



John Swinney BPA/MSP

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

1 March 2021

Dear Convener

We have communicated over recent months about the Committee's request for access to the legal advice that the Scottish Government received during the judicial review raised by Mr Salmond. In particular, the Committee has asked for sight of the written advice received from external Counsel.

As the Committee is aware, there is no existing precedent for the Scottish Government to waive legal privilege in the circumstances of litigation and I have been concerned about the potential risk of creating a new precedent that would impact on the ability of future administrations to receive candid and confidential legal advice.

However, as set out in my letter to the Committee of 1 December, I take very seriously indeed the role and decisions of Parliament. The Scottish Government has aimed throughout to ensure that the Committee has access to the information it requires to fulfil its remit, including with reference to the judicial review. As you know, in agreement with the Committee, we took the unprecedented step in December of sharing with Members, in confidence, the contents of the submission from the former Director General for Organisational Development and Operations of 29 December 2018 which provided a contemporaneous summary of both the internal and external legal advice received during the judicial review.

However, over recent days there has been public debate about the ability of the Parliament to hold the Government to account. Accusations have also been raised with the Committee, without evidence, about the reasons why the Government continued to defend the judicial review until it was conceded on a single ground in January 2019.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire
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I am concerned that this debate and the accusations, if not responded to, could impact negatively on public confidence in the Parliament, Government and even our justice institutions. I have determined therefore, consistent with the terms of section 2.40 of the Scottish Ministerial Code, that, in these exceptional circumstances, the balance of public interest now lies in releasing to the Committee and for publication the contents of legal advice received by the Government during the judicial review, in particular the contents of advice from external Counsel. The Law Officers have provided their consent that there are compelling reasons for disclosure in these specific circumstances.

The documents confirm that, whilst reservations were raised about the judicial review following the identification of the issue of prior contact with the complainers in late October, there were good public policy arguments and reasonable grounds for the Government to continue to defend the judicial review and to seek a determination from the Court on the matters raised, until the events of late December 2018.

Subject to completing the necessary legal notifications, in line with our statutory obligations, we aim to release the material to the Committee on Tuesday afternoon.

With the release of Counsel's advice, the Scottish Government will have responded to all of the Committee's requests for specific documents within our legal and other obligations.

During his evidence session with the Committee on Friday, Mr Salmond also raised an allegation that there was a desire within Government to seek to sist the judicial review once the issue of prior contact with the complainers was identified. I have asked officials to review the relevant documentation, but they have not identified any documents which support this allegation. As set out in earlier evidence provided by the Scottish Government, the issue of whether the judicial review should be sisted in light of the criminal investigation was considered at the start of the judicial review process in September. Once the Scottish Government was content that necessary arrangements were in place to protect the identities of the complainers to minimise impact of the judicial review proceedings on the police investigation, there was no need to sist the case. The Scottish Government agreed to the reporting restrictions proposed by the petitioner.

I hope that access to the legal advice, including the advice from external Counsel, will assist the Committee in fulfilling its remit and address some of the allegations that have been raised, without evidence, in the past few days.

JOHN SWINNEY

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