

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2017

Public Authority: UK Government Investments
Address: Limited
1 Victoria Street
London
SW1A 0ET

Decision (including any steps ordered)

1. The complainant has requested information concerning the due diligence process followed by the former Department for Business Innovation and Skills (BIS) prior to the Government's sale of the remaining mortgage style student loans in November 2013. At the time of the request BIS withheld the requested information in its entirety under section 35(1)(a)(formulation or development of government policy) and section 43(2)(prejudice to commercial interests) of the Freedom of Information Act 2000. During the course of the Commissioner's investigation, UK Government Investments provided the complainant with some of the previously withheld information but maintained that four of the five documents within scope of the request were exempt from disclosure under section 35(1)(a), section 43(2) and section 40(2) and that some of the information redacted from the fifth (disclosed) document was exempt from disclosure under section 43(2).
2. The Commissioner's decision is that UK Government Investments were correct to withhold four of the five documents in their entirety under section 35(1)(a) and that the small amount of information redacted from the disclosed fifth document within scope of the request is exempt from disclosure under section 43(2). UK Government Investments is therefore not required to take any further action in respect of this request.

Background to the Request

3. The Commissioner notes that the Shareholder Executive (which responded to the original request) ceased being part of BIS on 1 April 2016, becoming a new Government Company called UK Government Investments (UKGI) wholly owned by HM Treasury. As holders of the information within scope of the request, UKGI had responsibility for corresponding with the Commissioner in this matter. UKGI is the Government's centre of expertise in corporate finance and corporate governance and the Commissioner understands that they are a public authority for the purposes of the FOIA.
4. 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 million. 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 terms¹.
5. MS loans were available to eligible students between 1990 and 1998. Borrowers were 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).
6. At the time of announcing the student loans sale on 25 November 2013, the Coalition Government stated that:

¹ Figures taken from Coalition Government announcement of loan sale on 25 November 2013

'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'.

7. 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. BIS previously disclosed (under the FOIA) a redacted copy of the Sale and Purchase Agreement, which confirms that Erudio is obliged to operate under the UK's existing regulatory framework.

Request and response

8. On 25 September 2015, the complainant wrote to BIS and requested information in the following terms:

'A copy of the final report into the due diligence process relating to the purchaser(s) of the Government's remaining Mortgage Style student loans book, sold in November 2013 or (if no final report was produced) a copy of all documentation detailing any findings, conclusions and recommendations resulting from the due diligence process'.

9. The complainant acknowledged that she had previously requested the same information in July 2014 (which the Department had refused) and provided additional information to demonstrate that she was not being vexatious in submitting a second request for the information.
10. BIS responded to the request on 13 October 2015 and confirmed that they held the information requested. However, the Department informed the complainant that their position had not changed since the internal review provided to the complainant in response to her previous request of 30 July 2014. The response provided a link to that previous review of 15 September 2014, which confirmed that BIS were withholding the requested information under sections 35(1)(a)(formulation or development of government policy) and 43(2)(prejudice to commercial interests).
11. The complainant requested an internal review of the response on 18 October 2015. She contended that the public interest *'now favours release of the information'* and put forward a number of specific supporting public interest arguments.
12. BIS provided the complainant with their internal review on 5 November 2015. The review upheld the application of both exemptions and addressed each of the arguments made by the complainant.

