NCN: [2023] UKFTT 7 (GRC)
Case References: EA-2022-0014, EA-2022-0061

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 28, 29 and 30 November 2022
Panel Deliberations: 9 and 15 December 2022
Decision given on: 4 January 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER SUSAN WOLF

Between

(1) SPOTLIGHT ON CORRUPTION (EA/2022/0014)
(2) JAMES FRANCIS PEARCE (EA/2022/0061)

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE BRITISH BUSINESS BANK

Respondents

Representation:
For the First Appellant: Ms McNeil-Walsh (Counsel)
For the Second Appellant: Did not appear
For the First Respondent: Did not appear
For the Second Respondent: Mr Cornwell (Counsel), Mr Jackson (Counsel)

Decision: Both appeals are dismissed.

REASONS

Introduction

1. The tribunal heard two joined appeals: EA/2022/0014 and EA/2022/0061. This decision relates to both appeals.

2. EA/2022/0014 is an appeal by Spotlight on Corruption Ltd against the Commissioner's decision notice IC-66308-P4M4 of 14 December 2021 which held that the British Business Bank ('BBB') was entitled to rely on section 43(2) (commercial interests) to withhold the requested information. The Commissioner held that neither section 21 or section 22 were engaged. The Commissioner did not require BBB to take any steps. This is referred to as 'the Spotlight appeal'.

3. EA/2022/0061 is an appeal by James Pearce against the Commissioner's decision notice IC-66315-R8M1 of 14 February 2022 which held that BBB was entitled to rely on section 43(2) (commercial interests) to withhold the requested information. The Commissioner held that neither section 21 or section 22 were engaged. The Commissioner did not require BBB to take any steps. This is referred to as 'the Pearce appeal'.

4. The Spotlight appeal relates to a request for the names of companies who had taken loans out under 4 schemes introduced by the Government to help businesses during the Covid pandemic ('the Schemes'):

    4.1. The Coronavirus Business Interruption Loan Scheme ('CBILS')
    4.2. The Coronavirus Large Business Interruption Loan Scheme ('CLBILS'')
    4.3. The Bounce Back Loan Scheme ('BBLS')
    4.4. The Future Fund Scheme ('FFS').

5. The Pearce appeal relates to a request for the names of companies who had taken out loans under FFS.

Structure of the decision

6. A large part of the decision (paragraphs 42-290) is taken up with summarising the terms of the request, the Decision Notices, the pleadings and the submissions of the parties in both appeals.

7. As the parties are already familiar with those documents it may be helpful for them to note that the tribunal's substantive reasoning begins at para 291 on page 44.

Factual background

8. Much of the following factual background was not in dispute. The tribunal made the following findings on the balance of probabilities on the basis of the evidence before it.

9. BBB was established on 1 November 2014 by the UK Government. It is wholly owned by the Secretary of State for Business, Energy and Industrial Strategy ('BEIS'). One of its objectives is to increase the supply of finance to small and medium enterprises.

10. On 11 March 2020 the Chancellor of the Exchequer announced his intention to launch a loan guarantee scheme, to be delivered by high street banks and commercial lenders, to support businesses facing financial disruption due to the Covid-19 pandemic.

11. On 16 March 2020 the Prime Minister announced that individuals should reduce non-essential contact and unnecessary travel and work from home where they possibly can. On 23 March 2020 the Government enforced a full UK lockdown and told the public that they 'must stay at home'.

12. On 19 March 2020 the European Commission ('the Commission') adopted a temporary state aid framework ('the Temporary Framework'). At the date of the response to the requests, this required BEIS to publish on the Commission's Transparency Database details of awards of state aid notified to the Commissioner under the Temporary Framework that exceeded a limit of €100,000 (€10,000 in primary agriculture and fisheries) within 12 months from the moment of granting.

13. From 18 March to 22 March 2020 the BBB engaged in discussions with the Commission and prepared draft state aid notifications for the Coronavirus Business Interruption Loan Scheme ('CBILS') which were submitted to the Commission on 22 March 2020.

14. On 23 March 2020 the Government and BBB launched the Coronavirus Business Interruption Loan Scheme ('CBILS') on the basis of the Commission's 'in principle' sign off on the notification. CBILS was approved by the Commission on 26 March 2020.

15. In March 2020 BEIS were negotiating their own notification with the Commission under the Temporary Framework ('the Umbrella Notification'). This was an overarching notification which would allow granting authorities in the UK to design their own schemes in line with its terms without a separate requirement to notify the Commission.

16. The decision relating to the Umbrella Notification was received from the Commission on 6 April 2020. At the date of the response to the requests, the Umbrella Notification provided that details of <u>all</u> aid awards under the Umbrella Notification would be published, not just those that exceeded the limits set out in the Temporary Framework:

> the UK will request, for this measure, all granting authorities which will use it as a basis to grant aid to ensure that details of all aid awards, and not just of those that fall within the transparency obligation of point 34 of the Temporary Framework, are recorded on the Commission's Transparency Award Module. This will ensure that all aid under the national temporary framework is transparent under one State aid number.[1]

[1] 2.9 (25). As a result of discussions between BEIS and the Commission between December 2020 and April 2021 the Commission subsequently approved BEIS' request to disapply the reporting obligations under the Umbrella Notification.

17. The Coronavirus Large Business Interruption Loan Scheme (‘CLBILS’’) was launched on 20 April 2020. It was issued under the Umbrella Notification.

18. On 27 April 2020 the Chancellor announced the Bounce Back Loan Scheme (‘BBLS’). It was launched on 4 May 2020 under the Umbrella Notification.

19. On 20 May 2020 the Government and BBB launched the Future Fund Scheme (‘FFS’).

20. There are a number of relevant differences between the schemes.

CBILS

21. CBILS was established to provide financial support to businesses affected by Covid-19 primarily in the form of term loans up to a maximum value of £5 million. It was available to small and medium sized businesses based in the UK with an annual turnover of up to £45 million. The criteria included a confirmation that they would be viable were it not for the pandemic and that they had been impacted by Covid-19.

22. The finance was provided by accredited commercial lenders (‘Lenders’). The finance was backed by an 80% guarantee provided by the Government to the Lender in the event of default by the company (the ‘Borrower’). The Government paid the interest and any Lender levied fees for the first 12 months of the loan.

23. From 23 March 2020 to 19 July 2020, 55,674 facilities out of 112,212 applications were approved under CBILS, with a total value of £12.20 billion. The scheme closed to new applications on 31 March 2021. Published figures show that, in in total, 109,877 applications amounting to £26.39bn of lending were approved under CBILS by the end of the scheme.

CLBILS

24. CLBILS was designed to provide access to finance for medium and larger sized businesses affected by Covid-19. Loans and other types of finance of up to £50 million (and, for some larger Lenders, up to £200 million) were provided by accredited commercial Lenders to businesses with a group turnover in or excess of £45 million who were suffering disruption to cash flow due to lost or deferred revenue). The finance was backed by an 80% guarantee provided by the Government to the Lender in the event of default by the Borrower. The Government did not pay the first 12 months of interest nor any Lender’s fees.

25. From 20 April 2020 to 19 July 2020, 428 facilities out of 831 applications were approved under CLBILS, with a total value of £2.89 billion. The Scheme closed to new applications on 31 March 2021. In total, published figures show 753 applications amounting to £5.56 billion of lending were approved.

BBLS

26. BBLS offered loans with a term of up to six years between £2,000 and the lower of 25% of the Borrower's turnover or £50,000. The Government provided a guarantee to the Lender of 100% of the loan and paid the interest rate of 2.5% per annum for the first 12 months. No repayments of principal were required in the first 12 months of the loan and no Lender fees were permitted. The loan was then to be repaid over a further five years.

27. In order to qualify for a loan under BBLS, a business had to be: (a) based in the UK; (b) established before 1 March 2020; and (c) adversely impacted by Covid-19.

28. BBLS was deliberately designed to use Lenders' existing operational processes and practises wherever possible. Twenty-eight Lenders were accredited to provide loans under BBLS.

29. Under BBLS, the Government made changes to the standard banking procedures for loan applications and approvals to make it easier and quicker for small businesses to access urgently needed finance. These changes included allowing self-attestation by the Borrower, waiving the need for BBLS Lenders to do credit or affordability checks, and the disapplication of certain provisions of the Consumer Credit Act 1974. These changes reduced the checks that Lenders were required to carry out prior to offering a loan to a Borrower.

30. BBB identified very significant fraud and credit risks associated with the rapid launch of BBLS, and a draft review was commissioned by Price Waterhouse Cooper (PWC) which classified the fraud risk as very high.

31. BBB sent a formal Reservation Notice to the Secretary of State on 2 May 2020 raising concerns on the grounds of propriety, value for money and feasibility. This included the following:

> On the theme of propriety, our primary concerns relate to the extensive reliance on customer self-certification and the corresponding fraud risk… On value-for-money, my e-mail yesterday set out clear concerns based on our own assessment and that of an expert third party. The scheme is vulnerable to abuse by individuals and by participants in organised crime. Alongside the fraud risk, there will be considerable credit risk in the current economic environment, which will be exacerbated by removing significant elements of the credit checks that would otherwise have been undertaken… On the theme of feasibility, my Board have also asked me to highlight the clause in the Permanent Secretary's instruction that states: "You will need to ensure that there are robust controls and governance around these financial commitments that, as far as reasonably practicable, ensure public funds are being used appropriately in the context of the agreed parameters of the scheme." Given the pace at which decisions are being made and processes built, and the imperative for simplicity throughout, it is not feasible for us to achieve this to the standard implied by any ordinary interpretation of what is either "robust" or "reasonably practicable".

32. The Government made a Ministerial Direction to proceed with the scheme. The Government's view was that the threat to the viability of hundreds of thousands of the small businesses outweighed the risk of error and fraud in BBLS.

FFS

33. FFS was intended to assist early-stage businesses that were either pre-revenue or pre-profit. The aim was to provide an incentive for equity funds, angel investors and other investors to continue to back innovative, high-growth businesses that would have received investment but for the pandemic and were struggling to raise their next funding round.

34. Under FFS the Government provided loans ranging from £125,000 to £5 million directly to UK companies ('FFS Borrowers'), subject to at least equal match funding from private investors ('the Investors'). The FFS was an Investor-led scheme that allowed for an Investor, known as the Lead Investor, to apply to invest in an eligible company on behalf of itself and other Investors. This involved the Lead Investor starting an application on the application portal and providing information about the company in which they wished to invest and the other Investors. The FFS Borrower subsequently provided and verified the information provided by the Lead Investor during the later stages of the application.

35. FFS loans can convert to shares in the FFS Borrower in a variety of circumstances, as set out in a Convertible Loan Agreement ('CLA').

36. In order to establish FFS, BBB set up a company called UK FF Nominees Limited, which entered into the CLA with the FFS Borrower and the Investors. UK FF Nominees Ltd is the legal titleholder to the FFS loans and any shares resulting from their conversion. It holds a beneficial interest in the loans (and any shares resulting from their conversion) on a bare trust for the benefit of BEIS. If the loans do convert, UK FF Nominees Ltd becomes a shareholder in the FFS Borrower. This shareholding will then be publicly disclosed on the public register at Companies House.

37. At the time of the response to the requests, BBB had decided that it would publish on its website on a rolling basis the names of all FFS Borrowers in which UK FF Nominees Ltd has a shareholding at the end of each financial quarter, i.e. those companies in which the loan had converted to equity. At the time none of the names of the FFS Borrowers had been published and were not to be for a further year.

38. BBB sought a ministerial direction to proceed with FFS because of the uncertainty surrounding whether such a scheme would generate a positive economic benefit to cost ratio. The direction was given on 17 May 2020.

39. The FFS closed to new applications on 31 January 2021. By the time all applications had been proceeded, 1,190 companies had been approved to access £1.14bn worth of CLAs. At the time of Spotlight's request, the most up to date figures were those published on 23 June 2020, which showed that £236.2m of convertible loans had been approved for 253 companies. The most up to date figures as at the time of Mr Pearce's request were those published on 18 August 2020, which showed that 590 FFS loans had been approved, with a value of £588.3 million.

Publication on the EU Transparency Database

40. As a result of discussions between BEIS and the Commission between December 2020 and April 2021 the Commission subsequently approved BEIS' request to disapply the reporting obligations under the Umbrella Notification. BBLS, CBILS

and CLBILS were therefore ultimately only made publicly available on the Transparency Database where they exceeded the thresholds in the Temporary Framework.

41. As at 31 December 2021, details of 50.5% of CBILS loans, 74.8% of CLBILS loans and 2.4% of BBLS loans had been published on the EU Transparency Database. This represents the total percentages that will be published.

The Spotlight Request

42. The Spotlight Request was made on 15 July 2020 in the following terms:

> 1. the names of all those companies that have received a Bounce Back Loan Scheme loan.
>
> 2. the names of all those companies that have received loans under the Future Fund.
>
> 3. the names of all those companies that have received loans under the Coronavirus Business Interruption Scheme.
>
> 4. the names of all those companies that have received loans under the Coronavirus Large Business Interruption Scheme.

43. BBB replied on 12 August 2020 withholding the information under section 43 (commercial interests).

44. BBB upheld its decision on internal review on 8 October 2020 relying in addition on section 40(2), personal information, and section 31, law enforcement.

45. Spotlight referred the matter to the Commissioner on 23 October 2020.

46. During the course of the Commissioner's investigation, BBB indicated on 27 August 2021 that its position had changed because a proportion of the requested information was now accessible to the public on the Transparency Database. In relation to the information already published BBB relied on section 21 and for the information intended for future publication BBB relied on section 22.

47. During the course of the Commissioner's investigation, BBB also sought, in the event that some information was found to be exempt under section 40(2) but the remainder was found not to be exempt under section 31 and/or section 43(2), to rely on section 12 and/or 14 in respect of the remainder of that information.

