

From: [Redacted]
To: [Redacted]
Cc: [Redacted]; [Redacted]; [Redacted]
Subject: FOI - 202000094934 - appeal - Stage 2 - request for submissions - notification to reviewer
Date: 18 January 2021 15:47:00
Attachments: [letter8202001437.docx](#)

[Redacted]

[Redacted] was in touch in mid-December to advise that [Redacted] had appealed to the Commissioner about the review response in the above case – you may remember that we discussed it, with OCT colleagues, in late October before the response was finalised.

We have now been asked by the Commissioner's office for our submissions in response to the appeal, and these are due by **Monday 1 February**. While we would normally be asked to supply the withheld information first, the pattern for requests that relate to the complaints against former First Minister has been for the Commissioner to consider our submissions first and then decide whether or not he needs to see the information in question. OCT colleagues will be familiar with this approach.

We have been asked for submissions on six points, all bar the first of which relate to the application of section 17(1) (information not held) to the information requested in questions 2 and 2a in the review response:

1. Failure to comply with the timescales [Redacted]
2. We are asked to comment on [Redacted] view that (read short) reduction does not have the effect for which we contend.
3. Questions 3 and 4 are related to question 2 – the argument is broadly that we are taking an unduly narrow interpretation (i.e. we know that [Redacted] wants the decision report, reduced or otherwise [Redacted])
4. Question 5 follows a similar theme to Questions 3 and 4, but approaches it from the angle that we may not have given [Redacted] sufficient advice and assistance. [Redacted]
5. Question 6 is a fairly standard one, and asks us to explain how we ascertained the information within scope.

I think it would be helpful for us to discuss in early course, but it may be helpful if I circulate outline arguments in response to the first five questions before we do so. I will need some input from you (or the original casehandler) about how you determined what was in scope (Question 6). If we could aim to discuss on Thursday that should give us the best opportunity of drafting and agreeing the submissions within the Commissioner's timescales. Is that feasible from your (and OCT colleagues') perspective?

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy and Casework | Freedom of Information Unit

[Redacted]

I am currently working from home, and can be contacted by email, Skype for Business, Microsoft Teams, or on my mobile.

I do not work on Wednesdays at present – please contact foi@gov.scot if you need assistance

in my absence.

From: Jennifer Ross <jross@itspublicknowledge.info>

Sent: 18 January 2021 12:13

To: [Redacted]@gov.scot>

Cc: Freedom of Information <foi@gov.scot>; [Redacted]@gov.scot> **Subject:** Application to the Scottish Information Commissioner

Our ref: 202001437

Your ref: 202000094934

Dear [Redacted]

Please see the attached letter which is seeking the Ministers' comments on the application from [Redacted]

A response is required by **1 February 2021**.

If you have any questions about this letter, or the case in general, please don't hesitate to get in touch.

Please note that I only work mornings.

j.

Jennifer Ross
Freedom of Information Officer

Scottish Information Commissioner

Kinburn Castle, Doubledykes Road
St Andrews, KY16 9DS

Email: jross@itspublicknowledge.info

Web: www.itspublicknowledge.info

Twitter: [@FOIScotland](https://twitter.com/FOIScotland)

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Our Ref: 202001437

Your Ref: 202000094934

[Redacted]
Lead Caseworker By
email

18 January 2021

Dear [Redacted]

**Application for Decision by the Scottish Information
Commissioner Applicant: [Redacted]
Department/Agency: People Directorate**

I refer to previous correspondence between you and our Validation Officer in connection with [Redacted] request for information relating to the Scottish Government's handling of harassment complaints. I am the investigating officer for this case. If you have any queries during the investigation, please contact me at jross@itspublicknowledge.info.

I would be grateful if you would now provide me with any comments you would like to make on [Redacted] application, and also provide the following information or answers to the questions below, to enable me to make progress with the investigation.

Please let me have your response by 1 February 2021. If no substantive response (or notification of any reasons for delay in responding) is received by this date, it will be assumed that you have no submissions to make and the Commissioner may choose to decide the case accordingly. If you are unable to respond within this timescale because of the effects of the COVID-19 pandemic on your authority, let me know as soon as possible.

