

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2022

Public Authority: British Business Bank
Address: Steel City House
West Street
Sheffield
S1 2GQ

Decision (including any steps ordered)

1. The complainant has requested information on the investment to businesses from the British Business Bank ('BBB') under the Future Fund Scheme during the COVID-19 pandemic.
2. The Commissioner's decision is that the BBB has appropriately applied section 43(2) – Commercial interests to withhold the requested information and the public interest favours maintaining the exemption. In regard to the BBB's reliance on section 21 – Information accessible by other means and section 22 – Information intended for future publication the Commissioner finds neither exemption to be engaged.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The Future Fund ("FF") launched in May 2020 to support innovative UK companies with good potential, that typically relied on equity investment and were affected by the COVID-19 pandemic. Prior to the FF, these companies would have been unable to access other Government business support programmes because they were either pre-revenue or

pre-profit. The FF provided Government loans ranging from £125,000 to £5 million directly to UK companies, subject to at least equal match funding from private investors (a mixture of private individuals and corporate entities). UK FF Nominees Ltd¹ entered into a Convertible Loan Agreement ("CLA") with the company and other lenders. FF loans can convert into shares in the investee company in a variety of circumstances set out in the CLA, including fundraisings, exit events and upon maturity of the loans. The loans may alternatively be repaid on an exit event or at their maturity date either at the election of investors or, in certain circumstances, automatically. The FF closed to new applications on 31 January 2021.

5. Under FF, companies have the option to convert the loan into equity whereby UK FF Nominees Limited will become a shareholder. Under the Companies Act, companies are required to report the names of their shareholders to Companies House, which is then accessible to the public. In addition the BBB has published² the names of companies that had, as at 31 August 2021, converted their FF loans to equity. This was published on 14 September 2021 and will be updated at the end of every financial quarter³. In addition, summary information on the loans has been published⁴ and will be updated each quarter⁵.

¹ UK FF Nominees Limited (company number 12591650) is the entity that enters into Convertible Loan Agreements on behalf of the Future Fund. UK FF Nominees Limited is legal titleholder to the Future Fund's Loans and any shares resulting from their conversion. It holds beneficial interest in the Loans (and any shares resulting from their conversion) on bare trust for the benefit of the Secretary of State for Business, Energy and Industrial Strategy.

² <https://www.british-business-bank.co.uk/press-release/british-business-bank-publishes-names-of-the-companies-in-which-future-fund-has-a-shareholding/>

³ <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/future-fund/future-fund-companies/> [at 31.12.2021]

⁴ <https://www.british-business-bank.co.uk/press-release/final-future-fund-final-data-shows-scheme-completed-1-14bn-of-convertible-loan-agreements/>

⁵ <https://www.british-business-bank.co.uk/press-release/british-business-bank-publishes-updated-list-of-265-companies-in-which-the-future-fund-has-a-shareholding/>

Request and response

6. On 27 August 2020, the complainant wrote to the BBB and requested information 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 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.”

7. The BBB responded on 23 September 2020 providing a link to published information⁶ and a total value of convertible loan notes approved by Government as at 20 September 2020 of £720m. With regard to the names of companies in receipt of investment it provided a refusal notice in reliance of FOIA section 43(2) - Commercial interests.
8. Following an internal review the BBB wrote to the complainant on 22 October 2020. It upheld the section 43(2) exemption and in addition relied on section 41, Information provided in confidence.

Scope of the case

9. The complainant contacted the Commissioner on 23 October 2020 to complain about the way his request for information had been handled. He explained the following:
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⁶ For general statistics about the take-up of the Future Fund, see the HM Treasury web page at: <https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics#Future-Fund>

"Firstly, we would draw attention to the fact that the British Business Bank is wholly owned and funded by the British Government ie. it is entirely supported by the British taxpayer.

Particular emphasis was placed on the belief that disclosure of the investee names would be likely to prejudice their commercial interests, as well as the[sic] those of the investors and the British Business Bank itself. No evidence was offered in support of this 'belief' which is subjective, speculative and contestable. It ignores entirely the fact that we have specifically excluded information on the investors from our request, and we have not asked for any commercial information regarding the investee companies, other than a list of their names. It is difficult or impossible to construe how that could prejudice a company's commercial interests or that of the British Business Bank. Indeed, the opposite could just as easily be argued in that it could encourage other companies to apply.

There is plenty of information in the public domain, rightly so in our view, detailing Government support to Companies arising from the pandemic, and we believe the Future Fund should not be exempt from that. For example, it is well published that Easy Jet are in receipt of £600 million of Government Covid funding and it is not clear how or why a simple list of companies in receipt of support from the Future Fund should be some sort of 'official secret' seemingly putting the operations of the British Business Bank on a par with those of the Secret Intelligence Services.