Decision notice - Spotlight

48. In a decision notice dated 14 December 2021 the Commissioner decided that section 43(2) was engaged and that the public interest favoured maintaining the exemption. The Commissioner decided that section 21 and section 22 were not engaged.

49. As section 21 and 22 are not within the scope of this Appeal we will not set out that part of the Commissioner's decision.

Section 43(2) Engagement of the exemption

50. In relation to the CBILS, CLBIS and BBLS schemes, the Commissioner was satisfied that the harm alleged by BBB related to the commercial interests of the loan recipients. He particularly agreed with BBB's submissions on the potential impact on customer confidence in trading with businesses who could be considered to have financial difficulties. He also accepted that there could be a potential impact on share prices for larger organisations.

51. The Commissioner thought that the likelihood of loan recipients losing confidence in financial services (due to their concerns about the trust between themselves and their Lenders) which could ultimately lead to fewer Lenders applying to work with the BBB on future schemes was 'somewhat remote'. Similarly the Commissioner considered that there was quite a remote risk of competitors establishing the types of customers and industry sectors a Lender was interested in, potentially resulting in prejudice to the Lender's competitiveness.

52. Given the huge number of loan recipients with whom the BBB does not have a direct relationship or contact, the Commissioner considered that it was reasonable for BBB not to have consulted them.

53. The Commissioner was not persuaded that the private sector would refrain from engagement in future schemes, particularly if similar guarantees were in place. The Commissioner was not convinced that the Government and BBB would be commercially harmed by disclosure.

54. In relation to FFS, companies converting the loan into equity will have their names published. The Commissioner understood that businesses' names not published could be assumed to have been less successful and as a result may be commercially prejudiced.

55. With regard to the 'other Lenders' the Commissioner accepted that 'identification of the businesses could allow for disclosure of the 'other Lenders' who had invested in the named businesses. He stated that he could also accept that if the named businesses were commercially prejudiced then those investing in those businesses would in turn be commercially prejudiced.

56. The Commissioner noted BBB's comments regarding the potential for creating hesitancy of private sector investors to work with BBB. He considered that this was sufficient to demonstrate that there was an argument that BBB's commercial interests would be likely to be harmed.

57. Overall, the Commissioner was satisfied that the harm alleged by BBB related to the commercial interests of some if not all of the groups. He therefore accepted that the prejudice was relevant to the section 43 exemption in relation to FFS.

58. The Commissioner accepted that BBB had demonstrated that there were circumstances in which commercial prejudice could arise from disclosure (causal relationship); that the consequences of disclosure were not trivial; and that the prejudice was real and of substance for at least some of the parties and in particular for the loan recipients.

59. The Commissioner agreed that among the high volume of loan recipients there was a real and significant risk of prejudice to at least some of the parties. The Commissioner stated that it would not be proportionate to attempt to consider the likelihood of prejudice to each of the loan recipients in order to determine if some further information could be disclosed.

60. The Commissioner concluded that the prejudice test had been met and the exemption in section 43(2) was engaged.

Public interest test

61. The Commissioner was mindful of the need for transparency in government spending of public money and the very significant amounts of public money involved in the loan schemes. The Commissioner agreed that the arguments made by Spotlight on Corruption were important and demonstrated that the actions taken by the government warranted scrutiny. However, the Commissioner was not convinced that the disclosure of the loan recipients achieves that scrutiny.

62. The Commissioner stated that it could be determined that the public interest balance should weigh in favour of disclosure because of the potential impact on the public as a whole. However, the Commissioner was also mindful of determining whether disclosure of the requested information would result in significantly lessening that impact. If the business names across all the loan schemes were disclosed he was not convinced to what extent this would benefit the public. To what extent would disclosure to the world at large result in the detection of fraud which is not detected by the formal investigations in place? The Commissioner was unable to quantify the benefit to the public purse and concluded that he must reach a conclusion on the balance of the public interest based on the information available to him.

63. The Commissioner noted that at the time of the request the loan schemes were relatively new and at that point, the loss to the public purse was a potential loss. The COVID-19 Hotlines was announced on 13 October 2020 as measure to encourage the public to report any concerns. The public interest in disclosure of the names of loan recipients as a further means to encourage such public participation must be weighed against the potential for prejudice caused by unfounded accusations or retributions resulting in businesses suffering hardship or failing completely, particularly in the case of micro businesses and sole traders.

64. Amongst those receiving loans many will be worthy recipients appropriately obtaining help at a time of crisis. These recipients may ultimately be unable to fund the loan repayments as a result of various factors but at the outset had the intention to pay back the loan. On the other hand it appears that some recipients have deliberately made fraudulent applications. Consequently amongst this group there is a varied mix of recipients who would nevertheless be treated in the same way with some likely to be prejudiced by disclosure

65. The Commissioner gave weight to the volume of information already in the public domain. He noted that there had been much public debate and scrutiny. The Commissioner accepted that there will be some fraud. Nevertheless he was not persuaded that any benefit from disclosure, whether in terms of recouping money

paid to fraudulent applications or acting as a deterrent to committing fraud in any future scheme, outweighed the public interest in loan recipients being able to conduct their businesses without adding commercial prejudice to the already challenging circumstances they have encountered. Furthermore, regarding FFS the Commissioner had accepted the likelihood of commercial prejudice to the 'other Lenders' and the BBB itself which would adversely affect the public interest.

66. The Commissioner considered the public interest test in this case to be finely balanced. He stated that there was a significant argument in favour of disclosure due to the unprecedented circumstances and the large sums of public money concerned. However, the information already in the public domain and the independent evaluations taking place must be taken into account alongside the substantial risk of commercial prejudice to many parties. On balance the Commissioner concluded that the public interest test favoured maintaining the section 43(2) exemption.

Grounds of appeal - Spotlight

67. The Grounds of Appeal are, in essence, that
    67.1. The Commissioner was wrong to conclude that the exemption was engaged; and
    67.2. The Commissioner was wrong in his assessment of the public interest balance.

The Commissioner's response - Spotlight

68. The tribunal has to determine whether BBB's handling of the request was in compliance with part 1 FOIA at the date of the refusal of the request (12 August 2020).

Applicable interests

69. The Commissioner maintains that the alleged harms are relevant to the applicable interests within section 43(2) FOIA. It is in the commercial interest of a business to ensure customer and lender confidence, and any loss of such confidence and any resulting loss of trade could in turn be commercially prejudicial. Likewise it is in BBB's commercial interest to ensure private sector engagement.

Nature of the prejudice

70. The Commissioner submits that the loss of confidence in trading with loan recipients, associated commercial prejudice to other Lenders and potential reluctance of investors to work with BBB are real, actual and of substance. The fact that some recipients' names have been revealed does not alter the fact that there is a clear potential link between the disclosure and the prejudices envisaged. Whether those prejudices are likely to arise, or have already arisen is a matter of evidence for the next criterion.

Likelihood of prejudice

71. BBB confirmed that there were around 1.6 million Borrowers and 130 Lenders involved. The Commissioner concluded that it was not a stretch of logic to consider

that investors or customers would be reluctant to engage with a business if it had secured a pandemic loan, indicating financial vulnerabilities, and accordingly that at least some of the recipients and Investors would be prejudiced. Similarly he did not consider it to be a remote possibility for some private sector investors to be reluctant to work with the BBB as a result of disclosure.

72. The Commissioner accepted that demonstrating prejudice will sometimes, by its very nature, be a speculative exercise, and on the facts of this case BBB had provided sufficient submissions and evidence to demonstrate that commercial prejudice would have been likely to have been caused to at least some of the parties at the time of the request. The Commissioner remained of this view despite the publication of the names of loan recipients under different disclosure regimes, particularly given that such publication does not evidence that no harm had been caused to those recipients as result of disclosure.

Public interest

73. Whilst finely balanced, the Commissioner maintained that the public interest favoured non-disclosure. The Commissioner did not consider the public interest factors in favour of maintaining the exemption to have been overestimated, and the fact that some company names had been published did not alter the Commissioner's acceptance that if the names of the companies were disclosed it would be likely to cause commercial prejudice to at least some of the parties identified by the BBB, especially given the number of loans provided.

The response of BBB - Spotlight

74. BBB maintains its reliance on sections 31, 40(2) and (on a contingent basis) sections 12 and/or 14. BBB no longer seeks to rely on section 21 and section 22.

SECTION 43(2)
Engagement – BBLS, CBILS and CILBILS

75. As regards the BBLS, CBILS and CLBILS, prejudice to commercial interests 'would be likely' to arise from disclosure of Borrower names in respect of: (1) Borrowers; (2) Lenders; and (3) BBB and/or BEIS.

Prejudice to the commercial interests of Borrowers

76. In relation to Borrowers BBB identifies four causal mechanisms by which the relevant prejudice was likely to arise:

    76.1. Identification that a business was in receipt of a Scheme loan would attract speculation about the business's financial position and may give rise to a perception that they were more likely to cease trading. This could potentially undermine customer or supplier confidence, making these less likely to deal with the business. That would undermine the business's ability to trade successfully and to generate revenue.
    76.2. Disclosure could affect larger businesses' share price.

76.3. Disclosure may affect the trust which Borrowers have with their Lenders. Disclosure of the fact that a business had received a loan under the Schemes would make a business wary of seeking funding in future from government-backed schemes (including from these three Schemes), and instead they might seek alternative sources of financing that were more expensive and/or increased the financial pressure on them.

76.4. The disclosure of the names of businesses in receipt of the loans would effectively create a marketing list for anyone wanting to target such entities on the assumption that they needed finance, leading to unwanted and disruptive contact.

Prejudice to the commercial interests of Lenders

77. In relation to Lenders BBB identifies three causal mechanisms by which the relevant prejudice was likely to arise:

77.1. Damage would be likely to occur to the trust that Borrowers place in Lenders.

77.2. Disclosure would undermine confidence in the financial services industry.

77.3. Together with other publicly available information disclosure would allow deduction of Lenders' names. This would allow a Lender's competitors to build up a Borrower profile of that Lender, thus prejudicing the Lender's competitiveness in the market.

Prejudice to the commercial interests of BBB/BEIS

78. In relation to BBB/BEIS, BBB identifies two causal mechanisms by which the relevant prejudice was likely to arise:

78.1. Lenders would be deterred from engaging with government or BBB initiatives and/or from coming forward to participate in similar future financing schemes.

78.2. Should the private sector refrain from engaging with government schemes or BBB, this would prejudice the commercial interests of the Government in its ability to introduce and launch any future financing schemes, and the commercial interests of BBB in its ability to achieve its objectives to increase the availability and diversity of finance for Small and Medium Enterprises and, in turn, help the UK economy.

Engagement – FFS

79. Disclosure would be likely to prejudice the commercial interests of the Borrowers, Lenders and/or BBB/UK FF Nominees Ltd.

Prejudice to the commercial interests of FF Borrowers

80. The causal mechanisms by which BBB submits that such prejudice would be likely to arise in respect of FFS Borrowers are:

80.1. Disclosure would prompt unfair speculation about a business's financial standing and acumen, thus damaging its commercial prospects. The conditions of the loan agreement are that a company may have to convert BBB's loan into equity when their financial position changes. Given BBB's intention to publish the names of the companies that convert a loan into equity, if all FFS companies are published, this will highlight the companies that have not

reached the value/income threshold for conversion. Given the entry requirements for FFS, such companies are not easily capable of weathering unfair competition or adverse speculation.

80.2. For some companies, disclosure may affect their position in the market, valuation and ability to raise further funding and also affect the trust which such companies, particularly small innovative companies, have in working with the public sector.

80.3. Disclosure would give an unfair advantage to competitors who had not relied on FFS funding and/or impact on the decisions by prospective customers or investors.

80.4. Receiving a FFS loan may have the connotation of a 'bail out' and if a company's suppliers or customers found out, they could lose confidence in the company and either stop doing business or change the terms on which they are willing to do business.

Prejudice to the commercial interests of FFS Lenders and 'other Lenders'

81. The causal mechanisms by which BBB submits that such prejudice would be likely to arise in respect of FF Lenders and 'other Lenders' are:

81.1. Disclosure would be likely to damage the relationship between lead Investors, other Investors and BBB.

81.2. Disclosure would enable information about other Investors to be discerned which could impact on their commercial decision-making and, in turn, affect trust in the relationship between BBB and the Investors. Given the nature of the financial instrument under FFS the other Lenders are, in some cases, also shareholders.

Prejudice to the commercial interests of BBB/UK FF Nominees Ltd

82. The causal mechanisms by which BBB submits that such prejudice would be likely to arise in respect of BBB/UK FF Nominees Ltd are:

82.1. Disclosure would increase hesitancy among private sector partners in working with BBB.

82.2. Disclosure would be likely to increase the prospects of Borrowers' businesses failing and therefore of the Government not receiving a return on its investment.

Public interest balance

83. BBB's position is:

83.1. The release of all the requested information is not necessary to meet the public interest in how the Schemes operate. The aggregated data shows the extent to which taxpayers' money may be utilised. The Schemes are also being subjected to independent evaluation.

83.2. In respect of FFS, the public interest in transparency is already met in a number of ways. Companies are legally obliged to file a confirmation statement at Companies House detailing any changes to their shareholders and share capital, which statement will be freely available to the public. BBB has published on its website the names of companies that have converted their loans into equity and is updating this list periodically.

83.3. There is a public interest in preventing any prejudice-based detriment.

83.4. There is a strong public interest in the commercial interests reflected in the principle of banking customer confidentiality being respected and protected.

83.5. Disclosure is likely to lead to targeting of businesses by members of the public and the press and other professional subject matter experts. This could adversely impact Borrowers and potentially make trading more difficult, which may dissuade businesses from applying for future financial support or suffer customer loss. This would contribute to businesses ceasing to trade, and so loans not being repaid, thus increasing the burden on the taxpayer. BBB has a particular concern in this regard for the potential for targeting derived from business names of specific communities or ethnic groups.

