SUBMISSION ON JUDICIAL REVIEW

1. The Permanent Secretary wrote to me on 7th March 2018 saying that the Scottish Government was implementing a complaints process against me. I instructed Levy and McRae as my solicitors and Ronnie Clancy QC and Duncan Hamilton, Advocate, as my Counsel. At an early stage it was clear to me and to my legal advisers that the process was defective in a number of ways and that its application was suspect. In particular, I had never even heard of such a procedure applying to *former* Ministers and there was no parliamentary or public record of it ever being implemented.
2. One striking and immediately identified feature of this policy was that there was no provision for mediation in the case of former Ministers, in contrast to the policy on serving Ministers (see para 4 procedure) I put this to the First Minister at the meeting at her home on 2nd April 2018 which has now been referred to on many occasions. Such a provision would be a normal feature of complaints policies and was specifically part of the Scottish Government policies with which I was familiar
3. In the meeting of April 2nd the First Minister had suggested that she would intervene in favour of a mediation process at an appropriate stage. She subsequently decided against such an intervention. In the event, our proposals of 4th April 2018 seeking mediation were rejected by the Permanent Secretary without them even being placed before the complainers as an option.
4. My legal team crystallised our objections to the procedure in a letter to the Permanent Secretary of 5th June 2018. This letter which has been provided to the Committee gives Senior Counsel's opinion that on grounds of retrospectivity, absence of jurisdiction and multiple examples of lack of procedural fairness the procedure was inherently flawed and unlawful. A summary of the legal arguments is also provided in the open record which we have provided to assist the Committee. . However, to this and to other representations on procedural unfairness there was no substantive response.
5. My legal team advised strongly against rebutting specific allegations because in their view the Government had pursued an unfair and unlawful process. Their advice was that in those circumstances, full engagement and detailed rebuttal (as ultimately was provided in the High Court) would risk being presented as having acquiesced in that

unlawful procedure They did, however, agree to using independent witness statements to refute general allegations.

6. I have produced for the committee the full correspondence from 7th March 2018 up to the date of raising proceedings, which should be read in conjunction with this submission.
7. No substantive reply being received to our legal arguments, my lawyers advised that I should move to judicially review the government and that the prospects of success were excellent. I had asked them to draw up a draft petition for Judicial Review but I was extremely reluctant to sue the government I had previously led. I was also deeply concerned about such an action given what it might mean for both the First Minister and the SNP. I therefore asked to meet the First Minister to show her the draft Judicial Review petition. This meeting took place on 7th June. In contrast to our first meeting, the First Minister was now against making any intervention although I had previously spelt out in a WhatsApp message to her of June 3rd what I considered to be her duty to do so under the Ministerial Code. That too has been provided to the Committee.
8. On 26th June 2018, still seeking to avoid damaging court proceedings, we (my legal team and I) put forward a new proposal for arbitration drawing on Scottish] legislation passed in 2010. The offer was that I would abide by the decision of the arbiter if it went against me. We were confident that many of our criticisms would be accepted in any arbitration and agreed to submit to the full Scottish Government process if my legal advice was wrong. Arbitration had multiple advantages. First, it was confidential and thus protected those who had made complaints. Secondly, it would provide legal clarity and resolve whether the clear advice on the unlawfulness of the procedure was correct. Thirdly, it would have resolved these matters in a forum which maximised the potential for avoiding expense to the public purse, to me and minimised the damaging fallout for the complainers, Scottish Government and the SNP in the event I was successful. I explained the benefits of arbitration to the First Minister in a WhatsApp message of 5 July. At the First Minister's invitation (delivered via a senior official on 13 July) I met her for a third time at her home in Glasgow the following day to ask her to make it clear that she was not personally against such arbitration. That request arose in case any such perception was the basis for the otherwise inexplicable decision on the part of the Permanent Secretary to refuse any form of alternative dispute resolution and instead force this matter into an

expensive judicial review in the Court of Session. I updated my lawyers about this meeting.

