



The Commissioner for Public Appointments

The Commissioner for Public Appointments Report on the recruitment campaign for the Office for Students

Introduction

1. This report sets out the findings of an investigation by the Commissioner for Public Appointments (the Commissioner) into the appointment of non-executive board members for the Office of Students (OFS). The report has been made under section 4.(3) of the Public Appointments Order in Council 2016, which came into effect on 1st January 2017 and which permits the Commissioner to conduct an investigation into any aspect of public appointments with the object of improving their quality.
2. The circumstances around these appointments caused considerable public controversy, and highlighted a possible lack of due diligence taken by the recruiting department. In light of this, the Commissioner chose to investigate the whole appointment process. In the light of this case, the Commissioner has also been asked by departments to make suggestions about improving procedures for due diligence, which are addressed in detail in the attached annex A.
3. The initial subject of the controversy was the appointment of Mr Toby Young as a member of the Board of the Office for Students. Although he resigned from this post a week after the announcement was made, that did not negate the need for further investigation, especially in the light of separate concerns, which emerged over the appointment of the student member of the Board.
4. In common with normal practice for the Commissioner, this report will not name unsuccessful candidates, civil servants (apart from the Permanent Secretary at the Department for Education) and special advisers.
5. Decisions on public appointments are made by ministers subject to the provisions of the Government's own Governance Code and its key principles on transparency; and fair and open competition. This report will not be taking a view on the suitability of Mr Young or any other candidate. These are matters of judgment for ministers to decide and to defend. Nor

will the report consider the various allegations made against Mr Young on the basis of his published views, tweets and activities. These are not matters for the Commissioner to give a view on. This report focuses on the way the appointment process was conducted.

Background

6. The Office for Students was established as a legal entity on 1st January 2018 and will start operating in earnest on 1st April 2018, is sponsored by the Department for Education (DFE). An Order in Council lists all bodies regulated by the Commissioner and is refreshed from time to time to take account of changes in the creation and closure of public bodies. Whilst the OFS is not currently listed as being regulated by the Commissioner, the organisation will be included on the Order in Council later on this year. As has happened with other new public bodies, DFE therefore ran this campaign under the auspices of the Governance Code 2016. Jonathan Slater, the Permanent Secretary, confirmed this in his evidence to the Public Accounts Committee on 15th January 2018.
7. The OFS will replace the Higher Education Funding Council for England and the Office for Fair Access on 1st April 2018. In July 2017 when launching a campaign to recruit members to the OfS Ministers announced they were appointing 6 people to the OfS who had been appointed to the HEFCE Board earlier that year through a fair and open competition. Five of these were men and Sir Michael Barber, Chair of the OFS recognised the need to bring a balance to the gender diversity, he made these views known to both DFE and ministers throughout the competition.
8. The Department for Education advertised for a number of board members in July 2017. As there is a legal requirement for one board member to have experience of representing or promoting the interests of students in launching the campaign for OfS members DFE advertised this role (as the student experience representation role), along with the generic Non Executive Director (NED) role and this report examines the process for the entire competition.
9. There were therefore two separate rounds of sifting in recruiting to the board of the OFS. 221 applications were received for the generic NED position and 133 were received for the student experience representation role.
10. There were also two separate rounds of interviews, by two panels. Both were chaired by Sir Michael Barber, Chair of the OFS. Regrettably and contrary to best practice, the panel for the generic non-executive roles was all male.

Overview of review process

11. This report has been structured around the main provisions of the Governance Code 2016, from which the Commissioner takes his regulatory duties. In order to investigate this appointment process fully, the Commissioner requested the recruitment files for both the generic NED and the student experience representation roles for OFS in the first week of January. On 19th January 2018, DFE supplied a set of papers, which were disappointingly incomplete.
12. On 26th January 2018, the Commissioner spoke to Sir Michael Barber, the Chair of the OFS, to gain an overview of the process and an insight into the questions asked at interview. On 29th January 2018 the Commissioner met with Jonathan Slater, Permanent Secretary at DFE, and the Commissioner's office also had a number of conversations with the sponsorship team at DFE and the Cabinet Office.
13. The Commissioner met with Mr Jo Johnson, the Minister for Universities for the relevant period, on 12 February 2018.
14. It is normal practice for departments to supply full documentation within days of receiving a request from the Commissioner. There was not a formal timeline for the investigation. But, in this case, and contrary to the experience of working with others, it was not until 7th February 2018, five weeks after the original request, that the Commissioner's office received papers on the student experience competition.
15. The Commissioner conducted his investigation, and shared his report with Mr Johnson, Sir Michael Barber, the Centre for Public Appointments at the Cabinet Office and DFE on 20 February 2018. The Commissioner's office made it clear that the report was being shared, for comment on factual inaccuracies only. Two hours later, another set of papers was sent to the Commissioner's Office, along with answers to the Commissioner's questions sent to DFE on 24th January 2018.
16. The Commissioner is extremely disappointed at the delays in supplying information, often weeks after requesting and repeating those requests. These delays held up the investigation and are contrary to the spirit and usual practice of the Governance Code.
17. The documents that were reviewed by the Commissioner is attached at Annex B:

