

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2016

Public Authority: Department for Business Innovation & Skills
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested a copy of the Sale and Purchase Agreement, and other contracts concerning the Government's sale of the remaining mortgage style student loans to Erudio Student Loans Ltd in November 2013. The Department for Business Innovation and Skills withheld the requested information in its entirety under section 43(2)(prejudice to commercial interests) and section 41 (information provided in confidence) of the Freedom of Information Act 2000. During the course of the Commissioner's investigation the Department provided the complainant with most of the previously withheld information, with some information being redacted and withheld under the above exemptions and section 40(2)(third party personal data).
2. The Commissioner's decision is that the Department wrongly withheld all of the information at the time of the request but has subsequently provided the complainant with all the information within scope of the request other than that information which is validly exempt from disclosure on the basis of section 43(2). The Department is therefore not required to take any further action in respect of this request.

Background to the Request

3. In November 2013 Erudio Student Loans won the bid to buy the remaining 17% of mortgage style (MS) loans taken out by students between 1990 and 1998. The tranche of approximately 250,000 loans

had a notational (face) value of £890 million. They were sold to Erudio (which was backed by a consortium including consumer debt management companies CarVal Investors and Arrow Global) for £160 million¹. Two previous sales of MS student loans by the Labour Government in 1998 and 1999 passed £2 billion of the loans to the private sector. Approximately 1 million borrowers were retained by the Student Loans Company (SLC) following these previous sales and 69% of those had fully repaid their debt by November 2013. The Government had received £2 billion of repayments and of the loans sold in November 2013, approximately 46% were earning below the repayment threshold; 14% of borrowers were still repaying and 40% were not repaying their loans in accordance with their terms².

4. Mortgage-style (MS) loans were available to eligible students between 1990 and 1998. Borrowers are required to repay in fixed monthly instalments over a set period of 5 or 7 years. Interest is charged at a rate equivalent to the Retail Prices Index. Repayments can be deferred for a year at a time if a borrower's income is below the threshold, which is 85% of the national average earnings (£28,775 in November 2013).
5. At the time of announcing the student loans sale on 25 November 2013, the Coalition Government stated that:

'Erudio Student Loans will have to adhere to strict Office of Fair Trading (OFT) guidance about the treatment of borrowers which includes particular protections for vulnerable borrowers and those in financial difficulty. They have also committed to adhering to best-practice guidance issued by the Credit Services Association'.

6. There has been considerable media coverage of the impact on the approximately 250,000 borrowers whose loans were transferred to Erudio with management of their debt starting on 1 March 2014.

¹ BIS was advised on the transaction by PricewaterhouseCoopers (financial adviser) and Herbert Smith Freehills (legal adviser)

² Figures taken from Coalition Government announcement of loan sale on 25 November 2013

Request and response

7. On 10 January 2015 the complainant requested the following information from the Department for Business Innovation and Skills (BIS):

'Please provide a copy of the sale and purchase agreement, and any other contract, relating to the sale by the Government of the remaining mortgage style student loans to Erudio Student Loans Ltd/Arrow Global/Carval, in November 2013'.

8. The Department responded to the request on 6 February 2015 and confirmed that they held the information requested. The response stated that the information was exempt under section 43(2) (prejudice to commercial interests) but provided no explanation as to why the specific information was considered commercially sensitive and only provided generic public interest arguments.
9. The complainant requested an internal review on 12 February 2015. She correctly stated that the Department had not, *'quantified the nature of the harm that would be caused to either the Department's or the commercial stakeholder's commercial interests, or the likelihood of that harm'*. The complainant provided a number of public interest arguments in favour of disclosing the requested information.
10. BIS provided the complainant with their internal review on 12 March 2015. The review upheld the application of section 43(2) to the requested information (in its entirety) and stated that, *'release of the information could be harmful to the Department and potentially prejudice bidders in relation to future ICR (Income Contingent Repayment) loans sales, where there is a necessity to protect the commercial interests of third parties'*. The review also applied section 41 (information provided in confidence) to the requested information, advising that, *'information in scope of your request remains commercially sensitive to the purchaser (Erudio) and it could well impact Government in future sales if potential buyers consider that privileged information could be released without their consent'*.
11. The complainant subsequently complained to the Commissioner on 12 March 2015 about the Department's response to her request. The complainant advised the Commissioner that the sale and purchase agreements from the two previous sales (in 1998 and 1999) of MS student loans portfolios to the private sector are public documents, available in the Parliamentary Archives. Both of those previous agreements (which pre-dated the FOIA) had commercially confidential information removed.

