

Linda Fabiani MSP, Convenor  
- Committee on the Scottish  
Government Handling of Harassment  
Complaints  
c/o Clerk to the Committee  
Room T1.03  
The Scottish Parliament  
Edinburgh  
EH99 1SP

21 January 2021

Dear Ms Fabiani

At the meeting of the Committee on 12 January I undertook to write to the Committee to provide further information in response to questions raised.

### Scottish Government investigation into alleged leak

Mr Wightman and Mr Fraser asked about the internal investigation into the alleged unauthorised disclosure of information relating to the complaints that appeared in the press between 24 and 26 of August 2018.

The review was undertaken by the Scottish Government's Data Protection Officer, reporting to the Senior Information Risk Officer, between 29 August and 4 September 2018. The review focussed on:

- The handling and processing of relevant information within the Scottish Government for which I as Permanent Secretary have responsibility;
- Identifying and examining any evidence of unexplained transmission of relevant information to internal or external parties; and
- The arrangements for the release by the Scottish Government of relevant information to the Crown Office and Procurator Fiscal Service (COPFS).

Twenty-three staff members were identified who could potentially have had access to relevant material in some form, and all 23 were interviewed in the process. This included members of my office, SGLD and a special adviser. The level of access to material each staff member had was clarified in the investigation, and in some cases was very limited. Some (including the First Minister's office and the special adviser) had not seen the Decision Report but only a note from myself to the First Minister, which did not include the details of the complaints or individual conclusions.

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Electronic Records Management System logs were examined by system managers, a scan of the storage system for the relevant documents was undertaken by cyber security staff, and outbound e-mail logs for relevant staff were examined. Outgoing e-mail logs for all staff to relevant external e-mail accounts were also checked.

The review concluded that information relating to the original investigation was processed in a controlled and appropriate manner, with all staff within scope of the review complying with relevant information handling procedures and obligations. The only exception to this was that one staff member on long-term sick leave, who had had limited access to the relevant information, had not completed GDPR training. The forensic searches of Scottish Government corporate systems did not detect any evidence of a data breach, with no sign of any communication between media outlets and relevant staff through the Scottish Government IT system, and no indications of other members of staff seeking to gain unauthorised access to relevant information held on SG systems.

The technical searches were repeated in January 2020 at the request of the Information Commissioner's Office (ICO) using new investigative analytics and intelligence software that had since been acquired by the Scottish Government. Nothing further was identified.

Documents relating to the Scottish Government investigation were shared with the ICO during their investigation. The ICO investigation was concluded in early March 2020, when they wrote to the Scottish Government saying they also had found no evidence of a leak:

*“Based on the information gathered during our investigation, we are satisfied that we can close our investigation into the s170 DPA 2018 allegation and any potential breach of Article 5 (1) of the GDPR. We are satisfied that there is no evidence to corroborate the complaint that an employee of the Scottish Government unlawfully obtained and disclosed personal data relating to Mr Salmond. We are also satisfied that there is no evidence that the Scottish Government acted in breach of Article 5(1) of the Regulation in relation to the processing of Mr Salmond’s personal data.”*

### Knowledge of the identities of complainers

Ms Baillie asked how many Scottish Government staff were aware of the identities of the complainers, and whether it would have been possible for a special adviser to have known any of the complainers' names.

As I indicated during the Committee session, protecting the confidentiality of the complainers was of paramount importance in the investigation process and ever since. The Committee has already heard evidence about interactions with one or both of the complainers by myself, Judith Mackinnon, Nicola Richards, Barbara Allison, Gillian Russell and John Somers. In addition – aside from witnesses or potential witnesses – a very small number of HR, legal and support staff would have been aware of identities.

### Interpretation of paragraph 10 of the Procedure

Ms Baillie asked questions about when it became clear that paragraph 10 of the Procedure was open to another interpretation. There was no request for further information on this but I

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wanted to clarify one point. Ms Baillie referred to what she described as an “interview” of Judith Mackinnon by Junior Counsel on 17 October 2018 as being significant in this respect. As Ms Mackinnon has already confirmed in her evidence on 27 October 2020, she met Counsel on 19 October 2018. Others were present at the meeting. It was not an “interview” and its subject matter did not relate to paragraph 10.

