

June 13, 2018

By email:

Secondary Legislation Scrutiny Committee
hlseclegscrutiny@parliament.uk

Dear Chair and Members of the Committee,

**Statutory Instrument 607/2018: The Higher Education and Research Act 2017
(Cooperation and Information Sharing) Regulations 2018**

With reference to the consideration of this SI in the Joint Committee on Statutory Instruments 25th report¹ the timeframe between which this SI has been laid, without consultation or public announcement — coming into effect in under a calendar month including a week of Parliamentary recess —made external timely scrutiny impossible.

The negative Statutory Instrument No. 607² was laid on May 23 in Parliament, one week before the start of recess, and will take effect on June 18, 2018 less than one month later.

It will enable student data in England and Wales to be given on a statutory basis to a number of new prescribed persons. These include commercial organisations Pearson Ltd, as well as Gateway Qualifications Limited, and the Student Loans Company among others. [see Annexe for full list]

This affects the entire student population, present and future, and creates significant powers for the Office for Students to grant unprecedented data access to a single commercial provider, and with it unfair monopoly power to potentially influence the Higher Education sector, and student lives.

Recommendation for annulment. Review and revision required.

We believe that this Statutory Instrument requires legal review with regard to UK and European law, unfair competition, and to privacy rights under Human Rights law which once again the Department has chosen to omit in its data sharing plans. Its implementation would appear not to be pressing since no immediate purpose is listed in the Explanatory Notes.

It is within the praying period at the time of writing. We ask that the Committee note the EDM 1383 in the House of Commons to pray against this SI.³

We ask therefore for support that this Instrument be annulled in order for sufficient scrutiny and safeguards to be put in place, in a revised version.

This would allow review and appropriate purpose limitation, privacy impact and human rights assessment to be made, and those affected to be involved in these changes, so that an appropriately revised SI could be laid.

¹ Joint Committee on Statutory Instruments 25th Report <https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/150/150.pdf>

² SI 608/2018 http://www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxi_20180607_en.pdf

³ EDM 1383 in the House of Commons. to pray against the SI <https://www.parliament.uk/edm/2017-19/1383>

Concerns

1. **There has been no public or parliamentary debate or public consultation.**

Students and universities have been excluded from this decision. 90% of 37,000 students in a 2015 UCAS survey⁴ said they do not want their data to be handed to commercial companies without consent.

2. **Significant political and policy interest.**

i. There was concern raised during the development of the parent Act, **by Gordon Marsden MP** who spoke of these risks in debate in October 2016⁵ during its development: *"these clauses would give the state access to all university applicants' full data in perpetuity, for users who would only be defined as "researchers" and without "research" being defined at all; that might be capable of being changed under the direction of the Secretary of State."*

ii. **Dr Blackman Woods MP** also raised the concern about clause 71, *"that it allows for the opening up of student data and that it will possibly take the data outside current research protocols." ... "it is likely that a number of bodies will want it for a whole variety of commercial reasons that might not be in the student interest at all and that might not sufficiently protect individual data and individual information."*⁶

iii. We wrote to the House during the development of the parent act, The Higher Education and Research Act 2017, about the risks of such loose wording of the purposes of datasharing.⁷

iv. **UCAS** also raised these risks and concerns in Bill evidence at that time⁸.

v. **In response on behalf of the government, the Minister said in 2016**, *"The hon. Members for Blackpool South and for City of Durham asked about safeguards, in terms of who would have access to these data. Only named and approved individual researchers within Government and from approved bodies will have access to the data. All data will be de-identified before being received by these accredited researchers."*

vi. The commercial company Pearson is not whom the public or we believe the general members of each house would understand to be in layman terms 'accredited researchers' and this legislation provides powers for the data to be passed to an unlimited number of persons, not named and approved individual researchers.

vii. Further more, the power to shape the education sector and course content, derived from the knowledge that these kind of data hold about the students' personal background, own and parental income, courses, attainment and ongoing activity, will enable the holder to shape the education landscape with an unprecedented influence.

⁴ UCAS student survey [copy] defenddigitalme.com/wp-content/uploads/2016/09/ucas_applicant_data_survey_key_results_0.pdf

⁵ Hansard [https://hansard.parliament.uk/Commons/2016-10-13/debates/2058d2b2-86fc-473e-99be-fcd036ea073a/HigherEducationAndResearchBill\(TwelfthSitting\)#contribution-B791A963-1F3B-467E-9E76-AFFC5D623041](https://hansard.parliament.uk/Commons/2016-10-13/debates/2058d2b2-86fc-473e-99be-fcd036ea073a/HigherEducationAndResearchBill(TwelfthSitting)#contribution-B791A963-1F3B-467E-9E76-AFFC5D623041)

⁶ Hansard Col 458 [https://hansard.parliament.uk/Commons/2016-10-13/debates/2058d2b2-86fc-473e-99be-fcd036ea073a/HigherEducationAndResearchBill\(TwelfthSitting\)#contribution-B791A963-1F3B-467E-9E76-AFFC5D623041](https://hansard.parliament.uk/Commons/2016-10-13/debates/2058d2b2-86fc-473e-99be-fcd036ea073a/HigherEducationAndResearchBill(TwelfthSitting)#contribution-B791A963-1F3B-467E-9E76-AFFC5D623041)

⁷ Evidence to the Bill Committee in preparation of the Higher Education Act 2017 submitted by defenddigitalme <https://publications.parliament.uk/pa/cm201617/cmpublic/HigherEducationandResearch/memo/HERB39.htm>