Scope of the case

12. Following correspondence from the Commissioner and during the course of his investigation, the Department revised their position and disclosed the majority of the previously withheld information to the complainant. However, the Department maintained sections 43(2) and 41 to some of the information (which was redacted) and introduced section 40(2) to withhold the names of some individuals contained in the documents.
13. The Department confirmed that they held the following information within scope of the complainant's request:
 - i) Sale and Purchase Agreement (SPS)
 - ii) Master definitions schedule (MDS)
 - iii) Transitional Services Agreement (TSA)
 - iv) Disclosure Letter (DL)
 - v) Honours shared borrower loan delegation side letter (HSBLDSL)
14. In total, the above five documents, all of which have been seen by the Commissioner, comprise 286 pages. The TSA, MDS, DL and HSBLDSL were disclosed in their entirety except for minor (ie several sentences, figures, clauses or specimen letters) redactions. Of the 82 page (including schedules) Sale and Purchase Agreement, BIS disclosed this primary document in its entirety except for approximately 16 pages. The exact redacted information and the Department's specific explanation for the same are set out in the Confidential Annex attached to this notice.
15. The scope of the Commissioner's investigation has been to determine whether the residual requested information was correctly withheld under the exemptions applied by the Department.

Reasons for decision

Section 43(2)

16. Section 43(2) of the FOIA states that information is exempt information if its disclosure under the legislation would – or would be likely to – prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.

17. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would – or would be likely – to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

What harm would – or would likely – occur if the withheld information was disclosed?

18. The Commissioner notes that Schedule 9 to the SPA specifies information which is to be treated as confidential (which encompasses the redacted information in the Department's disclosure to the complainant), although the SPA itself (Clause 15.3.2) makes clear that such information may be disclosed if required by the Commissioner. That is to say, it is for the Commissioner to determine, on the basis of the arguments and evidence adduced by the parties, whether particular information contained in the SPA and the associated documents, should be disclosed into the public domain.
19. In submissions to the Commissioner, the Department advised that they had consulted with the Scottish Government, the Department for Employment and Learning of the Northern Ireland Executive and the Student Loans Company in relation to their interests in the information concerned, and had also received comments from Erudio. The Department confirmed that the withheld information relates to the commercial interests of Erudio, BIS and SLC.
20. By its very nature, the information contained in the withheld information is detailed and technical. If the Commissioner were to discuss the redaction specific explanations provided by BIS in this notice then this

would itself cause, or be likely to cause the very prejudice to commercial interests which section 43(2) is designed to prevent. Consequently, the amount of detail which the Commissioner can provide in this notice is limited, and the full explanations provided by the Department in support of section 43(2) are contained in a Confidential Annex.

21. In respect of the commercial interests of the Government and SLC, the Department stated that although a number of months (13) had elapsed between the sale of the student loans and the complainant's information request, the withheld information continued to be relevant on an ongoing basis and remained commercially sensitive. The Department acknowledged that any future sales may be significantly different in nature when compared to this mortgage-style loan sale, but release of the withheld information could create a negative perception amongst any potential private sector bidders.
22. In respect of the commercial interests of Erudio, the Department explained that the withheld information contained commercially sensitive information about the company's operations and business practices and strategies, particularly in relation to:
 - The limitations of liability provisions;
 - Loan Warranty provisions;
 - The Remediation Programme;
 - Costs payable by Erudio to SLC for ongoing services;
 - Borrower contact and collections strategy
23. In correspondence with BIS, the Commissioner noted that the existence of the Remediation Programme was already in the public domain at the time of the request, most notably through Erudio's own website.
24. In detailed submissions to the Commissioner the Department clarified that the concerns relate not to the existence of the Remediation Programme, but rather the nature and extent of the detailed information about the Programme contained (mainly) in the Sale and Purchase Agreement. The Department explained that Clause 11 of the SPA contained commercially sensitive information about Erudio's operations and business practices and strategies in relation to the Remediation Programme. The Department contended that disclosure of such information would be likely to lead to adverse practical, financial and reputational consequences for Erudio and borrowers.
25. The Department stated that disclosure of the commercially sensitive contractual terms within parts of Clause 11:

'Will put Erudio at a significant commercial disadvantage in any future asset sales or portfolio acquisitions as they will reveal to other potential

bidders how Erudio negotiated on this occasion and what provisions or terms they are prepared to accept. Although any future asset sales or portfolio acquisitions may not involve such a programme of remediation, disclosure of these clauses will still allow other potential bidders to ascertain aspects of Erudio's business strategy and approach to such contract negotiations in general terms, and hence give them an unfair advantage over Erudio when formulating their own bids'.

26. The Department also explained that at the time of the request the Remediation Programme was ongoing (it then having been expected to be completed by the end of 2015). Noting that the background to the Programme is *'inherently detailed and technical'* which is reflected in the complex content of Clause 11, the Department explained that Erudio *'wanted to communicate the nature and impact of the issues to affected borrowers in a clear, understandable and transparent manner'*. The Department advised that the company *'have invested a lot of time and resources in explaining the Remediation Programme through direct correspondence to borrowers, their own website and via conduits such as MoneySavingExpert.com'*. The Department contended that disclosing the level of detail contained in Clauses 11.3 -11.6 whilst the Remediation Programme was still ongoing, *'risks nullifying the benefits of that clear communications programme and will lead to borrowers responding to the information in a manner which they would not otherwise have done'*.
27. The Department acknowledged that further clarification could be issued if the information were to be disclosed, but such clarification would demand extra resources and would lead to increased costs for Erudio, and potentially also for BIS/SLC, in terms of handling increased correspondence and enquiries from borrowers and/or the media.
28. Having had sight of and considered the withheld information, the Commissioner is satisfied that its disclosure would harm Erudio's commercial interests for the reasons advanced by the Department.
29. In respect of the harm which disclosure of this specific information would be likely to cause to the commercial interests of the Department and SLC, the Commissioner notes that the Government has previously stated³ that the MS student loan portfolio (of which the November 2013 sale was the last tranche) is *'materially different'* to the ICR student loan

³ In the Government's 6 November 2014 response to the report of the BIS Committee into the sale of the mortgage-style student loan book (published on 22 July 2014)

portfolio, not only with regard to the terms and conditions of the loans, but also to the collection mechanism⁴. Therefore the Commissioner is not entirely persuaded that disclosure of the specific information in this case would necessarily prejudice bidders in relation to any future ICR student loans sales. As the complainant noted in her request for an internal review, the Sale and Purchase Agreement in the present case would be *'fundamentally different to any future agreement'*.

30. However, as a more general proposition, the Commissioner does consider that were the Department to disclose information provided by or relating to a third party which was commercially sensitive then such parties/companies would be reluctant or less likely to enter into commercial agreements with the Department if they thought that such commercially sensitive information would be placed in the public domain and made available to potential competitors. The Commissioner therefore accepts the Department's argument that were they to disclose commercially sensitive information which could adversely impact on the future business of an external business or stakeholder, then this would damage the Department's business reputation and the trust and confidence that such third party stakeholders have in them.

Is there a relationship between potential disclosure and the prejudice the exemption is designed to protect against?

31. Having seen the withheld information and the Department's redaction specific arguments as to the commercial sensitivity of the same, the Commissioner is satisfied that there is an actual causal relationship between the potential disclosure of the information and the prejudice to the commercial interests of Erudio, SLC and the Department. The Commissioner considers that this causal relationship is particularly strong in respect of Erudio's commercial interests, given the amount and level of detail which much of the residual withheld information contains about the company's business operations and strategies.

What is the likelihood of this prejudice occurring should the information be disclosed?

