STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

AGENDA

12th Meeting, 2010 (Session 3)

Tuesday 2 November 2010

The Committee will meet at 2.15 pm in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take items 3 and 7 in private.

2. **Commissioner for Public Appointments in Scotland:** The Committee will consider a report from the Commissioner for Public Appointments in Scotland.

3. **Complaint:** The Committee will undertake its initial consideration of a report from the Scottish Parliamentary Standards Commissioner.

4. **Review of Volume 2, Section 2 of the Code of Conduct (in private):** The Committee will consider a draft report.

5. **Volume 2, Section 7 of the Code of Conduct (in private):** The Committee will consider a note by the Clerk.

6. **Scrutiny of SPCB supported bodies (in private):** The Committee will consider a note by the Clerk.

7. **Commission on Scottish Devolution - Members' interests:** The Committee will consider a note by the Clerk.

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Clerks to the Standards, Procedures and Public Appointments Committee
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Edinburgh
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The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk

**Agenda item 3**

PRIVATE PAPER

**Agenda item 4**

PRIVATE PAPER

**Agenda item 5**

PRIVATE PAPER

**Agenda item 6**

PRIVATE PAPER

**Agenda item 7**

PRIVATE PAPER
Standards, Procedures and Public Appointments Committee

12th Meeting, 2010 (Session 3)

Tuesday 2 November 2010

Commissioner for Public Appointments in Scotland – Report CPA/2010/05

Purpose of paper

1. On 28 September 2010 the Commissioner for Public Appointments in Scotland (“the Commissioner”), under the terms of section 2(8)(a) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003, laid a report before the Parliament on a complaint investigation in connection with an application for the Scottish Legal Aid Board.

2. This paper summarises the terms of the complaint and the Commissioner’s findings in respect of the complaint.

Background

3. Reports laid before the Parliament under section 2(8)(a) relate to cases where it appears to the Commissioner there has been non-compliance in a material regard with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (“the Code of Practice”).

4. Standing Orders Rule 3A.5.1 provides that where the Commissioner lays a report of this type before the parliament, the report shall be referred to the Standards, Procedures and Public Appointments Committee.

5. It is for the Committee to decide what, if any, action to take in the event of such a referral. There is no procedure to be followed by the Committee in considering reports under Rule 3A.5.1 set out in either Standing Orders or elsewhere.

Details of the Commissioner’s investigation

6. The full details of the Commissioner’s investigation are set out in the report. A chronological summary of the actions taken by the complainant, the Scottish Government and the Commissioner is provided in pages 9 to 12.

7. In summary, the complaint submitted was that the Scottish Government had not provided an applicant with constructive feedback about his application in response to his initial request, that the detailed feedback did not, in the complainant’s opinion, provide a fair assessment of his application and that the feedback referred to an additional criterion against which his application was measured but which had not been part of the publicised criteria for the role.

8. The Commissioner notes that a similar complaint was dealt with in 2006 in relation to an appointment to the same body, which she upheld with respect to the quality of feedback provided. At that time the Commissioner indicates that she
issued guidance in respect of the provision of feedback and that this was noted and accepted by the Justice Department.

9. The Commissioner’s findings relate to the following provisions of the Code of Practice—

- **Section 4 – The Appointments Process**
  
  o Paragraph 19.6 which sets out that the criteria against which applicants are assessed at the shortlisting phase must be the same as those provided in the application pack and that new criteria will not be introduced during the appointment round.
  
  o Paragraph 26.2 which provides that feedback will be based on the evaluation forms completed at each stage of the appointment round and will provide a clear explanation for the decisions taken at each stage.
  
  o Paragraph 28.1 which provides that sponsor departments will ensure a full audit trail is readily available, consisting of all relevant paperwork and electronic communications generated during the appointment round.

- **Section 7 – Compliance**
  
  o Paragraph 40.1 which provides that there should be an effective system in place for handling complaints and recording details of each complaint.
  
  o Paragraph 40.2 which provides that sponsor departments should ensure a full audit trail is available for every complaint consisting of all relevant paperwork and electronic communications relating to the complaint and generated during the relevant appointment round.

10. The results of the Commissioner’s investigation at pages 6 to 8 of the report set out commentary and findings in relation to six questions.

11. The Commissioner has upheld the complaint in respect of 4 of these questions; has partially upheld the case in respect of 1 question and has not upheld the complaint in respect of 1 question.

12. In relation to the element of the complaint that is not upheld, the Commissioner has indicated that she intends to clarify what she considers to be the appropriate timescales for responding to requests for feedback in the guidance accompanying the revised Code of Practice.

13. The Commissioner has also indicated that the Scottish Government has not complied with paragraphs 28.1 and 40.2 of the Code of Practice in not providing the Commissioner with some material considered significant to the consideration of this case.
Guidance to the Scottish Ministers

14. In addition to the guidance that the Commissioner has indicated will be issued to accompany the revised Code of Practice, the Commissioner’s report sets out the following guidance to ensure future compliance with the Code of Practice—

- The Scottish Government must ensure that appropriate, clear and accurate selection criteria are communicated to all applicants during every appointment round to a body listed in schedule 2 of the Act.

