Submission by Alex Salmond – Phase 4 – Ministerial Code

Introduction

1. This is a submission to the Parliamentary Committee under Phase Four of the Inquiry. This submission is compliant with all legal obligations under the committee's approach to evidence handling and takes full account of the Opinion of Lady Dorrian in the High Court as published on 16th February 2021.

All WhatsApp messages between myself and the First Minister referred to in this submission, have previously been provided to the Parliamentary Committee by the First Minister and published by the Committee.

The Terms of Reference

2. Mr Hamilton, the independent adviser on the Ministerial Code, wrote to me on 8th September, 29th October, 16th November, 4th and 19th December. I replied on 6th and 17th October, 23rd November and 23rd December. I finally agreed under some protest to make a written submission.

The reason for my concern was that the remit drawn up for Mr Hamilton focuses on whether the First Minister intervened in a civil service process. As I have pointed out to Mr Hamilton, I know of no provisions in the Ministerial Code which makes it improper for a First Minister to so intervene.

3. To the contrary, intervention by the First Minister in an apparently unlawful process (subsequently confirmed by the Court of Session) would not constitute a breach precisely because the First Minister is under a duty in clause 2.30 of the Ministerial Code to avoid such illegality on the part of the Government she leads.

4. Further, to suggest intervention was a breach would be to ignore and contradict the express reliance of the procedure on the position of the First Minister as the leader of the party to which the former minister was a member in order to administer some unspecified sanction.

5. It will accordingly be a significant surprise if any breach of the Ministerial Code is found when the terms of reference have been tightly drafted by the Deputy First Minister to focus on that aspect of the First Minister's conduct.

6. By contrast, I have information which suggests other related breaches of the Ministerial Code which should properly be examined by Mr Hamilton. I have

asked that he undertake that investigation. I have drawn his attention to the apparent parliamentary assurance from the First Minister on 29th October 2020 that there was no restriction on Mr Hamilton preventing him from doing so.

7. Mr Hamilton has failed to give me a clear response as to whether these related matters relevant to the Ministerial Code, but outwith the specific remit, are going to be considered. However, in his letter of 4th December he did indicate that he was inclined to the view that such matters could be considered and will take into account arguments for their inclusion. Since that time I understand members of the Committee have received further assurances. It is on that basis I make this submission.

8. In doing so, I would note that it does not serve the public interest if the independent process of examination of the Ministerial Code (which I introduced as First Minister) is predetermined, or seen to be predetermined, by a restrictive remit given by the Deputy First Minister.

9. A restricted investigation would not achieve its purpose of genuine independent determination and would undermine confidence in what has been a useful innovation in public accountability.

10. I would accordingly urge Mr Hamilton to embrace the independence of his role and the express assurance given to the Scottish Parliament by the First Minister that he is free to expand the original remit drafted by the Deputy First Minister and to address each of the matters contained in this submission.

Breaches of the Ministerial Code.

11. Beyond the terms of the remit set for Mr Hamilton by the Deputy First Minister, there are other aspects of the conduct of the First Minister which, in my submission, require scrutiny and determination in relation to breaches of the Ministerial Code.

[Redacted]

[Redacted]

14. On receipt of the letter from the Permanent Secretary first informing me of complaints on 7th March 2018 I had secured Levy and McRae as my solicitors and Duncan Hamilton, Advocate and Ronnie Clancy QC as my counsel.

15. Even at this early stage we had identified that there were a range of serious deficiencies in the procedure. There was no public or parliamentary record of it

ever being adopted. In addition it contained many aspects of both procedural unfairness and substantive illegality. There was an obvious and immediate question over the respect to which the Scottish Government even had jurisdiction to consider the complaints. In relation to former Ministers (in contrast to current Ministers) it offered no opportunity for mediation. The complaints procedure of which I was familiar ('Fairness at Work') was based on the legislative foundation of the Ministerial Code in which the First Minister was the final decision maker. I wished to bring all of these matters to the attention of the First Minister. I did not know at that stage the degree of knowledge and involvement in the policy on the part of both the First Minister and her Chief of Staff.

[Redacted]

[Redacted]

18. I was well aware that under the Ministerial Code the First Minister should notify the civil service of the discussion and believed that this would be the point at which she would make her views known. The First Minister assured us that she would make such an intervention at an appropriate stage.

19. On 23rd April 2018, I phoned the First Minister by arrangement on WhatsApp to say that a formal offer of mediation was being made via my solicitor to the Permanent Secretary that day. In the event, this offer was declined by the Permanent Secretary, even before it was put to the complainers.

20. By the end of May, it was becoming clear that the substantial arguments my legal team were making in correspondence against the legality of the procedure were not having any impact with the Permanent Secretary. My legal team advised that it was impossible properly to defend myself against the complaints under such a flawed procedure. They advised that a petition for Judicial Review would have excellent prospects of success given the Government were acting

unlawfully. However I was extremely reluctant to sue the Government I once led. I wanted to avoid the damage both to the Scottish Government and the SNP which would inevitably result. To avoid such a drastic step, I resolved to let the First Minister see the draft petition for Judicial Review. As a lawyer, and as First Minister, I assumed that she would see the legal jeopardy into which the government was drifting. I therefore sought a further meeting.

