**SUBMISSION TO COMMITTEE ON LATEST DOCUMENTS RELEASED BY SCOTTISH GOVERNMENT AND PREVIOUSLY UNDISCLOSED DOCUMENTS**

## INTRODUCTION

The Committee has asked if I could assist with a submission on the latest documents sent by the Scottish Government to the Committee. Some of these had remained previously undisclosed, despite the Judicial Review and criminal disclosure process.

I am happy to do so and will repeat these comments in summary form in my full submission.

My legal team have thus far identified 46 of the near 400 documents in the recent Scottish Government data release, 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 proceedings. Given that the Judicial Review was won and I was cleared of all charges in the criminal case, it might be asked what does this matter now. It does for two reasons.

First, some of these withheld documents would have added a further powerful argument to the Judicial Review on bias, not just reinforcing the revelations about the role of the Investigating Officer, but also introducing an argument of bias in the actions of the decision maker, the Permanent Secretary.

Second, in the criminal case the proceedings of the Judicial Review were largely excluded as collateral. This had an impact on the ability of the defence case to lead important evidence. If these newly disclosed documents had been disclosed at the time ordered by court and search warrant to be so, it may have been possible to establish the relevance of the Judicial Review to the criminal proceedings. The actions of a Government failing to disclose evidence required by warrant having a potential bearing on the ability of any individual to respond to criminal charges, and thus the administration of justice, should be a matter of profound concern.

Notwithstanding the above, the 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.

## KEY MATERIAL WITHHELD

### 1. MEETING OF PERMANENT SECRETARY WITH COMPLAINERS

(DOCUMENTS 633, 524,249, 140, 520, 299, 300 and 270)

These documents show the extent of the prepared briefing by the Investigating Officer in advance of a meeting with the two complainants and the Permanent Secretary in the week beginning 5th March 2018. They reveal that the Investigating Officer, whose role under the procedure is meant to be an impartial collector of facts and preparer of reports, met herself with the Permanent Secretary, was in frequent communication with the complainants and witnesses and was also recommending wide ranging organisational responses. Document INV 270 shows the preparation notes for the meeting with the Permanent Secretary and the complainers.

Given that the first information of any procedure or complaints under it was intimated to me on 8th March 2018, this suggests that the decision maker, the Permanent Secretary, met the complainers before I was even informed of the existence of any complaints.

In her evidence before the Committee, the Permanent Secretary suggested that it would have been "inappropriate" for her to know the identities of complainers before the complaints procedure was approved. It is a much graver matter for the decision maker to be meeting complainers in mid-process.

The procedure adopted by the Scottish Government could have been declared unlawful on many grounds. One of these was that it uses a process by which the person complained about does not even get to present his or her own case, but that it is left to the Investigating Officer to make an "impartial" collection of facts for the decision maker to pronounce upon.

The bias of the Investigating Officer was determined not just because of the breach of clause 10 in the process, but because of the reason that such a clause exists. There is an assumption in common-law against actions which would be seen by a reasonable observer to be unfair. If impartiality of the Investigating Officer is important then the impartiality of the decision maker who thereafter makes a determination based on that information, is even more important.

To withhold this information is reprehensible. To attempt to excuse the withholding of this information is indefensible. However it is not only indefensible it is also inaccurate.

I understand that the Scottish Government are attempting to explain the withholding on the grounds that the information was not caught in the Specification of Documents in the Judicial Review.

That is irrelevant. As Lord Pentland indicated to the court at a procedural hearing of the Judicial Review on 6th November 2018 a public authority has a general duty of disclosure of relevant information and it would be unusual to require a court order to fulfil that duty. The Scottish Government indicated that they would take a responsible approach. The Permanent Secretary knew of this meeting (and the associated notes) and chose not to disclose it, until now, which I find staggering.

If this material had been disclosed, then the apparent bias of the Permanent Secretary as decision maker would have been introduced in our pleadings at the Judicial Review as an additional ground of review. Given the decision of Lord Pentland on apparent bias, it seems highly likely the Judicial Review would have succeeded on that ground also.

In the criminal case, the non-disclosure is even more blatant. The search warrant served on the Government specifically required all documentation of meetings between the Permanent Secretary and complainers.

Not to provide the relevant documents in the face of this warrant is a *prima face* a contempt of court. It may also be argued to be an attempt to pervert the course of justice. A key argument of the preliminary hearings in the trial was the attempt of my defence to introduce some of the material from the Judicial Review into evidence in the criminal case. I was not allowed to lead that evidence, Lady Dorrian being unpersuaded of the relevance.

