Rt Hon Alex Salmond MSP  
First Minister of Scotland  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG  

7 January 2013  

Dear First Minister  

SCOTTISH MINISTERIAL CODE: COMPLAINT BY CATHERINE STIHLER MSP  

Introduction  

1. In your letter of 25 October 2012, you invited me to become one of your independent advisers on the Scottish Ministerial Code and, in that capacity, to investigate a complaint by Catherine Stihler MEP that you had breached the Code. The basis of your invitation was paragraph 1.6 of the Code, which provides for the First Minister to refer matters to independent advisers on the Code.  

2. Ms Stihler set out her complaint in a letter to you on 24 October. The complaint related to comments by you and the Scottish Government about the legal advice that the Government had received on whether, and if so on what terms, an independent Scotland would be a member of the European Union (EU).  

Summary  

3. I have not found you, or the Scottish Government, to have breached the Ministerial Code in respect of any of the complaints made by Ms Stihler. I have though recommended that the Scottish Government considers revising those parts of the Ministerial Code relating to the provision of legal advice.
Remit and scope of investigation

4. You asked me to become an adviser and to carry out this investigation because Ms Stihler’s complaint, among other things, touched on the role of the Law Officers. The two other independent advisers are former Law Officers, and your Permanent Secretary had advised you that having them investigate such a complaint might have created the perception, if not the reality, of a conflict of interest.

5. Your remit to me was to consider the matters that Ms Stihler raised in relation to the Code and to provide you with a report on my conclusions. It required me to consider in their entirety all the matters that Ms Stihler had raised in terms of the Code. It did not refer or confine me to any particular part of the Code, and it did not require me to exclude any part of the Code from my investigation.

6. You stressed that any advice I decided to offer you would be entirely independent. You confirmed that my findings would be published.

7. The essence of Ms Stihler’s complaint related to comments you made, in an interview with Andrew Neil on the BBC on 4 March 2012, regarding legal advice that the Scottish Government had received concerning an independent Scotland’s continuing membership of the EU. Ms Stihler argued that your comments were incorrect, based on the statement by the Deputy First Minister, in the Scottish Parliament on 23 October 2012, that the Government had just at that point commissioned specific legal advice on the matter.

8. Ms Stihler complained further that your reliance on the Ministerial Code as the basis for withholding information about legal advice to the Government on EU membership that she had sought under the Freedom of Information (Scotland) Act 2002 (FOIA) constituted an abuse of power. In light of her complaints, she asked you to initiate an investigation into whether you had breached the Ministerial Code.

9. In her letter to you, Ms Stihler did not identify which part of the Code she considered that you had breached and did not elaborate on her complaint of abuse of power.

10. In determining the scope of my investigation, I decided that the Ministerial Code included no provisions relating to the abuse of power. That aspect of Ms Stihler’s complaint, I concluded, did not lie within the
remit that you had set me and, therefore, that I could not consider it. I decided also that I should not consider or comment on matters relating to FOIA as these are for the Scottish Information Commissioner and, if necessary, the courts to determine. I have, however, taken into account exchanges between the Government and the Commissioner in relation to Ms Stihler's FOIA case as part of the evidence of my investigation.

11. The sole purpose of my investigation has been to determine whether there has been a breach of the Code. I have not considered and do not discuss any of the constitutional and political arguments raised by the debate on independence.

**Methodology**

12. Having determined in broad terms the scope and remit of my investigation, I undertook an initial review of the available evidence. I identified potential gaps in the evidence, which I sought to fill through correspondence with Ms Stihler, the Lord Advocate and you, and at my meeting with you on Wednesday 19 December 2012. I analysed all of the evidence I had collected to identify the parts of the Ministerial Code – in both its 2008 and 2011 versions - that you might have breached and then considered whether, in my view, the evidence did support the conclusion that you had breached any part of either version of the Code. In the following sections, I outline the evidence; identify the relevant parts of the two versions of the Code; set out my analysis and findings; and offer my conclusion and recommendations.