21. On 1st June 2018 the First Minister sent me a message which was the opposite of the assurance she had given on the 2nd April 2018 suggesting instead that she had always said that intervention was "not the right thing to do". That was both untrue and disturbing. On 3rd June 2018 I sent her a message on the implications for the Government in losing a Judicial Review and pointing to her obligation (under the Ministerial Code) to ensure that her administration was acting lawfully and (under the Scotland Act) to ensure that their actions were compliant with the European Convention.

22. The First Minister and I met in Aberdeen on 7th June 2018 when I asked her to look at the draft Judicial Review Petition. She did briefly but made it clear she was now disinclined to make any intervention.

23. My desire to avoid damaging and expensive litigation remained. My legal team thereafter offered arbitration as an alternative to putting the matter before the Court of Session. That proposal was designed to offer a quick and relatively inexpensive means of demonstrating the illegality of the procedure in a process which guaranteed the confidentiality of the complainers. It would also have demonstrated the illegality of the process in a forum which would be much less damaging to the Scottish Government than the subsequent public declaration of illegality. I was prepared at that time to engage fully with the procedure in the event my legal advice was incorrect. In the event, of course, it was robust. I explained the advantages of such an approach to the First Minister in a Whatsapp message of 5th July 2018.

24. At the First Minister's initiative which I was informed about on the 13th July we met once again at her home in Glasgow at her request, the following day, 14th July 2018. There was no one else at this meeting. She specifically agreed to correct the impression that had been suggested to my counsel in discussion between our legal representatives that she was opposed to arbitration. I followed this up with a WhatsApp message on the 16th July 2018.

25. On 18th July 2018 the First Minister phoned me at 13.05 to say that arbitration had been rejected and suggested that this was on the advice of the Law Officers. She urged me to submit a substantive rebuttal of the specific complaints against me, suggested that the general complaints already answered were of little consequence and would be dismissed, and then assured me that my submission would be judged fairly. She told me I would receive a letter from the Permanent Secretary offering me further time to submit such a rebuttal which duly arrived later that day. As it turned out the rebuttal once submitted was given only cursory examination by the Investigating Officer in the course of a single day and she had already submitted her final report to the Permanent

Secretary. My view is now that it was believed that my submission of a rebuttal would weaken the case for Judicial Review (my involvement in rebutting the substance of the complaints being seen to cure the procedural unfairness) and that the First Ministers phone call of 18th July 2018 and the Permanent Secretary's letter of the same date suggesting that it was in my "interests" to submit a substantive response was designed to achieve that.

26. In terms of the meetings with me, the only breaches of the Ministerial Code are the failure to inform civil servants timeously of the nature of the meetings.

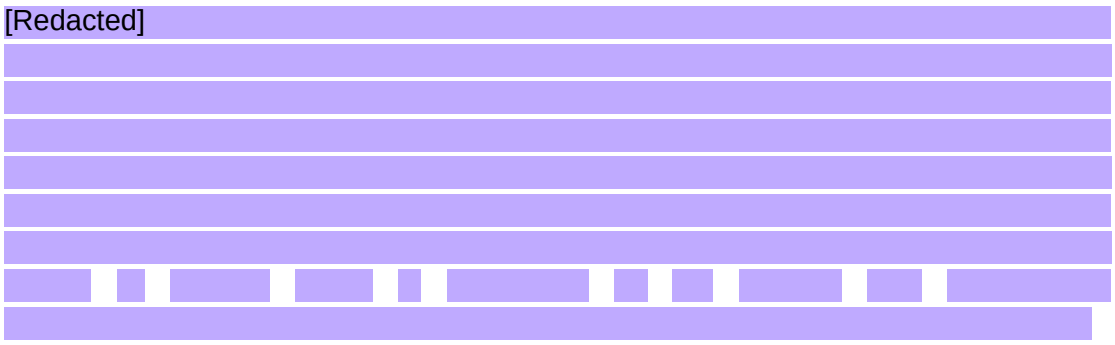
27. My view is that the First Minister should have informed the Permanent Secretary of the legal risks they were running and ensured a proper examination of the legal position and satisfied herself that her Government were acting lawfully.

28. Further once the Judicial Review had commenced, and at the very latest by October 31st 2018 the Government and the First Minister knew of legal advice from external counsel (the First Minister consulted with counsel on 13th November) that on the balance of probability they would lose the Judicial Review and be found to have acted unlawfully. Despite this the legal action was continued until early January 2019 and was only conceded after both Government external counsel threatened to resign from the case which they considered to be unstateable. This, on any reading, is contrary to section 2.30 of the Ministerial Code.

29. Most seriously, Parliament has been repeatedly misled on a number of occasions about the nature of the meeting of 2nd April 2018.

