



<u>Decision Ref:</u>	2018-0094
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Dissatisfaction with customer service Documents mislaid or lost Failure to process instructions in a timely manner
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns two mortgage accounts the Complainant holds with the Respondent Bank. The Complainant has appointed a representative (her Solicitor) to complain on her behalf and the factual background leading up to the complaint is set out in detail in a letter attached to the Complaint Form dated the 19 December 2016.

The loans in question, underlying the Complainant's mortgage accounts ****5285 and ****5293, were taken out in **November 2006**. In 2014, on foot of an application for forbearance by the Complainant and following an assessment of her financial circumstances, the Bank issued an Agreement to Amend Mortgage Loan Offer ("AALOO") in respect of both loans. The Complainant agreed to the alternative repayment arrangements offered- the AALOO in respect of account ****5285 was signed on the **24 May 2014** and the AALOO in respect of account ****5293 was signed on the **25 May 2014**.

The Complainant outlines that the repayment arrangements were maintained until April 2015, at which point the tenant residing in the property underlying mortgage loan account ****5293 moved out. As this rental income was the only means the Complainant had of meeting the repayments on account ****5293, the Bank was notified of the financial situation accordingly and the Complainant furnished the Bank with an updated Standard Financial Statement. A new tenant for the property was secured in July 2015, following on from which the Complainant indicated to the Bank that she would be able to recommence repayments as per the AALOO signed on the 25 July 2015. In August 2015 the tenant residing in the property underlying mortgage loan account ****5285 vacated the property and the

Complainant was left in a position where she was unable to meet the repayments due on this mortgage. The Bank was informed of the position.

The Complainant states that arising from ongoing difficulties in securing tenants and the knock-on effect on repayment affordability, on the **4 December 2015** she submitted a proposal to the Bank to sell both properties on consent, with deductions from the sales proceeds as estimated, in full and final settlement of the outstanding balances on the mortgage accounts in question. The Bank rejected this proposal but suggested that the properties could be subject to an assisted voluntary sale. In its letter to the Complainant dated the 14 December 2015 the Bank outlined that if the sales proceeds did not cover the amount outstanding, the borrower would remain fully liable for the remaining balance. The Bank further outlined that it would contribute 1% of the gross sale proceeds towards Solicitor's fees and 1.5% toward selling agent's fees.

Matters progressed and on the **11 May 2016** the Complainant's Solicitor wrote to the Bank requesting the title deeds for both properties on accountable trust receipt so that contracts could be prepared in anticipation of the proposed consent sales. By letter dated the 12 May 2016 the Bank responded requesting fees in the amount of €63 for the release of title deeds for the property underlying mortgage account ****5293. The requested fees were sent to the Bank on the 16 May 2016. The Complainant's Solicitor wrote to the Bank again on the **18 May 2016** and included a cheque in the amount of €63 in respect of the title deeds for the property underlying mortgage account ****5285, noting that the Bank's previous letter had only referenced one property. The Complainant's Solicitor also told the Bank that an offer of sale had been accepted for the property underlying mortgage account ****5285.

The Complainant's Solicitor states that title deeds for the property underlying mortgage account ****5293 were received on the 24 May 2016.

By email dated the **30 May 2016** the Complainant's Solicitor repeated its request for title deeds in respect of the property underlying mortgage account ****5285. In response the Bank advised that the title deeds were being held by the Complainant's former Solicitor.

By letter dated the **7 June 2016** the Complainant's Solicitor wrote to the Bank requesting the identity of the former Solicitor. Following on from this the Complainant's Solicitor wrote to the Bank again on the **21 June 2016**, requesting that the Bank vigorously pursue the return of the deeds. Some verbal communication took place between the parties subsequently, following which the Complainant's Solicitor sought an update by email dated the **26 July 2016**. In this email the Bank was asked whether it would consider suspending mortgage repayments pending the sale. The Bank responded advising that the Complainant would have to continue meeting her repayments.

In or around **August 2016** the sale of the property underlying mortgage account ****5285 collapsed. The Complainant's Solicitor wrote to the Bank on the 10 August 2016 advising it of the position, requesting a copy of the Bank's complaints procedure and indicating that a formal complaint was being considered. The request for suspension of repayments was renewed and a further request was made for the waiving of any arrears and interest accruing

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since the 18 May 2016 (the date on which title deeds were first sought) until the completion of a new sale.

On the **18 August 2016** the Complainant's Solicitor wrote to the Bank and advised that a new offer had been accepted. The Bank was also asked what steps had been taken to procure the title deeds. On the same date the Complainant's former Solicitor made contact to advise that the title deeds had been lost and that its firm was in the process of reconstituting title documents.

