



The Commissioner  
for Public Appointments  
Northern Ireland

Complaint investigation and report on a public appointment process for the  
Northern Ireland Fire and Rescue Service

Department of Health

July 2018

## **Glossary of Terms**

Code of Practice for Ministerial Public Appointments in Northern Ireland - the Code

Department of Health - the Department

Northern Ireland Fire and Rescue Service - the NIFRS

## INTRODUCTION

1. In October 2017 the complainant applied for a non-executive lay member post on the Board of the Northern Ireland Fire and Rescue Service (the NIFRS). The recruitment process was administered by the Department of Health (the Department).
2. The complainant having made her application and having been interviewed by the selection panel was found suitable for appointment to the NIFRS Board. Her name was accordingly included on the list of applicants suitable for appointment and submitted to the Permanent Secretary for consideration. The complainant was not selected for appointment.
3. The complainant submitted a complaint to me as Commissioner on 27<sup>th</sup> April 2018. I agreed to investigate the matter under paragraph 5.10 of the Code, which states that *'The Commissioner may decide to investigate a complaint which has come to her directly'*.

## NATURE OF COMPLAINT

4. The complaint submitted to me is summarised in three elements below.
  - I. If it is necessary for the Permanent Secretary to make appointments in the absence of a Minister, this decision should be taken using a merit-ordered list of suitable applicants.
  - II. The reasons recorded by the Permanent Secretary when selecting the appointees were different from the published essential criteria for appointments. The complainant asserts that new criteria should not have been introduced in the middle of the process.
  - III. The Department's Public Appointments Unit were obstructive in providing the complainant with information on her performance at interview in relation to other applicants.

## SUMMARY OF FINDINGS AND OBSERVATIONS

5. At this stage I draw attention to my role as Commissioner for Public Appointments for Northern Ireland which is to regulate, monitor, report and advise on the way in which appointments are made to the Boards of public bodies in Northern Ireland. I may also investigate complaints by an applicant dissatisfied with an appointment process. Decision-making on whether there has been unlawful discrimination in this or any other public appointments process lies outside my jurisdiction. My findings in this report do not, therefore, constitute a decision on whether there has or has not been unlawful discrimination at any stage throughout the process under scrutiny.
6. In bringing the first part of this complaint relating to the making of public appointments by a Permanent Secretary the complainant has highlighted a constitutional law issue the principle of which has been the subject of judicial proceedings in the Court of Appeal<sup>1</sup> (Buick case). The Buick case indicates that there are constitutional law arguments yet to be settled around the competence of Departments to make decisions during periods when no Minister is in place.

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<sup>1</sup> 17/110222/01/A02 in the matter of an application by Colin Buick for judicial review.

7. Legal uncertainty is not helpful for our public appointments system. As a matter of general advice I recommend that Departments review their legal advice in relation to the making of public appointments by Permanent Secretaries, to ensure the advice is compatible with the law as it stands.
8. In questioning whether the Permanent Secretary may appoint from an unranked list the complainant has asked whether the Permanent Secretary may use a process that is generally understood to be dependent on the unique role of Ministers because it differs to an extent from the usual merit-ordered list. Given the wider context of legal uncertainties around the powers of Departments in the absence of Ministers and the attendant political difficulties I will not take a position on the issue at this point in time.
9. I recommend, instead, that Departments review their legal advice in relation to the use of unranked lists by Permanent Secretaries in making public appointments. I would in any case emphasise that in making public appointments, Permanent Secretaries are bound to follow the Public Appointments Code. If a Permanent Secretary decides to use an unranked list he/she should take great care to show a proper rationale and correct justification directly relating to the published criteria for his/her appointment choices.
10. In this public appointment process a number of the reasons recorded by the Permanent Secretary for selecting the appointees were different and unrelated to the published criteria for the appointments. I find that the Permanent Secretary introduced new criteria unrelated to the published criteria in order to make his selection for appointment. When the Permanent Secretary adopted this approach the departmental Public Appointments Unit failed to advise him of the potential adverse consequences. These actions are a clear breach of the Code (and constituted a failure to follow the Departments' guidance). I uphold this element of the complaint.
11. I further find that there was no proper rationale or correct justification for the basis on which the Permanent Secretary selected the successful applicants in preference to the complainant. Consequently the complainant cannot be assured that there were rational and justifiable grounds for her non-appointment.
12. There is a great onus on the Department and the appointing Permanent Secretary to ensure that these appointments are made fully in accordance with the Code in the most transparent and justifiable manner. This is particularly so in the current political circumstances. There were substantive breaches of the Code in this appointment process accompanied by a lack of proper rationale and justifiable grounds for the appointments. This leaves the way open for the fair minded and informed observer to form a perception that some form of bias may have motivated the decision making. The outcome of this appointment process, therefore, created a situation wherein perceptions of unfairness, bias or discrimination could arise. These perceptions are exacerbated when there is existing significant under-representation of any section 75 groups on the public board being recruited to.