**Evidence in relation to Ms Stihler’s complaint**

13. In the Annex, I set out the sequence of relevant events which I have considered as evidence that might have a bearing on Ms Stihler’s complaint. Though Ms Stihler’s complaint was made on 24 October 2012, it is related to, and can be seen to have had its origins in, the FOIA request she submitted to the Scottish Government in May 2011. While I have not considered the merits of the FOIA case, I have treated correspondence on it as part of the evidence that I should consider.

**The Scottish Ministerial Code**

14. The Scottish Ministerial Code provides guidance on how Scottish Ministers should act. The current version came into force in December 2011, replacing the version that had been in force since June 2008. Ms Stihler’s
complaint had its origins in May 2011, when the previous version of the Code had been in force. Ms Stihler argued that those parts of her complaint that related to the period before the new version of the Code came into force should be considered in light of the 2008 version. I accepted that argument in principle and have referred to the earlier version when considering evidence dating from the period during which it was in force. I have made it clear when I am doing so. In all other cases, references to the Code are to the 2011 version.

15. In light of that consideration, of the evidence outlined in the Annex – particularly Ms Stihler’s letters of 24 October and 2 December - and of my decisions on scope in light of my remit, I identified various parts of the 2008 and 2011 versions of Code that were at least potentially relevant to the investigation. I cite these below, leading with the 2011 version and where necessary also indicating the equivalent parts of the 2008 version:

- Paragraph 1.2 – on the requirement to observe the Seven Principles of Public Life, of which the principle of Openness is particularly relevant to my investigation. (Paragraph 1.1 of the 2008 version.)

- Paragraph 1.2(c) – on the paramount importance of Ministers giving accurate and truthful information to the Parliament, correcting any inadvertent error at the earliest opportunity. (Paragraph 1.1(c) of the 2008 version.)

- Paragraph 1.2(d) – on Ministers being as open as possible with the Parliament and the public, reflecting the aspirations set out in the Report of the Consultative Steering Group to the Scottish Parliament. (Paragraph 1.1(d) of the 2008 version.)

- Paragraph 2.30 (2.26 of the 2008 version) – on

  1. the Law Officers having Ministerial responsibility for the provision of legal advice to Ministers on all matters relating to the Law of Scotland, but not advising on every legal issue which may arise, and the role of Scottish Government Legal Department (SGLD) as the primary source of legal advice for the Government.

  2. Ministers and officials being alert to the public interest in ensuring that their decisions are taken in a fully informed legal context and that the legal implications of any course of action are considered with SGLD at the earliest opportunity and that all
briefing to Ministers is informed by SGLD advice on the legal considerations.

- 3. Ministers taking account of the public interest in maintaining the right to confidentiality of communications between legal advisers and the fact that release of the content of legal advice is likely to be appropriate only in highly compelling cases.

- Paragraph 2.31 (2.27 of the 2008 version) – on
  
  - 1. the role of the Law Officers to ensure that the Government acts lawfully at all times and the general principle that they must be consulted in good time before the Government is committed to significant decisions involving legal considerations.

  - 2. the fact that sometimes the Law Officers will comment on submissions to Ministers, but often they will simply note them. Either way, the Law Officers are not to be taken as offering a legal view on the contents of such a submission. If the Law Officers’ legal advice is required, it should be sought by a reference from SGLD for an opinion.

- Paragraph 2.28(a) of the 2008 version of the Code – on it being appropriate normally to seek the advice of the Law Officers in cases where the legal consequences of action by the Government might have important repercussions in the foreign, EU or domestic fields.

- Paragraph 2.35 (2.30 of the 2008 version) – on the fact that whether legal advice has or has not been given to the Scottish Government by the Law Officers and the content of any legal advice given by them or anyone else must not be revealed outwith the Scottish Government without the Law Officers’ prior consent.

- Paragraph 10.2 (in both versions) – on the effective presentation of Government policy.

**Analysis and findings**

16. The starting point for my analysis of the evidence was the fact, confirmed by the Lord Advocate, that the Scottish Government had not sought or received any specific legal advice on EU membership from the Law Officers prior to 23 October. With that knowledge in mind, I considered
the points that Ms Stihler had raised in light of what I had identified as
the relevant provisions of the Code.

