

Consultation



The consultation closes at **1700 on 9 June 2022**.

Please submit your response by completing the online form at survey.officeforstudents.org.uk/s/supplementary-consultation-publication-of-information/

If you require this document in an alternative format, or need assistance with the online form, please contact regulation@officeforstudents.org.uk.

Please note: this email address should **not** be used for submitting your consultation response.

Supplementary consultation on publication of information about higher education providers

This document is a short supplementary consultation which proposes amendments to the proposals in the consultation we ran in December 2020 on publishing information about higher education providers.¹ We invite responses from providers and anyone with an interest in higher education.

Introduction

In December 2020 the OfS published a consultation seeking views on the approach we proposed to take to the publication of information about particular providers and particular individuals connected with them.

In April 2022 the Skills and Post-16 Education Bill received royal assent. Section 33 of the new Act² amends the Higher Education and Research Act 2017 (HERA) to make express provision for the OfS to publish information in a wide range of circumstances. Our December 2020 proposals are consistent with these new provisions, and we do not consider it necessary to consult again on those proposals. This means we will continue to consider consultation responses and publish our final decisions in due course. In the meantime, we will continue to make decisions about publication on a case-by-case basis and as set out in the regulatory framework.

However, our experience of regulating since December 2020 has caused us to revisit some particular aspects of our proposals (including in respect of some consequential matters) and to

¹ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

²See www.legislation.gov.uk/ukpga/2022/21/contents/enacted.

change the approach to publication we are minded to adopt. This supplementary consultation sets out these issues and our amended proposals. We are inviting any comments about our amended proposals from higher education providers and others with an interest in these issues by **1700 on 9 June 2022**.

Further information about how to respond to this supplementary consultation is set out in Annex A.

The other aspects of the proposals in the December 2020 consultation, and the reasons for them, are unchanged. This supplementary consultation is also a consultation for the purpose of section 75(8) of HERA.

The December 2020 proposals

We proposed in December 2020 to adopt a general policy for the publication of information about particular providers and particular individuals connected to them, and to provide greater transparency about the types of information the OfS would be likely to publish and the factors to which we would normally expect to have regard in making publication decisions. In making those proposals, we took the view that they were a necessary and proportionate way to ensure that we can publish information about higher education providers, and relevant individuals, where we consider this to be in the public interest, and to do so in a way that meets our public law obligations for a fair decision-making process.

We set out the following proposals:

Proposal 1: Information we would normally expect to publish.

Proposal 2: Information we would not normally expect to publish.

Proposal 3: Factors to which we would normally expect to have regard in making publication decisions.

The details of those proposals, and our reasons for making them, are set out in the December 2020 consultation document.

As part of proposal 2, we said that we **would not** normally expect to publish 'information about an investigation into any type of potential non-compliance with a condition of registration, except where this is relevant to a publication we would expect to make as a result of Proposal 1.'

We explained the reasoning for this as follows:

'We have considered, in particular, whether it would normally be appropriate to publish information about an investigation into any type of potential non-compliance with a condition of registration. We believe this issue to be finely balanced because the normal purpose of an investigation is to consider whether there is evidence of suspected wrongdoing and revealing the existence of an investigation may result in public misunderstandings or speculation about whether wrongdoing has taken place. However, we also consider there will be circumstances where there is a strong public interest in publishing information about the existence of an investigation, for example, where that may be the most effective way of gathering important evidence, such as by encouraging whistle blowers or witnesses to come forward. Therefore, while our policy proposals would mean that we would not normally expect to publish information about investigations (including where they are ongoing), we would always have the discretion to depart from that general policy position in circumstances where there are good reasons to do so. To facilitate

making such exceptions in the exercise of our discretion, our proposals are ultimately designed to help the OfS to balance a number of factors when considering whether publication is appropriate in a particular set of circumstances.’

Amended proposals for matters relating to investigations

We are now proposing the following in relation to the publication of information about a particular provider or a particular individual connected to that provider:

- a. We **would** normally expect to publish information about an investigation³ into any type of potential non-compliance with a condition of registration or into other potential regulatory harm:
 - i. We would normally expect to publish information when we decide to open an investigation (but may also choose to publish information about live investigations at any time after they have been opened).
 - ii. We would normally expect to publish information about the progress of an investigation at key milestones where that investigation has previously been announced, for example, a report of any assessment of quality or standards undertaken for the provider by the OfS or by the DQB.⁴
 - iii. We would normally expect to publish information about any provisional decisions we take as a result of an investigation that has previously been announced.
- b. We **would** normally expect to publish a report of any assessment of potential regulatory concerns, including an assessment of quality or standards undertaken for a provider by the OfS or by the DQB, regardless of whether that report has been produced as part of an investigation or results in an investigation being opened.
- c. We **would** normally expect to publish information about any referral we make to another regulatory or enforcement body, for example, the Competition and Markets Authority (CMA), trading standards, the Charity Commission, the Equality and Human Rights Commission (EHRC) or the police.
- d. In making a decision about publication in any particular case in relation to (a), (b) or (c), we **would** have regard to the factors set out in Proposal 3 in the December 2020 consultation.
- e. We **would** normally seek the views of a provider, and/or an individual connected to that provider where that is relevant, before reaching a final decision about whether to publish information and the information that should be published in relation to (a), (b) or (c).
- f. Where we have published information about a decision to conduct an investigation we **would** publish further information if we subsequently decide to close that investigation without making any finding, or if the findings of that investigation do not result in any further

³ Investigation in this context means a formal investigation into any type of potential non-compliance with a condition of registration initiated by a person authorised to do so under the OfS’s scheme of delegation.

⁴ The designated quality body is an organisation designated by the Secretary of State under paragraph 3 of schedule 4 of HERA. The Quality Assurance Agency for Higher Education is currently the designated quality body.

action. This may range from publishing only the fact that an investigation has been closed to publishing much more detailed information. For example, we may publish reports produced for any purposes connected with a closed investigation (such as reports assessing matters relating to quality or standards) even if those reports were not relied on to make any findings in respect of compliance with regulatory requirements.

Other amended proposals

Page 34 of the OfS's regulatory framework⁵ contains information about our current approach to the publication of information on the Register when the OfS has imposed a sanction on a provider. This includes the following statements:

'Information will be published about any sanctions applied to the provider. This information will be published after the provider has completed any appeal process and remain available until the sanction is withdrawn. The OfS will maintain a summary of sanctions that it has previously applied over the last three years.'

The proposals we have set out in this supplementary consultation would result in publication of information about a provider, or an individual connected with that provider, at an earlier stage of the regulatory process during an investigation. We are therefore also proposing to amend this text in the regulatory framework to ensure it is consistent with the policy approach we are proposing more broadly. We therefore propose to make consequential amendments to the regulatory framework by replacing the statements quoted above with the following:

Information will be published about any final decision to impose a sanction on a provider. The OfS will also normally publish information about a provisional decision to impose a sanction in circumstances where it has already published information about an investigation that led to such a decision being reached.

Reasoning for our amended proposals

These proposals would, if implemented, result in a general policy that we would normally expect to publish a greater range of information than we had originally proposed in the December 2020 consultation. That policy would therefore provide transparency and clarity about the investigations the OfS has opened, the progress of those investigations, or the referrals we have made, and the reasons those actions were considered necessary.

We have changed our proposed position on this issue since December 2020 for the following reasons:

- a. The OfS's new organisational strategy,⁶ published in March 2022, signalled the progression of the OfS from a new organisation in a 'start-up' phase to an established regulator undertaking a more extensive range of enforcement activity, particularly in relation to quality and standards matters.
- b. Our experience of regulating since December 2020 has involved consideration of publication matters in relation to investigations and three issues have arisen in this context. First, there have been cases in which information has entered the public domain about an

⁵ See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

⁶ See www.officeforstudents.org.uk/publications/office-for-students-strategy-2022-to-2025/.

OfS investigation and we have then needed to make public statements to ensure that information is accurate. It would have been more helpful in these circumstances if we had proactively published accurate information in the first place. Second, there have been cases in which we would have been likely to decide that the public interest in publication was sufficiently strong to outweigh other considerations but we felt constrained in publishing, including because of the position we had set out in the December 2020 consultation. Third, we are routinely asked whether we are investigating issues in a particular provider and, where we have publicly stated that we are investigating, we are routinely asked about the progress of our investigation. We agree that there are strong public interest arguments to publish in these circumstances.

- c. The Skills and Post-16 Education Act 2022 changes the legal context in which the OfS makes decisions about the publication of information about particular providers and particular individuals connected to them. It amends HERA to give the OfS an express power to publish notices, decisions and reports given or made in the performance of its functions, and this includes publication for both provisional and final decisions. In deciding whether to make such publications, we are required to consider a range of matters. We take the view that these provisions are consistent with the proposals in the December 2020 consultation and, in particular, are consistent with the factors to which we would have regard on the basis of Proposal 2 in that consultation. Further, the new sections in HERA expressly provide for the publication of a decision to open an investigation and, in those circumstances, put in place a safeguard requiring us to publish further information if an investigation is subsequently terminated without a formal finding, or without further regulatory action. We therefore take the view that Parliament has signalled that we should publish information in these circumstances and our amended proposal reflects these provisions.