Scope of the case

13. The complainant contacted the Commissioner on 1 February 2016 to complain about the way her request for information had been handled.
 14. UKGI advised the Commissioner that as part of the sale process, assessments of the bidders were carried out at several stages against various criteria. It was considered that although not strictly a 'final report into the due diligence process' as described in the request, these assessments taken together are essentially an appraisal of the purchaser and their bid against the sale objectives and other bids/bidders, akin to due diligence, and therefore fall within scope of the request. UKGI confirmed that there were no 'additional findings, conclusions and recommendations' separate to these assessments.
 15. The information within scope of the request, which the Commissioner has had sight of, comprises:
 - 1) Summary of bids received (information contained in 1 page table format)
 - 2) Briefing paper/submission to the then Minister of State for Universities and Science (David Willetts MP)
 - 3) Comparison of bids (information contained in 2 page table format)
 - 4) Further briefing paper/submissions to the Minister
 - 5) Consortium Project Ariel: Key Commercial and Operational Considerations document (12 page document)
 16. During the course of the Commissioner's investigation UKGI disclosed Document 5 above to the complainant. This document was originally provided by the purchaser (Erudio) to inform BIS' consideration of their bid and to provide information on their approach to managing the portfolio. A small amount of the information in this document was redacted as it remained commercially sensitive and was exempt under section 43(2). UKGI have withheld Documents 1-4 under section 35(1)(a) in their entirety.
 17. The scope of the Commissioner's investigation has been to determine whether the residual requested information was correctly withheld under the exemptions applied by UKGI.
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Reasons for decision

Section 35(1)(a)

18. Section 35(1)(a) states:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy'.

19. UKGI has applied section 35(1)(a) to Documents 1-4 in their entirety. The Commissioner has had sight of the withheld information, which directly relates to the Government's policy of selling the last remaining tranche of MS student loans. That policy was implemented in November 2013 with the sale of those loans to Erudio.

20. However, in submissions to the Commissioner, UKGI have explained that the withheld information also relates to the Government's ongoing policy *'to monetise the student loan book, and in particular to sell the pre-2012 Income Contingent Repayment (ICR) student loan book'*. UKGI note that the submissions (withheld information) contain Government's internal and detailed assessment of the bids at different stages of the MS loan sale process and *'whilst the ICR loan sale programme has differences, the policy development for the future sale programme builds on this mortgage style sale'*.

21. UKGI confirmed that the policy of selling the ICR loans was under development at the time of the complainant's request in September 2015 and the sale programme *'remains a live issue today, with the Chancellor's Budget in March 2016 outlining that a first sale was expected in 2016-17. As included in the Office for Budget Responsibility's March 2016 Forecast, the Government is planning a programme of sales with potential proceeds for the taxpayer of £12 billion over the next five years'*.

22. In submissions to the Commissioner, UKGI recognised that the two types of loans (MS and ICR) are different in regard to their terms and collection mechanism, but stated that the policy development stages and potential sale process for the two loan sales are similar.

23. In submissions to the Commissioner, the complainant stated that she considered the links made by UKGI between the MS and ICR loans regarding formulation of policy to be *'tenuous'* and contended that UKGI had not adequately explained in what way the policy development stages and potential sale process for the two loans are similar.

24. The complainant drew a distinction between the two loans in stating that, *'administration and collection of the ICR loans would remain with*

the SLC (Student Loan Company) and HMRC respectively, and any sale will require an entirely different type of purchaser (most likely life insurance companies or pension funds, as opposed to the 'debt management' Consortium involved in the MS loans sale. SLC's and HMRC's performance is a significant policy consideration for the sale of ICR loans, which does not apply to the MS loans, as the purchaser became responsible for administration and collection following the sale'.

25. The complainant also contended that the Value for Money considerations are *'inherently different'* for the two types of loans. She stated that:
- 'With the residual MS loans book, VFM was simply assessed on the basis of the residual loan book's face value (total of the outstanding loans) and BIS's assessment of its 'real value' (what it expected to collect), versus the price offered by the purchaser. ICR loans, on the other hand, require a far more complex model to assess VFM, with unique policy considerations: the RAB charge, interest rates on borrowers' loans, removal of the cap on student numbers, SLC/HMRC costs and performance in administration/collection, limited demand from potential bidders, the huge monetary value of the ICR loans book'.*
26. The complainant noted that prior to her request, in the Chancellor's Summer Budget in July 2015, it had been stated that by the end of 2015-16 the Government *'expects to sell the first tranche of the pre-Browne income contingent repayment student loan book'*. The complainant stated that it was clear that the decision to sell the first tranche of ICR loans had already been made at the time of her request, but that it was subject to value for money. The complainant contended that, *'the only outstanding policy considerations at that time (September 2015) related to the VFM aspects of a sale, which for the reasons outlined above, are unrelated to the VFM considerations with the MS loans sale'*.
27. Section 35(1)(a) is a class-based exemption, which means that there is no requirement to show any harm in order to engage the exemption. The information simply has to fall within the class described. The term 'relates to' can be interpreted broadly (DfES v Information Commissioner & the Evening Standard [EA/2006/0006, 19 February 2007]). The timing of the request is not relevant – the question is whether the information relates to the activity, irrespective of when the request was made. The activity does not have to be the sole or even the main focus of the requested information, as long as it is one significant element of it.