- The Scottish Government must ensure that the selection criteria are expressed in a way that is commonly understood by selection panels and applicants.

- The Scottish Government must ensure that assessment of applications is made against the communicated selection criteria. Additions to or re-definition of the criteria do not comply with the requirements of the Code’s principles and practices.

- The Scottish Government must have in place an effective system for dealing with complaints. The Scottish Government must consider the Scottish Public Services Ombudsman’s recommendations for public bodies on complaint handling and in particular the need to ensure that the individual handling the complaint is sufficiently arms-length from the subject matter of the investigation.

Recommendation

15. The Committee is invited to agree what, if any, action it wishes to take in relation to the Commissioner’s report. The Committee may wish to consider writing to the Cabinet Secretary for Justice to invite a response on the points raised in the Commissioner’s report and, in particular, whether the Government accepts the findings and will ensure that systems are put in place to take account of the guidance issued by the Commissioner.
REPORT TO PARLIAMENT

Laid before the Scottish Parliament by the Commissioner for Public Appointments in Scotland in pursuance of Section 2(8)a of the Public Appointments and Public Bodies etc. (Scotland) Act 2003

28 September 2010

TITLE: SCOTTISH LEGAL AID BOARD – COMPLAINT INVESTIGATION

MINISTER: KENNY MACASKILL MSP

DIRECTORATE: CONSTITUTION

PUBLIC BODY: SCOTTISH LEGAL AID BOARD

SUMMARY

1. A complaint made by an unsuccessful applicant was not dealt with to their satisfaction by the sponsor directorate. The complaint concerned the assessment of the complainant’s application and the provision of feedback.

2. The findings demonstrate that the directorate did not comply with paragraphs 19.6, 26.2, 28.1, 40.1 and 40.2 of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the code).

3. The findings also demonstrate that the directorate did not comply with the code’s principle of Openness and Transparency and may have compromised the principle of Probity and Respect. The investigation identified that one of the selection criteria communicated to applicants was redefined by the selection panel when deciding which applicants to select for interview. No-one was assessed against the criterion as it had been communicated to applicants, a practice at odds with the requirement for fairness enshrined in the Public Appointments and Public Bodies etc (Scotland) Act 2003 (the Act).

4. As the non-compliance with the code was material, I am obliged to report this case to the Scottish Parliament. I also consider it appropriate to issue written guidance to the Scottish Ministers as to compliance with the code in this case.

A detailed statement of the reasons for my findings and my guidance are given on the following pages.

Karen Carlton
Commissioner for Public Appointments in Scotland
28 September 2010

[A proportion of the documents referred to in this report are held by the Commissioner’s office and may be requested in accordance with the Freedom of Information (Scotland) Act 2002, the Data Protection Act 1998, and the OCPAS Publication Scheme. Some of the documents reviewed as part of the investigation were supplied by and returned to the Scottish Government and are no longer retained by the Commissioner’s office.]
COMMISSIONER’S COMMENTARY

Openness and Transparency is one of the principles of the code, which states:

The practices employed at every stage in an appointment round must be transparent. Decisions taken at each stage will reflect this Code of Practice and will be fully documented.

It is clear that the practices used during the appointment round in question did not comply with this principle. It is also clear that the practices did not reflect the Act’s requirement that appointments, and recommendations for appointment, to the specified authorities are made openly and fairly.

Respect for applicants is also one of the code’s principles:

Probity and Respect
Everyone engaged in the public appointments process will act with integrity and will demonstrate respect for all others involved in the process.

The provision of timely, accurate and constructive feedback to applicants is a key way of demonstrating that this principle is met. I question whether the way this complainant’s concerns and formal complaint were handled demonstrates respect.

I am particularly disappointed by my findings in this case. I dealt with a similar complaint about the quality of feedback provided to an applicant who had applied for a position on the same body in 2006. I upheld that complaint in respect of the quality of feedback provided to the applicant concerned. At that time I also issued clear guidance as to future compliance with the code.

The head of the Justice Department noted and accepted my findings and the recommendations that I made in respect of the provision of feedback. The Justice Department undertook to learn the lessons from the complaint to improve its processes and endeavoured to ensure future compliance. It is apparent from the findings set out in this report that improvements in the process used to provide feedback in this case do not match either my recommendations or that undertaking.
As Commissioner for Public Appointments in Scotland I have no discretion when I judge non-compliance with the code to be material and corrective action is not, or cannot be taken. I am bound by subsection 8 of the Act to report the case to the Scottish Parliament. Nothing can be done retrospectively to address the non-compliance in this case, the second of its kind to report the Cabinet Secretary for Justice to the Scottish Parliament because of the actions of a Scottish Government official.