9. On 18th July I was written to by the Permanent Secretary and phoned by the First Minister at 13.05 urging me to submit evidence on the specific complaints. This I did after a formal consultation with my legal team to whom I divulged the First Minister's phone call and advice. I refer to my submission made to Mr James Hamilton, the independent adviser to the Ministerial Code, which covers this passage of my evidence.
10. I now know that the submission was given only the most cursory examination by the Investigating Officer whose report had already been drafted and submitted to the Permanent Secretary. The rebuttal was submitted on Friday July 20th. The Investigating Officer finalised her report after submitting my comments to both complainers on Monday July 23rd.
11. On August 22nd the Permanent Secretary sent me her Decision Report having already instructed that it be sent to the Crown Agent, Mr David Harvie - not bringing matters "directly to the attention of the police" as provided for in the policy. On August 21st, The Chief Constable and the lead officer correctly refused to accept the Decision Report when the Crown Agent tried to hand it to them, and asked that there be no publicity, lest their investigation be contaminated.
12. Despite this, on Thursday 23rd August my legal team was informed that the Scottish Government intended to release a public statement on the fact of the investigation at 5pm that day. That, despite the firm assurances of confidentiality which had been made throughout. We replied that such a decision to publicise left no option but to seek an interim interdict against the government that evening preventing publication. That action became the petition for Judicial Review. The Scottish Government agreed to withdraw their proposed public statement pending resolution of the interim interdict application by the Court of Session.
13. By late afternoon the Government claimed that they had been contacted by the press but had confirmed nothing. At 6.34pm we informed the Government that an interim interdict would not be heard that evening. We had by that stage had no contact from any news outlet. Shortly after 8pm I was phoned by David Clegg, political editor of the Daily Record who then emailed me at 20.16 informing me that they now had been given confirmation that a police complaint had been made against me and were publishing their story at 10pm. We were unable by that time to secure a judge to hear

an interdict against the Daily Record's proposed story. At 9.30pm through my lawyers, I sent a statement embargoed until 10pm explaining that I would be raising proceedings against the Government and calling a press conference for the next day. The press statement read as follows:

STATEMENT FROM ALEX SALMOND EMBARGO 10pm THURSDAY 23rd AUGUST

FORMER FIRST MINISTER TAKES LEGAL ACTION AGAINST SCOTTISH GOVERNMENT IN COURT OF SESSION

"For many months now, and on the advice of Senior Counsel, I have attempted to persuade the Permanent Secretary to the Scottish Government that she is behaving unlawfully in the application of a complaints procedure, introduced by her more than three years after I left office. This is a procedure so unjust that even now I have not been allowed to see and therefore to properly challenge the case against me. I have not been allowed to see the evidence.

I have tried everything, including offers of conciliation, mediation and legal arbitration to resolve these matters both properly and amicably. This would have been in everybody's interests, particularly those of the two complainants. All of these efforts have been rejected.

The Permanent Secretary chose to deny me contact with any current civil servant, many of whom wished to give evidence on my behalf and access to documentation to allow me to properly challenge the complaints, all of which I refute and some of which were patently ridiculous. The procedure as put into operation by the Permanent Secretary is grossly unfair and therefore inevitably will lead to prejudicial outcomes.

It is therefore with great reluctance that I have today (Thursday 23rd August) launched a Judicial Review in the Court of Session which will decide the issue of the lawfulness of the procedure which has been used against me. If I lose then I will have to answer to the complaints both comprehensively and publicly. Until then I am bound to say nothing which would impinge on the Court proceedings. In our submissions on Judicial Review we have asked that the complainants' identity be protected.

If the Court of Session finds in my favour then the administration at the senior levels of the Scottish Government will have the most serious questions to answer. In my opinion and for whatever reason the Permanent Secretary has decided to mount a process against me using an unlawful procedure which she herself introduced. I will let a real court decide whether it was lawful for her to do so."

