

Office for
Students



Consultation on publication of information about higher education providers

**Analysis of responses to consultation
and decision**

Reference OfS 2022.56

Enquiries to regulation@officeforstudents.org.uk

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The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

Our four regulatory objectives

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

Documents referred to in this analysis of consultation responses and decisions

In this document we refer to the following documents:

- December 2020 consultation on publication of information about higher education providers (OfS 2020.64) (www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/)
- May 2022 supplementary consultation on publication of information about higher education providers (www.officeforstudents.org.uk/publications/supplementary-consultation-on-publication-of-information-about-higher-education-providers/)
- The OfS regulatory framework for higher education in England (OfS 2018.01) (www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/).

Introduction

What we consulted on

1. The Office for Students (OfS) receives and generates information about the higher education sector as a whole and about individual higher education providers' performance and regulatory compliance. We routinely consider whether it would be appropriate to publish such information, having regard to the principles of best regulatory practice, including the principle that regulatory activities should be transparent and accountable.
2. Our initial consultation ran from 15 December 2020 to 12 March 2021, and we refer to this as the 'December 2020 consultation' where it is necessary to distinguish it from the supplementary consultation. The supplementary consultation ran from 12 May to 9 June 2022, and we refer to it as the 'May 2022 consultation' or the 'supplementary consultation' where the distinction is necessary.
3. In the December 2020 consultation we tested our general view that, while there are some types of information that we do not normally publish, it is appropriate for us to publish information about our regulatory decisions. Our ability to publish information about an individual provider was tested and confirmed in October 2019 in the judgment of the High Court in *R (on the application of Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin) which was subsequently endorsed by the Court of Appeal in *R (on the application of the Governing Body of X) v Ofsted* [2020] EWCA Civ 594. We note the Court's confirmation of the 'right of members of the public – in particular, existing and potential students of [a provider] – to receive information which OfS wishes to communicate to them in the exercise of its statutory functions'.¹
4. We sought views on our proposed approach to the publication of information about particular providers and particular individuals connected with them. The intended effect of our proposals was to establish the OfS's general policy approach to the publication of such information, and to provide greater transparency about the types of information the OfS is likely to publish and the factors to which it normally expects to have regard in making publication decisions.
5. The consultation also set out the information that we proposed that we would not normally expect to publish because we anticipated that the reasons for not publishing this information would normally outweigh the public interest in publishing it. While there may always be public interest in the information that we hold as a regulator, it is important that we weigh different interests and publish information only where we find that the public interest does outweigh other relevant factors, or where we have a legal duty to do so.
6. The proposals in the December 2020 consultation were:
 - **Proposal 1: Information we would normally expect to publish.** The consultation document included a table listing the different types of information that would fall into this category.
 - **Proposal 2: Information we would not normally expect to publish.** The consultation document included a table listing the different types of information that would fall into this category.

¹ *R (on the application of Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin) at paragraph 30.

- **Proposal 3: Factors to which we would normally expect to have regard in making publication decisions.** The consultation document set out the relevant factors.
7. Our experience of regulating since December 2020, when the consultation was originally published, caused us to revisit certain aspects of our proposals, prompting a short supplementary consultation in May 2022, which proposed amendments to the approach we were minded to adopt. In particular the supplementary consultation proposed that we would ‘normally expect to publish’ information relating to an investigation, a referral to another regulatory or enforcement bodies, and a report of any assessment of potential regulatory concerns.
 8. In addition, section 33 of the Skills and Post-16 Education Act 2022 has introduced sections 67A to 67C to the Higher Education and Research Act 2017 (HERA), which make express provisions in relation to the publication of information.² These sections give us clear statutory powers to publish notices, decisions and reports in the performance of our functions; this includes publishing decisions to conduct or terminate an investigation.
 9. Our consultation did not make proposals in relation to the publication of data and analysis about particular providers, or particular individuals connected with them, where this is not part of a regulatory decision that was set out in Table 1 in Annex B of the 2020 consultation document. This is because we expected to consult on those matters separately, and have now done so in some areas.

Feedback and analysis

10. We received 110 responses across both consultations, the majority of which were from higher education providers, their staff, sector representative groups or sector mission groups. All responses received were considered, including those received after the submission deadline.
11. We undertook an analysis of the feedback that we received. In this document we identify and discuss the most significant issues raised by respondents. We have split feedback into three broad areas:
 - information we would normally expect to publish
 - information we would not normally expect to publish
 - our decision-making process and the impact of our proposals.
12. We discuss feedback in more detail in these sections, but have included here a summary of the main themes and any overarching themes:
 - a. There was broad support for a general policy about publication, and general agreement that the OfS’s regulatory activities should be transparent and accountable.
 - b. There was support for most of the information we proposed to normally publish or normally not publish. The notable exception to this was our proposal to publish information about an investigation before a final outcome is reached; some respondents considered this could lead to public misunderstanding and the outcome of an investigation being prejudged.
 - c. Points were made about the potential impact on individuals connected with a provider when the OfS publishes information; this was particularly raised in relation to cases

² The Skills and Post-16 Education Act 2022 received royal assent in April 2022, and can be accessed at <https://www.legislation.gov.uk/ukpga/2022/21/section/33/enacted>.

where an individual's interests may not align with those of the provider with which they are connected.

- d. An overarching theme that was raised by respondents in relation to the matters listed in 'Information we would normally expect to publish' was that publication could cause (potentially irreversible) reputational damage to a provider, which could lead to knock-on consequences for student recruitment and its financial viability and sustainability. This was of particular concern in relation to the publication of information about a provider's compliance with conditions of registration or about an investigation.
 - e. There were requests for a provider, and any relevant individuals connected with that provider, to be given the opportunity to engage with the OfS before any publication, to ensure any information published is accurate, and to ensure all relevant factors have been taken into account before a final decision about publication is made.
13. Respondents also asked for further information about the practical arrangements for publishing information, such as content, timing and duration, and how the OfS's decision-making process would work in practice.

Final decision

14. We have decided to implement the proposals in broadly the same form as we consulted on in the December 2020 consultation, as updated and revised in several important respects in the subsequent supplementary consultation of May 2022, and with some specific amendments described in paragraph 15 below, having taken into consideration the responses received. We consider that this is an appropriate way to achieve our policy objectives, which are in the public and student interest.
15. In particular we have amended the factors we will consider to more explicitly reflect the legal requirements placed on the OfS, in particular by section 67A of HERA. As part of this change:
- a. We now state that we **will** consider these factors rather than **normally** consider them. We take the view that this more accurately reflects the nature of relevant legal duties that require the OfS to have regard to various statutory considerations, such as the factors set out in section 67A of HERA.
 - b. However, we also consider that it is important to be clear that the OfS retains discretion in respect of how we have regard to, and the weight we apply to, different statutory factors. We are also therefore making it clear that we will consider the statutory factors in a manner the OfS considers appropriate, in all publication decisions, including when these decisions are in line with our general policy. To reflect this discretion, we have also clarified that the specific examples listed under the headings that relate to statutory factors are illustrative and non-exhaustive examples and therefore the OfS is not adopting a general policy approach of having regard to each of the examples when making a publication decision.
 - c. We have added a new factor to reflect the requirement in section 67A to consider 'the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual'. We consider this is relevant to the points made by respondents about the potential impact of publication on individuals.

- d. We have removed the proposed reference in the factors to ‘Principles from relevant legal cases or judgments insofar as they remain good law’, as we do not have a legal duty to consider these matters in each decision (although we may still do so where we consider it relevant and appropriate).
16. We have also provided further information about the practical arrangements for publication, as some respondents asked for further information on matters such as duration of publication, timing of publication, and the opportunities for a provider to engage with the OfS about publication decisions.
17. We have published consequential changes to the regulatory framework. We have updated the table ‘Content of the Register’, which sits under paragraph 72 of the regulatory framework. This table sets out the information we intend to publish in a provider’s Register entry.
18. We have published Regulatory advice 21, which sets out the OfS’s approach and general policy to the publication of information. This provides transparency about the types of information we would or would not normally expect to publish about providers, and individuals connected with them, and the factors we will consider in reaching our decisions about publication.

Matters to which we have had regard in reaching our final decisions

The OfS’s general duties

19. We have had regard to our general duties as set out in section 2 of HERA. The general duties that we consider particularly relevant to these decisions are (b) quality, choice and opportunities for students; (c) competition where this is in the interests of students; (d) value for money; and (g) best regulatory practice. The principles of best regulatory practice include, in particular, considerations of transparency, accountability and proportionality. We have also had regard to (a) the need to protect institutional autonomy insofar as that is consistent with the need for the OfS to be able to publish information that it considers appropriate to protect the public interest and the interests of students, and had regard to (e) equality and diversity in relation to access and participation
20. We have considered the principles of best regulatory practice and, in particular, considerations of transparency, accountability and proportionality. Our decisions are designed to ensure that the OfS’s general regulatory approach and the way this is applied to individual providers is transparent and accountable. We have had regard to considerations of proportionality in setting our policy, for example in reaching our decisions about the sorts of cases where we would normally expect not to publish information. We consider the policies on which we have decided to be appropriate in ensuring that the OfS can make decisions about publication for individual providers on a consistent and transparent basis.
21. We have considered our general duty to have regard to the need to promote greater choice and opportunities for students. We take the view that adopting a general policy in relation to the publication of information about individual providers is appropriate to support informed choice by students about what and where they wish to study. This is the case whether that information presents a positive or negative view of a provider. Therefore, we consider our approach to publication of information is consistent with this general duty.
22. We have considered our general duty to have regard to the need to encourage competition, where that competition is in the interests of students and employers. Competition could be encouraged by removing regulatory barriers, such that any provider is able to compete for

students, regardless of the regulator's view of that provider. However, our view is that it would be in the interests of students to make certain regulatory information publicly available to enable them to make informed choices about study, particularly students from underrepresented groups, or with protected characteristics, who may not have access to the information, advice and guidance needed to make appropriate choices. The role of the regulator in this context is to ensure that reliable and relevant information is published and available to ensure that students are able to choose from a variety of providers and courses that meet their needs, and we consider our approach to publication of information provides this.

23. We have considered our general duty to have regard to the need to promote value for money in the provision of higher education and we consider that this signals the importance of value for money for both students and taxpayers. Most students pay significant sums for their higher education and incur debt for tuition fees and maintenance costs whether or not a course represents value for money. Investing in a higher education course without access to information that would allow a student to make judgements about value for money would not be appropriate. Similarly, taxpayers contribute significantly to higher education through the provision of government-backed student loans and, for some providers, public grant funding. Transparency about individual providers in return for this investment is an important component of value for money. To help protect the interests of students and taxpayers, we consider that it is appropriate to adopt a general policy about publishing information in the way described in this decision, and that this approach is in line with this general duty.
24. We consider that our general duty in relation to institutional autonomy will be a potentially relevant consideration because it encompasses 'the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way', and this freedom could be argued to include providers taking their own decisions about whether information should be published about their affairs. The OfS is required to have regard to the need to protect institutional autonomy. It does not, however, have an absolute obligation to protect the autonomy of providers. Our policy takes 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 insofar as this is consistent with the need for the OfS to be able to publish information it considers appropriate to protect the public interest and the interests of students.
25. We have considered our general duty in relation to the promotion of equality and diversity in relation to access and participation and concluded that the positive impacts of the policy, such as increasing transparency and improving providers' compliance with conditions of registration, outweigh the negative impacts identified.

The OfS's functions

26. We have had regard to our functions set out in HERA:
 - a. The Regulations made under section 3(6), which set out the information that must be contained in a provider's entry in the OfS Register.³

³ The Office for Students (Register of English Higher Education Providers) Regulations 2017 (SI 2017/1196), which are available at <https://www.legislation.gov.uk/uksi/2017/1196/made>.

- b. Section 11, which requires us to publish annually a list of registered providers that have a fee limit condition and the level of that limit.
- c. Section 16, which requires the Register to state that a provider's registration is suspended, during any suspension, and to show the limits and end date for that suspension, where it is known.
- d. Sections 18 and 22, which require us to publish a list of providers that have been deregistered (including through voluntary deregistration), including information about any transitional provisions applying to each provider that mean that it is treated as still being registered for certain specific purposes.
- e. Section 67A, which allows us to publish notices, decisions and reports given or made in the performance of our functions.
- f. Section 67B, which requires that if we publish a decision to conduct an investigation which identifies a higher education provider or other body or individual whose activities are being, or to be, investigated, and we terminate the investigation without making any finding, or the findings of the investigation (relating to the higher education provider, body or individual) do not result in us taking any further action, then we must publish a notice stating that fact.

Guidance issued by the Secretary of State

- 27. We have had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically: 'Guidance to the OfS on strategic priorities for financial year 2022-23' (31 March 2022).
- 28. For example, we have generally had regard to the Minister's comments in 'Guidance to the OfS on strategic priorities for financial year 2022-23 (31 March 2022)' when reaching our decision to normally expect to publish information about an investigation at a provider: 'Our expectation is that the OfS should deploy [its] regulatory intelligence to implement a visible and effective inspections regime against the other B (Quality) conditions of registration...'

The Regulators' Code

- 29. We have had regard to the Regulators' Code. We have had regard to the entirety of the code, and the sections that in our view are particularly relevant to our decisions are:
 - a. Section 1.1, which emphasises the importance of regulators avoiding unnecessary regulatory burdens through their regulatory activities and choosing proportionate approaches to those they regulate. We have considered proportionality in setting our general policy. Moreover, our view is that the OfS's response to this consultation will reduce overall regulatory burden in two ways:

The burden on providers is better minimised if they have a clear understanding of our approach, our requirements and what to expect in their interactions with the OfS. By setting out our approach to the publication of information in Regulatory advice 21 we are increasing transparency in this area (see also discussion of section 6 of the code, in bullet point d below). This will also give more certainty to providers.

Publication of information about regulatory activity helps to incentivise compliance from all providers more generally, which in turn should reduce the need for more intrusive regulatory action.