28. The Commissioner recognises and accepts that there are, as the complainant has contended and UKGI has acknowledged, significant differences between the Government's policy of selling the remaining tranche of MS student loans and the Government's policy of selling the ICR student loans. However, whilst there are differences in the exact class of asset, the type of asset (student loans) is the same. The Commissioner entirely accepts that the withheld information obviously primarily and directly relates to the MS loans policy. However, she does not consider that the withheld information has no bearing upon or is entirely unrelated to, the Government's policy of selling the ICR student loans.
29. Given that the term 'relates to' is interpreted broadly, and as UKGI have confirmed that the policy development stages and potential sale processes for the two loan sales are similar (despite the differences highlighted above), the Commissioner is satisfied that the withheld information, although being of most relevance to the MS student loans policy, also relates to the Government's ongoing policy development with regard to selling the ICR student loans (within the umbrella policy of monetising the student loans book). Whilst the Commissioner does not consider that the withheld information strongly relates to the ICR student loans policy, she does not consider that the links between the two policies are so tenuous as to render the ICR student loans policy unrelated to the withheld information. Therefore, for the reasons given above, the Commissioner is satisfied that the withheld information engages the exemption at section 35(1)(a).

Public Interest test

30. Section 35(1)(a) is subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

31. In submissions to the Commissioner UKGI recognised that there is public interest in the decision to sell the MS loans and transfer administration to the purchaser. However, they contended that releasing further information would be of limited value given what is already in the public domain.

32. By contrast, UKGI contended that, *'releasing this information risks prejudicing the safe space for official and stakeholder advice in regard to ICR loan sale and broader asset sale policymaking and impacting Government commercial interests by discouraging investors from involvement in the sale programme'*. UKGI confirmed that they had judged that, *'the balance of public interest is in ensuring that stakeholders are not deterred from providing information to inform policy making in future for fear of disclosure and that officials are able to provide candid and broad ranging advice to Ministers'*.
33. With regard to the public interest in transparency as to how rigorous and robust the due diligence process had been in respect of the MS loans sale, UKGI stated that:
- 'As was announced at the time of sale, Erudio was selected following a competitive process. The process by which initial expressions of interest were shortlisted to reach a final decision was robust. It was driven not just by securing value for money for the taxpayer, but also three other objectives: ensuring successful execution, minimising the administrative burden on SLC and BIS, and that the purchaser undertakes 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'*.
- UKGI stated that the sale process, actions of officials and decisions by Ministers had all undergone public scrutiny through the enquiries of the BIS Select Committee.
34. UKGI noted that the administration problems experienced by Erudio (and therefore borrowers) had been *'well-documented in public'* and *'some borrowers and certain sections of the media have used this as an opportunity to question the suitability of Erudio as a purchaser, and whether Erudio had changed the terms and conditions of the loans'*. UKGI advised that this had led to a number of correspondence cases and FOI requests seeking assurances that Government had adequately considered ongoing borrower protection as part of the sale process.
35. UKGI stated that BIS was not responsible for the actions of the purchaser following sale and *'cannot comment on their record in relation to the Financial Ombudsman Service (FOS) or any other body'*. UKGI noted that MS loans are regulated loans under the Consumer Credit Act 1974 (as amended) and that Erudio is regulated by the Financial Conduct Authority for accounts formed under that legislation. Erudio had committed to continue to comply with the loan terms, relevant regulatory requirements, industry guidance and codes of practice and all applicable laws. UKGI advised that Government had viewed that

commitment as important to make sure that Erudio were able to act as a suitable and responsible owner of the debt *'and be subject to the UK's existing robust regulatory framework'*. UKGI noted that BIS had stated this publicly on a number of previous occasions and had previously disclosed (under FOIA) the Sale and Purchase Agreement, which confirms that Erudio is obliged to operate under the UK's existing regulatory framework.