14. The press conference was held on August 24th and was entirely devoted to the process of judicial review with no discussion allowed on the nature of the complaints. However, the Daily Record had also been leaked the detail of one of the complaints taken directly from the Permanent Secretary's Decision Report or an extract from it and published those details on August 25th. The Daily Record editor later confirmed on a documentary presented by Kirsty Wark on BBC television on 17th August 2020 that they had been in receipt of such a document.
15. The timing of these leaks is summarised in the enclosed review report from the ICO (appendix A paragraph 4.6) who concluded that they had "sympathy with the hypothesis that the leak came from an employee of the SG and agree that the timing could raise such an inference". There were in fact two leaks. First the leak to Mr Clegg on the evening of Thursday 23rd August followed by the release of details of one of the complaints published in the Record on Saturday 25th August. These leaks were carried out with no consideration to data protection laws, and with no regard to the interests or rights of the complainers or indeed myself. They were considered by the ICO to be *prima face* criminal. They set off a media storm deeply damaging to my reputation.
16. On 29th August I resigned from the SNP and launched a crowd funder to assist with the costs of Judicial Review challenge in the Court of Session. The crowd funder attracted 4146 donations in three days and I closed it at £100,000 on Saturday 1 September.
17. Shortly thereafter, my legal team lodged the petition for Judicial Review. Their advice was that the chances of success were high. The initial petition has been provided to the Committee. The Permanent Secretary has made much of the fact that the original petition for judicial review did not found on the prior contact of the Investigating Officer with the complainers. In fact this would have been impossible given that this

information was not provided to us until the beginning of November 2018. Indeed there is overwhelming evidence that this information was concealed by the Scottish Government. Had it been provided earlier, it would certainly have been included as a further basis for the judicial review. Even without it, there were multiple substantial grounds for a successful review. Those were not decided simply because the Scottish Government conceded the petition prior to the matter being argued.

18. On 4th October at the first hearing of the judicial review (and on my insistence), my legal team lodged a motion to protect the anonymity of the complainers. The Scottish Government chose not to attend this hearing.
19. On 16th October the Scottish Government lodged Answers to the Judicial Review which leant heavily on the technical argument that the Petition was out of time being more than three months after the investigation started. We were not concerned that there was any force to that argument and I personally took that as a sign of weakness and a lack of confidence in their substantive case. That argument was later abandoned.
20. On 21st October we received information that the new complaints process had not been published on the internal Scottish Government intranet until February 2018 which opened the question of how realistically complaints could possibly have been submitted under it in January 2018. We also learned that the press statement released by the Permanent Secretary on August 23rd 2018 had been deliberately worded to conceal this fact (appendix B shows the original wording and appendix C the version as recently amended on 21st August 2020 The original wording reads “Internal procedure agreed in December 2017 and published at that time on the Scottish Government Intranet”. The new wording reads “Internal procedure agreed in December 2017 and published in February 2018 on the Scottish Government intranet” Our requests for further documents were informed by those revelations.
21. On November 5th the Government finally disclosed the prior contact of the Investigating Officer with the complainers and that both complainers had been in contact with various Scottish Government staff in November and December 2017. As we now know this was only after Senior Counsel insisted that they do so. We adjusted the Petition accordingly.
22. On November 6th we petitioned the court for release of documents. Lord Pentland reminded the Government of their duty of candour as a public authority to release all relevant material saying, according to a court note taken by my legal team, that “A

public authority usually takes the view that it should disclose everything in a matter of this nature. Specifications are unusual for that reason."

23. Despite this, on 16th November when the first tranche of 147 documents were produced, followed by a further 70 pages on the 19th of November, it was clear that much information was missing, particularly on the origins of the procedure.
24. During November 2018 we became concerned about the possibility of the Government attempting to sist (delay) the judicial review and (mindful of their likely loss in court) seek to emphasise instead the police investigation. We have a witness precognition (statement) which recounts that in late November 2018 a Special Adviser told the witness that the Government knew they would lose the JR but that they would "get him" in the criminal case.
25. On the 1st December the ICO criminal investigation officer informed us that a "criminal offence may have been committed" on the leak of data and that their investigations were continuing.
26. On December 14th we successfully petitioned for a Commission on Diligence. It was opposed by the Government who had maintained that no more relevant documents existed. Remarkably, the Scottish Government had even signed a certificate confirming to the Court that no documents existed. In direct contradiction of that position, in the immediate run up to the Commission, during the Commission itself and in the aftermath of it, many batches of documents were produced which exposed many incriminating pieces of evidence against the government's position. Furthermore it became clear that the Government's position until that point on the nature of the contact between the Investigating Officer and the complainers was untrue. We also were aware that the Government's position introduced into their pleadings that the first time the First Minister knew of the complaints against me was on April 2nd 2018 was also untrue.
27. On 19th December at the first hearing of the Commission the Government's own Senior Counsel (properly) apologised to the Commissioner on multiple occasions for the late provision of documents. A further 18 pages of documents were then produced from the Investigating Officer. More documents emerged after the second hearing of the Commission on 21st December. In a further procedural meeting of the Commission on 28th December it emerged that potentially many more documents existed. My legal team then decided to call the Chief of Staff Liz Lloyd and Principal Private Secretary Mr Somers to the Commission as potential havers (people who hold