[Redacted]

[Redacted]



31. In her written submission to the Committee, the First Minister has subsequently admitted to that meeting on 29th March 2018, claiming to have previously 'forgotten' about it. That is, with respect, untenable. The pre-arranged meeting in the Scottish Parliament of 29th March 2018 was "forgotten" about because acknowledging it would have rendered ridiculous the claim made by the First Minister in Parliament that it had been believed that the meeting on 2nd

April was on SNP Party business (Official Report 8th & 10th January 2019) and thus held at her private residence. In reality all participants in that meeting were fully aware of what the meeting was about and why it had been arranged. The meeting took place with a shared understanding of the issues for discussion - the complaints made and the Scottish Government procedure which had been launched. The First Minister's claim that it was ever thought to be about anything other than the complaints made against me is wholly false.

The failure to account for the meeting on 29th March 2018 when making a statement to Parliament, and thereafter failing to correct that false representation is a further breach of the Ministerial Code.

Further, the repeated representation to the Parliament of the meeting on the 2nd April 2018 as being a 'party' meeting because it proceeded in ignorance of the complaints is false and manifestly untrue. The meeting on 2nd April 2018 was arranged as a direct consequence of the prior meeting about the complaints held in the Scottish Parliament on 29th March 2018.

32. The First Minister additionally informed Parliament (Official Report 10th January 2019) that 'I did not know how the Scottish Government was dealing with the complaint, I did not know how the Scottish Government intended to deal with the complaint and I did not make any effort to find out how the Scottish Government was dealing with the complaint or to intervene in how the Scottish Government was dealing with the complaint.'

I would contrast that position with the factual position at paragraphs 18 and 25 above. The First Minister's position on this is simply untrue. She did initially offer to intervene, in the presence of all those at the First Ministers house on the 2nd April 2018. Moreover, she did engage in following the process of the complaint and indeed reported the status of that process to me personally.

33. I also believe it should be investigated further in terms of the Ministerial Code, whether the criminal leak of part of the contents of the Permanent Secretary's Decision report to the Daily Record was sourced from the First Minister's Office. We now know from a statement made by the Daily Record editor that they received a document. I enclose at Appendix B the summary of the ICO review of the complaint which explains the criminal nature of the leak and the identification of 23 possible staff sources of the leak given that the ICO Prosecutor has "sympathy with the hypothesis that the leak came from an employee of the Scottish Government". My reasoning is as follows. The leak did not come from me, or anyone representing me. In fact I sought interdict to prevent publication and damage to my reputation. The leak is very unlikely indeed to have come from either of the two complainers. The Chief Constable, correctly, refused to accept a copy of the report when it was offered to Police Scotland on August 21st 2018 by the Crown Agent. It cannot, therefore have leaked from Police Scotland. Scottish Government officials had not leaked the fact of an investigation from January when it started. The only additional group of people to have received such a document, or summary of such a document, in the week prior to publication in the Daily Record was the First Minister's Office

as indicated in paragraph 4.8 of the ICO Prosecutor's Report. In that office, the document would be accessed by the First Minister and her Special Advisers.

I would be happy to support this submission in oral evidence.

Rt Hon Alex Salmond
17th February 2021

Upholding information rights

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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)

James Hamilton
Independent Adviser on the Scottish Ministerial Code

c/o E: [Redacted]

Alex Salmond,
c/o Levy & McRae
Pacific House
70 Wellington St
Glasgow
G2 6UA

8 September 2020

Dear Mr Salmond,

SCOTTISH MINISTERIAL CODE: FIRST MINISTER'S SELF-REFERRAL

As you may know, I have been appointed as the independent adviser to consider the First Minister's self-referral under the Ministerial Code. I attach a copy of the Parliamentary answer which sets out the remit for the referral.

My purpose in writing is to seek your cooperation in my enquiries, and to request from you a range of information to assist me in preparing my report.

I would be grateful if you would supply me with a general statement about your actions and involvement in the matters covered by my remit.

This should include, but not be limited to: an indication of what were the intentions that lay behind your actions and, in particular, the series of contacts that you had with the First Minister; and, any other information that would assist me in my considerations.

In addition to a general statement, I would welcome your response to a series of specific questions as follows:

1. Details of all contacts you, or anyone representing you, had with the First Minister or any civil servant or special advisor between 16 January 2018, when the first complaint was made under the Scottish Government's Procedure for the Handling of Harassment Complaints involving Current or Former Ministers, and 18 July 2018, when a second telephone conversation took place, which, according to the First Minister, was the last contact between the First Minister and yourself. Could you also provide details of the purpose of your communication with the First Minister?

2. In the case of each of the meetings or contacts set out in my remit, or any other meetings or contacts between the FM and yourself, whether direct or indirect, I should be grateful if you would confirm:

    2.1. Who initiated each meeting or contact?
    2.2. Who attended, participated, witnessed or was informed about each meeting or contact?
    2.3. What was the purpose of each meeting or contact?
    2.4. What was your purpose in participating in each meeting or contact? In what capacity were you at the meeting?
    2.5. What was discussed and who said what on each occasion?
    2.6. What was the duration of each meeting or contact?
    2.7. What was the conclusion of each meeting or contact?
    2.8. Was any record of the meeting or contact made?

