

ALLEGATIONS BY MR SALMOND OF DOCUMENTS WITHHELD BY THE SCOTTISH GOVERNMENT

Mr Salmond has made a number of allegations with reference to documents not being revealed by the Scottish Government to the Committee, the Commission for the Judicial Review or the Crown Office Warrant for the criminal investigation.

The following sets out the background and suggested response to each of these allegations:

Documents that have been released by the Scottish Government to the Harassment Committee that were not released either as part of the response to the warrant or the Commission as part of the Judicial Review

Accusation:

In his submission to the Committee of 14 December 2020, Mr Salmond states: *“My legal team have thus far identified 46 of the near 400 documents in the recent Scottish Government data release [for the Complaints Handling phase of the Committee’s work] , 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 proceeding.*

“... 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.”

In particular, Mr Salmond has highlighted documents relating to the Permanent Secretary’s contact with the complainants during the Judicial Review which, he argues, would have been crucial in the Judicial Review and should have been released in response to the Warrant.

Reality:

Officials have reviewed all 46 documents highlighted by Mr Salmond: Of the 46 alleged “undisclosed” documents listed by Mr Salmond, contrary to his claim, 13 were in fact released under the Warrant. The remaining 33 have been reviewed and none fall within the specific terms of the Warrant. [This includes document INV270 – a briefing note prepared for the Permanent Secretary before her meeting with the two complainants in March 2018 – which does not fall within the terms of the warrant.]

The Permanent Secretary wrote to the Committee on 21 January 2021 setting out the position with the various documents searches and releases:

“The warrant served on the Scottish Government was complied with in line with search criteria shared with COPFS. The Scottish Government undertook a rigorous process to ensure compliance with the terms of the warrant and the transfer of all relevant documents to the police. This included the oversight of an independent Commissioner, appointed by the court, on aspects of the process.

The Scottish Government has collected and provided documents on three distinct occasions: the judicial review, the warrant, and the Committee investigation. On each of these occasions we have been responding to specific requests, and have provided documents relevant to that request. That is why each of those exercises did not result in an identical set of documents.”

Counsel advised SG through the process of responding to the warrant including the interpretation to be given to its terms. SG also corresponded with COPFS about the terms of the warrant and were open with COPFS, Police Scotland and the Commissioner about how SG was interpreting it and what SG was providing. The Commissioner closely oversaw the process, asked SG officials for explanations at times and appeared, from her report to the sheriff, to be content with everything she received and was told.

On her meetings with the 2 complainers the Permanent Secretary said in her letter:

“As I set out in my evidence, the three contacts I had with the complainers were in relation to the organisation’s duty of care and occurred at appropriate pause points in the process, and to inform them of Government’s decision on the judicial review. These meetings were short, straightforward and private conversations in which I explained my decision and described next steps; as such there are no minutes of the contacts.”

Response:

- **There was no deliberate withholding of documents in response to the warrant, the judicial review Commission or the Committee as Mr Salmond alleges.**
- **The warrant was served on the Scottish Government – not any individual or individuals**
- **The SG has provided documents in three different situations:**
 - **JR – SG has accepted that identification of documents in a timeous fashion was not satisfactory and the committee has heard evidence about some documents relevant to the specification being discovered after the commission.**
 - **Warrant – all SG documents subject to the warrant were handed over to the police. The warrant may not have covered matters which the FFM wanted, but that would have been an issue for him to deal with at the time. He cannot now start claiming that SG did not provide something he would, with hindsight, have wanted.**
 - **Committee – all documents held by SG relevant to the specific requests of the committee – with the exceptions already detailed to**

the committee about legal privilege and court undertakings – have been provided.