documents) at the beginning of January 2019. This was when suggestions emerged of meetings with a complainer in the First Minister's Office on 20th and 21st November 2017.

28. On January 3rd my lawyers were contacted by Government lawyers with an offer to concede the case on the basis that the process had been unlawful, unfair and tainted by apparent bias.
29. On January 8th 2019 Lord Pentland, after a hearing in the Court of Session, issued an interlocutor to that effect (appendix D and reduced both the Investigation and Permanent Secretary's Decision Report. The Government provided undertakings not to distribute documents. Those undertakings were recorded in the Minute of Proceedings. Expenses were awarded on the punitive scale of agent and client, client paying basis. The interlocutor found that the actions of the Permanent Secretary had been unlawful on the grounds that the process had been carried forward in circumstances which were "procedurally unfair" AND "tainted by apparent bias". My senior counsel pointed out in court that the Investigating Officer's multiple contacts with the complainers were "bordering on encouragement"
30. On the same day the Permanent Secretary released a press statement asserting that on all other grounds the petition had been dismissed. This was deliberately misleading as in fact none of the many other grounds of challenge required to be heard, since the petition had been conceded prior to the hearing and her whole decision report reduced by the court. My legal team and I remained confident on the many other legal heads of challenge I had brought. These are all contained in the Record (court document containing petition and answers) which the committee has.
31. The First Minister told Parliament that the nature of the contact between the Investigating Officer and complainers was in the nature of "welfare support" Clearly she was misinformed because it is precisely because the Government had misled the Court in its pleadings about the nature of the contact that the Government case became, in the view of their own counsel, unstateable. This was confirmed to the Committee by the Lord Advocate in both of his evidence sessions on 8 September and 17th November 2020
32. At no stage was I, or indeed Parliament, informed of the fact that both Senior and Junior Counsel representing the Government had intimated in December 2018 their intent to resign from the case if the Government did not concede by January 3rd 2019.

33. I am now aware from documents obtained by this Committee that the Investigating Officer's behaviour involved contact with complainers before, during and after the procedure of a kind which would not stand any reasonable test of impartiality. I believe this included briefing the complainers and witnesses and pejoratively summarising my legal advice. I also understand that subsequent to the JR petition being lodged, she also briefed complainers and others of the Lord Advocates position on sisting the Judicial Review.
34. I am now aware from documents recently obtained by this Committee that the Permanent Secretary met one complainer and phoned the other in mid process before contacting me on March 7th 2018. I was astonished when I discovered this). There is nothing in the procedure which allows for this and I would certainly have wanted to argue this in our judicial review petition as behaviour incompatible with the role of an impartial decision maker and further evidence of bias against me. The failure to disclose this meeting either in the civil or criminal case despite court orders is a serious matter which I intend to take forward with the appropriate authorities.

SUMMARY

The procedure adopted "at pace" in late 2017 was not just "tainted by apparent bias" in the actions of the Investigating Officer but "procedurally unfair" in itself.

Only my reluctance to sue the Government as a Former First Minister prevented me from exercising that right earlier. Instead I offered conciliation, mediation and then arbitration which I was prepared to accept as binding. All such attempts at swift and confidential resolution of the legal issues without the expense and confrontation of court proceedings were rejected without consulting the complainers, in case of mediation without initially consulting the complainers and in the case of arbitration without consulting the complainers at all.

