

REPORT ON AN INVESTIGATION

12 August 2010



TITLE: HIGHLANDS AND ISLANDS AIRPORTS LTD – COMPLAINT INVESTIGATION

MINISTER: STEWART STEVENSON MSP, MINISTER FOR TRANSPORT, INFRASTRUCTURE & CLIMATE CHANGE

DIRECTORATE: TRANSPORT

PUBLIC BODY: HIGHLANDS AND ISLANDS AIRPORTS LTD

SUMMARY

- 1) The Minister for Transport, Infrastructure & Climate Change, Stewart Stevenson MSP, has re-appointed a board member to the board of Highlands and Islands Airport Ltd.;
- 2) The Commissioner considers that this re-appointment did not comply with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the code);
- 3) The Commissioner does not consider the breach of the code to be material and is not, therefore, required to report on this matter to the Scottish Parliament.

A handwritten signature in black ink that reads 'Karen Carlton'.

Karen Carlton
Commissioner for Public Appointments in Scotland
12 August 2010

[All 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.]

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NATURE OF COMPLAINT

In this case I received a complaint from a member of the public who expressed concerns about the probity of a board member of Highlands and Islands Airport Ltd. Those concerns related to that board member's non-disclosure of facts on the register of interests maintained by the body. The complainant was of the view that the extent of the disclosure of interests was inadequate and that material facts about the board member's directorships should have been included on the register but were not.

I explained to the complainant that I do not regulate the activity of individuals once appointed and that my role is not to oversee the registers of interests maintained by public bodies. My remit extends only to the public appointment process itself.

I established that the activities of this particular body and its board members are not overseen by the Standards Commission for Scotland and this was communicated to the complainant. The complainant then asked me to investigate the reappointment of the board member.

I explained that the investigation I would conduct would determine whether the code's requirements for reappointment had been met. These are as set out in paragraphs 29.1 to 29.12 of the code and include matters such as the effectiveness of the performance of the board member concerned. I also explained that I would check whether any investigation into the complainant's concerns was conducted effectively by the Scottish Government as this is also a code requirement at paragraph 40.1.

RESULTS OF THE INVESTIGATION

The results of my investigation are set out in the following pages. In summary, I found that:

1. The re-appointment of the board member concerned was not made in accordance with the code. The code requires regular and transparent performance appraisal for board members. The code also states that no one may be reappointed unless there is evidence of effective performance during their current term. I found that the code was not complied with in respect of these requirements.
2. The directorate conducted a thorough investigation into the complaint and the results of that investigation were communicated to the Chair of the body and the appointing Minister. Whilst I believe that the investigation conducted complied with the code, I question the extent to which the investigating officer assigned to investigate the complaint was sufficiently arms-length from the issues subject to investigation. This is because he had been copied into the majority of the correspondence originally generated in respect of the matters that he was later asked to investigate.

I do not consider the breaches of the code that I identified to be material.

I have no doubt that the complainant in this case will be dissatisfied with the findings in this report. This is because the complainant fundamentally disagrees with the appointing Minister about the appropriateness of the appointee concerned continuing in their role. It is not my role to pronounce on the suitability of appointees or on their conduct once appointed. This is clear from the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the 2003 Act). The complainant has attempted to direct me to take on a role during this investigation that I do not have the statutory power to fulfil. This is fundamentally a ministerial appointment. The appointing Minister has been made aware of the complainant's concerns and the results of the investigation into those concerns. The appointing Minister has concluded that the continuing appointment of the appointee remains appropriate. This is a matter for the appointing Minister.

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

The report deals with the re-appointment of a board member to Highlands and Islands Airports Ltd.

I have fully considered whether the process used to re-appoint this board member complied with the requirements of the code. I have found that it did not inasmuch as the ministerial decision to reappoint was not underpinned by an open, transparent and regular appraisal process. I do not, however, consider the non-compliance to be material in nature. It is clear that the performance of the appointee was considered by the Chair of the body and by the directorate and Minister before the reappointment was made. It is also clear to me that a thorough investigation was conducted by the directorate in response to the complainant's concerns.