- b. Section 2, which discusses the importance of regulators providing simple and straightforward ways to engage with those they regulate, to offer views and contribute to the development of their policies. We have given providers opportunities to contribute to the development of our policy via the consultation on our proposal, and the supplementary consultation on the subsequent refinements to this proposal.
- c. Section 5, which discusses the need for regulators to ensure clear information, guidance and advice is available to help those they regulate to meet their responsibilities to comply. Our publication of Regulatory advice 21 will ensure providers understand the OfS's approach to publication matters.
- d. Section 6, which discusses the need for regulators to ensure that their approach to their regulatory activities is transparent. Our decisions about our approach to the publication of information will increase the amount of information in the public domain about our regulatory activities and so aid transparency. We are also publishing Regulatory advice 21, which sets out in detail our general approach to the publication of information and what providers can expect in this regard, thus increasing the transparency of our approach.

The public sector equality duty

- 30. We have had regard to the public sector equality duty (PSED). As part of the consultation, we invited comments on the impact of our proposed policy on those with protected characteristics. We reviewed all responses fully and considered the points that had been raised. Our overall assessment is that the positive impacts of the policy outweigh the negative impacts identified. This has been explored further in paragraphs 174 to 190.

Information we would normally expect to publish

In December 2020, we asked for comments about the proposal for the information we would normally expect to publish. In May 2022, we asked for comments about some amended and additional proposals about what we would normally expect to publish.

General views

Summary of responses

- 31. Many respondents agreed that the OfS's regulatory activities should be transparent and accountable. Some considered that our proposals would support our stated policy objectives set out in the consultation. Others did not agree. For example, they questioned how information about compliance with conditions of registration would inform students' decision-making. Some also suggested that some of our policy objectives, including visibility of regulatory action, sector learning and incentivising compliance, could be met through the publication of anonymised data, summary information and/or sector-wide information instead.
- 32. Many respondents also commented on the framing of our proposal; 'information we would **normally expect** to publish'. Some suggested that our proposals provided some clarity. Others considered our proposals to be ambiguous and requested more information about the circumstances in which we might depart from the policy (and not publish this information). Some went further, advocating for a more rules-based approach in which we set out information that we 'would' publish, thereby providing more certainty.

33. Some respondents suggested additions to our list of subject matters that we would normally publish, such as data relating to student mental health and wellbeing.
34. A few respondents suggested we review our policy approach to the publication of information after a time, to assess whether it had been effective in achieving its goals and what the impact had been.
35. A few respondents asked what further changes to the regulatory framework would flow from our policy proposals and, in some cases, suggested that the OfS should consult further on those changes before implementing them.⁴

OfS response and decision

36. The matters that, under our general policy, we would normally expect to publish are those where we consider there to be an overriding public interest in publication. In other words, we consider that, normally, the public interest in publication would outweigh any other factors. Conversely, the matters that we would normally expect **not** to publish are those where we consider that other factors, normally, outweigh the public interest in publishing that information.
37. We have provided at Table 1 in Annex B the types of information we would normally expect to publish. Where we consider it appropriate to publish information of the types set out in Table 1 in Annex B that relate to particular individuals connected to a provider, we would normally expect to do so.
38. The framing of our policy – ‘normally expect’ to publish, or not to publish – is important. In our view a more rigid or rules-based system as requested by some respondents, for example setting out a blanket policy on matters that we would, or would not, always publish, would fetter our discretion and be inconsistent with our public law obligations. Our policy approach therefore allows us to make decisions that take account of the particular circumstances of a case and ensure we have regard to the considerations under section 67A of HERA, which we have a statutory duty to consider. We recognise this may make our decision-making process more complex in some cases, and reduce the certainty providers have about whether information relevant to them will be published, but for the reasons given it would not be appropriate for the OfS to seek to fetter our discretion in relation to publication decisions. Some of the information that we would normally expect to publish is more routine and factual, for example, information that we are required to publish on the face of the OfS Register under regulations made under section 3(6) of HERA, such as the fee limits that apply to the provider and whether it has degree awarding powers, and decisions to register a provider.
39. We remain of the view that it is in the public interest to adopt a general policy about publishing other information, such as non-compliance with one or more conditions of registration, or the opening, progress or outcome of an investigation, which may involve more complex issues that are specific to a provider’s context. Publishing this information will also serve to assist students in their decision-making. However, we will consider relevant factors including student, public and provider interests to determine whether to make an exception to our general policy. Again, as in all decisions that we make, we will have regard (in the manner the

⁴ In the consultation documents, we said that we would make consequential amendments to the regulatory framework to ensure it was consistent with the final decisions on our policy proposals, and that the consultation should be regarded as a statutory consultation under section 75 of HERA, for those purposes.

OfS considers to be appropriate) to our general duties in section 2 of HERA and to other relevant matters, such as the statutory requirements set out in section 67A(5) of HERA.

40. We note that some respondents wanted more information about how we would apply this policy. Regulatory advice 21 sets out the framework within which decisions about publication will be made. We have explained our general approach to decision-making, including how we will have regard to the factors in the student, public and provider interest, in more detail in paragraphs 128 to 146.
41. Some respondents suggested that the OfS should complete an equality impact assessment in deciding whether or not to publish information. We agree that it is important to consider equality matters as part of publication decisions. The OfS is subject to the PSED and will have due regard to relevant matters as we consider appropriate.
42. The list of information we would normally expect to publish comprises matters that are directly related to regulatory decisions by the OfS, or to information we generate or collect relevant to such decisions. Some respondents suggested we should publish additional matters, such as data relating to student mental health, that may not be directly linked to regulatory decisions. We did not consult on proposals in relation to the publication of data and analysis about particular providers, or particular individuals connected with them, where this is not part of a regulatory decision set out in Table 1 in Annex B. We plan to consult separately on these issues, and have now done so in some cases.
43. In terms of reviewing the impact of this policy, we consider that our general policy approach will facilitate the OfS giving appropriate consideration of the potential impact of publishing information in individual cases.
44. We have made consequential amendments to the table set out under paragraph 72 of the regulatory framework, to ensure it is consistent with the policy that we are now adopting. These amendments are highlighted in Annex C to this document. They flow from the policy that we consulted on, and we indicated in both consultation documents that we intended to make consequential arrangements to the regulatory framework as appropriate. The consultation was framed as a consultation for the purposes of section 75(8) of HERA.
45. In Regulatory advice 21, we have added information relating to the approach we will take to the publication of information about investigations. We have explained this in more detail in paragraphs 60 to 77.

Specific subject matters

46. Many respondents commented more specifically on the subject matters that we proposed would normally be published and on the information that we proposed would be included in the publication of those subject matters. The majority of comments related to: information relating to a provider's compliance with conditions of registration; information relating to individuals connected with a provider; and information relating to investigations.

Compliance with conditions of registration

Summary of responses

47. Common themes in comments relating to publication of information about a **provider's compliance with conditions of registration** included:
 - a. Overarching comments about reputational damage for a provider as a result of a publication, with consequential negative outcomes for its students, staff and others.

- b. Points about the publication of information relating to 'likely non-compliance', with some seeking more information about when we may do this and some suggesting that we should never do this.
- c. Mixed views on whether the OfS should publish its underlying assessment of a provider's non-compliance with conditions of registration. Some respondents suggested it would support transparency of OfS decision-making, while others were concerned about the potential impact it could have on a provider's reputation.
- d. Points that information about the imposition of a sanction could be misinterpreted without adequate contextual information about the provider. For example, the imposition of a monetary penalty may lead students and others to make incorrect assumptions, either about the severity of the breach or the financial impact of the penalty on a provider, without contextual information about the provider and the breach.
- e. A view that information about the imposition of a sanction, such as a monetary penalty, should not be published until any representations or appeals processes have been completed. Some respondents suggested that publication of information about sanctions would itself amount to a sanction, which they thought was not appropriate.
- f. A suggestion that publication should be limited to serious cases of non-compliance, taking into account the severity of the breach and the provider's actions following the breach. It was also suggested that new or emerging providers and small and specialist providers may be disproportionately affected by publication of information about non-compliance, as they have limited resources available to ensure regulatory compliance.
- g. A view that when publishing information, the OfS should give reasons for that publication, including why that publication is in the public interest.

OfS response and decision

- 48. We have considered the issue of potential reputational damage for a provider and consequential impacts on its staff and students. We note that the factors set out in section 67A(5) of HERA and in Annex D mean that we will consider the interests of providers and students as well as the risk of information seriously and prejudicially affecting the interests of any body or individual to whom it relates. We nevertheless continue to consider that there will often be public, provider and student interest in publication and that it is appropriate for this to be information that we normally expect to publish.
- 49. Our reference to 'likely' non-compliance in Annex B of the consultation reflects the fact that we may impose a specific condition of registration in situations where we identify, on the basis of evidence we receive, that there are wider regulatory concerns and/or an increased risk of future non-compliance with a condition (or conditions) of registration for that provider, rather than only when a breach has been identified.
- 50. We also consulted on the ancillary information that we would in particular consider including in a publication (in relation to subject matters that we would normally expect to publish under our general policy). We consider that issue further in paragraph 84 but note here that, for some subject matters, the ancillary information may include our detailed assessment of the underlying matter. That detailed assessment may, of course, include information about an investigation.
- 51. Some respondents suggested that we should only publish information about 'serious' breaches or breaches of 'more important' conditions of registration, and/or that we should

incorporate an additional 'materiality' test into our approach. We do not consider it appropriate for our general policy to limit publication to particular types of non-compliance. Our conditions work together to protect the interests of students, and, while our view of the severity and impact of a breach will depend on the circumstances of a particular case, we are not persuaded that any breach should be thought of as merely 'technical'. We therefore consider it is appropriate for our general policy to cover publication of information about any actual or likely non-compliance.

52. We also do not agree with the suggestion that our general policy should include an additional 'materiality' test. This is because our policy approach sets out a broad framework within which decisions will be made and relevant statutory factors already capture potentially relevant matters. When making publication decisions we will have regard to the individual circumstances of a case and relevant statutory factors in a manner the OfS considers to be appropriate. For example, this would include having regard (in a manner the OfS considers to be appropriate) to statutory factors relating to proportionality and whether, in the opinion of the OfS, publication of information may seriously and prejudicially affect the interests of a body or individual.

Individuals connected with a provider

Summary of responses

53. Common themes in comments relating to publication of information about **individuals connected with a provider** included:
- a. Requests for further information about how the OfS defines 'individuals connected with a provider' and the scope of the proposal, for example whether the OfS would publish information not directly linked to an individual's role within the provider.
 - b. Questions about the lawful basis for publishing information about connected persons and why we consider it to be in the public interest, including a suggestion that the OfS does not have authority to determine whether an individual is a 'fit and proper person'.
 - c. Points that publication may damage the reputation and professional standing of an individual, or adversely affect their future career opportunities, mental health or wellbeing. The risk of future publication may also affect providers' ability to recruit accountable officers or governing body members.
 - d. A suggestion that the OfS should consider the privacy of the individual involved, and any information published should comply with the requirements of the Human Rights Act 1998 and data protection legislation. Some respondents invited the OfS to take into account or follow the existing guidance and precedent set by the Information Commissioner's Office, First-tier Tribunals, and pre-existing public registers for disqualified company directors or charity trustees, when developing its own approach.
 - e. A view that an individual's interests should be taken into account and reflected in the factors to which we will have regard when making publication decisions, and that the OfS should engage with an individual before publication.
 - f. Comments on the timing of publication, including that publication should be delayed until any related criminal or other investigation had been concluded, to avoid prejudicing the outcome of those investigations.

OfS response and decision

54. When identifying individuals connected with a provider, we expect to apply the ordinary meaning of the word 'connected' (i.e. having a link between them); this is likely to include staff and contractors acting on behalf of a provider in circumstances where the conduct of such persons may be directly or indirectly relevant to a regulatory concern or risk identified by the OfS. Our direct interest is in these types of regulatory concerns and risks about providers, rather than about individuals in their own right, and this will also be reflected in the type of information we publish.
55. Some respondents asked about the legal basis for the OfS publishing information about an individual connected with a provider. We consider that the OfS's power under section 67A of HERA covers the publication of notices, decisions and reports given or made in the performance of our functions irrespective of whether the information relates to higher education providers, individuals or other persons.
56. Some respondents asked whether the OfS has authority to decide whether a person is 'fit and proper'. An example of the OfS's 'relevant functions' for the purpose of section 67A of HERA would be the regulatory obligations we impose relating to the public interest governance principles which include an expectation that certain individuals are 'fit and proper'. It follows, for example, that the OfS may make findings about such individuals in that context, such as in circumstances where there is a finding that a provider has breached a condition of registration that relates to those principles, or where a specific condition of registration is being imposed to address a risk of a breach in respect of such conditions or a wider regulatory concern in respect of the public interest governance principle.
57. Respondents also suggested that it would be necessary to consider the privacy rights of an individual under the Human Rights Act 1998. Our policy approach sets out a broad framework within which decisions will be made, and relevant statutory factors in section 67A of HERA already capture matters relevant to privacy, such as the factors relating to the public interest and provider interest.
58. We agree that, when we make publications involving individuals, this could affect any ongoing criminal or other investigations involving those individuals, which is why we will consider the timing and content of any publication, in the way we consider appropriate, during our decision-making process.
59. Respondents asked us to consider the interests of a connected individual themselves, stating that there may be situations where the interests of a provider and the interests of an individual do not align; for example, if a case relates to whistleblowing or if an individual is no longer connected with a provider when the OfS publishes information. We will of course consider relevant factors in individual cases. To ensure our position is clear for individuals we are also including in our published factors the requirement under section 67A(5) of HERA for us to consider 'the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual'.

