

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2023

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

Decision (including any steps ordered)

1. The complainant has requested copies of application forms and supporting information submitted by the firm Study Hall Ltd to the Future Fund scheme. British Business Bank ("BBB") elected to neither confirm nor deny whether the requested information is held, with reliance on section 43(3) (commercial interests) of FOIA.
2. The Commissioner's decision is that BBB is entitled to rely on the exemption at section 43(3) to neither confirm nor deny whether the requested information is held.
3. The Commissioner does not require further steps.

Background

4. On May 2020 the Government and BBB launched the Future Fund Scheme ("FFS"). The following summary is taken from the First Tier

Tribunal decision in *Spotlight on Corruption & Anor. V The Information Commissioner & Anor* [2023] UKFTT 7 (GRC)¹:

5. “[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 matching in 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 a lead Investor starting an application on the application portal and providing information about the company in which they wished to invest and 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’). All FFS companies that convert are published by the British Business Bank every quarter, alongside those who have had a FFS loan and have gone into administration.

[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

¹ <https://caselaw.nationalarchives.gov.uk/ukftt/grc/2023/7>

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.”

Request and response

6. On 25 May 2023, the complainant wrote to BBB and requested information in the following terms:

“Dear British Business Bank PLC

Under the Freedom of Information Act 2000 I wish to see the following:

Full copies of application forms along with any supporting information submitted by Study Hall LTD for their COVID-19 Future Fund grant.

<https://www.thetimes.co.uk/article/start-up-backed-by-rishi-sunak-s-wife-akshata-murty-given-government-grant-zpmk3k9w8>²

Yours faithfully,

[NAME REDACTED]”

7. BBB responded on 2 June 2023. It stated that it was electing to neither confirm nor deny whether the requested information is held, with reliance on section 43(3) of FOIA.
8. Following an internal review BBB wrote to the complainant on 21 June 2023. It stated that it was upholding its position.

² Paywall

Scope of the case

9. The complainant contacted the Commissioner on 24 June 2023 to complain about the way their request for information had been handled.
10. In their grounds of complaint the complainant stated that they did not believe BBB were correct to refuse the request under section 43(3). They stated that they understood there to be an overwhelming public interest in disclosing the requested information. They also alleged stated that:

"A Study Hall Limited, received nearly £350,000 from the Future Fund and the Prime Minister's wife, Akshata Murty currently a stake in the firm for Catamaran Ventures."³
11. The Commissioner considers that the scope of his investigation is to determine whether BBB are entitled to rely on section 43(3) to neither confirm nor deny whether the requested information is held.

Reasons for decision

12. Section 43(3) of FOIA states that a public authority is not obliged to confirm or deny whether information is held if to do so would, or would be likely to, prejudice the commercial interests of a third party, including the public authority.
13. 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 from confirmation or denial that the requested information is held 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 confirmation or denial that the requested information is held and the prejudice which the exemption at section 43(3) is designed to protect. Furthermore,

³ The Commissioner understands the complainant's allegation to stem from the article published in The Times (paragraph 6), however, the Commissioner feels it pertinent to state at this juncture that the article does not record that Study Hall Ltd received £350,000 from the Future Fund Scheme.

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 confirmation or denial 'would be likely' to result in prejudice or confirmation or denial '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.

BBB's position

14. In a letter to the Commissioner BBB explained that since 2020 it had received multiple requests to disclose the names of the FFS recipients and had relied on section 43(2) to exempt the information. BBB's position has been upheld by the Commissioner⁴ and in the First Tier Tribunal case referenced at paragraph 6 above.
15. However, BBB acknowledged that the request forming the basis of the present decision is qualitatively different to previous requests it had received, in that the complainant had identified a company it believed to have been in receipt of FFS and was requesting copies of its application forms and supporting information. BBB therefore decided that section 43(3) was the appropriate provision under which to refuse the request.
16. In its internal review, BBB explained to the complainant that if it were to confirm or deny if information was held about Study Hall Ltd., it would be obligated to confirm or deny if Future Fund information was held on any company. BBB believed that to do so would be likely to prejudice the commercial interests of the FFS Borrowers, FFS Investors and BBB itself.
17. BBB expanded on this point in its letter to the Commissioner, explaining that to respond to the complainant confirming whether information is held or not held would allow individuals a route to identify those who

⁴ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022107/ic-84455-v7g0.pdf> , <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019653/ic-66315-r8m1.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019294/ic-66308-p4m4.pdf>

have received a loan that had not yet been published on its website⁵. For example, if a request was received that asked for two companies, one of which it held information for and one of which it did not, without the application of a neither confirm nor deny response it would be apparent to the requester that one company had received a loan and the other had not. Confirmation or denial of whether the requested information was held could, effectively, constitute disclosure of the name of a FFS recipient. This would therefore undermine the FTT's upholding of BBB's application of section 43(2) to withhold all the names of the FFS recipients.

18. BBB also stated that confirmation or denial of whether the requested information is held had real potential to cause commercial prejudice to unnamed FFS recipients as they may subsequently be identifiable if additional requests are submitted to enquire about other companies. It further stated that confirming or denying whether information is held in this case then sets precedent for further requests.
19. In respect of the prejudice likely to arise from confirmation or denial of whether the requested information was held, BBB stated that confirmation or denial would be likely to impact FFS recipients as it could make them identifiable. BBB referred the Commissioner to the response it gave to the FTT (at paragraphs [80] to [82]) regarding FFS Borrowers, FFS Lenders and the interests of BBB/UK FF Nominees Ltd. BBB stated that it believed that the prejudice identified applied equally to its use of section 43(3), particularly the prejudice flowing from reputational damage:

"[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.