If you wish to rely on arguments previously made, either in the initial response or in the review outcome, please let me know – they do not have to be restated.

Late review outcome

[Redacted] made his requirement for review on 28 September 2020, but the Ministers did not respond until 26 November 2020, well outwith the 20 working days specified in section 21(1) of FOISA. In his application to the Commissioner, [Redacted] expresses dissatisfaction with the Ministers failure to complete their review timeously.

1. Please comment on the Ministers' failure to comply with the timescales contained in section 21(1) of FOISA, and indicate how they intend to prevent similar failures occurring in future.

Requests 2 and 2a

In their review outcome, the Ministers disregarded their previous reliance on sections 26(c), 30(b)(i) and (ii), 35(1)(g), 36(2) and 38(1)(b) of FOISA, and instead argued that the information requested by [Redacted] was in fact, not held.

The Ministers argued that because the original report into the two harassment complaints against Mr Salmond was reduced by the court it meant that original report did not set out the outcome of either complaint.

The Ministers stated, "Accordingly, the Scottish Government does not have the information you have requested in question 2 [and 2a] because an outcome has not as yet been reached in relation to either complaint."

In his application to the Commissioner, [Redacted] refuses to accept that section 17(1) applies to the information he asked for in request 2 and 2a. He notes that he had asked for the outcome of any complaint, including an official report, and that this was not provided to him on the basis that the outcome of the complaints in question are ongoing. [Redacted] contended that this was categorically inaccurate. He acknowledges that the outcome of the complaints were reduced by the Court, but he argues that this does not mean that an outcome was not reached and "by no means does it follow that the Scottish Government does not hold any information on the topic".

[Redacted] argues that either the decision report exists and is held by the Scottish Government or the judicial review did not take place and the report was not handed over to the Crown Office in connection with the criminal investigation into Mr Salmond. [Redacted] also argues that the retrospectivity of the decision to reduce the report does not scrub it from existence in a Freedom of Information sense. He notes that his request sought the "outcome" and not the "final outcome", which appears to be the interpretation made by the Ministers.

2. Please comment on the points, outlined above, made by [Redacted] in his application to the Commissioner.

It is clear to me that in their initial response the Ministers understood exactly what information [Redacted] was looking for, but at the review stage they chose to interpret his request in a narrow way, taking the word "outcome" to mean "final, legal, outcome".

I contend that the Ministers should have understood the request to mean the outcome of the original investigation into the complaints against Mr Salmond, regardless of the current legal standing of that outcome.

3. Please explain why the Ministers have taken such a narrow interpretation of [Redacted] request, given that they clearly understand the information he is seeking.
4. If the Ministers now accept that they do hold the information requested by [Redacted] please provide me with copies of that information, indicating what exemptions (if any) are being relied on to withhold it from [Redacted]

Section 15(1) of FOISA, provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who has made a request for information.

Given the Ministers' narrow interpretation of [Redacted] request at the review stage, and given their clear understanding of the information that [Redacted] is seeking, it is not clear to me how the Ministers, in this instance, have complied with their duties under section 15(1) of FOISA. For example, the Ministers do not seem to have offered [Redacted] any advice on re-phrasing his request in order to capture the information he is clearly seeking (and which is clearly held).

5. Please set out the Ministers' views as to whether or not they have complied with the requirements of section 15(1) of FOISA, in responding to [Redacted] information request.

6. Please explain how you established that your authority does not hold any information covered by this request. You should describe the searches carried out, including the records which were searched and any keywords and other search parameters used. If your searches involved email correspondence with other colleagues, it would be helpful to see copies of these emails. If other colleagues were consulted or otherwise involved in the searches, please explain why these individuals were considered relevant. If no searches were considered necessary, please explain why.

Please provide copies of any documents which you consider relevant and which provide evidence in support of your submissions, particularly where this shows the searches you have carried out for the information (for example, screenshots showing the results of electronic searches).

The Commissioner has issued guidance for Scottish Public Authorities on what to expect during an investigation carried out under FOISA or the EIRs. I strongly recommend that you read the guidance before responding to this letter if you have not already done so. The guidance is available on our website:

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=8370&sID=105>.

If you would prefer a printed copy, please let me know. Please note, in particular, the section on exemptions and the standard of submissions required by the Commissioner.

