



Appeal number: EA/2016/ 0103

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

ANNA JANE PATTERSON

Appellant

- and -

**THE INFORMATION COMMISSIONER
DEPARTMENT OF EDUCATION**

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
Ms MARION SAUNDERS
Mr JOHN RANDALL**

**Determined on the papers, the Tribunal sitting in Chambers
on 7 February and 4 July 2017**

© CROWN COPYRIGHT 2017

DECISION

1. The appeal is allowed in part. No steps are required to be taken by the public authority.

REASONS

Background to Appeal

2. The Appellant made a request to the Department for Business Innovation and Skills ("the Department") on 10 January 2015. She requested *a copy of the sale and purchase agreement and¹ 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 2013².*

3. The Department confirmed that it held the following five documents within the scope of the request:

Sale and Purchase Agreement ("SPS")

Master Definitions Schedule ("MDS")

Transitional Services Agreement ("TSA")

Disclosure Letter ("DL")

Honours shared borrower loan delegation side letter ("HSBLDSL")

4. The Department withheld the information, initially in reliance upon section 43 (2) and 41 of the Freedom of Information Act 2000 ("FOIA"). Later it released some information which had been redacted in reliance upon s. 40 (2) FOIA. By the time of the appeal, fewer than 20 pages of the requested information had been withheld, out of a total of 286 pages.
5. The Information Commissioner issued Decision Notice FS50574665 (page 1, open bundle) on 10 March 2016, in which she found that the Department had wrongly withheld all the information at the time of the request but that it had subsequently provided the Appellant with all of the information falling within the scope of the request apart from certain information which she considered to be exempt under s. 43 (2) FOIA (as disclosure *would* prejudice the commercial interests of Erudio Student Loans Ltd ("Erudio")) and *would be likely to* prejudice the commercial interests of the

¹ Originally the request was termed "*or any other contract*" but was amended to read "*and any other contract*" before the Department responded.

² At the time of the information request, the relevant Government Department was BIS. It has subsequently changed to DfE - see paragraph 16.

Department and the Student Loans Company. She found that the public interest favoured maintaining the exemption. She required no steps to be taken.

6. The Information Commissioner did not consider in her Decision Notice the application of s. 40 (1) or s. 41 FOIA as she considered all of the withheld information to fall within the scope of the s. 42 (3) exemption.

7. The totality of the information held ran to 286 pages. The information withheld in relation to the TSA, MDS, DL and HSBLDSL consisted of minor redactions. The Department also withheld 16 pages of the SPS. This information, described by the Information Commissioner as “technical and legalistic”, was considered in detail in a confidential annex to the Decision Notice.

Appeal to the Tribunal

8. The Appellant’s Notice of Appeal dated 7 April 2016 (page 21, open bundle) relied on the following grounds: The Decision Notice was not in accordance with the law because (i) s. 42 (3) FOIA was not engaged and (ii) the balance of public interest favoured disclosure.

9. In respect of the engagement of s. 42 (3) FOIA, the Appellant made the following submissions. Firstly, in relation to the interests of the Department and the Student Loans Company, the Appellant submitted that the contractual provisions themselves envisaged disclosure, so the Decision Notice had wrongly concluded that future bidders would be likely to be deterred from contracting with the Department and that its commercial interests would thereby be prejudiced by disclosure.

10. In respect of Erudio, the Appellant submitted that it had been established as a Special Purpose Vehicle for this particular transaction, so that it will not be engaging in other activity and cannot be viewed as likely to suffer a commercial disadvantage from the disclosure of the requested information. She also pointed out that the sale price was in the public domain and that future student loan book sales would be on a different commercial basis because the fundamentals of the student loan scheme had now changed (from mortgage-style to income-contingent repayment loans).