3. More generally, can you please provide me, whether in electronic or physical form, any notes, memoranda, minutes or other records of the meetings disclosed or contained in any communications concerning or describing any of these contacts, including communications between yourself and Mr Aberdein.

4. What was your understanding of the role of the First Minister in respect of the investigations into the complaints made?

It is important that I advise you that information provided to me may be referred to and/or disclosed in my report, which I expect will be published by the Scottish Government in due course. I will take all necessary advice to ensure that my report is consistent with all relevant legal considerations, including any court orders applying to the matters under consideration. You will wish to make sure that information you provide is also consistent with the orders set out by the court.

Once I have the material requested above, I expect that I may wish to invite you to an interview you about these matters. Given the current travel restrictions, any meeting will take place remotely.

It would be helpful to have your response to this letter by 6 October 2020. Please let me know if this deadline is likely to pose a difficulty for you or if you need any clarification about any aspect of my request.

Yours Sincerely

[Redacted]

James Hamilton

Question S5W-31054: Clare Adamson, Motherwell and Wishaw, Scottish National Party, Date Lodged: 03/08/2020

To ask the Scottish Government whether it will provide an update on progress with the First Minister's self-referral under the Scottish Ministerial Code, which was announced on 13 January 2019.

Answered by John Swinney (03/08/2020):
In my response to S5W-21344 on 31 January 2019, I advised Parliament that the Ministerial Code referral had to be paused to avoid any risk of prejudice to live criminal proceedings. Since the conclusion of those proceedings, the attention of the Government has been focussed on leading Scotland's response global health emergency. In light of the progress that has been made we are now able to re-commence the referral.

The referral will be led by James Hamilton, who is a standing member of the panel of independent advisers. Mr Hamilton is a former Director of Public Prosecutions in Ireland and has been an independent adviser since January 2013.

Mr Hamilton will now proceed with the referral and report as soon as he is able. The report will be published in line with the terms of the remit.

The remit for the referral is as follows:

Ministerial Code Referral: Remit for Independent Adviser

Background
It has been alleged that the First Minister breached the Scottish Ministerial Code in that she failed to feed back the basic facts of meetings and discussions held with Alex Salmond to her private office as required by sections 4.22 and 4.23 of the Code. The meetings and discussions in question took place on:

- 29 March 2018 – Meeting between Ms Sturgeon and Geoff Aberdein, former Chief of Staff to Mr Salmond, Scottish Parliament
- 2 April 2018 - Meeting between Ms Sturgeon and Mr Salmond at Ms Sturgeon's home.
- 23 April 2018 - Telephone conversation between Ms Sturgeon and Mr Salmond.
- 7 June 2018 - Meeting between Ms Sturgeon and Mr Salmond at SNP Conference, Aberdeen.
- 14 July 2018 - Meeting between Ms Sturgeon and Mr Salmond at Ms Sturgeon's home.
- 18 July 2018 - Telephone conversation between Ms Sturgeon and Mr Salmond.

It is has been further suggested that, in light of those meetings, the First Minister may have attempted to influence the conduct of the investigation then being undertaken by the Permanent Secretary into allegations made against Mr Salmond under the Procedure for Handling of Harassment Complaints involving Current or Former Ministers ("the Procedure").

Scottish Ministerial Code

The key relevant extracts from the Code are:

> 1.6. Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Ministerial Code and for justifying their actions to Parliament and the public. The First Minister is, however, the ultimate judge of the standards of behaviour expected of a Minister and of the appropriate consequences of a breach of those standards. Although the First Minister will not expect to comment on every matter which could conceivably be brought to his or her attention, Ministers can only remain in office for so long as they retain the First Minister's confidence.
>
> 1.7. Where he or she deems it appropriate, the First Minister may refer matters to the independent advisers on the Ministerial Code to provide him or her with advice on which to base his or her judgement about any action required in respect of Ministerial conduct. The findings of the independent advisers will be published.
>
> **Contacts with External Individuals and Organisations, including Outside Interest Groups and Lobbyists**
>
> 4.22 Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. Meetings on official business should normally be arranged through Private Offices. A private secretary or official should be present for all discussions relating to Government business. Private Offices should arrange for the basic facts of formal meetings between Ministers and outside interest groups to be recorded, setting out the reasons for the meeting, the names of those attending and the interests represented. A monthly list of engagements carried out by all Ministers is published three months in arrears.
>
> 4.23 If Ministers meet external organisations or individuals and find themselves discussing official business without an official present – for example at a party conference, social occasion or on holiday – any significant content (such as substantive issues relating to Government decisions or contracts) should be passed back to their Private Offices as soon as possible after the event, who should arrange for the basic facts of such meetings to be recorded in accordance with paragraph 4.22 above.
> The First Minister has, accordingly, referred the matter for consideration by one or both Independent Advisers for advice on which to base her judgement about any action required in accordance with the Code.