It is your responsibility as a public authority to justify your response to the applicant's information request and request for review. If your submissions fail to provide enough reasoning or evidence, the Commissioner may order you to release the information or to reconsider your response to the request.

The Commissioner will never share any of the withheld information with the applicant. However, he may decide to share some of the information from your submission to allow the applicant to comment on relevant matters, where this is necessary to help him reach a decision on the case. Similarly, where the Commissioner considers it necessary, the contents of the submission may be referred to in his decision on the case.

If you consider that any part of the submission should not be shared in this way, please let me know, explaining your reasons (with reference to the exemptions in FOISA). While your views will be taken into account, the final decision on whether information will be disclosed (to the applicant or in the decision) will be the Commissioner's.

If any information relevant to the case comes to light during the investigation, it is your responsibility to let me know as soon as possible. This is particularly important if you discover information covered by the request.

Sometimes it is possible to resolve a case without requiring a decision from the Commissioner, if the applicant is willing to withdraw their application for a decision. I would be glad to hear any suggestions you might have for resolution. If changes in circumstances create an opportunity for the case to be resolved, or otherwise affect the need for a decision, please let me know as soon as possible.

I would be grateful if you could provide me with your email address and direct telephone number for future contact. Please quote the case reference number in any future correspondence.

Yours sincerely

Jennifer Ross
Freedom of Information Officer

From: [\[Redacted\]](#)
To: [Jennifer Ross](#)
Cc: ["Margaret Keyse"](#)
Subject: FOI - 202000094934 - 2020001437 - appeal - submissions for the Scottish Ministers
Date: 12 March 2021 16:56:00
Attachments: [FOI - 202000094934 - appeal - final submissions.pdf](#)
[FOI - 202000094934 - appeal - Document A.pdf](#)
[FOI - 202000094934 - appeal - Document B.pdf](#)
[FOI - 202000094934 - appeal - Document C.pdf](#)

Dear Jennifer,

I refer to your email of 18 January 2021 in connection with the above appeal and now attach submissions on behalf of the Scottish Ministers, together with three accompanying documents.

If you require anything further, please do not hesitate to contact me.

Kind regards,

[Redacted]

[Redacted] | Head of Policy and Casework | Freedom of Information Unit

Scottish Government | 2W | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

I am currently working from home, and can be contacted by email, Skype for Business, Microsoft Teams, or on my mobile.

I do not work on Wednesdays at present – please contact foi@gov.scot if you need assistance in my absence.

[Redacted]
[Redacted]
[Redacted]

Jennifer Ross
Office of the Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

By email only to jross@itspublicknowledge.info

Your ref: 2020001437
Our ref: 202000094934

12 March 2021

Dear Ms Ross

APPLICATION FOR DECISION BY THE SCOTTISH INFORMATION COMMISSIONER
APPLICANT: [Redacted]
SUBMISSIONS FOR THE SCOTTISH MINISTERS

I refer to your letter of 18 January 2021 in connection with [Redacted] application for a decision in relation to his request for information relating to the Scottish Government's handling of harassment complaints, and to our subsequent correspondence with the Head of Enforcement about extending the period for submissions in this and related cases. We would make the following submissions in response to the queries you have raised.

Background

The requester asked for a range of information in connection with the Scottish Government's handling of harassment complaints. In particular, he asked for:

- 1) the date, nature of allegation, and the name of the person alleged to have harassed someone for each complaint dealt with using the Scottish Government's procedure for handling harassment complaints involving current or former Ministers ("the procedure")
- 2) the outcome of each complaint including any official report
- 2a) if a meeting took place as part of the outcome of the investigation into a complaint, the date, time, location, attendance record, agenda, minutes and any handouts provided to attendees
- 3) whether the procedure has been used since the former First Minister's judicial review

3a) if not, why not.

In his requirement for review, the requester did not take issue with our response to questions 1, 3 and 3a, and so we did not address them further. As our response to question 1 indicated, the procedure had been used in relation to two complaints made about the former First Minister, Mr Alex Salmond. Questions 2 and 2a therefore sought information in connection with those complaints.