11. In respect of the public interest test, the Appellant emphasised her view that the public interest favours disclosure on the basis that the sale to Erudio had impacted upon approximately 250,000 borrowers, that female borrowers had been disproportionately badly affected by the changed approach, and that there was considerable public and media interest in the terms of the sale. She referred to some of her own and others’ dealings with Erudio to illustrate the type of customer-service problems which she suggested were widespread (with reference to complaints made to the Financial Ombudsman Service and reports on the website *moneysavingexpert.com*.) She submitted that these on-going difficulties between borrowers and Erudio and also Erudio’s practice of reporting deferred loans to Credit Reference Agencies were both factors which supported the public interest in disclosure.

12. The Appellant also asked the Tribunal to determine whether s. 40 (1) and s.41 FOIA had been correctly applied, notwithstanding that there was no consideration of these sections in the Decision Notice, because she said they represented the sole basis for the Department withholding some of the requested information.

13. The Appellant also submitted that there was additional information falling within the scope of the request, namely a report from Price Waterhouse Cooper known as the “PWC Remediation Report”. She explained that this document was referred to in the contractual information disclosed to her and submitted that this document should be viewed as an integral part of the contracts relating to the sale of loans to Erudio and thus within the scope of the request.

14. The Information Commissioner’s Response dated 20 May 2016 (page 103, open bundle) maintained the analysis as set out in the Decision Notice in respect of the engagement of s. 43 (2) FOIA and the balance of public interest test. She submitted that the exemption covered all the withheld material so that it had not been necessary to consider any other claimed exemptions in the Decision Notice. The Information Commissioner submitted that the PWC Remediation Report did not fall within the scope of the original information request and noted that the Appellant was at liberty to make a free-standing request for that information.

15. We pause here to note that the Information Commissioner’s Response was filed before the Court of Appeal handed down its judgment in *DWP v IC and Zola* [2016] EWCA Civ 758, but that the Department’s Response was filed after the judgment in *Zola* was available, and relied upon it for a definition of “commercial interests”.

16. The Department’s Response dated 8 August 2016 (page 119, open bundle) confirmed that the Department for Education (also “the Department”) was now the relevant Government Department in relation to this matter. It generally supported the Decision Notice and the Information Commissioner’s Response. In particular, it submitted that the public interest arguments advanced by the Appellant were generalised and bore little relation to the particular withheld material contained in the Tribunal’s closed bundle.

17. The Department’s submissions as to the commercial interests of the Department and the Student Loans Company³ were that the withheld information continued to have commercial sensitivity notwithstanding the effluxion of time since the request; that although a redacted version of the sale contracts in respect of the mortgage-style loans in 1998 and 1999 have been disclosed, these were on a different commercial basis to the loans sold in 2013; that whilst future sales will involve loans made on a different financial basis to those sold in 2013, the disclosure of the withheld information could nevertheless create a negative perception of the Department amongst potential future private sector bidders. In particular, disclosure of the withheld information would be likely to prejudice the commercial interests of the

³ The interests of the Department and the Student Loans Company have apparently been regarded as synonymous by all parties throughout this appeal. We have not therefore considered whether they may have any divergent interests.

Government in relation to future income-contingent repayment loan sales and the Government's wider programme of asset sales. It was important for potential future bidders to have confidence that commercially sensitive information would not be disclosed. If not, there was a risk that they would be more cautious in their dealings with Government, to the detriment of an effective sale process and to the achievement of an advantageous deal for the taxpayer.

18. The Department resisted the Appellant's argument that Erudio should not be regarded as having commercial interests. It submitted that Erudio operates for profit, and that this represents a "commercial interest" within the wide meaning recently given to that term by the Court of Appeal in *Department for Work and Pensions v Zola* [2016] EWCA Civ 758. Furthermore it submitted that, if the Appellant was right in her analysis of Erudio, then the relevant commercial interests for the Tribunal to consider would be those held by parties who established Erudio.