17. The provisions in relation to openness and accuracy are straightforward,
placing easily understood expectations on the behaviour expected of
Ministers. It became clear to me that whether you had breached them in
terms of the matters you had asked me to investigate depended heavily
on what you had said about the provisions relating to the Law Officers
and legal advice, which in turn would play a large part in determining
whether you had breached those provisions. In light of that and of the
other aspects of Ms Stihler’s complaint, I identified a total of five
questions for me to address:

1. Did you make incorrect remarks in your interview of 4 March 2012
that resulted in you breaching the provisions at paragraphs 1.2 and
1.2(d) of the Ministerial Code that you should be as open and
accurate as possible?

2. Did your remarks in the 4 March interview breach the provisions at
paragraphs 2.30 and 2.35 of the Code in respect of the
confidentiality of legal advice?

3. Did you, or the Scottish Government collectively, breach the
provision at paragraph 2.28(a) of the 2008 version of the Code by
not seeking the Law Officers’ advice on EU membership in the period
during which the Code was in force (i.e. until December 2011)?

4. Did you breach the provisions at paragraph 10.2 of the Code on
ensuring effective presentation of Government policy?

5. Did you, or the Scottish Government collectively, use the Code
improperly to withhold the information that Ms Stihler had sought
under FOIA?

18. In terms of the first two questions, the provisions in the Code on the Law
Officers and legal advice are critical. However, these provisions are
complex. They identify, but do not classify or define with great clarity,
the various types of advice that the Law Officers and SGLD are able to
provide. I have read the provisions in light of the various comments that
the Lord Advocate has made about them in the correspondence with
Ruth Davidson MSP and me (see the Annex). My conclusion is that legal
advice can be classified as follows:
• A written opinion of the Law Officers "expressly sought" (as described at paragraph 2.31 of the Code). This is the highest form of legal advice available to the Scottish Ministers and Scottish Government. It attracts a particularly high level of protection against disclosure through the prohibition, at paragraph 2.35 of the Code, on the actual existence and the content of such advice being revealed outwith the Scottish Government without the Law Officers' prior consent.

• Advice from SGLD, which may be in the form of written advice from the Directorate, or advice from non-SGLD officials that reflects or is informed by legal advice from the Directorate. It appears, not least from your own response to my questions, that the latter is the most common means of giving legal advice to Ministers and that it is relatively rare for them to receive legal advice directly from SGLD. Paragraph 2.30 of the Code is clear that the content of legal advice should be released only in highly compelling cases. This protection against disclosure is less severe than that for the written opinion of the Law Officers. It appears to be directed principally at advice provided by SGLD, but presumably would be extended to any advice on legal considerations included in advice from non-SGLD officials that had originated in advice to them from SGLD.

• "Underpinning advice" from the Law Officers, which arises from them seeing submissions to Ministers and commenting or not on the content of such submissions. The purpose of this advice is narrow in that it seeks to ensure only that submissions to Ministers, and Government documents for publication, do not contain any wrong statements of the law. As paragraph 2.31 suggests, any comment or lack of comment from the Law Officers is confined to that limited purpose and is not to be taken as offering any wider legal view on the contents of submissions or documents. The Code is silent on whether such advice is protected from disclosure under the protection afforded to the opinions of the Law Officers, or under that available to legal advice from SGLD.

19. I should note that this description may oversimplify the position on disclosing legal advice but is based on my best understanding of the provisions contained in the Ministerial Code and the correspondence cited in the Annex. As Ms Stihler pointed out in her letter to me of 2 December, paragraph 2.35 contains two prohibitions that only the Law Officers' prior consent can set aside: one against revealing whether or
not the Law Officers have given legal advice; and one against the content of advice by the Law Officers "... or anyone else ..." being revealed. On the face of it that would appear to trump the less severe protection offered to legal advice from SGLD at paragraph 2.30 as such advice would, presumably, be caught the "anyone else" reference at paragraph 2.35. This is important as the ability of Ministers to discuss different types of legal advice without breaching the Code is central to considering my first two questions and what you said to Andrew Neil in your interview with him on 4 March 2012.