Judicial review proceedings

On 29 August 2018, Mr Salmond commenced judicial review proceedings against the Scottish Government in which he sought to review the handling of those complaints.

On 8 October 2018, Lord Woolman made an order withholding the names and designations of the complainers and any other information relating to the complainers that would lead to their identification under rule 102.3(5) of the Rules of the Court of Session 1994. He also made an order under section 11 of the Contempt of Court Act 1981 restraining the publication by any means of such information relating to the complainers. The order also allowed the complainers to be referred to as Ms A and Ms B in the judicial review proceedings. A copy of the order of 8 October is enclosed (**Document A**).

On 8 January 2019, the judicial review proceedings were concluded. Our solicitors have confirmed that, at the hearing when the proceedings were disposed of, Lord Pentland emphasised that the section 11 order continued (and continues) to have effect. We address the disposal of the proceedings, and in particular the effect that it has, in response to question 2 below.

However, at this stage we would observe that, against this factual background, the request was a particularly sensitive one. It seeks to obtain information about the outcome of a complaints procedure when that outcome has been reduced by the Court of Session, and when orders have been made by the Court prohibiting the disclosure of information that would lead to the identification of the complainers.

Related cases

There are a number of parallels between this application for a decision and an earlier one on the same broad subject ([Decision 125/2019](#)). In that case, the requester sought the complaints made by Ms A and Ms B. **[Redacted]**

Question 1

We regret that our review response was issued late to the requester, and we apologised for this at the time. Given the particular sensitivity of the information requested in questions 2 and 2a of the request, only a very limited number of Scottish Government staff were in a position to handle the original request or to undertake a review, as a result of the need to protect the identities of Ms A and Ms B. Within the FOI Unit, advice on matters relating to the former First Minister is similarly provided only by the Head of Unit and by me, in order to limit the number of staff with whom information about these particularly sensitive issues is shared.

Unfortunately, the review coincided with planned periods of leave for both the reviewer and for me. Given the complexity of the issues arising in the review, it was not possible to

reallocate it, and indeed we consider that this would have delayed rather than expedited the review response. The review request also prompted a more detailed appraisal of the precise status of the requested information (to which we return below) and this required extensive consideration of detailed advice on the point which – as you observe – resulted in the Scottish Ministers substantially altering their approach to the request as between the request and review stages.

We submit that the delays arising in responding to this requirement for review are particular to the specific case, and we apologise again for the lateness of the response.

Question 2

In our review response, we substituted a new decision in respect of questions 2 and 2a of the request, indicating that we did not hold the information requested and giving notice under section 17(1) of FOISA accordingly.

We observe that the requester asked for the outcome of the complaints, including any official report. Shortly put, the Scottish Ministers' position is that the purported decision report of 21 August 2018 was reduced by the Court of Session on 8 January 2019, and a copy of the interlocutor is enclosed (**Document B**). Reduction of a document deprives it of all legal force and effect¹, and accordingly it is our contention that the reduced decision report does not represent the outcome of the complaints in question. The practical effect of reduction on a decision is to return matters to the position that they were in before the decision was taken. Accordingly, we consider that the direct consequence of the decree of reduction is that the complaints in question have not yet reached an outcome. If anything, this is fortified by the fact that the Court also reduced the investigating officer's reports on which the decision report rested.

As the First Minister observed to the Parliament in her statement on 8 January 2019, it remains open to the Scottish Government to reinvestigate the complaints ([Official Report](#), 8 January 2019, cols. 61 and 62). It would not be in a position to do so had the complaints process reached an outcome.

In short, we disagree with the requester about whether an outcome has been reached in the two complaints in question. As a matter of law, it is our position that no such outcome has been reached. While the reduced decision report of 21 August 2018 appeared to represent an outcome, it ceased to be the outcome when reduced and the matter remains open for redetermination.

In our view, the question is not whether the reduced decision report exists or not. It is whether it is within the scope of the request. In our submission, the requester did not ask for the reduced decision report. It was public knowledge by the time the request was made that the decision had been reduced. We accept that the Scottish Ministers hold the reduced decision report. In no way do we contend that it is no longer held by the Ministers – it is simply our position that the requester did not ask for it. He asked for something which does not exist, and accordingly we were correct to give notice under section 17(1) of FOISA.