In subsequent correspondence the Bank outlined its position to the effect that responsibility for the lost deeds rested with the Complainant's former Solicitor. By letter dated the **5 September 2016** the Bank indicated that it does not offer debt forgiveness and that the Complainant, as borrower, has a duty to keep her loan accounts in order. The Bank asserted that the request to suspend payments and to write off interest and arrears accrued since the 18 May 2016 could not be acceded to, as any such agreement would fall outside of its credit policy.

The Complainant's Case

The complaint is that the Bank provided the Complainant with an unsatisfactory level of customer service by-

1. Unbeknownst to the Complainant failing to take adequate (if any) steps to procure the return of the title deeds pertaining to the property underlying mortgage account ****5285 for a period of in or around 11 years, thereby exacerbating the Complainant's financial difficulties.
2. Failing to notify the Complainant that her former Solicitor had not complied with its Undertaking to the Bank to return the title deeds.
3. Failing to advise as to what steps (if any) the Bank had taken over the 11-year period to enforce the Undertaking and therefore procure the safe return of the title deeds pertaining to the property underlying mortgage account ****5285.
4. Failing to furnish the title deeds in a timely manner, or indeed at all.
5. Frustrating attempts to voluntarily sell the secured property on consent.
6. Failing to employ a cohesive approach to the consent sale thereby delaying same by seeking information and documentation that had previously been submitted.
7. Failing to agree to suspend repayments, arrears and interest accrual on a mortgage account when it became apparent that the consent sale of the property would be delayed, at least in part, as a result of the Bank's actions and/or omissions.
8. Failing to furnish a copy of the Bank's complaints procedure, despite repeated requests for same.

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In order to resolve her complaint the Complainant has sought the following remedies-

1. The suspension of repayments, arrears and interest accrual as and from at the very least May 2016.
2. The waiving of any arrears and interest accrued from that date until the completion of the sale of the property.
3. The furnishing of evidence as to what (if any) steps the Bank took, as it alleges, to enforce its undertaking and procure the safe return of the title deeds.
4. A written apology in respect of each element of the complaint.
5. Compensation for the time expended by the Complainant in respect of this complaint and for the ongoing stress and financial hardship arising therefore.
6. Legal costs in respect of the complaint.

The Provider's Case

The Bank refutes the complaint and insists that it cannot be held responsible for the loss by the Complainant's former Solicitor of the title deeds pertaining to the property underlying mortgage account ****5285.

The Bank explains that when the Complainant purchased the property in question she engaged the services of a Solicitor to act as her professional advisor in respect of the transaction. The Bank submits that this Solicitor acted as the Complainant's agent and was duly instructed in the Undertaking, which the Bank accepts as security for the loan. The Undertaking system is a system agreed by the Irish Banker Federation and the Law Society of Ireland. The agreed system provides that undertaking Solicitors, selected by the customer, must stamp and lodge the deeds and mortgage documents for registration and then furnish the deeds to the Bank. The Bank emphasises that the onus is on the borrower and his/her agent, the appointed Solicitor, to ensure that the Undertaking is complied with.

The Bank states that following a request for the title deeds in furtherance of the sale of the property underlying mortgage account ****5285, it was established that the Bank never received the deeds from the Complainant's former Solicitor. The Complainant's former Solicitor confirmed the loss of the title deeds and the intention to reconstitute the necessary deeds.

The Bank refutes the suggestion that it was under a duty to the Complainant to take steps to enforce the undertaking entered into by the Complainant's former Solicitor. The Bank submits that as it did not hold the title deeds in question, it cannot be criticised or held liable for the Complainant's former Solicitor's handling of the deeds. The Bank utterly rejects the contention that there was an onus on it to supervise and pursue compliance by the Complainant's Solicitor to fulfil its professional duty to its client. It is the Bank's view that

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any such contention would represent a significant extension of a duty of care, which is not contemplated under the certificate of title system.

The Bank states that it is simply not responsible for any delay (in the process of selling the property in question) that arose as a result of the manner in which the Complainant's former Solicitor carried out its Undertaking. The Bank submits that there has been no inaction on its part. On the contrary, the Bank was limited in the approach it was able to take. When the loan in question was drawn down the Complainant's Solicitor undertook a) to perfect title, b) to perfect the Bank's security and c) to lodge the deeds with the Bank. The Bank points out that in 2007 it was advised that all was in order and that its security was in place. The Bank continued to pursue the return of the deeds; however, as title and security were in place a complaint to the Law Society was not warranted.