36. In submissions to the Commissioner, the complainant stated that the Project Ariel document disclosed (with minor redactions) (Document 5) by UKGI, *'does not actually relate to any due diligence process followed by BIS in assessing the Consortium's bid for purchase of the MS loans'*. Whilst accepting that Document 5 *'carries considerable public interest'*, the complainant stated that *'it does not in itself demonstrate due diligence by the Government'*. The complainant contended that it was the remaining documents within scope of her request (Documents 1-4) which carry the most public interest value and weight *'as it is this information which would confirm whether there was a competitive and robust bidding process, with appropriate selection criteria and proper assessment of all bids'*.
37. The complainant contended that without details of the bid proposals from the unsuccessful bidders, *'the public cannot form an opinion on the robustness of BIS's selection process and due diligence in relation to the competing bids'*. She noted that the request *'seeks information on the due diligence process, which cannot be demonstrated by reference to the purchaser alone. Rather, it is the comparison of the bids by BIS, and how its assessment of all bids resulted in Erudio being chosen as the most suitable bidder, which would confirm whether there was proper due diligence'*.
38. With regard to the expectations of third party stakeholders (i.e. unsuccessful bidders), the complainant cited the decision of the Information Tribunal in London Borough of Newham v Information Commissioner [EA/2011/0288] in which the Tribunal stated (in the context of section 41 of FOIA and not section 35) that in their view, *'the reasonable expectations of the confider, presenting information to a local authority in the circumstances of this case, is that confidentiality would be maintained for a reasonable period of time after the date when the licence (for a casino) was awarded'*. That is to say, such confidentiality could not be maintained indefinitely.
39. The complainant stated that the safe space *'is designed to allow Government the ability to work on policy decisions before they are made public'* and she noted that, *'the decision to sell the ICR loan book has been Government policy for many years, but has been postponed year*

after year'. In response to UKGI's contention that releasing the private advice given by officials to Ministers on the MS loan sale process would undermine the safe space, the complainant stated that:

'By this reasoning, no information relating to the sale of assets could ever be released to the public, as there will always be ongoing and future sales (until such time as there are no public assets left to sell). I do not believe that the provision under FOIA of the section 35 exemption is intended to provide such a 'safe space' that advice to Government, and the resultant decisions made in formulating policy, can never be scrutinised by the public'.

40. The complainant contended that, *'whether or not the formulation of policy relating to MS and ICR loan sales is inextricably linked in the way suggested by UKGI', there was a significant public interest 'in knowing that the Government's due diligence procedures in selecting a purchaser are robust, and that its policy relating to the sale of student loans is in the best interests of the taxpayer and the student'. The complainant stated that this public interest could be achieved by the disclosure of the withheld information, and she contended that this was crucially important, 'given that the ICR loans book is currently worth tens of billions of pounds to the public purse, and will be worth hundreds of billions of pounds in the next 20 to 30 years'.*

41. The complainant stated that there has been considerable controversy and criticism surrounding the Government's plans to sell the ICR student loans yet it *'was intent on pressing ahead'*. She provided the Commissioner with a number of newspaper articles which were critical of the Government's policy of selling off student loans and cited observations and findings of the BIS Select Committee and Public Accounts Committee on student loans and a National Audit Office (NAO) report².

42. The complainant contended that:

'There has been considerable criticism of the amount of 'financial engineering' required by Government to make the ICR loans book an attractive proposition to potential purchasers. Such 'financial engineering' is already evident in the highly controversial decision by Government to make retrospective changes to borrowers' terms, by

² https://www.nao.org.uk/wp-content/uploads/2013/11/10307-001-Student-loan-repayments_BOOK.pdf

freezing the repayment threshold on their loans. While this change is of severe financial detriment to borrowers, it benefits any future purchaser of the loans, as most borrowers will now have to pay thousands of pounds more over the lifetime of their loans. It is of the greatest public interest when it becomes clear that the Government has reneged on its promises and assurances to students and their parents, to ultimately protect and add to the future profits of private sector companies'.