13. The purpose of the Code is to instil public confidence in the transparency and fairness of our public appointments system. These breaches and failures adversely affected the complainant. Breaches of the Code in such circumstances have the potential to undermine public confidence in both these particular appointments and the public appointments system more generally.
14. Despite the fact that a skills audit was undertaken at the outset of the process the panel recorded additional candidate attributes as potentially beneficial to the NIFRS Board. Some of these attributes were used as the basis for appointment. This suggests that a more detailed skills audit could have been carried out at the beginning of the recruitment process. A skills audit exercise can be rendered inadequate, however, if a Department has an overly formulaic approach to criteria setting. I recommend that the Department reassesses its approach to the skills audit exercise and criteria setting with a view to ensuring they take full account of the skills and experience required for the Board appointments.
15. Although I do not consider that the Department was deliberately obstructive, nevertheless, it was unhelpful when it came to providing the complainant with the appropriate information she requested. Following a Freedom of Information (FOI) request and internal review of this request the complainant was provided with the range of scores awarded to applicants suitable for appointment. The Department ought to have known at the outset what information it could properly provide and do so without the need for an FOI request and internal review. To that extent I uphold in part this element of the complaint.
16. I wish to stress that this report does not reflect negatively in any way on those individuals appointed in the competition under scrutiny. All the evidence shows they came to the process in good faith and conducted themselves correctly throughout.

## THE APPOINTMENT PROCESS

17. Under the Northern Ireland Fire and Rescue Services (Northern Ireland) Order 2006 the NIFRS Board shall consist of a Chairman and ten other members appointed by the Department.
18. In January 2017 the then Minister of the Department approved the initiation of a recruitment competition to fill four vacant posts on the Board of the NIFRS (one district councillor member, two lay member and one trade union member), the Minister requested that those applicants found suitable for appointment be presented to her in an unranked list at the end of the process.
19. In March 2017 the office of the Minister of Health was suspended.
20. The Department proceeded with the appointment process and in September 2017 formed a selection panel comprising a Department of Health official, a representative of the NIFRS and an Independent Assessor provided by CPA NI. The vacancies were advertised in October 2017.

21. All applications were assessed against the following four essential criteria:

- i. **Strategic Thinking** – Drawing on either your working life or personal life provide specific examples that demonstrated an understanding of collective decisions making and good governance practice within an organization within the voluntary, public or private sector. Provide clear evidence of a scrutiny and oversight role of business objectives to achieve successful outcomes.
- ii. **Corporate Governance and Accountability** - Drawing on either your working life or personal life provide an example that demonstrates a commitment to or understanding of corporate governance and accountability. Provide a clear example to demonstrate your knowledge and understanding of the elements within good corporate governance practice including confidentiality and how you have been involved in ensuring this within an organization in the voluntary, public or private sector.
- iii. **Stakeholder Engagement** - Drawing on either your working life or personal life provide specific examples of how you have established effective relationships inside and outside organisations or in partnership within different organisations.
- iv. **Self-Awareness and Personal Contribution** - Drawing on either your working life or personal life provide an example of how you have managed conflict to reach consensus and ensured that your view has been heard. Demonstrate by way of example how you have used right judgment and impartiality to maintain your position on an issue which has divided opinion.

22. The original person specification included Business Sense as one of the essential criteria. Early on in the process this criterion was substituted with Strategic Thinking. Applicants were subsequently assessed using Strategic Thinking as a criterion for appointment. However, when the list of applicants suitable for appointment was presented to the Permanent Secretary as an annex to a submission, the Business Sense criterion was incorrectly included in the body of the submission. This error had no apparent effect on the outcome.

23. The selection panel conducted an initial sift of all applications against the essential criteria for appointment. Those applicants who met the required standard were invited for interview.