⁸ Evidence from UCAS <https://publications.parliament.uk/pa/cm201617/cmpublic/HigherEducationandResearch/memo/HERB10.pdf>

viii. In debate of the parent legislation, the Higher Education and Research Act, in the House of Lords among others **Lord Kerslake** pointed out that “*the Bill allows the Secretary of State to frame the guidance given to the OfS by reference to particular courses. As this House will know, that contrasts sharply with the current legislation—the 1992 Act—in which the Secretary of State is specifically forbidden from setting guidance to HEFCE in this way. Those are three very specific examples of why this Bill causes concern.*”⁹

3. There are no clear policy objectives or significance of its implications set out, in inadequate explanatory material.

i. It unclear in the Explanatory Notes why Pearson is singled out to be among the designated receiving bodies. There is no public transparency of the detailed purposes for which these data will be passed to the commercial provider, HMRC, the Student Loans company, or others.

ii. The Explanatory Notes¹⁰ say that the purposes were determined within the future users themselves (see 8.1) but what are they? “*The purpose of the information sharing, and whether it would be primarily for OfS functions or the functions of the other body was then determined through a further round of consultations within both the Department for Education and the bodies themselves between January and March 2018.*” The explanatory notes explicitly state further, that there will be no requirement for any guidance (see 9.1).

iii. There is no clear limitation of purpose or restriction on how the data may be used or distributed further after handing over to Pearson. Risks include Pearson selling the data directly, or as part of a company asset as they have done so in the past¹¹ and the potential uses once these data are distributed without public oversight to develop products that limit students’ life chances in their choices and access to institutions, courses, funding, and employment. The knowledge gleaned from the data, may give any single company, in this case Pearson Ltd, a sizeable and unfair commercial competitive advantage in the sector over others.

iv. Given the existing and specific collaboration between Pearson and IBM Watson¹², we suggest that there must be binding assurances given, how student data would be used and that student data would not be used to benefit Pearson’s machine-learning models and training its AI, without express individual consent, *before* any such legislation is passed.

4. Third-party processing will be unlawful unless collected with explicit purposes of the data controller(s) set out on a privacy notice for students at the time of collection — what these are should be clear now, but are omitted in the EN. There must also be a limitation for historical data transfer, for which no student has been informed of how their data can be used in future.

i. Since the as yet undefined purposes of processing are not the direct educational purposes the student would expect, the only available reasonable lawful basis for such use is consent, to respect the rights and freedoms of students under Article 6. This SI appears to attempt to override that consent basis, by creating a statutory one, without that respect or safeguards.

⁹ Lord Kerslake, January 2017 Hansard,, Col 1802, Higher education and Research Bill <https://goo.gl/7xVFRZ>

¹⁰ Explanatory Notes to SI 607/2018 www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxiem_20180607_en.pdf

¹¹ Pearson sell PowerSchool 2015 including 15 million US students’ data <https://www.thetimes.co.uk/article/pearson-sells-powerschool-to-vista-equity-partners-for-dollar350m-j0vq0kwt7gr>

¹² Pearson IBM Watson collaboration <https://www.ibm.com/watson/education/pearson>

ii. The General Data Protection Regulation recognises any data which are not anonymous including de-identified or pseudonymous data¹³, are still personal data, and fall under its obligations. As such, the general principles of purpose limitation and clear explanations to be given at the point of data collection, must include purposes of the processor and controller.

iii. There is no assurance that no historical data would be handed over — collected without the explanation to the applicants or students that personal data would be given to Pearson and the other new bodies in future. Such processing of historical personal data would therefore be without a fair and lawful basis, given the failure to fairly process it during its (past) collection.

5. Regulation and potential conflict of interest

In preparation of the Act a number of representatives in both Houses, Lords¹⁴ and MPs, raised concerns about the powers in the regulatory function of the OfS and institutional autonomy. We suggest that sufficient scrutiny should be given to the powers this SI confers on a new relationship between the OfS and Pearson, given the regulatory function of the OfS and potential conflict of interest, given the former position of the current Chair of the OfS¹⁵ who took up his post as chair of the Office for Students in March 2017, having been Chief Education Adviser at Pearson from September 2011 to March 2017.

6. DfE has not carried out any Privacy Impact or Human Rights Assessments.

The Department will take no accountability for the subsequent impact on privacy, but says in the Explanatory Notes (10.4) that the OfS has the responsibility for any privacy impact assessment. This is an abdication of responsibility, to create powers before understanding its significant effects. Creating rights of access to the entire student population's personal confidential data for Pearson Ltd (as well as other listed third parties) is of national significance, with potential long term implications for individuals and for the sector as a whole.

7. No Freedom of Information obligation, reduces transparency and oversight.

Once personal data have been transferred to some of these commercial bodies, such as Pearson, the State, and civil society, lose oversight and transparency and right to question policy and practice over its processing. Pearson EdExcel for example, will not tell defenddigitalme which countries abroad they routinely transfer and process school pupil personal data, from exams.¹⁶

Thank you for your urgent consideration.

Sincerely,

Jen Persson
Director, defenddigitalme
07510 889833

¹³ Recital 26 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

¹⁴ Hansard January 9, 2017 <https://hansard.parliament.uk/Lords/2017-01-09/debates/90BE8AAC-9AAB-435C-A908-BC082316C3E5/HigherEducationAndResearchBill>

¹⁵ OfS Board <https://www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/>

¹⁶ Exam Boards: Subject Access Policy https://www.whatdotheyknow.com/request/exam_boards_subject_access_polic_2#incoming-1173051

Annex

About defenddigitalme

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

Relevant persons and function of the new regulations

Source: http://www.legislation.gov.uk/uksi/2018/607/pdfs/uksi_20180607_en.pdf

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