As the Lord Advocate set out in his evidence to the Committee on 17 November 2020, the issue of prior contact and the interpretation of paragraph 10 of the Procedure was known within the Scottish Government as issues that required to be addressed from late October 2018. Further documents were sought to clarify the nature of the contact and the intention of the wording in paragraph 10. The Government made factual averments about this matter on 5 November 2018 and it was introduced into the petitioner’s case as a specific ground of challenge for the first time in mid-November 2018. Adjustment of the pleadings on this issue continued into December 2018.

### Decision to concede the judicial review

Ms Baillie asked about the basis on which the decision was taken to concede the judicial review. I have provided evidence and the Committee has seen the advice that I sought after the Commission hearings in late December 2018, including the summary of the legal advice which the Committee has seen in confidence. I have set out for the Committee the factors that I took into account in considering whether the case should be conceded, including legal advice, public policy and my role as Principal Accountable Officer. Any suggestion that the decision to concede the case was taken for any other reason is inaccurate and misleading.

### Material disclosed under the warrant

Although the criminal proceedings against Mr Salmond are not part of the Committee’s remit, Ms Baillie asked whether documents relating to the contact I had with the complainers were disclosed in response to the warrant in the criminal proceedings. It was not clear during the session which evidence Ms Baillie was referring to in her line of questions. I am concerned that this may relate to text that was specifically redacted by the Parliament and was not available in the Committee’s published papers for the meeting. It would be helpful if the Committee could clarify its position on this. I understand that the information redacted by the Parliament now appears to be in the public domain.

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.

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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.

### Detail of allegations provided to Mr Salmond

Mr Cole-Hamilton asked if verbatim accounts from the complainers were provided to Mr Salmond. I can confirm that the statements were not provided but that causes for concern, which provide details of each of the complaints, were shared. This approach allows sufficient specificity to be provided such that the events can be clearly understood, while also protecting so far as possible the confidentiality of the complainers, as is appropriate. It was clear that Mr Salmond knew the identity of the individuals.

As I explained in oral evidence, I sought and followed legal advice at every stage. Mr Salmond's full, fair and reasonable participation was sought in line with the Government's Procedure. Timescales were extended on three occasions to allow him additional time to respond to the complaints and I personally instructed that the Investigating Officer's report should not be finalised until Mr Salmond had been given a further opportunity to present his position as fully as possible.

### Referral to COPFS

A number of Committee members, including yourself, sought clarification around whether the Scottish Government made the referral to Police Scotland or to COPFS. I believe I was able to make this clear in my evidence but thought it would be helpful to restate it for absolute clarity.

The Procedure refers at paragraph 19 to the possibility that the Scottish Government may bring the matter of a complaint directly to the attention of the police. Discussion at the time, including with the complainers, was about a potential police referral. In the event it was determined, taking into account legal advice, that the matters should be referred to the police and that the appropriate mechanism for making a referral was to pass the information to COPFS for onward transmission to the police. The Committee has a copy of the relevant correspondence.

There have been references in previous evidence to a referral to the police, and as you suggested yourself, this was a loose description meaning referral to criminal justice bodies. There was no direct referral from the Scottish Government to the police.

Mr Fraser asked whether I followed the advice from Nicola Richards to consult with individuals before disclosing to another party or the police. The audio issues in the virtual session made it difficult for me to respond at the time and I can confirm that this was the approach taken. Mr Fraser referenced a memo dated 3 November 2018, but the relevant document is an email dated 23 November 2017, provided to the Committee as INV315.

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## Scottish Government review

You also asked when Laura Dunlop QC is likely to report on the Scottish Government Review of its Handling of Harassment Complaints Procedure. The Deputy First Minister provided an update in his letter of 22 December. Ms Dunlop has advised that she is making progress and her review will conclude by Spring 2021. We will provide a further update to the Committee in February.

Yours sincerely

**Leslie Evans**

Permanent Secretary to the Scottish Government

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