83.6. There is a public interest in tackling fraud and financial crime. Although in some instances release of the information may help identify some possible cases of fraud on the part of Borrowers, it is likely to increase pressure on the Borrowers and the Lenders generally at a time of economic uncertainty, and potentially disrupt or impact on the agencies involved in officially Appellant's investigating fraudulent activity. The Appellant's stated intention is to publish the information in order to encourage members of the public to carry out their own identification of alleged fraud concerning the Schemes. This shows that the possibility is not unrealistic. Such informal activity is unlikely to be effective in identifying fraud but is likely to disrupt innocent businesses.

Response to the grounds of appeal

The time for considering the application for an exemption

84. The Commissioner and the Tribunal have to assess a public authority's compliance with Part 1 FOIA as at the time of the refusal.

Subsequent publication under the EU Transparency Framework

85. Publication started many months after the refusal and is not relevant to this appeal. Publication is equally consistent with prejudice being caused but overridden by the legal duty to publish.

Lack of substantiating evidence

86. With over a million Borrowers and 130 Lenders, BBB could not sensibly be expected to consult with individual Borrowers (with whom BBB had no direct relationship) as to their commercial interests.

87. BBB also addresses the specific points made in the grounds of appeal on section 43(2).

Section 31 – Law enforcement

88. Disclosure would be likely to increase the potential for fraud. This view is based on consultation with various counter-fraud bodies.

89. The three causal mechanisms by which disclosure would be likely to cause such prejudice are:

89.1. Disclosure would facilitate identity theft and impersonation of businesses by fraudsters, e.g., for the purpose of making fraudulent loan applications or to divert funds.
89.2. Disclosure would assist fraudsters to target Borrowers by impersonating their Lenders and/or BBB/BEIS.
89.3. Disclosure would increase the burden on law enforcement agencies by encouraging false and inaccurate reports of fraud.

90. The public interest in maintaining the section 31(1)(a) exemption in respect of the BBLS, CBILS and CLBILS information outweighs the public interest in disclosure.

91. BBB would, in the alternative, rely on the aggregated public interest in maintaining both the section 43(2) and section 31(1)(a) exemptions, if both are found to be engaged, as outweighing the public interest in disclosure.

SECTION 40(2) – personal information

92. Where a business's name is, or includes, the name of an individual (e.g. a partnership or sole trader) the business's name may constitute that person's personal data. BBB accepts that there is a legitimate interest in transparency about the Schemes generally and understanding how public money may be spent. Disclosure of the names of individual Borrowers is not necessary for that aim, which could be served by global information or information available under the EU Temporary Framework (in respect of larger loans).

93. Such a legitimate interest would, in the alternative, be overridden by the interests and/or fundamental rights of the data subject Borrowers. It is likely that this information will be combined with other data sources and analysed for a plethora of reasons, for example, for customer profiling. This form of profiling may result in information (or its outputs) being inaccurate, misused or misinterpreted and potentially cause harm to the business and/or the data subjects associated with it. The information may also be used for more illicit reasons including fraud and identity theft. Law enforcement agencies already have access to the data and are conducting a range of detection activities in a professional manner. Borrowers would not expect their personal data to be disclosed pursuant to a FOIA request. The release of information that identifies individuals who have taken out a loan has the real potential of causing further harm and distress to those individuals.

Sections 12 and 14(1)

94. If it were necessary to identify, locate and extract personal data, this would amount, at a conservative estimate to 25,000 hours of work.

Reply by Spotlight

95. Spotlight submits that the relevant date for the purposes of this appeal is the date of the internal review – 8 October 2020.

96. Spotlight relies on only facts and matters that either existed at the date of the refusal and/or are relevant in that they throw light on the grounds given for refusal. The fact that publication under the EU Transparency Framework started months after the refusal does not render it irrelevant for the purposes of this appeal. The obligations were already in place at the date of refusal.

Sections 12 and/or 14

97. The time spent redacting exempt information is not one of the activities specified in 4(3) of regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

98. In light of the considerable public interest considerations in favour of disclosure, providing the requested information would be a wholly proportionate exercise.

Section 31(1)(A)

99. Spotlight notes that both the BEIS Counter Fraud Team and NATIS are functions within BEIS. BBB has not explained whether this argument applies to Borrowers below the EU transparency threshold or whether disclosure of the names of those Borrowers did in fact increase the potential for fraud.

100. The alleged increase in the potential for fraud does not prejudice the ability of law enforcement to protect or detect crime.

Section 40(2) – personal information

101. The GDPR only applies to data relating to individuals acting as sole traders, employees, partners, where the information relates to them as an individual rather than as the representative of a legal person. In the alternative disclosure is necessary for the purposes of legitimate interests.

102. Section 5 of the Data Protection Act 2018 provides that, 'The listed GDPR provisions do not apply to personal data consisting of information that the controller is obliged by an enactment to make available to the public'. Spotlight's submission is that the BBB is obliged to make available the names of loan recipients pursuant to FOIA.

Section 43(2)

Lack of substantiating evidence

103. The need to provide evidence, rather than speculation, of prejudice to the commercial interests of a third party is well-established in authority and clearly set out in guidance. BBB's failure to produce evidence or consult those allegedly affected is not the inevitable consequence of there being a large number of entities with whom it could consult about the potential prejudice. The BBB failed to meet the evidential threshold to demonstrate the alleged prejudice to commercial interests and appears to have failed to consult with any of the entities it claims would be prejudiced.

Alleged prejudice to the commercial interests of Borrowers

104. In relation to BBB's assertion that disclosure would lead to, for example, speculation about a business' financial position, Spotlight submits that the specific context of Covid loan schemes is significant.

105. The Commissioner and the Tribunal routinely resist the argument that the information should be withheld in order to prevent it being misinterpreted by the public.

Alleged prejudice relating to the commercial interests of Lenders

106. BBB's assertion that disclosure would allow competitors to produce profiles of Lenders and thus prejudice the Lender's competitiveness in the market is speculative.

107. Any failure by BBB and/or commercial Lenders to communicate the implications of a government-backed loan or anticipate the public interest in disclosure cannot be relied on to evade disclosure under FOIA. Companies are more likely to be prepared to accept greater public access to information about them where they receive heavily subsidised government-backed loans.

Alleged prejudice to the commercial interests of BBB/BEIS

108. 'The Government' has no commercial interest in introducing such financing schemes, which are not intended to generate profit for the Government but to protect private businesses, employment and the economy. Spotlight agrees with the Commissioner who was not persuaded that the private sector would refrain from engagement in in future schemes, particularly if the circumstance of similar guarantees were in place.

Alleged reluctance to work with the BBB

109. BBB's Response predicates the willingness of investors to work with the BBB on conditions of secrecy, in circumstances where billions of pounds of public money have been lost as a result of poor due diligence, inadequate counter-fraud measures and other failings by the BBB. Spotlight invites the Tribunal to consider whether the argument for the continuation of secrecy in the present circumstances serves the public interest.

Likelihood of prejudice

110. The purported risk of prejudice is not very significant and weighty.

Balance of the public interest

Transparency

111. Withholding the information significantly reduces transparency and accountability about public spending, in respect of a scheme estimated to cost the public purse billions of pounds during a public health emergency and looming economic crisis. Lord Agnew, the Minister with oversight of counter-fraud, resigned partly as a result of the lack of transparency around the loan schemes.

112. BBB claims that aggregated data will show the extent to which taxpayers' money may be utilised. The BBB's argument that events subsequent to the refusal are irrelevant seems to be deployed only to the extent that it supports its position. In any event, the requested information contains new material that would help inform a very important public debate.

Use of public resources and spending public money

113. BBB acknowledges that the speed of the introduction of the Schemes, the number of loans and substantial amounts of money have given rise to concerns about the risk of fraudulent applications by Borrowers and possible rates of default, and that it is possible that the release of the names of the Borrowers could potentially help law enforcement agencies and other third parties to identify and investigate possible cases of fraud as the information is interrogated by the public.

114. The administrative costs of the three business loan support schemes will amount to £75 million by the end of 2024-2025, with a cost of f20 million for the year ending 2020-2021.

115. A recent investigation published by The Times on 26 April 2022 found that suitcases filled with money from Covid loans had been seized at the border, that other loan recipients used the money to fund gambling sprees, home improvements and to pay for luxury cars and watches. The Guardian recently reported that an estimated £4.9 billion of the £47 billion awarded on BBLS will be lost to fraud, and another £12 billion will not be recovered. A report dated 23 February 2022 by the Public Accounts Committee said that the estimated losses due to fraud and error across all Covid response measures is estimated to be at least £15 billion.

Accountability

116. Spotlight submits that there is a plausible suspicion of wrongdoing by BBB and disclosing the information would serve the public interest by enabling a proper assessment. Publication would directly increase accountability and help lessons to be learned and shared across Government.

Countering fraud

117. BBB were so concerned by the risk of fraud in BBLS that they wrote a formal Reservation Notice to the Secretary of State for BEIS, warning of the significant fraud and credit risks.

118. BBB significantly overstate the efforts being made by BBB and wider Government to tackle fraud and financial crime.

119. Disclosure information would enhance the Government's efforts to ensure justice, counter-fraud, and recover losses, enable public scrutiny, increase investigative capacity and shed light on the role of commercial Lenders.

120. BBB's characterisation of the potential for civil society to assist in the prevention of fraud as 'essentially vigilante investigation' overlooks the many occasions on which civil society organisations and other actors have identified wrongdoing by public authorities or private entities.

The Pearce Request

121. The Pearce Request was made on 27 August 2020 in the following terms:

> The British Business Bank is a UK public authority dispensing public funds on behalf of the UK Government and arranging for the dispensing of funds from private investors on behalf of the UK Government.
>
> The Future Fund Scheme involves the direct investment of public money.
>
> We would therefore request a list of all those companies that that have received such investment from the British Business Bank under the Future Fund Scheme and the total amount of public money so invested.
>
> In so requesting, we would stress that we do not seek information on any particular company, any private or accredited lender nor the amount lent to any particular company nor when such amount was drawn down.

122. BBB replied on 23 September 2020 withholding the information under section 43 (commercial interests).

123. BBB upheld its decision on internal review on 22 October 2020 relying in addition on section 41 (information provided in confidence).

124. Mr Pearce referred the matter to the Commissioner on 23 October 2020.

125. During the course of the Commissioner's investigation, BBB withdrew its reliance on section 41 and sought to rely on section 21 and section 22 on the basis that the names of some companies had been published.

Decision notice - Pearce

126. In a decision notice dated 14 February 2022 the Commissioner decided that section 43(2) was engaged and that the public interest favoured maintaining the exemption. The Commissioner decided that section 21 and section 22 were not engaged.

127. As section 21 and 22 are not within this Appeal we will not set out that part of the Commissioner's decision.

Section 43(2) Engagement of the exemption

128. The Commissioner noted that those benefiting from FFS loans were made aware of BBB's obligations under FOIA and that those companies converting the FFS loan into equity will have their names published. He considered that there was an intention to disclose converting companies' names and therefore full disclosure at the time of the request would subsequently have allowed the public to make assumptions about those business names not subsequently published. For example those company names

not published as converting their FF loans into equity could be assumed to have been less successful and as a result may be commercially prejudiced.

129. The Commissioner considered that BBB's comment regarding the receipt of a FFS loan having the connotation of a "bail out" could apply to all the companies prior to the intended publication.

130. The Commissioner accepted that identification of the businesses could allow for disclosure of the other Lenders who had invested in the business. If the business is commercially prejudiced then its investors would be commercially prejudiced.

131. The Commissioner was satisfied that the potential for creating hesitancy or reluctance of private sector investors to work with BBB was sufficient to demonstrate that BBB's commercial interest were likely to be harmed.

132. The Commissioner was satisfied that the harm alleged by the BBB related to the commercial interests of some if not all of the different groups cited.

133. The Commissioner considered that BBB had demonstrated that there were circumstances in which commercial prejudice could arise. He also considered that BBB had demonstrated that the consequences of disclosure could not be seen as trivial. He was satisfied that the prejudice claimed was real and of substance for at least some of the parties.

134. The Commissioner agreed with BBB that amongst the number of loan recipients there is a real and significant risk of prejudice to at least some of the recipients, other Lenders and the BBB.

135. Accordingly the Commissioner concluded that section 43(2) was engaged.

Section 43(2) Public interest balance

136. The Commissioner considered the public interest test was finely balanced. He noted that there was a significant argument in favour of disclosure due to the unprecedented circumstances and the large sums of public money concerned. However, in assessing circumstances at the time of the request in the light of the future disclosure planned at that time and subsequent developments in publishing information, the Commissioner considered that this must be taken into account alongside the likely commercial prejudice to many parties. On balance the Commissioner concluded after much deliberation that the public interest test favoured maintaining the section 43(2) exemption.

Grounds of appeal - Pearce

137. The Grounds of Appeal are, in essence, that the Commissioner was wrong to find that section 43(2) was engaged, and was wrong in his assessment of the public interest balance.

138. In the grounds of appeal Mr Pearce makes the following points:

138.1. The Commissioner did not deal with section 41. It is not unreasonable to conclude that BBB's invocation of section 41 suggests that it was inclined to deny the request on any grounds, despite its stated commitment to openness and transparency.
138.2. It is inequitable to allow BBB to provide a more detailed justification to the IC which is not provided to Mr Pearce until the Decision Notice is published. The Commissioner should have engaged with both parties during its investigation.
138.3. The parties were made aware that information might be subject to disclosure under FOIA.
138.4. No evidence was provided to support BBB's contention that disclosure would prejudice the companies' commercial interests.
138.5. Companies would be pre-profit or pre-revenue and therefore it is unlikely that disclosure would have such an impact.
138.6. The suggestion that the fact that a company had received a loan would be a weapon for competitors is overstated.
138.7. The use of the term 'bail out' is inaccurate and irrelevant.
138.8. The request did not include information about Investors and therefore prejudice to Investors is irrelevant.
138.9. There is insufficient information about the example of a company that attracted media attention which could have resulted in the company losing business.
138.10. The names of companies converting to equity would be in the public domain in any event.
138.11. The public interest favours disclosure.