Investigations

Summary of responses

60. The December 2020 consultation proposed that we would not normally publish information related to investigations, except where this was relevant to a publication we would expect to make as a result of Proposal 1. Many respondents expressed broad support for this approach, but we also received responses that:
 - a. Sought further information about what constituted an ‘investigation’, the criteria for opening one, how it would be conducted and how robustness and objectivity would be assured.
 - b. Suggested we should never publish information about an investigation while it was in progress, arguing that doing so risked prejudicing the outcome and was unjust. Some respondents preferred publishing information only about concluded investigations, or only in cases where a breach of a condition of registration had been confirmed or a sanction imposed.
 - c. Considered that an unacceptable risk of lasting reputational damage to a provider or individual existed even if an investigation concluded that there had been no wrongdoing, and would increase if investigations took a long time to conclude.
 - d. Disagreed that publication might encourage others to come forward with further evidence.
61. As set out in paragraph 7, we published a supplementary consultation in May 2022 because our experience of regulating between December 2020 and May 2022 suggested that we should amend our proposals, including by proposing that we would normally publish information about an investigation.
62. Some respondents questioned the OfS’s rationale for making changes to the initial proposals, suggesting that the public interest did not outweigh the interests of a provider in practice. They suggested that the desire to provide transparency about opening an investigation did not take into account the possibility of the OfS’s impartiality being reduced and the outcomes of such investigations being pre-judged. Respondents commented on the importance of considering these factors in order to make fair, proportionate, robust decisions in relation to the publication of information about a provider under investigation.
63. A few respondents to the supplementary consultation disagreed with the consultation’s interpretation of the March 2022 ministerial guidance that to publish information about investigations would assist the implementation of a ‘visible and effective inspections regime against other B (quality) conditions of registration’. Respondents suggested that this did not mandate or warrant the publication of information about providers under investigation. Respondents argued that the fact of the OfS being asked whether a provider is under investigation does not demonstrate that there is a legitimate public interest in publication.
64. Respondents also made reference to the new provisions in sections 67A to 67C of HERA, which give the OfS express publication powers and protection from defamation claims. It was suggested that the policy proposal to normally publish information about investigations might contravene the requirement to consider the factors specified in the legislation when deciding whether to publish.
65. Common themes in comments relating to the supplementary consultation on the publication of information about **investigations** included:

- a. Comments welcoming the new approach, noting that early publication of information about investigations being opened could prompt action by a provider that would lead to more positive outcomes. However, this support was qualified in some instances when respondents suggested that providers should be consulted and given the right to submit representations or a public response before information about them is published by the OfS.
- b. Dissatisfaction with the proposal to adopt a general policy of normally publishing information about investigations both when an investigation is opened and when a provisional decision has been reached. Respondents thought this would lead to unintended consequences, such as an assumption by the public that there had been a finding of wrongdoing where that was not the case. Most respondents expressed a strong preference for the approach proposed in the December 2020 consultation.
- c. Comments that the OfS already has the power to publish information, with many respondents stating that the December 2020 proposals did not need to be amended and should be reverted to, adding that the original proposals contained more safeguards against potential negative effects on students and providers.
- d. Arguments for publications to be anonymous, particularly where an investigation is not based on publicly available information, or, where an individual provider is named, being published only after the investigation has concluded with a finding of a breach of conditions of registration or other wrongdoing. Respondents took the view that this would mitigate the risk of public misunderstanding or speculation. In cases where a provider is named and an investigation results in no sanctions or interventions, respondents suggested that the provider should be entitled to compensation or redress.
- e. Suggestions that the OfS should adopt the approach taken by other regulators, such as the Financial Conduct Authority (which does not normally make public the fact it is investigating a particular matter and will normally publicise enforcement action), when considering what information to publish in relation to investigations. Respondents also asked the OfS to consider using specific conditions of registration as a tool to encourage compliance rather than as a sanction imposed following a breach.
- f. Comments on the importance of keeping a factual public record with a mechanism for correcting any errors and removing historical notices that are no longer relevant to a provider.
- g. Comments on the legal implications of publications containing statements beyond established fact. Respondents took the view that it was important to ensure that all information to be included in a publication had been fact-checked and quality assured before publication, particularly where it came from a third-party notification.

OfS response and decision

66. While we have decided to adopt the policy position that was set out in the May 2022 consultation in respect of publishing information about investigations, we have also decided that it is appropriate to provide further information about matters relating to investigations for these purposes. First, we are clarifying that the OfS will give the word 'investigation' its ordinary meaning and therefore interpret this word to mean 'a careful search or examination in order to discover facts or other information'. Second, we are clarifying that the scope of an investigation for the purposes of this policy would include any matters relating to potential non-compliance with any condition of registration (including risks of non-compliance) and/or any

potential wider regulatory concerns or harm. Non-exhaustive examples of potential wider regulatory concerns or harm would include whether or not a higher education provider or other persons (such as individuals) connected with it are engaging, or have engaged, in conduct that may:

- a. Have a negative impact in relation to subject matter that is directly or indirectly connected with the scope of any existing conditions of registration, for example subject matter that relates to management and governance, any of the public interest governance principles or consumer protection law.
 - b. Amount to a failure to comply with legislation or legal requirements that are not currently directly regulated or enforced by the OfS.
 - c. Have a negative impact in relation to the broader interests of students or broader matters of public interest.
67. While there is no test or threshold for reaching a decision to open an investigation, the regulatory framework sets out the OfS's policy approach to interventions and this applies to investigations. For example, paragraphs 166 and 167 of the regulatory framework state that the OfS will consider a range of factors in deciding whether and how to intervene. This includes having regard to the OfS's general duties under section 2 of HERA. It therefore follows that the OfS will consider such factors in considering whether or not to open an investigation.
68. As explained in paragraph 66, the OfS will give the word 'investigation' its ordinary meaning and therefore interpret this word to mean 'a careful search or examination in order to discover facts or other information'. Consistent with this ordinary meaning, paragraph 170 of the regulatory framework provides the following example of an investigation as a type of intervention: 'the OfS may take targeted action if it needs to establish the facts before reaching a judgement about whether there is, or is likely to be, a breach of one or more of the ongoing conditions of registration.'
69. Given the responses we received on this matter we intend to amend Regulatory advice 15: Monitoring and intervention, to set out some of the information discussed in paragraphs 60 to 77 and to clarify the circumstances under which the OfS might use its investigatory powers.
70. Additional feedback we received relating to our rationale for proposing to normally publish information about investigations was that this was not the intention of the March 2022 ministerial guidance, which stated that the OfS should implement a 'visible and effective inspections regime' in relation to the quality conditions of registration. We have considered these comments but remain of the view that the publication of information about an investigation – whether it relates to quality or otherwise – is the clearest, most effective, way of demonstrating that our 'inspections regime' is visible, because this information will be easily accessible to stakeholders. It is also the case that the OfS's obligation in relation to statutory ministerial guidance is to have regard to that guidance and we did so in a manner the OfS considered appropriate in formulating our consultation proposals and in reaching our final decisions.
71. Respondents also suggested that adopting a policy to normally publish information about investigations would contravene the requirement to consider the interests set out in section 67A(5) of HERA. We disagree with this view and we are clear that we will comply with our statutory duties and have regard to the relevant factors set out in statute in a manner the OfS considers to be appropriate. We have amended our factors – as set out in Annex D – to more

directly reflect the statutory duties placed on the OfS, including the matters set out in section 67A(5) of HERA. Where we consider it is appropriate to do so, the OfS may give a provider (and, where relevant, persons connected with it) the opportunity to make representations about the publication of information about an investigation. Whether or not relevant persons are given the opportunity to make representations, the OfS will have regard (in a manner it considers appropriate) to relevant factors and the OfS may ultimately exercise its discretion to depart from its general policy approach to publishing information about investigations on a case-by-case basis. 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 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 it would be beneficial for current and future students to be able to access that information.

72. We have considered whether publishing sector-level, anonymised reports on the number and type of investigations we open would be an alternative way of meeting this objective. We think this could meet some of our objectives. However, we take the view that publishing the identity of providers subject to investigation will improve transparency and also be likely to encourage compliance from that provider and others. We have, therefore, decided to adopt a general policy approach of normally publishing information about investigations. However, the factors in Annex D mean that, before a final decision is taken to publish information in individual cases, we will consider (in a manner the OfS considers to be appropriate) whether publication of the identity of a body or individual could seriously and prejudicially affect its interests.
73. We have considered, but do not agree with, the view put forward by some respondents that publishing information about an investigation before it has concluded will not encourage, or would actively discourage, individuals coming forward with relevant information. We consider that students, staff at providers, and the public expect the OfS to be active in addressing any areas where there are potential regulatory concerns about a provider. A common view expressed by those who submit notifications to the OfS is that they hope the OfS will take action to investigate their concerns. In our view, the publication of information, as set out in the consultation, will serve to further demonstrate our commitment to investigate areas of concern, and to further reassure potential notifiers or whistleblowers that notifications remain an important part of how we regulate universities and colleges.
74. Some respondents asked whether publishing information about opening an investigation, or making a provisional decision about an investigation, would prejudice the outcome of the investigation and cause reputational damage to a provider. We do not agree that, as a general principle, publishing information about potential regulatory concerns at a provider would undermine the impartiality of any ongoing or subsequent investigation. We accept that the publication of information about an investigation might raise reputational issues; however, we do not consider that it is appropriate to refrain from adopting a general policy to normally publish this information. However, as explained in paragraph 71, the OfS retains the discretion to depart from its general policy position on a case-by-case basis and will have regard (in a manner the OfS considers appropriate) to statutory factors, which include matters relevant to whether publication of information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of a body or individual. We also note that providers will likely have a range of mechanisms available to address reputational issues that may arise.

75. Our policy does not mean that we will always publish information about an investigation. The 'normally expect to publish' framing of our policy remains important, as we reserve the right to deviate from the general policy when we consider there are good reasons for doing so. We therefore remain of the view that there is likely to be public interest in publishing information in these circumstances. We do not agree that, as a general principle, publishing information about opening an investigation, or a provisional decision about an investigation, would prejudice the outcome of that investigation, as these publications would clearly state the scope of the investigation and that no wrongdoing had been found.
76. Our policy is clear that consideration of relevant factors may result in our including content in a publication that seeks to address risks relating to misunderstandings or unintended consequences that could flow from a particular subject matter. This may be of particular relevance in relation to publication of a decision to open an investigation or publish a provisional decision about an investigation. Where we publish information that confirms we are undertaking an investigation, we will also publish information when we close that investigation, including when we do not make any finding or take any regulatory action.⁵ Some respondents also asked about the likely timescale for completing an investigation. Our view, as previously expressed in our response to the consultation on quality and standards conditions of registration, is that the timescale for an investigation may be legitimately shaped by a number of factors, including the potential severity and urgency of the concern, and the scale and complexity of the investigation required.⁶ For that reason we do not intend to set out overall timescales, because these could not cover all reasonably likely circumstances.
77. We address the points made about engagement with a provider and any representations process before publication in paragraphs 171 to 173.

Other amended proposals

Summary of responses

78. The 'other amended proposals' section of the supplementary consultation described a proposed change to a section of text on page 34 of the regulatory framework that described the OfS's approach to the publication of information on the Register where the OfS has imposed a sanction on a provider. Common themes in the responses relating to this proposal included:
- a. A lack of understanding of what constituted a 'provisional decision' in this context, with requests for additional information about the process for reaching such decisions.
 - b. Strong disagreement with the proposal to normally publish information about provisional decisions and about investigations prior to a final decision being taken, or without an opportunity for a provider to appeal first. It was argued that provisional decisions were, by their nature, not binding and could later change, and also that they could be prejudicial and that their publication risked reputational damage to a provider.
 - c. Requests for further information about when and how a provider would have an opportunity to appeal against the publication of information relating to a provisional or final decision, with respondents considering it important that there should be such an appeals process.

⁵ In accordance with section 67B(2) of HERA.

⁶ See www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/.

- d. A request for further information about whether information about a sanction would be removed from the Register if the decision to impose it was overturned following a successful appeal by a provider.
- e. Requests for further information about how long information about sanctions would remain published on the Register.

OfS response and decision

79. With regard to the request for further information about what is meant by a 'provisional decision', we mean any type of decision that is not yet finally determined by the OfS. This would typically be a type of decision that expresses the OfS's intention to do (or not to do) something in circumstances where a final determination is subject to the outcome of some form of further consideration and/or reconsideration. An illustrative and non-exhaustive example of a 'provisional decision' would be a decision that the OfS is proposing to impose a monetary penalty, which is communicated to the relevant provider via a statutory notice issued pursuant to paragraph 2 of schedule 3 of HERA. It is important the Register is up to date with all relevant regulatory decisions, and so information about a final decision to impose a sanction will normally be published shortly after it has been taken. Should a successful appeal change the outcome for a provider we will update the Register accordingly. We discuss in paragraphs 160 to 163 and 171 to 173, our response to points relating to appeals against information being published and to the views we received about how long information should be retained on the Register.

Other subject matters

Summary of responses

- 80. Respondents made few substantive comments on the **other subject matters** that we proposed 'we would normally expect to publish'. Some disagreed with the scale of ancillary material that we proposed to particularly consider publishing (for example, quality and standards reports or the OfS's underlying assessment, where registration is refused), or suggested additional ancillary material that they considered should be published (for example, further information about a provider's subcontractual and validation arrangements). Other comments included a suggestion that publication about voluntary deregistration should stress the voluntary nature of, and a provider's reasons for, that deregistration, and a query about whether historical outcomes from the Teaching Excellence Framework would continue to be publicly available.
- 81. In the supplementary consultation we also proposed that we would normally expect to publish a report of any assessment of potential regulatory concerns at a provider, regardless of whether that report had been produced as part of an investigation or results in an investigation being opened. We received a few comments similar to those received in relation to publishing information relating to investigations, such as about reputational damage and whether publishing information about a provider before a final regulatory decision is reached could pre-determine the outcome of that decision.
- 82. In the supplementary consultation we also proposed that we would normally expect to publish information about any referral we make to another regulatory or enforcement body. A few respondents suggested that any OfS publication about a referral to another regulatory or enforcement body should not inhibit or prejudice the regulatory work or procedures of that body.