19. The Department argued that the withheld information was commercially sensitive in relation to the limitation of liability, loan warranties, remediation, payments for ongoing services, and the borrower contact and collections policy. Disclosure of these terms would put Erudio "and the consortium" at a significant commercial disadvantage as against other bidders in any future portfolio acquisitions as the terms it was prepared to accept would be revealed, thus giving competitors an unfair advantage in formulating their own bids.

20. The Department submitted that there was a strong public interest in maintaining the exemption because of the likely adverse impact of disclosure on the terms of future Government sales of loans. It also submitted that the withheld information bore no relationship to the customer-service issues highlighted by the Appellant and that it did not advance the public's understanding of the subject of higher education funding or shed light on the value for money aspect of the sale (which had received Parliamentary scrutiny in any event).

21. The Department concluded that the Decision Notice was correct in finding that there was a causal connection between the potential disclosure of the withheld information and the claimed prejudice to the commercial interests of the Department, the Student Loans Company and Erudio.

22. The Department argued in favour of the Tribunal applying the claimed s. 40 (1) and s.41 exemptions to certain of the withheld information notwithstanding the fact that these exemptions had not been considered in the Decision Notice. Finally, it argued that the PWC Remediation Report falls outside the scope of the request.

23. The Appellant's Reply to the Information Commissioner's Response (undated, page 112 open bundle) clarified further her argument that Erudio should not be viewed as having commercial interests in the way that a normal commercial entity would have them, because it had been established for one purpose only. She acknowledged that Erudio had a "financial interest" in the contract, but submitted that this was a different consideration to the factors properly falling under s. 43 (2) FOIA.

The Appellant referred the Tribunal to Erudio's description of itself in its Annual Report and Financial Statements for the year ended 31 December 2013 as:

"...a Special Purpose Vehicle to act as a Trustee for the sole purpose of acting as a conduit through which a consortium of interested parties were able to acquire a portfolio of unsecured student loans being sold by the Student Loans Company in November 2013." (page 307, open bundle).

24. She argued that:

"it is not reasonable that a company constituted in such a way can simultaneously have the benefit of an existence distinct from ordinary commercial and financial reality, while claiming an exemption from disclosure designed to protect the commercial interests of businesses functioning with independent competitive purpose" (page 113, open bundle).

25. The Appellant's Reply to the Department's Response (undated, page 146 open bundle) disputed that the commercial interests of the distinct entities which created Erudio as an SPV were relevant for the purposes of s. 42 (3) FOIA, given that they were beneficiaries of a trust which held the loan portfolio, rather than parties to the contractual arrangements with which her information request was concerned. She submitted that *Zola* was distinguishable as it related to the very different factual context of the loss of custom in a competitive commercial environment.

26. The Appellant also raised the issue of the length of time between her request and the Decision Notice. She submitted that the commercial sensitivity had diminished in view of the effluxion of time. She reiterated her public interest arguments.

27. The Tribunal initially convened on 7 February 2017 but adjourned without determining the appeal. In issuing adjournment directions, it commented that:

"...the Information Commissioner is not merely a party to the appeal but has a further role as the "guardian" of the freedom of information regime, as referred to by the Court of Appeal in Browning v IC [2014] EWCA Civ 1050. The Tribunal considers that the Information Commissioner should accordingly be given a further opportunity to assist the Tribunal by commenting on the arguments put forward by the other parties in the light of the Court of Appeal's judgment."

28. The Tribunal issued the following Directions:

The Information Commissioner is to provide further written submissions on the following issues:

- (i) *What is her Response to the Appellant's submission that a SPV does not have "commercial interests" for the purposes of s. 43 (2) FOIA*

because it exists for the purposes of one enterprise and is not engaged in trade in any other sense?