18. The Commissioner also considered the Urgent Question in the House of Commons on 8th January 2018 which was answered by Jo Johnson and the evidence given by the Permanent Secretary, Jonathan Slater to the Public Accounts Committee on 15th January 2018.

Findings

Principles of Public life (Paragraph 2 Governance Code 2016)

19. The Governance Code 2016 states that the Principles of Public Appointments will 'apply to all those involved in the public appointments process'. In order to establish whether appointees have considered the obligations of the principles, departments should ensure that candidates are fully informed of those principles. Due diligence checks play an essential part to this process, and ensure that that ministers are provided with assurance that appointees are suitable for roles. The essential criteria in the advert for these roles stated that candidates should demonstrate good judgment and high levels of integrity as part of the seven Nolan Principles of Public Life. The Commissioner has found that due diligence was inadequate and not conducted in respect of all candidates on an equal basis, compromising the principle of fairness in the Governance Code. In the light of this case, the Commissioner has been asked by departments and by the Committee on Standards in Public Life to comment specifically on due diligence and a report on due diligence appears in the attached annex A.
20. The interview panels for this appointments process met on 5th, 12th and September 29th 2018. Each candidate was asked about their understanding of the Nolan Principles of Public Life; and whether there was anything in addition to the conflicts of interest already declared which might cause issue or embarrassment. Only one candidate's response to this question was documented in the official record (the panel report), but the Commissioner has learned that no issues were raised by any of the candidates. The Commissioner has also noted there is a responsibility on candidates to declare any relevant information as part of the appointments process.
21. All candidates were asked to declare political activity prior to interview, and Mr Young did so fully. However, the press notice released by the department about the appointments on 1st January 2018 did not include this information, as is the normal practice with public appointments. Despite a number of reminders by the Commissioner's office, this was only corrected a week later, just before Mr Young resigned from the board.
22. The evidence demonstrates a lack of consistency in the approach to due diligence throughout this competition. The Department informed the

Commissioner on 21st February that due diligence took place ahead of all appointments with internet searches for public statements by shortlisted candidates. But by its own admission, it did not delve back extensively into social media so it was not aware of the tweets by Mr Young. However the social media activity of the initially preferred candidate for the student experience role was extensively examined.

23. After the interviews had taken place, names of candidates found appointable were suggested to ministers. Justine Greening, the then Secretary of State for Education questioned the proposed choice of Mr Young, particularly in terms of time commitment. DFE shared a document with the Commissioner, which set out a list of the merits of Mr Young and his record on educational reform in relation to the range of skills and experience sought for members of the board. This note did not however refer to any due diligence checks.
24. The Department has said it was neither proportionate nor normal to trawl through potentially large mounds of past social media activity. The Commissioner finds this response disappointing and this is a key area for improvement. The speed in which the media and others responded to Mr Young's appointment by revealing some of his tweets suggests that it was not very difficult to find relevant evidence. Mr Johnson later described some of these tweets by Mr Young as offensive in his statement to the House of Commons on 8th January 2018. Neither Mr Johnson nor the interview panel was told about these tweets. Had this information been available, the panel would have been able to question Mr Young and other candidates in more detail, and been able to report on these matters to ministers. This may have made no difference to the decision to appoint Mr Young, who was seen by ministers as a leading public supporter of the Government's educational policies, and of the creation of OFS in particular. However, at the very least, ministers would have been alert to possible controversy. The Department of Education has agreed that due diligence should have been better. Jonathan Slater at PAC on 15th January said ".Clearly, as the commissioner has pointed out, the due diligence arrangements were not adequate and he is looking at the paperwork on that, which I am very grateful for, and I am looking forward to his advice and recommendations about what we do better next time."

