

Briefing on the Draft Higher Education and Research Act 2017 Regulations 2019 with regards new and extended powers to the Office for Students (OfS)

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As a point of process regards Part 2(14), new powers under the Digital Economy Act, we are uncertain whether this Regulation has been prepared in line with parts 5.1 and 5.2 of the Cabinet Office *Debt and Fraud Information Sharing Review Board*¹ Code of Practice, passed by the House in November.²

At the time of writing, we have not yet seen any publication as required by the Code paras. 144 or 145. Applications to amend the Schedules should be made through the secretariat but since it does not publish minutes, it is unknown if this happened. Some of the requirements for the preparation and publication of a Data Protection Impact Assessment would fall under the requirements of the Code.

defenddigitalme is a non-profit, non-partisan, data privacy and digital rights group led by parents and teachers. We aim to make all children's data safe, fair, and transparent across the education sector. Our work is funded through an annual grant from the Joseph Rowntree Reform Trust Ltd. For more information please see: <http://defenddigitalme.com/>

¹ Debt and Fraud Information Sharing Review Board

<https://www.gov.uk/government/publications/the-digital-economy-act-2017-debt-and-fraud-information-sharing-review-board>

² Code of Practice for public authorities disclosing information under Chapters 1, 3 and 4 (Public Service Delivery, Debt and Fraud) of Part 5 of the Digital Economy Act 2017

<https://www.gov.uk/government/publications/digital-economy-act-2017-part-5-codes-of-practice/code-of-practice-for-public-authorities-disclosing-information-under-chapters-1-3-and-4-public-service-delivery-debt-and-fraud-of-part-5-of-the-di>

1. Summary

1. These regulations will give the OfS a range of new powers to obtain and distribute data from children and staff across the state education sector in England, from both mainstream and Alternative Provision education. Without any obvious limitation, at current volume, this may be the individual-level, confidential personal data of over 25 million pupils and staff - and this number grows every year by around 700,000³.
2. The new powers for data collection in Part 3 (28) and (32), are not limited by the new powers of data sharing purposes in Part 2(14).
3. As per paragraph 6.3 of the Explanatory Memorandum,⁴ *“OfS functions in relation to the regulation of higher education are much broader than those of HEFCE.”*
4. These additional powers must be viewed in combination with *new* powers awarded in 2018 enabling the OfS to share personal confidential data with third parties, through the statutory instrument, the *Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations 2018*. That SI enabled the OfS to share identifying, personal confidential data, with commercial as well as public bodies.

2. The Effects of the new Regulation (2019/ TBA)

5. Over 25 million students, children, and staff across England’s Education sector will be denied control over their digital footprint, in perpetuity. Data will be copied to an indefinite number of data recipients, without clear safeguards for scope creep, of new or onward uses, or users, and this number will grow by well over 700,000 every year.
6. There is no meaningful limitation in its existing powers for what purposes OfS may pass on personal data to third parties; nor for which purposes those third-parties in turn may use the data⁵ on the face of the Act (s63) or in the 2018 Regulation no 607.
7. By giving the OfS -- and potentially its own prescribed persons (third parties), access to the entire education dataset of the population, past and present, since 2002:
 - There is no oversight of its data handling or accountability for processing
 - There is no published plan to inform each child and adult of the change of data controller or new processing purposes by any new body, or third parties.
 - There is no route for redress if data are wrongly processed or mistakes made in any processing of children’s school and AP records (Part 3 (28 and 32)).
 - There is no route for redress if data are wrongly processed or mistakes made in any processing of anyone’s records for the purposes of fraud. (Part 2 (14)).

³ FOI May 2016 BEIS tables of the volume of Alternative Provision personal data records, staff and students
<https://www.whatdotheyknow.com/request/322634/response/818510/attach/3/FOI2016%2009068.pdf>

⁴ Explanatory Memorandum: Draft Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019
http://www.legislation.gov.uk/ukdsi/2019/9780111186572/pdfs/ukdsiem_9780111186572_en.pdf

⁵ Parliamentary question 156350 (June 2018)

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-06-21/156350/>

3. Part 3(28)(32) New Powers of a Prescribed Person to receive data

8. **Part 3 (32):** This gives powers to the Office for Students as a Prescribed Person, under the Education (Individual Pupil Information)(Prescribed Persons)(England) Regulations 2009 that enable them to receive personal confidential information.

Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009

32. In regulation 3 of the Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009(51) (prescribed persons)—

- (a) for paragraph (5)(c), substitute—
 - “(c) the Office for Students;”;
- (b) in paragraph (6)(f), before “higher education sector”, insert “wider”.

Extract 6: Part 3(32)

9. This role under the Education (Individual Pupil Information)(Prescribed Persons)(England) Regulations 2009 would enable the OfS access to the National Pupil Database (NPD), “*one of the richest datasets in the world*” according to the DfE’s own National Pupil Database User Guide.⁶
10. In 2016, through FOI, defenddigitalme determined that over 50 databases were held by the Department for Education, each with enormous stores of personal confidential data all kept indefinitely. Around 25 of those are linked together to form collectively the National Pupil Database.⁷
11. **Part 3 (28):** This gives powers to the Office for Students to receive information about children from the Alternative Provision (AP) sector⁸ in England.

Education (Information About Children in Alternative Provision) (England) Regulations 2007

28. In regulation 8 of the Education (Information About Children in Alternative Provision) (England) Regulations 2007(46) (other persons to whom individual information supplied may be passed in addition to information collators), for paragraph (i), substitute—

- “(i) the Office for Students;”.

Extract 7: Part 3(28)

12. Alternative Provision means children age 2-18, attending a school not maintained by a local authority for whom the authority is paying full tuition fees, or educated otherwise than in schools, pupil referral units, AP academies and AP free schools under arrangements made (and funded) by the authority.
13. The Department for Education has collected the personal data of every child in Alternative Provision once a year, at pupil level, in the AP census since 2008. In

⁶ NPD User Guide para 1.3 https://defenddigitalme.com/wp-content/uploads/2019/05/NPD_user_guide.pdf

⁷ The National Pupil Database (England) https://en.wikipedia.org/wiki/National_Pupil_Database

⁸ Alternative Provision (AP) education sector data collection https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752540/2019_Alternative_Provision_Census_Guide_v1.2.pdf

January 2017, there was a reported total of 22,212 children in AP settings, and they are added to year on year.

14. These data can include special category data such as special educational needs, and sensitive reasons ascribed to a child, to record their move from mainstream education into Alternative Provision. Since 2018 those reasons may include pregnancy, mental and physical health needs, and young offender status. Our research in 2017 showed that no Local Authority had made efforts to communicate to their families ahead of the AP census collection in January 2018, to tell them which labels had been assigned to the children. Families have no opportunity to validate or correct their own records, before the data are submitted to the national database forever. Since no data are ever deleted, the records may be shared indefinitely.
15. In 2016, the to-date cumulative volume of AP student and staff records collected by HESA on behalf of the Department for Business Innovation and Skills (BIS) and the Higher Education Funding Council (HEFCE) was in the region of 23 million individual records.⁹

Collection type	Total individuals on database (1994/95 to 2014/15)
Student	20586280
Destinations (subset of Student)	6347555
Staff	2173910

Table 1: Volume of personal data records held by BEIS in 2016, obtained via FOI.

16. *"It is not possible for a parent/carer or an individual child to opt out of the alternative provision census."*¹⁰ It is also impossible to opt out of the uses of data by third parties.
17. It should be unthinkable that such sensitive, personal confidential data could be passed on to third parties without a child or families' knowledge, and yet that is the power this Regulation creates. The OfS will be granted powers of a Prescribed Person able to get hold of every record from Alternative Provision, not anonymous or aggregated data, but identifying data at individual level, without clear purposes.
18. Combined with its data distribution powers awarded in 2018, the OfS would further be able to pass on every record from Alternative Provision, and mainstream education,

⁹ Letter from BEIS

<https://www.whatdotheyknow.com/request/322634/response/818510/attach/3/FOI2016%2009068.pdf>

¹⁰ Parliamentary Question Alternative Education (HL4236)

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-12-15/HL4236/>

to any of the thirteen third parties of the 2018 Regulations, without clearly specified purposes or limitations.

4. Higher Education and Research Act 2017 (Cooperation and Information Sharing Regulations)(2018)¹¹ which enables data distribution.