OfS response and decision

83. In response to comments about the information we would publish about voluntary deregistrations, we can confirm that in line with section 22 of HERA we will normally publish the fact of a provider's voluntary deregistration alongside the date from which it was effective, and any transitional or saving provisions imposed. We will also normally publish a brief description of the reasons for deregistration.
84. In relation to the ancillary material we proposed to particularly consider publishing, various opinions were expressed for both publishing more and publishing less. However, we have not seen any compelling arguments for departing from our proposals. We therefore intend to proceed with the proposals in this area as set out in the December 2020 consultation because we do not consider it appropriate to depart from the reasoning we set out in the consultation. In the May consultation we proposed some additional areas where we would normally expect to publish information, specifically relating to investigations, referrals and reports of any assessment of potential regulatory concerns. For these we have included, as related or ancillary material, 'The OfS's detailed assessment of a provider's compliance with the relevant condition(s) of registration, including the underlying evidence considered in that assessment and 'the report of any assessment of quality and standards undertaken for the provider where that is relevant to the main subject matter.' This is consistent with the approach we are taking to other comparable issues about which we propose to publish information.
85. We have set out our approach to publication of information relating to the Teaching Excellence Framework (TEF) separately.⁷
86. We have considered comments about our proposal to normally publish reports of any assessment of potential regulatory concerns at a provider, and, as stated in paragraph 48, consider that there is likely to be public interest in publishing this information, including because it may encourage others to come forward with further relevant information, and it supports the principle that regulatory activities should be transparent and accountable. We do not agree that, as a general principle, publishing information about potential regulatory concerns at a provider would undermine the impartiality of any ongoing or subsequent investigation. We have considered the issue of potential reputational damage for a provider and any consequential impact of publication, and note that the factors to which we will have regard when making decisions encapsulate consideration of reputational damage. For these reasons we will adopt the approach set out in the consultation and will normally publish a report of any assessment of potential regulatory concerns at a provider.
87. We agree there may be cases where publication of an OfS referral to another regulatory or enforcement body could negatively affect the work of that body, which is why we will consider the timing and content of any publication, in the way we consider appropriate, during our decision-making process. We have decided to adopt the approach in the consultation and will normally publish information about any referral we make to another regulatory or enforcement body.

⁷ See 'Addendum to TEF Consultation: Publication of Information Decisions' at www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/.

Information we would not normally expect to publish

We asked for comments about the proposal for the information we would not normally expect to publish.

Summary of responses

General views

88. Many respondents expressed general support for this proposal,⁸ in some cases commenting that it was ‘appropriate’, ‘sensible’ and/or ‘proportionate’.
89. Many respondents commented on the framing of our policy proposal; ‘information we would **not normally expect** to publish’. Some said that our proposals were clear. Others requested more information about the circumstances in which we may publish this type of information. For example, it was suggested that providers may be reluctant to comply with enhanced monitoring requirements (i.e., they may be less open or more reluctant to provide sufficiently detailed information) if we may decide to depart from our normal policy and publish information about those arrangements.⁹ Some respondents suggested that the OfS may not be consistent in deciding when to publish this information, creating unfairness and an increased risk of reputational damage for providers where information is published.
90. Some respondents advocated for a more rules-based approach in which we would list information that we would never publish, thereby providing more certainty.

OfS risk profile for a provider

91. The majority of respondents agreed with our proposal that we would not normally publish our risk profile for a provider.¹⁰ In doing so, some described risk profiles as ‘temporary’ and ‘fluid’, and agreed with our view set out in the consultation that risk profiles were not equivalent to regulatory judgements. Some suggested that risk profiles may be interpreted negatively by students and others, leading to unjustified reputational damage with consequential negative consequences for students, such as in relation to the value of their qualifications.
92. Some respondents took the opportunity to comment on risk profiles more generally, although this was not within the scope of our consultation. They suggested that risk profiles should be shared with providers, either routinely or on a case-by-case basis. This, it was suggested, might facilitate providers’ compliance with conditions of registration and enable them to align their internal risk registers with OfS risk assessments. Some also commented that this would increase regulatory transparency and reduce regulatory burden.

⁸ See paragraphs 18 to 19 of the December 2020 consultation document.

⁹ For the avoidance of doubt, full compliance with a legally binding requirement imposed by the OfS is not optional, and we would expect to take enforcement action in relation to cases of non-compliance.

¹⁰ During the initial registration process, the OfS assesses for each provider the risk of a future breach of each ongoing condition of registration. This assessment forms the basis of a ‘risk profile’ for that provider. The OfS then monitors a registered provider in relation to its conditions of registration and this monitoring is used to update the provider’s risk profile.

Enhanced monitoring requirements imposed on a provider

93. Many respondents supported our proposal not normally to publish enhanced monitoring requirements imposed on a provider, in some cases suggesting this was aligned with the OfS's stated intention to reduce significantly the use of enhanced monitoring.

Information provided by third parties through our notifications process

94. Many respondents expressed support for our proposal not normally to publish information provided by third parties through our notifications process, except in anonymised form where this is relevant to a publication we would expect to make as a result of Proposal 1 (information that we would normally expect to publish).
95. Many of the comments on this issue related to the circumstances in which we may decide to publish this information and the perceived risks associated with doing so. Some sought further information about the level of detail that would be published and/or made points about publication of what they considered to be unsubstantiated claims or claims that had yet to be investigated by the provider concerned. Some suggested that information submitted in notifications should never be published in certain circumstances, including where the concerns raised had been, or were in the process of being, resolved by a provider. It was also suggested that the OfS may be used as a mechanism for others to publicise vexatious complaints or false allegations against a provider and that any decision to publish the information should be made only by very senior OfS staff, or the OfS board.
96. Some respondents suggested that the risk of publication may dissuade potential notifiers from sharing information with the OfS.

OfS response and decision

97. In responding to responses on this topic, it is important to note that we will take into account the factors set out in Annex D when making publication decisions. We have considered whether a rules-based approach, as proposed by some respondents, would be helpful, but have concluded this would fetter our discretion and be inconsistent with our public law obligations. Our policy approach therefore allows us to make decisions that take account of the particular circumstances of a case and, for example, it allows us to have regard to the considerations set out in section 67A of HERA, which we have a statutory duty to consider.
98. In relation to a provider's risk profile, we note the majority view supporting our proposed position. As set out in the consultation, the risk profile for a provider is not equivalent to a regulatory judgement and we generally consider that the public interest in publishing this information is likely to be outweighed by other factors. We would not, therefore, normally consider it appropriate for a provider's risk profile to be published.
99. We note the general support among respondents for not publishing information about enhanced monitoring requirements. This feedback is consistent with our view that the public interest in publishing information about enhanced monitoring requirements is likely to be outweighed by other factors and so this type of information will therefore not normally be published.
100. We also remain of the view that the public interest in publishing information about individual notifications is likely to be outweighed by other factors, and so this will not normally be published, except in an anonymised form or where it is relevant to another publication. In relation to questions asked by respondents to the supplementary consultation about the role of notifications in opening investigations: notifications are an important component of our risk-

based approach to monitoring providers' compliance with our regulatory requirements.¹¹ Notifications may signal an issue that may warrant further investigation to establish whether a provider poses increased regulatory risk.

101. In light of the feedback received, and the reasoning set out in our consultations, we will be implementing the majority of Proposal 2 as set out in the December 2020 consultation, but have removed information related to investigations from this list. This has been moved under the heading 'information that we would normally expect to publish', following our supplementary consultation. Our response to comments received about the proposal that we would normally expect to publish information about investigations is set out in paragraphs 65 to 74.

Our decision-making process and the impact of our proposals

We asked for comments about the factors we propose to consider in reaching decisions about the publication of information. We also asked if there were any additional factors that we should take into account, or factors that we should not take into account.

We also asked for comments about any unintended consequences of these proposals, for example, for particular types of provider or course or for any particular types of student;

102. In our proposals, we noted that in reaching a decision about whether to publish information about a provider, and what should be published, we are required to have regard to relevant factors which, include our general duties set out in section 2 of HERA, guidance issued by the Secretary of State pursuant to section 2(3) of HERA and the PSED.

103. We also set out other factors that we proposed would normally be considered and these include, but are not limited to, the principles from relevant case law and judgements, and factors relating to the student interest, the provider interest and the public interest. We indicated that we envisaged that we would use those factors in our consideration of: whether to make exceptions to our general policies about publishing, or not publishing, information about particular subject matters; whether to publish information about subject matters not covered by those general policies; what information to include in a publication; and where relevant, the timing of the publication. We also indicated that we would consider the most appropriate mechanism for publication. Since the December 2020 consultation, sections 67A to 67C of HERA have been introduced, which require us to consider certain factors in our decision-making process, many of which were present in our proposed policy. We confirm that we will have regard to the relevant provisions in a manner the OfS considers to be appropriate.

Summary of responses

104. We received wide-ranging and detailed comments on our decision-making process and on the perceived potential negative consequences of our proposals for providers, students and others.

¹¹ See our guide to notifications at www.officeforstudents.org.uk/for-students/ofs-and-students/notifications/, and Regulatory advice 18: Notifications at www.officeforstudents.org.uk/publications/regulatory-advice-18-notifications-about-providers-from-third-parties/.

105. Some respondents commented specifically on the factors that we had set out relating to the student, public and provider interest, in some cases suggesting that one or more should carry more or less weight. Some seemed to agree with the principle that the OfS should consider those different interests but disagreed with our policy proposals on how these may translate into decisions about publication. However, many respondents framed their comments more generally, referencing the negative consequences that they considered would flow from the publication of information.
106. Some respondents commented more generally on the OfS's decision-making process for publication decisions. More specifically, many respondents suggested that providers should be consulted in relation to individual publication decisions.
107. We have summarised respondents' comments on these matters under broad headings in paragraphs 108 to 118. Many of the comments relate to more than one heading, but we have not repeated them across the different sections. Similarly, we have not repeated points that we have already captured in the preceding sections of this document.

Student interest, provider interest and public interest

108. There were mixed views on whether the publication of information is in the **student interest**, and on the factors for and against publication which we proposed in relation to student interest.
109. Some respondents agreed that the provision of independent information about providers (published by the OfS) could help students to make more informed choices about what and where to study. Some agreed that the publication of information may support improved quality in higher education providers.
110. Conversely, some respondents commented that students' decision-making is complex and queried whether they could appropriately interpret regulatory information relating to an individual provider, particularly negative judgements or outcomes, without contextual information, clear benchmarking, or further guidance. One respondent to the December 2020 consultation went further to suggest that publication could lead to students making poorly informed decisions about what and where to study. This was also raised in response to the supplementary consultation, with respondents stating that early publication of information in relation to investigations could result in prospective students being confused about what this means and making ill-informed decisions.
111. Many respondents welcomed the OfS's proposal to consider the **provider interest** when making publication decisions. In particular, respondents agreed that the OfS should consider whether information could damage a provider's legitimate commercial interests or create a competitive advantage for other providers. Some commented that consideration of this factor would help to avoid distorting the English higher education market, including avoiding disproportionate effects on financial sustainability or UK and international student recruitment. Respondents to the supplementary consultation also took the view that early publication of information in relation to an investigation could place a provider under an unsustainable financial burden as it would need to expend resources managing potential reputational damage, particularly where this could affect recruitment. Some commented on the wording of the factor, suggesting that it seemed to focus on situations where publication might also create a competitive advantage for others, which they considered was too narrow.
112. Many respondents commented in more detail on issues relating to the publication of commercially sensitive information. Some suggested that this should only be published 'where

absolutely necessary' because of the potential harm that publication may cause. Others suggested that it should not be published at all, with some referring to the provisions of the Freedom of Information Act 2000 in that regard.

113. Many respondents agreed that, in principle, publication of information may be in the **public interest**, with some commenting that it would help to increase transparency and maintain public confidence in the OfS's regulatory approach and the English higher education sector. Some noted that in other jurisdictions, for example, quality assessment outcomes for providers are routinely published. Some respondents did not agree with the suggested factors, for example questioning whether publication would encourage individuals to come forward with further information (and how the OfS would determine what sort of publication might have that effect). Respondents to the supplementary consultation also made this point, adding that the revised proposal that we would normally publish information about investigations may discourage individuals from coming forward with relevant information, as they may be concerned about confidentiality. Respondents also suggested that certain factors should be stressed in consideration of the public interest, such as the risk of course closure, which could result in professional shortages in a local area with consequences for the local economy.
114. Some respondents suggested that the **interests of individuals connected with a provider** could be overlooked by the OfS when making publication decisions. Some suggested that the interests of an individual should be considered separately, since their interests may not be aligned with a provider's interests, for example where the individual is no longer associated with a provider. Some respondents suggested additional factors to be included in our decision-making process, for example damage to an individual's reputation and future career opportunities and impact on their mental and physical health.
115. A few respondents to the supplementary consultation suggested that the proposed approach was inconsistent because it differentiates between information in the public interest, such as the financial health of a provider (which is unlikely to be published) and other information such as in relation to quality, student outcomes and consumer protection matters (which is likely to be published). Some respondents considered any published information that suggests a provider is subject to an OfS investigation is likely to have a significant negative affect on that provider. A few respondents also stated that the revised proposal to normally publish information about investigations suggests that the OfS is no longer proposing to treat cases on their individual merits and is instead adopting a blanket approach to publication, thereby changing the balance between public, provider and student interest.
116. Some respondents suggested that the OfS should reframe its consideration of the public interest so that information is published only where there is 'genuine', 'strong' or 'legitimate' public interest, and that the OfS should set out in more detail the factors that it would use to determine whether that test is met, such as contextual information about a provider, its student population and local economy. A couple of respondents also suggested that the OfS could adopt the approach other regulators take to defining 'public interest' and referring to relevant factors, such as the implications for other providers, maintenance of academic standards and student wellbeing; however, there was a lack of detail about which aspects of other regulators' approaches would be helpful in this context.
117. Some respondents commented more generally on publication and the 'public interest'. For example, some suggested that publishing information too frequently (for example, for every breach of condition) may reduce the public interest in such regulatory notices. Some suggested that reputational damage to providers resulting from publication of information may

damage the higher education sector as a whole and so not be in the public interest. This view was repeated in responses to the supplementary consultation, with respondents adding that they thought small and specialist providers would be exposed to more risk because they may not have the resources to effectively manage potential reputational damage.

118. Many of the 'factors against publication' that we set out under student, public and provider interest, referenced the potential negative consequences of publication on those interests. Many respondents commented more generally on those negative consequences, and we have considered key themes arising from those comments in the following section.