**Transparency (paragraph 8 Governance Code 2016)
Merit (paragraph 2.1. (D) Governance Code 2016).**

25. The Government's Governance Code (Clause 2, H) states that the procedures for making public appointments should be open and transparent, with ministers making a choice of candidates from a strong and diverse field of candidates whose skills and experiences have been judged to meet the needs of the public body in question.

26. Mr Johnson asked officials to inform Mr Young about the advert for the campaign. They did so by email and he applied in the same way as other candidates, and was shortlisted for interview in the normal way for a competition. He was subsequently recommended as appointable after what was described by the panel as a 'very good' interview, which displayed a strong understanding of the challenges facing OFS and experience leading change in the school system.
27. As noted above, in an apparent inconsistency with the treatment of candidates for the generic NED role, the Commissioner found that the department checked the social media activity of the candidates found appointable for the student experience representation role. An email to the minister's office, supplied by the department, indicated that comments made by these student candidates, particularly the preferred one, on social media had been examined, and a judgment formed on suitability for the role in the light of these comments.
28. Email records mention 'No 10 Googlers'. The social media history of one candidate was brought to the attention of the minister, with comments from officials about the risks associated with such an appointment (and concluding that the risk was negligible). Notably, no such exploration or research was made on other possible appointees, including Mr Young.

Fairness (paragraph 2.1 (H) Governance Code 2016)

29. The Governance Code 2016 states that '*selection processes should be fair, impartial and each candidate must be assessed against the same criteria for the role in question*'.
30. The Commissioner is satisfied, from the records of the long list and of the later stages of the process, that the parallel panels chaired by Sir Michael Barber did operate in line with the Code in assessing candidates on a fair, impartial and equal basis. It is clear that the problems relating to the student experience role occurred at a later stage.
31. All competitions should involve close ministerial involvement consistent with the Code - from suggesting names to choosing whom to pick amongst a list of appointable candidates. In this case, the Commissioner was informed of one change of approach that took place during the competition which was entirely consistent with the Code and supported the aims and remit of the OFS. The Higher Education and Research Act requires the body to have board members with a background as a graduate employer, Mr Johnson felt that the first shortlist submitted to him did not present ministers with a strong enough choice of candidates with this experience and asked the panel to review this. Sir Michael then

consulted the rest of the panel by phone and as a result, two candidates with experience as graduate employers were added to the list of appointable candidates. This intervention was consistent with the spirit of the Code.

32. In the student experience campaign, candidates were assessed against the advertised criteria and advice, based on the panel's findings, was put to ministers on the relative strengths of appointable candidates. At this point, no objections were raised, either by officials, the Chair or by ministers, who favourably mentioned one of the candidates found appointable. The panel findings were then circulated more widely to special advisers, who then made objections to one candidate in particular.
33. The evidence presented to the Commissioner indicates that the decision on whether or not to appoint one candidate in particular was heavily influenced, not by the panel, but by special advisers, notably from 10 Downing Street. The candidate found appointable for the student experience role had been suggested by the minister at the start of the process after taking account of the candidates history, affiliations and social media activity. But the candidate was then rejected on the basis of public statements and student union activity. The department argues that attitudes towards free speech on campus and to the Prevent agenda were relevant to the published criteria of delivering the Government's priorities for higher education and effective running of OFS. Moreover, the department argued that matters might be taken into account above and beyond the specific criteria in the job advert. That escape clause undermines the point of published criteria. The submissions and email records show that there had been a desire amongst ministers and special advisers not to appoint someone with close links to student unions, like the National Union of Students. This was not made clear in the advertised candidate information.
34. In this case, the decision not to accept the finding of the panel also actively went against the declared preferences of the Chair and DFE officials. Both supported the view that the candidate judged appointable for the student experience role had performed well at application and interview stage and had advised that a decision to reject the candidate was not in the interests of the public body or wider relations with the student world. The reputational risks of not picking one of the candidates judged appointable were stressed in one of the Department's submissions. There were references to a major own goal if the preferred candidate was not appointed, distracting attention from the positive aspects of the OFS, while leading to scrutiny from the Commissioner about why no candidates from the campaign had been appointed to the student experience role. The decision not to accept the appointable candidates was made after further information was supplied by a 10

Downing Street special adviser about the preferred candidate's recent views on a number of controversial issues. Moreover, the papers indicate that political factors completely unrelated to the remit of the OFS were cited by the special adviser in objecting to the preferred candidate. Ministers subsequently withdrew their support and looked for alternatives.