19. Who the receiving third-parties are, to whom the OfS may pass on data as result of the SI 607/2018, was decided behind closed doors, not in public consultation.
20. Meeting notes¹² between Nov. 2017-March 2018 confirm that Regulations were only necessary at all, where the purposes were ***predominantly for the functions of the other body, not the OfS***, since the Act provided for the OfS' own data purposes, *without* need for Regulations.
21. The reasons behind the decision to award powers for data sharing from the OfS to some of those specific bodies seems at best tenuous, and created a power without *necessity*.
22. For example, notes from the discussion with the Competition and Markets Authority suggest their inclusion in Regulations was a *“nice to have’ if regs going ahead for other reasons”*.

CMA

1) OfS might wish to share info with CMA to assist them with a live investigation

- low likelihood of future investigations

- not clear if CMA has the power to inform OfS of a live investigation

=> suggest not sufficient justification for regs (although nice to have, if regs going ahead for other reasons)

2) OfS might become enforcer of consumer law in future and this would require data sharing

=> consider in future once live issue.

Extract 1: Notes from DfE meetings to determine the purposes of data sharing from the OfS to third-parties for the purposes of Regulation 2018/607 Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations (2018)

23. Where the cooperation or information sharing is **predominantly for the purposes of the OfS**, there is **no requirement for Regulations or to prescribe the other persons**.

¹¹ Higher Education and Research Act 2017 (Cooperation and Information Sharing Regulations)(2018)
http://www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxi_20180607_en.pdf

¹² Notes obtained through FOI from DfE meetings in January, 2018 with HEFCE about GMC and the HEE (p14)
<https://www.whatdotheyknow.com/request/491880/response/1210408/attach/4/FOI%202018%200026457%20Je n%20Persson%20Annex%20A.docx.pdf>

Background

The Higher Education and Research Act 2017 section 63 enables the OfS to share information with other organisations, without regulations being made, if the information sharing or co-operation is a) for the purposes of OfS functions, or b) for both OfS and the other body's functions, but where the dominant function is for the OfS. However, regulations are required where the information is shared, or the cooperation occurs, predominantly for the performance of functions of the other body. In these cases, s.63 regulations will need to identify the relevant bodies and the relevant functions of those bodies. Until such regulations are made, the information sharing powers of the OfS will be limited. We are therefore progressing the s.63 regulations as a priority, and our legal team requires settled policy instructions within the next two weeks to meet the demanding timetable for the regulations to be laid.

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Extract 2: Via FOI; notes from DfE meetings to agree the purposes of data sharing from OfS to third-parties for the purposes of Regulation 2018/607 Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations (2018) ¹³

5. The purposes of the data sharing powers granted to the OfS in the Regulations (2018/607) combined with this draft 2019 Regulation

24. The OfS was established by the Higher Education and Research Act 2017.¹⁴ Regulations in May 2018, expanded the receiving organisations to whom the OfS could pass data *onwards*.
25. These bodies include commercial company Pearson Education Limited, as well as a number of public bodies, in a list of thirteen prescribed persons (organisations) in total.
26. The purposes for which personal data may be used are unlimited and vague in the 2018 Explanatory Memorandum¹⁵ for the *Higher Education and Research Act 2017 (Cooperation and Information Sharing) regulations 2018 No.607*.
27. Discussion notes before the 2018 No.607 Regulation was made, were only obtained via FOI after it came into effect, and after the July 2, 2018 annulment debate, and shows that the DfE believed new regulations were not *necessary* to include Pearson, but that it was agreed that Pearson should be included in order 'to be safe', and that while there was a '*problem of including Pearson in the regs but not others*', it '*can be got round because there is precedent for info sharing with Pearson*'.¹⁶

¹³ Explanatory Memorandum: Higher Education and Research Act 2017 (Cooperation and Information Sharing Regulations)(2018) http://www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxiem_20180607_en.pdf

¹⁴ The Higher Education and Research Act 2017 <http://www.legislation.gov.uk/ukpga/2017/29/contents/enacted>

¹⁵ *ibid*.