There is an overwhelming likelihood in my view that the criminal leak(s) of August 21/22 2018 came from within Government and were committed with the intention of damaging my reputation but with no regard whatsoever to the interests of the complainers.

The advice of my counsel at the outset was that I had a very strong case which only further strengthened as the process continued. The evidence was forced out of the government by a lengthy and expensive commission process, despite the government having assured the Court and my legal team previously, that they had produced all relevant documents. This turned out to be untrue.

I have yet to read the government's legal advice from external counsel. This is despite two parliamentary votes to force its release.

It is rare in my experience, for the Scottish Government to behave unlawfully. It is surely rarer still for the Government to only concede a case when both of its external counsel threaten resignation.

I understand that expenses being awarded on an agent and client, client paying basis reflects the court's dissatisfaction with the conduct of the case from the Government. That failure was not due just to incompetence. The pattern of government lack of candour and a systematic failure to disclose has been deliberate and consistent since 7 March 2018It continued through the judicial review process and then my criminal trial. To my astonishment, it continues to date with a persistent failure to produce all relevant documents to the parliamentary Inquiry which has forced two Parliamentary votes and triggered an unprecedented procedure under s. 23 of the Scotland Act. It has also seen the recall of a number of government witnesses to clarify and in some cases correct their evidence. .

In short, it remains a matter of deep regret that I had no option but to take the Scottish Government to the Court of Session. I did so very reluctantly and only after every other avenue had been exhausted.

But courts exist for a reason. They exist because when Governments act illegally there must be a remedy for the citizen. In this case, the illegality was finally conceded but only after a legal process which will have cost upwards of £750,000 of taxpayers money and which caused immense strain and distress to all involved.

The behaviour of the Government was, in my view, a disgrace. But actions have consequences. Accountability is at the heart of the Scottish Parliament. The rule of law requires that those who have acted illegally are held to account. It is now the job of this Committee to resolve how that is best done.

Ends

Alex Salmond
27th January 2021

Upholding information rights

Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF
[Redacted]
www.ico.org.uk

Our ref: CH/IC/0295/2018

Mr David McKie
Levy & McRae
Pacific House
70 Wellington Street
Glasgow
G2 GUA

By email only: [Redacted]

Dated 28 May 2020

Dear Mr McKie

Re: Your Client – Mr A. Salmond/ Your Ref DMK/LL/STE039-0001

1. Introduction

1.1 Further to a request made on behalf of your above client, I have been asked to review a decision made by the Criminal Investigations Team (**CRIT**) at the ICO to discontinue an investigation into potential offences under **s.170 Data Protection Act (DPA) 2018**, in accordance with the Victims Right to Review scheme.

1.2 I am a Solicitor (Prosecutor) based within the Regulatory Enforcement Team at the ICO. I confirm that I have had no previous dealings with the matter.

1.3 My remit is to consider whether, having investigated the complaint, the decision made by the investigations team to not investigate further was correct and reasonable.

1.4 I have had full access to, and have carefully reviewed, all material gathered and held by CRIT during the course of their investigations.

1.5 The review concerns the outcome of an investigation into a complaint made under **s.165 DPA 2018** on behalf of Mr Salmond to the ICO on the 29 October 2018.

1.6 The complaint pertained to the suspected unlawful obtaining and disclosing of personal data relating to Mr Salmon to the press in August 2018; a potential offence under **s.170 DPA 2018**.

1.7 The data was contained within a report relating to the outcome of an internal misconduct investigation, which was leaked to the press on the 23 August 2018 and published in the Daily Record on 23 and 25 August 2018.

1.8 Furthermore, the fact and content of legal advice from the Lord Advocate to the Scottish Government regarding the allegations made against Mr Salmond were reported in an article in The Sunday Post published on the 26th August 2018 and again in The Herald on 12 November 2018.

2. Relevant Law

2.1 Under **s.170 DPA 2018**, it is an offence to, knowingly or recklessly, obtain, disclose, procure disclosure or retain personal data without the consent of the data controller.