Regarding the claim that the Bank wrongfully failed to accede to the Complainant's request to suspend repayments, arrears and interest accrual pending completion of the sale of the property, the Bank submits that the Complainant remained at all time liable to service her mortgage loans in accordance with the loan agreements between the parties.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 3 May 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

The Bank made a detailed submission dated 22 May 2017, a copy of which was furnished to the Complainant's representative on 23 May 2018. The Complainant elected to make no observations in relation to the Bank's said submission which contended that the Preliminary Decision dated 3 May 2018 contained an error of law. On 25 June 2018, the FSPO requested confirmation from the Complainant's representative as to whether the Complainant accepted or disagreed with the Bank's contention that, at law, the Bank bears no responsibility for the delay encountered by the Complainant in securing access to the Title

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Deeds of the property until March 2017, given that the Bank was not required to “police” compliance by the Complainant’s former solicitor with the Undertaking which had been given. Confirmation of the Complainant’s position in that regard was requested within a further period of 10 working days from that time, and the Complainant’s solicitors were advised that if the FSPO did not hear within that period, this office would proceed to conclude the adjudication, by issuing a Legally Binding Decision to the parties, taking into account all of the evidence, including any submissions from the parties, after the Preliminary Decision was issued.

Following the consideration of the additional submissions received, the final determination of this office is set out below.

The Complainant has outlined a number of grounds of complaint. All of these grounds of complaint relate to the manner in which the Bank conducted itself with regard to the Complainant’s attempt to complete a voluntary consent sale of the property underlying mortgage account ****5285. While the Complainant refers to two mortgage accounts, and indeed both accounts are relevant to the factual background, as there was never any issue with receipt of the title deeds pertaining to the property underlying mortgage account ****5293, and no corresponding allegation of delay or other wrongdoing on the part of the Bank regarding the sale of this particular property, this complaint is essentially focused on mortgage account ****5285. Notwithstanding that numerous grievances have been specified, the crux of this complaint is that the Bank failed to provide the Complainant with the requested title deeds, thus causing a delay in the consent sale of the property underlying mortgage account ****5285.

By letter dated the 25 October 2017 the Bank confirmed that the property in question has now been sold.

A very detailed chronology of events has been set out in the Complainant’s submission to this Office attached to her Complaint Form dated the 19 December 2016. In its response to the formal investigation by this Office commenced in October 2017, the Bank also set out a comprehensive timeline of events. I have considered this background information, along with all submissions by the parties, including the documentation furnished in evidence.

On the 10 August 2006 the Bank issue the Complainant with a Mortgage Loan Offer Letter, which she duly accepted on the 17 August 2006. An amount of €240,000 was advanced to the Complainant to fund the purchase of a property in County Wicklow, repayable over a 25 year term, with loan instalments subject to a variable rate of interest. This loan forms the basis of mortgage account ****5285. When the Complainant signed the ‘Borrower’s Acceptance and Consents’ she agreed to adhere to the loan offer terms and conditions. General Condition 4(a) stipulates the following-

“Unless otherwise stated herein or agreed by the Lender in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution. For an annuity or other repayment loan, repayments should be comprised of principal and interest and any other amounts payable and for

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an endowment loan shall comprise of interest and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.”

Notwithstanding the Complainant’s commitment to service the loan as per the Mortgage Loan Offer letter dated the 10 August 2006, the Bank agreed to grant the Complainant forbearance on numerous occasions, thereby altering the repayment arrangement in place between the parties.

In its letter to this Office dated the 25 October 2017 the Bank refers to 10 separate Mortgage Forms of Authorisation, which issued in respect of the loan in question. The first Mortgage Form of Authorisation was accepted by the Complainant on the **8 November 2007**; the final Mortgage Form of Authorisation referred to is dated the **17 February 2015** and was accepted by the Complainant on the 2 March 2017. In her submissions to this Office the Complainant explains that she experienced ongoing financial difficulties with respect to servicing her mortgage loan account- a lot of these difficulties, it would appear, emanated from the sourcing of rental income. The Complainant takes no issue with the content of the various Mortgage Forms of Authorisation signed over the years, nor does she have a gripe with the terms of the original loan agreement; rather, the grievance relates to the Bank’s conduct following its consent to a voluntary sale of the mortgage properties.