Impact of our proposals

119. Many respondents commented on the reputational damage to providers, and negative consequences for students and others, that they considered may be caused by the publication of information. Respondents were particularly concerned about proposals to publish information about an investigation when it is opened and when a provisional decision is made. Respondents argued that there might be substantive reputational damage to a provider when the investigation could go on to conclude there was no wrongdoing and/or that no condition had been breached. Respondents therefore requested that information should not be published until an investigation had fully concluded and the OfS had reached a final decision that there had been a breach or other wrongdoing.

120. Some respondents suggested that the risk of reputational damage for a provider was particularly acute in relation to publication of information about non-compliance with conditions of registration or the imposition of sanctions. Common themes in relation to the potential negative effect of publication raised by respondents in both the original and supplementary consultation included:

- a. A reduction in student recruitment, affecting the financial viability of a provider and/or leading to course closures and reduced funding for student support services. Some suggested that 'high-tariff' providers, which rely on their reputation to recruit home and international students, may be particularly affected in this regard.
- b. Removal of accreditation by professional, statutory and regulatory bodies, affecting student choice.
- c. Undermining the perceived value of a provider's qualifications, affecting the career prospects and opportunities for further study of current and former students.
- d. Redirection of resources to engage and respond to investigations, this being a particular issue for small and specialist providers that already lack resource.
- e. Loss of staff confidence and difficulties in recruiting or retaining well qualified staff, leading to instability and further uncertainty within a provider, which some considered may be a particular issue for smaller providers.
- f. Negative impact on relationships or partnerships with stakeholders, such as local schools (which may affect or reduce widening participation activity) and employers (which may affect the provision of placements for professional and vocational courses).
- g. More risk-averse behaviour in providers, stifling innovation in higher education.

121. Respondents to the supplementary consultation highlighted paragraph 28 of the December 2020 consultation, which stated, in relation to publishing information about an investigation, that 'revealing the existence of an investigation may result in public misunderstandings or

speculation about whether wrongdoing has taken place'. They took the view that this potential impact remains valid, particularly where an investigation goes on to find no wrongdoing. We have considered the issues relating to potential public misunderstanding of publications in paragraph 151.

122. In some cases, it was not clear whether respondents were suggesting that, given these potential negative consequences, the OfS should simply never publish certain types of information. In that regard, some respondents suggested specifically that protecting the interests of past, present or future students should be paramount. Others said information should not be published where negative consequences for a provider and its students have the potential to outweigh public interest.

The OfS's decision-making process

123. Many respondents took the view that transparent, consistent, proportionate and risk-based decision-making about the publication of information would be important. Some agreed that the proposals would deliver that. In other cases, respondents asked how the proposals would achieve it, or went further, suggesting that our proposals would not achieve it. Some suggested that the number of factors to be considered by the OfS would make decision-making a complicated and time-consuming process. Many respondents sought further information about **how** the OfS would make publication decisions. They asked how the OfS would consider the different factors and what weight it would attribute to each factor, in some cases suggesting that the interests of students, the public and providers may sometimes sit in tension. For example, respondents asked how the OfS would balance the desire for transparency with the desire to avoid negative consequences that may arise from damage to a provider's reputation. The OfS was invited to provide examples or 'process maps' to illustrate its decision-making process, and/or to publish sector-wide reports summarising the sorts of information that it had decided to publish or not publish, and the reasons for this. Some also queried who, within the OfS, would make decisions about publication, with some suggesting that decisions should be made by the board or the chief executive.

124. In response to the amended proposals set out in the supplementary consultation, some respondents sought assurance that the OfS would still take into account the factors set out in Proposal 3 of the December 2020 consultation when making decisions about whether to publish information relating to investigations, such as the general duties in section 2 of HERA, guidance issued by the Secretary of State pursuant to section 2(3) of HERA and the PSED. Other respondents interpreted the proposal to normally publish information about an investigation as a sign that the OfS would be taking a blanket approach to decision-making rather than taking into account contextual factors or the impact of publication on providers and/or students.

125. Respondents also expressed a desire for more information about OfS decision-making in relation to investigations, with some saying that without more information and guidance about the OfS's approach, they were unable to meaningfully engage with the consultation. There were also responses suggesting that publishing information about a provider when opening an investigation or reaching a provisional decision undermines the principle that investigations should be, and be perceived as, impartial.

126. Some respondents did not support the OfS publishing information about provisional decisions, particularly those relating to investigations or the imposition of sanctions (as a result of an investigation), as they considered these decisions would be made without suitable scrutiny,

would be subject to change and would not, by their very nature, be binding, but may lead to a significant reputational impact on a provider. Additional information about the process for making a provisional decision was also requested, particularly the publication of detailed information if a final decision was different from a provisional decision, or where a provisional decision was erroneous or contained misrepresented information.

127. Some respondents suggested that an additional ‘materiality test’ be included in the decision-making process, in which the ‘severity’ of the issue is identified together with the risks that it presents to students, staff or the public. On that point, it was suggested that the OfS should set out a ‘materiality threshold’ to guide its publication decisions, and that it may be ‘counterproductive’ to publish information about issues that were not sufficiently material. In this regard, a respondent questioned whether publication of information about the late payment of a statutory fee was in the public interest, or a proportionate use of OfS time, if this did not signal a pattern of non-compliance.

OfS response and decision

128. In the December 2020 consultation document, we set out the framework within which we proposed that decisions about publication would be made. This included a policy that we would normally follow in relation to publication, including the factors that we are required to have regard to, and the factors that we would normally expect to have regard to, in making publication decisions. The former included (among other factors) our general duties under section 2 of HERA, and the latter a set of factors relating to the student, public and provider interest.
129. The inclusion of decision-making factors, and the illustrative considerations for and against publication that sit underneath them, gives us the ability to move away from our general policy where appropriate, as it would be inappropriate to introduce a rigid blanket approach to publication. We have adopted this framework in our general policy in Regulatory advice 21, and have provided further information about how we will apply our policy in practice in the current document.
130. In Annex E of the December 2020 consultation, we set out our general duties that we considered to be particularly relevant in formulating our policy proposals including about what we would, and would not, normally expect to publish. We have set out in paragraphs 19 to 25 how we have considered these in reaching final policy decisions. When we are making individual publication decisions, we are also required to have regard to our general duties. We consider that the general duties referred to in these paragraphs are also likely to be particularly relevant to those individual decisions.
131. We have carefully considered the comments made by respondents about the scope and detail of the factors we have published, and their view of the potential complexity involved in decision-making. We noted in the supplementary consultation that our proposals were consistent with the requirements in section 67A(5) of HERA, and still consider this to be the case. However, given the points made by respondents, we have decided to make this link clearer. We have redrafted our factors so they directly incorporate the language used in section 67A, and we have retained a final factor, which reflects the other legal requirements placed on us by HERA and other legislation. We have also made clear we will always consider these factors in our publication decisions in a manner the OfS considers appropriate. In amending our factors to directly reflect these legal requirements, we have included a factor relating to the risk of seriously prejudicially affecting the interests of a provider, body or individual. Furthermore, we have decided not to adopt our proposal to include an explicit

reference to considering relevant legal judgements; our general policy is clear that we may have regard to other relevant factors in making publication decisions, and those will depend on the particular circumstances of a case.

132. We have also reconsidered the specific issues set out under the headings of student, public or provider interest and labelled with 'factors in favour of publication may include' or 'factors against publication may include'. Taking into account responses, we consider that these remain helpful examples of potentially relevant issues as we consider student, public and provider interests. However, we recognise the points made about complexity of decision-making, and we also consider it important to retain discretion about how we consider the statutory factors in the context of an individual decision. We have therefore decided to identify the specific issues listed under the statutory factors as illustrative and non-exhaustive examples. As a result, the OfS is not adopting a general policy approach of having regard to each of the examples when making publication decisions.
133. We have considered responses that suggested that the interests of an individual connected with a provider may be different from those of the provider itself. We consider that our decision to adopt the factors set out in section 67A(5) of HERA is relevant because of the need to consider excluding from publication, so far as practicable, any information that relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual.
134. The potential consequences of publication that respondents identified have been discussed throughout this document. For each publication decision we will consider all relevant factors in a manner we consider appropriate for that case. We will take a holistic view and weigh relevant factors against one another, deciding how to balance any tensions that may exist between them. How we do this will depend on the facts of an individual case, and the weight that we attach to a particular factor will depend on the facts of a case.
135. We do not think it appropriate to define the student, public and provider interest further in our policy. They are broad terms, commonly used, and we have given illustrative, non-exhaustive examples of what they might include. We have also made clear that the OfS will have regard to other relevant factors on a case-by-case basis. Similarly, some respondents referred to 'strong' public interest. We consider it inappropriate to qualify, or quantify degrees of, public interest; our general policy refers simply to 'public interest'. This approach is consistent with that taken by Parliament – section 67A of HERA neither provides definitions nor suggests that the OfS should do so.
136. Many respondents raised points about the publication of information that: is commercially confidential; may harm a provider's, or an individual connected with a provider's, reputation, leading to negative consequences for students and others; or is inaccurate. Many of those points related more specifically to the publication of information about non-compliance with our regulatory requirements and information relating to investigations, as discussed in paragraphs 47 to 52. Some suggested that the risks of reputational damage to a provider outweighed any other factors, such that information about non-compliance should never be published.
137. We take the view that these specific points are already reflected in the statutory factors to which we will have regard. We consider the framing of those factors to be sufficiently wide. In our view, it is not reasonable to suggest that we should never publish information about a provider's non-compliance because it may damage the provider's reputation. Registration with the OfS attracts benefits, such as access to student loan funding for the provider's students.

Our regulatory requirements are in the student, provider and public interest and it is appropriate for us to expect all registered providers to comply with them. Where providers do not comply, we will use our general policy to make decisions about publication of information about that non-compliance. Reputational damage, and the consequences that may flow from that, could be relevant to our assessment of the factors we will consider in making those decisions. However, they are not, and should not be, the only factors.

138. Many respondents took the view that reputational damage would be a particular issue when publishing information related to investigations, particularly in relation to publication about an investigation before a conclusive finding or where an investigation has found no wrongdoing. Our policy is clear that consideration of the factors may result in us including content in a publication that seeks to address risks of potential misunderstandings or unintended consequences that could stem from a particular subject matter. Sections 67A to 67C of HERA expressly provide for the publication of a decision to open an investigation and related matters and, in those circumstances, put in place a requirement for us to publish further information if an investigation is terminated without a formal finding, or without further regulatory action. We take the view that, by granting these new express powers, Parliament has given a clear signal that the OfS may publish information about investigations subject to considering particular factors.
139. Furthermore, we were also clear in our supplementary consultation that there is likely to be public interest in the progress of ongoing investigations, including when a provisional decision has been made about the outcome, and we continue to consider that publication of this information is appropriate and meets our policy objective that regulation should be transparent. We have set out in paragraphs 171 to 173 our approach to engagement with a provider in relation to publication.
140. We also considered the argument put forward by some respondents that smaller or more specialist providers with fewer resources would be more likely to experience negative consequences, such as reputational damage, as a result of being named as the subject of an investigation. Respondents argued that such providers deserved additional support from the OfS or greater leeway in our assessments of compliance. However, we take the view that all registered providers must comply with their conditions of registration and are able to decide not to register with the OfS if they do not wish to be bound by our regulatory requirements. Moreover, we can take account of any particular vulnerability to any negative consequences of publication as we consider appropriate when we consider the factors of ‘provider interest’ and ‘the risk of seriously and prejudicially affecting the interests of a body or individual’.
141. We have noted the points made by some respondents about those making decisions about publication and requests for process maps that illustrate our approach to decision-making. Individual decisions made under this policy will be made in accordance with the OfS’s published scheme of delegation, or other delegation arrangements the OfS may make from time to time.¹² We have not produced a process map because we take the view that this would not further expand on the approach described in Regulatory advice 21.
142. Some respondents suggested that we should only publish information about ‘serious’ breaches or breaches of ‘more important’ conditions of registration and/or should incorporate

¹² See ‘Scheme of delegation’, available at www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/.

an additional 'materiality' test into our approach. We do not agree, for the reasons set out in the following paragraphs.

143. In our view, it is not appropriate for our general policy to limit publication to particular types of non-compliance. Our conditions work together to protect the student interest, and, while the severity and impact of a breach will depend on the circumstances of a case, we are not persuaded that any breach is merely technical. We therefore consider that it is appropriate for our general policy to cover publication of any type of non-compliance.
144. We also do not think it is appropriate for our general policy to include an additional 'materiality' test. The policy sets out the framework within which decisions will be made and the factors we will consider each time.
145. We have considered respondents' comments that stakeholders may lose interest if a large amount of regulatory information is published by the OfS. We accept that there may be instances where we decide not to publish particular information, but our prevailing view is that it is more important for the OfS to be transparent about the regulatory decisions it takes, and for students in particular to have access to information that may help them to make informed decisions about what and where to study.
146. For the reasons set out in paragraphs 128 to 145, we consider that our decision-making process will allow us to publish information about providers in an appropriate way, to address non-compliance (or potential non-compliance) with our regulatory requirements and to provide a credible deterrent to future non-compliance. We consider this to be in the student interest and in the public interest.

Practical considerations

Summary of responses

147. Some respondents suggested that the OfS should include in any publication its reasons and justification for the publication. In a similar vein, some respondents to the supplementary consultation said it was important for the OfS to provide its reasons for making any exceptions to the policy of normally publishing a piece of information, for example if it decided not to publish the outcome of an investigation. Some respondents suggested that our proposals seemed not to provide for the publication of adequate contextual information about a provider.
148. Many respondents commented on the importance of validating information before publishing it, to ensure it is accurate. Some respondents linked this to the need for a consultation or representations process with individual providers in relation to individual publication decisions, and we consider that issue in paragraphs 171 to 173. A few respondents requested information about the OfS complaints procedure and/or asked whether compensation would be paid to providers, should the OfS publish information that turned out to be inaccurate. Respondents also commented on the timing of publications. Some respondents also suggested that the OfS should 'test' the information it intended to publish with a small number of students before publication, and not proceed with publication if students deemed the information to be 'of no benefit'.
149. In relation to the timing of any publication, many respondents suggested that this should be agreed with, or at least notified to, the provider or individual concerned. Some suggested that the OfS should not publish information at certain times in the academic cycle, for example during peaks of student recruitment activity or exam periods, or while mitigating action was still being taken by a provider. This was considered particularly important for information relating

to the opening of an investigation, suspension of registration, or revocation of degree awarding powers.