Public interest arguments in favour of maintaining the exemption

43. As noted above, in submissions to the Commissioner, UKGI stated that disclosure of the withheld information risked prejudicing the safe space for official and stakeholder advice in relation to ICR loan sale and broader asset sale policymaking and impacting Government commercial interests by discouraging investors from involvement in the sale programme. UKGI contended that such disclosure *'would be likely to undermine the safe space for ongoing ICR sale policy making for Ministers, officials and external stakeholders'* and that it would *'risk exposing our methods of bid assessment which could lead to 'gaming' of future sale processes'*.
44. UKGI also contended that disclosure would *'also be likely to discourage potential investors from bidding if they believe commercially sensitive information would be released into the public domain and be available to potential competitors while reciprocal information on those competitors would not be available'*.
45. UKGI contended that the above factors have the potential to impact future proceeds for the taxpayer from ongoing and future asset sales.

Balance of the public interest arguments

46. In FS50574665 (which concerned an information request to BIS for the Sale and Purchase Agreement and other contractual documentation of the MS student loan sale) the Commissioner noted that the Government had stated (in its 6 November 2014 response to the report of the BIS Committee into the sale of the MS student loan book (published on 22 July 2014) that the MS student loan portfolio was *'materially different'* to the ICR student loan portfolio, not only with regard to the terms and conditions of the loans, but also to the collection mechanism. The Commissioner therefore stated that he was, *'not entirely persuaded that*

disclosure of the specific information in this case would necessarily prejudice bidders in relation to any future ICR student loans sales³.

47. In the above case the Commissioner noted that, *'there has already been considerable transparency and accountability of this decision (selling off the final tranche of MS student loans) 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 2014⁴.* The Commissioner found that the requested information (Sale and Purchase Agreement) would not elucidate the Government's policies and decisions in relation to the sale of student loans, noting that, *'it is not for example, advice or information provided to Ministers'*.
48. By contrast, in the present case, the withheld information does include advice and information provided to the Minister. In the previous case (FS50574665) the Commissioner found that the withheld information *'would not appreciably add'* to the public interest in transparency and accountability of the decision to sell the remaining MS loans since it detailed administrative and contractual matters between the parties rather than more high level policy information. In the present case, the complainant has noted that her request seeks information on the due diligence process, *'which cannot be demonstrated by reference to the purchaser alone'*. Although the withheld information in both cases would not provide appreciable transparency or accountability of the Government's policy decision to sell the remaining MS loans (the controversial nature of which is widely known), the Commissioner recognises that there is clearly a separate and legitimate public interest in knowing that an appropriately robust and reasonable due diligence process was followed by Government in selecting a purchaser for the MS loans.
49. The Commissioner notes that since the time of the sale in November 2013, Government has been clear that in addition to securing value for money for the taxpayer, the decision to sell the MS loans was driven by three other objectives, namely, ensuring successful execution, minimising the administrative burden on the SLC and BIS and that the purchaser undertook to continue treating borrowers in accordance with their loan terms and conditions and in line with regulation and best

³ Paragraph 29 of FS50574665

⁴ Paragraph 65 of FS50574665

practice. The process was a competitive one and UKGI have confirmed that assessments of the bidders were carried out at several stages against various criteria.