20. Given its significance, I reproduce in full your exchanges with Mr Neil on the matter of EU membership.

Andrew Neil
Can we clarify whether an independent Scotland would have to reapply for membership of the EU?

Alex Salmond MSP
Well, no we wouldn’t. We’d be a successor state, one of two successor states. Both of these successor states would have to negotiate but they would do it within the context of the wider European Union.

Andrew Neil
But there’s no precedent for an EU member state to split, so I understand it’s uncharted territory. There are many leading experts, like the professors of international law at Edinburgh and Glasgow universities, I think you and I would agree you can’t get better than that. The House of Commons research paper, Professor of Constitutional Law at University College London said most international lawyers say Scotland would have to reapply. Now why should Scots believe you rather than these experts?

Alex Salmond MSP
I’ll cite my experts in turn, I mean, Emile Noel who was Secretary General of the European Union for decades; Eamonn Gallagher who was a Director General of the European Union; Lord Mackenzie Stewart, the only Scottish judge to chair the Court of Justice all argue the contrary position. They argue both countries would be in the same position with regards to each other, and with regard to the European Union. And of course there is no precedent, incidentally, for any country being expelled....(interruption)
Andrew Neil
...We’ve established that it is unprecedented, although you’re trying to give a guarantee. Have you sought advice from your own Scottish Law Officers in this matter?

Alex Salmond MSP
We have, yes, in terms of the (inaudible), and obviously....(interruption)

Andrew Neil
...and what did they say?

Alex Salmond MSP
Well you could read that in the documents that we’ve put forward, which argue the position that we’d be successful.

Andrew Neil
But what do they say?

Alex Salmond MSP
You know I can’t give you the legal advice, or reveal the legal advice of Law Officers. You know that Andrew.

Andrew Neil
But this is about the future of Scotland.

Alex Salmond MSP
Yes but what you can say is everything we’ve published is consistent with the legal advice that we received. Now the other point I was going to make to you – we can argue lawyer against lawyer....(interruption)

Andrew Neil
But I’m (inaudible) you if you’ve sought advice, and you tell me you won’t tell me the advice.

Alex Salmond MSP
Well you know, Andrew, the only precedent I can think of in terms of the publication of legal advice from any government is the advice on the Iraq war, but every government, in regards to London or Edinburgh, will not publish legal advice.
Andrew Neil
But that's standing on Westminster precedent. This is about the future of our country. Now don't you owe it to the Scottish people to publish both the advice of the Scottish Law Officers and the advice of Brussels? Have you got advice from Brussels?

Alex Salmond MSP
Brussels has answered quite rightly, as you would accept, the Commission has said that they won't answer a hypothetical question. They've said that publicly, although you will have noted a number of agency reports saying that Commission lawyers actually agree with the successor state argument.

21. These exchanges became an issue only on 23 October with the Deputy First Minister’s announcement that the Scottish Government had just then sought specific legal advice on EU membership. At that point it was claimed, not least by Ms Stihler, that your comments in the interview implied strongly that the Government had already received specific legal advice from the Law Officers and that that position was inconsistent with the Deputy First Minister's announcement.

22. A large part of my investigation has been devoted to considering how far what you said in the interview is consistent with what you have said since about what you meant by your remarks. You have contended throughout that you were referring to legal advice in general terms in the context of a variety of earlier publications when you answered Mr Neil’s question. You made this point explicit in your statement to the Scottish Parliament on 23 October 2012 when you said:

As the full transcript of that interview (the one with Andrew Neil referred to immediately above) makes very clear, I was talking about the issue of Scotland’s continued European Union membership in terms of general debate and in terms of many eminent legal opinions that were offered.

23. In the same statement to the Scottish Parliament, you also said:

I have repeatedly made it clear in the chamber and elsewhere that, under the terms of the ministerial code, neither I nor other ministers can comment on either the existence or the content of legal advice without prior permission from law officers.

24. You went onto say later in the statement:
In the interview – as is clear from that full transcript – I specifically refused to depart from the convention on specific legal advice, despite being pressured to do so by Mr Neil. Indeed, that is the position that I and other ministers have held on to at all points subsequent to the interview and until earlier today, when the Deputy First Minister made her statement to Parliament, with the permission of law officers.