The Commissioner's response - Pearce

Applicable interests

139. The Commissioner maintains that the alleged harms are relevant to the applicable interest within section 43(2) FOIA. It is in the commercial interest of a business to ensure customer and Lender confidence, and any loss of such confidence and any resulting loss of trade could in in turn be commercially prejudicial. Likewise it is in BBB's commercial interest to ensure private sector engagement.

Nature of the prejudice

140. The Commissioner noted in the Decision Notice that those benefitting from the Future Fund loans were made aware of BBB's obligations under FOIA.

141. The Commissioner submits that the loss of confidence in trading with or investing in loan recipients, associated commercial prejudice to other Lenders and potential reluctance of investors to work with BBB are all prejudices that are real, actual and of substance.

142. It is clearly a real risk that a company, including one which is pre-revenue/pre-profit, could suffer commercial prejudice, in turn prejudicing investors in that company, if it were to become public that it had received funding during the pandemic but then did not manage to convert the loan into equity for the reasons set out by BBB. It is not

fanciful to suggest that some individuals may not wish to conduct business with/invest in a company which is perceived to be struggling. Whether those prejudices are likely to arise, or have already arisen is a matter of evidence for the next criterion.

Likelihood of prejudice

143. It is not a stretch of logic to consider that investors or customers would be reluctant to engage with a business if it had secured a pandemic loan, indicating financial vulnerabilities, and accordingly that at least some of the recipients and Investors would be prejudiced, even if they are in pre-profit or revenue. Similarly he does not consider it to be a remote possibility for some private sector investors to be reluctant to work with the BBB as a result of disclosure.

144. The Commissioner accepted that demonstrating prejudice will sometimes, by its very nature, be a speculative exercise, and on the facts of this case BBB has provided sufficient submissions and evidence to demonstrate that commercial prejudice would have been likely to have been caused to at least some of the parties at the time of the request.

Public interest

145. Whilst finely balanced, the Commissioner maintains that the public interest favours non-disclosure. The Commissioner ultimately accepts that if the names of the companies were disclosed it would be likely to cause commercial prejudice to at least some of the parties identified by the BBB, especially given the number of loans provided.

The response of BBB - Pearce

146. BBB maintains its reliance on section 43(2). BBB no longer seeks to rely on section 21 and section 22.

SECTION 43(2)
Engagement

147. Disclosure of the names of FFS Borrowers would be likely to prejudice the commercial interests of the Borrowers, Lenders and/or BBB/UKK FF Nominees Ltd.

148. In relation to Borrowers BBB identifies four causal mechanisms by which the relevant prejudice was likely to arise. These are set out in its response to the Spotlight appeal above.

FFS Lenders and "other Lenders"

149. In relation to Lenders BBB identifies three causal mechanisms by which the relevant prejudice was likely to arise. The first two are set out in BBB's response to the Spotlight appeal above. The third is that where Lenders have invested in FFS Borrowers, the Lenders have a commercial interest in the success of the FFS

Borrower and if the commercial interest of the FFS Borrower is prejudiced so too will the commercial interests of the Lenders be prejudiced.

Prejudice to the commercial interests of BBB/UK FF Nominees Ltd

150. In relation to BBB/UK FF Nominees Ltd, BBB identifies two causal mechanisms by which the relevant prejudice was likely to arise. These are set out in the response to the Spotlight appeal above.

Public interest balance

151. BBB's position is:
    151.1. The release of all the requested information is not necessary to meet the public interest in how the Schemes operate. The aggregated data which has been, or will be, released, shows the extent to which taxpayers' taxpayers' money may be utilised. The Schemes are also being subjected to independent evaluation.
    151.2. The public interest in transparency is already met in a number of ways. Companies are legally obliged to file a confirmation statement at Companies House detailing any changes to their shareholders and share capital, which statement will be freely available to the public. BB publishes on its website a rolling list of the names of companies that have converted their loans into equity and intended to do so at the time of the Request.
    151.3. There is a public interest in preventing any prejudice-based detriment.
    151.4. The media and other professional subject matter experts may fairly or unfairly, form opinions on certain Borrowers or single out particular Borrowers. Such unfair targeting would not be in the public interest as it could adversely impact Borrowers and potentially make trading more difficult or cause them to suffer customer loss, which may dissuade businesses from applying for future financial support. This would contribute to businesses ceasing to trade, and so loans not being repaid, thus increasing the burden on the taxpayer. None of this is in the public interest.

Response to the grounds of appeal

152. A public authority (and a requester) may develop their arguments and evidence before the Commissioner and the Tribunal. They are not limited to arguments raised in the refusal notice or internal review.

153. An appeal to the Tribunal is a complete re-hearing and the Tribunal stands in the Commissioner's shoes, so any procedural defects in the Commissioner's investigation are irrelevant.

154. When combined with the context of the Request the names would disclose that a company had received an FFS loan, which clearly is a matter of commercial significance and sensitivity.

155. BBB's reliance on section.41 is an irrelevant matter as BBB no longer seeks to rely on that exemption.

Challenge to the engagement of the section 43(2) exemption

Alleged lack of substantiating evidence of prejudice

156. The explanation of how prejudice to commercial interests would be likely to arise is cogently reasoned and not inappropriately speculative.

Alleged lack of consultation with FFS Borrowers or Lenders

157. There is no rule of law that a public authority must always provide evidence to the Commissioner of consultation with third parties whose commercial interest is likely to be prejudiced by disclosure in order to establish commercial prejudice. What is sufficient evidence, in the particular circumstances of a case, will always be a matter for the Commissioner (or the Tribunal on appeal) to determine.

158. BBB could not sensibly be expected to consult with hundreds of individual FFS Borrowers, particularly in light of the tight statutory deadline for responding to a FOIA request. Indeed, had BBB sought to consult a small sample it would doubtless have been criticized by the Appellant as relying on an unrepresentative sample.

159. BBB did inform FFS Borrowers of its intention to publish the names of FFS Borrowers whose loans had converted. Even that was met with expressions of concern. It is reasonable to infer that FFS Borrowers whose loans had not converted would be at least equally concerned about disclosure

FFS Borrowers accepted disclosure under FOIA

160. FFS Borrowers or Investors cannot sensibly be said to have accepted that their information would be disclosed under FOIA without regard to the application of exemptions. In reality, the point about Borrower/Lender knowledge of FOIA raised by the Appellant is thus entirely neutral - the key question is whether the section.43(2) exemption is properly engaged in this case.

161. The CLAs under FFS were not conventional loans. First, FFS applicants would (at the time) have been very unlikely to obtain a conventional loan due to their lack of revenue (indeed, if they could obtain a conventional loan they would have done so, as the terms would have been more favourable than the FFS). Second, the Scheme was aimed at companies who could not get the equity that would usually have been available in the market due to COVID restricting the appetite of venture capitalists, etc. An FFS loan could properly be seen to be akin to a "bail out".

The impact on Investors is irrelevant

162. Disclosure would be likely to prejudice the commercial interests of FFS Investors, notwithstanding that it is Borrower names that the Appellant seeks to be disclosed.

Companies in receipt of an FFS loan would be pre-profit and pre-revenue and therefore disclosure will not impact on them.

163. On the contrary, companies in such a position are likely to be in a weaker position and less able to weather the adverse effect of disclosure. Even if a company is not

generating revenue or profit, it may still suffer a commercial impact if its losses are increased or the point at which it will make a profit or generate revenue is delayed.

Public interest balance

164. The Commissioner expressly recognized that FFS involved the investment of a significant amount of public money, saying that 'cannot be easily dismissed' and recognized 'a significant argument in favour of disclosure due to the unprecedented circumstances and the large sums of public money concerned.'

165. He quite properly balanced that against the commercial prejudice that disclosure was likely to cause and the extent to which the public interest was already met by other information being published.

166. FFS loans are not simply government funding - they include at least half by way of commercial loans from private sector Investors with genuine and legitimate commercial interests of their own.

Reply by Mr Pearce to the Commissioner

167. BBB has failed to consult with Borrowers. The FOIA Code of Practice and the Commissioner's guidance states that public authorities should consult with third parties where disclosure may potentially prejudice a third party's commercial interests.

168. The Commissioner's guidance for organisations states that 'if the organisation proposes to withhold information because the disclosure would, or would be likely to prejudice a third party's commercial interests, it must have evidence that this this accurately reflects the third parties' concerns. It is not sufficient to simply speculate about the prejudice which might be caused. The authority needs to consult them for their exact views in in all but the most exceptional circumstances.'

169. No evidence has been provided that that BBB consulted any of the FF investee companies or the FF private Investors nor has it provided any evidence of exceptional circumstances pertaining in in this this case.

170. In the absence of any such consultation, it is not it is not for the BBB, the Commissioner, Mr. Pearce or anyone else to second guess whether the third parties' commercial interests are prejudiced or not.

171. The investee companies applied for a loan in full knowledge that commercial information might be disclosed. This indicates that they perceived no prejudice to their commercial interests from disclosure, or none sufficient to deter them from applying.

172. Such a request can reasonably be defined as being at the lowest or most basic level of commercial information, therefore not likely to prejudice any commercial interests or, at least, not significantly.

173. If there is no evidence from the investee companies that their commercial interests are prejudiced by the disclosure of their names, then it follows that there is no evidence of prejudice to the commercial interests of the private Investors nor, nor, by extension, to the BBB. It is difficult to envisage any circumstance in which private Investors would not wish to engage with BBB.

174. A loan that has just been made by BBB would not be likely to be regarded as a bail out, on the reasonable assumption that BBB would have carried out at least a modicum of due diligence on behalf of the tax-payer.

175. Investee companies do not have to convert their loan to equity until the end of the 36 month loan term, and the earliest this can occur is March 2023. Until then, there is no evidence available on which anybody would be able to speculate whether a company is struggling or not arising from the request.

176. At the end of the loan period, some of the investee companies will have converted their loans to equity (295 of the 1190 as at December 2021) and reported to Companies House; their details will also be published by BBB. Other companies may have repaid their loans, and others may have ceased trading. Publishing the company names at the outset, will have no effect on any of these outcomes.

177. Mr Pearce refutes the suggestion that customers, suppliers and competitors will use the list of company names either to avoid trading with them or to gain competitive advantage. In reality, a customer does not pause to consider whether that that company is in receipt of a FF loan and still less do they consider whether it has received a loan but not converted it to equity before making a purchase. The same applies to suppliers; if they are paid for what they supply, a FF loan would be no reason for them not to trade with that company. With regard to competitors, the appellant contends that that there is no evidence that that there is a competitive edge to be gained from knowing a competitor has received a FF loan.

Reply by Mr Pearce to BBB

178. Mr Pearce contends that, that, while it might be reasonable for a public authority to develop arguments to support its case, that should only occur once a sound basis for refusal under FOIA, has been established. In this case, that did not occur.

179. Mr Pearce reiterates his submission that section 41 is relevant to this appeal.

180. Without consultation with Borrowers, BBB's case for relying on section 42(3) is unconvincing as it entirely based on speculation.

181. Both the Commissioner's guidance and Part 1 FOIA s45 Code of Practice are relevant. Mr Pearce has legitimately drawn them to the Tribunal's attention for its consideration.

182. Mr Pearce disagrees that he would 'doubtless have criticised the BBB for consulting an unrepresentative sample of Borrowers', when that is clearly the diametric opposite of what he says.

183. BBB has had time to consult a a sample of FFS Borrowers to support its case, something which other tribunals have considered essential in order to establish whether commercial interests would be prejudiced or not.

184. BBB states it received an adverse reaction when it informed FFS Borrowers that it intended to publish the names of those whose loans had converted to equity. BBB gives no details of when this occurred nor how many Borrowers it informed. What concerns were expressed, and how many such expressions were there? None of this information is provided, and we can assume the expressions of concern were allayed (or ignored), given that that BBB publishes a rolling programme of the names of Borrowers whose loans have converted to equity. Furthermore, it is impossible to infer from an unspecified response to one question by an undefined audience, a similar outcome to a different question from a different audience.

185. If no prejudice to the commercial interests of the Borrower has been established, then there can be no prejudice to the commercial interests of the private Lender.

186. The names of FFS Borrowers who do not convert their loans to equity will, forever remain secret from the public who lent them the very considerable amount of money. Nobody knows what proportion of companies will convert.

187. Mr Pearce accepts that FFS loans are not simply Government funding and that they involve up to 50% of the funding from private Lenders. None of the private Lenders' commercial interests are prejudiced by the request, and BBB has provided no evidence that they would be. be. The Government, on behalf of the taxpayer, is the major Lender and the private Lenders are the lesser.

Legal Framework

188. Section 43(2) provides:

> Information is exempt information if its disclosure under this Act, would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it)

189. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

190. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

191. S 43 is a qualified exemption, so that the public interest test has to be applied.

192. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

193. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

The role of the Tribunal

194. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

List of issues

195. The issues for the tribunal determine in the Pearce appeal are:

195.1. Whether the FOIA, section 43(2) commercial interests exemption is engaged on the basis that disclosure would be likely to prejudice the commercial interests of:
195.1.1. Borrowers under the FFS schemes and/or
195.1.2. Lenders under the FFS scheme, and/or
195.1.3. BBB and/or UK FF Nominees Ltd
195.1.4. and/or the taxpayer.

195.2. If the FOIA, s43(2) commercial interests exemption is engaged on the basis of prejudice to the commercial interests of one or more of the above, is the public interest in disclosure of the requested information outweighed by the public interest in maintaining the exemption?

