



KEEPING CHILDREN SAFE IN EDUCATION 2022

Following a period of consultation, the Department for Education has updated its guidance document, *Keeping Children Safe in Education (KCSIE)*. All education settings will, from 1 September 2022, need to follow the updated guidance, when carrying out their duties to safeguard and promote the welfare of children.

The most significant change, in terms of HR, is the introduction of a new requirement on Schools to consider conducting online checks on candidates during a recruitment selection process.

Online checks for new staff

Paragraph 220 of the new guidance reads as follows:

“As part of the shortlisting process, schools and colleges should consider carrying out an online search as part of their due diligence on the shortlisted candidates. This may help identify any incidents or issues that have happened, and are publicly available online, which the school or college might want to explore with the applicant at interview.”

KCSIE states that, ‘we use the term “must” when the person in question is legally required to do something and “should” when the advice set out should be followed unless there is good reason not to’. As paragraph 220 uses the term, ‘should’, carrying out online checks will not be a legal requirement, but Schools will nevertheless be obliged to conduct them unless they have reasonable grounds not to do so. It is difficult to imagine many roles, particularly those with direct contact with children, where it would not be reasonable to conduct an online search of candidates. In addition, Ofsted inspectors may well have particular views on what they regard as a compliant recruitment process.

How should online checks be carried out?

Unfortunately, KCSIE gives no practical guidance as to how Schools should undertake online checks on prospective employees. However the aim of this article is to provide some guidance on how and when to conduct the checks as well as the possible legal implications of doing so.

What to look for?

The first issue to consider is what a School is looking for when conducting an online search as part of a recruitment exercise.

Schools will, of course, want to be satisfied that candidates for employment are suitable to work with children and will not bring the School into disrepute. As a result, any search should focus on issues that

may impact on safeguarding, reputation and the ability of the candidate to perform the role for which they have applied..

Evidence of offensive or inappropriate behaviour, jokes or language, discriminatory comments, inappropriate photos and drug or alcohol misuse may indicate that the candidate will not be a suitable employee.

Care will need to be taken if the checks reveal a candidate's ethnicity, religion, sexual orientation or another protected characteristic, as these should not be used as a basis for the decision whether or not to call them for an interview.

Where to look?

KCSIE gives no guidance as to how education settings should conduct their online recruitment checks. Schools should therefore develop their own protocols as to the extent of any searches. It would be sensible for a basic online check to start with a Google search of the candidate's name, followed by a search on the main social media and video platforms such as Facebook, Twitter, Instagram, TikTok and YouTube. It will be important to ensure that online checks are carried out consistently so that each search for each candidate follows the same process.

Who carries out the search?

In order to minimise risks of discrimination, or allegations of bias, the online review ought to be carried out by someone who is not directly involved in the decision as to which candidate is offered employment.

What to do with the information

Paragraph 220 of KCSIE advises that Schools '*might want to explore with the applicant at interview*' the results of any online search. Any interview panel will therefore need to decide, when constructing their interview questions:

1. whether the results of an online search contain any information that merits questions being posed to the candidate; and, if so
2. how any such questions should be phrased.

However, any questions to candidates arising from an online search will need to be approached with caution. Take the following scenarios:

1. Candidate A has expressed views online that demonstrate that they supported Brexit and hold strong views on immigration;
2. Candidate B has stated on Twitter that trans-women are biologically male and should be banned from participating in sporting events for women;
3. Candidate C's Facebook account displays a picture of them virtually naked at a gay pride event;
4. Candidate D is a devout Muslim who has stated in an online forum that girls should be educated separately from boys.

Are you going to ask any questions of these candidates based on the results of the online search?

If you do, you will need to be able to justify why any such questions are relevant to the role for which the candidate has applied. You will also note an inherent risk in posing questions to the candidates listed

above based on the (admittedly limited) information supplied – suppose, for example, that you question Candidates C and D about the result of their online search and they are then unsuccessful in the recruitment process. They might argue, depending on how questions to them were phrased, that they have been rejected for reasons connected with a protected characteristic (i.e. sexual orientation in the case of C and race/ religion in the case of D).

Any recruitment panel facing these issues should therefore ask themselves:

1. Do the results of the online searches reveal any issue about the particular candidate, in terms of safeguarding, the reputation of the School or the ability of the candidate to perform the role for which they have applied? If not, then there is unlikely to be any justification in asking the candidate a question about the search results.
2. If there is an issue, what is it? Why is it important?
3. Can question(s) to the candidate, based on their online activity, be justified? On what basis?
4. Can question(s) be posed to the candidate which do not suggest or imply that the decision to recruit has been influenced by a protected characteristic?
5. If so, what are those questions?
6. If not, is the issue of such importance that you will ask the question(s) anyway?

When to carry out the search?

The guidance in KCSIE makes clear that any online search should be done as part of a School's due diligence on shortlisted candidates and prior to candidates being interviewed.

Given the issues, highlighted above, associated with asking candidates questions about their online activity at interview, Schools might prefer to adopt a policy of only inviting to interview those candidates whose online searches are satisfactory. In other words, to conduct an online search before candidates are invited to interview. Such a practice would have the advantage of avoiding the potentially difficult issues associated with questioning candidates about their online history.

However, Ofsted may well consider that declining to interview a candidate in such circumstances is unfair (and potentially discriminatory) because the candidate has not had the opportunity of responding to any concern revealed by the search of their online activity. In addition, whenever the searches are done, care will still need to be taken to ensure that any protected characteristics (or other irrelevant information) revealed by the searches do not influence the decision whether or not to invite a candidate to interview

What about data protection?

Data gathered about candidates during an online search should be treated in the same way as any other information relevant to the recruitment process, such as that contained in the application form, a DBS certificate and references. The information should be securely stored, shared with the interview panel only to the extent that is reasonably necessary and retained for no longer than is necessary, in accordance with the School's policy on the retention of recruitment data.

Online searches may well reveal, '*special category data*' about a candidate (i.e. information about the person's health, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, sex life and/ or sexual orientation). Such data should be only be processed in a manner that is lawful, fair and transparent, meaning that:

- A lawful basis for processing needs to be established – one such basis is that a School is likely to have a *'legitimate interest'* in conducting an online search in order to comply with the guidance in KCSIE and, more broadly, to safeguard the wellbeing of its students. Candidates do not need to provide explicit consent for an online search to be conducted, but they should be warned that such a search might be conducted and that the results could influence the School's recruitment decision. Ideally such a warning would be contained in an application form, in order that each candidate is aware that a search might be conducted before the candidate applies for the role in question.
- In addition to a lawful basis for processing, special category data can only be processed if one of the specific conditions, set out in UK GDPR, is met. These conditions include, *'Employment, social security and social protection'*, but the condition will only be met if the School has an appropriate policy document in place.

In conclusion, the new guidance in the forthcoming version of KCSIE needs careful thought and planning. Schools would be well advised to review and, if necessary, amend, their recruitment policies to include provision for a search of candidates' online histories. In addition, employment application forms should be reviewed and will, ideally, warn candidates that they may be subject to an online search and that the results of any such search may be used in the recruitment process and referred to at interview. A basic form, capturing the results of online searches, would be prudent in order to maintain a consistent approach. Schools should also consider providing some training to those conducting online searches, as well as those conducting formal job interviews, in order to highlight the risks associated with using online searches during recruitment.

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