- **Each request or requirement was specific, requiring a specific response, and SG endeavoured to comply fully with its obligations. It is not the case that documents provided in one situation should automatically have been provided in another.**
- **Mr Salmond’s accusation that documents were inappropriately withheld from the warrant relating to the criminal investigation against him is a serious matter. However, it is not supported by the facts.**
- **Officials have reviewed the 46 documents he listed in his submission to the Committee. Of these, 13 were in fact released in response to the warrant and others did not meet the specific terms of the warrant.**
- **Scottish Ministers and the Permanent Secretary had no role in determining which documents were in scope of the terms of the warrant**
- **The Scottish Government undertook a rigorous process to ensure compliance with the terms of the warrant and the transfer of all relevant documents to the police**
- **The warrant process included oversight by an independent Commissioner, appointed by the Court.**
- **The warrant covered, amongst other things, correspondence between the Permanent Secretary and five specific individuals. Documents held by SG which made reference to the Permanent Secretary’s meetings with the two complainers in the JR were not covered by the terms of the warrant.**

Legal Advice received by the Scottish Government during the judicial review, in particular advice from external Counsel, which the Government has not released because of legal professional privilege

Accusation:

In his final submission to the Committee Mr Salmond states:

“First on the legal advice which the Government received from external counsel in the Judicial Review. In normal circumstances the extraordinary discovery by this Committee that both Senior and Junior Counsel to the Government threatened resignation because the case they were being asked to argue was unstateable would have been headline news. However, despite two parliamentary votes, the full advice from Counsel hasn’t been provided to the Committee. It is extraordinary that the Lord Advocate, who could sanction such advice being published, has refused to do so.”

Reality:

Both the Deputy First Minister and the Lord Advocate have explained repeatedly to the Committee and in response to two parliamentary debates the importance of legal professional privilege and the ability of current and future Governments to receive confidential and candid legal advice.

The maintenance of legal professional privilege is routine. The Scotland Act specifically does not give Parliament the power to demand documents that a Court could not compel, which includes legally privileged documents. No Government

since devolution has released legal advice relating to litigation, which is, by its nature, adversarial.

Whilst the Committee has asked in particular for access to advice from external Counsel, the Government has explained that this advice cannot be considered in isolation from other legal advice that informed the Government's final legal position, that has been shared with the Committee.

The Committee has also been clear that it does not only want access to the legal advice from Counsel, but for this to be published and to be available for inclusion in their published report.

The Government has already taken unprecedented steps to provide the Committee with access to a contemporaneous summary of the legal advice – both internal and external – in the submission from the former DG Organisational Development and Operations to the Permanent Secretary of 29 December 2018 that led to the judicial review being conceded on a single ground. The Committee is aware therefore of the legal advice that the Government received throughout the judicial review from internal and external sources. Nothing in the former DGODO's submission contradicts the evidence provided to the Committee by the Lord Advocate and Permanent Secretary about the legal position taken by the Government throughout the judicial review, based on the full range of legal advice available.

Response:

- **Contrary to the claims made during Mr Salmond's evidence session, the Scottish Government has taken unprecedented steps to share with the Committee a summary of the legal advice received during the judicial review, including from both internal and external legal advisers.**
- **The Government has also offered to discuss and answer questions about the content of the confidential legal advice with the Committee in a private session.**
- **Nothing in the contemporaneous document which the Committee has seen contradicts the evidence that the Committee has received from the Lord Advocate and others about the Scottish Government's legal position throughout the judicial review, based on the totality of legal advice received.**
- **As the Lord Advocate explained, legal advice is not a single thing at a single point in time – something Committee Members are aware of.**

Documents and minutes from meetings that took place between officials during the Judicial Review

Accusation:

Mr Salmond's final submission to the Committee states:

"...restriction arises as a result of the failure of the Government to provide documents from when the Judicial Review started in August 2018 until the Scottish Government finally conceded in January 2019. There were 17 meetings with external Counsel, daily meetings on progress of defending the Judicial Review (according to

Paul Cackette, acting Solicitor to the Scottish Government during the case) and thrice weekly meetings according to Ms Judith Mackinnon, the Investigating Officer.”

Reality:

Legal professional privilege applies to requests for legal advice as well as legal advice provided. Notes or minute of meetings involving external Counsel, Law Officers or SGLD would be covered by legal professional privilege, so would not be released to the Committee or to anyone else. Any decisions in these meetings are reflected in the legal position of the Scottish Government at that point in time which has been shared with the Committee and explained.

