

Our ref: CH/IC/0295/2018

Mr David McKie  
Levy & McRae  
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Glasgow  
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By email only: DMckie@lemac.co.uk

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 26<sup>th</sup> 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 Lesley Boal, 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 Boal 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,

**Carolyn Hubble**  
**Solicitor (Prosecutor)**