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SP SGHHC

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SPSGHHC

Attachment 2

From: [Redacted] on behalf of [Permanent Secretary](#)
To: [Evans L \(Leslie\)](#)
Cc: [Thomson KAL \(Ken\) \(Director-General\); Allison B \(Barbara\); Chief Financial Officer; \[Redacted\] Permanent Secretary; Davidson S \(Sarah\); Cackette PH \(Paul\)](#)
Subject: RE: Official - sensitive: Judicial Review
Date: 31 December 2018 17:12:26
Attachments: [FW PRIVATE CONFIDENTIAL AS vs Scottish Ministers - Draft Statement.msg](#)
Sensitivity: Private

Perm Sec

As requested, please find attached advice from SGLD in relation the nature and basis of concessions.

[Redacted]

[Redacted]

[\[Redacted\]](#)

From: [Redacted]@gov.scot> **On Behalf Of** Permanent Secretary
Sent: 31 December 2018 11:51
To: Davidson S (Sarah) [Redacted]@gov.scot>; Cackette PH (Paul) [Redacted]@gov.scot>
Cc: Evans L (Leslie) [Redacted]@gov.scot>; Thomson KAL (Ken) [Redacted]@gov.scot>; Allison B (Barbara) [Redacted]@gov.scot>; Chief Financial Officer [Redacted]@gov.scot>; [Redacted]@gov.scot>; Permanent Secretary [Redacted]@gov.scot>
Subject: RE: Official - sensitive: Judicial Review
Sensitivity: Private

Sarah and Paul

The Permanent Secretary is considering the attached advice. She would be grateful for further advice from SGLD during the course of today on the specific nature and basis on which any concession may be made.

I have included [Redacted] given Paul is out of the country.

[Redacted]

[Redacted]

[\[Redacted\]](#)

From: Davidson S (Sarah) [\[Redacted\]@gov.scot>](#)
Sent: 29 December 2018 18:27
To: Permanent Secretary [\[Redacted\]@gov.scot>](#)
Cc: Evans L (Leslie) [\[Redacted\]@gov.scot>](#); Cackette PH (Paul) [\[Redacted\]@gov.scot>](#);

Thomson KAL (Ken) [Redacted]@gov.scot>; Allison B (Barbara) [Redacted]@gov.scot>; Chief Financial Officer [Redacted]@gov.scot>

Subject: Official - sensitive: Judicial Review

Sensitivity: Private

Permanent Secretary

Please find attached advice fulfilling your commission to me of last week in relation to the current Judicial Review proceedings.

I am available to discuss the contents of this note at any point.

Sarah

Sarah Davidson

DG Organisational Development and Operations

(4)[Redacted]

[Redacted]

From: [Redacted]
To: [Redacted] [Redacted] Davidson S (Sarah); [Redacted]
Subject: FW: [PRIVATE & CONFIDENTIAL] AS vs Scottish Ministers - Draft Statement
Date: 31 December 2018 16:10:10

[Redacted]

Please see the below from the LA which is his response on getting as much precision on the terms of the concession as we can, consistent with the note to the Perm Sec and the developing Statement.

See in particular (iv) and (v) and the suggestion at the end of (iv). This to me matches the intended Statement sufficiently closely.

As discussed earlier, the precise wording will need to be worked up but it is helpful to see LA confirmation that we do the deciding, if needs be.

The pinch point in the below ties with when counsel are asked for a view on what to say. I take the point made by the LA but, if our own discussions with counsel are essential before the decision goes live, I cannot see that being resolved in time for 12:00 on Thu.

This is not least because a final final basis for disposal will need either agreement with the other side (which by definition must wait until after we go live) or a direction by the LA telling our counsel since I can't see them fitting in with what we need in the requisite time scale.

I'm happy to go back to the LA and say that.

Meantime, subject to handling of counsel in the period ahead, we now have from the LA a steer on the concession and how it would look.

[Redacted]

PS - I gather that there was some discussion just now on AS continuing. The LA and I discussed that on Saturday and he thought that, in the face of us saying the decision letter can't be sustained, the court would have no basis to contemplate continuing and is unlikely to entertain such a suggestion.

Sent with BlackBerry Work (www.blackberry.com)

From: Lord Advocate [Redacted]@gov.scot>
Sent: 31 Dec 2018 16:01
To: [Redacted]@gov.scot>; "Cackette PH (Paul)" [Redacted]@gov.scot>
Cc: [Redacted]
Subject: Re: [PRIVATE & CONFIDENTIAL] AS vs Scottish Ministers - Draft Statement

Afternoon both,

Please see the below from the Lord Advocate for your attention:

(i) With a view to effective handling it seems to me: (a) the concession should be narrowly framed to reflect accurately and carefully the legal basis upon which Ministers are conceding the petition; and (b) the basis of the concession should be explained as fully as it can be.

(ii) It may be unlikely that it will be possible to avoid the phrase “apparent bias” being used at all, in all communications (including with the court); however, the use of that phrase should, in my view, be minimised, and should always be coupled with an appropriate explanation, intelligible to a lay person, of what that means – ie that the process must be seen to be impartial as well as actually impartial – and what it does not mean (ie that the process was actually tainted by bias).

(iii) It also seems to me that it may be helpful to reflect: (a) that the legal conclusion is based on a review of the case, in light of all the information now available, including the documents which were recently disclosed; and (b) that Government always keeps any litigation under review, in light of the case as it develops, and that is what has happened here.

(iv) It is for SG to decide on what basis it is prepared to concede the petition. As I understand it, SG will concede that the decision should be reduced, and it would be appropriate for SG also to invite the Court to pronounce a declarator in appropriate terms which would support reduction: counsel’s input will be necessary on the terms of the declarator, but I envisage that this could be along the lines of the following: that having regard to the totality of the IO’s dealings with the complainers before her appointment, the reasonable observer would conclude that there was a real possibility that she could not act impartially as she was required to do by the procedure.

(v) If SG proposes to concede reduction, it is not clear to me, subject to counsel’s advice, that it would be necessary to enter into a joint minute. Certainly, it is not for the petitioner to dictate the basis upon which SG concedes. No doubt it is possible that the petitioner could say that he would like the petition to continue, notwithstanding the concession, so that his other challenges could be adjudicated on – and such a position might be supported on the basis that Ministers are reserving the right to reconsider the matter once the police inquiries are at an end. Whether to accede to such a position would ultimately, in the absence of agreement, be for the Court, and SG might be quite happy with the petition continuing to provide the clarity which Ministers have hitherto thought was useful. However, I would be very surprised if the Court would entertain the proceedings continuing, to challenge a decision where the Minister propose to concede was flawed.

(vi) It would be useful to have counsel’s input on these matters before the decision “goes live”; and, ideally, before final decisions are made on handling, though I appreciate that the intervention of the holiday makes that difficult.

Kind regards,

[Redacted]

Sent from my BlackBerry 10 smartphone.

From: Lord Advocate

Sent: Monday, 31 December 2018 12:24

To: [Redacted]

Subject: [PRIVATE & CONFIDENTIAL] AS vs Scottish Ministers - Draft Statement

As discussed.

Kind regards,

[Redacted]

Sent from my BlackBerry 10 smartphone.

From: [Redacted]@gov.scot>

Sent: Monday, 31 December 2018 12:23

To: Lord Advocate

Subject: Statement

[Redacted]

[Redacted]

[Redacted]

[\[Redacted\]](#)