We have also taken the view that if we do decide to adopt a policy to publish information about an investigation, we would also normally publish information about the progress of that investigation, including any provisional decisions we take as a result. This means, for example, that we would publish information about a provisional finding of a breach of a condition of registration. We consider that there is a strong public interest in publishing information about provisional decisions taken as a result of investigations that have previously been announced. For example, at such an important milestone there is likely to be a strong public interest in transparency to further encourage parties with relevant information and evidence to come forward to help inform the OfS's decision-making process.

We have also proposed to publish a report of any assessment of potential regulatory concerns, including an assessment of quality or standards undertaken for a provider by the OfS or by the DQB, regardless of whether that report has been produced as part of an investigation or results in an investigation being opened. We take the view that publication of a report in these circumstances is of particular public interest because it would allow us to confirm, or otherwise clarify, important matters about a provider. For example, our view of whether quality and/or standards are being maintained by a provider is important information that students would wish to have in making decisions about whether to study, or continue to study, with that provider.

We recognise that we have now provisionally taken a different view to that expressed in the December 2020 consultation in relation to investigations. We continue to believe publication in the circumstances about which we are now consulting is a finely balanced issue. For example, the

normal purpose of an investigation is to consider whether there is evidence of suspected wrongdoing. Revealing the existence of an investigation may result in public misunderstandings or speculation about whether wrongdoing has taken place. Similarly, the normal purpose of making a referral to another body is to allow that body to reach its own view of relevant matters. Revealing the existence of a referral may result in public misunderstanding. However, we also consider that there is a strong public interest in publishing information about the existence of an investigation, any provisional decision we make as part of that investigation, or a referral.

In the December 2020 consultation we suggested that publication of information about an investigation may be the most effective way of gathering important evidence, such as by encouraging whistle blowers or witnesses to come forward. We now consider that there are other circumstances in which publication would be likely to be in the public interest. Within a general policy that normally points towards publication, the factors in Proposal 2 of the December 2020 consultation would mean that the OfS would consider carefully whether publication was appropriate in each case. For example, we may be less likely to publish information about an investigation into a provider's financial position where we take the view that publication would be likely to cause deterioration of that position, or about an investigation of allegations of fraud where maintaining confidentiality of investigatory steps is important. Conversely, we may be more likely to publish information about an investigation into concerns about quality, or compliance with consumer protection law, because current and future students may wish to have that information.

Therefore, while our proposal would mean that we would normally expect to publish information about an investigation or referral (including where an investigation is ongoing), we would always have the discretion to depart from that general policy position in circumstances where there are good reasons to do so. To facilitate making such exceptions in the exercise of our discretion, the factors in Proposal 2 of the December 2020 consultation are designed to help the OfS to balance a number of factors when considering whether publication is appropriate in a particular set of circumstances.

Matters to which we have had regard in making our amended proposals

Annex E of the December 2020 consultation set out the way in which we had regard to various matters in reaching our proposals. That account remains relevant to the amended proposals in this supplementary consultation, although we note that statutory guidance referred to in that consultation has since been rescinded.

In relation to the OfS's general duties as set out in section 2 of HERA, we recognise that the amended proposals mean that we are proposing to place less weight on institutional autonomy when compared with the position in the December 2020 consultation. We consider this to be appropriate because our amended proposals maintain a principles-based approach to making decisions about publication because using rigid rules-based mechanisms would not allow us to make decisions about publication that take account of a provider's particular context. We are therefore giving less weight to autonomy because this is consistent with the need for the OfS to be able to publish information it considers necessary to protect the public interest and the interests of students.

Since the December 2020 consultation we have received further statutory guidance from ministers on the basis of section 2(3) of HERA. We consider that guidance issued in March 2022 which encourages the OfS to 'implement a visible and effective inspections regime' is particularly relevant to our amended proposal.

Our views about the appropriate approach to the public sector equality duty and the Regulators' Code are unchanged from those set out in the December 2020 consultation.

Next steps

We will consider responses to this supplementary consultation together with responses to the December 2020 consultation. We will publish a single summary of responses in early summer 2022. We will explain how and why we have arrived at our decisions, and how we have addressed any points raised by respondents. We will then set out next steps in the policy and implementation process.

Annex A: How to respond

The consultation closes at **1700 on 9 June 2022**.

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How we will treat your response

We will summarise the responses to this supplementary consultation as part of our analysis of responses to the December 2020 consultation. We will publish our analysis on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy).⁷

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

⁷ Available at www.officeforstudents.org.uk/ofs-privacy/.