¹⁶ Notes from a DfE meeting on January 15, 2018 with HEFCE about GMC and the HEE (p21) <https://www.whatdotheyknow.com/request/491880/response/1210408/attach/4/FOI%202018%200026457%20Je n%20Persson%20Annex%20A.docx.pdf>

Pearson Conclusions

Info historically shared between DfE and Pearson (awarding body) about alternative providers. This is in line with govt. Guidance.

Info sharing would usually be to aid OfS investigations, so regs potentially not required. However, it was agreed that Pearson should be included to be safe.

Problem of including Pearson in the regs but not others can be got round because there is a precedent for info sharing with Pearson, with MOUs/agreements in the past that are still honoured de facto. A new agreement will be ready soon.

Extract 4: Notes from DfE meetings to determine the purposes of data sharing from the OfS to third-parties for the purposes of Regulation 2018/607 Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations (2018)

28. One might therefore reasonably conclude that since the company was included only 'to be safe' that specific purposes were considered necessary. This is not the case.
29. For the non-public bodies, the 2018/607 Regulation relies on the purposes of the Articles of Association of the Company, and those are not included in the legislative text, but only in Explanatory Notes. The Explanatory Notes stated that *"The relevant parts of the Memoranda and Articles of Association of the incorporated companies listed in paragraph 7.4 are submitted with this Explanatory Memorandum."*
30. However these advisory Notes in 2018 were incomplete, and for example, for Pearson Limited, the Notes showed only page 1 of these company Articles, but there are in fact 4 pages — and the further articles missing from the Memorandum include the purposes not in the public interest, but commercial purposes of lending money, pensions, and *"to promote or concur in the promotion of any company."*
31. Since the text in the Introductory Notes that accompanied the 2018/607 Regulation, which was given to this Committee at the time the Statutory Instrument was considered and passed into law through the negative procedure, left out those further Articles, it may have meant that the full possible purposes of data uses allowed by the Regulation 2018/607 were perhaps not seen by the Committee members, or fully understood before being approved. They were not available for debate in the Committee on July 2, 2018, when the First Delegated Legislation Committee held an annulment debate of the *Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018*, and were not discussed.¹⁷
32. **Is it the intention of the new Regulation SI (2019/TBA) *The Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019* through the new data powers it gives OfS to receive data in paragraphs 28 and 32, to also enable the *distribution by OfS* of that population wide personal data -- of**

¹⁷ Annulment debate Hansard, July 2, 2018 Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018
[https://hansard.parliament.uk/commons/2018-07-02/debates/b015265b-dbf3-48e3-b944-d72d99b5ec78/HigherEducationAndResearchAct2017\(CooperationAndInformationSharing\)Regulations2018](https://hansard.parliament.uk/commons/2018-07-02/debates/b015265b-dbf3-48e3-b944-d72d99b5ec78/HigherEducationAndResearchAct2017(CooperationAndInformationSharing)Regulations2018)

every pupil from state education since 1996 and in perpetuity -- to its own third party prescribed persons, including potentially Pearson Education Limited; for such wide ranging company purposes, through the powers of last year's Regulation? If not, then these purposes should be made explicit and narrowed on the face of the Act or in each Regulation.

a) To carry on in the United Kingdom or elsewhere, all or any of the following trades or businesses in all or any of their branches viz., the business of publishers, printers, booksellers, book binders, lithographers, engravers, die sinkers, print sellers, magazine and newspaper proprietors, advertisers and advertising agents, paper makers, stationers and manufacturers and dealers in all materials and things whatsoever used or employed for or in connection with any of such businesses

b) To carry on in the United Kingdom or elsewhere, all or any of the following trades or businesses in all or any of their branches, the business of educational consultancy, acting as advisors and consultants to governments, local authorities, schools, colleges and other educational establishments, corporations, professional bodies and other parties on all education related matters, including, but not limited to, educational materials, technologies, assessments, learning programmes, test development, processing and scoring services, including course assessments, skills and competency tests and clinical tests for educational needs, and related services, developing programmes for and providing all types of technical and professional training including training on the development of personal competencies, development and delivery of courses and training on all subjects, developing and designing computer systems and software, developing and dealing in software applications and solutions and providing training on such systems and software and other technologies, and, carrying on all things incidental to such businesses

h) To amalgamate or enter into partnership or any joint purse or profit sharing arrangement with and to co-operate in any way with or assist or subsidise any company, firm or person, and to purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person, body or company carrying on any business which this Company is authorised to carry on or possessed of any property suitable for the purposes of the Company

i) To promote or concur in the promotion of any company, the promotion of which shall be considered desirable

j) To lend money to and guarantee or provide security (whether by personal covenant or by mortgage or charge) for the performance of the contracts or obligations of any company, firm or person, and the payment and repayment of the capital and principal of, and dividends, interest or premiums payable on, any stock, shares and securities of any company, whether having objects similar to those of this Company or not, and to give all kinds of indemnities