50. In terms of the legitimate and valid public interest in the due diligence process, the Commissioner considers that this has to a significant and important extent already been appropriately and proportionately met by the sale process, actions of officials and decisions by Ministers having undergone public scrutiny through the enquiries of the BIS Select Committee. Whilst the Commissioner entirely accepts the complainant's contention that the disclosure by UKGI of the (redacted) Project Ariel document (Document 5) '*does not in itself demonstrate due diligence by the Government*', she does not agree with the contention that the document does not relate to the due diligence process followed by BIS in assessing the Consortium's bid for purchase of the MS loans. The fact that Document 5 was included by BIS as information within scope of the complainant's request (and the contents of the document itself) show that it did relate to the due diligence process followed by BIS at the time. Nevertheless, the Commissioner accepts that disclosure of the remaining withheld documents (Documents 1-4) would clearly add further transparency and accountability to the due diligence process already scrutinised by the BIS Select Committee (e.g. they would show the identities of unsuccessful bidders and the strengths and weaknesses of their bids).
51. Safe space arguments are central to section 35(1)(a) but the legitimate need for the safe space will very much depend upon the stage at which the relevant policy or policies had reached at the time of the request and the individual circumstances of each case. UKGI have contended that disclosure of the withheld information would risk prejudicing the safe space for official and stakeholder advice in regard to the planned ICR loan sale, '*and broader asset sale policymaking and impacting Government commercial interests by discouraging investors from involvement in the sale programme*'. This is to cast the safe space too wide. Section 35(1)(a) is not an absolute exemption and as the complainant has correctly stated, is not intended to ensure that advice to Government and resultant policy decisions '*can never be scrutinised by the public*'. Rather, the extent to which the safe space will be legitimately and proportionately required will depend upon the particular policy or policies to which it relates and at what stage the policy or policies are at the time of the request.
52. Such considerations of timing have a very important (often decisive) bearing on the determination of the public interest balance in cases concerning this exemption. Whereas the policy of selling the remaining MS loans had clearly been implemented and completed almost two years

prior to the complainant's request in September 2015, the Government's planned policy of selling the ICR student loan book, although announced, remained at the development stage and indeed remains ongoing at the present time. Until such time as that policy is implemented, the Commissioner considers that there is a strong and legitimate public interest in Government being afforded the safe space in which to develop and finalise the same.

53. Whilst the Commissioner recognises that there are material differences between the MS and ICR student loans, and the withheld information obviously concerns and focuses upon the MS rather than ICR loans, the withheld information comprises high level advice and information of the type and nature that would be likely to be provided to Ministers by officials (and external stakeholders) in respect of the planned sale of the ICR loans. Both loan sale policies (one implemented and one not) fall within the Government's wider policy of monetising the student loans book.
54. The Commissioner fully accepts the complainant's contention that the Government's policy of monetising the student loans book is one which has attracted considerable controversy and opposition (amongst other information provided to the Commissioner, the complainant pointed to a survey carried out by Survation which found that 64% of those polled opposed selling the student loan book, compared to 13% who supported selling it⁵). The Commissioner appreciates and accepts that this policy has considerable financial implications, both for the borrowers potentially affected and the nation's finances and therefore carries strong and widespread public interest. However, the disclosure of the withheld information would not appreciably add transparency or accountability for the policy itself (as opposed to the bidding process).
55. The Government has been publicly clear about the objectives which drove the MS loans sale, and the criteria by which the various bidders were assessed. Having seen the withheld information, the Commissioner is satisfied that it reflects and does not contradict such public statements. As UKGI have noted, the due diligence process has already undergone important and robust scrutiny by the BIS Select Committee.

⁵ <http://www.independent.co.uk/news/uk/politics/overwhelming-opposition-to-george-osbornes-plans-to-privatise-state-assets-poll-finds-a6769121.html>

56. Whilst the Commissioner accepts that the disclosure of the withheld information would add further transparency and accountability to the due diligence process, she considers that this additional public interest is outweighed by the public interest in providing Government with the necessary and legitimate safe space in which to develop and finalise its policy in respect of the ICR loans. The Commissioner considers that the disclosure of the high level advice and information comprising the withheld information in this case, would undermine and jeopardise Government's attempts to achieve best value for money for the taxpayer (though it is a matter of debate as to whether the policy itself would achieve this, in the long term).
57. Having carefully considered the detailed and helpful submissions from both parties, the Commissioner has concluded, for the reasons given above that in all the circumstances of the case, the public interest balance favours maintaining the exemption to the withheld information.
58. Having found that Documents 1-4 are exempt from disclosure under section 35(1)(a) in their entirety, the Commissioner has not proceeded to consider the applicability of section 43(2) to this information.