32. In respect of Erudio's commercial interests, particularly those surrounding their purchase of the MS student loans and subsequent remediation activity, the Commissioner considers that the likelihood of

⁴ Whilst SLC collected MS student loan repayments, the majority of ICR student loan repayments are now collected via HMRC

prejudice is sufficiently strong so that it can be said that this would happen. The information would be commercially advantageous to Erudio's competitors and public disclosure would also undermine and prejudice the company's attempts to secure repayments of the outstanding student loans and maximise the return on its investment.

33. With regard to the commercial interests of the Department and SLC, the Commissioner considers that the degree of prejudice would be less pronounced and the likelihood less certain. Given the significant value and potential rewards of public sector contracts to third parties such as private sector bidders, disclosure of the specific information in this case would be unlikely to significantly discourage or dis-incentivise companies from doing business with the Department and SLC. However, the disclosure of commercially sensitive information which was provided to or exchanged with the Department in a clearly commercially confidential context, would be likely to lessen the degree of openness (and therefore the value) of information provided by third parties in future business dealings with BIS. Such restrictions would be likely to constrain and harm the Department's commercial interests.

Commissioner's conclusion

34. Having reviewed the withheld information and the detailed submissions provided by the Department, the Commissioner is satisfied that the disclosure of the residual withheld information would prejudice Erudio's commercial interests and would be likely to prejudice the commercial interests of the Department and SLC. As section 43(2) is a qualified exemption the Commissioner will move on to consider the public interest test.

Public interest arguments in favour of disclosing the information

35. The Commissioner has noted that in their responses to the request the Department was disappointingly silent on the public interest factors in favour of disclosing the specific requested information, recognising only the '*general public interest in the disclosure of information, as greater transparency makes Government more accountable*'. As the Upper Tribunal made clear in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) in advancing public interest arguments both parties should try to identify the specific harms that would occur if the

information was released, and the specific benefits of the information being released, rather than making generic arguments⁵.

36. In submissions to the Commissioner the Department was more specific, noting that the Government has been transparent about the value for money of the sale, ie the differential between the face value of the loans and the purchase price paid (being an old and distressed loan book with limited scope for recovery). The Department noted that there has been Parliamentary scrutiny of the value for money achieved, most notably through the report of the BIS Select Committee published in July 2014. The Department stated that, *'we consider that the withheld information will not help to make a judgement on value for money, and as such we do not believe that there is a strong public interest in releasing this information'*. Similarly, the Department advised the Commissioner that they did not consider that the withheld information would help make a judgement on Erudio's treatment of borrowers or their suitability as a purchaser, and there was consequently no strong public interest in releasing the information.
37. The Department explained that the previous 1998 and 1999 sales of MS student loans were conducted on a different commercial basis to the November 2013 sale, with the earlier sales involving Government having retained some of the financial risks of non-payment as well as loan administration responsibilities. The Department stated that these factors had increased the public interest in accountability and transparency of the earlier sale agreements. By contrast, the 2013 agreement was an outright sale to Erudio, involving complete transfer of responsibility for the loans and their administration. For this reason the Department contended that there was a stronger public interest in protecting the commercially sensitive information than had been the case in the earlier sales.
38. In her internal review request the complainant advanced four arguments as to why disclosure of the requested information (at that time withheld by the Department in its entirety) would serve the public interest.
39. Firstly, the complainant contended that disclosure would further the public understanding of the issues relating to student finance and the Government's policies and decisions in relation to the sale of student loans. She stated that, *'this would not only benefit the 250,000*

⁵ As referenced by the Independent Commission on Freedom of Information report of March 2016

borrowers affected by this particular sale, but also current and future students, their families, as well as taxpayers and the electorate in general'. The complainant contended that these were the Government's main stakeholders, and not the private sector stakeholders involved in the purchase of a student loans portfolio.

