



Ministry
of Defence

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20 February 2021

Dear [REDACTED]

Your email of 23 November has been considered to be a request for information in accordance with the Freedom of Information Act 2000. You requested the following information:

A copy of the note from former Brigadier Colin Findlay to the Service Complaints Ombudsman for the Armed Forces dated 10 December 2018 regarding the Army's approach to 2-person appeal boards/panels/bodies

As I advised you in my letter of 18 December, a search for the information has now been completed within the Ministry of Defence, and information in scope of your request is held. As the requested document contained information which engaged the qualified exemption Section 42 (Legal Professional Privilege). It was therefore necessary for a decision to be made as to whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure. It is necessary to weigh the factors favouring disclosure on a case by case basis against the strong public interest in protecting the Legal Professional Privilege which has been recognised by the courts and the Information Tribunal. A public interest test has now been completed, which concluded that on this occasion public interest favoured releasing the information requested, which can be found attached below.

If you have any queries regarding the content of this letter, please contact this office in the first instance. If you wish to complain about the handling of your request, or the content of this response, you can request an independent internal review by contacting the Information Rights Compliance team, Ground Floor, MOD Main Building, Whitehall, SW1A 2HB (e-mail CIO-FOI-IR@mod.gov.uk). Please note that any request for an internal review should be made within 40 working days of the date of this response.

If you remain dissatisfied following an internal review, you may raise your complaint directly to the Information Commissioner under the provisions of Section 50 of the Freedom of Information Act. Please note that the Information Commissioner will not normally investigate your case until the MOD internal review process has been completed. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Further details of the role and powers of the Information Commissioner can be found on the Commissioner's website at <https://ico.org.uk/>.

Yours sincerely,

[REDACTED]
Army Secretariat

ARMY RESPONSE TO SERVICE COMPLAINTS OMBUDSMAN ANNUAL REPORT

TWO PERSON APPEAL PANELS

Reference:

A. Service Complaints Ombudsman (SCO) Annual Report 2017.

'A number of stakeholders have taken the time to inform the Ombudsman of how impressed they have been with the Army's attitude and approach to handling panels to decide Service Complaints. It has also been noted that how the panels are managed and constituted has been a driving force in the Army's ability to reduce its backlog of outstanding Service complaints to such a significant degree.'

While accepting that this is allowed for in legislation, the Ombudsman is interested to learn more about how the use of two-person panels has been managed. To those outside the complaints process, having an equal number of people on a panel can, on the face of it, appear to be at odds with the basic principles of justice and fairness. Having an unequal number of panel members allows for an objectively fair decision to be made in a 'tie-break' situation. The Ombudsman's understanding is that where there is disagreement on a two-member panel, the complaint is held to be not proven on the balance of probabilities. Though this does not make the process automatically unfair or unjust, it is important to understand how that process is managed end-to-end as this management is inherently linked to fairness.'

*The Ombudsman has no specific cause for concern, nor is she questioning the validity of the decisions made to date. However, as the Army has taken a leading role on using the flexibility of two-person panels, the Ombudsman would be interested in receiving a report from the Army before the end of 2018 on the **achieved efficiencies, any challenges faced, how the decision making process is handled where there is disagreement and thoughts on how and when two person panels can and should be used as the default position.**'*

(SCO Annual Report 2017 pp 40-41).

1. In response to the SCO's observations regarding the use of two-person panels by the Army, we offer the following to explain the circumstances in which two-person panels are used and our experience of their effectiveness.

2. Two-person panels are used when a case requires an Independent Member to sit with a Military Member to determine a case. These cases usually involve allegations of improper behaviour made against army personnel and can involve matters ranging from allegations of bullying and harassment to the incorrect application of policy to the disadvantage of a complainant.

3. Since the introduction of the new SC Process in Jan 16, two-person panels have represented 70% of all panels appointed. The statistics for the period 1 Jan 16 – 31 Aug 18 are as follows:

- a. Number of Appeal cases overall: 314 (100%).
- b. Number of One-Person Appeal Panels: 85 (27%).
- c. Number of Two-Person Appeal panels: 221 (70%).
- d. Number of Three-Person Appeal panels: 8 (3%).