24. Thirteen applicants were presented to the DoH Permanent Secretary, in a submission from the Public Appointments Unit dated 21st February 2018, as suitable for appointment to the non-executive lay member positions. The Permanent Secretary selected two of these for appointment as lay members of the NIFRS Board and recorded reasons for the decision. From the same submission an individual was selected from a group of three local council nominees for appointment to the Board (also with recorded reasons). One applicant was found to be suitable as the Trade Union representative and was selected for appointment.

25. The complainant was informed that the Permanent Secretary had made the appointments, that she had not been selected and that her name would be placed on a reserve list. The complainant requested feedback on her performance throughout the process. This was provided by the Department in the form of the selection panel's documentation from her

interview which included her scores. The complainant subsequently requested details on where she was placed in merit order; this was not provided by the Department. The complainant requested information detailing the number of applicants found suitable for appointment, how many scored higher than the complainant, how many scored lower and how many scored the same. The Department did not provide this information and the complainant was informed that no merit-ordered list existed.

26. Subsequently the complainant submitted a Freedom of Information (FOI) request to ascertain where on the merit list she was placed. The Department once again informed the complainant that no merit-ordered list existed and that they were unable to supply the information requested. Following a subsequent internal review of this decision requested by the complainant the Department provided her with the range of overall scores awarded to those applicants presented to the Permanent Secretary as suitable for appointment. It was evident from the overall scores that the complainant had come at the top of the score range.

## SCOPE OF THE INVESTIGATION

27. The investigation involved a detailed review of the following documentation.
- The information pack for the competition.
  - The appointment plan for the competition.
  - All documentation relating to the assessment of each applicant who passed the interview stage.
  - All communication with the complainant.
  - The submission requesting the initiation of the competition and the Minister's response.
  - The submission to the Permanent Secretary presenting the applicant summaries of those applicants found suitable for appointment.
  - The record of the Permanent Secretary's decision.
28. As part of the investigation a list of questions was put to the Department of Health Permanent Secretary, the Head of the Public Appointments Unit and each member of the selection panel. The responses to these questions were considered by the Commissioner in determining the investigation findings.

EACH ELEMENT OF THE COMPLAINT IS DEALT WITH BELOW.

**Element I**

**If it is necessary for the Permanent Secretary to make appointments in the absence of a Minister, this decision should be taken using a merit-ordered list of suitable applicants.**

29. Although not raised directly by the complainant, the process of investigating her complaint raises the underlying issue of whether the Permanent Secretary has the lawful authority in the absence of a Minister to make appointments to the NIFRS Board.
30. The Fire and Rescue Services (Northern Ireland) Order 2006 provides for the establishment of the Fire and Rescue Service Board. Paragraph 2 of schedule 1 provides for the appointment of the Chairman and the Board Members by the Department.
2. (1) *The Board shall consist of the following members–*
- (a) *a chairman appointed by the Department;*
  - (b) *the Chief Fire and Rescue Officer; and*
  - (c) *10 other members appointed by the Department.*
2. (2) *Persons appointed under sub-paragraph (1) (a) or (c) shall be referred to as “non-executive members”.*
31. Since 2006 the appointments to the NIFRS Board have been made by the Minister of the Department of Health. (In 2006 the Department was the Department of Health, Social Services and Public Safety. These functions were retained within the new Department of Health under the Departments Act (NI) 2016.)
32. In this instance the appointment of the four new Board members was made by the Permanent Secretary in the absence of a Minister with responsibility for the Department, there having been no Executive in Northern Ireland since January 2017. The question of whether the Permanent Secretary has the lawful authority to make these appointments can be related to the constitutional law questions raised in the Court of Appeal decision<sup>2</sup> in the appeal from the High Court judicial review case on the Arc21 planning decision (referred to in this report as the Buick case).
33. The Buick case concerned the lawful exercise of the planning decision function of the Department for Infrastructure and how the relevant provisions of the Departments (NI) Order 1999 and the Northern Ireland Act 1998 are to be interpreted. If and how this case may apply to the manner in which Departments may make public appointments, in the absence of Northern Ireland Ministers, remains unclear.
34. As Commissioner I am supportive in principle of the motivation of Departments and their Permanent Secretaries to ensure the proper functioning of our public bodies, despite the suspension of devolution, in this case through the continuity of our public appointments

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<sup>2</sup> [2018] NICA 26

processes. However, at the time of writing the Buick case suggests that there are constitutional arguments yet to be settled around the competence of Departments to make decisions during periods when no Minister is in place. This level of legal uncertainty could undermine public confidence in our public appointments processes.