35. When the set of papers were finally supplied on 7th February 2018, the Commissioner's office also received a letter from DFE explaining that: *'ministers took into account the advice of the Advisory Assessment Panel and carefully weighed up the evidence given to them by the panel, as well as advice from DFE and the Cabinet Office/No10 officials and advisers. In particular, ministers took into account the policy context and new legal remit of the Office for Students to regulate the implementation of universities' legal responsibilities on Prevent and on free speech. Ministers concluded that it would undermine the intended policy goals of the new regulator to appoint student representatives who publicly opposed the Prevent duty and/or supported no-platform policies. Taking all of these factors into account, ministers concluded that none of the candidates were right for the role'*.
36. The Commissioner recognises that ministerial appointments to boards of public bodies reflect the preferences and views of ministers—and special advisers have an established role in providing unique, political advice and support to ministers. The Commissioner, however, has concerns about how this decision was taken and maintains that non-executive boards are intended to bring effective challenge to the organisations they serve, and that can only be achieved by having a diverse range of views, backgrounds, skills and experience. This independence is put at risk by taking too partisan an approach to candidates' views. It is a question of balance, and ministerial judgment, but any expansion or change in the criteria used to judge candidates should be explicit from the start. No explanation of why the three candidates assessed as appointable had been rejected was given at the time the subsequent appointment was announced on 1st January 2018.
37. The Commissioner is concerned at the catch-all nature of the subsequent justification for rejecting the preferred appointable candidate and has therefore concluded that this competition had serious shortcomings in terms of the fairness and transparency aspects of the Code.

Diversity (paragraph 7.4 Governance Code 2016)

38. The Code states that *'To be truly effective public bodies must bring together a mix of people with different skills and background to serve on their boards'*.

39. The OFS board includes a student representative role, which is encouraging in that it directly relates to the responsibilities of the body, and provides an opportunity for younger people to gain experience of board level engagement. This would have been achieved with the original proposed candidates for the student experience role and with the alternative candidate who was subsequently appointed, as discussed below.
40. Four of the six board members announced on 1st January were women, achieving 40% female membership of the board, all of whom were appointed on merit.

Appointments without fair and open competition (paragraph 3.3 Governance Code 2016)

41. The Code states that ministers should consider the advice of panels, but are not bound by their views. The Commissioner has already questioned the process behind the decision not to appoint any of the three candidates found appointable by the panel for the student experience role. In order to fill this position, names were taken from a competition to form an OFS Student Panel.
42. The Department had stated in submissions to ministers that the criteria used for the Student Panel appointments was similar to that of the student experience role. Two successful candidates were put forward as possible interim appointments. The Commissioner has been informed that sift notes from the panel exercise do not exist since this separate campaign was run by the OFS. A note from a departmental official, about the two suggested candidates said that they were without student union ties, indicating that these factors were of importance to ministers.
43. It is apparent that the search for a student experience appointee was carried out in a hurry in order to meet the 1st January 2018 statutory deadline for setting up the new board. It is unclear how the choice between the two alternative candidates was taken. Of the two candidates suggested to the Minister, both were acceptable to the Chair of OFS. He leant towards one candidate, while ministers opted for the other one, whom they felt had stronger experience in relation to the role.
44. When making an appointment without an open competition, or appointing a candidate that was not found appointable by a panel following interview, the Code is clear that ministers must consult with the Commissioner prior to the appointment being made. The Centre for Public Appointments at the Cabinet Office did make an enquiry with the Commissioner's office in December 2017 regarding appointing without fair and open competition to

this public body. This enquiry was by phone, and on a hypothetical/ in principle basis, no names of candidates were confirmed and no formal request was received. The Commissioner's office often receives such hypothetical inquiries, but they must be followed by a formal request stating: the reasons for not appointing a candidate or candidates under a competition; and the identity; and specific terms for an interim or temporary appointment.