Section 43(2)

59. As noted, during the course of the Commissioner's investigation, UKGI disclosed to the complainant (and therefore the public at large) Document 5 (Consortium Project Ariel: Key Commercial and Operational Considerations document) which was originally provided by the purchaser (Erudio) to inform BIS' consideration of their bid and to provide information on their approach to managing the portfolio. Given that Erudio had been the successful bidder for the remaining tranche of MS loans, and the widely publicised problems which borrowers had subsequently encountered in their contacts with the company, there was a strong public interest in transparency and accountability of this particular document.
60. UKGI withheld a small amount of information in this document under section 43(2) as it remained commercially sensitive (the information was redacted from the disclosed document). The Commissioner has therefore considered the applicability of section 43(2) to the small amount of redacted (withheld) information concerned.
61. 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.

62. 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?

63. In submissions to the Commissioner, UKGI explained that the small number of redactions had been made to information which remained particularly commercially sensitive to Erudio's ongoing operations. UKGI provided the Commissioner with a rationale/explanation for each of the redactions, informed by consultation with Erudio.
64. If the Commissioner were to discuss many of the redaction specific explanations provided by UKGI 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 UKGI in support of section 43(2) are contained in a Confidential Annex.

65. The majority of the information redacted from Document 5⁶ is contained on page 8, which contains illustrative examples of customer treatment. UKGI explained that this information remains commercially sensitive to Erudio as its disclosure would risk borrowers believing that the illustrative examples are prescribed processes and/or encouraging them to behave differently in their dealings with Erudio.
66. Having had sight of and considered the withheld information, the Commissioner is satisfied that its disclosure would be likely to harm Erudio's commercial interests for the reasons advanced by UKGI.

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

67. 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.

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

68. In respect of Erudio's commercial interests, particularly those surrounding their purchase of the MS loans and subsequent remediation activity, the Commissioner considers that the likelihood of prejudice is sufficiently strong so that it can be said that this would happen. The small amount of redacted (withheld) information would undermine and prejudice Erudio's attempts to secure repayments of the outstanding student loans and maximise the return on its investment.

Commissioner's conclusion

69. Having reviewed the minor redactions to Document 5 and the redaction specific submissions provided by UKGI, the Commissioner is satisfied that the disclosure of the withheld information would prejudice Erudio's commercial interests. 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

⁶ It should also be noted that redactions were made to pages 3 and 12 of the document as the documents listed in the appendix were not held by the Shareholder Executive at the time of the original request and were not included as part of the advice given to Ministers on the sale. They are not held by UKGI and are outside the scope of the request.

70. Many of the public interest arguments in favour of disclosure of the residual withheld information in Document 5 are the same as or similar to those applying to Documents 1-4 (exempt under section 35(1)(a)) and the Commissioner will not reiterate them here.
71. As the withheld information specifically concerns Erudio and its commercial interests in the MS loans sale, the main public interest in disclosure concerns the interests of the 250,000 borrowers affected by the sale. In FS50574665⁷, the complainant provided the Commissioner with detailed public interest arguments on this particular point. She noted that administration of the deferment process passed to the private sector debt purchasers for the first time in the November 2013 sale (borrowers from previous student loan sales having had the protection of the deferment process remaining with the SLC) and that Erudio had no prior experience of processing deferment applications. The complainant contended that this was evident *'in its poor handling of the deferment process since completion of the sale'*.
72. The complainant noted that two years on from the sale, borrowers who wished to exercise their legal right to deferment were still experiencing issues, and contended that:

'It now seems 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 (BIS) 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'.

73. The Commissioner notes that whilst the complainant's above arguments were made in relation to the Sale and Purchase Agreement (previously released by BIS subject to redactions) they also have applicability to some of the information redacted from Document 5 in the current case.