Question 3

We do not accept that the interpretation of the request at the point of responding to the review was unduly narrow. The decision-making process in question is a quasi-judicial one. We do not consider that there is a legitimate distinction to be drawn between the “outcome”

¹ Maxwell, *The Practice of the Court of Session* (1980), p. 380.

and the “final, legal, outcome”: in our submission, they are one and the same. To say otherwise would, in our view, undermine the decision of the Court of Session in the judicial review proceedings. For the reasons given above, the effect of reduction is that the reduced decision report does not represent the outcome of the complaints procedure.

Your letter appears to suggest that it is clear that the requester was seeking the reduced decision report. With respect, we cannot accept that contention. Were we to provide the reduced decision report in response to this request, that would necessarily imply that the Scottish Ministers considered that reduced document to represent the outcome of the complaints in question. That does not represent the Scottish Ministers’ position, either as set out in disposing of the judicial review proceedings or in the First Minister’s statement to the Parliament on 8 January 2019.

Question 4

For the reasons set out above, the Scottish Ministers do not accept that they hold the information requested.

Should the Commissioner wish to view the information which we contend is out of scope, we would be grateful for an opportunity to discuss the matter further. We submit that the information in question is of equal sensitivity to the information requested in Decision 125/2019, and suggest that it would be appropriate to explore whether similar measures should be put in place for the handling and examination of that information.

Question 5

We confirm that the requester was not offered any advice on rephrasing his request. We recall the comments of the Inner House of the Court of Session in *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73, at paragraph 45:

“In particular, although there will be cases where the request is made by persons who can be expected to describe precisely what it is that they wish to receive (the present case, where the requests were made by solicitors on behalf of a commercial client, being a paradigm case), there will also be cases where requests are made by individuals who cannot be expected to express themselves with precision. Allowance has to be made for that possibility in the application of the Act; and that is reflected, in particular, in the duty placed upon public authorities by section 15 of the Act to provide advice and assistance to a person who proposes to make, or has made, a request for information.”

In our view, in this passage the Court acknowledged that a spectrum exists in relation to the precision that can be expected in framing requests. At one end of the spectrum, the Court clearly envisaged that a solicitor making a request on behalf of a commercial client could “...be expected to describe precisely what it is that they wish to receive”. Some requesters find it challenging to express in writing what they are seeking (and they would clearly fall at the other end of the spectrum). In this case, the requester is a professional journalist who represents a national newspaper. The making of information requests is a part of his professional role, as it was for the firm of solicitors in *Glasgow City Council*. We therefore submit that it is not unreasonable to expect requesters in [Redacted] position to “describe precisely what it is that they wish to receive”.

The Court goes on to observe that allowance has to be made for requests made by individuals who cannot be expected to express themselves with precision, and that this is

reflected in the section 15 duty. It therefore appears to us that the extent of that duty depends on the degree of precision which can reasonably be expected of a particular requester.

If we are wrong in our understanding of the above passage, then we observe that in any case it would not in fact have assisted the requester had we suggested that he rephrase his request to ask for the reduced decision report.

We take this view because it is our position that the reduced decision report in its entirety is exempt from disclosure in terms of section 26(c) of FOISA for the following reasons.

First, the joint minute between the parties bringing the judicial review proceedings to a conclusion provided for the Scottish Ministers to give an undertaking in the following terms, which was then to be recorded in the minute of proceedings (and was so recorded, as narrated in the interlocutor):

“Save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the [Scottish Ministers] will not cause or permit the publication or dissemination to any other person of the said Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same.”

A copy of the joint minute is enclosed (**Document C**). Where such an undertaking is given, the Inner House has held that a failure to take reasonable steps to ensure that the undertaking is adhered to, if that failure is so gross as to demonstrate a disregard for the importance which should have been attached to the undertaking, constitutes a contempt of court (*Beggs v Scottish Ministers* 2005 1 S.C. 342 at paragraph 46). The position of the petitioner is that the undertaking impacts on the decision report because the undertaking was given at the same time as the decision report was reduced by the Court. The petitioner argues that reduction of the report, coupled with the undertaking, means it would be a contempt of court for the Government to publish or disseminate the reduced decision report..