If the fact of this meeting had been revealed, it would have significantly reinforced the arguments being advanced on my behalf. It may have resulted in the defence having an additional and important line of questioning at trial. Without it, my Counsel were unable to explore what, if any, disclosure was made at this meeting and ask the obvious question if a referral was to be made on instruction of the Permanent Secretary to the Crown Office or police against the wishes of complainers, then why wasn't it made at the latest in March 2018 rather than August 2018?

**2. REVELATION OF LEGAL ADVICE TO COMPLAINERS AND WITNESSES**

**(**DOCUMENTS 640, 625, 507, 659~~,~~ 462,213,210)

Documents in this series demonstrate contact between the Investigating Officer and the complainers throughout the process. The duty of the Investigating Officer under the policy, is to provide an impartial collection of facts. That is not compatible with regular contact with the complainers in the manner and type suggested by these documents.

In these documents the Investigating Officer describes her view of my legal position to both complainers and indeed witnesses.

My legal advice is subject to legal professional privilege. It was presented to the Permanent Secretary to explain to her that the policy she had introduced was neither fair nor lawful. It has now been released to the Committee to assist in the parliamentary process. No permission was ever sought, or given, for that legally privileged correspondence to be summarised in a partial and incomplete version to others and, in particular, to the complainers in the case.

The irony of civil servants willing to freely dispense my privileged legal advice, while the Scottish Government continues to refuse to divulge its own, will not be lost on the Committee. It seems that the principle of legal professional privilege is a highly selective one as far as the Scottish Government is concerned.

In a letter to the Committee (7th December) Ms MacKinnon seeks to argue that she was merely fulfilling her role of informing the complainers of the progress of the case and relaying information such as the offer of mediation. This is seriously misleading for three reasons.

First, the offer of mediation was relayed to the complainers AFTER it had been rejected by the Permanent Secretary. This is shown for example by document INV 202. The Scottish Government's attempts in its timeline and explanations to conceal this from the Committee are reprehensible.

Second, the Scottish Government were quite entitled in terms of any duty of care to stay in touch with the complainers and keep them up to date with the progress of the procedure. That is not the issue. The issue is that this should not have been done by the "impartial" Investigating Officer and that information should not have included my privileged legal advice. The dangers inherent in these actions are illustrated by document INV104 where the Investigating Officer not only interprets the legal arguments of Levy and McRae, but then goes on to speculate with Ms B on my "thinking" behind the response. These are not the actions of an impartial Investigating Officer.

Thirdly, the documents (eg INV 461) now disclose that the Investigating Officer was revealing her version of the contents of my legal advice not just to complainers, but to witnesses in the case as well.

Similar to the revelations on the Permanent Secretary's meeting, this material should have been disclosed as part of a general duty of disclosure in the Judicial Review and would have enabled my legal team to introduce yet further arguments on the bias of the Investigating Officer.

In addition some of this material was again within the specification of the search warrant in the criminal case and, once again, parts of it were withheld by the Scottish Government.

I was therefore placed at a disadvantage in both cases by the lack of disclosure.

**3. MATERIAL ON CIRCUMSTANCES OF POLICE REFERRAL AGAINST WISHES OF COMPLAINERS**

(DOCUMENTS 130, 320, 317, 316, 323 and 325)

The documents make it clear that the reference to the police via the Crown Office was against the wishes of both complainers. In early August 2018, first Ms McKinnon then Ms Richards acting on behalf of the Permanent Secretary, 'sounded out' the complainers on their attitude to a criminal case.

The Permanent Secretary told the Committee in her evidence session on 17th November, that the interests of the complainers were always at the "forefront" of her consideration. Earlier documentation released to this Inquiry indicated that the view of the civil servants when embarking on the process in November 2017 was that any police referral had to respect the wishes of complainants and it will presumably not be contested that this assurance would have been given to the complainers. Another hitherto undisclosed document (INV 584) indicates that they were still being told this as late as 25th July 2018 that their views were "central to decisions that's made" on police referral.

However, when it came to August 2018 (as document INV320 makes clear), Ms Richards specifically highlighted the view of the complainers against criminal proceedings, and this was apparently ignored by the Permanent Secretary.

The Permanent Secretary claimed before the Committee (8th September 2020) not to be "completely aware" of how the police referral; was made. As we now know from these documents, it was made on her instruction by Ms Richards via the unusual route of the Deputy Crown Agent (INV 323) who was sent documentation on 22nd August 2018 although the letter was dated 20th August 2018. The Sunday Post newspaper reported on 26th August 2018, that this was on the advice of the Lord Advocate. The Permanent Secretary said in her evidence to the Committee that the referral was made "on legal advice". It would be important to know if something similar was said to the complainers.