196. The following list of issues in the Spotlight appeal was agreed between the parties.

196.1. Whether the request includes a request for the names of individuals and sole traders or is limited to 'companies' that are incorporated and registered at Companies House.

196.2. Whether the FOIA, s43(2) commercial interests exemption is engaged on the basis that disclosure would be likely to prejudice the commercial interests of:
196.2.1. Borrowers under the (i) CBILS, (ii) CLBILS, (iii) BBLS and/or (iv) FFS schemes and/or
196.2.2. Lenders under each such scheme, and/or
196.2.3. BBB and/or
196.2.4. (in respect of the CBILS, CLBILS and/or BBLS schemes) BEIS and/or

196.2.5. (in respect of the FFS) UK FF Nominees Ltd
196.2.6. and/or the taxpayer.

196.3. If the FOIA, s43(2) commercial interests exemption is engaged on the basis of prejudice to the commercial interests of one or more of the above, is the public interest in disclosure of the requested information outweighed by the public interest in maintaining the exemption?

196.4. Whether the FOIA, s31(a) law enforcement exemption is engaged (in respect of names of Borrowers under the CBILS, CLBILS and/or BBLS schemes) on the basis that disclosure would be likely to prejudice prevention or detection of crime.

196.5. If the FOIA, s31(1)(a) exemption is engaged on the basis of prejudice to the prevention or detection of crime that would be likely to arise from the disclosure of some or all of the names of Borrowers under the CBILS, CLBILS and/or BBLS schemes, is the public interest in disclosure of the requested information outweighed by the public interest in maintaining the exemption?

196.6. Does the FOIA, s40(2) personal information exemption apply in respect of the names of Borrowers under the BBLS and/or CBILS schemes where such names amount to personal data? *Note: Spotlight accepts that any personal data that the tribunal finds is within the scope of the request is exempt under section 40(2).*

196.7. Do FOIA, ss12 and/or 14(1) apply in respect of the names of Borrowers under the CBILS and/or BBLS schemes which are not exempt under FOIA, section 40(2)?

Note: Issues 4 and 5 only need to be decided if the answers to issues 2 and/or 3 are negative in respect of some or all of the requested information in respect of the CBILS, CLBILS and/or BBLS schemes.

Issues 6 and 7 only need to be decided if the answers to issues 4 and/or 5 are negative in respect of some or all of the requested information in respect of the CBILS and/or BBLS schemes.

Evidence

197. We read an open and a closed bundle. We were provided with a small number of additional documents during the course of the hearing, all of which related to the Spotlight appeal only. These documents were added to the open bundle.

198. The closed bundle consists of:

198.1. A closed witness statement of Alice Carpenter.
198.2. An unredacted BBLS example Loan Guarantee Agreement
198.3. An unredacted CBILS example Loan Guarantee Agreement

198.4. An unredacted CLBILS example Loan Guarantee Agreement
198.5. An unredacted note of Lender views

199. The closed witness statement of Alice Carpenter simply exhibits the attached documents. A redacted version of those documents appears in the open bundle. The tribunal was satisfied that it was necessary to withhold the redacted information under rule 14.

200. We read open witness statements and heard oral open evidence from:

200.1. George Havenhand, Senior Legal Researcher, Spotlight.
200.2. David Clarke, Counter-fraud professional.
200.3. Richard Bearman, BBB Managing Director, Small Business Lending.
200.4. Reinald de Monchy, BBB Managing Director, Guarantee and Wholesale Solutions.
200.5. Keira Shepperson, BBB Director, Future Fund.
200.6. Alice Carpenter, BBB, Deputy General Counsel.

201. Alice Carpenter confirmed her closed witness statement in a short closed session. The gist of the closed session was given in open session as follows. Ms Carpenter confirmed that her closed statement was true. She was taken to an example document in the closed bundle and confirmed that it was a redacted version of a document in the open bundle. There were no further supplementary questions from Mr Cornwell, no questions from the tribunal and no closed submissions.

Submissions

Spotlight's oral submissions/skeleton argument

Parliamentary privilege

202. Both parties to the Spotlight appeal made submissions on parliamentary privilege, but ultimately were broadly in agreement as to the relevant principles and this ceased to be an issue.

The scope of the request

203. The request is clear and unambiguous. It asks for the names of companies. The letter to the Secretary of State on 16 June 2020 (OB579) from the CEO of Spotlight and others refers to companies. The request for an internal review refers to the names of companies.

Whether the commercial interests exemption is engaged – CBILS, CLBILS, BBLS

204. The FOIA request was narrow. It was limited to the names of companies. The tribunal must focus on the alleged risk of prejudice arising out of the specific category of information requested.

205. These are fundamentally not routine commercial transactions. The parties entering the schemes would not have viewed them as routine two party transactions akin to

any other private financial transaction. All loan recipients would have reasonably understood that the relationship was between the government, the lending bank, and the company itself as a recipient of state aid, and that this amounted to a different financial arrangement with different expectations as to confidentiality, reporting and transparency.

206. Borrowers should have been clear that there were entering into a loan scheme with a public body, given the contents of the information that had to be provided to them by the Lender, including the link to BBB's privacy notice. Borrowers had been notified that BBB was a government development bank wholly owned by the Treasury, that state aid requirements applied and that obligations arising from FOIA may have flowed from their involvement in the scheme.

207. Therefore in relation to CBILS, CLBILS and BBLS disclosure cannot cause a real and significant risk of prejudice by way of damage to the trust that Borrowers place in Lenders and the other claimed prejudice to Lenders and BBB that is said to flow from that, or by way of Lenders being deterred from engaging with similar initiatives in the future.

208. The assumption that consumers, suppliers and members of the public would draw adverse inferences from the fact that a company had taken out a loan under one of the schemes which would lead to commercial prejudice is wrong and not supported by the evidence.

209. Therefore in relation to CBILS, CLBILS and BBLS disclosure would not be likely to cause a real and significant risk of prejudice by way of attracting negative and damaging speculation about a company's financial position and the other claimed prejudice to Lenders and BBB that is said to flow from that.

210. The chain whereby the Lender could be identified is remote and depends on a series of assumptions including that the Borrower took out the loan from the bank from which it had existing security which was available on Companies House. Even if the Lender is identified the alleged prejudice is remote.

211. In relation to FFS, it was clear on the documentation provided that information might be released under FOIA. In relation to any adverse inferences that might be drawn merely from having been part of FFS, this is based on the same wrong assumption unsupported by evidence dealt with above.

212. In relation to adverse inferences that might be drawn because a company had not converted to shares, this is a prejudice that might arise in 18 months time if and when companies converted to shares.

213. In relation to the identification of Lenders/Investors, the chain is similarly remote.

Public interest

214. If the exemption is engaged, it is only weakly engaged.

215. Spotlight relies on the following factors in favour of disclosure:

215.1. The exceptional scale of expenditure of public funds and/or risk of expenditure to public funds.
215.2. The speed at which the schemes were rolled out.
215.3. The awareness by BBB that the schemes were high risk.
215.4. Transparency obligations applied under the temporary framework and the umbrella agreement in relation to CBILS, CLBILS and BBLS. At the time of the refusal of the request there was an obligation to publish all names in relation to CLBILS and BBLS under the Umbrella Agreement and those over £100,000 (or £10,000) in relation to CBILS.
215.5. State aid rules applied to CBILS, CLBILS and BBLS.
215.6. Disclosure would enable wider scrutiny, research and understanding in relation to a wide range of matters including potential fraud.
215.7. There is a fundamental public interest in transparency and accountability.
215.8. There was a lack of transparency at the time of the request.
215.9. Disclosure could have had a deterrent effect at the relevant time.

216. Given our findings on section 43 it is not necessary to set out Spotlight's submissions on this issue.

Personal data

217. Spotlight accepts that personal data, if within the scope of the request, would be exempt.

Section 12 and 14

218. Given our findings on section 43 it is not necessary to set out Spotlight's submissions on sections 12 and 14.

BBB's skeleton argument/oral submissions/supplementary written submissions

Note

219. At the beginning of his oral submissions Mr Cornwell indicated that he had had instructions that BBB had been alerted to complaints that had been received by UK Finance while these proceedings were ongoing. Mr Cornwell stated that he could recall one of his witnesses if the tribunal preferred him to have a witness deal with that point. The Judge indicated that it was a matter for Mr Cornwell if he wished to apply to recall a witness at this stage in the proceedings and at present there was no evidence on that point before the tribunal. Mr Cornwell did not make an application to recall any of the witnesses.

Overarching submissions

220. The tribunal should focus on the requested information, i.e. the names of companies who have received these loans, when considering what disclosure would contribute to the objective of transparency and what prejudice it would be likely to cause.

221. It is not the role of the tribunal to determine whether the Government or BBB acted appropriately in relation to how it set up the four schemes.

222. In relation to the potential losses, these are only estimates and these have gone down over time. The tribunal is entitled to take account of evidence of later estimates to assess the public interest in disclosure at the time. It is important to distinguish the different potential types of loss: credit loss, fraud and error cannot be lumped together.

223. When considering the costs of the scheme, it is important to take account of the costs of what would have happened had nothing been done. There is evidence in the IPSOS MORI report in relation to those potential consequences.

224. In relation to parliamentary privilege, parliamentary material cannot be used a shortcut to evidence. It is appropriate to rely on the fact that matters had been considered by parliament without going into the details of what was said or decided.

225. It is important to remember the context in which the decisions were made to introduce the schemes in this way and at this pace. There was a very real fear of grave economic damage unless urgent action was taken. This meant that the schemes had to be set up and implemented very quickly, that funding had to be delivered very quickly and that there was limited opportunity to engage in the normal data gathering and assessment.

226. The core of CLBILS, CBILS and BBLS is private sector Lenders providing their own money by way of loans to businesses, often to existing customers who had sometimes already taken out loans or other types of finance with that Lender. In relation to CLBILS and CBILS the Lender holds an element of the risk of default.

227. There is a contingent risk to public funds, but this is a contingent risk and an estimated figure, and those estimates have gone down over time (as have the estimates as to fraud risk). This is not a government grant.

228. The upfront costs of fees, interest payments for the first year (CBILS and BBLS) and administrative costs are substantial sums but a relatively small proportion of the overall figures.

229. FFS does involve government funds directly, but at heart there was a conventional financial instrument. This was not a grant and had to be at least matched by a private Investor.

The scope of the request

230. The question for the tribunal is: objectively, in a common-sense manner, what would a reasonable public authority have understood the request to mean? It was reasonable to interpret the request as colloquially referring to businesses or firms rather than literally to incorporated companies. This is supported by later correspondence from Spotlight. This was how the Commissioner understood the request.

SECTION 43

231. Commercial interests have a wide definition.

Commercial prejudice to Borrowers – BBLS, CBILS and CLBILS

232. There are three fundamental mechanisms:
   232.1. Disclosure would be likely to adversely affect the reputation of the business and cause negative speculation, which can affect market valuation.
   232.2. Disclosure would be likely to affect the confidence of Borrowers in their Lenders.
   232.3. Disclosure would be likely to lead to unwanted targeting.

233. In relation to negative speculation, the evidence of Mr Bearman, Mr De Monchy and Ms Shepperson was that receiving a loan had the potential to be regarded as an indication that a business was in trouble. This flows from the preconditions for the loan – that the business had to be adversely affected.

234. Some might regard it positively, but there are a sufficient number of people who would not. It is a realistic possibility that it would be regarded as a bad thing. Other entities might look on the business as an unacceptable credit risk, not provide supplies to that business or cut back on the credit provided. Businesses may be subject to unwarranted criticism for taking out a loan.

235. If the Borrower's reputation and status is undermined this will affect the company's market value.

236. In relation to the confidence of Borrowers in their Lenders, the route by which the Borrower would become aware that FOIA would apply was tenuous. Small businesses would not be aware that FOIA could be engaged. Even if companies knew that information might be disclosed, they would be aware that exemptions apply and it may well not be disclosed. The deterrent effect can properly be taken into account.

237. In relation to unwarranted targeting by fraudsters and others this is not dependent on reputation or the loss of confidence.

Prejudice to Lenders – BBLS, CBILS and CLBILS

238. Prejudice to the commercial interests of Lenders flows from the damage to the trust placed in Lenders by their Borrowers. Confidence is undermined in Lenders and the financial services industry as a whole. There are resource implications in dealing with complaints.

239. Lenders who are known to have participated in these schemes will suffer prejudice through being associated with the mass disclosure of data.

240. If a Borrower had previously taken out a loan with a Lender which appears on Companies House, and, assuming that the Borrower had taken out a Covid loan with the same Lender, then publishing the name of the Borrower would allow the Lender to be identified with a reasonably high degree of confidence. The evidence was that the majority of Borrowers took out Covid loans with existing Lenders.

241. Once the Lender is identified, that information could be used to build up an overall picture of, for example, the type of sector that the Lender lends to, and could be used by competitors to the disadvantage of the Lender.

Prejudice to BBB and/or BEIS – BBLS, CBILS and CLBILS

242. The prejudice to BBB/BEIS flows from Lenders being deterred from engaging with BBB in the future as a result of the disclosure of this information. This would impede the Government's ability to set up a similar scheme in the future.

243. BBB/BEIS are likely to have to spend time dealing with complaints from Borrowers if they suffer commercial prejudice.

244. There is an increased risk that companies will go under as a result of commercial prejudice and be unable to repay their loans. The Government will therefore have to be called upon to pay the guarantees.

Prejudice to Borrowers - FFS

245. There is likely to be speculation and concern about the financial standing of the business that took a loan under FFS. FFS Borrowers are likely to be at an early stage and either pre-revenue or pre-profit and reliant on further external funding to continue trading. Investors often act on the basis of gut instinct.