For cases considered by the single stage Defence Council or Army Board over the same period, the figures are:

- a. Total - 47 (100%).
- b. Two Members – 38 (80%).
- c. Three Members – 9 (20%).

4. With nearly three years' experience since the new SC process was introduced our experience of using two-person panels has been wholly positive and we have had no instances of a two-person panel failing to reach agreement. The advantages of using two-person panels are summarised below, these observations being collated from both Panel members and the legal team who have supported them.

a. **Balance.** We have no experience of a two-person panel failing to achieve agreement in making a determination. Anecdotal evidence from the Independent Members suggests that they prefer the 'equality of arms' that a two-person panel provides, with no risk, as some have experienced in the past, of being outvoted by military members. Our Senior Legal Adviser advises that *'Independent Members have mentioned more than once to me that they have felt unconsciously under more pressure to agree findings when dealing with SC's where there are two x Military Member's as they tend to often think the same way & hold the same opinion which generates more pressure for the Independent Member to agree than in a two-person panel where there is equality of arms and different dynamic. This is important because a key role of the Independent Member is to bring to the SC a different perspective/opinion on the issues so there should be no reticence on their behalf in voicing their views on the case'*. Reflecting on his experience of the functioning of two- person panels he states that *'In my experience the interaction between the Military Member and Independent Member on the issues is entirely as it should be. Both voice their own views on a case which are entirely respected. Particularly at the outset of an SC these views may not entirely align but as the case progresses while the overall view of the AB may change significantly, the actual views of the Independent Member and Military Member increasingly align to their agreed finding. I have only encountered one occasion when an Independent Member and Military Member were in disagreement at the end but this more to do with fireproofing their decision rather than a fundamental disagreement and was resolved by further advice from the legal adviser after consultation with the Senior Legal Team'*.

Our Senior Legal adviser also believes that in oral hearings involving allegations of bias, legitimate expectation and the Equality Act, the outward perception of 50% Military Member and 50 % Independent Member representation has a positive presentational impact on the Complainant and Respondents/Potentially Affected Persons alike.

b. **Timeliness.** In utilising two-person panels we believe that there is a significant timesaving in not having to factor in the diary commitments of a third member. This has a bearing on the time frames for arranging Panel meetings, on the Panel's decision-making process as the views of a third member do not have to be accommodated and on the mechanics of finalising and agreeing the text of the decision document. The only circumstance where a third member has been of benefit has been where a two-person panel has identified that it would be assisted by having a specialist member (for example, with a medical background) to advise on a technical aspect of a complaint.

c. **Cost.** We estimate that if the 221 two-person panels held since Jan 16 had been three-member panels, this would have incurred additional cost of at least £165k in salary based on the additional member being 1*, paid at rank minimum (without travel and subsistence).

d. **Management of Disagreement.** The SCO alludes to the default position being, in case of disagreement, a finding of 'not proven', thereby possibly disadvantaging the complainant. In practice in the event of an irreconcilable 'tie-break' situation, we would

recuse the Panel and appoint a new one, if appropriate with three members, to consider the evidence afresh. Our Senior Legal adviser does not agree that the proposition that a two-person panel goes against the principles of 'justice and fairness' simply because there is no scope for a majority decision. This is a hypothetical problem given our experience of two-person panels which if it did arise, is mitigated by the recusal process. In practice, taking the above factors into account, the benefits of two-person panels, far outweigh this hypothetical perception.

5. Our experience of two-person panels has been entirely positive and we can see no benefits, apart from the exceptional circumstances mentioned at (b) above where conducting a three-person panel would be advantageous. I hope this helps in understanding of why the Army favours the use of two-person panels rather than three. Please come back to me if I can assist with any further explanation or you wish to discuss the response.

CA FINDLAY
Brigadier (Retired)
Army Service Complaints Secretary 10 Dec 18