The Deputy Crown Agent in turn arranged a meeting with the Chief Constable and another senior officer who, quite correctly, refused to accept the documentation on the grounds that it might prejudice their enquires.

The degree of persuasion applied to the complainers in this matter would have been highly relevant to the criminal proceedings, and although it was admitted to a very limited extent in evidence, the disclosure of these documents would have placed the argument onto an entirely different level.

**4. DOCUMENTS WHICH REMAIN UNDISCLOSED**

Despite the general admonition from Lord Pentland in the civil case on the general requirement of disclosure by the Scottish Government, a Commission and Diligence in December 2018, a search warrant in the criminal case, and the repeated calls for documents made by this Committee, it is still far from clear that all relevant documents have been provided. My legal team, the Committee and indeed the Crown Office have all experienced similar frustration, obstruction and delays in securing documentation.

In late November 2019 the Crown Office felt required to warn the Scottish Government that they would take "necessary steps" to ensure compliance with the terms of the search warrant for documents which would have seen the police moving in and independently seizing Scottish Government files. It is not clear whether in this process of obfuscation and delay the civil servants have been acting as they are now under the direction of Ministers. It goes well beyond the question of the, as yet, withheld legal advice.

The Committee has heard evidence that there were 17 meetings between Scottish Ministers, civil servants, a Special Adviser and external Counsel between late August 2018 and early January 2019. It is likely that there were additional meetings before that date, when Counsel were first instructed. The Committee has heard evidence from Mr Cackette that, in addition, there were daily meetings to discuss the progress of the Judicial Review and Ms McKinnon indicated that she herself attended such meetings some three times a week. She also told the Committee that she continued her role of reporting back to the complainers.

Despite this, minutes, 'OneNote' notes and exchanges between civil servants about the progress of the Judicial Review are missing entirely from the documentation presented to the Committee. In her evidence on 1st December Ms McKinnon referred to the "update emails that went to the complainers." These updates should be provided to the Committee.

Document INV 212 provides an indication of why that might be the case. In this email of 28th August 2018, Ms Richards provides an update on the early stages of the Judicial Review, including what appears to be legal advice from the SGLD which includes the prospects of "sisting" (suspending) the Judicial Review behind the criminal investigation.

The question of sisting has been mentioned by a number of witnesses including Mr Cackette and the Lord Advocate. It is certainly a matter which was discussed at these meetings, on which advice was given and information was forwarded on to the complainers and perhaps others. This has now been confirmed by Ms Mackinnon in her letter to the Committee of 7th December 2020 but as yet there are no documents provided to show how this was done.

It would be instructive for the Committee to see the notes and minutes of any of these meetings and the communications and emails of civil servants attending them, to judge how the prospects of success in defending the Judicial Review were being regarded in Government and whether it was hoped or believed that the Judicial Review (and the likely consequences of losing that Judicial Review) might be delayed indefinitely behind the prospect of criminal proceedings.

**SUMMARY**-

My legal team has identified a large number of documents which have not been previously disclosed in the civil or criminal proceedings.

These materials have been provided to me and my legal team in a drip feed manner from the beginning. I was forced to pursue a lengthy and very expensive Commission process over Christmas 2018 to enable recovery of documents which the judge had said in November ought to have been provided without formal orders and which the Scottish Government had previously claimed did not exist. I was then denied yet further documents in the preparation of my trial.

A number of these are highly relevant and could have been influential in both proceedings. There seems to be no reasonable explanation for this apparent and flagrant violation of court direction, orders and search warrants.

The documents, as produced, have followed a familiar pattern. The documents produced via orders of court have generally been damaging to the case of the Scottish Government. The same applies to these documents extracted by the Committee and now being seen for the first time. It raises the question of what further documentation remains unseen.

In the Judicial Review, this behaviour resulted in expenses being awarded on the punitive 'agent/client, client paying' basis. In the context of the criminal proceedings, the blatant disregard of the provisions of a search warrant secured by the Crown would appear to be a *prima facie* contempt of court. We accordingly will pursue that matter with the Lord Advocate.

Alex Salmond
14 December 2020

Footnote 1: List of undisclosed documents

- 576, 673, 6, 357, 161, 135, 356, 17, 286, 54, 80, 584, 156, 633, 535, 524, 96, 249, 140, 520, 299, 300, 270, 662, 640, 625, 507, 659, 462, 213, 210, 425, 421, 204, 329, 530, 661, 324, 110, 209, 130, 320, 317, 316, 323, and 325.