150. Respondents also commented on the 'duration' of publication, with some suggesting that the OfS's regulatory decisions would become less relevant over time, for example where they relate to historical breaches of conditions of registration. The OfS was invited to outline its processes for reviewing, updating and/or archiving published information, and to provide further information about its approach to the management and retention of information. Several respondents suggested that publication should be time-limited, in line with the approach taken by the Information Commissioner's Office, and others suggested that a provider should be able to request that information be updated, for example to include the publication of the provider's action plan to mitigate the published non-compliance.

OfS response and decision

Content of publications

151. We note respondents' points about the content of publications, and specifically concerns about the publication of inaccurate material, or material that may be misleading if it lacks sufficient context. Those issues are reflected in the factors to which we will have regard in relation to publication decisions and have been addressed in paragraph 138. Indeed, we specifically note that the factors may result in us including content in a publication that seeks to address risks of potential misunderstandings or unintended consequences that could stem from a particular subject matter. It is important that the information we publish is accurate and properly understood by all stakeholders, including students. We will seek to ensure that information we publish is accessible, and we are not persuaded by suggestions that students in general, or those with disabilities, would, as a matter of course, be unable to understand regulatory information.

152. Much of the feedback from respondents on these points related to the publication of information about non-compliance with our regulatory requirements as outlined in Table 1 in Annex B:

'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'.

We note that we would normally seek the views of a provider, and/or an individual connected with that provider where that is relevant, before reaching a final decision about whether to publish information related to an investigation, as set out in paragraph 171.

153. Some respondents commented specifically on our proposal to normally publish information about our underlying assessment, together with detailed underlying evidence considered in that assessment (which may include mitigating actions taken by a provider), in relation to publications about non-compliance with our regulatory requirements or decisions to refuse registration or to refuse an application for, to vary, or to revoke authorisation for degree awarding powers. We do not intend to publish a provider's risk assessment as a matter of course, but may publish this information if it is relevant to another publication we make. Publishing a report of, or specific details of, our assessment is appropriate to explain the reasons for our decision. The ancillary material supports the main content, and that main content will explain what the ancillary material is. We acknowledge that some stakeholders will

not engage with all of the ancillary material we publish, but we do not consider that to be sufficient reason not to publish it where we feel that it is appropriate to do so.

154. In our view, it would not be appropriate to specify in our general policy the content of each publication about a regulatory decision, as this will depend on the individual circumstances of each case. Some respondents suggested that the OfS should include its reasons and justifications for the publication. We will likely publish a statement of fact about a regulatory decision, using neutral language, and any related content, such as an underlying assessment, will have been reviewed for accuracy and any potential impact on providers and individuals in a manner the OfS considers appropriate.

Timing of publications

155. We will consider timing as part of a publication decision, and this will therefore form part of our consideration of the factors set out in Annex D. Where other regulators or enforcement bodies are involved, such as the police or the Competition and Markets Authority, we may consider postponing the publication of any information related to a case until these organisations have concluded their assessment and/or investigation into the issues raised.

156. We consider issues relating to the timing of publication further in paragraph 171 on engagement with providers.

Mechanics of publication

157. Some of the information we would normally expect to publish will be published on the OfS Register, as set out in paragraph 72 of the regulatory framework, and replicated in Annex C of this document. Where the information is lengthy, we will publish it in documents that are linked from the Register.¹³

158. Where we decide to publish information about a regulatory decision, whether that relates to a matter listed in paragraph 72 of the regulatory framework or not, we will determine one or more appropriate mechanisms for publication. This might include publication on our website, as a case study with or without other case studies, or through a press release, or elsewhere.

159. We note respondents' views that some of our policy objectives could be met through the publication of anonymised case studies or other anonymous or summary information. We agree that this may be possible in some cases, and would expect to continue to publish in this way where we consider that would meet our objectives, such as demonstrating transparency and accountability. However, our view is that in many instances, the identification of a particular provider is the approach most likely to maximise the deterrent effect of enforcement action, inform student choice, and create a strong incentive to encourage compliance across the sector. For example, should a similar breach of a condition occur at several providers, simply publishing that this had occurred – and been sanctioned – at one provider, or at a number of providers, would not have the same deterrent effect (or be as fair) as naming each of those providers.

¹³ This includes information about a provider's partnership arrangements, which is not currently published in full. We are currently considering the most appropriate mechanisms through which to collect this information from providers.

Duration of publication

160. We carefully considered the comments about the length of time published information would remain on the Register or published elsewhere. In developing our proposals, we set out 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. We consider that our policy is an appropriate way to ensure we can publish information about higher education providers, and relevant individuals, where we consider this to be in the public interest.
161. As a result, we have decided that all published information will normally remain publicly available, on the Register or elsewhere, in perpetuity, along with explanatory commentary where the OfS considers this appropriate; for example, information about a specific condition imposed on a provider will remain on the Register, but could be accompanied by a statement indicating that it is no longer in force. Similarly, information about an investigation into possible non-compliance at a provider will remain publicly available, alongside further information where appropriate on the outcome of that investigation. In our view this approach is appropriate as it is important that the OfS maintains an accurate public record of its activity in relation to higher education providers.
162. We carefully considered the suggestion from some respondents that some published information should be deleted from the Register, or elsewhere, after a set period of time. However, we concluded such an approach would be not appropriate, as there would not then be a complete public record. In our view, the points respondents made about potential negative consequences of outdated information will be mitigated by the inclusion of an OfS statement setting out, for example, the outcome of an investigation.
163. As set out in Regulatory advice 16: Reportable events, a provider must report to the OfS any matter that affects the accuracy of the information contained in the provider's entry in the OfS Register; this is to ensure the Register remains an accurate public record of regulatory information relating to providers registered with the OfS.

Engagement, representations and appeals

Summary of responses

164. Many respondents commented on issues relating to engagement with a provider (and, where relevant, with connected individuals) in relation to the publication of information. Some suggested that our policy proposals were not clear on whether, and if so how, we would engage with providers or individuals.
165. The majority of respondents considered that engagement of some sort was important or even essential, with that engagement being described variously as a discussion or consultation during the decision-making process and/or a formal representations or appeals process in relation to a preliminary decision to publish information. Some suggested that the latter was a requirement of HERA and/or the Regulators' Code, and that representations from a provider or individual should be expressly referenced in the 'factors' to be considered in decision-making.
166. Many respondents suggested that the OfS should engage with a provider or individual in relation to all aspects of a decision, from whether to publish to the contents, location and timing of publication.

167. Respondents suggested numerous reasons in support of engagement with a provider or individual before publication. Common themes included that engagement would:
- a. Promote transparency and fairness.
 - b. Enable any inaccuracies in the information to be corrected, which may be particularly important where the information comes from a third party, and provide an opportunity for the provider or individual to bring any other relevant information to the OfS's attention.
 - c. Ensure that the OfS properly understood the potential impact of publication, especially of commercially sensitive information (which, in some cases, the OfS may not otherwise have appreciated was commercially sensitive).
 - d. Bring issues to the attention of the provider or individual more quickly, prompting quicker mitigating actions by the provider or individual.
 - e. Enable the OfS properly to explain to the provider or individual how it makes its decision, including how it balances the different factors. This was considered to be of particular importance where the OfS was deciding to publish information that would not normally be published.
 - f. Enable providers, particularly those with multiple different stakeholders, to plan for publication and take action to mitigate any unnecessary reputational damage. In that regard, some suggested that the OfS should notify a provider or individual in advance of the proposed date of publication.
168. Some respondents suggested that the content and timing of any publication should be agreed with a provider or individual before any publication was made and/or queried how the OfS would consider any request by a provider or individual not to publish certain information. Some respondents to the supplementary consultation suggested that publication should be delayed where the publication of certain information about an investigation could exacerbate issues at a provider (for example, financial challenges) or where confidentiality was otherwise important.
169. Some respondents suggested that a provider's representations should be published alongside any OfS publication and/or that a provider should be permitted to publish a counter-statement. In relation to investigations, some respondents took the view that a provider should be given the right to respond in public and have a mechanism by which out of date information in the public domain could be corrected or otherwise updated and any reputational damage could be repaired.
170. Some respondents invited the OfS to set out an engagement process as part of its general policy. Further, it was suggested that the OfS should set out its position on consulting with awarding bodies, validating partners, professional bodies or other potential stakeholders before taking a decision to publish information relating to a provider under investigation.

OfS response and decision

171. Our engagement with a provider in relation to a publication decision will depend on the particular circumstances of a case. We will seek representations before making a final publication decision where we consider it is appropriate to do so and in the manner we consider appropriate. In particular, as proposed in the supplementary consultation, we would normally seek the views of a provider, and/or an individual connected with that provider where relevant, before making a final decision to publish information about an investigation, a report of an assessment of potential regulatory concerns, or a referral made to another regulatory or

enforcement body – these are the subject matters covered in rows 4, 5 and 6 in Table 1 in Annex B.

172. Respondents asked whether a provider would be given the right to publish a response to any publication by the OfS. Providers are free to publish information, for example on their own websites. However, this information must not be misleading to students or other stakeholders, and the OfS may take regulatory action in cases where it considers the information published by a provider relating to a regulatory action or decision taken by the OfS does not provide a fair or accurate representation of the circumstances.
173. Where we consider it appropriate to do so, we may engage with other organisations before any publication, to allow us to consider how our publication might affect the activities of another body. In addition to regulatory or enforcement bodies, this could include for example other validating or awarding bodies linked to the provider in question.

Impact on individuals on the basis of their protected characteristics

Summary of responses

174. Several respondents specifically welcomed that we would have regard to the PSED in reaching a decision about whether to publish information about a provider or connected individual.
175. Many respondents identified impacts for students generally but did not generally identify any particular impact of our proposals for individuals on the basis of their protected characteristics. The impacts that were identified are explored in paragraph 179. Some responses grouped this issue with views on impacts for all individuals (including where these impacts did not relate to the protected characteristics set out in the Equality Act 2010).
176. Some respondents agreed that it was important for students with particular protected characteristics to be aware of the breadth of higher education provision available, and to identify a provider with a poor track record of regulatory compliance, particularly in relation to matters that could affect students from underrepresented groups or with particular protected characteristics. These points suggest that there would be some positive impacts for such students as a result of our decisions.
177. It was also suggested that information published by the OfS should be appropriately contextualised to enable students, including those with particular protected characteristics, to make informed choices. Respondents also suggested that the OfS should carefully consider accessibility issues, so that individuals with disabilities can access and understand published information adequately.
178. Several respondents suggested that the OfS should conduct an Equality Impact Assessment before deciding whether or not to publish information. Some also suggested that the OfS should conduct periodic reviews to examine the impact of the policy and identify any unforeseen unintended consequences for providers, local economies, students or other individuals with protected characteristics.
179. Negative impacts that were identified by respondents included:
- a. Publication may damage a provider's reputation and affect its financial status, affecting its ability to deliver high quality courses and support services. This may have a

disproportionate effect on students with certain protected characteristics, who may need support services in particular.

- b. Further education colleges may be particularly vulnerable to financial issues resulting from reputational damage caused by the publication of information, which could lead to course or campus closures. Students from underrepresented groups or with particular protected characteristics often choose to study at local colleges because of mobility issues or other constraints, such as mature students opting to live at home while balancing home life with studies, which may mean they are unable to transfer to other providers in the event of a course or campus closure.
- c. The possibility that the OfS would publish information about individual notifications from third parties (in the event that the OfS departs from its normal policy not to publish that information) may dissuade potential notifiers from sharing information with the OfS. This may have a particular impact on students from underrepresented groups or with particular protected characteristics who, it was suggested, may be more likely to need to (or want to) notify the OfS of concerns, for example relating to discrimination or other barriers to success that they may face.

180. A small number of respondents commented more generally on equality issues, asking how the OfS was fulfilling its duties under the PSED and suggesting that the OfS should do more to collect information from providers about how they are complying with the PSED.

OfS response

181. In conducting this consultation and in reaching our decisions about our general policy on the publication of information we have had due regard to the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. This requires the OfS, in the exercise of its functions, to have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

182. We also have a general duty under section 2(1)(e) of HERA to have regard to the need to 'promote equality of opportunity in connection with access to and participation in higher education'.

183. In relation to responses suggesting that we conduct an equality impact assessment before making decisions about publication, we have interpreted this as suggesting an equality impact assessment before deciding our general policy and for each individual publication decision we make on made the basis of that policy. We can confirm that we have had due regard in to the PSED in reaching the final decisions on our general policy approach and will have regard to the legal duties placed on the OfS (which include the PSED) in a way we consider appropriate in making individual publication decisions. We have engaged with equality considerations throughout the development of this policy, considering the matters ourselves and also inviting respondents to identify any potential impact of our proposals on those with protected characteristics.