**NATURE OF COMPLAINT**

The complaint relates to the feedback received by an unsuccessful applicant. Specifically, the complainant asserts that:

1. He was not provided with constructive feedback in response to his initial request.
2. He had to make several requests before constructive feedback was provided to him.
3. When the detailed feedback was provided it did not, in his opinion, provide a fair assessment of the answers he provided in his application form.
4. The feedback provided made reference to an additional criterion against which his application was measured and that was not part of the publicised criteria for the role.
5. He was not provided with personal data on request in the form of the selection panel’s scoring of his application. This information was only provided when he raised the issue as an FOI request.
6. When he raised concerns about the appointment process and feedback, his concerns were not dealt with appropriately and nor were they dealt with timeously. Even though he raised a formal complaint, his view is that it appears not to have been treated as such.

To assess whether the complaint should be upheld we investigated the following:

1. Was the complainant provided with constructive feedback in response to his initial request in compliance with code paragraphs 26.1 and 26.2?
2. Did the complainant have to make several requests before constructive feedback was provided to him in contravention of code paragraph 26.1?
3. Did the feedback provide a fair assessment of the answers he provided in his application form in accordance with code paragraph 26.2?
4. Was the feedback on and assessment of his application subject to the introduction of a new criterion for selection in contravention of code paragraph 19.6?
5. Did the directorate concerned conduct the round in accordance with the code’s principle of Openness and Transparency and the code’s obligation that the requirements of relevant legislation must be reflected at every stage in the appointments process?
6. Were his concerns and latterly formal complaint about the appointment process and the feedback he received dealt with effectively and timeously in accordance with the code principle of Probity and Respect and code paragraph 40.1?

Results of the investigation are contained in pages 6 to 8 of this report.
**DEFINITION OF MATERIAL NON-COMPLIANCE WITH THE CODE**

The 2003 Act does not provide a definition of material non-compliance. It is therefore for the Commissioner to determine whether the actions of the Scottish Ministers represent material non-compliance. In doing so the Commissioner considers the following questions.

- Were the principles of the code breached?
- Was any non-compliance with the code not simply of a trivial or minor nature but something more serious or substantive?
- Did the non-compliance affect, or have the potential to affect, the outcome of the process?

**NATURE OF NON-COMPLIANCE WITH THE CODE**

In this case the following principle of the code was breached:

*Openness and Transparency*

*The practices employed at every stage in an appointment round must be transparent. Decisions taken at each stage will reflect this Code of Practice and be fully documented.*

The following code paragraphs were breached: 19.6, 26.2, 28.1, 40.1 and 40.2.

The non-compliance was not of a trivial nature. In addition to non-compliance with the above principle and practices, the Commissioner questions whether the way in which the complainant’s concerns and complaint were handled demonstrated respect. Respect for applicants is a fundamental requirement of the public appointment process. The official involved has provided an explanation for the delay in responding to the complainant and has defended his decision to further define the selection criterion in both assessing the complainant’s application and providing feedback to him. However, the explanation and defence do not justify the way in which this applicant was treated.

To command the confidence of applicants the Scottish Government must be respectful of those who apply for positions and demonstrably fair to those who choose to apply. As the Scottish Government did not demonstrate appropriate adherence to the principles of the code on this occasion, despite previous reassurances that it would address such failings in future rounds, the non-compliance in this case is considered to be material.

The Scottish Government did not conduct an effective investigation into the complainant’s concerns. Whilst this represents non-compliance with paragraph 40.1 of the code, I do not consider this to represent a material breach.

**RESULTS OF THE INVESTIGATION**

*Was the complainant provided with constructive feedback in response to his initial request in compliance with code paragraphs 26.1 and 26.2?*

The complainant was provided with feedback by the chair of the selection panel in a letter dated 18 February. That feedback was lifted directly from the selection panel’s collective assessment of the complainant’s application. The feedback and the underpinning assessment in relation to one of the criteria (the ability to operate at a strategic level) had involved further interpretation of that criterion by the selection panel. During assessment, the
selection panel looked additionally for evidence that applicants had the ability to make or shape strategic decisions that would have a positive impact on the future and success of an organisation, in some cases paraphrasing this as “setting the direction of an organisation in a way likely to determine its future success or failure”. The result of this further interpretation was that the feedback provided to the applicant was less than constructive in that it included an element of assessment (in the applicant’s case expressed as “shaping the choices which will determine the future success of the organisations concerned”) not communicated to applicants at the outset.

- This element of the complaint is partially upheld; feedback was provided but was not wholly constructive. Furthermore, the investigation found that the selection panel had redefined one of the selection criteria communicated to applicants when selecting people for interview. This was unfair to everyone who applied and did not demonstrate openness and transparency.

Did the complainant have to make several requests before constructive feedback was provided to him in contravention of code paragraph 26.1?

The complainant first requested feedback on 22 January. On 25 January and again on 11 February the complainant requested a copy of the panel’s scoring of his application as he had been advised that his feedback may take some time to provide. Feedback was provided by the selection panel chair on 19 February. In mitigation, the panel chair concerned advised OCPAS that his workload was heavy and that he had other commitments on his time. He believed that it was reasonable to provide feedback in response to requests within 20 working days of the request, and that he did so on this occasion.

- The complainant made one request for feedback on 22 January followed by two requests for the scoring of his application. Thus technically this element of the complaint is not upheld, as only one request was made.