⁵ <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/future-fund/future-fund-companies/>

[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."

[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 the 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.

[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 working with BBB.

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

20. In its findings, the FTT accepted BBB's evidence of the prejudicial impact that disclosure of the names of FFS recipients would have on FFS Borrowers, FFS Investors and BBB. For brevity, the FTT's findings have been included in an appended annex.
21. BBB explained that the prejudice identified above remained relevant to the companies that have not yet converted their loan into equity, therefore it was maintaining the position not to release names under FOIA. In light of this and within the context of the present request, BBB determined that the appropriate exemption was 43(3).

The Commissioner's position

22. With respect to the first criterion that must be met in order for an exemption at section 43 to be engaged, harm to commercial interests as a result of confirmation or denial of whether the requested information is held, the Commissioner is satisfied that the harm alleged by BBB relates to the commercial interests of FFS borrowers, FFS investors and BBB. He therefore accepts that the alleged prejudice is relevant to the section 43 exemption.
23. The second criterion requires BBB to demonstrate a causal relationship between the confirmation or denial of whether the requested information is held and prejudice to the parties identified. The Commissioner accepts that the arguments presented to the FTT, as outlined at paragraph 20 above, are applicable in the circumstances of the present case. He accepts that confirmation or denial could equate to disclosure of the names of the FFS borrowers and that the prejudice that would be likely to occur as a result is real and of substance.
24. In regard to the third criterion, the level of likelihood of prejudice, the Commissioner agrees that there is a real and significant risk of prejudice to at least some of the FFS borrowers, FFS investors and the BBB. Confirmation or denial would in the first instance reveal whether or not Study Hall Ltd. was in receipt of a FFS loan. However, the Commissioner accepts that it is logical to argue that a confirmation or denial response to this request would set a precedent which BBB would have to follow in future similar requests. It would be not be proportionate for the Commissioner to attempt to consider the likelihood of prejudice to each of the loan recipients individually, however he considers that confirmation or denial of whether information is held about specific FFS borrowers carries the risk of prejudice occurring to FFS borrowers, FFS investors and BBB. In the Commissioner's view this finding is supported by the conclusions of the FTT decision.
25. The Commissioner has concluded that the prejudice test has been met and the exemption at 43(3) is engaged. He will now go on to consider the public interest test. The Commissioner has considered the points raised by the complainant at paragraph 10, however there is no information in the public domain – as far as the Commissioner can locate – that confirms whether or not Study Hall Ltd received a loan under the FFS.

Public interest test

Arguments in favour of confirming or denying whether the requested information is held

26. BBB recognised the public interest in confirmation or denial of whether the requested information is held. It stated that it acknowledged that there is an inherent public appetite for understanding the way public bodies operate, spend money and make decisions, particularly when there is direct investment of public money (over £1.4 billion) to companies eligible to apply for FFS. It also stated that confirmation or denial may be likely to minimise the time spent on handling FOIA requests and provide more certainty to requesters if there is a settled position to confirm or deny information is held when responding to requests about FFS and specific recipients.
27. The Commissioner notes the complainant's argument that disclosure of the information is in the public interest is owing to an article published in The Times newspaper stating that Catamaran Ventures, an investment company controlled by Akshata Murty (wife of Prime Minister Rishi Sunak) holds shares in Study Hall Ltd which had been awarded almost £350,000 through a government grant from Innovate UK⁶. The article continues to explain that the owner of Study Hall Ltd had previously received £650,000 of Future Fund Scheme support for their education start-up, Mrs Wordsmith. Catamaran Ventures was also a minority shareholder in Mrs Wordsmith. The complainant stated that the article is evidence of "overwhelming public interest".

Arguments against confirming or denying whether the requested information is held

28. In favour of maintaining a neither confirm nor deny response, BBB stated that it was already meeting the public interest with the routine publication of FFS recipients that have gone into administration or whose loans have converted to equity. It also stated that the ramifications of confirmation or denial, which may amount to disclosure, had real potential to have an adverse impact on FFS recipients' reputations, as well as their future investment or business opportunities. Finally, BBB argued that the public interest in whether it held application information for a single business is much lower than the public interest in maintaining a degree of commercial confidentiality and maintaining a fair and stable market place.

⁶ <https://www.ukri.org/councils/innovate-uk/>

Balance of the public interest test

29. 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 Future Fund schemes.
30. The Commissioner does not agree that existence of the article and the contents contained within it represents overwhelming public interest in BBB's confirmation or denial of whether the requested information exists, such that it would outweigh the risk of commercial prejudice that would be likely to occur. He is mindful of considering whether confirmation or denial of whether the requested information is held would result in any benefit or detriment to the public purse, particularly if the outcome would cause commercial harm to FFS borrowers resulting in inhibiting the success of those companies and the other parties considered above.
31. The Commissioner considers the public interest in this case to be finely balanced. There is a significant argument in favour of confirmation or denial of whether the requested information is held due to the large sums of public money committed under the Future Fund Scheme. However, the Commissioner takes the position that BBB is already meeting the public interest in publishing the names of companies in receipt of FFS funding who have either converted their loans into equity or gone into administration. The Commissioner does recognise that an article published in a national broadsheet indicates towards a public interest in confirmation or denial that extends beyond just the complainant, however he does not find that this outweighs the public interest in protecting against the potential prejudices that would be likely to occur as a result of similar requests. On balance the Commissioner has concluded that the public interest test favours maintaining the section 43(3) exemption.

Right of appeal

32. 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

33. 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.
34. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

35. “[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 commercial interests and is real actual and of substance. We therefore accept that the exemption is engaged in relation to all Schemes

[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.

[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.

[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.

[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.

[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.

[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.”