184. Some respondents also suggested that the OfS should collect information about how providers are fulfilling their duties under the PSED. We consider that this issue falls outside the scope of this consultation, and we do not currently have plans to collect such data.
185. We consider that our general policy on publication of information will be beneficial for the general public, providers and students, including those with protected characteristics, and have positive impacts, including:
- a. Providing greater transparency about the types of information that the OfS would and would not normally publish.
 - b. Assisting students to make informed choices about what and where to study.
 - c. Assisting members of the public to understand the performance of providers that may be in receipt of public funding.
 - d. Providing confidence in the regulatory system and incentivising compliance across the sector, including in relation to compliance that directly affects students with particular protected characteristics.
186. Improved transparency and provision of information for students, allowing them to make informed decisions about what and where to study, could be of particular benefit for students from underrepresented groups and those with protected characteristics, meaning that they may access relevant information depending on their needs or circumstances. Incentivising improved compliance across the sector would be likely to improve quality and standards, which would be strongly positive for all individuals.
187. In relation to potential impacts identified in consultation responses set out in paragraph 179, we have also identified further potential negative impacts of the policy, many of which broadly align with the negative impacts identified by respondents. These include that publication of information may cause reputational damage to a provider, which could lead to:
- a. Prospective students deciding not to study with a particular provider, which could cause course closures, affecting choice for future students, study options for current students and the availability of local provision. This could potentially, for example, cause particular issues for students and staff who may not be able to travel further to other providers.
 - b. Staff redundancies where publication of information leads to course or campus closures, causing detrimental impacts on staff who have unusual working patterns, or who are unable to travel and are unable to find alternative employment close by.
188. We acknowledge that there may be some adverse consequences for people with protected characteristics resulting from reputational damage that may stem from publication of information, such as the reduction of student support or the cessation of some localised provision. However, we consider that the positive impacts of publication of information outweigh these for example, ensuring that students have access to relevant information that would allow them to make informed choices about what and where to study and gain value for money, whereas without this information they may have chosen not to enter higher education at all. Respondents also suggested that publication may dissuade individuals, especially those with protected characteristics, from submitting notifications. Our general policy is that we would not normally expect to publish information about individual notifications, and so we do not agree that our approach would dissuade individuals from making a notification. We expect that by publishing information about regulatory matters including investigations we are likely to

encourage those with concerns, including those with protected characteristics, to make notifications to us.

189. Where the publication of particular information would have a negative effect on some student groups, particularly those with protected characteristics, we would have regard to this where we consider it appropriate, as part of considering the factors we have set out.

190. In determining our general policy, we have considered equality matters and take the view that any potential negative impacts are outweighed by the positive outcomes and aims that would result from adopting our general policy on publication.

Interactions with other consultations

191. Respondents noted that the OfS had launched a number of consultations in recent months, and considered that there was increased regulatory burden associated with having to respond to those consultations at the same time. Some said that this burden was a particular issue for small providers, which have less resource to engage with consultations. A number of representative bodies reported that they were responding on behalf of their members because those providers did not have the capacity to respond directly.

192. We are mindful of the demands on providers' resources and seek to ensure there is sufficient time for providers to engage with consultations. We are satisfied that we have received a substantial quantity of responses to this consultation and supplementary consultation from a range of respondents. We have also accepted and considered all responses that were submitted after the deadline. The responses we received include views from different types of provider, both directly and through sector-representative bodies. We appreciate the time taken by respondents to reply to our consultations and the role of sector-representative bodies in that process.

193. A few respondents suggested that the OfS should consider any cross-cutting impacts from the different consultations that were active at the same time, to prevent any potential inconsistencies. Some referred specifically to the OfS's recent consultation on reportable events, asking whether and how reportable events would be published by the OfS.¹⁴ We would not normally publish the information contained in a reportable event submitted by a provider. However there may be cases where regulatory notices, decisions or reports published under our general policy contain information from a reportable event (for example, where our assessment of a reportable event leads to a decision that there is a breach of a condition of registration).

194. Decisions following the following consultations will give due regard to the outcomes of this consultation, primarily the resulting publication policy (Regulatory advice 21), to ensure consistency across policies when deciding whether to publish a regulatory notice, decision or report:

- Consultation on a new approach to regulating student outcomes (January 2022)
- Consultation on the Teaching Excellence Framework (January 2022)

¹⁴ Available at www.officeforstudents.org.uk/publications/consultation-on-reportable-events/.

- Consultation on constructing student outcome and experience indicators for use in OfS regulation (January 2022).¹⁵

195. Where publication in relation to the matters listed in paragraph 194 sits outside the scope of this policy (as set out in Regulatory advice 21) – for example, publication of sector-wide student outcomes data that does not constitute a regulatory decision taken about an individual provider – the approach to publication will be set out in the relevant publication decision documents and any resulting regulatory guidance.

¹⁵ All available at www.officeforstudents.org.uk/publications/consultations/.

Annex A: The consultations and responses

Background to the December 2020 consultation

1. The December 2020 consultation was held between 15 December 2020 and 12 March 2021.
2. The consultation was published on the OfS website and accountable officers of higher education providers registered with the OfS were notified of it by email. Stakeholders were invited to share their views on six consultation questions by using an online survey to submit written responses.
3. The OfS also held a roundtable event for sector representative bodies. The discussions at that event were not recorded and were not considered when making our decision. Attendees were invited to submit formal responses to the consultation through the online survey.
4. The consultation closed on 12 March 2021. The majority of responses were received via the online survey, followed by three late submissions by email. We considered all responses.

Characteristics of respondents to the December 2020 consultation

5. We received 64* complete responses to the consultation, 61 via the online survey tool and a further three by email, the majority of which were from English higher education providers.
6. There were three responses from other regulatory or enforcement bodies and five responses from sector representative groups or other mission bodies
7. There were five anonymous responses.
8. There were no responses from students' unions or other student representative groups.

Figure 1: Responses by category

| Category | Number of responses |
|-------------------------------------------------|---------------------|
| Higher education providers | *51 |
| Sector representative bodies and mission groups | 5 |
| Anonymous | 5 |
| Regulatory or enforcement bodies | 3 |
| Students' unions and student representatives | 0 |
| Total | 63 |

* This number excludes one duplicate response.

Background to the May 2022 supplementary consultation

9. The May 2022 supplementary consultation was held between 12 May 2022 and 9 June 2022.
10. The consultation was published on the OfS website and accountable officers of higher education providers registered with the OfS were notified of it by email. Stakeholders were invited to share their views on proposed amendments to the position articulated in the December 2020 consultation questions by using an online survey to submit written responses.
11. The consultation closed on 9 June 2022. The majority of responses were received via the online survey, with only one late response being by email. We considered all responses.

Characteristics of respondents to the May 2022 supplementary consultation

12. We received 47* complete responses to the consultation, 45 via the online survey tool and a further two by email, the majority of which were from English higher education providers. Of these 47 respondents, 17 had also responded to the December 2020 consultation.
13. There were no responses from other regulatory or enforcement bodies to this supplementary consultation, and six responses from sector representative groups or other mission bodies.
14. There were six anonymous responses.
15. There were no responses from students' unions or other student representative groups.

Figure 2: Responses by category

| Category | Number of responses |
|-------------------------------------------------|---------------------|
| Higher education providers | *35 |
| Sector representative bodies and mission groups | 6 |
| Anonymous | 6 |
| Students' unions and student representatives | 0 |
| Total | 47 |

*This number excludes two duplicate responses.

Annex B: Information we would normally expect to publish

We would normally expect to publish information on the subject matter set out in Table 1. In making publication decisions we will consider the factors set out in Annex D in the manner we consider to be appropriate. The ‘related or ancillary material’ listed in Table 1 reflects material that we will, in particular, consider publishing in relation to these subject matters but it is illustrative and not exhaustive.

Table 1: Information the OfS would normally expect to publish

| | Main subject matter | Main content in respect of that subject matter | Any related or ancillary material |
|---|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | A decision to register a provider | Publication of the provider’s entry in the Register and, in addition: Any final decision to impose a specific condition of registration (see row 7) | The report of any assessment of quality and standards undertaken for the provider |
| 2 | The information listed in regulations made under section 3(6) of HERA ¹⁶ | Publication in a provider’s entry in the Register of the information listed in the Regulations | N/A |
| 3 | A decision to refuse registration for a provider | The refusal decision and the reasons for that decision | A summary of the reasons that one or more initial conditions of registration have not been satisfied The report of any assessment of quality and standards undertaken for the provider, whether or not the OfS has decided that initial conditions relating to quality and standards have been satisfied The OfS’s detailed assessment of a provider’s application for registration, including the underlying evidence considered in that assessment |
| 4 | Information about an investigation into any type of potential non-compliance with a condition of registration or into other potential regulatory harm: A decision to open an investigation, or information about a live | The identity of a provider subject to investigation, a summary of the matters being investigated, and the progress of an investigation A provisional decision and the reasons for that decision | The OfS’s detailed assessment of the relevant issues, including the underlying evidence considered in that assessment |

¹⁶ The Office for Students (Register of English Higher Education Providers) Regulations 2017 (SI 2017/1196), which are available at <https://www.legislation.gov.uk/uksi/2017/1196/made>.

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| | <p>investigation at any time after it has been opened</p> <p>The progress of an investigation at key milestones where that investigation has previously been announced</p> <p>Any provisional decisions taken as a result of an investigation that has previously been announced</p> <p>Where information has been published about a decision to conduct an investigation, any decision to close that investigation without making any finding, or if the findings of that investigation do not result in any further action</p> | <p>A decision to close an investigation and the reasons for that decision</p> | <p>The report of any assessment of quality and standards undertaken for the provider</p> |
| 5 | <p>A report of any assessment of potential regulatory concerns, including an assessment of quality or standards undertaken for a provider, regardless of whether that report has been produced as part of an investigation or results in an investigation being opened</p> | <p>An assessment report and the reasons that assessment was conducted</p> | <p>The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment</p> |
| 6 | <p>Any referral to another regulatory or enforcement body, for example, the Competition and Markets Authority, trading standards, the Charity Commission, the Equality and Human Rights Commission or the police</p> | <p>A decision to make a referral and the reasons for that decision</p> | <p>The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment</p> |
| 7 | <p>Information about a provider's compliance with its conditions of registration and any action the OfS has taken in response to actual or likely non-compliance:</p> <p>A breach of a condition of registration</p> <p>Imposition of a specific condition of registration, whether or not there has been a breach of a condition</p> <p>Imposition of a monetary penalty</p> <p>Suspension of registration</p> <p>Deregistration</p> | <p>The decision that there is or has been a breach of a condition of registration and the reasons for that decision</p> <p>The content of any specific condition and the reasons it has been imposed</p> <p>The decision to impose a monetary penalty, the amount of that penalty (and how it was calculated), and the reasons for those decisions¹⁷</p> <p>The information about suspension of registration listed in section 16 of HERA and the reasons for that suspension</p> | <p>The OfS's detailed assessment of a provider's compliance with the relevant condition(s) of registration, including the underlying evidence considered in that assessment</p> <p>The report of any assessment of quality and standards undertaken for the provider where that is relevant to the main subject matter</p> |

¹⁷ See www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/.

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| | | The information about deregistration listed in section 18 of HERA and the reasons for that deregistration, and the reasons for the imposition of any transitional or saving provision | |
| 8 | <p>Information that relates to individuals connected with a provider:</p> <p>A finding that an individual is not suitable to be approved as a provider's accountable officer</p> <p>A finding that an individual is not a fit and proper person</p> <p>The conduct of an individual where this is relevant to the reasons for a regulatory finding about a provider, including a breach of a condition</p> | The decision about an individual and the reasons for that decision | The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment |
| 9 | The information about voluntary deregistration listed in section 22 of HERA | As listed in section 22 of HERA and the reasons for the imposition of any transitional or saving provision | |
| 10 | <p>Information about a provider's authorisation for degree awarding powers:</p> <p>A decision to grant an application for an authorisation for a provider</p> <p>A decision to refuse an application for an authorisation for a provider</p> <p>A decision to vary a provider's authorisation to restrict its scope</p> <p>A decision to revoke a provider's authorisation</p> | <p>Publication in a provider's entry in the Register of the information listed in the Regulations and, in addition:</p> <p>The type of authorisation granted to a provider</p> <p>The decision to refuse an application for an authorisation and the reasons for that decision</p> <p>The decision to restrict an authorisation and the reasons for that decision</p> <p>The decision to revoke a provider's authorisation and the reasons for that decision</p> | <p>The OfS's detailed assessment of a provider's authorisation, including the underlying evidence considered in that assessment</p> <p>The report of any assessment of quality and standards undertaken for the provider, where that is relevant to the main subject matter</p> |
| 11 | <p>Information about a provider's authorisation to use the term 'university' in its title:</p> <p>A decision to authorise the use of the term 'university'</p> | <p>Publication in a provider's entry in the Register the information listed in the Regulations and, in addition:</p> <p>The decision to refuse an application for an</p> | The OfS's detailed assessment of a provider's authorisation, including the underlying evidence considered in that assessment |

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| | <p>A decision to refuse to authorise the use of the term 'university'</p> <p>A decision to revoke authorisation for the use of the term 'university'</p> | <p>authorisation and the reasons for that decision</p> <p>The decision to revoke a provider's authorisation and the reasons for that decision</p> | |
| 12 | <p>Other information to be published in the provider's entry on the Register as listed in the table at paragraph 72 of the regulatory framework, and not covered by the preceding rows in this table:</p> <p>The provider's unique identifier (UKPRN) assigned by the UK Register of Learning Providers</p> <p>Information about the provider's legal form and whether it is an 'exempt charity' or registered charity¹⁸</p> <p>The general ongoing conditions of registration that apply to the provider</p> <p>Information about the provider's primary regulator where this is not the OfS (for example, the Education and Skills Funding Agency for further education and sixth form colleges)</p> <p>Where the provider holds a Home Office student sponsor licence to recruit international students, confirmation that this is the case</p> <p>A link to the provider's entry on the Discover Uni website</p> <p>Information about the provider's sub-contractual arrangements and, where the provider is the lead provider, information about which providers deliver its courses under sub-contractual arrangements</p> <p>A link to the provider's access and participation statement (on the provider's website), where it has one in place</p> <p>Where the provider is accredited by the Department for Education to deliver initial teacher training courses for which student support</p> | N/A | N/A |

¹⁸ An exempt charity is exempt from registration with and direct regulation by the Charity Commission. The OfS is the principal regulator for registered providers that are exempt charities, and for exempt charities that are closely connected with them.

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| <p>funding is available, confirmation that this is the case</p> <p>Where the OfS has determined that access to student support funding should be determined on a course-by-course basis, a list of the provider's courses that have been approved for that purpose.</p> <p>Whether the provider is eligible to take part in the Teaching Excellence Framework (TEF) and the provider's current TEF outcome.</p> | | |
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Annex C: Consequential amendments to the regulatory framework

Following our consultation we are making amendments to the regulatory framework, with effect from 30 September 2022.