45. The press release on 1st January 2018 confirmed the name of the student representative, which would lead the public to assume that this appointment was made after an open competition. This was in fact an appointment made using an exemption in the Code, and made without prior consultation with the Commissioner. The Commissioner has therefore found the department in breach of the Code. The department has assured the Commissioner that there was no intention to mislead and that this will not happen again.
46. The press statement of 1st January 2018 also did not make it clear that the appointment to the student experience role was temporary or short term in nature. The Commissioner has been told that the intention was to provide a fuller announcement about student engagement later in the week. That explanation is inadequate and unconvincing. The full position should have been set out in the 1st January statement.
47. The submission to ministers in December 2017 recommended that the appointment be initially for an interim period of one year to allow the OFS board and the Department to gain experience of working with the student panel and to give time to run another campaign in light of a comprehensive OFS student engagement strategy. The one year term, but not the thinking behind it, were set out in the letter of appointment to the successful candidate dated 27th December 2017. Further inconsistencies lay in the letter of 16th January 2018 seeking retrospective agreement from the Commissioner - as it stated that the appointment would be made temporarily for a period of nine months, in contrast to the earlier letter to the candidate saying the duration would be for one year. DFE changed its mind in early January 2018 for reasons which have not been explained.
48. The Commissioner has serious concerns that the Department did not manage the expectations of the candidates applying for the student experience role satisfactorily and the public was misinformed in the announcement of 1st January 2018. The letter sent to the Commissioner by DFE on 16th January 2018, seeking retrospective agreement to appoint without open competition failed to explain why the candidates found appointable were deemed unsuitable for the role. It is now clear that the central reason was because of the political views and student

union links of the main preferred candidate judged appointable by the panel.

49. In submitting the final documents on 7th February 2018, DFE stated that, following advice from the Commissioner in mid-January 2018, the interim appointment to the student experience role would now only last for a six-month period, with an open competition being launched in order to make a substantive appointment as quickly as possible and not later than the end of June 2018. The Commissioner has responded positively in a separate letter.

Summary

50. Ministerial choice and direction are permitted by the Government's Governance Code. However, the Code also requires appointments to be made on merit, and the principle of 'fairness' requires the selection process to be impartial, with candidates assessed against the same criteria.
51. The Commissioner recognises the good intentions of ministers, officials and the leadership of OFS as well as the time pressures all were under and concludes that the advisory panel did judge candidates on a fair, open and impartial basis. But he believes that avoidable mistakes were made. In particular, the reasons given for rejecting the initially preferred appointable candidate for the student experience role involved going well beyond the published criteria for the position and invoking a 'catch- all' generalized objection based on political views.
52. The Commissioner has found that the appointments to the board of OFS followed an inconsistent approach in one crucial respect: there was a clear disparity in the level due diligence performed between different types of candidates, as discussed in the annex.
53. The temporary appointment to the student experience role was made without fair an open competition and was mishandled. Not only was there a breach of the Code in the failure to consult the Commissioner and in the misleading announcement put out on 1st January 2018 but the successful candidate was not well handled by the department in being given conflicting information. The Commissioner welcomes the assurances by the department that this situation will not happen again and will work with DFE on this.
54. The delay in supplying the Commissioner's office with relevant paperwork has held up this investigation. The Code and the Order in Council provide for the Commissioner to undertake investigations into any campaign, and

as such, the Commissioner must be granted access to the files in a timely manner.

55. The Commissioner is concerned that there was inadequate customer care over the student experience roles. There were changes over the term of appointment offered to the appointed candidate,. The Commissioner believes that the mishandling of this competition may have given a negative impression to people considering applying for public appointments.

Recommendations

56. The flaws recorded above in the appointments process for the Office for Students board point to a number of lessons for future competitions by the Department for Education and other departments:-
1. Build a greater capability to understand and work with the Government's own Governance Code, both its principles and application in practice. This includes the customer care element, on which the Code is clear that departments should provide a good service to candidates,
 2. Maintain full and accessible records of key stages of a competition to fulfill and demonstrate the Code's provisions on transparency, fairness and openness.
 3. Respond promptly and fully to inquiries about the operation of a competition, respecting the Commissioner's role as the independent regulator of public appointments.
 4. Institute effective rather than largely formal, and often minimal, due diligence procedures, as discussed in the accompanying annex. Based on 'trip wire' social media searches, these should alert interview panels and ministers to possible problems, which can be pursued with candidates.