35. As a matter of general advice, I recommend that Departments review their legal advice in relation to the making of public appointments by Permanent Secretaries, to ensure the advice is compatible with the law as it stands.
36. The Buick case judgments reflect public and judicial concern about democratic accountability where Permanent Secretaries are taking decisions which previously were made by elected Ministers. It is always important, but particularly so in current circumstances, that the highest standards of transparency and accountability are followed by those involved in making decisions in public appointments.

#### The use of an unranked list

37. This leads me to the second point in the first part of the complaint, that is, the use by the Permanent Secretary of an unranked list in the NIFRS competition.
38. An unranked list consists of the names of applicants found suitable for appointment by the selection panel presented in alphabetical order irrespective of and without note of the interview numerical scores. The complainant challenges this approach. She maintains that if the exigencies of the situation meant the Permanent Secretary had to make the public appointments he should have done so on the basis of a ranked list. A ranked list would set out the applicants' total scores achieved at interview with the implication that appointments would be offered on the basis of the highest scoring applicants.
39. The Code, which is premised on Ministers making appointment decisions, allows for the use of both ranked and unranked lists. Paragraph 3.3 of the Code states that,

*'During the planning stage, Departments must also consult with the Minister to confirm whether he or she requires an alphabetical list of a pool of candidates (unranked) deemed suitable for appointment, or a merit-ordered list (ranked), in the Ministerial submission.'*

40. The use of an unranked list enables a Minister to select any candidate deemed suitable for appointment by the selection panel regardless of the merit order. It is implicit under the Code that this flexibility enables the Minister to appoint suitable candidates to achieve a balance across the full range of skills and experience. In the Lennon employment tribunal case<sup>3</sup>, which concerned the use of an unranked list by a Minister making a public appointment, the Department's Counsel asserted that such flexibility derived from the unique role of Ministers with their need to enjoy complete confidence in those whom they appoint to execute important public functions. In explaining the use of an unranked list Counsel emphasised

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<sup>3</sup> CASE REF 75/11FET

Ministers' accountability to the Assembly. This understanding is generally accepted as the basis for its inclusion in the Code and I see no need as Commissioner to proffer a different view on the unranked list.

41. It has, therefore, been the practice of Ministers to have applicants' names presented to them in an unranked list. The Departmental guidance routinely provided to Ministers electing to use an unranked list emphasises the care required in pursuing this course and the risks attached (departmental procedure requires the guidance to be presented to any Minister making a public appointment decision). The guidance states that:

*'An unranked list consists of the names of candidates found suitable for appointment by the selection panel presented in alphabetical order irrespective of interview scores. Unranked lists enable Ministers to appoint anyone on the list but it is important that the decision relates only to the agreed, advertised requirements and that a clear and cogent record of the Minister's appointment decision is kept. Ministers should be aware that while unranked lists potentially offer greater flexibility in terms of achieving the best mix of skills and experience, their use may present particular difficulties in persuading, for example, an Employment Tribunal, that the Ministerial decision was based on merit.'*

42. In January 2017 the then Minister of Health requested an unranked list of applicants found suitable for appointment. The Minister was in receipt of the departmental guidance when making this decision.
43. Following the decision by the then Minister to have names presented in an unranked list, the Permanent Secretary proceeded with this approach. The Permanent Secretary has stated that he took the view that the Minister's decision to use an unranked list was binding on him.
44. The submission to the Permanent Secretary of 21<sup>st</sup> February 2018 contained as an annex the applicant summaries in an unranked list and in addition in the main body of the submission the scores were provided against the alphabetically listed names. The applicant scores are not provided to Ministers who have requested an unranked list and as such their provision in this submission to the Permanent Secretary is a significant departure from established procedure. The Department has stated that it considers the information provided to the Permanent Secretary to be an unranked list. I do not accept the Department's contention that a list of applicants with their respective total scores against their names is an unranked list merely because applicants' names are not listed in order of their scores. There were only thirteen applicants on this list and the reader could readily see how they performed relative to each other. In this appointment process the Permanent Secretary was presented with what amounted to a ranked list but he proceeded to appoint without following the selection panel scoring, in other words, as if he had been presented with an unranked list. This departure from previous procedure has served to complicate and make more stark the issues raised in this complaint.
45. In questioning whether the Permanent Secretary may appoint from an unranked list the complainant has asked whether the Permanent Secretary may use a process that is generally

understood to be dependent on the unique role of Ministers because it differs to an extent from the usual merit-ordered list. Given the wider context of legal uncertainties around the powers of Departments in the absence of Ministers and the attendant political difficulties I will not take a position on the issue at this point in time.