We would contend that any company applying to a government Department for public funding should reasonably expect that such information might be disclosed through a Freedom of Information request. Indeed, that is exactly reflected in the information given to those companies applying to the Future Fund by the British Business Bank."

10. In its submissions to the Commissioner of 24 September 2021 the BBB explained that it no longer wished to rely on section 41. In addition, with regard to the information publicly available at that date, the BBB relied on section 21- Information accessible by other means, in addition to the previously stated exemptions. The BBB also relied on section 22 – Information intended for future publication. The Commissioner therefore considers the scope of his investigation to be the application of the exemptions at FOIA sections 21, 22, and 43(2) to the requested information.

Reasons for decision

Section 21 Information accessible by other means

11. Section 21 of FOIA states:

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”⁷

12. Information is regarded as being in the public domain if it is reasonably accessible to the general public at the time of the request. If only part of the requested information is in the public domain, section 21 can only apply to that part of the request. The BBB advised that information relating to the FF, ie names of companies, had been published and was publicly available at the time of its submission to the Commissioner⁸.

13. However, in this case no information in the scope of the request was in the public domain at the time of the request. This remained the situation at the time of the response and internal review.

14. As set out above some of the requested information became accessible in June 2021 and the complainant was notified of this change at the time, 30 July 2021.

15. The publication of partial information is set out above in paragraph 5. As the steps taken postdate the request the Commissioner finds that the exemption was not engaged at the time of the request.

Section 22 Information intended for future publication

16. Section 22 of FOIA states:

“(1) Information is exempt information if—

⁷ The full text of section 21 is available at:

<https://www.legislation.gov.uk/ukpga/2000/36/section/21>

⁸ 23 September 2021

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

17. For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that it must have a settled expectation that the information will be published at some future date.
18. The BBB advised the Commissioner that it wished to rely on section 22 with respect to information concerning the FF. It advised that at the time of the request there was an intention to publish information both by the BBB itself but also when companies converted their loans into equity, as described above at paragraph 5.
19. The Commissioner accepts that at the date of the request, the BBB had an intention on its own behalf, and an expectation of companies converting their loans into equity, that some of the FF companies' names would be published. However, the BBB did not know which of those companies receiving the FF loans would be identified. The Commissioner therefore does not accept that there was a settled position on the information to be published. Consequently he finds that the exemption was not engaged at the time of the request.

Section 43 Commercial interests

20. Section 43(2) of FOIA states:

"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)."⁹

⁹ The full text of section 43 is available at:
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

21. The Commissioner has considered the application of this exemption to the information withheld at the time of the request which was not subsequently disclosed.
22. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged should be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, ie disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
23. The BBB explained that the FF is different to the other COVID-19 support schemes provided by the BBB as it is a loan given directly to the company on a matched funds basis. UK FF Nominees Ltd enters into the CLA with the company and the private investors and if the loan converts UK Nominees Ltd will hold shares directly in the company as an investor shareholder. Those shares being held on bare trust for the Department for Business, Energy and Industrial Strategy.
24. The BBB considers that disclosure of the requested information would be likely to result in the following parties having their commercial interests prejudiced; the FF companies; FF 'other lenders' offering matched funding under the terms of the CLA (a mixture of private individuals and corporate entities); BBB and UK FF Nominees Limited.

Future Fund companies (whose loans have not converted into equity)

25. The BBB explained:

"Future Fund was designed to provide finance to support innovative UK companies with good potential that would usually have been able to rely on equity investment. The Covid-19 pandemic disrupted the usual investment opportunities, therefore, the Future Fund provided a sound opportunity for companies to apply for government loans. The conditions of the loan agreement are that a company may have to convert the loan into equity when their financial position changes - for instance, if the company undertakes a fundraising round it triggers the equity conversion.

Given the intention to publish the names of the companies that convert the loan into equity, if all Future Fund companies are published, this will highlight the companies that have not reached the value/income threshold for conversion. This may result in speculation about their financial standing and business acumen. Disclosure of the information could, therefore, result in competitors gaining an unfair advantage and/or impact on the decisions by prospective customers or investors. Furthermore, receiving a Future Fund loan may have the connotation of a "bail out" or "rescue" financing 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."

The 'Other Lenders'/Investors

26. The BBB explained that the FF scheme is an investor-led scheme, such that a lead investor applies on behalf of themselves and may provide information about other parties making up the investment round (in connection to a particular company). The 'other parties' providing finance have invested in a commercial opportunity. The BBB considers that the other parties therefore have commercial interests and gave the example of the other parties needing to maintain the confidentiality of their investment relationships. The BBB added that disclosure of the names of the FF recipients is likely to damage the relationship between the investors, lead investors and the BBB.