40. Secondly, the complainant submitted that disclosure would facilitate the accountability and transparency of the Government for decisions taken. She stated that, *'it seems likely that the public interest will favour accountability and sound decision making over protecting the commercial interests of the purchaser of the student loans portfolio'*. The complainant contended that the content of the SPA should not be regarded as privileged information between the seller and buyer, noting that, *'it is relevant to the borrower as the other party to the loan agreement, and will also have a major bearing on their relationship with the new owner of the loans'*.
41. Thirdly, the complainant argued that disclosure of the information would assist borrowers in understanding and, if necessary, challenging *'the decisions made by the Government as the previous owner of the student loans, and the actions of the purchaser as new owner'*. Fourthly, the complainant contended that access to the information would help protect the public from *'dubious practices by private companies'*.
42. In subsequent submissions to the Commissioner (following the Department's disclosure of most of the previously withheld information), the complainant stated that she did not believe that the reasons given by the Department in their response to her request justified the refusal to disclose the residual information, although she appreciated that the Department had provided the Commissioner with further (more detailed and largely confidential) submissions.
43. The complainant accepted that there would be differences between the 1998 and 1999 sales and the November 2013 sale which was the subject of her request, but noted that, *'disclosure of the previous agreements (at a time before the introduction of the FOIA, the aim of which was a more open Government based on mutual trust) was not considered prejudicial to commercial interests, and it seems perverse that it should be for the latest agreement'*.
44. The complainant suggested that the loans contained in the November 2013 sale would have been *'far less attractive to potential bidders, given that a large number of defaulted loans would most likely be statute-barred, and all deferred loans are due to be written off in the coming years, as prescribed in the loan agreements and the Education (Student Loans) Regulations 1998'*. Noting that Government had sold the last

tranche of MS student loans *'at approximately 15% of face value'*, the complainant contended that, *'if it is the case that the Government had to provide further incentives to the purchaser via attractive terms in the agreement, then the need for public scrutiny is even greater, particularly if any of those terms are, or could potentially be, of detriment to the borrower'*.

45. The complainant made the point that potential bidders for the student loans portfolio would have been aware of the need for transparency and public scrutiny when purchasing Government assets and noted that there are clauses in the SPA which make provision for the disclosure of confidential information under certain circumstances (including if ordered to do so by the Commissioner).
46. The complainant submitted that there is no reason why borrowers whose loans were sold in November 2013 should not be afforded the same safeguards and have access to full information, when such information directly affects them. The complainant contended that, *'this is particularly important for borrowers whose loans are in deferment, as administration of the deferment process passed to the private sector debt purchasers for the first time in the 2013 sale'*. The complainant stated that borrowers whose deferred loans were sold in the previous two sales had the additional protection of the deferment process remaining with the SLC.
47. The complainant stated that Erudio had no prior experience of processing deferment applications and this was *'evident in its poor handling of the deferment process since completion of the sale'*. Noting that two years on from the sale, borrowers who wished to exercise their legal right to deferment were still experiencing issues, the complainant contended that:

'It now seems more likely that the Purchaser is acting in a way that maximises its return on the purchased asset. Whilst it is entitled to increase profit, and the Department even acknowledges this in the agreement, this cannot be by means of frustrating a borrower's legal right to a peaceful deferment, on proof that income is below the annual threshold. Borrowers are therefore entitled to know any information contained in the agreement that may impact on their ability to exercise their legal rights'.

48. In addition, the complainant suggested that *'if borrowers have a legitimate claim under the Consumer Credit Act against the loan purchaser and/or Government, for example, a claim for mis-selling, or unfair relationship, then it is their right to know what provisions have been made in the agreement to counter such claims'*.

49. The complainant concluded her submissions to the Commissioner by contending that any redacted information containing details of further costs, such as subsidies or compensatory payments from the Seller to the Purchaser, should be disclosed to the taxpayer and general public. She submitted that *'such information is important in determining the true cost to the Government in selling the student loans book'*.