THE PROVISION OF INFORMATION BY THE SCOTTISH MINISTERS

In advance of making this report my office requested the information required to investigate the complaint. The Scottish Government refused to provide me with a copy of that information unless I agreed to be bound by conditions that it wished to place on the use of that information. I undertook to meet with a senior civil servant on 07 July, in order to discuss the Scottish Government's position and to secure agreement to have the material released to me.

Based on my undertaking to meet with the Scottish Government in July, and not to report on my findings in this case until I had done so, the material was released to me. The material was released to my office later than the deadline that I originally set. The material was provided in a fragmented fashion between 25 March and 08 June. This had an impact on the time taken for the investigation to be conducted.

At my meeting with the Scottish Government on 07 July I agreed future action in respect of the release of information. I do not anticipate problems in requesting and receiving material to support future investigations.

OCPAS CHRONOLOGICAL REPORT

1. The initial offer of an appointment term, to run from 01 March 2006 to 28 February 2009, was made to the appointee concerned in January 2006.
2. The proposal that the board member be reappointed was made to the Minister on 09 January 2009. The Scottish Ministers confirmed that they wished to reappoint the board member in January 2009.
3. The reappointment offer for a second appointment term to run from 01 March 2009 to 29 February 2012 was made on 21 January 2009.
4. A complaint was initially received by OCPAS from a member of the public on 21 May 2009 relating to the recently announced re-appointment of the board member concerned. The complaint was primarily related to the appointee's register of interest entries. This is not a matter regulated by OCPAS or referred to in the code.
5. The complaint was forwarded to the sponsor team in the Transport Directorate for investigation and their reply was sent to the complainant on 26 June 2009. This reply prompted further enquiry from the complainant and another letter was sent from the sponsor team on 10 August 2009. The complainant responded on 13 October and reiterated his concerns, primarily about the register of interest entries made by the appointee which the complainant alleged were misleading. The directorate reiterated its position - that it had investigated the matter and that the complaint had no foundation - on 13 November. The complainant replied on 30 November requesting a copy of the board member's most recent register of interests. This was provided to the complainant on 15 December.
6. The complainant was dissatisfied with the Scottish Government's response to his concerns. He wrote to OCPAS on 22 December 2009 requesting that the re-appointment be investigated.
7. Following an exchange of letters, the Commissioner confirmed to the complainant on 17 February 2010 that an investigation would be conducted into this re-appointment and advised the Scottish Government of this on the same day. The Commissioner made it clear to the complainant that the investigation would consider compliance with the code and not other matters that the complainant wished to have investigated.
8. The notification to the sponsor directorate that an investigation was to be conducted included a request for a full list of documentation and other materials needed to conduct the investigation. It was requested that these be submitted by 18 March 2010. The directorate was advised of the key elements to be considered by the investigation:
 - whether the re-appointment was conducted in accordance with the code
 - whether the complaint handling process conducted by the sponsor directorate met the requirements of the code
 - what information was generated for Ministers involved in the re-appointment decision.
9. The investigation was hampered by a parallel dispute between OCPAS and the Scottish Government over the release of information to the Commissioner. Files relevant to the complaint were provided to OCPAS later than requested. The information required was provided in a fragmented fashion and in an unhelpful format between 25 March 2010 and 08 June 2010. The material released in June was only released further to prompting by the Commissioner's office even though that material was clearly requested when the investigation was started. In order to obtain all of the required information, the Commissioner agreed to delay any report until such time as she had met with a senior representative from Scottish Government on 07 July to discuss subsequent use of the released material. The meeting resulted in resolution of the issue.

10. The OCPAS investigation concluded that:

- the re-appointment of a board member to Highlands and Islands Airports Limited was not made in accordance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the code).
- the breach of the code in respect of the reappointment is not material
- the directorate fully investigated the complainant's concerns and the result of that investigation was discussed with the Chair of the body and the appointing Minister.