- (ii) *What is her Response to the Department's submission that an SPV has "commercial interests" within the meaning given to that term by the Court of Appeal in DWP and IC v Zola [2016] EWCA Civ 758?*
- (iii) *What is her Response to the Department's submission that s. 43(2) FOIA is engaged by the risk of prejudice to the commercial interests of the third parties who establish a SPV?*
- (iv) *What is her Response to paragraph 65 of the Department's Response, to the effect that the Decision Notice failed to appreciate that the Department had relied upon s. 40 (2) in circumstances where s. 43 (2) had not been relied upon?*
- (v) *What is her Response to the Department's continued reliance on s. 41 FOIA (paragraph 52 of the Department's Response)?"*

29. The Tribunal set a timetable for the Information Commissioner to file her submissions and for the Department then the Appellant to reply. The Tribunal reconvened on 4 July to make its decision in the light of the parties' further submissions, for which we were grateful. These are referred to at paragraphs 38 to 46 below.

Mode of Hearing

30. The Appellant's Reply asked the Tribunal to *use its discretion* as to the mode of hearing. The Notice of Appeal had requested a determination on the papers and both Respondents had agreed to this. The Tribunal agrees that this matter is suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

31. The Tribunal considered an agreed open bundle of evidence comprising 430 pages, plus the submissions made by all parties, for which we were grateful. We also considered a closed bundle of 319 pages. We also received additional materials consisting of case management directions, open and closed witness statements from Mr Paul Williams of the Department for Education, open and closed submissions, and further submissions from the Appellant. A redacted version of the confidential annex to the Decision Notice was included in the open bundle, with an un-redacted copy in the closed bundle. We were satisfied that the closed material consisted only of the withheld information itself or of documents which were revelatory of the withheld information.

The Legal Framework

32. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

33. The exemptions claimed in this case were s. 41(1) (information provided in confidence) and s. 43 (2) (prejudice to commercial interests) of FOIA. These are so-called qualified exemptions, giving rise to the public interest balancing exercise required by s. 2 (2) (b).

34. Section 43(2) FOIA provides that:

“(2) information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

35. The Department also relied on s. 40 (2) FOIA which relates to the personal data of a third party. Where engaged, this provides an absolute exemption falling under s. 2 (2) (a) FOIA.

36. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

37. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Submissions

38. In response to the Tribunal’s Directions of 7 February 2017, the parties filed helpful additional submissions as follows.

39. The Information Commissioner filed open and closed submissions. In her open submissions, she argued that Erudio’s website says that it “manages” student loans

and accordingly it would appear that Erudio is seeking to generate income and/or profit. The Court of Appeal had accepted that loss of income or profit is a commercial interest. She considered that if an SPV were engaged, or were likely to be engaged, in other commercial activities, disclosure of the information in question could result in an increased likelihood of prejudice to the relevant interests. In relation to the Department's submission that the Tribunal should consider the commercial interests of the third parties which established Erudio, she submitted that it was not necessarily the case that if a SPV had no commercial interests itself then the commercial interests of such third parties should be considered. In any event, she noted that a public authority could not speculate on this question but would need to produce evidence on the point. She noted that no such evidence had been filed in this appeal.

40. The Information Commissioner said she had not appreciated that the Department sought to rely on s. 40 (2) alone in relation to some of the withheld information. She supported the application of s. 40 (2) FOIA in relation to some of information in respect of which the s. 40 (2) exemption was claimed, as set out in a redacted table in her open submissions and in full in the closed submissions.

41. In relation to the exemption claimed under s. 41 FOIA, the Information Commissioner submitted that she had been entitled not to make a decision on this claimed exemption in circumstances where she was satisfied that all the information was exempt under s. 43(2) FOIA and that the public interest favoured maintaining the exemption. Nevertheless, she accepted that s. 41 FOIA applied in relation to the information not already disclosed.

42. The Department's submission reiterated that it regarded Erudio as having commercial interests within the meaning of s. 43 FOIA and that if the Tribunal found to the contrary, then it should consider the interests of the third parties who established Erudio. It noted that the Information Commissioner had referred to the need for evidence on this point and stated that it was "copying in" Arrow Global Ltd so that it could apply to be joined as a party to this appeal as it was best-placed to provide such evidence. We understand that no such application was made.

