It does for two reasons.

First, some of these withheld documents would have added a further powerful argument to the Judicial Review on bias, not just reinforcing the revelations about the role of the Investigating Officer, but also introducing an argument of bias in the actions of the decision maker, the Permanent Secretary.

[Redacted]



Notwithstanding the above, the withholding of relevant evidence to either proceedings contrary to a requirement for disclosure in the civil case and a search warrant in the criminal case, may amount to a contempt of court. We shall therefore refer the matter to the Lord Advocate who has already described before this Committee the rate of disclosure in the civil case as “unsatisfactory”. I suggest it is a great deal more than that.

KEY MATERIAL WITHHELD

1. MEETING OF PERMANENT SECRETARY WITH COMPLAINERS

(DOCUMENTS 633, 524,249, 140, 520, 299, 300 and 270)

These documents show the extent of the prepared briefing by the Investigating Officer in advance of a meeting with the two complainants and the Permanent Secretary in the week beginning 5th March 2018. They reveal that the Investigating Officer, whose role under the procedure is meant to be an impartial collector of facts and preparer of reports, met herself with the Permanent Secretary, was in frequent communication with the complainants and witnesses and was also recommending wide ranging organisational responses. Document INV 270 shows the preparation notes for the meeting with the Permanent Secretary and the complainers.

Given that the first information of any procedure or complaints under it was intimated to me on 8th March 2018, this suggests that the decision maker, the Permanent Secretary, met the complainers before I was even informed of the existence of any complaints.

In her evidence before the Committee, the Permanent Secretary suggested that it would have been “inappropriate” for her to know the identities of complainers before the complaints procedure was approved. It is a much graver matter for the decision maker to be meeting complainers in mid-process.

The procedure adopted by the Scottish Government could have been declared unlawful on many grounds. One of these was that it uses a process by which the person complained about does not even get to present his or her own case, but that it is left to the Investigating Officer to make an "impartial" collection of facts for the decision maker to pronounce upon.

The bias of the Investigating Officer was determined not just because of the breach of clause 10 in the process, but because of the reason that such a clause exists. There is an assumption in common-law against actions which would be seen by a reasonable observer to be unfair. If impartiality of the Investigating Officer is important then the impartiality of the decision maker who thereafter makes a determination based on that information, is even more important.

To withhold this information is reprehensible. To attempt to excuse the withholding of this information is indefensible. However it is not only indefensible it is also inaccurate.

I understand that the Scottish Government are attempting to explain the withholding on the grounds that the information was not caught in the Specification of Documents in the Judicial Review.

That is irrelevant. As Lord Pentland indicated to the court at a procedural hearing of the Judicial Review on 6th November 2018 a public authority has a general duty of disclosure of relevant information and it would be unusual to require a court order to fulfil that duty. The Scottish Government indicated that they would take a responsible approach. The Permanent Secretary knew of this meeting (and the associated notes) and chose not to disclose it, until now, which I find staggering.

If this material had been disclosed, then the apparent bias of the Permanent Secretary as decision maker would have been introduced in our pleadings at the Judicial Review as an additional ground of review. Given the decision of Lord Pentland on apparent bias, it seems highly likely the Judicial Review would have succeeded on that ground also.

[Redacted]

[Redacted]

[Redacted]

2. REVELATION OF LEGAL ADVICE TO COMPLAINERS AND WITNESSES

(DOCUMENTS 640, 625, 507, 659, 462, 213, 210)

Documents in this series demonstrate contact between the Investigating Officer and the complainers throughout the process. The duty of the Investigating Officer under the policy, is to provide an impartial collection of facts. That is not compatible with regular contact with the complainers in the manner and type suggested by these documents.

In these documents the Investigating Officer describes her view of my legal position to both complainers and indeed witnesses.

My legal advice is subject to legal professional privilege. It was presented to the Permanent Secretary to explain to her that the policy she had introduced was neither fair nor lawful. It has now been released to the Committee to assist in the parliamentary process. No permission was ever sought, or given, for that legally

privileged correspondence to be summarised in a partial and incomplete version to others and, in particular, to the complainers in the case.

The irony of civil servants willing to freely dispense my privileged legal advice, while the Scottish Government continues to refuse to divulge its own, will not be lost on the Committee. It seems that the principle of legal professional privilege is a highly selective one as far as the Scottish Government is concerned.

In a letter to the Committee (7th December) Ms MacKinnon seeks to argue that she was merely fulfilling her role of informing the complainers of the progress of the case and relaying information such as the offer of mediation. This is seriously misleading for three reasons.