Extract 5: Only the first part of Pearson Education Limited Memorandum and Articles of Association were included in the Explanatory Note to Regulation 2018/607 Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations (2018) articles 1a-c -- its pages 2-4, and articles h,i,j for example were left out of the text. These additional purposes would also become permitted purposes for Pearson Education Limited for its use of the any new data granted to it via the OfS by dint of paragraphs 28 and 32 in Part 3 of the new Regulation.

SCHEDULE		Regulation 2
Relevant persons and relevant functions		
<i>Relevant person</i>	<i>Relevant function</i>	
Competition and Markets Authority	(a) Its functions under section 215(2) of the Enterprise Act 2002(a) and (b) Its functions under Part 2 of Schedule 5 to the Consumer Rights Act 2015(b)	
A local weights and measures authority in Great Britain	(a) Its functions under section 215(2) of the Enterprise Act 2002 (b) Its functions under Part 2 of Schedule 5 to the Consumer Rights Act 2015 and (c) Its function under article 9 of the Financial Services Act 2012 (Consumer Credit) Order 2013(c)	
Health Education England	Its functions under the Care Act 2014(d)	
Pearson Education Limited (registered company number 00872828)	Its functions pursuant to the objects set out in its Memorandum and Articles of Association(e)	
Vocational Training Charitable Trust (registered company number 02050044)	Its functions pursuant to the objects set out in its Memorandum and Articles of Association	
Gateway Qualifications Company Limited (registered company number 05502449)	Its functions pursuant to the objects set out in its Memorandum and Articles of Association	
Scottish Qualifications Authority	Its functions under the Education (Scotland) Act 1996(f)	
Her Majesty's Revenue and Customs	Its functions under the Commissioners for Revenue and Customs Act 2005(g)	
Office for Standards in Education, Children's Services and Skills	Its functions under the Education and Inspections Act 2006(h)	
Her Majesty's Chief Inspector of Education, Children's Services and Skills	That person's functions under the Education and Inspections Act 2006	
The Office of the Independent Adjudicator for Higher Education (registered company number 04823842)	Its functions pursuant to the objects set out in its Memorandum and Articles of Association	
The Board of the Pension Protection Fund	Its functions under section 175 of the Pensions Act 2004(i)	
Student Loans Company Limited (registered company number 02401034)	Its functions pursuant to the objects set out in its Memorandum and Articles of Association	

Table 2: The prescribed persons in the 2018 Regulations to whom the OfS can pass data on without specified narrow purposes.

33. The answer to the Parliamentary question 156350 (June 2018) stated that the OfS considers that it is '*unlikely that personal data would routinely be shared with non-government bodies*' under these (Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations 2018) regulations.
34. 'Unlikely' is insufficient safeguard for the personal confidential data of over 25 million individuals, ever growing, collected from schools and Alternative Provision, as well as millions enrolled in higher education at the 167 higher education providers reporting statistics to HESA¹⁸. Therefore defenddigitalme recommend limitations of purpose are imposed retroactively on the regulations that enable wide distribution of data.


¹⁸ HESA Statistical bulletins and first releases <https://www.hesa.ac.uk/data-and-analysis/statistical-first-releases>

Office for Students: Data Protection:Written question - 156350

Q Asked by **Gordon Marsden** (Blackpool South) [N]

Asked on: 21 June 2018

Department for Education

 156350

Office for Students: Data Protection

To ask the Secretary of State for Education, whether confidential personal information relating to (a) Higher Education personnel and (b) students may be provided by the Office for Students to (i) Pearson Limited, (ii) the HMRC, (iii) student loans company and (iv) other persons prescribed the Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018.