25. Contrary to what you have said, Ms Stihler argues that your answer, 'We have, yes, in terms of the general debate' in response to a question explicitly about legal advice from the Law Officers, suggested strongly that you had already sought specific legal advice on the point of European Union membership. By implication, it had created a misleading impression which came to light only when the Deputy First Minister made her statement on 23 October.

26. I raised this point in my letter to you of 21 November asking why you began your response to Mr Neil as you did rather than with the well-established formula of neither confirming nor denying the existence of Law Officers' advice. You did not answer the question directly, but said instead that you had been explaining the process of underpinning Government publications with legal advice; that is to say you had been describing the third type of advice that I outline at paragraph 18 above.

27. I asked also whether what you said in the Scottish Parliament on 23 October about not being able to comment on either the existence or content of legal advice was consistent with you saying to Mr Neil simply that you could not discuss the content, which may have implied that the advice existed. You repeated what you had said in response to my earlier question and went on to say:

I was not discussing the existence or content of specific legal advice on Scotland's membership of the EU. In my answers I therefore provided the standard response to questions about advice from the law officers, which was the intention of this answer:

You know I can't give you the legal advice, or reveal the legal advice of Law Officers. I did not use the precise phrase "existence or content of legal advice", which would have made my meaning clearer, but I can confirm it was my intended meaning.
28. Adjudicating on what was said, as well as what was implied, in an adversarial media interview is difficult. On the one hand, you can fairly point to your references to the underpinning process immediately after you said “We have, yes in terms of the debate”. In support of that, I note the comments by the Lord Advocate in his letter to me of 30 November, where he said:

My attention having been drawn to the interview I raised it with the First Minister who confirmed to me that he had not said that he had obtained specific advice on EU membership from the Law Officers, rather he was describing the process that when documents were under consideration Ministers would have had a reasonable expectation that any wrong statements of the law contained in the document would be corrected. I accepted this explanation.

29. On the other hand, your opening words were in response to a question framed specifically in terms of advice from “your own Scottish Law Officers” on the issue of Scotland’s continuing membership of the EU, and could be taken to imply that you had sought specific legal advice. The fact too that you mentioned explicitly the Law Officers and the convention of not revealing their advice might also be interpreted as meaning that you had sought specific legal advice and were barred from revealing it by the provisions of the Code.

30. This goes directly to the question of whether you were open and accurate in the interview. It should be said at the outset that Paragraph 1.2 of the Ministerial Code sets a high standard in requiring Ministers to observe the *Seven Principles of Public Life*. The fifth principle, *Openness*, as laid out in Annex A of the Code says:

*Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demonstrates.*

31. However, the *Openness* section of the *Seven Principles of Public Life* and Paragraph 1.2(d) of the Ministerial Code do provide for Ministers to maintain confidentiality on certain matters. Such confidentiality is particularly relevant in the case of legal advice as paragraph 2.35 states:

*The fact that whether legal advice has or has not been given to the Scottish Government by the Law Officers and the content of any legal*
advice given by them or anyone else must not be revealed outwith the Scottish Government without the Law Officers’ prior consent.

32. You were entitled, therefore, not to answers questions about legal advice provided to you and the Scottish Government. The challenge for you was to be clear about the basis upon which you were and were not answering Mr Neil’s questions. That challenge was compounded by the confusing nature of the different types of legal advice and Mr Neil’s clear interest in advice from the Law Officers.

33. You said in your letter to me that your meaning would have been clearer had you spoken about not being able to reveal the existence or content of the legal advice. I agree and would go further by suggesting that you should have used the full “neither confirm nor deny” formula at the very outset of your response to Mr Neil’s question about advice from Law Officers. With that said, you could have gone on to explain the convention and reasons for its existence and then moved on to describe the underpinning process and what that meant in terms of avoiding any incorrect statements of the law in Government publications.