Remit

The remit for the referral is to:

1. Review any relevant documentation relating to the meetings and discussions listed above.
2. Interview any Minister or official of the Scottish Government, including Special Advisers, who may have any knowledge of the facts and content of the meetings and discussions, to assess whether the Ministerial Code is engaged and, if so, whether the terms of the Code have been complied with.
3. Interview any relevant person outwith the Scottish Government, including the former First Minister, Alex Salmond, who may have information relating to the facts and content of the meetings and discussions.
4. Determine if there is any evidence that the First Minister attempted to use information discussed during those meetings and discussions to influence the conduct of the investigation being undertaken by the Permanent Secretary into allegations made against Mr Salmond under the Procedure.
5. Provide the Deputy First Minister with a report setting out the findings and conclusions with regard to:

i. whether the Ministerial Code is engaged regarding the meetings and discussions;
ii. whether there has been any breach of the Code and the nature of any such breach; and
iii. if a breach has occurred, advice on the appropriate remedy or sanction.

6. The Independent Adviser is further invited to consider and offer views on whether the Ministerial Code might need revision to reflect the terms of the Procedure and the strict limitations it places on the involvement of the First Minister in cases which fall to be considered under the Procedure.

Timing
The Independent Adviser is invited to commence the investigation and submit a report as soon as possible.

Publication
The terms of this remit will be published.

The final report will be published. If required, the report will be redacted to remove the risk of any complainer being identified and otherwise to ensure compliance with the terms of the order made by the court in the criminal proceedings.

Payment
Appointment as an Independent Adviser does not attract payment. Reasonable travel and subsistence costs will be paid in line with normal Civil Service rules.

Secretariat
The Scottish Government will provide secretariat support as required.

Current Status: Initiated by the Scottish Government. Answered by John Swinney on 03/08/2020

EMAIL EXCHANGES BETWEEN MR ALEX SALMOND AND MR JAMES HAMILTON

1. Mr Salmond to Mr Hamilton
31st December 2020

Dear [Redacted]

Correspondence for Mr Hamilton

Please see attached correspondence, submission and two appendices for the attention of Mr James Hamilton. Please confirm receipt and thank you for your assistance.

Best wishes for 2021

Yours for Scotland

Alex Salmond

2. Mr Hamilton to Mr Salmond
19th December 2020

Dear Mr. Salmond,

Further to my letter of 7 December 2020, I repeat my enquiry whether you are prepared to provide a written statement to help me with my investigation. It would be very helpful to have a written statement from you, with as much information as you feel able to provide, setting out your responses to the questions included in previous correspondence.

As you are aware the Ministerial Code provides that the First Minister may refer matters to the independent advisers to provide her with advice on which to base her judgment about any action required in respect of Ministerial conduct. The First Minister has made such a referral to me on foot of which I have sought written statements from all the persons whom I have identified as likely to have evidence relevant to that remit. I have now received written statements from every person whom I have so identified except you.

As you are also aware I have no power to compel any person to cooperate with me. That being so I must formulate my advice on the evidence and information which is available to me. I also consider that the First Minister is entitled to expect that I will do so in a reasonably expeditious manner.

I therefore now intend to complete my consideration of written statements as soon as possible. In order for any statement from you to form part of that consideration I will need to receive it without delay. If you do intend to make a statement I would appreciate it if you could let me know when I might expect to receive it, otherwise I shall assume that you have decided not to become involved in this process.

Yours sincerely,

James Hamilton

3. Mr Hamilton to Mr Salmond
Dated 4th December 2020 but emailed on 7th December 2020

Dear Mr. Salmond

Thank you for your letter of 23 November sent via email to [Redacted] .

I consider it necessary in order for me to fulfil my remit that I obtain a full understanding of what was the purpose of the meetings between you and the First Minister and what occurred at them. Your evidence is therefore of great importance to me.

I am prepared to consider any arguments you may wish to advance about the scope of my remit. However, until I know what evidence you wish to give it would be premature for me to form a decided opinion on whether the remit should be extended or, in the event that I accepted the case for an extension, on how I should then proceed.

My inclination is to think that in the case of matters which form part of, or are closely related to, the subject matter of the remit it could be open to me to consider whether any provisions of the Ministerial Code other than those mentioned expressly in the remit had been broken. However, that situation is distinct from broadening the factual scope of the inquiry. I am, of course, prepared to consider any arguments you may wish to make before coming to a final conclusion on this point.

Although the procedure for an inquiry by an independent advisor under the Ministerial Code is a relatively informal one the rules of natural justice apply including in particular my obligation to hear both sides of any question which arises for determination. This, in my opinion, extends not only to the

consideration of evidence but also to any questions which may arise as to the scope of the remit.