The selection panel’s assessment of the complainant’s application was available prior to 22 January. With a heavy workload, the panel chair could have prioritised this work or delegated the provision of feedback to a member of the sponsor team, to ensure that feedback was provided shortly after the original request. The Commissioner does not accept that 20 working days is a reasonable timescale for the provision of material that is readily accessible once a panel has made its short-listing decisions. The Commissioner has taken this view to ensure that, in the case of non-selection for interview, unsuccessful applicants have an opportunity for concerns to be addressed before the round ends and appointment decisions are made. The Commissioner intends to clarify timescales for responses to requests for feedback in the guidance accompanying the revised code of practice.

Did the feedback provide a fair assessment of the answers the complainant provided in his application form in accordance with Code paragraph 26.2?

As the feedback and underpinning assessment involved further interpretation of one of the criteria for the role, the assessment was not fair.

- This element of the complaint is upheld. The complainant’s view that his application was not assessed fairly or openly was exacerbated when the selection panel chair provided additional feedback to the applicant. The panel chair advised the applicant, by reference to a dictionary definition of strategic, that the panel had also looked for evidence of long-term planning. The investigation found no evidence in the audit trail...
to suggest that this further interpretation of the criterion was used in the assessment of applications.

**Was the feedback on and assessment of the complainant’s application subject to the introduction of a new criterion for selection in contravention of code paragraph 19.6?**

Whilst a new criterion was not introduced, redefining the criterion communicated to applicants meant that assessment was on a different basis and so had the same effect as introducing a new criterion. The original criterion, “the ability to operate at a strategic level” was defined during the assessment of applications as “setting the direction of an organisation in a way likely to determine its future success or failure”. It is not necessary to provide evidence of setting strategy to demonstrate the ability to operate at a strategic level. Redefinition by the selection panel to mean the ability to make or shape strategic decisions that would have a positive impact on the future success of an organisation was not appropriate.

- This element of the complaint is upheld.

**Did the directorate concerned conduct the round in accordance with the code’s principle of Openness and Transparency and the code’s obligation that the requirements of relevant legislation must be reflected at every stage in the appointments process?**

Further interpretation by the selection panel at the point at which assessment took place was neither open nor transparent. When his initial request for feedback and the scores given to his application by the panel did not receive a substantive response, the complainant used the provisions of the Freedom of Information Scotland legislation in order to obtain this information. The complainant was advised by the directorate that this was to be treated as a data subject access request. The information was provided to the applicant on this basis.

- The complaint is upheld in respect of meeting the principles of the code. The complaint is not upheld in respect of the directorate’s meeting the requirements of relevant legislation.

**Were the complainant’s concerns and latterly formal complaint about the appointment process and the feedback he received dealt with appropriately and timeously in accordance with the code principle of Probity and Respect and code paragraph 40.1?**

There was a delay between the applicant’s request for feedback and the provision of that feedback to him. The applicant’s request that his concerns be treated as a formal complaint appears not to have been handled appropriately by the directorate. The complainant acted reasonably throughout by simply setting out why he thought his application was worthy of consideration and asking for more detailed feedback on the panel’s assessment. The complainant offered to discuss the matter with the selection panel chair on several occasions before complaining. Rather than take the opportunity to discuss the matter with the complainant the panel chair chose to respond in writing and to further paraphrase the selection panel’s agreed assessment. Only after the applicant raised his concerns in the form of a formal complaint did the selection panel chair offer to discuss these with him in person.

The Scottish Government conducted no investigation into the complaint. The panel chair, about whom the complaint was made, did not refer the matter to another senior civil servant who might have been sufficiently arms-length from the subject matter to review the complaint objectively. No investigation of the complainant’s concerns was conducted until the matter was referred to OCPAS.
• This element of the complaint is upheld regarding code paragraph 40.1. The Commissioner questions whether the response from the directorate reflects the principle of respect and intends to add clarity on timescales for feedback to the guidance on the new code of practice.

In order to conduct this investigation OCPAS requested all material held by the directorate relating to the complaint. Some material considered significant to consideration of this case, such as correspondence between the complainant and the directorate, was not provided by the directorate. The directorate also therefore failed to comply with paragraphs 28.1 and 40.2 of the code.

**THE COMMISSIONER’S GUIDANCE**

To ensure future compliance with the Code:

1. The Scottish Government must ensure that appropriate, clear and accurate selection criteria are communicated to all applicants during every appointment round to a body listed in schedule 2 of the Act.

2. The Scottish Government must ensure that the selection criteria are expressed in a way that is commonly understood by selection panels and applicants.

3. The Scottish Government must ensure that assessment of applications is made against the communicated selection criteria. Additions to or re-definition of the criteria do not comply with the requirements of the code’s principles and practices.

4. The Scottish Government must have in place an effective system for dealing with complaints. The Scottish Government must consider the Scottish Public Services Ombudsman’s recommendations for public bodies on complaint handling and in particular the need to ensure that the individual handling the complaint is sufficiently arms-length from the subject matter of the investigation.