Arguments in favour of maintaining the exemption

74. In submissions to the Commissioner, UKGI stated that future potential investors would be discouraged from bidding in ongoing and future asset sales *'if they believe commercially sensitive information would be released into the public domain and be available to potential competitors*

⁷ Which concerned the Sale and Purchase Agreement of the MS loans sale.

while reciprocal information on those competitors would not be available'.

75. UKGI recognised that *'there is public interest in the decision to sell the loans and transfer administration to the purchaser'*, but contended that releasing further information would be of limited value given what is already in the public domain.

Balance of the public interest test

76. In approaching her task of determining the balance of the public interest in respect of the specific information withheld under this exemption, the Commissioner is aware and appreciative of the significant media attention and controversy which the November 2013 MS loans sale, and the subsequent handling by Erudio, has generated.
77. In view of the fact that Erudio was the successful purchaser of the MS loans the Commissioner considers that a high degree of transparency and accountability is required with regards to how Erudio had proposed (as part of its bid to BIS) to manage the loans. However, the Commissioner considers that this important and legitimate public interest has already been appropriately and proportionately met by the disclosure (in FS50574665) of the Sale and Purchase Agreement, and latterly the disclosure of Document 5 by UKGI (which the complainant acknowledged in submissions to the Commissioner, *'carries considerable public interest'*).
78. Whilst at the time of the complainant's request, almost two years had passed since the MS loans sale, Erudio were (and still are) in the process of administering the loans and therefore some of the information contained in Document 5 (and in the Sale and Purchase Agreement in FS50574665) retains a commercial sensitivity to the company. 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 the SLC) have proven to be controversial, the Commissioner understands that these are changes which Erudio are entitled and able to make under the terms and conditions of the loans.
79. The Commissioner previously addressed the complainant's public interest arguments with regard to borrowers in FS50574665. The Commissioner recognised that there is a strong and important public interest in ensuring that the sale of the MS loans to Erudio has not restricted or negatively impacted upon the legal rights of borrowers, or removed any legal safeguards in place prior to the sale. However, as Clause 10.2 of the disclosed Sale and Purchase Agreement 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. Government has been clear that 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.

80. The Commissioner recognised 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 loans⁸. That is to say, the passing of the loans from SLC to Erudio, whilst 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.
81. In view of the above, the Commissioner found (in FS50574665) that the complainant's contention that borrowers are entitled to know any information in the Sale and Purchase Agreement that may impact on their ability to exercise their legal rights to be misconceived. Such legal rights, and the ability to exercise the same, are explicitly protected by Clause 10.2 and the associated regulation. The Commissioner noted 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 did not necessarily follow, as the complainant contended, that *'it is their right to know what provisions have been made in the agreement to counter such claims'*. The Commissioner considers that her above findings also apply to the information redacted from Document 5 in the present case, particularly the withheld information on page 8.
82. In view of the considerable information which has now been disclosed by UKGI (and previously BIS) about the management of the MS loans by Erudio (specifically the Sale and Purchase Agreement and Document 5), the Commissioner considers that the small amount of redacted (withheld) information in Document 5 would not appreciably add to the information now in the public domain. The Commissioner considers that the limited public interest in the withheld information is outweighed by the wider public interest in not disclosing information which retains a

⁸ The Commissioner would note that SLC was less experienced in debt collection than a company such as Erudio

commercial sensitivity to a third party, as such disclosures would be likely to discourage or inhibit future potential investors in ongoing and future asset sales, which would prejudice the Government's ability to achieve best value for the taxpayer.

83. The Commissioner is satisfied that the balance of the public interest favours maintaining section 43(2) to the small amount of residual withheld information in Document 5.

Other matters

84. The Commissioner would wish to commend both parties for the quality and detail of the submissions provided. As a newly formed public authority, the Commissioner would also wish to acknowledge the excellent level of engagement which UKGI had with the Commissioner throughout her investigation, most notably in the decision to disclose Document 5 (subject to the minor redactions addressed above and in the Confidential Annex) having reviewed the position previously taken by BIS in this case.

Right of appeal

85. 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

86. 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.

87. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**