34. Responding as you did, you got off on the wrong foot, so that your attempt afterwards to describe the underpinning process was somewhat muddled and incomplete and later became confused with references to the conventions protecting other forms of legal advice. In these circumstances, one can understand the reaction of Ms Sthiler and others when subsequently they compared your comments with the Deputy First Minister’s statement on 23 October.

35. Nevertheless, and bearing in mind the Lord Advocate’s comments to me, in his letter of 30 November, I am satisfied that you were trying genuinely to describe the underpinning process in the face of interruptions from Mr Neil, which it seems to me prompted you to talk about the conventions around legal advice. I also believe that your earlier references to the distinction between different kinds of advice (for example, in an exchange with James Kelly MSP in the Scottish Parliament during the Referendum Consultation debate on 25 January 2012) is further evidence of your intent. Consequently, in terms of question 1, I find that you did not breach paragraphs 1.2 and 1.2(d) of the Ministerial Code.

36. Question 2 is whether you breached the Ministerial Code in referring, at all, to legal advice having been sought and received. You maintain that
you were acting in accordance with the Ministerial Code in not referring to specific legal advice. (I note, despite Scottish Government statements that refer to "specific legal advice", that term does not feature at all in paragraphs 2.30-2.37 of the Code. I take that as evidence of the Government itself being confused over the types of legal advice covered in the Code.)

37. The argument you advanced was contained in your statement to the Parliament of 23 October:

*I was also – as the interview makes clear – speaking in terms of the various Scottish Government documents that contain references to an independent Scotland’s membership of the European Union.*

38. The question then becomes whether you are able on the one hand to talk about one form of advice (the "underpinning advice") in a way that is not permitted in respect of the other forms of advice identified in the Code. My consideration at paragraph 18 above of the different types of legal advice left me of the view that there was at the very least a strong presumption against disclosing any legal advice, whether from the Law Officers (when "expressly sought"), or from SGLD – either directly or as part of wider advice from non-SGLD officials. No such presumption appears to exist in the case of underpinning advice, reflecting perhaps its narrow and limited nature and the fact that it is not considered to offer any wider legal view.

39. This suggested to me that discussing such advice in the terms that you attempted in the interview would be consistent with the Code. In support of this view, I return to the Lord Advocate’s comments to me about him accepting your explanation of what you had said. In addition, he said in a letter to me of 21 December:

*...in my view it is permissible for Scottish Ministers to refer to the general process of consideration of Government documents provided that Scottish Ministers do not contravene the Ministerial Code by referring to specific legal advice having been provided by Law Officers in relation to the documents under consideration.*

40. The Lord Advocate is, in a sense, the guardian of this part of the Code with a strong interest in it being observed rigorously – and he confirms as much in what he says to me about the convention on legal advice being very important for the proper functioning of Government. The fact
that he was comfortable with what you said is reassuring. It reinforces my own view, in terms of question 2, that your comments, though muddled and not always clear, were so partly because you were trying to observe paragraph 2.35 of the Code. Consequently, in terms of Question 2, I find that you did not breach paragraph 2.35 of the Code.

41. Question 3 is focused tightly paragraph 2.28(a) of the 2008 version of the Code, which provides:

*It will normally be appropriate to seek the advice of the Law Officers in cases where:*

(a) the legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic fields.

42. In her letter to me of 2 December, Ms Stihler argued that this provision, which is not repeated in the 2011 version of the Code, meant the Government should have sought legal advice from the Law Officers on Government documents that commented on EU membership. The Government’s letter to the Information Commissioner of 1 December 2011 set out the position of the Government where it stated:

*...no advice yet has been sought from the Law Officers or the Scottish Government Legal Directorate, but, as this topic is a matter of developing policy (the policy being the Scottish Government’s policy on membership of the EU), Ministers have a clear policy position on the matter (Independence) which has not yet required legal advice to be sought but which is a crucial part of the Scottish Government’s wider policy on constitutional change.*

43. The letter more or less coincides with the point at which the 2008 Code ceased to be in force. I infer from it that the Government had considered the matter and concluded that no legal advice of the types described in the extract quoted had been necessary to that date. I consider that to be a reasonable position in the context of the provision, particularly as the provision is couched in terms of what would "normally be appropriate" and of action that would have legal consequences. In the case of the latter point, no action – as opposed to statements of intent or belief - had been taken or was imminent. Consequently, in terms of Question 3, I find that neither you, nor the Scottish Government
collectively, breached paragraph 2.28(a) of the 2008 version of the Code.