It is our position, standing the views of the petitioner, that disclosing the reduced decision report would constitute a contempt of court. Disclosure would only be permitted to comply with any lawful requirement, to co-operate with any criminal investigation, or as otherwise approved by the Court. For the avoidance of doubt, we consider that the effect of the words “(otherwise than under this Act)” in section 26 is that authorities should discount the requirement to disclose in terms of FOISA for the purposes of determining whether disclosure would constitute, or be punishable as, a contempt of court. Accordingly, the duty imposed by section 1(1) of FOISA is not, in our submission, a lawful requirement for the purposes of the undertaking.

This being the case, we submit that the reduced decision report is exempt information by virtue of section 26(c) of FOISA.

Secondly, as we noted above Lord Woolman’s order of 8 October 2018 (which is a perpetual order) prohibits the disclosure of information that would lead to the identification of the complainers. It is our position that if the reduced decision report were redacted so as to remove all information that would lead to the identification of the complainers, then it would be unintelligible. This mirrors the position that we advanced in relation to Decision 125/2019 in relation to the complaints themselves (see paragraphs 20 to 26).

We submit that it would be actively unhelpful to suggest that a requester reframe a request, only to refuse to provide any information in response to such a reframed request because it was exempt.

Question 6

As previously noted, a proper construction of the request turns on whether or not there has been an outcome to the complaints in question. The reviewer was aware that the only document which could conceivably represent an outcome to those complaints was the reduced decision report. Once the proper effect of its reduction was appreciated, in the course of responding to the review, it was clear that the reduced decision report did not represent the outcome of the complaints process. The reviewer, as one of a small number of staff working on this and related matters, was aware that the complaints had not been reinvestigated or redetermined as at the date of the request. That being the case, there could be no outcome to the complaints. Accordingly, it was not considered necessary to carry out searches.

Confidential information

We would be grateful if the information in bold italics above were not shared with the requester or included in any Decision Notice, as it outlines steps taken by the Scottish Ministers to protect the identity of the complainers.

We hope the information in this submission is sufficient to explain the issues of this case and to allow you to reach a decision. Please let me know if you require anything further.

Yours sincerely

[Redacted]

[Redacted]
[Redacted]
FOI Unit



Court of Session

CONTEMPT OF COURT ORDER

Restrictions: [Children under 18](#)

Name of Case	Alex Salmond –v– Leslie Evans, Permanent Secretary to the Scottish Government and The Scottish Ministers
Case Name to be anonymised on Website?	NO
Case Ref No	P850/18
Date of Order	Monday, 8 October 2018
Interim/Full Order	Full Order
Place of Order	Court No. 1, Court of Session, Edinburgh
Judge	Lord Woolman
Name of Clerk of Court	C. R. Richardson
Email Address	crichardson@scotcourts.gov.uk
Terminal Date of Order (if given).	Not given

EXACT TERMS OF ORDER FROM MINUTES

The Lord Ordinary, in chambers and in light of the absence of Lord Pentland, having resumed consideration of the interim order granted by Lord Pentland on Thursday 4 October 2018, makes an order in terms of Chapter 102.3(5) of the Rules of Court withholding from the public in these proceedings the names and the designations, past and present, of the complainers referred to in the decision report which is the subject matter of this petition and any other information concerning those complainers which would lead to their identification; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made; further, allows the complainers to be referred to as “Ms A” and “Ms B” respectively in the present proceedings.

Please notify Katie Crawford (kcrawford@scotcourts.gov.uk) when Order can be removed from Website

8 January 2019

Lord Pentland

Act: Clancy, Q.C. *et* D. Hamilton

Alt: R. Dunlop, Q.C. *et* C. O'Neill, Solicitor Advocate

The Lord Ordinary, having heard counsel, on the petitioner's motion, of consent, and in terms and in respect of the Joint Minute for parties No. 39 of process,:-