**ANNEXE 1 – CHRONOLOGICAL REPORT**

1. The chair of the selection panel, a senior civil servant, sent the complainant a letter on 18 January advising that he had not been shortlisted by the selection panel for interview. The letter encouraged future applications and provided a date of 29 January 2010 and a contact email address for the complainant to request feedback on his application. This is in line with the timetable contained in the application pack.

2. The complainant requested feedback via an email sent to the directorate on 22 January and additionally asked for details of how his application had been scored against the essential and desirable criteria for the role. The complainant also offered to speak with the chair of the selection panel.

3. A response was sent from the directorate on Monday 25 January, acknowledging the complainant’s request and informing him that it may take some time due to a large number of applications. There was no mention of the complainant’s request for scores.

4. The complainant sent an email of response on 25 January. The complainant indicated that, due to the potential delay for feedback, he would be happy to be sent a copy of the score sheet used to assess his application.

5. The directorate responded on the same day (25 January) advising the complainant that his request would be passed to the chair of the selection panel.
6. The complainant sent a further email on 11 February, this time direct to the chair of the
selection panel. The complainant requested a copy of “the assessment form used to assess
my application against the essential and desirable criteria for the post”. The complainant
offered to submit a formal Freedom of Information (FOI) request if this was needed to obtain
a copy of the document.

7. The chair of the selection panel responded to this email on 12 February. The panel chair
confirmed that the complainant did not have to submit a FOI request as his request for
information already represented such a request. The panel chair copied this email to the
member of his team named in the original letter and who had provided early responses to
the complainant (see 3 and 5 above). The panel chair advised that he was asking this team
member to handle the request.

8. The team member wrote to the complainant on 15 February to apologise for the delay in
responding to the request for feedback and the details of his assessment. The team member
explained that the panel chair had been out of the office for much of the past fortnight and
therefore unable to finalise feedback letters. The email indicated that the team member was
due to meet with the panel chair on 16 February and to issue the feedback letters by the end
of the week.

9. On 19 February 2010 a feedback letter was issued to the complainant attached to an
email. The email advised the complainant that his request submitted under FOI, as it related
to personal data, fell to be dealt with under the data protection legislation. The letter itself
was dated 18 February as a hard copy was sent by regular post on the previous day. The
letter referred the complainant to OCPAS and indicated that the regulated appointment
process “can seem strange to those outwith the public sector”. It further advised that OCPAS
was established to “create and regulate the process by which people are appointed to the
boards of many of Scotland’s public bodies” and that “the appointment process is laid down
by the Commissioner and set out in full in the Code”. The letter explained that the panel had
been impressed by the number and quality of applications. It also explained the sift and
shortlisting processes conducted during the round to identify a field of 22 candidates for
interview. The letter then went on to give specific feedback on each of the essential criteria
examined in the application form and to give general feedback on the panel’s assessment of
the desirable criteria. Approximately one sentence was provided for each of the criteria and
a general comment about the complainant’s overall application at the conclusion of the
feedback letter. The sentences and overall summary were copied directly from the shortlist
evaluation document agreed by the selection panel.

10. The complainant responded to the panel chair by email on 19 February to reiterate his
request, under FOI, for a copy of the assessment form and score sheet used to assess his
application.

11. The team member from the directorate who had previously been in correspondence with
the complainant responded on 19 February to advise that the selection panel chair, in
accordance with his “out of office” message, would not be back in the office until 1 March.
The email provided the scores agreed by the selection panel in relation to the complainant’s
responses to each of the criteria for the role. The email provided an explanation of what the
scores meant. The relevant score for the purposes of this complaint was the 0 given by the
panel against the complainant’s answer to the criterion “the ability to operate at a strategic
level”. The email explained that a score of 0 meant that an applicant had provided “little or no
evidence”.

12. On 22 February the complainant wrote to the selection panel chair by email again. In the
body of his email the complainant reproduced the answers he had provided in his original
application form to demonstrate his “ability to operate at a strategic level”. The complainant
advised that he had provided four answers to demonstrate the ability and that, in the case of two of these, the examples given related to ministerial appointments that he held on other public bodies. On this basis the complainant asserted that he believed that a score of 0 meant that his application was not assessed objectively or fairly on this occasion. The complainant indicated that he would welcome a discussion with the chair of the panel about the assessment of his application. The complainant also noted that the chair of the panel was not in the office “this week” but that he looked forward to hearing from the panel chair when he returned.

13. On 9 March the complainant wrote to the panel chair by email referring him to his email of 22 February. The complainant indicated that he would be grateful to know if the panel chair intended to respond and, if so, whether he was going to take up the complainant’s suggestion of a discussion on the assessment of his application.

14. On 22 March the complainant wrote to the Commissioner by email referring to and copying the Commissioner into his emails of 22 February and 09 March as these had gone unanswered. The complainant indicated that he was raising his concerns direct with OCPAS.

15. On 23 March, the Commissioner’s office responded to the complainant by telephone, to clarify what his concerns were, and followed this up with an email explaining how the Commissioner dealt with complaints and advising the complainant to raise his concerns with the Scottish Government as a formal complaint. Due to a firewall issue with the complainant’s email provider, the email had to be resent by regular post on 25 March.