44. In addition to considering Ms Stihler's narrow point about a possible breach of paragraph 2.28(a) of the 2008 version of the Code, I decided that it was within my remit to consider the wider issue of seeking timely legal advice in the context of the current version of the Code in the period up to 23 October 2012. The relevant part of Code for this purpose is the following sentence in paragraph 2.30:

Ministers and officials should be alert to the public interest in ensuring that their decisions are taken in a fully informed legal context and should ensure that the legal implications of any course of action are considered with SGLD at the earliest opportunity and that all briefing to Ministers is informed by SGLD's advice on the legal considerations.

45. On the basis of the evidence considered to answer my first two questions, I am satisfied that such legal advice as the Government required was indeed provided as part of the underpinning advice which you described in your interview with Mr Neil. In addition to that, you confirmed in your letter to me of 30 November that discussions within the Government on the matter of EU membership had been informed by general advice on legal considerations. You said you had also received briefings from officials which covered EU membership and which reflected advice on legal considerations.

46. I am also persuaded by your argument, put to me when we met on 19 December, that the Edinburgh Agreement was the appropriate moment to seek specific legal advice from the Law Officers. As you pointed out, it was only when the details of the referendum process became clear that you were in a position to seek such advice.

47. I have commented already on the apparent confusion around what constitutes legal advice. Even so, what you describe appears to be consistent with the final part of the sentence that I quote above in that whether or not legal advice as such was being provided, the briefing you received did reflect SGLD advice on legal considerations. More specific advice might have been required in the period up to 23 October 2012 had the Government been contemplating substantive decisions or actions in the period, but as that does not appear to have been the case, no such requirement arose.
48. I would add also that the timing, nature and extent of any such requirement must be a matter of judgement for the Government and its various legal advisers. It would be difficult for anyone else to second guess that judgement – unless there was evidence that the Government had taken action that was shown by subsequent events to have required legal advice that had not been taken. Consequently, as an adjunct to Question 3, I find that you did not breach paragraph 2.30 of the Code.

49. Question 4 relates to Ms Stihler’s argument in her letter to me of 2 December that the absence of legal advice would have undermined the effective presentation of Government policy on EU membership. Having concluded in terms of Question 3 that the Government had taken sufficient advice for its purposes in respect of the EU in the period up to 23 October 2012, I do not accept Ms Stihler’s premise. Consequently, in terms of Question 4, I find that you did not breach paragraph 10.2 of the Code.

50. Question 5 relates to Ms Stihler’s claim that it was inappropriate to use the Ministerial Code as a basis for withholding information that had been sought as a result of a FOIA request, particularly in the light of the Information Commissioner’s decision that such information should be released.

51. As noted in paragraphs 10 and 13 above, I am not concerned here with Ms Stihler’s original FOIA request, the Scottish Government’s response to it, or the Information Commissioner’s judgement. My concern here relates to whether, in seeking to appeal the Information Commissioner’s decision, there was a breach of the Ministerial Code.

52. At the outset it should be said that there is nothing in the Ministerial Code that would, on the surface, preclude an appeal being made against a ruling of the Information Commissioner. The issue here has to be seen in the light of the fact that the decision was to appeal against a judgement that referred to advice that, as subsequently transpired, did not exist.

53. You, on behalf of the Government, have argued that this course of action was followed to protect the principle enshrined in paragraphs 2.30 and 2.35 of the Ministerial Code regarding the confidentiality of legal advice. Furthermore, the Government has argued that whether or not specific
legal advice existed on an independent Scotland’s role in the EU was irrelevant to the point of defending the principle of confidentiality.

54. In the case of the FOIA request – and in contrast with the line you took in your interview with Mr Neil - the Scottish Government, had from the outset, maintained the position that it would neither confirm nor deny the existence of legal advice. It justified that decision in terms of section 18(1) of FOIA, which appears to me an entirely reasonable use of that provision. In that sense, the Government was clear and consistent from its initial response to Ms Stühler, through to the papers it submitted to the Information Commissioner.

