
HEARINGS IN PRIVATE PROCEDURES

1. INTRODUCTION

- 1.1 Section 16 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 gives the Standards Commission for Scotland (Standards Commission) the power to hold a Hearing. Section 17 of the 2000 Act enables the Standards Commission to decide what procedures to follow at any Hearing. Section 17(9) provides that a Hearing shall be held in public unless the members of the Commission conducting it determine that it is in the public interest that it, or such part of it as they specify, be not so held.
- 1.2 The Standards Commission has produced and published a Hearing Process Guide and Rules (the Hearing Rules), outlining the process and procedures to be followed after it makes a decision to hold a Hearing.
- 1.3 The Hearing Rules state that Hearings will be held in public unless the Hearing Panel determines the Hearing, or part of it, will be held in private. This document aims to provide transparency about how the Standards Commission makes any decision under the Rules to hold a Hearing, or part of it, in private; and the procedures it will follow in doing so. The document also outlines the factors the Standards Commission will consider in making such a determination.
- 1.4 The relevant provisions in the Hearing Rules are reproduced below, for ease of reference. In summary, they state that the parties may request that the Hearing or part of it be held in private by writing to the Executive Director no less than 14 days prior to the Hearing. The Rules further state that during a Hearing, the Panel may at its own discretion, or following a request from one of the parties or a witness, decide to proceed with the Hearing, or part of it, in private.
- 1.5 The Rules provide that representations will be sought from both parties before the Panel decides to hold a Hearing or part of it in private. To hold a Hearing or part of it in private, the Panel would have to be satisfied that: (i) a decision to exclude the public causes no prejudice or unfairness to either party; and (ii) the particular circumstances of the case outweigh the public interest in holding it in public. The Rules also provide that the Panel will also take into account the need to protect any sensitive, personal and confidential material or information when determining what and how evidence can be led and/or when deciding whether or not to hold the Hearing or part of it in private.
- 1.6 This document is intended as a guide and the list of considerations outlined below is not exhaustive. Any decision and procedures to be followed will depend on the individual and particular circumstances of each case.

2. REQUEST FOR A HEARING OR PART OF IT TO BE HELD IN PRIVATE

- 2.1 Any party making a request that the Hearing or part of it be held in private must do so in writing to the Executive Director no less than 14 days prior to the Hearing. The party must explain:

- whether they are asking for the whole Hearing to be held in private or only part of it. If the request is for part of the Hearing to be held in private, the party should clearly state which part (for example, witness X's evidence should be heard in private);
 - why they are making such a request;
 - why they consider that the particular circumstances of the case outweigh the public interest in holding the Hearing or the specific part of it in public;
 - what they consider the potential consequences may be if the Panel does not accede to the request; and
 - whether they are seeking the Standards Commission to make any other adjustments to the normal Hearing procedures (and, if so, what these are).
- 2.2 Within three days of receipt of the request and information from the party, the Standards Commission will write to the other party and advise them:
- of the request and the general reasons behind it;
 - of their right to make representations and the fact that any received will be taken into consideration by the Panel when it makes its decision on the request; and
 - that to hold a Hearing or part of it in private, the Panel will have to be satisfied that: (i) a decision to exclude the public causes no prejudice or unfairness to either party; and (ii) the particular circumstances of the case outweigh the public interest in holding it in public.
- 2.3 The Standards Commission will invite the other party to submit representations, within five days of the date of the correspondence referred to under paragraph 2.2.
- 2.4 The Panel will make a decision, under Section 21, within three days of receipt of any submissions from the other party, or within three days of expiry of the deadline for submitting representations (whichever occurs sooner).

3. DECISION TO HOLD THE HEARING OR PART OF IT IN PRIVATE

- 3.1 In determining whether to accede to any request to hold a Hearing or part of it in private, the Panel will review the request and any representations received from the other party and will consider whether it is satisfied that:
- a decision to exclude the public causes no prejudice or unfairness to either party;
 - the particular circumstances of the case outweigh the public interest in holding it in public;
 - that it has taken into account the need to protect any sensitive, personal and confidential material or information; and
 - the decision is proportionate in the particular circumstances of the case.
- 3.2 **Prejudice / Unfairness:** In assessing whether there could be any prejudice or unfairness to either party, the Panel will review any representations received and will consider whether excluding the public from the Hearing, or part of it, would or could have any detrimental impact on the ability of either party to present, lead evidence or make submissions on their case.
- 3.3 **Public interest:** In assessing the public interest, the Panel will start from the position that, in order to ensure transparency in decision-making and to promote the ethical standards framework, it is generally in the public interest for Hearings to be held in public. The Standards Commission recognises, however, that it would not be in the public interest to hold a public Hearing where this would threaten the personal well-being or safety of any parties involved in a case (including witnesses), or where there are significant confidentiality concerns (where, for example, medical evidence was being considered).
- 3.4 In relation to the issue of personal well-being or safety, the Panel will consider the alleged impact / consequence or potential impact / consequence to any individual or individuals if the Hearing

is held in public. The Panel would normally expect to be provided with an explanation as to why it is considered there is a risk of substantial harm (including physical, mental and reputational) to an individual involved in the Hearing before determining the Hearing, or any part of it, should be in private.