A Answered by: **Mr Sam Gyimah**

Answered on: 26 June 2018

The purpose of Section 63(4) is to enable the Office for Students (OfS) to provide information to other specified bodies for the purposes of their own important functions, such as investigating fraud. Section 63 does not place limitations on the type of information that may be provided, and therefore it could include personal data. These regulations allow data sharing, they do not oblige it. In practice, the OfS considers that it is unlikely that personal data would routinely be shared with non-government bodies under these regulations. They are in place for circumstances where the OfS or the organisation has identified serious concerns (such as fraud or malpractice) by a provider or its students.

The provision of any personal information must be in accordance with data protection legislation, (such as the General Data Protection Regulation) which imposes strict conditions on the processing of personal information.

We understand that the OfS will publish its collaboration agreements with other bodies on its website and these will set out how the organisations will work together and whether there is also a data sharing agreement in place.

Grouped Questions: [156351](#)

Extract 8: Parliamentary question 156350 (June 2018)

7. Data Sharing decision making and Oversight

34. As a new body the OfS began recruitment with “*considerable public controversy*¹⁹ and *lack of due diligence*” according to the Commissioner for Public Appointments. To ensure public trust is maintained in the institution and data sharing, it is vital -- in particular given the Chair of the OfS’s²⁰ former position²¹ -- that any third-party recipient of data is seen to be necessary, and would not be given, or be perceived to be given, preferential treatment above other commercial companies.
35. Oversight of its datasharing practices must be independent and seen to be free from any potential conflict of interest. That oversight does not currently exist.

8. Part 2(14) New powers under the Digital Economy Act 2017 for fraud

Digital Economy Act 2017

14.—(1) Schedule 8 to the Digital Economy Act 2017⁽²⁷⁾ (specified persons for the purposes of the fraud provisions) is amended as follows.

(2) In paragraph 27, for “The Higher Education Funding Council for England”, substitute “The Office for Students”⁽²⁸⁾.

(3) After paragraph 32, insert—

“32A. United Kingdom Research and Innovation.”⁽²⁹⁾.

(4) Omit paragraphs 33 to 40.

¹⁹ Commissioner for Public Appointments Report from investigation into the appointments to the Board of the OfS <https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2018/02/Commissioner-for-Public-Appointments-Investigation-OfS-Final-.pdf>

²⁰ About the Office for Students <https://www.officeforstudents.org.uk/about/who-we-are/>

²¹ Sir Michael Barber to leave Pearson <https://www.pearson.com/corporate/news/media/news-announcements/2016/11/sir-michael-barber-to-leave-pearson.html>

Extract 8: Part 2(14)

37. Part 5 of the Digital Economy Bill has been controversial from the outset. To expand this, expands its problems that will affect an even wider set of individuals. The personal confidential data of millions of children and young people, will be possible to channel to the long list of Part 5 data recipients, through the OfS new collection powers, to distribute for the purposes of public sector delivery and fraud.
38. The assurances given by the Cabinet Office during the Open Government making of the Digital Economy Act, that such powers would not be used punitively, seem to be slipping away less than three years later, as its scope is expanded.
39. Jerry Fishenden on leaving his position as Co-Chair of the Cabinet Office's Privacy and Consumer Advisory Group (PCAG) in 2017, wrote²² of that primary legislation, *"it seems to me a classic example of what happens when the group's advice and offers of help are repeatedly ignored by officials who should know better."*

9. Fraud, Errors and Redress

40. These powers should also be seen in the current context of punitive powers exerted by public authorities against targeted parts of the population, under the context of fraud and under the Hostile Environment²³ which include the prevention of access to housing by private landlords.
41. The TOEIC English language testing scandal has resulted in about 34,000 foreign students having had their visas cancelled or curtailed and more than 1,000 people were forcibly removed from the UK. It involved the government accusing tens of thousands of students who sat a Home Office-approved test of fraud and cheating.
42. The NAO report from investigation into the removal of TOEIC international students is expected to be published shortly, in late Spring 2019.
43. Separately, the Student Loans Company surveillance of students' social media came to light in 2018 after they wrongfully accused estranged students of fraudulent support claims. The SLC is one of the thirteen named prescribed persons and potential recipient bodies of OfS data.
44. The Student Loans Company has declined in response to FOI²⁴, to state how many students it investigates for fraud, and therefore the necessity and proportionality of this power is hard to assess. However, since it is a named recipient of OfS data, without limitation of purposes, we must assume that data that the OfS may receive,