246. Once the FFS loan has converted to equity when the company has raised further equity, it would generally be recognised that a company is succeeding. Once the names of FFS Borrowers that had converted to equity were published, this would be an indication of the other FFS Borrowers' relative lack of commercial success.

Prejudice to Investors – FFS

247. Disclosure would be likely to damage the relationship between Investors and the BBB, because it would undermine the confidentiality of their investment relationships, when they had brought the FFS Borrower to the FFS scheme.

248. Publishing the names of FFS Borrowers would enable Investors to be identified using information on Companies House. In some cases, Investors are also shareholders in the FFS Borrower company. A shareholder listed on Companies House may well be the Investor in the FFS scheme. This would enable information about the Investors to be ascertained and could affect the relationship between BBB and the Investors.

Prejudice to BBB/UK FF Nominees Ltd and/or the taxpayer – FFS

249. Investors would be deterred from working with BBB. The prospects of FFS Borrowers' businesses failing would be increased.

Public interest balance for section 43(2)

250. The exemption is firmly engaged. There is a strong public interest in preventing prejudice to commercial interests, particularly where Borrowers were in a financially and commercially vulnerable position because of the pandemic.

251. There is a strong public interest in maintaining commercial confidentiality, as reflected in the principle of confidentiality between a bank and their customer, and maintaining Borrowers' confidence in their Lenders to respect the confidentiality of their information.

252. The schemes did involve a substantial amount of public money, but some of the bigger figures are purely estimates and it would be wrong to infer that these amounts will actually be called upon.

253. There is nothing sinister about the fact that CBILS was rolled out before Commission approval.

254. In relation to the transparency requirements in the Temporary Framework and the Umbrella Notification, the Commission ultimately accepted that the requirement in the Temporary Framework rather than the Umbrella Notification applied. To the extent that there is a public interest in disclosure it is met and addressed by the requirements of transparency under the transparency framework.

255. Mr Clarke's evidence on the public interest in allowing scrutiny and fraud prevention by civil society was based on a misunderstanding. Almost every step that was suggested by Mr Clarke to prevent fraud had been taken by BBB. Some of the steps took time to implement, given the urgency of the situation.

256. There was an anticipation at the relevant time that there would be a National Audit Office assessment and a House of Commons Public Accounts Committee assessment. This very substantially addresses the public interest in understanding how these schemes operated.

Section 31

257. Given our findings on s 43 it is not necessary to set out BBB's submissions on section 31.

Section 40

258. Given Spotlight's concession and our findings on the scope of the request, it is not necessary to set out BBB's submissions on this issue.

Section 12 and 14

259. Given our findings on section 43 it is not necessary to set out BBB's submissions on sections 12 and 14.

Written supplemental closing submissions – Pearce appeal

260. The complaint in relation to section 41 is misconceived. The hearing of the appeal is a full re-hearing.

261. The evidence of Keira Shepperson should carry considerable weight. Whilst BBB accepts that the third-party evidence was not specifically addressed to FFS, Ms Shepperson's clear evidence was that the same considerations, e.g. in respect of the mechanisms by which adverse effects would be likely to be caused to Borrowers' commercial interests applied to the FFS as well as to the other three Schemes.

262. Assessment of whether prejudice would, or would be likely to, arise involves an evaluative assessment looking ahead to a hypothetical future in which disclosure of the requested information occurs. Inevitably, that involves a degree of speculation as the public authority (and the Commissioner or Tribunal on appeal) will be considering a situation that has not (yet) occurred.

263. It is not part of BBB's case that the Tournier principles apply to BBB in its role in the FFS. Regardless of BBB's legal status, a CLA under FFS is still a commercial contract entered into in the venture capital market. In respect of FFS, BBB's case is that parties to the CLA (Borrowers and Investors) would reasonably expect conventional commercial confidentiality to apply in respect of their investment relations.

264. Ms Shepperson accepted that the risk to BBB under the FFS was broadly the same risk as venture capital. However, successful FFS investments through BBB convert into equity, generating a shareholding for BEIS, and hence the taxpayer. As Ms Shepperson explained in her oral evidence, conversion is generally recognised in the venture capital market as a sign of success for a business. A large number of FFS investments have, in fact, already converted (notwithstanding the challenging financial circumstances in 2020-2021) - more than one third of the total as at 30 June 2022.

265. From the information provided in the FAQs a reader would properly understand that the information that BBB held was subject to FOIA, but that commercially sensitive information could be exempt from disclosure. They could reasonably expect that BBB would seek to withhold information that was properly exempt under section 43(2) FOIA. That is not to elevate the section 43(2) exemption into an absolute exemption. Rather, Mr Pearce's argument that Borrowers had thereby accepted that their information would be disclosed (if requested) makes the opposite error that if an exemption is not absolute then it is no exemption at all – that is simply to ignore section 43(2) FOIA. And simply establishing that Borrowers knew that FOIA "might" apply takes the appellant nowhere with his argument.

266. The fact that one business, in one particular sector, apparently considers that it is in their interests to publicise the fact that they have received a FFS loan does not mean that this is true for every business (or, indeed, most businesses) that received a FFS loan.

Written submissions of Mr Pearce (including the response to BBB's supplementary written submissions)

267. The tribunal has read and taken account of the submissions to the extent that they are relevant to the issues it has to determine. The following are the most relevant points.

268. Given the tribunal's conclusions on the relevance of section 41 to this appeal, it is not necessary to set out Mr Pearce's submissions on this issue.

269. It does not matter how many third parties are involved; if there is no evidence before the tribunal from a single one of them as to whether its commercial interests, would, or would be likely to be prejudiced. BBB has also failed to consult with a representative sample. There is no evidence before the tribunal on which it can base its judgment with regard to prejudice to commercial interests.

270. If BBB can simply ignore the Code of Practice and Commissioner's guidance, what is their point?

271. Speculation is speculation whether it is 'cogently reasoned' or not and Mr Pearce argues that it is not cogently reasoned in this case.

272. There is evidence from the one company identified by BBB in its correspondence with the Commissioner that shows that the arguments about prejudice are wide of the mark.

273. The 1924 Tournier principles about customer/bank confidentiality do not apply to the BBB, as it is not a banking institution. The Lender and the Borrower in FFS have a direct financial relationship with BBB under contractual arrangements which clearly state they are subject to FOIA requests. Rather than legitimately regarding the public disclosure of their commercial information as a violation of their trust, the Investors and Borrowers should expect the reverse with regard to FFS.

274. BBB's statement that it did not consult the companies or private sector Lenders with regard to the FOIA requests because 'we considered the loan to be a commercial contract carried out with the level of confidence normally afforded to such arrangements between commercial entities' is implausible and contradicts its acceptance that the FFS CLA confirms BBB's obligations under FOIA to disclose information when it is required to do so.

275. The information given about FOIA to FFS applicants states unambiguously that FOIA applies. It was made clear at the outset that FOIA requests might be made.

276. BBB was acting as a de facto venture capital company with tax payers money. This is an extremely high risk investment.

277. The third parties were not consulted about FFS. Comments made about BBLS. CBILS and CLBILS cannot be ascribed to FFS given the significant differences between the schemes. Further, the Cooperative bank does not operate commercial bank accounts; UK Finance only represents 300 out of 100,000 banking and finance industry firms; and there is no evidence that the CBI was consulted or consulted its members about FFS, and it is unlikely that FFS Borrowers would be members of the CBI. The Lenders whose identities are redacted refer only to BBLS, CBILS or CLBILS.

278. An Investor would receive the benefit of public money if it is a shareholder or becomes one when the company converts.

279. Para 45 of Ms Shepperson's witness statement is contradictory in relation to whether Borrowers were made aware of the possibility of FOIA requests.

280. In relation to the example of a journalist seeking to investigate a high profile media personality, this does not relate to FFS and should be discounted. Further, it should not be surprising that a high profile media personality would attract media attention.

281. BBB rely on one specific example of media reporting on a company that had received a FF loan which could have resulted in loss of business and/or companies being persuaded not to consider Government loans or BBB schemes. Mr Pearce submits that this particular company has courted publicity, describing itself as the 'pin-up' of FF companies, and does not appear to have suffered any adverse financial consequences having had no difficulty raising over £1 million at its next fundraising event. The single example of a FF company referred to by the BBB and the Commissioner shows no prejudice to commercial interests whatsoever and, in fact, demonstrates the opposite outcome to that speculated by the BBB and accepted by the Commissioner.

Response to BBB's closing supplemental written submissions

282. Mr Pearce does not accept that his complaint in relation to section 41 is misconceived. A complete rehearing includes exemptions relied on then abandoned.

283. The tribunal should not accept BBB's submission that the witness statement of Ms Shepperson carries considerable weight. Ms Shepperson cannot be regarded as impartial, and the evidence from third parties that she relies on did not relate to FFS. Her evidence should be treated with circumspection.

284. BBB has not made any effort to obtain the views of FFS Borrowers, contrary to its own rubric, the Commissioner's guidance and the Code of Practice, and rely instead on speculative arguments which Mr Pearce submits are far from logical, coherent or properly evidenced.

285. The evidence before the Tribunal is that 2206 companies applied independently for FFS loans in the knowledge that FOIA requests could be made and that commercial information might therefore be disclosed.

286. The Appellant contends that Borrowers and Lenders should expect the reverse of commercial confidentiality, given that the loan involves the investment of taxpayers' money and the BBB is not a banking institution in the commercial sense.

287. Approximately 800 companies, i.e. two thirds of the total, had not converted at what is the two thirds stage of the loans. It is anybody's guess how many more will convert by the end of the loan periods in 2023. Venture capital statistics, and the view expressed by the non-executive Director of the BBB quoted by Mr Pearce, do not augur well.

288. There should be no circumstance in which the public should be denied knowing the names of private commercial companies in which the public's money has been invested by a publicly-funded organisation such as the BBB.

289. Mr Pearce does not argue that Borrowers have accepted their information would be disclosed if requested, as suggested by the BBB. He simply points out that FOIA requests might be made and that, consequently, commercial information could be disclosed.

290. The only reason why Mr Pearce referred to the details of one particular company is because this company was relied on as evidence by BBB.

Discussion and conclusions

Overarching findings

291. We have not been assisted by the decisions of other first tier tribunals referred to by any of the parties.

292. The relevant date for determining the public interest is at the date of the response to the request. In the Spotlight appeal the response was on 4 August 2020. In the Pearce appeal the response was on 23 September 2020.

293. The question of whether it was right as a matter of policy to introduce these particular schemes at all, at this speed or in this manner is not a matter for this tribunal.

294. The policy decisions taken did, however, have consequences that are relevant to our decision. The following extract from the BBB Process Evaluation and early impact assessment from June 2022 (the June 2022 impact assessment) highlights some of those consequences:

> The British Business Bank, BEIS, and HM Treasury were able to establish CBILS within twelve days of its announcement. Despite limited emergency planning for the scale and nature of the macroeconomic shock caused by Covid-19 (as opposed to more typical shocks caused by recessions), the establishment of CBILS was facilitated by the existence of an existing delivery template and infrastructure (the Enterprise Finance Guarantee (EFG)), effective engagement with the lending community, and acceptance of significant risks to value for money at a political level.
>
> The British Business Bank, BEIS, and HM Treasury sought continuous feedback from the business and lending community and several adjustments were made to the design of the Covid-19 Loan Guarantee Schemes during the course of the pandemic — including the introduction of CLBILS to better serve the needs of large businesses that were unable to England's access the Bank of England's Coronavirus Corporate Financing Facility and the introduction of BBLS to more rapidly provide cashflow support to businesses with smaller credit requirements (both of which also adapted the EFG delivery template). Adjustments generally prioritised the aim of increasing the speed of lending decisions and widening access in response to emerging concerns that funding was taking too long to reach businesses. This was achieved by removing the requirement for businesses to demonstrate that they could not obtain funding on normal commercial terms and, in the case of BBLS, allowing businesses to self-certify their eligibility, viability and credit-worthiness (aspects that would otherwise have been assessed by the lender).

> This increased the potential scale of the government's contingent liability arising from the interventions and required accepting greater levels of deadweight and, specifically in relation to BBLS, increased scope for fraud risk. Given the risks, the Permanent Secretary of BEIS sought a Ministerial Direction (for all three schemes), and CEO of the British Business Bank issued a Reservation Notice (for BBLS) respectively in advance of the schemes coming into effect. Ministers acknowledged the issues raised and confirmed their intent to proceed.

295. The schemes involved the direct expenditure of significant amounts of public money:
   295.1. On administrative costs (all schemes) – for example the NAO records that the forecast administrative costs for the Scheme from 20/21 to 24/25 were £67 million as at September 2021
   295.2. On the payment of interest for 12 months (BBLS and CBILS - at, in relation to CBILS, a rate set by the Lender)
   295.3. On fees charged by the Lender (CBILS).

296. The initial estimates for losses from fraud and error from BBLS were extremely high. The precise figure is uncertain and an evolving estimate that has come down over time. It remains and is likely to remain very significant.

297. The June 2022 impact assessment states as follows at p 11 (p 2013 of the open bundle):

> The National Audit Office's investigation into BBLS in their update report dated 3 December 2021 highlighted that a British Business Bank commissioned review produced a central estimate that around 11 percent or £4.9bn of loans approved were potentially fraudulent. This estimate is highly uncertain, and a subsequent assessment revised this estimate to 7.5 percent of approved facilities, although this estimate assumes that any fraud leads to a total loss of the loan which is likely to overestimate losses as some funds may be recoverable. In any event, it is still too early to fully assess the level of defaults and fraudulent claims. The National Audit Office noted that BBLS was launched with limited counter fraud measures compared to BAU lending as a result of the objective to provide funding rapidly to businesses (although core counter fraud checks consistent with the self-certification design of the scheme, and 'know-your-customer' `know-your-customer checks were required from lenders). Lenders reported prevention of £2.2 billion in fraudulent applications using these measures. Given the speed at which BBLS was launched, the NAO report found that the approach to fraud prevention evolved with time with certain measures added after the scheme launched. As such, the focus of government's counter-fraud response has largely been on fraud detection, investigation and recovery.