43. The Department provided an up-dated version of the information disclosed to the Appellant, as more information had in fact been disclosed than was indicated from the Tribunal's closed bundle. It apologised for this oversight.

44. The Appellant's submission disputed that the Information Commissioner was entitled to rely on the word "manage" on Erudio's website as evidence to support it having relevant commercial interests. In any event, she submitted, it was apparent from Erudio's public financial statements which were before the Tribunal that it did not itself manage the loans but relied on another company to do so. She said that the Information Commissioner had simply not understood that Erudio cannot make or retain any profit.

45. With respect to the suggestion that the Tribunal should have regard to the commercial interests of third parties, the Appellant submitted that there was no authority for this approach and that no relevant evidence had been submitted.

46. The Appellant reiterated her request for the Tribunal to determine the engagement of s. 40 (2) and s. 41 and to consider the balance of public interest where required.

Evidence

47. The Tribunal considered the open and closed witness statements of Mr Paul Williams, a Senior Civil Servant at the Department. He is the Deputy Director of Student Funding Policy, a post which he has held since 2011. He manages the team with responsibility for mortgage-style loans policy, although he explains that this type of loan was replaced by the current income-contingent repayment system in 1998.

48. Mr Williams' evidence was that between 1990 and 2008, around 1.8 million borrowers were issued with mortgage style loans with a total face value of £5.1 billion. These were originally administered by the Student Loans Company, a non-profit making Government-owned organisation. Loan book sales took place in 1998 and 1999 and the remaining publicly-owned mortgage style loan book still administered by the Student Loans Company was sold to Erudio in 2013. This was by then an old, closed portfolio which was deteriorating in value because most of the loans it contained should have been repaid by 2013 according to their terms, so they were mostly in deferment or in arrears. The Student Loans Company was felt to be unlikely to achieve the same level of repayment as specialist private sector companies.

49. Mr Williams stated that the 2013 sale process had been announced through a written Ministerial statement and that Erudio and the SLC had contacted all affected borrowers to inform them of the situation. The sale had been scrutinised by the National Audit Office and two Parliamentary Committees. He accepted that the sale had proved controversial in some quarters but emphasised that Erudio is regulated by the Financial Conduct Authority (operating under the FCA authorisation for Arrow Global Ltd). He accepted that Erudio had experienced some initial technical and customer service issues but suggested that the reducing percentage of complaints to the Financial Ombudsman Service about Erudio was indicative of an improving situation.

50. In his closed witness statement, Mr Williams sets out in detail the commercial prejudice which would or would be likely to result from disclosure of the withheld information with reference to the withheld information itself. In the open version of his statement, he describes more generally how the disclosure of commercially sensitive contract terms would reveal how Erudio had negotiated on this particular occasion so that in the future, rival bidders would have the advantage of knowing both what terms the Department would be prepared to accept, and the detail of Erudio's business strategy and negotiating terms. He comments at paragraph 57 of his witness statement in relation to the limited information now in dispute that:

“...if commercially sensitive information is released, I am strongly of the view that it will discourage potential investors from dealing with the Government. If potential investors consider that all of the terms of commercial agreements with Government are released, including the most commercially sensitive parts, it will inevitably lead to a more cautious approach on their part with them either being less willing to contract with the Government or them being more cautious as to what information they are willing to provide to Government. In turn, if potential bidders are so discouraged in dealing with the Government, it will have a detrimental effect upon the ability of Government to have comprehensive and effective negotiations with other parties. It follows that a real consequence would be the reduced ability of Government to operate in a commercial market, and secure the best value possible for the taxpayers’ money”.

51. At paragraph 60 he states:

“...If the information were released into the public domain, there is a serious risk that it would damage the Department’s ability to achieve value for money in any future loan sale as it would hinder the Department’s negotiating position. In effect, I consider that there would be a serious risk of an increase to public expenditure (or reduced prospects of decreasing public expenditure) if this information were disclosed and that consequently the public interest favours withholding the information”.

