



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

26 October 2020

Dear Ms Fabiani

### **Committee on the Scottish Government Handling of Harassment Complaints**

Further to my letters of 14 and 21 October, I am writing to provide you with an update on a number of matters you raised with me in your recent correspondence dated 7 and 12 October. I address each point in turn below.

#### Additional detailed timeline on the judicial review

As you are aware, the Scottish Government has already provided the Committee with a written statement and supporting documents; a timeline; and a detailed chronology on the judicial review. In addition to this information, I am pleased to provide the Committee with a further timeline today which sets out step by step, the actions the Scottish Government took throughout the judicial review process and responds to the specific questions you have asked as far as it is possible to do so. I believe this, taken with the information already presented, provides the detail on key elements of the process which the Committee seeks to understand. I should make clear that the Scottish Government has shared this timeline with Mr Salmond's legal representatives Levy & McRae, who are of the view that it contains material omissions which their client intends to draw to the Committee's attention.

#### Further timelines

The Committee sought 2 further timelines, the first to support the written statement on the First Minister's self-referral under the Scottish Ministerial Code which was provided to the Committee on 10 August. I am pleased to be able to provide that timeline to you today as part of the material which accompanies this letter.

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The second, on the Scottish Government's investigation of the two complaints against the former First Minister. As the Committee will be aware, that statement has not yet been finalised. Consequently, it is not possible to provide a timeline at this point. I will, however, ensure that when the written statement is submitted, it will include a timeline to aid the Committee's understanding of the chronology of events.

### Documents provided in support of the Scottish Government's written statement on the JR

The Committee sought to understand the criteria the Scottish Government applied which resulted in the small selection of records which were provided in support of the written statement on the JR. As is the case with each of the written statements the Scottish Government has and will provide to the Committee, we sought to answer the specific questions the Committee asked. In doing so, we have provided any documentation felt necessary to illustrate the assertions made in the statement. In this instance, the documents which were provided supported the answer to the Committee's request for information about "*how the decision to settle was taken and what factors had contributed to the cost of settlement*".

Paragraphs 36 to 40 of the written statement set out the answer to that question and specifically in paragraphs 36 and 37, set out the combination of two factors and the impact the Scottish Government considered it could have on the case. Firstly, that whilst the meaning of paragraph 10 of the procedure was clear to those involved in its development and operation (i.e. not being involved in the matter being investigated), the paragraph was open to a different interpretation – to mean no prior contact with the complainers in addition to any involvement in the subject matter of the complaint. Secondly, having regard to the totality of the Investigating Officer's dealings with the complainers before her appointment as Investigating Officer, 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. The documents provided to the Committee in footnote 15 of the statement were intended to illustrate the extent and nature of the prior contact between the Investigation officer and Ms A and Ms B.

### Update on the search to establish whether Barbara Alison received a specific text from the Permanent Secretary

The Committee sought an update on the efforts Barbara Allison has made to establish whether she had received a text from the Permanent Secretary. I understand that Ms Allison has written today to the Committee to clarify this matter following searches conducted by the Crown Office and Procurator Fiscal Service.

### Fourth tranche of material

In my letter of 14 October I said I would provide you with a further update on the progress the Scottish Government is making to provide you with a fourth tranche of material.

After intensive work carried out over several weeks, I expect the Scottish Government to be in a position later this week to provide a set of securely redacted papers to Levy & McRae (L&M) which, together, consist of the fourth tranche. In total they comprise in excess of 400 documents (over 2000 pages).

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The Scottish Government is taking this course of action to ascertain precisely which documents L&M consider are covered by the undertaking given by Scottish Ministers in the judicial review. The Scottish Government's position is that only documents expressly referred to, or described, in the undertaking are subject to it. That position is disputed by L&M. The Scottish Government's position is also that documents reduced by the Court of Session remain in existence and that the Scottish Government should be able to disclose them to you (albeit with the clear caveat that they have been reduced). We understand from correspondence to the Committee that our position on the effect of reduction may not be shared by L&M.

The Scottish Government, when handing over those papers, will be seeking from L&M express confirmation in relation to each document that they either (i) agree to disclosure of the document to the Committee or (ii) object and the basis of that objection. L&M will have two weeks from the date we provide them with the papers to revert to the Scottish Government.

Where L&M confirm they do not object to a document, this will allow us to immediately disclose that document to the Committee. In relation to documents which L&M object to on the basis of their interpretation of the undertaking, we will prepare an application to the court, seeking the court's decision as to whether or not disclosure would breach the undertaking. As I said in my letter of 14 October, the Scottish Government does not intend in the court application to seek the court's permission to disclose documents which we already accept are covered by the undertaking – in particular the Investigating Officer's reports.

If the court considers that some or all of the documents are covered by the undertaking, the Scottish Government will abide by that interpretation of the undertaking and will not disclose those documents to the Committee. Any documents that the court does not consider are covered by the undertaking will be provided to the Committee. Given the need to provide L&M with the opportunity to confirm which documents they object to, I anticipate that any disputed documents will not be identified until November. That will then set the timetable for taking forward any application to the court.

In addition, the Scottish Government is also embarking on the process of compiling and redacting further tranches of documents and handing these over to the Committee. These documents would be:

- The answers for the Scottish Government as originally lodged and as at each adjustment date; and
- The Scottish Government's productions and the documents provided by the Scottish Government which were "recovered" in the Commission, where not already provided as part of the fourth tranche.

I will write to you to confirm when this material will be ready, though I would hope to be able to begin sharing it within the next month.

I will also write to you again to confirm that the fourth tranche is with L&M; and again once we have received their response.

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I note that the Committee wishes the Scottish Government to request the productions held by the Court of Session and send these together with the productions that we already have as soon as possible, along with copies of the Notes of Argument for the substantive Judicial Review hearing and the opposed specification of document hearing. The Scottish Government will prove this information to the Committee as soon as it is possible for us to do so. However, as you will appreciate, these documents need to be considered and redacted as appropriate and in line with the criteria and principles we have applied to all of the other documentation we have provide the Committee. We will endeavour to provide this information to you as soon as we can and I will update you on progress in due course.

Finally, should the Committee (once it has considered all of this material) believe there are further documents which are relevant to its remit, which the Scottish Government alone holds and which we are not under legal restrictions in terms of being able to share, I would be grateful if you could please identify what those further documents might be so that we can ascertain if such additional material does in fact exist and how quickly it can be provided.

Yours sincerely

**JOHN SWINNEY**

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