The Scottish Government has confirmed that there are no formal written records of the regular catch up meetings between officials during the Judicial Review. These were catch up meetings to share updates and information. Any specific actions or decisions arising from meetings will be reflected in other documents provided to the Committee.

Response

- **The Scottish Government has provided a detailed statement and timeline that sets out clearly the decisions that were taken throughout the Judicial Review.**
- **Discussions between Ministers, officials and legal advisers are reflected in the Government’s legal position, which has been shared with the Committee.**
- **As is entirely normal within Government, officials met regularly to review the progress of the Judicial Review. Any decisions or actions meetings are reflected in the legal position of the Scottish Government at that point in time which has been shared with the Committee and explained.**
- **The regular catch up meetings during the Judicial Review involved colleagues across SG and included general updates on a range of areas including communications and correspondence issues as well as actions relating to the Judicial Review.**
- **These were not decision making meetings and in the normal course of Government business not all conversations and meetings are minuted.**
- **Where decisions or commissions arise they are recorded for action or the official record as necessary**
- **The Scottish Government has provided full information to the Committee about the decisions taken during the Judicial Review and this is reflected in the legal positions taken by the Government during the Judicial Review which are set out in the pleadings in the Open Record which the Committee has.**

“Scottish Government” documents and other texts that were shared with Mr Salmond’s legal team but which he has not been able to share with the Committee because of the application of section 162 of the Criminal Justice and Licensing (Scotland) Act 2010

Accusation:

During his oral evidence to the Committee, Mr Salmond said:

“That brings us on to one of the essential difficulties. There has been a lot of talk about section 162 and the case. You will know what that is; it is the prohibition on my supplying evidence. Much of that has been around text messages, which I know that the committee has been very exercised about. You realise that it also applies to Government documents. There are Government documents that I have seen that were disclosed as part of the disclosure in the criminal case that should have been provided to the committee. Under its remit, the committee should have seen those documents. They were disclosed during the criminal case, but they are not about the criminal case; they are about the judicial review.”

Reality:

Decisions about the application of section 162 of the 2010 Act are not matters for the Scottish Government. The Government has had no role in the decisions of either the SPCB or the Crown.

By law the documents are shared by the Crown with the accused’s lawyers. The accused himself would only see the actual documents in exceptional circumstances, with the approval of the Law Society of Scotland.

We do not know what “Government documents” Mr Salmond is referring to that were shared with his lawyers for the criminal proceedings. Any Scottish Government documents released under the warrant that are relevant to the work of the Committee have already been released, with appropriate redactions. His lawyers may have received documents obtained by the police direct from individual civil servants, but anything on Scottish Government IT systems will have been reviewed and released, if relevant.

Response

- **We do not know what alleged “Scottish Government” documents Mr Salmond is referring to.**
- **Any relevant documents held on Scottish Government systems that have been identified, including documents issued under the warrant, have already been shared with the Committee.**
- **No documents identified on Scottish Government systems suggest “a deliberate, prolonged, malicious and concerted effort” against Mr Salmond as he suggests.**
- **The documents indicate Ministers and officials seeking to ensure appropriate arrangements to respond to credible allegations of sexual harassment against Mr Salmond**

Documents from the court proceedings released to the committee but not yet published by them

Accusation:

[passing reference to court documents which he thought the committee did not have]

Reality:

The Scottish Government provided the committee on 11] February with 15 documents which comprise all the productions and recoveries from the judicial review which had not already been provided to the committee by the SG in earlier tranches of evidence. The committee has not yet published these documents.

Response:

The committee has already received 15 documents from the committee from the productions and recoveries in the judicial review.

Documents not held by SG

Accusation:

Only the FFM is prepared to disclose the transcript of the Commission to the committee

Reality:

The SG does not have a transcript of the Commission. It was instructed by Mr Salmond, as the party who was seeking the Commission. It was never shared by his lawyers with SG.

Mr Salmond could have provided the transcript to the committee at any time.
[Redacted]

Response:

- **Mr Salmond's lawyers did not provide a copy of the transcript to SG.**
- **It has been open to Mr Salmond to provide the transcript to the committee at any time over the last year.**