It follows that if a question arises as to whether a particular matter can be regarded as falling within the scope of the remit or, if it does not, whether that scope ought to be expanded, it would be wrong of me to take a decided view on those issues based solely on your submissions without also giving the First Minister an opportunity to comment on them.

I would therefore suggest that you let me see your proposed evidence as soon as possible, together with any observations you may wish to make about the scope of the remit. If necessary I will then seek the First Minister's observations before I decide how I should deal with the matter.

Finally, with regard to your suggestion that there was a "criminal leak" to a newspaper I have no function to investigate crimes which should be reported to the proper authorities.

Yours sincerely,

James Hamilton

4. Mr Salmond to Mr Hamilton
23rd November 2020

Dear Mr Hamilton

Thank you for your letter of 29th October. I apologise for the delay in replying, but I had assumed that it had crossed with the exchange in the Scottish Parliament, detailed below, of that same date. To that end, I was awaiting a follow up letter from

you, confirming that indeed your remit was not “limited to one aspect of the Ministerial Code”;

- **Oliver Mundell (Dumfriesshire) (Con):** Will the First Minister agree to expand the ministerial code investigation to include her statements to Parliament and her actions on the legal advice regarding the judicial review into Alex Salmond’s alleged behaviour?
- **The First Minister (Nicola Sturgeon):** My view right now is that James Hamilton, who is the adviser undertaking the investigation into the ministerial code, is not restricted at all in the issues that he can look at. If he thinks that there are any issues that engage the ministerial code or could in any way constitute a breach of the ministerial code, my view is that he is free to look at them. If he considers that that requires any change to his official remit, I am sure that he is perfectly able to say that. However, for the record and to be clear, I do not consider his remit to be limited to just one aspect of the ministerial code.

You will have noted that this parliamentary exchange seems at odds with your letter, which suggests that you are restricted to answering the “questions asked in the referral”. You state;

“As you are aware the remit of the referral was set out by the Deputy First Minister in a PQ response to the Scottish Parliament made on 6 August 2020. Considering that the principal matter I am asked to consider concerns an alleged breach of the Ministerial Code in the First Minister’s failure to record contacts with you it seems entirely logical to ask the question whether the First Minister was in fact involved in any way in the Scottish Government investigation. In seeking to answer the questions asked in the referral I will of course have to consider any relevant surrounding circumstances.”

As detailed in my previous letter, I know of no aspect of the Ministerial Code which prevents a First Minister intervening in a process, not least one which was found by the Court of Session to be “unlawful”, and as one consequence of which said process is currently being examined by the SGHHC Committee of the Scottish Parliament.

As I understand it, not intervening to ensure Government is not acting unlawfully when there is a danger that this might be the case, could be considered a breach in terms of the Ministerial Code. Non-intervention in this matter is relevant to the period covering spring and summer of 2018, and in the autumn, this extended to agreeing with or permitting the Permanent Secretary to disregard external legal advice on the Government’s prospects of success in the Judicial Review.

This was further compounded by Parliamentary statements on repeated occasions, which have been questioned by MSPs as misleading, most pertinently in relation to the timing of when the First Minister first knew of the investigation and the explanation that the 2nd April meeting was held in the First Minister’s private home because she thought it was a matter of party business. There is, of course, the further question of the criminal leak of protected information to the Daily Record newspaper on 23/24th August 2018 and what, if anything, was the First Minster’s state of awareness of the circumstances and the potential involvement of her staff in same.
When I established the independent procedure for referral of purported First Ministerial breaches of the Ministerial Code, it was an innovation and one carried through in good faith. I appointed people of outstanding calibre, such as yourself as independent advisors, so that no-one could suggest that any referrals were being “fixed” either by the civil service or the Government.

It would be disappointing if this is now being done by the Deputy First Minister, by virtue of confining your terms of referral.

I look forward to your confirmation that your remit is not “limited to just one aspect of the Ministerial code”. On that basis I will submit the evidence for which you have asked.

Two final matters.

Firstly, I enclose the letter from the Crown Office which you requested. As you will note, it threatens prosecution if I were to reveal to the Parliamentary Committee (and presumably to yourself) documents which were disclosed in the course of the criminal case.

Secondly, I confirm that the record of Whatapp messages between the First Minster and myself from 5 November 2017 to 20 July 2018 supplied to the Parliamentary Committee by the First Minister and published on their website is correct. There is however, one exception. [Redacted]

I look forward to hearing from you

Yours sincerely

Rt Hon Alex Salmond

5. Mr Hamilton to Mr Salmond
Dated 29th October 2020 but emailed on 16th November 2020

29 October 2020

Dear Mr. Salmond,

As I set out in my letter dated 29 October, I am in the process of considering written submissions in relation to the matters referred to me by the First Minister as independent adviser in relation to the Ministerial Code and considering what additional information I may need to gather. I have now received written submissions from all the principal persons whom I believe may have relevant evidence except for you.

I would hope to be able to consider any written submission you might wish to provide as part of that process. It would therefore be helpful to me if you could indicate whether you intend to provide a written submission and if so when it might be available.