Arguments in favour of maintaining the exemption

50. In submissions to the Commissioner the Department noted that the majority of the previously withheld information had now been disclosed and the residual withheld information represented *'only a minor part of the requested information'*.
51. Whilst recognising that private companies will be aware that certain levels of transparency and accountability are required when choosing to do business with (and benefit from) the public sector, the Department contended that, *'there is, however, a balance which needs to be considered when commercially sensitive information is concerned. We consider private companies and bodies need to have both an expectation and an assurance that Government will treat such information with a suitable level of privacy'*.
52. The Department stated that whilst there is a public interest in the disclosure of information in order to increase transparency as regards the accountability of public funds and to allow scrutiny of the activities of public authorities, there *'is also a public interest in ensuring that the commercial interests of BIS and external businesses are not damaged or undermined by disclosure of information which is not common knowledge and which could adversely impact on future business'*. The Department contended that disclosure of the withheld information in this case would make it less likely that companies would provide BIS with commercially sensitive information in the future and this would be likely to consequently undermine the ability of the Department to fulfil its role.
53. With regard to the issue of the impact of the sale on borrowers, the Department noted that they had previously released (in response to a separate request) Clause 10.2 of the SPA entitled *'Compliance with Applicable Laws and Credit Agreements'*. This clause confirmed that the specific mechanics of collection would be a matter for the purchaser within the bounds of applicable laws, loan credit agreement terms and relevant codes of practice.
54. In submissions to the Commissioner, the Department noted that MS loans are regulated loans under the Consumer Credit Act 1974 (as amended) and explained that:

'One of the key criteria for the sale of these loans in 2013 was to ensure that the eventual purchaser undertook to continue treating borrowers in accordance with their loan terms and conditions and in line with regulation and best practice on the fair treatment of borrowers. An important consideration in the sale process was therefore choosing a purchaser that would not only comply with law, regulation and the terms of the loans, but would also adopt and adhere to credit industry best practice and guidance'.

55. The Department stated that Erudio is regulated by the Financial Conduct Authority for accounts formed under the Consumer Credit Act 1974 (as amended) and that the company, *'has committed to continue to comply with the loan terms, relevant regulatory requirements, industry guidance and codes of practice and all applicable laws. We viewed this as important to make sure that they were able to act as a suitable and responsible owner of the debt and be subject to the UK's existing robust regulatory framework'.*
56. The Department noted that Erudio have acknowledged that the *'extremely high'* levels of customer contact they experienced in the months immediately following transfer of the administration of the loans in March 2014 led to delays and unacceptable levels of service for some borrowers. However, the Department advised that Erudio had, *'since made significant improvements to all aspects of their customer service, and continue to monitor, review and make improvements to all aspects of their customer service operations, to ensure that borrowers receive the quality of service they deserve and expect'.*

Balance of the public interest test

57. In approaching his task of determining the balance of the public interest in this case, the Commissioner is aware and appreciative of the significant media attention and controversy which the November 2013 student loans sale, and the subsequent handling by Erudio, has generated.
58. Immediately following the sale, the Independent (26 November 2013) noted that Erudio was a private company *'renowned for its persistent debt recovery practices'.* On 20 May 2014, The Guardian reported that since the sale, *'Erudio has been dogged by complaints covering three main issues: difficulty deferring loans; a change of policy regarding information being registered with credit reference agencies; and payments being taken by mistake'.* The newspaper reported that Erudio had written to around 45,000 borrowers who defer repayments to inform them that their details would now be given to credit reference agencies. *'Previously, even though the SLC's terms and conditions said*

it could pass information on deferred loans to the agencies, only defaulted, not deferred loans appeared on credit records'. It was noted that the change in process could prejudice or compromise a borrower's attempts to obtain credit elsewhere.

59. The founder of MoneySavingExpert.com commented on his blog that the adoption of a 'tell us about you and we'll decide whether you can defer' policy was *'seemingly abrogating the decision away from the borrower to the loan company'*.
60. Although the Commissioner would note that it seems widely recognised and accepted that the true value of the student loans portfolio sold was lower than the notational value (£890 million), a number of commentators⁶ raised concerns that the sale (as with its predecessors in 1998 and 1999) had sold valuable future income streams at a considerable discount in order to secure a short-term reduction of public sector debt.
61. The Commissioner recognises that there are clearly divergent arguments (both economic and political) as to the public benefit and value of the November 2013 student loans sale, with the Government maintaining (in its response of 6 November 2014 to the report of the BIS Committee) that the sale of the remaining MS student loans *'achieved good value for money'*.
62. However, at the time of the request, all of the above information was already in the public domain and taxpayers and members of the public could form their own view and judgements as to the merits or otherwise of the sale. What the Commissioner must consider is to what extent (if any) the disclosure of the specific withheld information would further inform or advance the public interest factors which surround the sale.
63. In both her correspondence with BIS and submissions to the Commissioner the complainant put forward a number of important and legitimate public interest arguments in respect of the public interest issues which surround the loans sale itself. Many of these issues have, as noted above, been the subject of considerable debate in the public arena. Having had sight of the specific residual withheld information, the Commissioner is of the view that in terms of the public interest