46. I recommend, instead, that Departments review their legal advice in relation to the use of unranked lists by Permanent Secretaries in making public appointments. I would in any case emphasise that in making public appointments, Permanent Secretaries are bound to follow carefully the Code and the departmental guidance. If a Permanent Secretary decides to use an unranked list he/she should take great care to show a proper rationale and correct justification directly relating to the published criteria for his/her appointment choices. It is also incumbent on officials concerned with the public appointment process to ensure that Permanent Secretaries are appropriately supported in the exercise.
47. However, as the rest of my report will show the Code was breached in material ways in this appointment process and there was a failure on the part of the Department to follow their own clear guidance.
48. Throughout the competition documentation applicants were advised that the final appointment decision would be taken by the Minister.
49. Following an interview on 24<sup>th</sup> January 2018 the complainant was advised that she had passed the interview and that the Department was awaiting the appointment of a Minister before proceeding further and presenting the Minister with an unranked list.
50. It is feasible to assume that at this stage it was still the intention of the Department and the Permanent Secretary that an incoming Minister would make the final appointment decision. However, less than two months later the Department wrote to the complainant advising her that the appointment decision had been made by the Permanent Secretary and that she had not been selected for appointment.
51. Where a Permanent Secretary is to make an appointment decision the Department must ensure that applicants are informed of this at the earliest opportunity. To do so only after the appointment decision has been taken is not in keeping with the Code principles of openness and transparency.

## Element II

**The reasons recorded by the Permanent Secretary when selecting the appointees were different from the published essential criteria for appointments. The complainant asserts that new criteria should not have been introduced in the middle of the process.**

### The appointments decision and related documentation

52. The names of the applicants successful at interview were presented to the Permanent Secretary in an alphabetical list as an annex to a Departmental submission dated 21<sup>st</sup> February 2018 asking him to make appointments. This submission contained their individual total scores. The Permanent Secretary was also provided with the departmental guidance and it was recommended that he make appointments, taking this into account.

53. The guidance emphasises that:

*'It is important that the Minister makes his or her decision only on the basis of the criteria agreed and advertised for the competition. It is inappropriate to introduce additional criteria at this stage in the process and to do so could lead to successful challenge.'*

### The reasons for appointment recorded by the Permanent Secretary

54. The Permanent Secretary selected two applicants for appointment as lay members (and additionally one for the local councillor position and one for the Trade Union representative position). One of the two lay member applicants was appointed on the basis of their 'wide range of experience and previous NED roles'. The recorded reason for appointing the other applicant was 'corporate governance experience and legal background could be an asset to NIFRS Board'.

55. Some of these reasons recorded by the Permanent Secretary for selecting the appointees were different and unrelated to the published criteria for the appointments. This action by the Permanent Secretary is a clear breach of the Code and constitutes a failure to follow the departmental guidance. And as the guidance warns such action leaves the way open for 'successful challenge'.

56. In the submission of 21<sup>st</sup> February 2018 the Permanent Secretary was presented with an applicant summary for each applicant. The purpose of the applicant summary is to provide the Minister, or as in this case the Permanent Secretary, with an objective analysis of each applicant's skills and experience based on the information provided by each applicant during the appointment round.

57. The Permanent Secretary made the appointment decision based on the information provided by the selection panel to him in the applicant summaries (with one important exception - see paragraph 60 below). The applicant summaries included a paragraph detailing the applicants' background and how they had performed at interview, and also a comment on 'what skills and knowledge will the individual bring to the role', all of which was lifted almost verbatim

from the selection panel's notes. The summaries contained information (also from the selection panel's notes) which was extraneous to the published criteria about some applicants' skills and experience. In addition the applicant summaries contained a brief pen picture, a line covering conflicts of interest and time commitment and details of other public appointments held.

58. I make a number of observations below about the reasons upon which the Permanent Secretary based his decision to appoint the two successful lay applicants.