16. The panel chair responded by email on 30 March to the complainant’s email of 22 February. He apologised for not having responded sooner as “we were concluding the appointment process”. The email went on to confirm that the selection panel assessed the evidence provided by candidates in the same way and against a shared understanding of what that evidence would look like. The panel chair advised the complainant that “In the case of the criterion “ability to operate at a strategic level”, the panel sought evidence of involvement in long-term planning, in particular for involvement in shaping the strategy by which an organisation will prosper or fail. This goes beyond the skills and knowledge covered in your evidence on this point”.

17. The complainant responded the same day (30 March) and indicated that he wished to raise a formal complaint about the assessment of his application and about the quality of the feedback that he had received. The complainant also referred to the time taken to reply to his concerns and the panel chair’s reluctance to discuss the issues with him directly, as requested. The complainant also expressed the view that his request for information and feedback was met with “a complete lack of courtesy and respect”. The complainant requested a response to his concerns no later than 16 April 2010 and indicated that if he found the response to be unsatisfactory, he would pursue his complaint via OCPAS.

18. The panel chair responded to this email on 04 May. The panel chair advised that he would be happy to speak with the complainant, either by phone or through a meeting. The panel chair advised the complainant that if he would like to make arrangements for this he should contact a member of the panel chair’s team. The panel chair provided an email address for this purpose. The email address was incorrect.

19. In an email of response on the same day the complainant attempted to book a telephone call to hold the discussion. As he had been given the wrong email address his message was returned to him automatically. The complainant was able to work out what was wrong with the email address and resent his request for a telephone discussion on 05 May.
20. The complainant received no response to this email and wrote again to the selection panel chair on 10 May to reiterate that he was making a formal complaint. The complainant indicated that he intended to raise the matter with OCPAS.

21. Having received no substantive response to his complaint email of 30 March and follow up email of 10 May the complainant wrote to the Commissioner on 18 May to raise his complaint and to ask for it to be investigated.

22. The investigating officer telephoned the complainant the following day and agreed the basis of the complaint with him. The letter agreeing the complaint was sent to the complainant, along with a blank consent form, on 19 May.

23. The consent form was received by the investigating officer on 24 May and the directorate was advised of the Commissioner’s intention to investigate this case on 28 May. On the same day the directorate was asked to provide the material relevant to the investigation no later than 29 June.

24. The material was provided to OCPAS on 12 July, partially due to a parallel dispute running between the Scottish Government and OCPAS regarding the provision and subsequent use of such material.

25. The investigating officer requested additional material on 18 August and asked a number of questions of the directorate. A prompt response was requested although no timescale for that response was set. This was in order to finalise the report on his findings and as he had identified significant gaps in the audit trail. As at 03 September the directorate had not provided the material and nor had it responded to the request or the questions.

26. A draft report was sent to the panel chair on 03 September on the basis that the requested material would not be provided. The detailed findings of the investigation were included. The panel chair was offered an opportunity to respond to the findings within a week.

27. The panel chair responded on 07 September. He advised that the timescale afforded for comment was unreasonable in the view of the Scottish Government and that he required additional time to prepare a response as he needed to consult with others. He attributed his lack of acknowledgement or response to the e mail of 18 August to leave and (in later correspondence) various other commitments.

28. The investigating officer responded the following day. He advised that a short extension was afforded by the Commissioner to ensure that a full five working days was given for the work. The investigating officer made it clear that the material requested should have been provided in response to the original request in May and that the questions asked of the director should have been capable of being answered without reference to others.

29. This led to an exchange of additional correspondence between the panel chair and OCPAS between 08 September and 15 September when the panel chair’s substantive response to the report of 03 September and the questions of 18 August was received. The panel chair took the view that 20 working days was a reasonable timescale to provide a response to such matters. OCPAS investigating officer explained why the Commissioner did not share that view.

30. The investigation, taking into account the response from the directorate of 15 September, was finally concluded on 20 September 2010.
ANNEXE A

ANNEXE 2 – DETAILED FINDINGS

The OCPAS investigation concluded that:

The original feedback provided to the applicant was agreed by the panel and accurately reflected the panel’s assessment. However, as that assessment involved further interpretation of the publicised criterion for the role it contravened paragraph 19.6 of the code.

The additional feedback provided by the selection panel chair, in response to concerns raised by the complainant about the original feedback, paraphrased the criterion for selection further. In doing so it also went beyond the collective view of the selection panel about the evidence provided by the applicant. The selection panel chair’s actions were therefore in contravention of paragraph 26.2 of the code.

These two findings demonstrate that the code’s principle of Openness and Transparency has not been complied with.

There are no set deadlines required by the code for the provision of feedback although the appointment timetable must include a date by which feedback is to be requested. The code’s principle of Probity and Respect would suggest that individuals should not have to wait for an excessive period or have to make multiple requests for constructive feedback to be provided to them. There can be mitigating circumstances that might explain or justify a delay in the provision of feedback. The mitigating circumstances offered by the panel chair in this case were his workload and his belief that 20 working days were sufficient for the provision of feedback. These are matters that the Commissioner considers it appropriate to discuss with the Scottish Government to ensure that public appointments work is appropriately prioritised.