52. Mr Williams explains that the Government has announced its intention to sell the pre-2012 loan book with an estimate of £12 billion proceeds over the four years from the announcement in 2016. He expresses concern about the likely appetite to engage with the Department by investors if the remaining information were disclosed.

53. Mr Williams acknowledges that private companies which deal with the Government ought to be aware of the expectation of transparency and accountability. However, he notes that the vast majority of the requested information has been disclosed and submits that the information which remains withheld is limited to that which would or would be likely to cause a negative commercial impact to the Government, the Student Loans Company, and/or Erudio, with possible direct or indirect adverse consequences to the taxpayer.

54. The Tribunal was provided in its closed bundle with an un-redacted version of all the information held, together with a closed clause-by-clause commentary of the reasons for redaction of any part thereof. A redacted version of this commentary is in the open bundle at pages 220 – 231.

55. The Appellant relied on documentary evidence (pages 274 to 430, open bundle) including screen-grabs from websites, press and social media articles, published information about Erudio, published decisions of the Financial Ombudsman Service, and extracts from Hansard. The admissibility and relevance of this evidence was unchallenged by the other parties and we were content to rely on it where it was helpful to do so.

Conclusion

56. The Decision Notice found (at paragraphs 28, 32 and 34) that disclosure of the remaining withheld information *would* prejudice the commercial interests of Erudio. Erudio's "commercial interests" are identified at paragraph 25 of the Decision Notice and are predicated on the understanding that Erudio operates in a competitive commercial environment.

57. We have considered carefully the Appellant's arguments in respect of Erudio's constitutional arrangements and her submission that it does not have relevant commercial interests to engage s. 43 (2) FOIA. We note that she has produced documentary evidence (pages 304 to 314, open bundle) of Erudio's published Financial Statements and that it is there stated that Erudio operates by holding the loan book asset on trust for third parties who are the beneficiaries of that trust. The loan book is not shown as an asset of Erudio because it does not own it beneficially. Erudio's assets and liabilities are evenly balanced. It discloses no profits and it is reimbursed its own administration costs by its beneficiaries, retaining no earnings of its own. No dividends are declared or paid and it is stated that the trust deed provides for any surplus assets on liquidation to be distributed to charity.

58. We note the acceptance by the majority of the Court of Appeal in *Zola* of a wide definition of "commercial interests", in the context of that case "*to include loss of income, profits, and donations and the loss of volunteer workers*" (paragraph 18) but, considering the evidence before us, we struggle to identify Erudio as an entity which may be described as seeking to generate an income or to make a profit. We accept the Appellant's submission that Erudio is a corporate vehicle established to hold the loan book only, whilst commercial activity in relation to the loan book is undertaken by other companies. Neither the Department nor the Information Commissioner chose to comment on the evidence of the Financial Statements in the Decision Notice, the pleadings, their submissions or their additional submissions. We prefer the evidence of the Financial Statements to the evidence of commercial interests relied on in the Decision Notice and the Information Commissioner's reliance on Erudio's website, which we regard as inconsistent with the Financial Statements. In all the circumstances, we are not satisfied that Erudio itself has commercial interests so as to engage s. 43 (2) FOIA.

59. It has been suggested subsequent to the Decision Notice that the third parties which established Erudio have the relevant commercial interests for the purposes of FOIA. We have not been referred to any authority for this proposition and we doubt it is correct. If we are wrong about that, then we find ourselves unable to assess the relevant prejudice to those commercial interests in the absence of any evidence on the point. We note that the evidential burden rests with the public authority which claims an exemption under FOIA. We find that the Department has not discharged that burden on this point.

60. Our conclusion is that the Decision Notice was erroneous to conclude that Erudio had commercial interests which would be prejudiced by the release of the requested information. To that extent, we allow the appeal.