2.2 The information contained in the internal misconduct report and the legal advice was highly sensitive and personal, in that it related to allegations of misconduct made against Mr Salmond. It would certainly meet the definition of "personal data" pertaining to a living individual as per **s.3(2) DPA 2018**.

2.3 It was clear from the events set out in the complaint sent on behalf of Mr Salmond that the personal data had indeed been obtained and disclosed to the press.

2.4 The ensuing investigation by the ICO was to establish whether any individual could be identified and potentially prosecuted for the unlawful obtaining and/or disclosing of the data under **s.170 DPA 2018**.

2.5 The offence of unlawfully obtaining and/or disclosing personal data contrary to **s.170 DPA 2018** is an offence committed against the data controller. In this matter, the personal data contained in the internal misconduct investigation report and in legal advice from the Lord Advocate, belonged to the Scottish Government (SG).

2.6 The SG was therefore the data controller in accordance with **s.3(6) DPA 2018** and the potential complainant in this matter.

2.7 As the data subject under **s.3(5) DPA 2018,** Mr Salmond would however also be classed as a "victim". Any impact on him resulting from the offence would of course therefore be an important consideration in ascertaining the level of harm caused by the offence.

2.8 The issue for the investigations team was whether the source of the data leak could be identified, to enable a prosecution to be brought against the individual responsible under **s.170 DPA 2018.**

3. Review of the evidence

3.1 In order to identify a suspect, it would be necessary to identify the method of disclosure used.

3.2 A forensic examination of the IT systems used by the SG was carried out as part of the Data Handling Review conducted by the Data Protection Officer at the SG following the data leak.

3.3 No evidence was found that data was leaked through email, document sharing or downloading to portable media device. Furthermore, no evidence was found that a third party had unlawfully accessed the SG's IT systems.

3.4 Without an electronic trail to follow, it was difficult to uncover the method of disclosure used.

3.5 To progress the investigation, a witness would be needed who would be willing to provide information about the method of disclosure (for example, by hard copy being passed in person) and the identity of the culprit.

3.6 The Daily Record had declined to provide information as to how or by whom they came by the copy of the report, relying on the journalistic exemption within the **DPA 2018**, clause 14 of the Editors Code of Practice and s.10 of the Contempt of Court Act 1981.

3.7 23 members of staff were identified as having knowledge of, or involvement in, the internal misconduct enquiry. These members of staff were interviewed by the Data Protection Officer at the SG as part of their Data Handling Review. The interviews did not disclose any information which would enable a suspect to be identified.

3.8 In the absence therefore of any further information coming to light, or any witness coming forward, there was insufficient evidence to point to any specific suspect and to allow the investigation to move forward.

4. Representations on behalf of Mr Salmond

4.1 In addition to all the material provided by the SG, I have also considered the representations made on behalf of Mr Salmond in previous correspondence with Levy & McRae, in particular the submission that the timing of the leak to the press raises an irresistible conclusion that the leak came from within the SG.

4.2 The leak came a few hours after the SG had notified their intention to publish a press release and very shortly after Levy & McRae had given notice of their intention to apply for an interim interdict. The effect of the leak was to defeat the court action because the information was by then in the public domain.

4.3 I have also considered the statement of Detective Chief Superintendent [Redacted], helpfully provided by Levy & McRae. The statement confirms that at a meeting on the 21 August 2018, the police were offered a copy of the internal misconduct investigation report but refused to take it. Furthermore, at that meeting, DCS [Redacted] voiced

concerns about the SG making a public statement about the outcome of their investigations.

4.4 Levy & McRae point to this statement to show that the SG (or an employee thereof) wanted the information to get into the public domain and to show that the police are highly unlikely to have been the source of the leak.

4.5 The SG sent a proposed press release to Levy & McRae on the 23 August. In response, Levy & McRae notified the SG of their intention to apply for an interim interdict. The SG responded by confirming that they would not issue the press release in the meantime. Events were then of course overtaken by the leak of the information to the press and into the public domain.

4.6 I have sympathy with the hypothesis that the leak came from an employee of the SG and agree that the timing arguably could raise such an inference. It was still necessary to identify a suspect.

4.7 The interviews with the relevant staff members didn't provide any leads however and no other person had come forward volunteering information.