55. The fact that the Information Commissioner took a different view in her Decision Notice and the Scottish Government decided to appeal that judgment is not a matter that falls under the Ministerial Code. The fact that no specific advice in the end actually existed does not, in itself, imply a breach of the Code. Indeed, the consistency of the Scottish Government’s position could be seen to be fully in accordance with Paragraph 2.35 of the Code.

56. In my view, the Scottish Government was acting consistently and within its rights by challenging the Information Commissioner’s Decision Notice. In doing so, it was upholding the principles on the confidentiality of legal advice in the Code. There was nothing improper in that. Consequently, in terms of Question 5, I find that neither you, nor the Scottish Government collectively, breached any aspect of the Code.

Conclusion and recommendations

57. In light of my analysis and findings at paragraphs 16 to 56 above, I confirm that I have not found you, or the Scottish Government, to have breached the Ministerial Code in respect of any of the complaint made by Ms Stühler.

58. In reaching that conclusion though, I have commented at various points on the muddled and potentially confusing nature of your responses to Andrew Neil on 4 March and on the lack of clarity in the provisions on the Law Officers and legal advice at paragraphs 2.30 to 2.35 of the Ministerial Code. I believe that part of your problem in the interview with Mr Neil lay in the variety of different types of legal advice described at 2.30 to 2.35 in the Ministerial Code, the apparently different levels of
protection against disclosure afforded to them and the difficulty you had in being clear about which type you were discussing at any given time.

59. This could be taken to raise questions about the quality and clarity of the advice you received from your officials about what you should, or should not, say in relation to legal advice. However, I think this would be unduly harsh as I would suggest that the problem lies more in the Ministerial Code itself.

60. I agree with the Lord Advocate that the conventions around the confidentiality of Law Officers' advice are important for the proper functioning of Government. There is a strong public interest in Ministers being able to discuss and take policy decisions in full possession of legal advice and for that advice to be confidential to them as it would be to any client. It is right that the Ministerial Code should reflect this principle and provide for the confidentiality of that advice. For these reasons, the current lack of clarity in the Code is unsatisfactory. I recommend, therefore, that the Scottish Government considers whether this part of the Code could be redrafted in a clearer and more accessible form, for example by providing classifications of each type of advice and attaching to each class rules on whether its existence or content should be disclosed and, if so, in which circumstances.

61. More clearly drafted provisions would help Ministers explain their position to the Parliament, the media and the public on those occasions when, quite properly, they are not able to reveal or disclose information. In such cases, being fully open and accurate means stating clearly the limits on their ability to be frank and explaining why it is so by reference to accessible and comprehensible parts of the Ministerial Code.

62. In making this recommendation, I have in mind Ms Stihler's observation to me that her FOIA request had been for a copy of any legal advice. That is to say, she had not asked just for copies of advice from the Law Officers or directly from SGLD. I appreciate, in light of the decision by the Information Commissioner, that however she had framed the request, Ms Stihler would not have managed to secure the release of any material. Nevertheless, I am not clear, from what I have established about the existence of the underpinning advice and other legally informed advice and what you told me about the advice you had received on legal considerations, that the Scottish Government was justified in its claims to the Information Commissioner about it holding no information to be passed to the Commissioner.
63. In saying this, there is no suggestion that the Scottish Government sought to mislead deliberately either Ms Stihler or the Information Commissioner. But given that the Government had received – by any common sense definition of the term – legal advice, then it stretched credulity to have argued that it held “no information”. This only reinforces my point that greater clarity in the Code on the range of legal advice available might have enabled Scottish Government officials to share with the Commissioner the relevant information, such as that about advice on legal considerations of EU membership, that you shared with me.

Conclusion

64. Finally, I should place on record my thanks to William Fleming in the Scottish Government for his exemplary assistance as I have undertaken this investigation. I should, of course, state though that I alone am responsible for all the conclusions outlined in this letter.

Yours sincerely

SIR DAVID BELL KCB