- (i.) finds and declares that the decisions of the first named respondent, *viz.* Leslie Evans, as set out in:-
 - (a) a Decision Report written by her dated 21 August 2018 entitled "Formal complaints against Former First Minister, Alex Salmond" (production No. 6/2 in the petitioner's First Inventory of Productions); and
 - (b) a letter from her to the petitioner's solicitors dated 22 August 2018 (production No. 6/1 in the petitioner's First Inventory of Productions)are unlawful in respect that they were taken in circumstances which were procedurally unfair and in respect that they were tainted by apparent bias by reason of the extent and effects of the Investigating Officer's involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints;
- (ii.) reduces the decisions of the first named respondent contained in the aforementioned Decision Report dated 21 August 2018 and letter dated 22 August 2018;
- (iii.) refuses the petitioner's opposed motion, made at the bar, for production of the three investigation reports prepared by the Investigating Officer dated 22 February, 18 July and 23 July 2018; thereafter, without production of the aforementioned reports requiring to be satisfied in these circumstances, reduces the aforementioned three investigation reports dated 22 February, 18 July and 23 July 2018;
- (iv.) finds the respondents liable to the petitioner:-
 - (a) in the expenses of the petition and proceedings following on from the order for commission and diligence pronounced in the interlocutor dated 14 December 2018, including the expenses of the open commission, all on an agent and client paying scale; and
 - (b) except in so far as already dealt with, including as already dealt with in the foregoing expenses order of even date, in the expenses of the petition and proceedings;remits the account of expenses, when lodged, to the Auditor of Court to tax;
- (v.) allows the undertaking offered on behalf of the respondents to be recorded in the minute of proceedings of even date;
- (vi.) discharges the substantive hearing fixed for Tuesday 15 January 2019 and the ensuing three days;
- (vii.) *quoad ultra* dismisses the petition and decerns.

8 January 2019

Lord Pentland

The Lord Ordinary decerns against the respondents for payment to the petitioner of the expenses referred to in the foregoing interlocutor, of even date, as the same shall be taxed by the Auditor of Court.

IN THE COURT OF SESSION

JOINT MINUTE FOR THE PARTIES

in the petition of

ALEX SALMOND, c/o Levy & McRae, Pacific House, 70 Wellington Street, Glasgow

G2 6UA

PETITIONER

against

(FIRST) LESLIE EVANS, Permanent Secretary to the Scottish Government, St

Andrews House, Regent Road, Edinburgh EH1 3DG; and **(SECOND) THE**

SCOTTISH MINISTERS, St Andrews House, Regent Road, Edinburgh EH1 3DG

RESPONDENTS

For judicial review of a purported decision of Leslie Evans dated 21 August 2018 under and in terms of a Procedure for Handling Complaints Involving Current or Former Ministers

Clancy QC for the petitioner and Dunlop QC for the respondents concur in stating to the court that the parties are agreed that:

1. Decree of declarator should be pronounced in the following terms: that the decision of the first respondent as set out in a Decision Report written by her dated 21 August 2018 entitled "*Formal Complaints against Former First Minister, Alex Salmond*" (Production 7/2) and in a letter from the first respondent to the petitioner dated 22 August 2018 (Production 7/1) (collectively "the decision") is unlawful in respect that it was taken in circumstances which were procedurally unfair and in respect that it was tainted by apparent bias,
2. Decree of reduction should be pronounced in respect of the decision and the three Investigating Officer reports submitted to the first respondent and referred to in the said Decision Report dated 22 February, 18 July and 23 July 2018 respectively,
3. The respondents shall be liable to the petitioner for the expenses of the proceedings following on from the order for Commission and Diligence

granted on 14 December 2018 including the expenses of the Open Commission and that on the agent and client scale as the same shall be agreed or taxed,

4. That, save in so far as previously awarded and in respect of the expenses provided for in paragraph 3 above, the respondents shall be liable to the petitioner for the expenses of the petition as the same shall be agreed or taxed,
5. The following undertaking to the court on behalf of the respondents will be recorded in the Minute of Proceedings *“save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the respondents will not cause or permit the publication or dissemination to any other person of the said Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same.”*
6. *Quoad ultra* the petition shall be dismissed.

They therefore crave the court:

- 1) To interpone authority hereto;
- 2) To pronounce decree in terms of paragraphs 1, 2, 3, 4, and 6 above;
- 3) To order that the undertaking set out in paragraph 5 above be entered into the Minute of Proceedings.

IN RESPECT WHEREOF