We have reproduced the relevant sections of the regulatory framework published in February 2018, below. Where our amendments will result in deletion of text from the regulatory framework, this is shown as follows: ~~deleted text~~. Where our amendments will result in the addition of text to the regulatory framework, this is shown as follows: additional text.

Paragraph numbers are those of the regulatory framework.

Content of the Register

71. The Register will provide a single, authoritative reference for students, businesses, providers, other regulators, and members of the public about a provider's regulatory status.
72. The Secretary of State for Education has laid regulations under section 3(6) of HERA¹⁹ to set out the information that must be contained in a provider's entry in the Register. In addition, the OfS has decided that further information should also be published for each provider in the interests of transparency. Both categories of information are set out in the table below, with those items required by statute identified by an asterisk. We have published a general policy in relation to publication decisions²⁰.

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| The provider's name* | The legal name and any trading names of the registered higher education provider, including any names granted by, or by virtue of, any Act or Royal Charter. |
| The provider's unique identifier | The UK Register of Learning Providers assigns a unique UKPRN number to a provider to support the sharing of information about learning providers with government departments, agencies, learners, and employers. This number helps to identify individual providers correctly and will be included on a provider's Register entry. |
| The provider's contact details* | An address, email address, and telephone number at which the provider may be contacted. An address at which the provider carries on its activities, or which is the provider's principal place of business or which is otherwise suitable for the service of documents on the provider. |
| The address of the provider's website* | The address of the principal website maintained by, or on behalf of, the provider. A link between the OfS Register and the provider's website will enable Register users to check that they are looking at the correct provider and to find further information about a provider's activities. |

¹⁹ The Office for Students (Register of English Higher Education Providers) Regulations 2017 (SI 2017/1196), which are available at <https://www.legislation.gov.uk/ukSI/2017/1196/made>.

²⁰ See 'Regulatory advice 21: Publication of information' at www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/.

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| The provider's legal form | <p>The provider's legal form, for example whether it was created by Royal Charter, Act of Parliament, or as a company limited by shares or by guarantee.</p> <p>Whether the provider is an exempt or registered charity and a link to information about its charitable status on the provider's website.</p> |
| The category in which the provider is registered* | This information allows users of the Register to understand the regulatory requirements placed on a provider and the provider's eligibility for public grant funding, student support funding, and a Tier 4 <u>student</u> sponsorship licence. |
| The general ongoing conditions of registration applied to the provider | <p>The general ongoing conditions of registration that apply to the provider will be listed, together with information that shows any current breach of any of these conditions.</p> <p>Any general ongoing conditions of registration that have been dis-applied for the provider under section 5(6) of the Higher Education and Research Act 2017 will be listed.</p> <p>A link to explanatory text for each condition will be included.</p> |
| A link to the provider's access and participation plan, where a plan is in place* | The Register will state whether the provider has an access and participation plan in place and the period for which the plan is in place. Such plans should be easily accessible to students and prospective students on the provider's own website. The Register will include a link to the plan on the provider's website. |
| A link to the provider's access and participation statement, where a statement is in place | The Register will state whether the provider has an access and participation statement in place. Such statements should be easily accessible to students and prospective students on the provider's own website. The Register will include a link to the statement on the provider's website. |
| The fee limits that apply to the provider* | Section 11 of HERA requires the OfS to publish annually a list of registered providers that have a fee limit condition and the level of that limit. The provider's Register entry will contain information about the fee limits applicable to the provider. |
| The provider's access to the student support system for its initial teacher training courses | Providers accredited by the Department for Education are able to deliver initial teacher training courses and their students are able to access the student support system. The provider's Register entry will <u>confirm whether this is the case.</u> contain this information. |
| A list of the provider's courses that provide access to the student support system, where the OfS has determined that approval on a course-by-course basis is desirable for that provider | The OfS may determine that access to the student support system should operate on a course-by-course basis for a provider. In these circumstances, the Register entry for the provider will contain the list of approved courses. |

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| <p>The outcome of any assessment of quality and standards undertaken for the provider by the DQB</p> | <p>The OfS may ask the designated quality body (DQB) to assess, <u>or make arrangements for an assessment of</u>, the quality and standards of the provider. The outcome of such assessments will be published on the Register.</p> |
| <p>The <u>provider's TEF eligibility and outcome</u> outcome of the provider's entry in the TEF</p> | <p>The Register will state whether the provider has met the eligibility criteria to take part in The Teaching Excellence and Student Outcomes Framework (TEF) and will contain the provider's current TEF rating(s) <u>outcome</u>.</p> |
| <p>Any specific ongoing conditions of registration applied to the provider</p> | <p>Any specific ongoing conditions of registration that have been applied to the provider will be listed, together with an explanation of the reasons that these have been applied unless the OfS considers it inappropriate to do so.</p> |
| <p>Any sanctions applied to the provider</p> | <p>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</p> <p><u>Any decision to impose a sanction on a provider, including information about a provisional decision to impose a sanction in circumstances where the OfS has published information about an investigation that led to the provisional decision.</u></p> <p>A monetary penalty – including the amount of the penalty and the reason for it.</p> <p>Suspension of registration* – section 16 of HERA requires the Register to state that a provider's registration is suspended during any suspension, to show the limits of that suspension, and the end date for the suspension. The reason for the suspension will also be included.</p> <p>De-registration of the provider* – section 18 of HERA requires the OfS to maintain a list of deregistered providers and to publish this, together with any transitional and savings provisions. This list of deregistered providers does not have to be on the Register. In most cases, information about a provider's de-registration and reason for this will be published in the OfS's historic records, after a final decision has been made and any appeal process has concluded.</p> |
| <p>Any transitional provisions to 'teach out' a provider's students after the provider has been deregistered</p> | <p>When the OfS deregisters a provider, it may make a transitional or saving provision, which means treating the provider as though it were registered for a transitional period.</p> <p>Transitional and savings provisions may include any arrangements to teach out students registered with the provider at the date of its deregistration and to allow such students to</p> |

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| | continue to access the student support system until the end of their course. In these circumstances, the provider's deregistration and reason for this will be published on the Register for the duration of the teach out period. |
| Any authorisation for the provider to grant degrees* | The Register will include information about whether the provider has degree awarding powers and, if so, what type of powers it has and, where relevant, the period for which they have been granted. |
| Variation of authorisation to grant degrees* | The OfS has powers to vary a provider's authorisation to grant taught awards and research awards. The OfS will publish information on the Register about any variation in the provider's authorisation to grant degrees and the reason for this. |
| Revocation of authorisation to grant degrees | <p>The OfS has powers to revoke a provider's authorisation to grant taught awards and research awards. When a provider remains registered after the revocation of such powers, the OfS will publish the timing and reasons for the revocation on the provider's entry on the Register.</p> <p>When a provider is deregistered after the revocation of such powers, it will no longer appear on the Register and information about the revocation will be recorded in the OfS's historic records.</p> |
| Recognised awards* | The Register will identify whether awards granted by the provider have been designated by the Secretary of State or the OfS under section 214(2)(c) of the Education Reform Act 1988 (c). |
| The provider's validation arrangements* | The Register will identify where a provider has entered into validation agreements, which is where the courses of a provider without degree awarding powers are awarded by another provider with degree awarding powers. |
| The provider's subcontractual arrangements | The Register will include information relating to a provider's subcontractual arrangements. A lead provider may subcontract teaching of some or all of a course to a delivery provider or to another organisation. The lead provider remains responsible for the students studying at the delivery provider. The Register entry for the lead provider will include information about those providers delivering its courses under subcontractual arrangements. |
| The provider's right to use 'university' in its title* | The OfS has powers to authorise the use of 'university' or 'university college' in a provider's title. The OfS Register will state whether the provider has this right and, if so, when and how the right was granted. |
| Revocation of authorisation to use 'university' or 'university college' in the provider's title | <p>The OfS has powers to revoke authorisation to use 'university' or 'university college' in a provider's title.</p> <p>When a provider remains registered after the revocation of such authorisation, the OfS will publish the timing and reasons for the revocation on the provider's entry on the Register. When a provider is deregistered after the revocation of such authorisation,</p> |

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| | it will no longer appear on the Register and information about the revocation will be recorded in the OfS's historic records. |
| A link to the provider's entry on the Home Office's Register of licenced sponsors, where the provider holds a Tier 4 sponsor licence <u>Information about any Home Office student sponsor licence</u> | The Register will link to the Home Office's Register of licensed sponsors to show whether the provider has a Tier 4 licence to recruit students from outside the European Economic Area. <u>The Register will confirm whether the provider holds a Home Office student sponsor licence to recruit students from outside the UK.</u> |
| <u>Information about</u> A link to the provider's primary regulator, where this is not the OfS | The Register will include a link to <u>information about</u> the provider's primary regulator where this is not the OfS (for example the ESFA for further education and sixth form colleges). It will also identify those of the provider's general ongoing conditions of registration that are satisfied by evidence provided by the primary regulator. |
| A link to information designed to support prospective and current students to make informed study choices | The Register is not intended to be the primary place for students to find information about higher education providers and courses. Instead the Register will link to the provider's entry on the Unistats <u>Discover Uni</u> website so that users can find further information about a provider and its undergraduate courses. |

Annex D: Factors we will consider in making publication decisions

1. When making a publication decision, we will have regard to the factors set out below and will consider them in the manner we consider to be appropriate for an individual case.
2. We will consider the factors as we decide whether information about a particular subject matter should be published and, if so, the particular content of that publication. It follows, for example, that our consideration of the factors may result in content being included in a publication that seeks to address the potential for publication to result in misunderstanding or unintended consequences. We may also consider these factors when deciding when, how or where to publish information.
3. In addition to the factors set out below we will have regard to other relevant factors on a case-by-case basis. For example, we may consider principles from relevant legal cases or judgments insofar as they remain good law. For example, at the time of publication of this document, we consider the judgment of the High Court in *R (on the application of Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin) to be a particularly relevant judgment, particularly following the endorsement by the Court of Appeal in *R (on the application of the Governing Body of X) v Ofsted* [2020] EWCA Civ 594. Similarly, in some cases we may consider case law relating to privacy rights.
4. The factors we will consider in making publication decisions are as follows:
 - a. **The student interest.** We will consider the interests of students on higher education courses provided by English higher education providers and the interests of people thinking about undertaking, or who have undertaken, such courses.

Considerations in favour of publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- i. Publication provides prospective students with more information, enabling them to understand the value of the course and provider they are considering and make an informed choice about what and where they study.
- ii. Publication provides current students with more information about their provider and its performance, enabling them to understand the value of their course and provider and make an informed choice about whether to continue studying with that provider.
- iii. OfS regulation helps to promote quality in higher education. Providing clear information about providers reinforces this.
- iv. Publication signals to students, and others, the types of information we may be able to act upon if it is submitted to us.

Considerations against publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- v. Publication may result in prospective students deciding not to study with that provider and this could result in the course or provider no longer being viable and mean that current students may not be able to complete their course with that provider.

- vi. Publication may result in prospective or current students deciding not to study with that provider and this could result in the course or provider no longer being viable and that could reduce choice for future students.
- vii. Publication may result in a third party taking action in relation to that provider and this could result in the course or provider no longer being viable and mean that current students may not be able to complete their course with that provider.
- viii. Publication could damage the reputation of the course or provider, and this could mean that the qualifications held by past students could be undermined.

b. **The public interest.** We will consider the public interest.

Considerations in favour of publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- i. There is a general public interest for regulators to be transparent about decisions they take about those they regulate.
- ii. Publication may encourage staff, students and members of the public to come forward to provide the information about that provider, or other providers, that supports the OfS's registration, monitoring and investigatory activity.
- iii. Publication may enable the OfS to regulate in a way that is proportionate and cost effective because it may encourage staff, students and members of the public to come forward to provide the information about that provider, or other providers.

Considerations against publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- iv. Publication of specific details may limit the ability of the OfS to perform its functions effectively, for example, by reducing the likelihood of providers reporting regulatory risk. Publication may limit the ability of the OfS to address issues in a way that limits the costs to providers, the OfS, students and the public.
- v. Where there are credible risks that specific details could compromise confidential sources of intelligence and evidence about potential wrongdoing, for example, through publishing information that could potentially reveal the identity of members of staff at providers or third parties who have decided to 'blow the whistle' on suspected wrongdoing.
- vi. Where there are credible risks of prejudicing investigatory or compliance activities of the OfS or other regulatory or enforcement bodies, for example, where the timing of publication could lead to evidence being concealed or destroyed.
- vii. Where there are genuine questions about the accuracy or reliability of information.
- viii. Where specific details could be considered to be commercially confidential information of a nature whereby publication (or other forms of disclosure) would be likely to give rise to actual or potential competition law concerns.

- c. **The provider interest.** We will consider the impact of publication on English higher education providers.

Considerations in favour of publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- i. Publication signals to other providers issues that are of concern to the OfS and that encourages compliance.
- ii. Publication demonstrates to providers that are compliant that action is taken in relation to providers that are not compliant.
- iii. Publication of the reasons for a decision about a provider may have a more positive effect than would be the case if no explanation of a negative decision were published.

Considerations against publication may include, but not be limited to, the following illustrative and non-exhaustive examples:

- iv. Publication may damage the provider's legitimate commercial interests if it generated adverse publicity or would create a competitive advantage for other providers.
- v. Publication may damage the legitimate commercial interests of the owners of a provider if it generated adverse publicity or would create a competitive advantage for other providers.
- vi. Publication may damage the interests of a provider's staff if prospective or current students decide not to study with that provider and this could result in the course or provider no longer being viable and that could put employment at risk.

- d. **The risk of seriously and prejudicially affecting the interests of a body or individual.** We will consider the need for excluding from publication, so far as practicable, any information which relates to the affairs of a particular body or individual, where publication of that information would or might, in the opinion of the OfS, seriously and prejudicially affect the interests of that body or individual.
- e. **Other legal duties placed on the OfS.** We will consider matters to which we are required to have regard, for example, our general duties under section 2 of HERA.



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