As explained by the Complainant in the account attached to her Complaint Form, in December 2015 she submitted a request to the Bank to sell the properties underlying mortgage loan accounts ****5285 & ****5293 on consent. By letter dated the 14 December 2015 the Bank offered the Complainant the option of an assisted voluntary sale and indicated that it would contribute *“up to 1% towards your Solicitor fees and up to 1.5% Selling Agent fees”*. The letter also contained the following information in bold type-

“Please note that if the sale proceeds of the property do not cover the amount outstanding on the Mortgage Loan Account(s), you remain fully liable for the amount outstanding...”

The Complainant outlines that on the 11 May 2016 her Solicitor requested the title deeds in respect of the properties she was planning to sell, on accountable trust receipt. Subsequently, on the 18 May 2016 a fee in the amount of €63 was furnished to the Bank to fund the release of the title deeds relating to the property underlying account ****5285. A purchase offer in respect of the said property was duly accepted and the Bank was notified of same. On the 2 June 2016 the Bank notified the Complainant that the title deeds requested were actually in the possession of the Complainant’s former Solicitor. Subsequent information came to light to the effect that the Complainant’s former Solicitor had mislaid the deeds. The Complainant outlines that numerous letters and emails issued to the Bank seeking an explanation for the delay procuring the deeds and urging expedition in the process before the sale ultimately collapsed in August 2016. The Complainant’s requests to suspend repayments, arrears and interest accrual on the loan were refused.

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Mindful of the multiple grounds of complaint advanced by the Complainant, the central question that needs to be determined is whether the Bank is responsible for failing to furnish the title deeds, as requested. The Complainant insists that the failure to provide the deeds resulted in the initial sale falling through. The suggestion is that while the property has since been sold, a sale could have been achieved at a much earlier date, thus alleviating the Complainant's financial difficulties.

The Bank denies liability and points to the fact that the Complainant's former Solicitor acknowledged fault in mislaying the deeds and proceeded to take steps to reconstitute the deeds. The Bank has furnished a letter dated the 22 August 2016 in evidence in which it referred the Complainant to a letter dated the 18 August 2016, received from the Complainant's former Solicitor, as follows-

"We note correspondence received from [the Complainant's former Solicitor] of the 18th August in which they concluded that the title deeds have been lost/mislaid. They are in possession of the mortgage deed dated 03/11/2006 and in this regard the Bank's position is secure. They advised that they will be lodging the application for first registration and the remainder of the title will be reconstituted."

The Bank is of the firm view that it was not obligated to ensure that the Complainant's former Solicitor completed its Undertaking by furnishing it with the title deeds. The Bank argues that the Complainant's former Solicitor, who was engaged as the Complainant's professional advisor when she entered into the mortgage agreement in question, bears full responsibility for any perceived delays or resultant financial consequences arising out of the loss of the title deeds.

I fully accept that the Complainant's former Solicitor undertook to furnish the title deeds in question to the Bank, and I also acknowledge that the Complainant's former Solicitor took ownership of the loss of the title deeds. Whilst the Bank owed a duty to the Complainant, its customer and mortgagee, to ensure that once a request for release of the title deeds was forthcoming, that said request would be processed with expedition, nevertheless, I am conscious that the Bank could not provide documents which had never come into its possession. Though it was incumbent on the Bank to ensure that title deeds within its possession, would be released as efficiently and expeditiously as possible, it had no power to release those title deeds if they had never been made available by the Complainant's former Solicitor. I note the Bank's advice that it had followed up with the Complainant's former Solicitor on a number of occasions but that the Bank did not have any duty to make a complaint to the Law Society.

I note the views of *Hedigan J* in *Clark v FSO [2010 No. 193 MCA]* that any suggestion that the Bank owed a duty in that regard to make a complaint to the Law Society in such circumstances, would amount to a significant extension of the duty of care and would raise obvious public policy issues. I do not believe there was a duty on the part of the Bank to go behind the Complainant's solicitor-client relationship (with her former solicitor) by communicating directly with that former solicitor's client (the Complainant) about the lack of progress in the title deeds being lodged. Although I acknowledge that from a customer service perspective, it was frustrating that the title deeds were not to hand, when the

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request for same was made, this office must however recognise that, at law, the Bank was entitled to rely on the existence of the Undertaking from the Complainant's former Solicitor, to the effect that the deeds would be made available. In the event however, the said former Solicitor was unable to make the deeds available, because they had been mislaid.

The Bank seeks to rely in that regard on the judgment in *Clark v FSO [2010 No. 193 MCA]* which largely concerned a Finding issued by the Financial Services Ombudsman in January 2011, which found that the Complainants in that instance, had failed to establish any loss, in the context of the complaint made at that time, against a different Bank.