²² New tech observations from the UK, Jerry Fishenden's blog (May 2017)

<https://ntouk.wordpress.com/2017/05/03/the-canary-that-ceased-to-be/>

²³ Report by the Independent Chief Inspector of Borders and Immigration (2016) An inspection of the 'hostile environment' measures relating to driving licences and bank accounts January to July 2016

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf

²⁴ FOI https://www.whatdotheyknow.com/request/student_data_sharing_policies#incoming-1288009

may be passed on to the Student Loans company (Perchlane Limited) for all its purposes, without limitation.²⁵

45. In one published case of the investigation of an estranged student²⁶, the student's funding was stopped. Their university received a letter informing the institution that the student was under investigation. Months later, the Student Loans Company agreed that they were mistaken. For this student, it was too late to restore their place, their ability to return to the course, and their damaged reputation.
46. There are no published figures how many young people and individuals the SLC investigates for fraud on an annual basis, how many students' are surveilled, and statistics for correct and incorrect cases or accusations made in error, and their outcomes on students' lives.
47. There is no route for redress for wrongful accusations, and the logical conclusion of increasingly the volume of who may be subject to fraud investigations, is that there will be an increase in wrongful accusations. How will this be addressed? And what course of redress will be available to both appeal mistakes, but to claim compensation for life altering effects.
48. The 2017-18 Student Loans Company annual report²⁷ includes the Independent Assessor's concerns about fraud investigations process:

*"Students Unfitted for Support - we have seen a continuing rise in the number of cases where students have been found to be unfitted for support following investigation of suspected fraud. **We would repeat the observations we made last year that to make a finding that a student is unfitted for support and going forward, is a heavy sanction and in our view ought to be applied in only the most obvious of cases.** In the main such a sanction has been quite properly justified but we have seen cases where it has appeared to us that there ought to have been deeper consideration as to the specific circumstances of the case. There was, albeit in only a small number of cases, a too heavy reliance upon the view of a child care provider without more detailed investigation with the member of staff concerned.*

"Evidence Disclosure – we have had some concern over the disclosure, or perhaps non-disclosure of documentation in a small number of cases. We have seen the Counter Fraud Service (CFS) rely on such evidence, for example from childcare establishments, public authorities, and medical practices, which is then not disclosed to the student other than by a reference to it in a telephone interview. Failure to disclose such evidence is likely to breach the basic principles of natural justice since the student will not have the opportunity to make an informed response."

²⁵ Student Loans Company Articles of Association <https://beta.companieshouse.gov.uk/company/02401034/filing-history>

²⁶ The Guardian (August 2018), Student Loans Company spied on vulnerable students' social media <https://www.theguardian.com/education/2018/aug/02/student-loans-company-spied-on-vulnerable-students-social-media>

²⁷ Student Loans Company Annual Report 2017-18 p54/57 <https://defenddigitalme.com/wp-content/uploads/2019/05/2017-18-annual-report.pdf>

10. Why these effects are inappropriate

49. The scale of passing population-wide pupil data to a new Company for unclear purposes which may not be in the public interest, but in commercial interest, is a reflection of past bad practice, and one that the Department for Education is in the process of moving away from.
50. In September 2018, a new 'safe pupil data access' policy began at the DfE supported by the Office of National Statistics (ONS)²⁸, with the intention of ending the unsafe distribution of raw national pupil data. While DfE is still in transition to the new safe model, external data sharing continues, and is documented in the public register of External Data Shares²⁹.
51. Following the change of legislation, since 2012 including the simultaneous expansion of the Prescribed Persons 2009 Act, releases of pupils' data from the Department for Education to third parties have not been anonymous, but have instead been of "identifiable and highly sensitive" (Tier 1), "identifiable and sensitive" (Tier 2), "aggregated but may be identifying due to small numbers" (Tier 3) and "identifying non-sensitive items" (Tier 4). Raw data about millions of individuals were released on a regular basis to over 1,000 third parties - including commercial companies, charities, think tanks, and journalists, and continue to be in 2019 for a more narrow range of users, as the model is undergoing change.
52. This Regulation gives the OfS power to access the same data and to distribute it without limitation to its use. We fear this will be making a significant step backwards - to former, far more dangerous ways of data sharing - distributing raw data to the recipient's desktop, for example, rather than 'distributing' secure access to data in the safe setting under the oversight of the Office for National Statistics or Department for Education.
53. While higher risk data distribution has only been reduced rather than entirely replaced under this new model, it should be unthinkable to now give this body powers to receive bulk copies of the individual-level personal confidential data of an estimated cumulative total of 50 million individuals - growing every year.
54. It is time to put safe boundaries on all data access, address effective public communication, and to establish comprehensive independent and transparent oversight of data sharing across the education sector.