First, the offer of mediation was relayed to the complainers AFTER it had been rejected by the Permanent Secretary. This is shown for example by document INV 202. The Scottish Government's attempts in its timeline and explanations to conceal this from the Committee are reprehensible.

Second, the Scottish Government were quite entitled in terms of any duty of care to stay in touch with the complainers and keep them up to date with the progress of the procedure. That is not the issue. The issue is that this should not have been done by the "impartial" Investigating Officer and that information should not have included my privileged legal advice. The dangers inherent in these actions are illustrated by document INV104 where the Investigating Officer not only interprets the legal arguments of Levy and McRae, but then goes on to speculate with Ms B on my "thinking" behind the response. These are not the actions of an impartial Investigating Officer.

Thirdly, the documents (eg INV 461) now disclose that the Investigating Officer was revealing her version of the contents of my legal advice not just to complainers, but to witnesses in the case as well.

Similar to the revelations on the Permanent Secretary's meeting, this material should have been disclosed as part of a general duty of disclosure in the Judicial Review and would have enabled my legal team to introduce yet further arguments on the bias of the Investigating Officer.

[Redacted]

I was therefore placed at a disadvantage in both cases by the lack of disclosure.

3. MATERIAL ON CIRCUMSTANCES OF POLICE REFERRAL AGAINST WISHES OF COMPLAINERS

(DOCUMENTS 130, 320, 317, 316, 323 and 325)

The documents make it clear that the reference to the police via the Crown Office was against the wishes of both complainers. In early August 2018, first Ms McKinnon then Ms Richards acting on behalf of the Permanent Secretary, 'sounded out' the complainers on their attitude to a criminal case.

The Permanent Secretary told the Committee in her evidence session on 17th November, that the interests of the complainers were always at the "forefront" of her consideration. Earlier documentation released to this Inquiry indicated that the view of the civil servants when embarking on the process in November 2017 was that any police referral had to respect the wishes of complainants and it will presumably not be contested that this assurance would have been given to the complainers. Another hitherto undisclosed document (INV 584) indicates that they were still being told this as late as 25th July 2018 that their views were "central to decisions that's made" on police referral.

However, when it came to August 2018 (as document INV320 makes clear), Ms Richards specifically highlighted the view of the complainers against criminal proceedings, and this was apparently ignored by the Permanent Secretary.

The Permanent Secretary claimed before the Committee (8th September 2020) not to be "completely aware" of how the police referral; was made. As we now know from these documents, it was made on her instruction by Ms Richards via the unusual route of the Deputy Crown Agent (INV 323) who was sent documentation on 22nd August 2018 although the letter was dated 20th August 2018. The Sunday Post newspaper reported on 26th August 2018, that this was on the advice of the Lord Advocate. The Permanent Secretary said in her

evidence to the Committee that the referral was made “on legal advice”. It would be important to know if something similar was said to the complainers.

The Deputy Crown Agent in turn arranged a meeting with the Chief Constable and another senior officer who, quite correctly, refused to accept the documentation on the grounds that it might prejudice their enquiries.

[Redacted]

4. DOCUMENTS WHICH REMAIN UNDISCLOSED

Despite the general admonition from Lord Pentland in the civil case on the general requirement of disclosure by the Scottish Government, a Commission and Diligence in December 2018, a search warrant in the criminal case, and the repeated calls for documents made by this Committee, it is still far from clear that all relevant documents have been provided. My legal team, the Committee and indeed the Crown Office have all experienced similar frustration, obstruction and delays in securing documentation.

[Redacted]

The Committee has heard evidence that there were 17 meetings between Scottish Ministers, civil servants, a Special Adviser and external Counsel between late August 2018 and early January 2019. It is likely that there were additional meetings before that date, when Counsel were first instructed. The Committee has heard evidence from Mr Cackette that, in addition, there were daily meetings to discuss the progress of the Judicial Review and Ms McKinnon indicated that she herself attended such meetings some three times a week. She also told the Committee that she continued her role of reporting back to the complainers.

Despite this, minutes, ‘OneNote’ notes and exchanges between civil servants about the progress of the Judicial Review are missing entirely from the documentation presented to the Committee. In her evidence on 1st December Ms McKinnon referred to the “update emails that went to the complainers.” These updates should be provided to the Committee.

Document INV 212 provides an indication of why that might be the case. In this email of 28th August 2018, Ms Richards provides an update on the early stages of the Judicial Review, including what appears to be legal advice from the SGLD which includes the prospects of “sisting” (suspending) the Judicial Review behind the criminal investigation.