According to the Bank's timeline of events, the title deeds in question were finally furnished to the Complainant's new Solicitor on the 1 March 2017, some ten months after the initial request seeking them was made. I am satisfied that a period of approximately ten months for provision of title deeds in furtherance of a proposed property sale is wholly excessive and completely outside the bounds of an acceptable timeframe. However, it was not a matter for the Bank to 'police' the manner in which the Complainant's former Solicitor performed its Undertaking, and neither was the Bank obliged to vigorously pursue the enforcement of that Undertaking. The Bank's obligation was to ensure that its customer, the Complainant, was afforded an appropriate and efficient level of service when she made the difficult decision to sell her negative equity property underlying account ****5285. It could not comply with her new Solicitor's request however because it did not have custody of the title deeds and was reliant on the Complainant's former Solicitor to make them available in accordance with its Undertaking, which it ultimately did, some 10 months after the deeds had been requested. The delay however, was not one which had been caused by the Respondent Bank and I must accept, that notwithstanding the frustration caused to the Complainant, at law, the Respondent Bank bears no responsibility for the delay caused by the Complainant's former Solicitor in making the relevant deeds available.

The Complainant in this matter also takes issue with the approach taken by the Bank to the consent sale, and specifically with the fact that various individuals/teams were involved in the matter and these individuals/teams did not appear to know what the other was doing, resulting in a fragmented approach to the whole process. I accept the Complainant's position that various officials handled the matter at different stages; however, I am unwilling to fault the Bank for the manner in which it delegates the various work involved in the sale of a security property. It would be unreasonable to expect one individual/team to be assigned to a process as intricate as the sale of a negative equity security property relating to a loan in considerable arrears, which has been the subject of numerous alternative repayment arrangements. However, I appreciate the frustration experienced by the Complainant when letters issued to her Solicitor requesting information furnished/agreed previously. Given the fact that the Complainant was in such financial difficulties, borne out by her desire to sell the negative equity properties and as evidenced by the history of forbearance granted, I am of the view that the Bank ought to have extended to the Complainant the optimum level of service possible. By renewing requests already addressed (for example as demonstrated by the request made to the Complainant's Solicitor on the 3 August 2016 seeking a schedule of deductions to be sent to the credit committee when such a schedule had been furnished previously), the Bank failed to so deliver.

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Regarding the Complainant's upset at not being provided with the Bank's complaints procedure, I believe there may have been some confusion here, with the Bank believing it was being asked to disclose its own internal complaints procedure. In its letter to the Complainant dated the 5 September 2016 the Bank advised that it was not prepared to reveal the details surrounding its complaint procedure as it is "*highly confidential and market sensitive*". The Bank did proceed to advise the Complainant of her right to receive a final response to her complaint. I am unwilling to make a finding of any wrongdoing on the part of the Bank on this specific issue.

The remaining grievance articulated by the Complainant concerns the Bank's failure to suspend repayments, arrears and interest accrual on the mortgage account when it became apparent that the consent sale of the property would be delayed. I do not believe that there was any obligation on the Bank to agree to waive repayments on the mortgage. On numerous previous occasions the Bank agreed to amend the repayment terms of the Complainant's mortgage due to her financial circumstances. The Bank engaged with the Complainant many times (the Bank refers to 10 Mortgage Forms of Authorisation in respect of the account in question, the first of which dates back to November 2007) in order to alleviate the financial pressure brought to bear in the servicing of her mortgage loan. When the Complainant suggested selling the properties underlying her mortgage accounts, the Bank consented to an assisted sale, by agreeing to contribute towards the fees arising out of the sale. Against this backdrop of facilitating the Complainant, and considering that there is no concrete evidence revealing the precise reasons the sale collapsed, I do not believe the Bank had any onus, equitable or otherwise, to agree to suspend the Complainant's mortgage repayments and the accrual of arrears and interest. It must be borne in mind that when the Complainant accepted the Bank's original Mortgage Loan Offer Letter dated the 10 August 2006, she agreed to meet the repayments associated with the loan on the due dates fixed by the Bank. General Condition 4(a) is set out above. Also of note is that according to the Bank, the Complainant breached the terms of the alternative repayment arrangement set out in the Amended Letter of Loan Offer dated the 17 February 2015 applicable to account ****5285 when arrears began to accrue in August 2015. This breach occurred before the Bank consented to the voluntary sale of the property.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint must be rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES**

11 July 2018

Pursuant to Section 62 of the Financial Services and Pensions Ombudsman Act 2017, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,**
- (ii) a provider shall not be identified by name or address,**

and

(b) ensures compliance with the Data Protection Regulation and the *Data Protection Act 2018*.