61. The Decision Notice found (at paragraphs 29, 30, 33 and 34) that disclosure of the remaining withheld information *would be likely to* prejudice the commercial interests of the Department and the Student Loans Company. The relevant commercial interests were identified as the potentially harmful impact on the Department's ability to engage with private sector bidders in future loan sales, and the potentially adverse impact on the Department's reputation. We agree with those conclusions and are also satisfied on the basis of the evidence of Mr Williams referred to above that there would be a likely impact on the Government's ability to secure best value for the taxpayer in future sales. We are satisfied that the exemption under s. 43 (2) FOIA is engaged by the commercial interests of the Department and the Student Loans Company.

62. The Decision Notice found that the public interest favoured maintaining the exemption. We agree with that assessment. We accept that there is a public interest in transparency in relation to the sale of student loans by the Government to the private sector, and that this is heightened by the controversy surrounding this subject. Nevertheless, we note that the transaction has received Parliamentary scrutiny and that much of the detail of the transaction is already in the public domain. We are not persuaded that the customer service issues referred to by the Appellant provide a public interest argument for the disclosure of the particular granular contractual information with which we are here concerned.

63. We agree with the Decision Notice that the Department's arguments as to the "chilling effect" of the disclosure by public authorities of information obtained from private contractors carries limited weight. As the Appellant notes, the contractual terms themselves refer to disclosure and, after many years of operating within the framework of freedom of information legislation, it ought to come as no surprise to the private sector that information disclosed to a Government department in the course of a tender process might find its way into the public domain.

64. However, as noted above, we were persuaded by Mr Williams' evidence in relation to another prejudice likely to flow from disclosure of the withheld information. This was his opinion as a Senior Civil Servant with experience in this area, that it would hinder the Department's ability to negotiate deals which represented value for money to the taxpayer in the future because disclosure of the granular contractual information now withheld (described briefly at paragraph 19 above and detailed in the closed annex to the Decision Notice) would be revelatory of the Department's negotiating stance and tolerance for particular contractual terms. We accept his evidence that this would be so even though the future planned loan sales will involve income-contingent repayment loans as opposed to mortgage-style loans. We find that there is a strong public interest in the Government being able to deliver best value to the taxpayer in the context of ongoing loan book sales.

65. Our conclusion is that we agree with the Decision Notice that the public interest favours maintaining the exception in respect of the information now withheld. To that extent, we dismiss the appeal.

66. We agree with the Information Commissioner that there was no reason for the Decision Notice to make a discrete determination in respect of s. 41 FOIA in circumstances where she had concluded that the totality of the withheld information was exempt under s. 43 (2) FOIA. However, it does appear that there was a misunderstanding between the Department and the Information Commissioner in respect of the Department's reliance upon s. 40 (2) FOIA. To the extent that it is necessary to do so (the information already having been disclosed in redacted form) we approve and adopt the approach of the Information Commissioner as set out in her supplementary submissions and described at paragraph 40 above.

67. In respect of the Appellant's argument that the PWC Remediation document falls within the scope of her request, we are not persuaded that this is the case. The PWC document is not, on a plain reading of the request "*any other contract*". We agree with the Information Commissioner that the Appellant is at liberty to make a further information request to the Department for disclosure of this document.

68. Having reached these conclusions, we allow the appeal in part, but require no steps to be taken by the public authority. This is because we find that the information which is within the scope of the request and not subject to an exemption has already been disclosed. We are satisfied that the remaining information may be withheld in reliance upon s. 43 (2) and s. 40(2) FOIA, as set out above.

69. As the appeal is against the Decision Notice in its entirety and we have upheld the disposal recommended by the Information Commissioner, we could describe this appeal as "dismissed". However, as the Decision Notice reached two separate conclusions and as we have found one of them to be erroneous, we prefer to describe the appeal as "allowed in part".

ALISON MCKENNA

PRINCIPAL JUDGE

DATE OF DECISION: 10 July 2017

DATE PROMULGATED: 12 July 2017