The question of sisting has been mentioned by a number of witnesses including Mr Cackette and the Lord Advocate. It is certainly a matter which was discussed at these meetings, on which advice was given and information was forwarded on to the complainers and perhaps others. This has now been confirmed by Ms Mackinnon in her letter to the Committee of 7th December 2020 but as yet there are no documents provided to show how this was done.

It would be instructive for the Committee to see the notes and minutes of any of these meetings and the communications and emails of civil servants attending them, to judge how the prospects of success in defending the Judicial Review were being regarded in Government and whether it was hoped or believed that the Judicial Review (and the likely consequences of losing that Judicial Review) might be delayed indefinitely behind the prospect of criminal proceedings.

SUMMARY

My legal team has identified a large number of documents which have not been previously disclosed in the civil or criminal proceedings.

These materials have been provided to me and my legal team in a drip feed manner from the beginning. I was forced to pursue a lengthy and very expensive Commission process over Christmas 2018 to enable recovery of documents which the judge had said in November ought to have been provided without formal orders and which the Scottish Government had previously claimed did not exist. [Redacted]

A number of these are highly relevant and could have been influential in both proceedings. There seems to be no reasonable explanation for this apparent and flagrant violation of court direction, orders and search warrants.

The documents, as produced, have followed a familiar pattern. The documents produced via orders of court have generally been damaging to the case of the Scottish Government. The same applies to these documents extracted by the Committee and now being seen for the first time. It raises the question of what further documentation remains unseen.

In the Judicial Review, this behaviour resulted in expenses being awarded on the punitive 'agent/client, client paying' basis. [Redacted] We accordingly will pursue that matter with the Lord Advocate.

Alex Salmond
14 December 2020

Footnote 1: List of undisclosed documents

- 576, 673, 6, 357, 161, 135, 356, 17, 286, 54, 80, 584, 156, 633, 535, 524, 96, 249, 140, 520, 299, 300, 270, 662, 640, 625, 507, 659, 462, 213, 210, 425, 421, 204, 329, 530, 661, 324, 110, 209, 130, 320, 317, 316, 323, and 325.



The Scottish Parliament
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Committee on the Scottish Government Handling of Harassment Complaints

John Swinney MSP
Deputy First Minister

c/o Clerk to the Committee
Room T1.03
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BY EMAIL

SGHHC@parliament.scot

23 December 2020

Dear Mr Swinney

I am writing to inform you that the Committee has now considered the former DGODO report referred to in your letter dated 21 December and accompanying documents.

The Clerks have highlighted to your officials which confidential elements of the report the Committee would wish to be able to refer to in public session when questioning witnesses. The Committee looks forward to receiving the paraphrased text of the redactions to inform all future evidence sessions.

The Committee has asked me to highlight that it wishes to see the unredacted report again in the New Year in a further 'reading room' in part to ensure the paraphrased wordings provided by the Government encapsulates the redacted text. I appreciate that any such paraphrasing will be framed to take account of the fact that the Government continues to assert legal privilege over the text.

The reading room and the ability to view information of relevance to the inquiry's remit is progress. However, there are elements of the legal advice which the report does not cover, for example any counsel advice from August to the beginning of October 2018 including counsel advice on the initial petition. There are also elements of the judicial review process that the Committee understands to have been key moments, about which the report goes into very little detail. For example, details of legal advice around the 19 October 2018 when, the Committee understands from evidence, prior contact of the investigating officer with the complainers became a focus for internal and external lawyers.

Given the Committee's unanimous agreement that sight of the legal advice itself is required, you will be unsurprised to hear that the Committee remains determined to see further advice, in line with the terms of the motion agreed on 15 December which states:

That the Committee considers that in order to discharge its duties, it needs to see the legal advice from counsel and associated minutes of meetings relating to the Judicial Review with LPP waived and that this needs to be published in the interests of transparency; agrees to continue discussions with the Scottish Government including to secure access to this legal advice in a reading room to be provided by 14 January 2021; in the interim accepts the Scottish Government offer to read the former DGODO's report of 29th December 2018; subject to agreement that notes can be taken to refer to in questioning Scottish Government witnesses and that these witnesses should not refer to legal privilege in answering questions relating to the report; insists that the SG waives LPP over the document so as to enable publication of whatever contents the Committee deems fit.

