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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

2 March 2021

Dear Convener

I refer to my letter to you of 1 March 2021 and your letter to me, emailed at 14:52 today. I will reply separately to your letter emailed at 16:08.

We are publishing today copies of written advice from external Counsel during the judicial review brought by Mr Salmond and other associated documents. As requested by the Committee, the Scottish Government will publish these documents this afternoon on its website.

As set out in my letter to you of 1 March, I confirmed that I have determined, consistent with the terms of section 2.40 of the Scottish Ministerial Code, that there are exceptional circumstances which mean that the balance of public interest now lies in releasing to the Committee and for publication of the contents of these documents.

These exceptional circumstances have arisen in the past few days. Up until this point, my view remained that the balance of public interest remained in the Government maintaining legal professional privilege, beyond the sharing in confidence with the Committee of the summary of legal advice in the submission of 29 December 2018 by the former Director General for Organisational Development and Operations (DGODO). Within the short timescale available and given the need to complete essential document checks and data notifications, we have focused on making available to the Committee those documents that reflect the concerns raised by the Committee during the Judicial Review phase of its work.

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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As set out in my response to the topical question from Murdo Fraser MSP, the documents we are making available to the Committee today cover the advice from external Counsel that informed decisions at critical points in the progress of the judicial review, in particular around the prospects of success. With the agreement of the Law Officers, the Scottish Government has waived legal privilege over these documents in these exceptional circumstances. In light of your letter of today we will consider whether there are further documents that should be released, subject to essential statutory checks and notifications. We will do this as a matter of urgency.

The documents being published today need to be viewed in the context of the key stages of the judicial review process, set out in the oral evidence from the Lord Advocate; in the former DGODO's submission of 29 December 2018 and the accompanying statement provided to the Committee in December 2020. In line with the request in your letter of earlier today, we are waiving legal professional privilege over the DGODO's submission which is being published without significant redactions.

It is important to note that in any legal case a range of opinions are expressed. The concluded legal opinion of the Scottish Government is therefore a result of a range of views being considered. It is not the case that the opinion of external counsel alone constitutes the legal advice to Ministers. Indeed, the Ministerial Code is clear that the primary role lies with the Scottish Government's Legal Directorate (SGLD) and, ultimately, with the Law Officers.

We are sharing the minute of 27 September 2018 from senior and junior Counsel. This sets out an assessment of the merits of the petition brought by Mr Salmond and the Government's prospects of defending the proceedings at that point. The assessment confirms that the majority of the grounds of challenge raised by Mr Salmond were assessed at that time as "weak" and were considered capable of being resisted successfully. As is normal in litigation advice, the document identifies potential areas of risk and options for resisting these. The document confirms that the Scottish Government was justified in defending the judicial review brought by Mr Salmond.

We are also releasing Counsel's written advice of 31 October and 6 December which demonstrate the development of Counsel's concerns around the issue of prior contact between the Investigating Officer and the two complainers and whether this could be reconciled with the text of paragraph 10 of the Scottish Government's Harassment Procedure.

On 31st October senior Counsel raised the prospect of conceding and described the issue as extremely concerning; Counsel set out two options, one of which was concession, the other was to disclose the issue and offer grounds for resisting.

As the case progressed during November and early December, this issue was identified as the greatest area of risk for the Government's prospects in the judicial review.

Advice of 6 December was discussed in consultation with the Law Officers on 11 December. The minutes of 11 December following consultation between Counsel and the Law Officers confirm that there remained good public policy reasons for continuing to defend the case and benefits in securing the clarity of a judicial finding from the Court. The minute also states that "his note was not intended to convey that he didn't think we have a stateable case."

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We are attaching Counsel's advice of 19 December following the Commissioner hearing that day which reflects the pressurised atmosphere of the process of identifying and handing over documents. As has been acknowledged in evidence to the Committee, the Scottish Government's handling of that process was flawed and this is regrettable. This, along with the subsequent Commission hearing on 21 December, was the moment at which the Scottish Government's case became no longer stateable. As set out in the former DGODO submission of 29 December, this was a shared view of both internal and external legal advisers. The case was reviewed and conceded quickly after this, taking account of further internal legal advice on the terms of the concession, which we are also sharing.

The documents reflect the advice received at key points in the Judicial Review process of most relevance to the Committee. Further, more technical and administrative documents are currently the subject of necessary checking processes, but will not change the narrative described above. We will do this as swiftly as we can.

The documents published today demonstrate that the Scottish Government did not ignore legal advice in continuing to defend the judicial review, contrary to the terms of the Scottish Ministerial Code or the Civil Service Code.

The documents demonstrate that there was no "malicious" intent against Mr Salmond. The Scottish Government was within its rights to defend a judicial review raised against it by Mr Salmond and to continue to defend it whilst it still had a stateable case. There were good public policy reasons for continuing to defend the case and to seek a determination from the Court.

After initial consideration in September and assurance that appropriate arrangements were in place to protect the identity of the complainers, the Scottish Government did not seek at any stage to sist the judicial review.

Once it became clear that the Scottish Government no longer had a stateable case after the Commission hearings in late December 2018, the Government quickly reviewed the position and conceded the case. The view that the Government no longer had a stateable case was agreed by both internal and external advisers.

Contrary to claims that have been made, the Court did not "judge" that the Scottish Government Procedure was "unlawful" or, indeed, "illegal". The Government conceded the case on a single ground of apparent bias in the application of the Procedure in this specific case.

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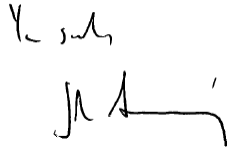


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We have shared these documents following relevant statutory processing and notifications.

I hope this information is helpful to the Committee and addresses allegations and assertions that have been raised in recent days.



JOHN SWINNEY

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