The directorate did not treat the complainant’s formal complaint appropriately. The panel chair about whom the complaint was made did not refer the complaint to a colleague or to any other part of the Scottish Government so that an effective investigation could be conducted. Paragraph 40.1 of the code has not, therefore, been complied with.

There were significant gaps in the audit trail when the material requested by OCPAS to conduct this investigation was examined. A repeat request for information made on 18 August was not acknowledged until 07 September when a request for additional time was made. When the directorate did provide a substantive response on 15 September there were still significant gaps in the audit trail that could not be justified. The directorate also therefore failed to comply with paragraphs 28.1 and 40.2 of the code.

The basis on which the Commissioner has drawn these conclusions is set out below.

Findings related to OCPAS’s investigation of the complaint

We requested a range of information from the directorate in order to conduct this investigation. The information we requested and that provided by the directorate is set out below along with key findings relating to the information that we reviewed.

We requested the person specification and role description for the role in question

This was provided along with the entire pack contents. The person specification included a criterion stated as “The ability to operate at a strategic level”. In the application form, applicants were provided with prompts to allow them to provide evidence that they met the criterion. These were
What was the situation?  
What skills did you deploy?  
What was the outcome and your personal contribution?

The person specification made no mention of the ability to formulate or shape successful organisational strategies. Strategy was mentioned under the corporate responsibilities of the board overall in the role description. It was also referred to in the background note on the work of the body. These papers were also provided to all applicants. From the pack overall it would not be reasonable to conclude that applicants would have to demonstrate that they shaped or formulated strategy in their response to the criterion concerned in order to demonstrate that it was met. This fundamental issue, of reasonable interpretation, is what gave rise to this complaint.

We asked for the notes from the planning meeting held by the selection panel

These notes were requested but not provided although we were advised by the OCPAS Assessor who participated in the appointment round that a note of that meeting was taken by a member of the sponsor team.

We were provided with an agenda for the planning meeting and with subsequent correspondence between the panel members and the sponsor directorate discussing matters arising from the planning meeting. In response to the first draft of this report the panel chair advised that the subsequent correspondence represented the minutes of the planning meeting. The Commissioner does not accept this explanation as it was clear that this was not a minute of a meeting and that, in any case, it did not set out the matters that must be agreed for assessing applicants.

Item 7 on the agenda for the planning meeting was “Assessing applicants”. The fourth bullet point was “assessing merits of applicants against criteria”.

In an email of 10 November, the panel chair advised of his intention to “prepare a proposal...for how we assess and score applications at sift and interview, which I will then put to you [the selection panel] well in advance of those stages, and to ensure that we have enough preparation and meeting time at the later stages to ensure that the decisions we take then will stick.” We specifically requested a copy of the proposal on 18 August. The directorate responded to this request on 15 September. It could not provide the information requested despite searching for it. The OCPAS Assessor confirmed that such a proposal was not provided to him in his capacity as a member of the selection panel. Thus, the panel’s intention in respect of assessing evidence against the criterion “Ability to operate at a strategic level” was not included in the documentation provided to OCPAS and not reviewed as part of the investigation.

The OCPAS Assessor advised during a discussion on this issue that the panel was not provided in advance with an indication of how to score applications and nor had the panel been provided with an indication of the types of answers in application forms that would represent evidence that the criterion was met. The fact that individual panel members each used their own, and quite different, methods for scoring applicant’s responses bears out our view that guidance was not provided to the panel on scoring applicants or on assessing the criteria for the role. The panel chair advised that he had intended to include scoring guidance on the blank shortlisting forms provided to panel members but did not do so as these had already been printed. He did not explain why such guidance could not have gone out in a covering note or email to the panel members.

The panel's collective assessment of the complainant's application reads as follows:
“Showing evidence of involvement in a number of roles, but not of operating in them at a strategic level, shaping the choices which will determine the future success of the organisations concerned”.

This exact wording was used when the panel chair provided initial feedback to the applicant. The letter provided full feedback against each of the essential criteria for the role and accurately reflected the collective view of the selection panel. When the applicant challenged the feedback provided to him on 22 February it took some time for the panel chair to respond. His response was provided on 30 March.

The actual wording in the panel chair’s response to the candidate was as follows:

“I am sorry that you feel your application was not assessed objectively or fairly. The evidence provided by candidates was assessed in the same way for each candidate, and against a shared understanding by the panel of what they were looking for in the evidence for each criterion.