4.8 There remains the possibility that the leak came from elsewhere. The list of stakeholders who had access to the internal misconduct investigation report includes the original complainants, the QC, the First Minister's Principal Private Secretary, the Crown Office & Procurator Fiscal Service and Mr Salmond and Levy & McRae, as well as the relevant staff members of the SG.

4.9 The list of stakeholders who had access to the legal advice provided by the Lord Advocate during the misconduct investigation included staff within the Lord Advocate's office, the Permanent Secretary's Office and officials in the SG's Legal Directorate.

4.10 Following investigation, there was no evidence to identify any specific individual within these lists, or any member of staff working for anybody within these lists, as a potential suspect.

5. Review of decision by CRIT

5.1 As investigators, CRIT must have regard to the provisions of the **Criminal Procedures and Investigations Act 1996**, specifically s.23(1) Code of Practice Part II.

5.2 Point 3.5 provides that the investigator shall pursue all reasonable lines of inquiry. CRIT have a duty therefore to investigate data complaints to an appropriate extent.

5.3 During this investigation, it is clear that CRIT gathered extensive information from the SG, seeking further information and clarification where needed.

5.4 The result was no suspect could be identified from the evidence collated and the decision was taken that the investigation could not be progressed without further information coming to light.

5.5 I am satisfied that the complaint had been investigated to an appropriate extent, with all reasonable avenues of inquiry considered and/or pursued.

5.6 When deciding whether to proceed to prosecute in any case, I am required to apply the two stage test prescribed by the Code for Crown Prosecutors issued by the Crown Prosecution Service.

5.7 The first stage is to consider whether there is sufficient evidence to provide a realistic prospect of conviction. Without a suspect, there is simply no realistic prospect of conviction because there is nobody to prosecute and/or convict. I do not therefore even reach the second stage of the test, which is to consider whether it would be in the public interest to prosecute.

5.8 I am satisfied that in the absence of any suspect, the decision to discontinue the investigation was correct and reasonable in all the circumstances.

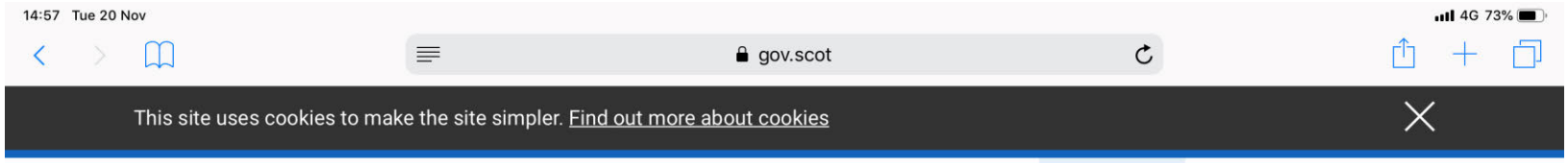
5.9 If further information comes to light, for example if a witness comes forward, then I have no doubt that the matter would be properly

revisited. At the present time, however, I am satisfied that there are no grounds to re-instate the investigation.

Yours sincerely,

[Redacted]
Solicitor (Prosecutor)

Appendix B



PUBLICATION - ADVICE AND GUIDANCE

Handling of harassment complaints involving current or former ministers

Published: **23 Aug 2018**

From: Permanent Secretary

Directorate: Communications, Ministerial Support and Facilities Directorate

Internal procedure agreed in December 2017 and published at that time on the Scottish Government intranet.

Initial contact

1. An individual may choose to raise an issue involving a current or former Minister through a number of mechanisms. These may include a senior manager of your choosing, direct to HR or a Trade Union representative. If the approach is made through these routes it should be escalated to the Director of People for consideration and so that sources of support can be offered to the individual.

2. At this early point it will be important to support the individual to consider how best to resolve the issue. At this point options available to the staff member include:

2.1 Asking th[redacted]ut further action being

https://www.gov.scot/publications/handling-of-harassment-complaints-involving-current-or-former-ministers/

P850/18 Pet: Alex Salmond for J/R

DAC Beachcroft Scotland LLP Scottish Government

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 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.

Author: [Redacted]