27. The BBB explained:

"Given the nature of the financial instrument the Other Lenders are, in some cases, also shareholders. As such, disclosure of the names of Borrowers whose loans have not converted could enable information about the investors in those companies to be ascertained, which could impact on their commercial decision making and, in turn, affect the relationship between BBB and the investors in terms of trust. Future potential commercial transactions (which facilitate the commercial activities of businesses) which investors may enter into with BBB may be harmed."

BBB and UK FF Nominees Limited

28. The BBB stressed that its role as the Government's development bank necessitates and relies on good working relationships with the finance sector including investors, companies, regulatory bodies and lenders.
29. Although customer information or commercial arrangements would not usually be disclosed in the private sector the CLA in the FF confirmed the Bank's obligations under FOIA to disclose information where appropriate. Notwithstanding this the BBB considers that section 43(2) is engaged because:

"...disclosure would have an adverse impact on the relationship between the Bank and the investors. There is a risk that disclosure of commercial information into the public domain will concern private sector partners and potentially result in hesitancy in working with the Bank (or other public sector bodies, unless legally required to do so) or involvement with other BBB schemes or programmes."

30. The BBB explained that consultation with BEIS and HM Treasury led to the decision to proactively publish the names of companies whose FF loans have converted into equity. It explained that this decision took into account the number of companies whose loans had converted, the rate of conversions, the need to give those companies adequate notice of publication and the legitimate public interest in disclosure. The BBB advised the Commissioner that the affected companies have been contacted to confirm the intention to publish their names. The BBB explained that it considers this disclosure:

"...is appropriate because of the obligations of UK companies to file the changes to their shareholder information as per the Companies Act 2006, at which point UK FF Nominees Limited's shareholding will be publicly available information (now published)."

31. The complainant explained that he had not requested any information on private investors nor any specific commercial information regarding the individual companies. As set out in paragraph 9 above the complainant considers that because companies applying to the FF were informed of the possibility of FOI requests they accept this when they apply and he failed to see how publishing a list of names could prejudice their commercial interests.

The Commissioner's considerations

32. The Commissioner notes that those benefitting from the FF loans were made aware of the BBB's obligations under FOIA. He also notes that in the circumstances described in paragraph 5, those companies converting the FF loan into equity will have their names published. In considering

the circumstances at the time of the request the Commissioner notes that no names had been published at that point. However, he considers that as there was an intention to disclose converting companies' names, 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. Furthermore the Commissioner considers that the BBB's comment in paragraph 25 regarding the receipt of a FF loan having the connotation of a "bail out", could apply to **all** the companies prior to the intended publication.

33. With regard to the "other lenders" the Commissioner accepts that identification of the businesses, as described in paragraph 25, could allow for disclosure of the "other lenders" who had invested in the named businesses. He can also accept that if the named businesses are commercially prejudiced then those investing in those businesses, as a commercial opportunity, would in turn be commercially prejudiced.
34. The Commissioner notes the BBB's comments regarding the potential for creating hesitancy or reluctance of private sector investors to work with the BBB as a result of disclosure. He considers that this is sufficient to demonstrate that there is an argument that the BBB's commercial interests would be likely to be harmed.
35. Having considered the different groups cited by the BBB in regard to the FF scheme, the Commissioner is satisfied that the harm alleged by the BBB relates to the commercial interests of some if not all of the different groups cited. He therefore accepts that the alleged prejudice is relevant to the section 43 exemption. The first criterion set out in paragraph 22 has therefore been met.
36. The second criterion, set out in paragraph 22, requires the BBB to demonstrate a causal relationship between the potential disclosure of the loan recipients and prejudice to the commercial interests of at least some of the parties concerned. The Commissioner considers that the BBB has demonstrated that there are circumstances in which commercial prejudice could arise. He also considers that the BBB has demonstrated that the consequences of disclosure cannot be seen as trivial. He is satisfied that the prejudice claimed is real and of substance for at least some of all the parties covered above.
37. In regard to the third criterion, the level of likelihood of prejudice, the BBB explained that it wished to rely on the lower threshold of 'would be likely'. The BBB advised:

"We believe the prejudice 'would be likely to' occur on the basis that prejudice may not affect all of the parties above, in particular all of the Future Fund companies, but it is likely to affect a proportion of them given the continued pressures from the pandemic and the significant media attention the Schemes have garnered."

38. The Commissioner agrees 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. It would not be proportionate for the Commissioner to attempt to consider the likelihood of prejudice to each of the loan recipients to determine if some further information could be disclosed.
39. The Commissioner has concluded that the prejudice test has been met and the exemption at section 43(2) is engaged. He will now go on to consider the public interest.