One successful applicant appointed on the basis of a 'wide range of experience and previous NED [non-executive director] roles':

59. There was no evidence presented to suggest that the Permanent Secretary in making his decision evaluated the breadth of the successful applicant's experience against any other applicant and particularly against the complainant's experience. Looking at the information provided in the applicant summaries I find no grounds for concluding that the complainant had less wide experience than the appointed applicant. Even if one assumes that the wide experience of the successful applicant was related to the agreed criteria - and this is not at all clear - the term was too vague to be used as a selection criterion. It was also unjustified to use it as the basis for selecting the successful applicant because, based on the information in the applicant summary, the complainant could also equally be said to have had a wide range of experience.

60. The criterion of 'previous NED roles' as a second basis for selection of this applicant was not only unrelated to the published criteria, there was in fact no evidence presented in the applicant summary relating to the successful applicant's previous non-executive director roles. This information was not sought from applicants. In responding to a request for information the Permanent Secretary informed this investigation that he knew the successful applicant professionally although not particularly well. (He also similarly knew the complainant - both had been civil servants.) This professional familiarity may explain the introduction by the Permanent Secretary of this new information not provided in the applicant summary. In citing the successful applicant's previous non-executive director roles as the basis for selection the Permanent Secretary introduced a wholly new selection criterion for which there was neither justification nor evidence. Applicants were unaware of it and the skills audit which had been carried out at the outset of the process made no reference to the need for previous non-executive director experience. Indeed the emphasis on previous non-executive Board experience runs counter to the Department's avowed policy of increasing diversity and bringing in new people to serve on our public boards.

One successful applicant selected on the basis that their 'corporate governance experience and legal background could be an asset to NIFRS Board':

61. It was clear from the applicant summary that the complainant had performed strongly against the corporate governance criterion. Her applicant summary stated that she 'demonstrated considerable experience of governance and accountability across a range of government departments and ALBs' and she 'demonstrated strong evidence in all areas including strategic

thinking, governance and accountability, stakeholder engagement and self-awareness and personal contribution.’ Although it was a published criterion, there was no rationale offered for selecting the successful applicant on the basis of her corporate governance experience given that the complainant had clearly performed strongly on this criterion.

62. The Permanent Secretary was also provided with the applicants’ total scores where it was manifestly clear that the complainant had performed the strongest against all of the published criteria. But even without the scores the text of the applicant summary made clear the complainant was a strong, if not the strongest, applicant against the published criteria.
63. The reference to the successful applicant’s legal background as a basis for their selection was unrelated to the published criteria. In citing this reason as the basis for his selection decision the Permanent Secretary was introducing a wholly new criterion of which the applicants were unaware. The skills audit which had been carried out at the outset of the process made no reference to the need for legal skills on the NIFRS board. In addition another applicant had a similar legal background to this successful applicant and was not appointed.

#### Legitimate Expectations

64. I will now look at the complainant’s expectation that the final selection decision would be based solely on the published criteria. Applicants were advised throughout the information pack that the assessment process would relate only to the criteria included in the person specification and that the evidence they provide throughout the appointment process must relate only to these criteria.
- Paragraph 18 states that *‘The person specification addresses the qualities, experience, background and competencies sought.’*
  - Paragraph 23 states that *‘All applicants must demonstrate clearly and provide the accompanying evidence to support their application that they have the necessary skills, knowledge, experience and qualities required. They will need to show, both on the application form and at interview, how they meet the criteria.’*
  - Paragraph 44 states that *‘Competence based interviewing tests candidates against the specific selection criteria for a particular appointment’.*
  - Paragraph 45 states that *‘The interview is a crucial part of the appointment process and thorough preparation is essential. You can prepare by: reading and thoroughly understanding the selection criteria.’*
  - Paragraph 52 states that *‘At interview, all candidates must satisfy the panel that they adequately meet all of the relevant criteria.’*
65. Applicants would therefore correctly expect that any appointment decision would be based solely on the published criteria, and that as the assessment process had focused solely on these criteria that the information provided to the Permanent Secretary would also be based on the evidence they had provided against these criteria.

### Flawed Applicant Summaries

66. There is no doubt that the applicant summaries provided to the Permanent Secretary were flawed in a number of ways. They did not consistently, accurately and fairly portray how each applicant had performed against the published criteria. For some applicants one or more of the criteria were not referred to in the applicant summary. In this competition all criteria were weighted equally and the omission of certain criteria for some applicants could have had a detrimental effect on the final consideration for appointment. It should be noted that in the case of the complainant the applicant summary referred to her performance against all of the criteria.
67. The panel also added information to the applicant summaries that was extraneous and unrelated to the published criteria. It may have been tempting for the panel to add in a reference to attributes of applicants unrelated to the published criteria but since the panel were aware or ought to have been aware, that these extra attributes should not be used for selection purposes their addition merely served to confuse the assessment process.