In the case of the criterion “ability to operate at a strategic level”, the panel sought evidence of involvement in long-term planning, in particular for involvement in shaping the strategy by which an organisation will prosper or fail. This goes beyond the skills and knowledge covered in your evidence on this point……

I hope you find that additional feedback helpful. Many of the applications did not score well on this criterion, and many used the word “strategic” to describe experience or situations which the panel was not persuaded were genuinely strategic. This may suggest that we need to be more specific about what strategy means – it is a much misused word, though long-term planning features in dictionary definitions. That may be an improvement we can make for future appointment rounds, but I hope you will appreciate that we had to assess applications in this round against the wording used for the criteria, and I give you my assurance that the panel did its level best to apply that criterion objectively and fairly to all the applications (which were at that stage anonymised).”

Based on the foregoing, and on the letter of complaint sent to the directorate by email on 10 May, one of the main concerns expressed by the applicant may well be attributed to the selection panel chair’s decision to further paraphrase the feedback agreed by the selection panel.

In order to assess whether this was in fact the test used by the panel, OCPAS’ investigating officer reviewed a sample of other application forms as comparators. These were reviewed as were the collective panel member’s assessments of them. There was no evidence that “long term planning” was a feature of each of the panel member’s assessments.

We asked for copies of all application forms submitted for the role in question

These were provided in electronic format. A review of a sample of the forms selected at random was undertaken by the investigating officer as indicated above. The forms were compared to the collective panel member’s assessments of them.

Following this review, the investigating officer concluded that, in the view of the selection panel, the ability to operate at a strategic level appeared to be only fully evidenced by applicants who demonstrated that they set strategies. So, for example, executive directors who evidenced operating at a board or equivalent (strategic) level were marked down unless they provided evidence of their having set strategies.
Common wording in the assessments agreed by the selection panel against this criterion was as follows:

“setting the direction of an organisation in a way likely to determine its future success or failure”.

and

“operating at the level of setting strategy by making or shaping choices determining the future and success of the organisation”.

There were also several references to setting rather than implementing strategy, most often in cases where the panel felt that the criterion was not fully met.

We asked for the shortlisting notes, both combined and individual, of all selection panel members for each application reviewed

The collective scores and evaluations of the selection panel were provided in the form of a print-out of an excel spreadsheet. Individual shortlist evaluations were missing from the papers submitted. The directorate was again asked to provide these documents on 18 August. The panel chair explained on 15 September why these papers were missing; his explanation did not justify their non-provision.

We reviewed the collective evaluations of the panel, individual panel member assessments (where available) and also a random selection of application forms.

We noted that individual panel members had used completely different scoring systems from each other. We also noted that the notes on applicants entered on individual panel members forms (other than those completed by the OCPAS Assessor) were exceedingly limited. On 18 August we asked the panel chair to explain these apparent discrepancies. On 15 September the panel chair advised OCPAS that he had intended to provide guidance to panel members on the scoring to be used but that he had not done so.

We asked for all correspondence between the directorate and the complainant relevant to this complaint

As the complainant had already provided some email correspondence to us, we were able to establish that the panel chair did not provide us with what we had requested in response to our original request. On 18 August we referred the panel chair to examples of missing correspondence and the request for the information was repeated. The panel chair responded on 15 September. The panel chair thought that the missing correspondence may have been lost due to an IT problem. This was conjecture and did not, in any case, justify the loss of correspondence as the Scottish Government’s own policy requires correspondence of this nature to be saved on an Electronic Records Document Management system (ERDMS). The panel chair had not done so.

The panel chair also advised that he had not received the reiteration of the complainant’s formal complaint that was sent on 10 May. He confirmed that had received a message from the Scottish Government’s email postmaster about the message advising that it may be spam. The instructions were clear that if he believed this to be a legitimate business email, he should have contacted IT security to have the message provided to him. He did not do so but did make it clear that he had a significant number of emails to respond to. This explains why the panel chair did not respond but does not justify it. Adequate resourcing of the public appointments process and any follow up required, as in this case, is the responsibility of Scottish Government.
The complainant initially raised his formal complaint with the panel chair on 30 March. The panel chair acknowledged that he received this formal complaint but failed to provide a copy of this email or his response to our investigating officer.

A review of the information provided by the complainant, and the limited information provided by the panel chair, has led us to conclude that the complainant was not dealt with promptly or with the respect that he should have been accorded. Substantive responses to the complainant’s requests for information appear to have been unnecessarily delayed. Requests for conversations were ignored until the point at which the complainant felt it necessary to complain formally.

We asked for any communications between directorate staff and with the Minister relevant to the complaint and for a copy of all of the documents prepared by the directorate relating to its investigation of the complaint.

No such information was provided by the directorate. It appears that the directorate did not investigate the formal complaint raised with it.

On 18 August we referred the panel chair to correspondence with the complainant and asked for confirmation that he had responded to the complainant’s last formal complaint of 10 May.

We received the response to this question on 15 September. As indicated above, the panel chair advised that he had not received the reiteration of the complainant’s formal complaint sent on 10 May but, strictly speaking, this was the fault of the panel chair in not following up an electronic message.

We have concluded that the directorate did not investigate this formal complaint in contravention of paragraph 40.1 of the code.

Further, the directorate’s failure to provide the Commissioner with information relating to the complaint, such as the correspondence between the complainant and the directorate, is in contravention of paragraphs 28.1 and 40.2 of the code.