298. There was a credit risk to the Government of the money loaned directly under FFS and up to the extent of the guarantees in relation to BBLS (100%), CBILS (80%) and CLBILS (80%).

299. We note that under FFS, BBB was effectively taking the role of a venture capital investor, an investment that inherently carries a high risk.

300. The estimates of potential losses for the Government, whether due to fraud, error or credit losses, are highly uncertain. This is particularly so in relation to the estimates that had been made at the time the requests were refused.

301. Mr Cornwell submits that the tribunal is entitled to take into account the revised, lower, estimates that post-date the refusal of the request. He submits that although the public interest must be assessed at the date of the refusal the tribunal is entitled to

take into account current estimates of the potential losses that the Government was facing at the time of the refusal.

302. The following examples show that on any estimate, these schemes involve a significant risk of default and the consequent significant risk of future expenditure of very large amounts of public money.

303. In July 2020 the Office for Budget Responsibility estimated that 40% of BBLS Borrowers might default, compared with 10% each for CBILS and CLBILS. The central case scenario suggested write-offs of £16.9 billion, of which 95% would come from BBLS.[2]

304. In March 2021, BEIS estimated that between 31% and 48% of BBLS loans would not be repaid, with its 'most likely' estimate of 37%. This equated to an overall loss of £17 billion. Most of this would arise from inability to repay rather than from fraud/error which was estimated to be approximately 11% of loans i.e. £4.9 billion. We accept Mr Bearman's evidence that this estimate has recently been revised downwards in the most recent BEIS accounts to a figure of 8% occurrence of fraud/error and 4.24% for lifetime losses for the scheme for fraud and error.

305. Ultimately in our view the particular estimate that we rely on makes no difference to the public interest balancing exercise. All the estimates are necessarily very uncertain, and all support a finding that the schemes represent an extremely significant future risk to the public purse on top of the very high amounts of direct expenditure involved.

The relevance of section 41 to the Pearce Appeal

306. In his grounds of appeal, Mr Pearce complains that the Commissioner did not deal with section 41. He submits that it is not unreasonable to conclude that BBB's invocation of section 41 suggests that it was inclined to deny our request on any grounds, despite its stated commitment to openness and transparency.

307. We stand in the shoes of the public authority in deciding whether the information can be withheld under the relevant exemption. We are not reviewing the reasonableness of the public authority's decision. We do not need to determine whether or not BBB was inclined to deny the request on any grounds. As section 41 is no longer relied on, we do not need to make any findings on this issue, nor did the Commissioner.

The relevance of alleged procedural failings in the Commissioner's investigation

308. Procedural failings in the Commissioner's investigation are not relevant to our decision. We consider the matter afresh. Mr Pearce has been provided with all the relevant information in advance of the hearing and has had the opportunity to respond to BBB's case as clarified.

Scope of the Spotlight request

[2] Office for Budget Responsibility, Fiscal Sustainability Report, July 2020. These were the most recent OBR figures provided to the tribunal.

309. We must interpret the request objectively in the light of the surrounding circumstances. In our view the request is not ambiguous. The request asks for names of 'companies'. The request was made by an organisation which could be assumed to choose its words with care and to know what a company was. It was not a request made by an individual litigant.

310. In our view the word 'companies' should be given its normal meaning. A company is a particular legal entity. A sole trader is not a company. Nor is a partnership. There is nothing in the correspondence from Spotlight at the time of the request or the refusal which suggested that Spotlight meant anything other than what it said.

311. We accept that later correspondence and submissions from Spotlight could be seen as supporting a wider interpretation of the request, but in our view the request should be interpreted objectively in the light of the circumstances in existence at the time.

312. Mr Cornwell submitted in the alternative that the request had been narrowed at a late date. We do not accept that there is any correspondence that is sufficiently clear to support such a finding. Further we note that the Commissioner's investigation and decision notice dealt with the request as made on 15 July 2020, and not any later reformulated request.

Section 42(3) – commercial interests

313. Where the specified activity or interest which would be likely to be prejudiced is a public interest, there is an obvious overlap between whether or not the section is engaged and any subsequent application of the public interest test.

314. There is a public interest in preventing prejudice to commercial interests, and accordingly in this appeal there is significant overlap in the evidence and submissions on the first two issues. We have therefore combined our consideration of the evidence and submissions of those issues, but we bear in mind that although the relevant factors may overlap, the questions that we have to answer are different.

315. When considering whether BBB has established a causative link or that the prejudice would be likely to happen, we have to take account of the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure.

316. In this appeal, the commercial interests of hundreds of companies are in issue and it would be unrealistic to expect consultation with each Borrower. The Commissioner's guidance suggests, at para 3.5 that it might be helpful to contact a representative organisation. In this appeal BBB have chosen to consult with Lenders and a number of trade organisations in relation to BBLS, CLBILS and CBILS and ask the tribunal to infer that similar prejudice will arise in relation to FFS.

317. In any event, a failure to comply with the FOIA Code of Practice or the Commissioner's guidance does not mean that the exemption will not be engaged. The tribunal has to decide whether it is satisfied that the prejudice would be likely to be caused by disclosure on the basis of the evidence before it. Any failure to produce evidence obtained by consulting Borrowers would only be relevant to the extent that

the tribunal was not satisfied, in the absence of that evidence, that prejudice would be likely to be caused.

318. Further it is appropriate for the tribunal to place weight on the opinions of Mr Bearman, Mr De Monchy and Ms Shepperson as to the likely effects of disclosure given their expertise and experience in this area.

319. When considering the prejudice that might flow from disclosure we have focussed on the consequences of disclosure of this particular information, i.e. the list of names of companies that have taken out loans under the relevant scheme (the Pearce appeal) or schemes (the Spotlight appeal).

The claimed prejudice to commercial interests

Prejudice flowing from expectations that the information would not be disclosed

320. Some of the arguments on prejudice in this appeal are founded upon the effect of disclosure of this information on expectations that the information would not be disclosed.

321. One of the consequences is said to be a loss of trust between the bank and its customers/a loss of trust in the financial services sector. A further consequence is said to be a deterrent effect on Investors or Lenders in taking part in similar schemes with BBB on the future and/or a deterrent effect on Borrowers in taking part in similar schemes in the future.

322. In relation to BBLS, CBILS and CLBILS, the expectation of Borrowers that the information would not be disclosed was founded, in part, on evidence in the written statements of Mr Bearman and Mr De Monchy.

323. At para 41 of his witness statement. Mr Bearman explains, in relation to BBLS, CBILS and CLBILS:

> … the Borrower's relationship was with their Lender, not BBB or BEIS. Disclosure of their name by BBB as a recipient of a loan would involve a disclosure of information provided by the Lender to BBB. When entering into a contract with its Lender, a Borrower will have an expectation of confidentiality. Generally, information (including the identity of Borrowers) will not be publicly available and so Borrowers would not expect this information to be released. In applying for a loan under the Schemes, BBLS, CBILS and CLBILS Borrowers were not informed that the information they supplied to their Lender could be publicly to disclosed by the BBB under FOIA. The possibility was never drawn to their attention.

324. Mr De Monchy states at paras 31 and 32 of his witness statement as follows:

> 31. A Borrower will have an expectation of confidentiality when entering into a contract of with its Lender. They will have expected the loan to be treated with the same level of commercial confidence as any other transaction with their bank. From their perspective, it is simply a routine transaction with their Lender. The identity of the recipient of a routine commercial loan would not generally be publicly available, and so Borrowers would not expect this information to be released.
>
> 32. Nor did BBB or Lenders say anything to CBILS or CLBILS Borrowers, when they applied for a loan, that their information might be disclosed under FOIA. I exhibit the standard Borrower

> data protection declaration for a CBILS loan application form (which appears at Schedule 3 of the CBILS Guarantee Agreement) at [RDM1/60], and the standard Borrower data protection declaration for a CLBILS loan application form (which appears at Schedule 3 of the CLBILS Guarantee Agreement) at [RDM1/138]. The possibility was not raised with Borrowers that their commercially sensitive information would be disclosed to the public at large.

325. The standard Borrower data protection form exhibited by Mr De Monchy requires the Borrower to acknowledge that personal data will be communicated, inter alia, to BEIS and BBB and, inter alia, used by BBB in accordance with the BBB Privacy Notice to which a hyperlink is provided.

326. Ms McNeill-Walsh took the witnesses through the relevant parts of the Privacy Notice including para 12.1 which states as follows:

> 12. Please note that under the Freedom of Information Act 2000, we are only permitted to protect information that is actually confidential and where, if we were to disclose it we could be sued for breach of confidence.

327. There is a similar provision in relation to BBLS.

328. We accept that the Privacy Notice relates to personal data rather than all information, but it certainly draws the application of FOIA to the attention of the Borrower.

329. We take judicial notice of the extensive publicity surrounding these schemes, and of the fact that this took place at time when people were likely to be paying significant attention to the news. In those circumstances it is inconceivable that Borrowers understood this to be 'simply a routine transaction with their Lender'. All Borrowers would, in our view, have understood, in the light of the documentation and the extensive publicity, that this was a Government scheme with funding and/or a guarantee provided by the state. It is clearly flagged up in the documentation as 'state aid'. Further the documentation provided makes clear, in relation to BBLS, CBILS and CLBILS, that the Borrower's information would be provided to BBB, and that BBB were part of the Government.

330. Whether or not the individuals from the company who entered into the loan agreement read the legal documentation, which specifically flags up the possibility of disclosure under FOIA in relation to the three schemes, we find that any properly informed company would have been aware that public bodies were subject to FOIA, and therefore as their identities would have been passed to FOIA, there was a risk of disclosure of their names under FOIA.

331. Further, any company entering into an agreement ought to read the applicable documentation and cannot, in our view, rely on prejudice caused by unrealistic expectations that they hold solely because of their failure to do so.

332. On this basis we do not accept that any Borrower could properly have formed the view that their usual expectations as to confidentiality would apply to a loan of this nature.

333. Further we do not accept that any behavioural changes in the future due to awareness of the risks of disclosure of information held by a public authority under FOIA are causatively linked to disclosure in this appeal. Companies entering into agreements in

which BBB or any part of Government is a party ought to know that there is a risk of disclosure under FOIA.

334. Any reluctance to participate in similar schemes in the future arising simply because there is a risk of disclosure under FOIA, is not in our view caused by our decision, but by the existence of FOIA. The decision to disclose the information in this case does not become the cause of that reluctance simply because our decision might remind people about the existence of FOIA.

335. For the above reasons we do not accept, in relation to BBLS, CBILS and CLBILS, that there is a causative link between disclosure of the requested information and any prejudice that relies on a mistaken assumption that there was no risk of disclosure under FOIA of information held by BBB.

336. To the extent that this submission is made in relation to FFS we reject it for similar reasons. We note that the risk of disclosure under FOIA was explicitly drawn to the attention of the parties in the FFS FAQs (OB2662 and 2663). Any hesitancy in working with BBB in the future as a result of the risk of disclosure of information under FOIA is caused by the existence of FOIA, not by the disclosure of the information in this appeal.

337. On that basis, in relation to all the Schemes we do not accept that the exemption is engaged in relation to any claimed prejudice flowing from a breach of any expectation that the requested information might be disclosed. We find that this includes the claimed prejudices set out in the following paragraphs in BBB's skeleton argument: 59(3), 61(1), (2) and (5), 63(1), 65(1) and 66(1).

Prejudice flowing from reputational damage

338. We remind ourselves that we are considering the prejudice that would be likely to be caused disclosure of this particular information, i.e. names of companies, at a particular time, i.e. in August 2020. August 2020 was still a very uncertain time for companies and the most severe restrictions had only recently been lifted. We accept, as Mr Bearman put it in evidence, that this was a 'moment of crisis' for companies.

339. Further we accept that evidence of the impact of disclosure will, to some extent, always involve an element of opinion or speculation, because it relates to a future event that has not yet happened.

340. We accept, for the following reasons, that there is a real and significant risk, at this particular point in time, of prejudice to commercial interests as a result of a real and significant risk of reputational damage to companies that, in our view, is causatively linked to the disclosure of the requested information. We accept that the prejudice relied on would be to commercial interests and is real actual and of substance. We therefore accept that the exemption is engaged in relation to all Schemes.

341. In relation to all schemes we accept that there is a real and significant risk that at least some suppliers, customers, providers of credit or potential investors would take a negative view of a company that had taken out a loan under one of the schemes. Further, we find that there is a real and significant risk that at least some of those who

formed a negative view would act on that negative view in the light of the very uncertain economic situation in August 2020.

342. We accept that there is a real and significant risk that, for example, suppliers might alter the terms on which they were prepared to deal with a company, or that they might choose an alternative supplier who had not needed to rely on Government support. This is particularly so at that moment in the pandemic.

343. We accept that this is the opinion of Mr Bearman, Mr De Monchy and Ms Shepperson, all of whom have experience and expertise in this area. We accept that this is the opinion of a number of Lenders (in relation to all schemes except FFS), who have experience and expertise in this area. We accept that this is also supported to some extent by the opinion of the CBI in relation to those three schemes, although the weight of this is reduced somewhat by the fact that they appear to have been talking about the release of names and amounts of Covid loans.

344. We found Mr De Monchy's explanation particularly persuasive on this issue. He stated that although suppliers, for example, might have a lot of sympathy for people who were in extreme difficulty, they would still do what is best for their company, because at the end of the day they want to make sure that they get paid.