⁶ E.g. 'Why the Student loan sell-off is a terrible deal for taxpayers' (The New Statesman, 25 November 2013)

factors surrounding this sale, its disclosure would have the following effect.

64. Given the very technical and legalistic nature of the withheld information, which focuses upon the agreements and commitments between the Department/SLC and Erudio in respect of the loans in question, the Commissioner does not consider that the information would significantly further the public understanding of the general issues relating to student finance. The information would not elucidate the Government's policies and decisions in relation to the sale of student loans (it is not for example, advice or information provided to Ministers).
65. In terms of transparency and accountability of the Government for the decision to sell off the final tranche of MS student loans, the Commissioner is mindful that there has already been considerable transparency and accountability of this decision, most notably through the evidence given by the former Minister for Universities and Science and other senior Departmental officials to the BIS Committee in January 2014, and the Committee's subsequent report of 22 July 2014. The withheld information would not appreciably add to either public interest since it details administrative and contractual matters between the parties rather than more high level policy information (such as the options open to Government for managing or disposing of such assets as student loans).
66. In respect of the complainant's suggestion that disclosure of the withheld information would help protect the public from (unspecified) *'dubious practices by private companies'*, the Commissioner would note that whilst some of the changes of approach by Erudio (particularly that relating to deferment) to managing the loans (as compared to the approach previously taken by SLC) have proven to be controversial, these are changes which Erudio are entitled and able to make under the terms and conditions of the loans and the Commissioner is not aware of any evidence or grounds for alleging wrongdoing or illegality. This public interest proposition therefore has no bearing or relevance upon the withheld information.
67. In the Commissioner's view, the strongest and most pertinent public interest factor which attaches to the withheld information, and one which has been well articulated by the complainant, is the fact that the SPA (and associated documentation) is not only relevant to the purchaser of the student loans portfolio and the seller, but also to the 250,000 borrowers concerned (though they are not actually parties to the agreement). How Erudio chooses to manage the loans which they have bought will clearly have a potentially significant impact and effect upon the 250,000 borrowers concerned. Given the number of borrowers

to which the SPA relates, the Commissioner considers this to be a public interest rather than a private/individual one.

68. The complainant has contended that there is no reason why borrowers whose loans were sold in November 2013 should not be afforded the same safeguards and have access to full information, when that information directly affects them. The Commissioner would agree that some of the withheld information, particularly that which details the Remediation Programme, clearly directly affects borrowers. As the Department have explained, this has been recognised and acted upon by Erudio, who have invested time and resources explaining the Remediation Programme to borrowers through direct correspondence, the company's website and other conduits.
69. The complainant accepts that Erudio are entitled to try and maximise their return on the purchased asset, but contends that this cannot be by frustrating a borrower's legal right to deferment.
70. The Commissioner would entirely agree that there is a strong and important public interest in ensuring that the sale of the student loans to Erudio has not restricted or negatively impacted upon the legal rights of the borrowers concerned, or removed any legal safeguards in place prior to the sale. However, as the Department has explained, and as the disclosed clause of the SPA (Clause 10.2) makes clear, Erudio are subject to the same rules and guidance in their managing of the loans as SLC were previously. That is to say, the sale has not caused or risks causing, the borrowers any legal disadvantage or restriction in such respects. As the Department has explained, a key objective of the sale was to ensure that the purchaser (Erudio) undertook to treat borrowers in accordance with their loan terms and conditions, and in-line with regulation and best practice on the fair treatment of borrowers.
71. The Commissioner recognises that for borrowers who wish to defer their loan repayments, the passing on of information to credit reference agencies is bound to be of understandable concern and (depending on the individual circumstances) could be of questionable fairness. However, such an approach was always an option under the agreed terms and conditions of the loan agreements, even if the practice of SLC was to restrict such reporting to defaulted, and not deferred loans⁷. That is to say, the passing of the loans from SLC to Erudio, whilst

