

Annex A Due Diligence

A discussion of due diligence in public appointments and new guidance has been sought by ministers, departments and the Committee on Standards in Public Life. The following is my response to the issue as Commissioner..

The controversy in the first week of January over the appointment of Toby Young to the board of the Office for Students appears to have taken the Department for Education by surprise. The papers that the Commissioner received warned ministers in early November that the only candidate who might be considered remotely controversial was one for the student experience role who had expressed views on social media and in tweets, and these had been taken into account by ministers. This reveals an inconsistency since there was no comparable analysis of Mr Young's social media presence, and none was reported. The Commissioner has been told that Mr Young was regarded as a known quantity-- both in his prominent public support for educational reform, notably in leading the development of free schools, and in his often provocative journalism. But his tweeting was apparently unknown.

In response to questions from the Commissioner, the department responded on 21st February that 'due diligence took place ahead of all appointments to the OFS Board, Internet searches were carried out for public statements by the shortlisted candidates and references were taken up before candidates were interviewed. The outputs of due diligence were discussed with the panel and were briefly discussed with the Minister of State [Jo Johnson]. It was also noted with the panel and with Ministers which candidates had declared political activity and evidence of that activity in social media was reviewed. There is always a balance of proportionality in undertaking due diligence and we did not delve back extensively into social media'.

Jo Johnson, the then Universities Minister, argued in the House of Commons on 8th January 2018 that, 'in respect of due diligence, one has to look at what is reasonable and proportionate for a panel to do. Neither I nor the department were aware of the offensive tweets before the appointment was made, but there is nothing unusual about that. Many of the remarks were made years-- in some cases, decades- ago and it is not reasonable or proportionate for the Government to trawl through tens of thousands of tweets over many years when making public appointments'.

That response frames the choice over due diligence in too extreme a way. The familiar practice clearly did not work in this case. Mr Johnson is right that it would be unreasonable or disproportionate for departments to trawl through tens of thousands of tweets over many years. But that is not necessary. First, Mr Young's reputation as a controversialist, in itself hardly a secret, should have prompted further probing to examine whether what he had said and done might conflict with his public responsibilities and standards expected on the OFS board. Second, the rapid disclosure of what were described as offensive tweets in the days after his appointment was announced suggests that it was not that hard to find them, that not very much delving was required. Such questioning and information is about providing a fuller picture to the interview panel and to ministers.

The Commissioner's role is not to second guess the panel or ministers about whether candidates are appointable, nor to investigate the charges subsequently made against them.

Rather, it is to consider whether the appointments process followed the principles set out in the Government's Governance Code. In this case, as discussed in the main report, the key question was whether each candidate was treated fairly and impartially. The answer here is no. Extensive research was carried out into the background and opinions of certain candidates for the student experience role, but much less, as described above, for the generic non-executive role, though they were part of the same competition. The process failed to provide sufficient information about Mr Young.

The interview panel was consistent. Sir Michael Barber, who chaired the panel which recommended that Mr Young was appointable, has said publicly, and confirmed to the Commissioner, that he did ask all the candidates about whether there was anything else over and above any conflicts of interest included with application forms that the panel should know about or might be embarrassing. That question, linked to an understanding of the Nolan principles of public life, is standard at the end of all interviews for public appointments. According to Sir Michael, Mr Young said there was nothing he wanted to add, as did other candidates, although one or two referred back to conflicts of interest they had already declared. Panel members could take notes on these answers by candidates, but none were quoted in its report to ministers. Mr Young had already made a full disclosure about his political activities and about possible conflicts with his existing interests in the form accompanying his application.

Supporters of Mr Young have argued publicly that the controversy is in danger of narrowing the range of candidates chosen for public appointments. This could reinforce an existing, and perhaps inherent, tendency towards safety first selections and against more independent-minded candidates like Mr Young. There is no simple answer. The key is providing all relevant information. Drawing the line is a matter of judgement for ministers to make and to justify, as Mr Johnson did.

The arrival of social media has both increased the challenge facing departments over due diligence and simplified it. There is much more comment in the public domain but it can also be found via the internet. Departments need to take a fresh look at a realistic approach to due diligence, going beyond what has been regarded as reasonable and necessary. For a public appointment, it should not be necessary to trawl through every tweet or other social media intervention made by a candidate. A quick look through the internet, and, in particular, social media activity should act as a 'trip wire', not providing a definitive profile of a candidate but alerting a department to potential problems which can then be put to a candidate and passed on to the interview panel. This would go beyond the internet searches of public statements that now occur by looking also at social media activity.

It is hard to draw up precise guidance about what is proportionate in due diligence and checking of candidates. This is bound to vary depending on the public body involved, the post being filled and on the candidate applying. There needs, however, to be consistency in each competition. Among the practical questions are whether there be a cut-off date, defining a period beyond which a candidate's comments and behaviour would not be considered relevant by an interview panel? The limits of acceptability shift over time though most people would exclude what is said or done during student days. In part, of course, it depends on the nature of the words and actions and whether someone has deleted what they later regret.

The questioning at Mr Young's interview, and the subsequent report to ministers, might have been different if such a 'trip wire' trawl had been done and at least some of the 'offensive tweets' had been known at the time. In particular, the panel might have asked about the compatibility of Mr Young's tweets and views with the Nolan principles. They could have reported on this further information. It would then have been for ministers to judge whether, in the light of this, and balanced with their strong support for him as an alternative voice with different experience on the board, they continued to regard Mr Young as appointable. As it was, there was a failure of due diligence which could have been remedied, and can be.

These issues of due diligence are part of a wider concern about whether officials and interview panels pay enough attention to potential conflicts of view and of interest in their assessments and reports to ministers. There is a sense that the 'anything embarrassing to tell us' question is often posed hurriedly as a formality at the end of an anyway squeezed interview. The Commissioner has found a number of cases where insufficient attention has been paid to conflicts of interest leading to later controversy after a candidate has been appointed. These problems are avoidable if due diligence is given a higher priority by departments in probing both a candidate's interests and their views, via the type of 'trip wire' trawl of social media urged above. None of this is intended to narrow the field of candidates- far from it- but, rather, to ensure that recommendations by interview panels and decisions by ministers are based on fuller information.