345. We accept that this might, as a result, affect a larger company's share price.

346. In relation to FFS we find that there is a particularly significant risk of investors acting on any negative view that they take of a company. We take account of the evidence of Ms Shepperson that investors often act on gut instinct when deciding whether or not to invest. We accept that the evidence of the Lenders, the CBI and the FSB does not explicitly address the consequences of disclosure of the names of FFS Borrowers. However, as a matter of common sense, supported by the evidence of Ms Shepperson, we accept that the argument applies also in relation to FFS Borrowers. In our view the differences in the schemes are not material in this regard.

347. Further we accept that there is a particularly significant risk that FFS Borrowers would be adversely affected by any decision not to invest, because they are in a particularly vulnerable start up phase.

348. We accept Mr Pearce's submission that the particular company relied on by BBB in correspondence with the Commissioner does not appear to be a useful example of prejudice, because that company appears to court publicity and to have suffered no adverse affects. The experience of one individual company does not affect our conclusions that there is a particularly significant risk of other FFS companies suffering damage to their economic interests.

349. Further we accept in relation to FFS that there was, at the relevant time, a real and significant risk that in the future, when the names of FFS Borrowers who had converted to equity were published, investors would take a negative view of those companies who had not. Again we take account of Ms Shepperson's evidence that investors act on gut instinct, and we accept her view, in the light of her relevant expertise and experience, that converting to shares is 'a fairly strong indication that you are doing well' and that having not done so by the date that you would ordinarily

have expected a company to have raised finance might be an indication that the company was doing badly.

350. We do not accept that the fact that FFS Borrowers entered into the scheme in full knowledge of the risk of disclosure under FOIA means that they perceived no prejudice to their commercial interests from disclosure. We accept that, by definition, FFS Borrowers were not deterred from applying by the risk of disclosure under FOIA. It does not follow from this, in our view, that disclosure would not be likely to lead to prejudice to the economic interests of FFS Borrowers.

351. We accept that other companies or suppliers or investors may either take a neutral view, or a positive view of those companies that took advantage of these schemes. This does not affect our conclusions as to the risk of prejudice set out above.

352. We turn now to the level of risk and the extent of likely harm, which affects its weight in the public interest balance.

353. In relation to BBLS, CBILS and CLBILS, we note that there is no evidence of any prejudice of this nature that has arisen as a result of the publication of the names on the Transparency Database. We accept that this may be as a result of the database not being well known or easy to search. Further we note that only a very small proportion of BBLS loans appear on that database.

354. However, we find that if disclosure of names was likely to lead to severe and widespread economic damage, at least some evidence of this is likely to have emerged since the publication of a large proportion of the requested names under CBILS and CLBILS. Further we note that there is no evidence from Borrowers themselves as to the risk of economic harm.

355. Further we accept Ms McNeill-Walsh's submission that at least some companies or investors would view the taking of a Covid loan positively or neutrally, particularly in the light of the circumstances at the relevant time.

356. Overall in our view the evidence shows that, in relation to BBLS, CBILS, and CLBILS, some companies would be likely to suffer some financial damage as a result of disclosure. In relation to the FFS scheme, given the nature of investment and the early stage of the companies we find that there is an increased risk of significant financial damage to some companies.

357. We do not accept that there is sufficient evidence before us on which we could base a conclusion that there is a real and significant risk that any reputational damage and consequent economic harm would be so significant that it would lead to the failure of companies to the extent that it caused more than de minimis economic harm to BBB as a result of having to pay out on more guarantees or more than de minimis economic harm to Lenders as a result of a greater risk of default. In our view there are too many uncertain links in the chain to conclude that this would be likely to be caused by disclosure.

358. We do accept in relation to FFS that harm to the economic interests of an FFS Borrower is likely to prejudice the economic interests of those that have invested in

the company, after conversion of the loan to equity or otherwise, whether Lenders or the BBB.

359. In relation to the slightly different submission that companies, in particular companies that took out a loan under BBLS, would be likely to suffer reputational damage as a result of some people's negative view of companies who are seen as 'scrounging' from the state, or who have taken advantage of a scheme associated with a high level of fraud, we do not accept that there is sufficient evidence on which we could base a conclusion that this would be extensive enough to cause economic harm. We reach a similar conclusion in relation to the submission that media or other professional subject matter experts may, fairly or unfairly, form an opinion on certain Borrowers or 'single out' particular Borrowers. We do not accept that the exemption is engaged in relation to this particular aspect of claimed prejudice.

Complaints to BBB and Lenders – all Schemes

360. Despite our finding that the risk of disclosure should not have been unexpected, we accept that disclosure would be likely to lead to some complaints to BBB and/or Lenders as a result of our findings above that some companies would be likely to suffer reputational damage and consequent economic harm and our findings below that there is a real risk of targeting by fraudster/claims companies.

361. This is likely to cause some time and expense to be wasted. We accept that the exemption is engaged on this basis, but we think the extent of the prejudice is likely to be limited, given that no complaints have yet been received in relation to the publication on the Transparency Database.

Prejudice to Lenders/Investors

362. Some of the claimed prejudice to Lenders or Investors falls under 'prejudice flowing from expectations that the information would not be disclosed'. For the reasons set out above, we have concluded that the exemption is not engaged in relation to that claimed prejudice.

363. Under BBLS, CBILS and CLBILS, in relation to the risk that Lenders would be identified and would be likely to suffer prejudice to their economic interests we are not satisfied that there is a causative link between disclosure of the information and a real and significant risk to the Lender's commercial interests.

364. Although we accept that it is not an unreasonable assumption that a Borrower would take out a Covid loan with a bank from whom they had already taken a loan, it is still an assumption. The release of Borrower's names does not identify any of the Lenders, it simply identifies who some of the Lenders are likely to be.

365. We are not persuaded that this inherently uncertain and unreliable information is sufficiently valuable to competitors that it would be likely to cause harm to the Lender's economic interests. Further, we were not satisfied that any 'added value' to a competitor in knowing/suspecting that an existing lender had also provided a Covid loan to the same Borrower was sufficient to provide any real competitive advantage.

366. In relation to FFS we think the means by which an Investor could be 'identified is even more remote. Again it operates on an assumption that the Investor was an existing shareholder, which may or may not be the case. Further it was not adequately explained to us why an Investor would be likely to suffer any harm to its economic interests as a result of it being known/suspected that it had provided match funding to a company in which it was already a shareholder.

367. For those reasons we are not persuaded that there is a causative link in this way between disclosure of the information and a real and significant risk to the Investor's commercial interests.

368. BBB also argues that Lender's reputations will be jeopardised by them being associated with the mass disclosure of commercially sensitive data. This does not rely on the identity of individual Lenders. We think it is unlikely that Lender's reputations will be tarnished by the disclosure by BBB of customer data under FOIA, and certainly not to such an extent that people will act on this to the extent that damage to the Lenders' economic interest results.

369. We have dealt with consequential prejudice to BBB and Investors/Lenders as a result of financial harm to Borrowers under '*Prejudice flowing from reputational damage'* above.

Unwanted and disruptive contact – BBLS, CBILS and CLBILS.

370. We accept as a matter of common sense and on the basis of the evidence before us, including, for example the opinions of Lenders, that there is a real and significant risk that the list of names will be used by claims companies to target Borrowers to encourage them to submit claims or to or resist making loan repayments without merit. We accept that this is likely to lead some Borrowers to suffer prejudice to their economic interests by way of, for example, consequences such as default action or financial loss through unnecessary fees paid to such companies.

371. Further we find that there is a real risk that the list of names will be used as a marketing list for anyone wanting to target companies on the assumption that they needed finance.

372. Finally we find that there is a very clear risk that disclosure would expose the Borrowers to targeting by fraudsters. We were persuaded by the evidence from Mr Bearman and the Lenders that there was a particular risk of fraudsters posing as BBB with the attendant risk that some companies would be likely to fall for the scam and suffer financial loss as a result.

373. We accept that the prejudice relied on would be to commercial interests and is real, actual and of substance and that there is a causative link between disclosure and the risk of prejudice.

374. On this basis we find that the exemption is engaged. In terms of the level and extent of risk, we find that there is a really clear risk of unwanted targeting, with a significant risk that some companies will suffer some financial losses as a result.

Conclusions on the public interest in withholding the information

375. We conclude that there is a very strong public interest in preventing prejudice to the commercial interests of Borrowers, in particular at a time where Borrowers under all schemes were in a financially vulnerable position through no fault of their own as a result of restrictions imposed by the Government in the interests of public health. The very purpose of the Schemes was to avoid or minimise prejudice to commercial interests caused by Government action in the face of a public health crisis. In these circumstances we take the view that there is very strong public interest in avoiding the risk that the companies who were helped by the Scheme do not suffer prejudice to their economic interests.

376. The weight of this prejudice in the public interest balance in relation to BBLS, CBILS and CLBILS, is reduced to some extent by the fact that we do not think the harm will be particularly extensive or wide ranging.

377. In relation to the FFS scheme, given the nature of investment and the early stage of the companies we have found that there is an increased risk of significant financial damage to some companies. We have also found that this leads to a risk of prejudice to the economic interests of Investors in those companies that suffer financial damage.

378. We accept, in relation to BBLS, CBILS and CLBILS, that is very clearly not in the public interest to release information that would lead to a really clear risk that Borrowers would be exposed to targeting by fraudsters. This carries significant weight in the public interest balance.

379. Some weight is added in relation to BBLS, CBILS and CLBILS by the risk of targeting by claims companies and those offering finance.

380. We also add some limited weight as a result of the relatively limited costs/time likely to be spent by BBB and/or Lenders dealing with complaints in relation to all Schemes.

The public interest in releasing the information

381. Overall the schemes involved the expenditure and the risk of future expenditure of extremely significant sums of money. Further these schemes were introduced at speed and, in the case of BBLS, with the removal of some of the usual safeguards against fraud and the risk of default. The Government recognised the high risks of fraud and error in relation to BBLS and the question marks over value for money in relation to FFS.

382. In our view these factors mean that there is an extremely high public interest in transparency and scrutiny in relation to the operation of these schemes. We accept that there was an intention, at the relevant time, that the operation of all these schemes would be subject to scrutiny in a number of ways and that has since happened. This satisfies, in our view, the public interest in scrutiny to a large extent. The extent to which the release of a list of names adds to the detailed evaluation and

scrutiny by, for example, the National Audit Office and the House of Commons Public Accounts Committee is, in our view, extremely limited.

383. We have considered the extent to which the release of the names of the companies who received loans would serve this public interest in scrutiny. In our view the release of the names of companies would not assist the scrutiny of the operation of the schemes to any material extent.

384. We do not accept that there is significant value in the release of the list of names for the purposes of fraud prevention. We listened carefully to the evidence of Mr. Havenhand and Mr. Clarke, and we have considered their evidence in detail. We accept, on the basis of that evidence, that there will be some value in releasing the information because of fraud detection work which is likely to be taken by civil society and other organisations.

385. However, we accept on the basis of the evidence of Mr Bearman that the steps that Mr Clarke asserted should be taken to identify and combat fraud were largely already being taken or about to be taken by BBB in any event. The public release of the names was not necessary to facilitate those steps. This significantly reduces the weight of this factor in the public interest balance.

386. Given that the schemes were still operating at the time that the release was taking place, we do accept that there would be likely to have been some deterrent effect in relation to duplicate applications and we take that into account.

387. In relation to transparency, we take account of the fact that, at the relevant time BBB was required under the Umbrella Framework to publish all of the names of recipients of loans under BBLS and CLBILS within 12 months of the granting of the loan. The fact that this obligation was later removed is not something we can take into account when assessing the public interests in disclosure at the relevant time. We are not persuaded that there would be any significant benefit from the point of view of transparency in having the names released 12 months earlier.

388. In relation to CBILS, BBB was required under the Temporary Framework to publish details of any loans over €100,000 (€10,000 in the fisheries and agriculture sectors) within 12 months of the loan being granted. This would result in the publication of the details, not just the names, of approximately 50% of all CBILs loans. In our view this goes a very significant way to meeting the public interest in transparency and significantly reduces its weight in the public interest balance.

389. Finally in relation to FFS, the names of all those companies that, in the future, converted the loan to equity, and were therefore in a less vulnerable position, would be identifiable through Companies House. BBB had also taken the decision at the relevant time to publish the names of those companies on a rolling basis. Again, the tribunal's view is that goes a significant way to meeting the public interest in transparency and significantly reduces its weight in the public interest balance.

Conclusions on the public interest balance

390. Although we have considered the public interest separately in relation to the different schemes where appropriate, our overall conclusion on where the balance ultimately lies is the same in relation to all the schemes.

391. We have found in relation to all schemes that there is a very strong public interest in preventing prejudice to commercial interest, the weight of which is reduced to some extent in relation to BBLS, CBILS and CLBILS by the fact that we do not think the harm will be particularly extensive or wide ranging. In relation to the FFS scheme, we have found that there is an increased risk, accompanied by a risk to the economic interests of Investors.

392. Added to this, in relation to BBLS, CBILS and CLBILS we have accepted that it is very clearly not in the public interest to release information that would lead to a really clear risk that Borrowers would be exposed to targeting by fraudsters. We have found that this carries significant weight in the public interest balance. Finally some weight is added in relation to BBLS, CBILS and CLBILS by the risk of targeting by claims companies and those offering finance and the relatively limited costs/time likely to be spent by BBB and/or Lenders dealing with complaints in relation to all Schemes.

393. Overall we take the view that the extremely high public interest in transparency and scrutiny of these schemes is substantially met by other measures which had either taken place or were to take place. The release of all the names at the time of the refusal of the request would not materially add to this public interest. Further although the public interest in detecting fraud is high, the public release of the names was not necessary to facilitate that, save to a limited extent as set out above.

394. In those circumstances we agree with the Commissioner in both appeals that the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

395. In the light of that conclusion, we do not need to address any other issues and both appeals are dismissed.

Signed Sophie Buckley Date: 27 December 2022
Judge of the First-tier Tribunal