3.5 Proportionality: In assessing whether a decision to hold a Hearing or part of it in private is proportionate, the following may be relevant:

- whether the request to hold a Hearing or part of it in private could more appropriately be dealt with under the provision in the Hearing Rules that provides that if either the Respondent or ESC believes any witness is vulnerable and/or may need particular assistance because of physical or mental impairment, language difficulties or any other substantial reason, they should advise the Standards Commission accordingly so that it can ensure that appropriate supportive measures, as far as is reasonably practicable, are in place prior to the Hearing.
- the Standards Commission has the authority, under Section 17(5) of the Ethical Standards in Public Life etc. (Scotland) Act 2000, to require any person to attend a Hearing and give evidence. Where a Panel is advised of a witness being reluctant to voluntarily agree to give evidence in public, but where no satisfactory explanation or reason has been given as to why their evidence cannot be heard in public, it will consider whether it is appropriate, in the particular circumstances of the case, to cite the witness in question.
- if an application to hold the full Hearing in private is received, the Panel will always consider whether it would be more proportionate and appropriate to hear only part of the Hearing in private (for example, if a Respondent intended to provide confidential information about his or her health in mitigation, it may be proportionate to only exclude the public from the mitigation part of the Hearing, should a breach be found).
- whether a decision to hold the Hearing or part of it in private will enable the Panel to hear submissions or evidence that is likely to assist in making a decision on whether or not there has been a breach of a Code of Conduct, that it would not otherwise hear. The Panel is less likely to agree to a request to hold the Hearing or part of it in private if it does not consider that the submissions or evidence being led during the private session will be relevant and helpful to its decision making. It should be noted that the Standards Commission has produced Guidance on the Relevancy of Evidence at Hearings, which can be found at: www.standardscommissionscotland.org.uk/cases/hearing-rules.

4. PROCESS TO BE FOLLOWED AFTER A DECISION IS MADE

- 4.1 The Standards Commission will advise the Respondent and the ESC of the decision and reasoning behind it within three days of the decision being made. The Standards Commission may also choose to advise the complainer(s).
- 4.2 If a decision is made to hold part of the Hearing in private, the Standards Commission will explain what part and any further adjustments it intends to make. The Standards Commission will clearly state in its correspondence that the decision should not be seen as any comment or finding on the validity of any evidence or allegations against the Respondent.
- 4.3 The Standards Commission will publish information about any decision made to hold a Hearing or part of it in private on its website and may also choose to disseminate this on its social media platforms. In doing so, the Standards Commission will clearly state that the making of such a decision should not be seen as any comment or finding on the validity of any evidence or allegations against the Respondent.
- 4.4 The Standards Commission will contact the venue to ensure that practical arrangements are in place to ensure the public are excluded from the Hearing or part of it, as agreed. Additional measures may also be considered and taken, such as ensuring there is different access to the

Hearing room for witnesses who are giving evidence in private and ensuring members of the public are unable to hear proceedings if, for example, they are in an adjacent room.

- 4.5 If a decision is made before the Hearing commences that the public are to be excluded from part of the Hearing, the Chair will announce this and explain what part during his or her opening remarks. The Chair will ask the public to leave at the relevant part of the Hearing and will adjourn proceedings until he or she is satisfied that they have done so.
- 4.6 If the Hearing is to be held online, and a decision is made before the Hearing commences that the public are to be excluded from part of the Hearing, the Chair will announce this and explain what part during his or her opening remarks. The Chair will ensure the livestream is paused at the relevant part of the Hearing and will adjourn proceedings until he or she is satisfied this has been done. The livestream will not restart until the private part of the Hearing has concluded.

5. DECISION TAKEN DURING A HEARING

- 5.1 As noted above, the Hearing Rules provide that, during the Hearing, the Panel may decide at its own discretion, or following a request from one of the parties or a witness, to proceed with the Hearing, or part of it, in private.
- 5.2 If any party, witness or Member of the Hearing Panel wishes to proceed with the Hearing or part of it in private, they should advise the Chair accordingly and indicate the general reasoning behind the request. The Chair will then adjourn the Hearing so that the Hearing Panel can consider the request in private.
- 5.3 If the party, witness or Member does not wish to make the reasons for their request public, they should advise the Chair that they wish to make a request and for this to be considered in private. The Chair will then adjourn the Hearing and invite both parties (and their representatives if they are formally represented) to join the Panel in its determination room (or breakout room if the Hearing is held online), so that the request and any objections to it can be discussed fully. The Panel will then make its decision in private.
- 5.4 If a decision is made that the public are to be excluded from all or part of the remainder of the Hearing, the Chair will reconvene the Hearing to announce this and to explain what part. The Chair will ask the public to leave at the relevant part of the Hearing and will adjourn proceedings until he or she is satisfied that they have done so. If the Hearing is being held online, the livestream will be paused until all deliberations about holding the Hearing in private and any parts that are then held in private have concluded.

6. WRITTEN DECISION

- 6.1 If a decision has been made to hold any or part of the Hearing in private, the Standards Commission will state this in its written decision. The Standards Commission will not publish or otherwise disclose any information concerning submissions made or evidence led during the private part of any Hearing that is sensitive, personal or confidential.

HEARINGS IN PRIVATE PROCEDURE DOCUMENT – INDICATIVE MILESTONE DATES

Data control and version information				
Date	Action by	Version Updated	New Version number	Brief Description
18/12/18	LJ	N/A	V1.0	Implementation of Procedure Document
05/03/19	EM	V1.0	V1.1	Update reference CESPLS to ESC
26/11/20	LJ	2019v1.1	2020v1.0	Updated to include reference to possibility of Hearings being held online