Yours sincerely,

James Hamilton

6. Mr Hamilton to Mr Salmond
29th October 2020

Dear Mr. Salmond,

Thank you for your emails of 6th October and 17th October asking various clarification questions about the work I am

undertaking. I apologize for the delay in acknowledging your first email, and for the delay in providing a substantive response. Your correspondence raised a number of significant questions which I wanted to give full consideration to.

Regarding the first point, I note what you say about representing yourself. I will, of course, have no control over what you put in your submissions. I can confirm that I will do my best to ensure that nothing in my report will be in breach of any applicable court orders.

In relation to your second point, thank you for drawing my attention to the two court interlocutors attached to your letter. I will have regard to these when conducting my investigation. I would indeed appreciate receiving a copy of the letter from the Crown Office which you refer to. Again, as I have just stated, I will do my best to ensure that nothing in my report will be in breach of any applicable court orders.

On the third point, as you will know, James Hynd's role as head of Cabinet Secretariat includes supporting Ministers in matters relating to the Ministerial Code. On that basis, Mr. Hynd supported the Deputy First Minister in establishing the referral I have been asked to undertake.

Mr. Hynd has stepped away from the process and [Redacted] [Redacted] has been appointed as Head of Secretariat Support to support my work as I require. I can confirm therefore that James Hynd will not play any role in relation to the day to day conduct of the inquiry or in the finalisation of my report and any recommendations that I may make.

I note your comment concerning my remit. As you are aware the remit of the referral was set out by the Deputy First Minister in a PQ response to the Scottish Parliament made on 6 August 2020. Considering that the principal matter I am asked to

consider concerns an alleged breach of the Ministerial Code in the First Minister's failure to record contacts with you it seems entirely logical to ask the question whether the First Minister was in fact involved in any way in the Scottish Government investigation. In seeking to answer the questions asked in the referral I will of course have to consider any relevant surrounding circumstances.

In relation to the issues raised in your second email, I can confirm that any response to my enquiries relating to the factual matters I am asked to enquire into will be used in the compilation of the report. I have not yet decided fully on the format of the report but any reply to such enquiries will be liable to be published with the exception of material which cannot be made public as a result of court orders or for other legal reasons.

I have set out various matters relevant to your questions in my recent correspondence with the Parliamentary committee.

https://www.parliament.scot/HarassmentComplaintsCommittee/James_Hamilton.pdf

With regard to incidental queries it would not be my intention to publish them as a matter of routine and it would be my preferred option to make no comment pending the completion of my enquiries. However, I am concerned not to favour or be perceived to favour any particular interested party in the matter and therefore if I were asked questions concerning contacts between interested parties and me I might well think it proper or necessary in the public interest and in particular in the interests of transparency to give a full reply.

For that reason I cannot exclude the possibility that any correspondence between us might at some stage be published.

I hope this answers your questions.

As you know, I am currently in the process of considering written submissions and what additional information I may need to gather. It would be helpful if you were able to indicate when you would be able to offer a written submission.

James Hamilton

7. Mr Salmond to Mr Hamilton
17th October 2020

Mr James Hamilton
Independent Adviser on The Scottish Ministerial Code.

17th October 2020

Dear Mr Hamilton

Further to my letter of 8th October I await an answer to the questions posed or an acknowledgement of the email. Could you ask your staff to provide this?

I am now in receipt of several press queries on whether I have been in communication with you. My practice with the Parliamentary Committee has been to “no comment” but draw attention to the publication of correspondence. However, I doubt that it is your intention to publish correspondence and therefore I would wish your guidance on how to reply to these questions.

On which subject I enclose a letter which my lawyers sent to the Parliamentary Committee on 14th October, which is clearly relevant to your remit, however it be defined.

Yours sincerely

The Rt Hon Alex Salmond

Appendix 1

Dear [Redacted]

WhatsApp Messages between Mr Salmond and First Minister

Thank you for your email of 13th October.

These are the additional messages we referred to in our letter of 27th November which were omitted from the First Minster's earlier submission. Apparently as a consequence of our informing the Committee of this omission, the First Minister has already read them out on live Sky News television in an interview with Sophy Ridge on October 11th without seeking our client's permission to release his data. In these circumstances he considers that it would be perverse for him to object to them being seen and published by your Committee.

However, we make the assumption that you only intend to publish material relevant to the Committee's remit.

The message of 5th November 2017 is the First Minister initiating contact over a Sky News press inquiry while the message on 6th November was the First Minister wishing to speak further after an approach on the same subject from the

Permanent Secretary. These are at least arguably relevant to the Inquiry and he is content that they are published.

The first two messages of 9th November concern the First Minister's objections to the launch of our clients TV Show that day on RT (as confirmed by her on Sky News) and are therefore not relevant to your enquiry and should not be published.

However the third message of 9th November beginning "Ps" is a direct reference to her earlier messages of 5th November and should be published.