Public interest in favour of disclosing the information

40. The complainant explained his view as follows:

"We could find no evidence in Section 43 to justify their judgement that the balance was weighted in favour of maintaining the exemption, rather than disclosure.... We found particularly troubling their description as 'a private matter' a company applying to a Government body for Government funding. While private investment is also involved, we made it absolutely clear we were not seeking any information whatsoever regarding the private investors nor any commercial information regarding the individual companies in receipt of funding."

41. The BBB acknowledged that there is always a public interest in the transparency of the operation of public authorities in decision making and the spending of public money. The BBB noted the significance of the FF scheme making 1190 investments totalling over £1 billion of public money.¹⁰

Public interest in maintaining the exemption

42. The BBB explained:

"Pursuant to s. 853F(5) of the Companies Act 2006, the Future Fund companies are under a legal obligation to file a confirmation statement

¹⁰ As at the date of the BBB submissions to the Commissioner 23 September 2021

at Companies House that will include details of any changes to their shareholders and share capital. The confirmation statement is freely available to the general public. Consequently, the companies that have converted the Future Fund loan into equity will include UK FF Nominees Limited as a shareholder in its updated shareholder information.

BBB publishes information about its other investments on its website in relation to British Business Investments, British Patient Capital, and Enterprise Capital Fund Programme. As such the public interest in disclosing this information is already being met to a substantial extent.”

43. The BBB advised the Commissioner of its view that prejudice to the commercial interests of the FF companies risks both wasting public money already invested in the companies and the possibility of the growth in the Government’s investment being lost thereby prejudicing the Government’s commercial interests. It considers both outcomes not to be in the public interest.
44. The BBB explained:

“Future Fund loans are covered by contract and there is the contractual expectation that [the details of the contract, including the amounts of the loans¹¹] and the details of the investors, would not be disclosed to the general public. Future Fund is designed to convert the loan into equity and, where that happens, UK FF Nominees Limited will be listed as a shareholder of such a company in an updated confirmation statement published on Companies House.

Future Fund is designed to convert the loan into equity at specific points where the company has reached an increase in investment; it follows that the premature release of the information (the name of the company) would result in speculation about the company, its operating model, personnel and business acumen, which in turn could have a detrimental impact on the company and its abilities to grow. Limiting the success and development of Future Fund companies is not in the public interest as the success of the company will result in a return for the Future Fund (and the public purse).”

45. The BBB argues that disclosure of the names of the FF companies would attract media attention potentially resulting in focus on specific companies. The BBB provided an example of media reporting on a particular company which it considers could have resulted in the

¹¹ The Commissioner notes that this information was not requested by the complainant here.

company's loss of business and/or other companies being persuaded not to consider government loans or BBB schemes because of concern over the disclosure of commercial information. It also references the possible stigma of obtaining a FF loan negatively impacting trading or prejudicing a company's ability to raise further funding for reasons identified in paragraph 25 above.

46. The BBB considers that the public interest in the transparency of the FF is "substantially met" because it currently publishes a rolling list of such companies that convert their loans¹² and intended to do so at the time of the request.

Balance of the public interest

47. The Commissioner has considered the arguments put forward by the complainant and the BBB. The Commissioner is mindful of the need for transparency in government spending of public money and the very significant amounts of public money involved in the loan scheme.
48. The complainant has focussed only on the public money involved with the loans. His view being that the amount of public money invested should necessitate disclosure of the names of the companies benefitting from that investment and can acknowledge no commercially prejudicial reasons for withholding the requested information.
49. The Commissioner accepts that the cost to the public purse of over £1 billion cannot be easily dismissed. However, the Commissioner is mindful of considering whether disclosure of the requested information would result in any benefit or detriment to the public purse particularly if such disclosure would likely cause commercial harm to the companies involved resulting in inhibiting the success of those companies and the other parties considered above.
50. As noted at paragraphs 33 and 34, he accepted the likelihood of commercial prejudice to the "other lenders" and the BBB itself. The Commissioner notes the complainant's assertions regarding not requesting information on other investors. He understands this reasoning, however, this does not prevent the other investors being impacted by disclosure as set out in paragraph 26

¹² <https://www.british-business-bank.co.uk/press-release/british-business-bank-publishes-names-of-the-companies-in-which-future-fund-has-a-shareholding/>

51. The Commissioner considers the public interest test in this case to be finely balanced. There is 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 considers that this must be taken into account alongside the likely commercial prejudice to many parties. On balance the Commissioner has concluded after much deliberation that the public interest test favours maintaining the section 43(2) exemption.

Right of appeal

52. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Hughes
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