⁷ The Commissioner would note that SLC was less experienced in debt collection than a company such as Erudio

resulting in some changes of approach, has not resulted, so far as the Commissioner is aware, in any changes to the legal liability or safeguards of the borrowers potentially affected.

72. The above being the case, the complainant's contention that borrowers are entitled to know any information in the SPA that may impact on their ability to exercise their legal rights is misconceived. Such legal rights, and the ability to exercise the same, are explicitly protected by Clause 10.2 and the associated regulation. The Commissioner would also note that if it were the case that a borrower or borrowers had a claim for action under the Consumer Credit Act against Erudio and/or the Government, then it does not necessarily follow, as the complainant contends, that *'it is their right to know what provisions have been made in the agreement to counter such claims'*.
73. The Commissioner acknowledges and accepts that borrowers may well be interested in some of the withheld information (particularly that pertaining to the Remediation Programme) but this does not mean that borrowers are *entitled* to have sight of sensitive commercial (and legal) information which helps protect the legitimate interests of the signatories to the SPA. Where individual borrowers believe that they may have a claim for action under the Consumer Credit Act, then there is nothing in the withheld information which would prevent them from exercising such legal rights. Just as borrowers are entitled to exercise their legal rights, so are Erudio entitled to make provision in the SPA to protect their commercial interests.
74. The Commissioner notes that it is often the case that some information contained in a contractual agreement will retain commercial sensitivity for a variable length of time even after that agreement is signed or finalised. Given that the 1998 and 1999 sale agreements retained some financial risk and responsibility for the Government in respect of the relevant MS student loans, the Commissioner considers that the public interest dictated a greater degree of transparency and accountability in respect of those agreements than the outright sale to Erudio. However, even in respect of the November 2013 SPA, the Commissioner recognises that the Department has now disclosed the vast majority of the documentation within scope of the complainant's request (with only approximately 20 pages out of 286 remaining withheld). That is to say, the revised disclosure has taken due and proportionate account of the public interest attached to the information (which the Department's initial responses to the request did not).
75. Whilst the Commissioner recognises that the Government's decision to sell the remaining tranche of MS student loans to the private sector has proven controversial in some quarters, and has caused understandable

concern to the borrowers affected (concerns not helped by Erudio's initial mismanagement of the loans), he considers that the public interest of the residual withheld information is limited. The information relates mainly to Erudio's operations and business practices and strategies and would add little to what is already in the public domain about the Government's decision to sell the loans. In addition, the information in no way hampers or restricts the ability of borrowers to exercise their legal rights (which are explicitly protected in the SPA itself).

76. Weighed against the limited public interest in disclosure of the specific withheld information, the Commissioner considers that there is a stronger and wider public interest in ensuring that the commercial interests of the Department and the third parties with whom they do business are protected and not undermined by the disclosure of commercially sensitive information. Given that the information in question is clearly of immediate commercial sensitivity to Erudio, and of wider sensitivity to the Department/SLC, the Commissioner is satisfied that the balance of the public interest favours maintaining section 43(2) to the residual withheld information.
77. As the Commissioner has found that the withheld information is exempt under section 43(2), he has not gone on to consider the applicability of section 41 and section 40(2) to the same.

Other matters

78. The Commissioner would wish to commend both parties for the quality and detail of the submissions provided. However, he would note his disappointment that the Department's initial response to this request was not as information specific or realistic as it should have been. The initial withholding of the documentation in its entirety was manifestly disproportionate and will have done little to downplay the complainant's concern that (some) information was being unjustifiably withheld.

Right of appeal

79. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
81. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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Wycliffe House
Water Lane
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SK9 5AF