²⁸ Presentation: Modernising 3rd party access to DfE data, Partnership with the ONS Secure Research Service, Neil McIvor and Richard Machen, Data Group, Department for Education, Nick O'Donnell and Sarah Fisher, Research Services and Data Access, ONS (September 2018)

https://defenddigitalme.com/wp-content/uploads/2019/05/ONS-Secure-Research-Service_mcvor2018.pdf

²⁹ DfE External Data Shares register <https://www.gov.uk/government/publications/dfe-external-data-shares>

Annex A: The Digital Economy Act (Part 5) Schedule 8: Specified persons for the purposes of the fraud provisions³⁰ relevant to Part 2(14) of the Regulation -- unconnected from the new powers in Part 3 (28,32)

The Secretary of State for the Home Department.
The Secretary of State for Defence.
The Lord Chancellor.
The Secretary of State for Justice.
The Secretary of State for Business, Energy and Industrial Strategy.
The Secretary of State for Work and Pensions.
The Secretary of State for Transport.
The Secretary of State for Housing, Communities and Local Government.
The Secretaries of State for Health and Social Care and for Housing, Communities and Local Government
The Secretary of State for the Environment, Food and Rural Affairs.
The Secretary of State for International Development.
Secretary of State for Digital, Culture, Media and Sport
The Minister for the Cabinet Office.
Her Majesty's Revenue and Customs.
The Export Credits Guarantee Department.
A county council in England.
A district council in England.
A London borough council.
The Common Council of the City of London in its capacity as a local authority.
The Council of the Isles of Scilly.
The Greater London Authority.
The Chief Land Registrar.
The Big Lottery Fund.
The Nuclear Decommissioning Authority.
The Environment Agency.
The Homes and Communities Agency.
The Historic Buildings and Monuments Commission for England.
The Student Loans Company.
The British Council.
The Arts Council of England.
The English Sports Council.
The Technology Strategy Board.
The Arts and Humanities Research Council.
The Medical Research Council.
The Natural Environment Research Council.
The Biotechnology and Biological Sciences Research Council.
The Economic and Social Research Council.

³⁰ The Digital Economy Act 2017 (Schedule 8) Prescribed persons for the purposes of fraud
<http://www.legislation.gov.uk/ukpga/2017/30/schedule/8/enacted>

The Engineering and Physical Sciences Research Council.

The Science and Technology Facilities Council.

A person providing services to a specified person who—

(a) falls within this Part of this Schedule; and

(b) is a public authority,

in respect of the taking of action in connection with fraud against a public authority.

The Welsh Ministers.

The Counsel General to the Welsh Government.

The Welsh Revenue Authority.

A county council in Wales.

A county borough council in Wales.

A community council in Wales.

A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004, or a scheme to which section 4 of that Act applies, for an area in Wales.

Annotations: Help about Annotation

The Higher Education Funding Council for Wales.

The Natural Resources Body for Wales.

Arts Council of Wales.

The Sports Council for Wales.

The Royal Commission on Ancient and Historical Monuments in Wales.

The National Library of Wales.

A registered social landlord being a body registered in the register maintained under section 1 of the Housing Act 1996.

and

A person providing services to a specified person who—

(a) falls within this Part of this Schedule; and (b) is a public authority.

(defendidigitalme notes on the final Prescribed Person in Part 5 of the Digital Economy Act:
this is almost unlimited: ie any contracted commercial companies and third parties)