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

FINDINGS

Findings related to the re-appointment of the board member

Paragraphs 29.1 to 29.12 of the code describe the requirements for re-appointment. Members may only be re-appointed for a second term in the same role without open competition subject to evidence of effective performance and assessment that they possess the skills, knowledge and personal qualities required by the board at the time of re-appointment. That assessment is to be by way of regular and transparent performance appraisals.

There is no evidence that Highlands and Islands Airports Ltd had in place any system of performance appraisal for board members at the time that this reappointment was recommended.

There is no evidence that the appointee has at any point since their appointment in March 2006 been subject to any regular and transparent performance appraisal process. Indeed there is no record of formal performance appraisal of any kind.

There is no evidence of a review of the person specification to assess what skills, knowledge or personal qualities the board needed at the time of re-appointment.

The only reference to the performance of the appointee during their three year first term of appointment is as part of correspondence between the then Chair of HIAL and civil servants of the transport directorate during May 2008.

From the next relevant documentation relating to this re-appointment, it appears that a submission was prepared for the Minister(s) and circulated within the sponsor directorate for final comment on 7 January 2009. There is nothing to explain the gap between the previous discussions around this re-appointment in May 2008 and the eventual submission in January 2009. The Chair who had provided the brief performance comments referred to above, on which basis the re-appointment was recommended, resigned during this period.

The final submission went to Ministers on 9 January 2009. It was approved the same day by appointing Minister and by the Cabinet Secretary for Finance and Sustainable Growth on 13 January 2009.

There is no documentation detailing the content of the assessment referred to in the ministerial submission and on which the Minister's decision to reappoint was based.

Letters of re-appointment were agreed and sent out by the appointing Minister to the two re-appointees on 21 January 2009.

On 24 January 2009 the appointee accepted the offer of re-appointment and signed up to the terms and conditions and code of conduct and completed a political activity declaration.

When the Scottish Government's investigating officer was specifically asked by OCPAS to provide appraisal documentation and documentation setting out the outcomes of appraisals for the appointee, the investigating officer advised that:

The appraisal of non-executive Directors of Highlands and Islands Airports Ltd. is a matter for the Chair of the company and copies of the appraisal documentation are not held by the Scottish Government. Before making any recommendation to Ministers on the re-appointment of an NED we seek written confirmation from the Chair of his assessment that the NED continues to perform at a satisfactory level on the Board. (Please see, for example, letter of 2 May 2008 from [the directorate to the chair] and his email reply of 21 May 2008.)

We reviewed the documentation we were referred to by the investigating officer and all other material relevant to the re-appointment that was provided by the directorate. We found nothing to substantiate the claim that such appraisal documentation exists. Further, re-appointment is subject to evidence of effective and not satisfactory performance.

Findings related to the investigation of the complaint arising from this re-appointment

Documentation that was provided latterly during the investigation demonstrated that the complaint was investigated effectively.

The appointee was advised that a complaint had been raised and was asked to respond to the issues raised by the complainant. The appointee did so and the resulting information was shared with the Chair of the body and with the appointing Minister. It is apparent that the Chair of the body and the appointing Minister were satisfied with the appointee's rebuttal of the complainant's allegations.

The Scottish Government's investigating officer was attached to the directorate subject to the complaint. He was copied into much of the correspondence on the appointee's original appointment and re-appointment.

Although the extent of the investigating officer's involvement during the appointment and reappointment may have been limited, the Commissioner questions the extent to which the investigating officer was sufficiently arms-length from the matters subject to investigation.

The code requires the Scottish Government to have an effective system in place for handling complaints (paragraph 40.1). The Public Services Reform (Scotland) Act 2010 gives the Scottish Public Services Ombudsman (SPSO) the lead role in developing standardised public service complaints handling systems. The Act requires the Ombudsman to publish a statement of principles on which all public service complaints handling procedures should be based. The SPSO has consistently required complaints handling processes to be objective and transparent and to demonstrate impartiality and independence. In the current consultation being run by the SPSO, further guidance is given on what that means in practice:

"As far as possible, staff who have been the subject of, or involved in handling, a complaint should not be appointed to investigate it."