Our client's message to the First Minister of 10th November is a continuation of our client's disagreement with the First Minister over the television show and a reference to the then bid for the Scotsman newspaper. As such it should not be published.

In addition, in our letter of 27th September we raised the question of the reasons for the redaction of the name of the person who had relayed the message from the First Minister that she wished to meet our client for a third time on this issue. You explained that it was the First Minister had redacted this information from our client's message of 13th July 2018 at 11.01am.

Since it was our client's message, we are aware of no legal reason for this redaction; it seems highly relevant to your deliberations and our client is content to see the message published in full. Can you please clarify the reason for redaction with the Scottish Government? Our client is content to provide a copy of the unredacted message.

However, we will leave the final decision on publication to your Committee. However we would ask that this information is shared with Committee members.

As we previously noted for completeness our client has a record of a missed call from the First Minister to our client at 13.05 on the 18th July.

Our client hopes that this is helpful.

Yours sincerely

David McKie
Partner

8. Mr Salmond to Mr Hamilton
6th October 2020

Mr James Hamilton
Independent Adviser on the Scottish Ministerial Code

6th October 2020

Dear Mr Hamilton,

Thank you for your letter of 8th September.

I do indeed have information which will be of assistance to your enquiries and am happy to assist you if I can.

However I would like to accept your offer of clarification on your request and ask first for answers to the following points;

Firstly, I am prepared to represent myself in presenting you with evidence. I am a private individual and simply cannot afford to hire further legal representation as my lawyers are fully

occupied dealing with the Scottish Parliamentary Inquiry. Vast sums of public funds have already been expended by Scottish Government officials in legal representation in this process. I am also informed that other witnesses are relying on their political party to finance their legal representation. I will represent myself and am therefore in no position to accept responsibility as to whether my submissions are in line with legal requirements as you suggest in your letter. That will require to be your responsibility and I will be grateful if you could now confirm this.

Secondly, on a related point, the remit drawn by the Deputy First Minister refers to the anonymity orders drawn up by the "court in the criminal proceedings". I would draw your attention to the rather more relevant ruling of Lord Woolman in the civil proceedings of 8th October 2018. This was sought by my counsel and as I recall the Scottish Government were not even represented by counsel at that hearing. Also relevant would be the interlocutor of Lord Pentland of January 8th 2019 after concession of the Judicial Review, where certain Scottish Government documents were reduced by the Court as the product of an unlawful process. For ease of reference I have copied you both of these court interlocutors. Please confirm that you shall not be relying on, or accepting into evidence, said unlawful documents as any part of your enquiries.

You may also be aware that my solicitors have been informed by letter from the Crown Office that if they present or even describe to the Parliamentary Committee information gained in disclosure in the criminal proceedings they will be liable to prosecution. I am happy to provide you with this letter if you wish. Please confirm if this threat applies to your enquiry because there are indeed relevant documents under this restriction. However, given that much of this documentation was obtained by Crown search warrant from the Scottish Government it would be open for the Government to supply you

with it. Your difficulty is that you do not know what it is and I am currently debarred from informing you.

Thirdly, I understand from the Parliamentary Committee hearings in answer to a question from Ms Jackie Baillie that the civil servant who has been allocated responsibility for leading support for your enquiry is Mr James Hynd. However Mr Hynd was himself deeply involved in the Scottish Government's unlawful complaints procedure. Indeed he claimed under oath at both the Commission which was required as part of the Judicial Review in December 2018 and in front of the Parliamentary Committee last month to be the original author of the policy. I do not dispute Mr Hynd's personal integrity although I note he was forced to write to the Committee to correct an impression he had unwittingly given about me in his evidence. However, please clarify his status and position in your enquiry given his prior involvement in this matter.

Fourthly, the remit given to your investigation by the Deputy First Minister lays a surprising stress on whether she interfered in the Scottish Government investigation. It might even be suspected that this remit has been set up as a straw man to knock down. There is no general bar on Ministers intervening in a civil service process of which I am aware and indeed there are occasions when Ministers are actually required by the code to intervene to correct civil service behaviour.

What I wish to know is whether matters which, by contrast, are specified in the Ministerial code such as the primary responsibility of not misleading Parliament (contrary to 1.3 (c) of the code), such as the failure to act on legal advice suggesting the Government was at risk of behaving unlawful (contrary to 2.30 of the code), and such as the Ministerial failure to ensure civil servants gave truthful information to parliament (contrary to 1.3 (e) of the code) will have at least equal status in your deliberations or are you confined to the political remit which you

have been set? If your enquiry has been confined by Ministers then please tell me if you have the authority to expand that remit unilaterally? If not, will you seek the authority of those in the Scottish Government who set the remit to expand it into these, and other, areas?

Finally since the Parliamentary Committee has demanded full transparency and expressed an interest in your deliberations I have copied them into this email.

As I am answering your enquires personally please direct all future correspondence to me directly at [Redacted] .

Yours faithfully

The Rt Hon Alex Salmond