As such, I should be very grateful if you could confirm the Government's position on the remainder of the motion and in particular the Government's position on the Committee viewing the legal advice referred to in the motion by 14 January 2021.

The Committee seeks confirmation that the Government is amenable to such a request given the terms of recent negotiations. In addition, given the restrictive timescales the Committee is working to, in order to complete its inquiry before the end of the Parliamentary session, I would be grateful for an indication as soon as is practicable as to whether viewing these documents in a reading room would be possible in mid-January as per the Committee's motion.

Yours sincerely

Linda Fabiani MSP
Convener, Committee on the Scottish Government Handling of Harassment
Complaints



John Swinney BPA/MSP

Linda Fabiani MSP
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8 January 2021

Dear Ms Fabiani

Thank you for your letter of 23 December 2020 following the Committee's reading room session on 22 December to view, in confidence, the submission from the former Director General for Organisational Development and Operations (DGODO) of 29 December 2018, summarising the legal advice ahead of the final decision to concede the judicial review brought by the former First Minister.

I note the Committee's request for a paraphrased version of the DGODO's submission, replacing the confidential text which is subject to legal privilege. Officials will arrange to provide a version through the normal arrangements for sharing documents with the Committee, ahead of the Committee's meeting on 12 January. The additional text in the version will paraphrase the confidential text where possible and otherwise will draw on the evidence already provided to the Committee, in particular by the Lord Advocate in his oral evidence on 17 November 2020 about the Scottish Government's legal position at each stage. In line with legal professional privilege, the paraphrased text does not reveal the sources or content of legal advice.

As requested, our officials are also engaging around the practical arrangements for the unredacted former DGODO submission to be made available to named Committee members and staff in a further reading room session. This is subject to the same terms of agreement as for the reading room session on 22 December. As set out in the agreement, if Committee members subsequently want to ask any Scottish Government witnesses questions about information that is legally privileged this should be undertaken in a private session. In line with established principles, witnesses in public sessions are not able to refer to legally privileged information in open session. I understand that the Committee has indicated that it wishes to question the Permanent Secretary on the former DGODO submission at its session on 12 January and that it intends to do so in open session. Notwithstanding the provision of the new Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot



paraphrased material, the Committee should be fully aware of the restrictions placed on the Permanent Secretary in answering questions about this submission in open session.

I note the Committee's request for access to further information about the content of legal advice between August and October 2018. I confirm that the Committee has already received copies of the pleadings which set out the Scottish Government's response to the initial grounds for the judicial review brought by the former First Minister in August 2018. These pleadings were developed based on the legal advice received at the time. The Government was satisfied that all of the grounds could, and should, be resisted. As set out in previous evidence, the issue relating to prior contact with the complainers – which ultimately led to the judicial review being conceded - was not one of the grounds on which the petition was initially raised.

You ask specifically about any legal advice received around 19 October 2018. The position has already been set out by the Lord Advocate in his evidence to the Committee on 17 November 2020. In late October 2018, the Scottish Government first identified the possible issue relating to contact between the investigating officer and the complainers. In response the Government had to consider that issue relative to the interpretation of the wording of the procedure and secondly to investigate the factual position of the nature of the prior contact. As the Lord Advocate set out in his evidence: *"...when an issue is raised in the context of litigation, it is rarely a kind of binary point. Almost invariably, it is a matter that needs to be considered and investigated and, if there are facts that must be explored, they must be explored as far as they can be, before a conclusion is reached."* That process was undertaken in late October and early November and led to the Scottish Government making factual averments on 5 November about that contact, and voluntarily disclosing documents to the petitioner. The Committee already has access to the pleadings that set out the legal position following that process. The Committee has also seen, in confidence, a summary of the legal advice received at the end of October following the identification of this issue. Scottish Government witnesses have acknowledged that the process of establishing and collating the detail of the nature of the prior contact during October to December 2018 was not sufficiently robust and ultimately led to the circumstances of the Commission on 19 and 21 December 2018 that caused the judicial review to be conceded.

Finally, I note the Committee's request for the Government to waive legal privilege over legal advice from external Counsel and associated minutes. My view remains as set out previously, including in my letter to the Parliament of 1 December.

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

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The Scottish Government has already taken significant steps to share information with the Committee, including providing copies of the pleadings; oral evidence from both the former interim Director of Legal Services and the Lord Advocate; and, exceptionally, confidential access to a legally privileged summary of the legal advice that led to the decision to concede the judicial review. I am confident that the Committee has access to information to enable it to fulfil its remit.

JOHN SWINNEY

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

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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