### Ultimate Responsibility for Decision Making

68. The Permanent Secretary used to a large extent the extraneous information set out in the applicant summaries as the basis for his appointment of the two lay members. The Code, case law, and the departmental guidance provided to him, however, are clear and the practice well established that appointment decisions should be made only on the basis of the published criteria. Additionally his use of extraneous information was selective in that he could just as readily have used the extraneous information provided about the complainant. It is more than unfortunate, that the departmental Public Appointments Unit failed at the time to advise the Permanent Secretary of the potential adverse consequences of the approach he was proposing to adopt. Similarly the applicant summaries did not serve the Permanent Secretary well. Ultimately, however, it was his responsibility to ensure his decision making was lawful and compliant with the Code (and the departmental guidance).
69. I find that the Permanent Secretary introduced new selection criteria into the appointments process and in doing so materially breached the Code. I therefore uphold this element of the complaint.
70. I further find that there was no proper rationale or correct justification for the basis on which the Permanent Secretary selected the successful applicants in preference to the complainant. Consequently the complainant cannot be assured that there were rational and justifiable grounds for her non-appointment.
71. There is a great onus on the Department and the appointing Permanent Secretary to ensure that these appointments are made fully in accordance with the Code in the most transparent and justifiable manner. This is particularly so in the current political circumstances. There were substantive breaches of the Code in this appointment process accompanied by a lack of proper rationale and justifiable grounds for the appointments. This leaves the way open for

the fair minded and informed observer to form a perception that some form of bias may have motivated the decision making. The outcome of this appointment process, therefore, created a situation wherein perceptions of unfairness, bias or discrimination could arise. These perceptions are exacerbated when there is existing under-representation of any section 75 group (the Chair of the NIFRS had quite properly drawn to the attention of the Permanent Secretary at the outset that women and Catholics were significantly under-represented on the Board of NIFRS).

72. The purpose of the Code is to instil public confidence in the transparency and fairness of our public appointments system. These breaches and failures adversely affected the complainant. Breaches of the Code in such circumstances have the potential to undermine public confidence in both these particular appointments and the public appointments system more generally.

#### Skills audit

73. Despite the fact that a skills audit was undertaken at the outset of the process the panel recorded additional candidate attributes as potentially beneficial to the NIFRS Board. Some of these attributes were used as the basis for appointment. This suggests that a more detailed skills audit could have been carried out at the beginning of the recruitment process. A skills audit exercise can be rendered inadequate, however, if a Department has an overly formulaic approach to criteria setting. I recommend that the Department reassesses its approach to the skills audit exercise and criteria setting with a view to ensuring they take full account of the skills and experience required for the Board appointments.

#### **Element III**

#### **The Department's Public Appointments Unit were obstructive in providing the complainant with information on her performance at interview in relation to other applicants.**

74. The complainant requested details on where she was placed in merit order; this was not provided by the Department. The complainant requested information detailing the number of applicants found suitable for appointment, how many scored higher than the complainant, how many scored lower and how many scored the same. The Department did not provide this information and the complainant was informed that no merit-ordered list existed.
75. Subsequently the complainant submitted an FOI request to ascertain where on the merit list she was placed. The Department once again informed the complainant that no merit-ordered list existed and that they were unable to supply the information requested. Following a subsequent internal review of this decision requested by the complainant the Department provided her with the range of overall scores awarded to those applicants presented to the Minister as suitable for appointment.
76. Although I do not consider that the Department was deliberately obstructive with the complainant, nevertheless, it was unhelpful when it came to providing her with the

appropriate information she requested. Following an FOI request and internal review of this request the complainant was provided with the range of scores awarded to applicants suitable for appointment. The Department ought to have known at the outset what information it could properly provide and do so without the need for an FOI request and internal review. To that extent I uphold in part this element of the complaint.

77. Finally, I wish to stress that this report does not reflect negatively in any way on those individuals appointed in the competition under scrutiny. All the evidence shows they came to the process in good faith and conducted themselves correctly throughout.