



Neutral Citation Number: [2023] UKFTT 766 (GRC)

Case Reference: EA-2023-0103

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard: By CVP
Heard on: 4 September 2023
Decision given on: 20 September 2023**

Before

**TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER KATE GRIMLEY EVANS**

Between

BARNABY DAVIES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: In person

For the Respondent: Did not appear

Decision: The appeal is Dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-109976-F5F5 of 31 January 2023 which held, on the balance of probabilities, that the British Business Bank ('BBB') held no further information within the scope of the request.

2. The request relates to investments made by Maven and Mercia, who make investment decisions and manage the investment of the Northern Powerhouse Investment Fund (the NPIF).
3. The NPIF was launched in February 2017 in response to, inter alia, longstanding challenges around access to finance, productivity and enterprise rates in the North of England. The NPIF was designed to increase the supply of debt and equity finance to SMEs located in the NPIF area, enable recipient businesses to grow and innovate, and create sustainable financial ecosystems.¹

4. According to the report of SQW on the NPIF in July 2019 ('the SQW report'):

"The NPIF is a "fund of funds", overseen by the Bank in close partnership with the LEPs, and delivered in each region by a series of contracted fund managers who are tasked with targeting funding towards 'ambitious SMEs'."

5. Northern Powerhouse Investment Limited is an investor in the NPIF funds. NPIL is administered by British Business Financial Service Limited (BBFSL). NPIL uses a Limited Partnership structure which ensures that the Fund Manager is responsible for fund operation. As a Limited Partner neither NPIL nor BBFSL control or direct individual investments into underlying companies. The sole responsibility for those investment decisions rests with the General Partner (the Fund Manager) whose role is to make the commercial judgements necessary while operating within the agreed mandate.

6. Page 14 of the SQW report includes the following:

"In terms of investment stage, the Bank's monitoring data shows that:

- 10% of SMEs are "start-ups"
- 27% are "early stage" SMEs
- 34% are "expansion" SMEs²⁵
- 30% are "growth" SMEs."

7. Footnote 25 at the bottom of page 14 states:

"Defined as 'Start-Up' (Prior to the first commercial sale); 'Early Stage' (Operating in any market for less than seven years); 'Expansion' (New Markets or Products). No definition of growth is provided in the MI data."

8. The investments classified as 'Start-up' or 'Early Stage' businesses may or not be pre-revenue. Pre-revenue is not the same as prior to the first commercial sale (the

¹ See NPIF early assessment report by SQW at p A37 onwards of the bundle.

definition of 'Start-up' used by NPIF). Revenue can come from other sources such as revenue grants, consultancy activities, paid trials & feasibility studies and licensing.

9. Mr Davies' start-up unsuccessfully applied for investment from NPIF funds. Despite evidence that the fund was intended, in part, to provide funding to start-ups, Mr Davies suspects that BBB have not dispersed revenue to any start-ups, whether a start-up is defined as pre-revenue or as prior to first commercial sale. His request arises out of a desire to obtain information to evidence that BBB has (or has not) dispersed funds to start-ups.

Requests, Decision Notice and appeal

The Request

10. This appeal concerns the request for the following information made on 22 March 2021:

"Number of investments made by Mercia utilising NPIF funds

Number of investments made by Mercia in pre revenue start-ups utilising NPIF funds

Total amount of all investments made by Mercia utilising NPIF funds

Total amount of all investment made by Mercia pre revenue start-ups utilising NPIF funds

Total number of 'later stage'* applications made to Mercia for funding number of investments made by modern utilising NPIF funds

Number of investments made by Maven in pre revenue start-ups utilising NPIF funds

Total amount of all investments made by Maven utilising NPIF funds

Total amount of all investment made by Maven pre revenue start-ups utilising empire funds

Total number of 'later stage'* applications made to Maven for funding

Total number of pre revenue start-ups that applied to Maven for funding

All of the above for the years 2017,2018,2019 and 2020

*Later stage is intended to mean anything that isn't pre revenue."

The response

11. On 16 April 2021, the BBB responded. It provided some information but stated that it did not hold some of the information because:

“We do not hold data that classifies whether a business is a pre-revenue start-up or 'later stage' in the way that you have asked with the distinction being whether they are or are not pre-revenue. We use the industry standard terminology of early stage, start-up etc, with fund managers allocating investments accordingly.”

12. In its internal review response on 17 May 2021 BBB confirmed its initial response. It stated:

“... we do not hold data on whether a business is a pre-revenue start-up. The investments classified as Start-up or Early Stage businesses may or not be pre-revenue and it should be noted that pre and post revenue is not the same as pre enclosed commercial sale (the definition of Start-up used by NPIF).

Revenue can come from sources such as revenue grants, and quite often in the case of start-up and early stage companies consultancy activities, paid trials & feasibility studies and licensing.

The start-up definition used by NPIF relates to the first commercial sale of the product or service that is the focus of the investment and would not include the revenue status as described above.

Using the investment stages identified in your correspondence dated 19 th April, a table has been provided (see attachment) which shows the cumulative equity investments from the two NPIF equity funds (NW and Yorkshire & Humber /Tees Valley) by investment stage, to the end of December 2020.

As demonstrated in the table, by number, 21% of NPIF equity funds' investments are classified as Start-up, and 58% are Early Stage. By amount invested, these figures are 12% and 59% respectively.

NPIF equity fund portfolios consist of significant levels of Start-up and Early Stage businesses. Combined these are 79% by number and 71% by amount invested.”

13. The table that was attached is at p B196 of the bundle.

14. BBB also stated that Maven and Mercia were not subcontractors of BBB and that there was no requirement for BBB to request data from Mercia or Maven to respond to an FOI request.
15. BBB was asked by the Commissioner to ask Mercia and Maven if they held the requested data. BBB informed the Commissioner as follows on 5 September 2022:

“...the Bank has approached Mercia and Maven to ascertain whether they hold data requested by the claimant i.e. ‘pre-revenue’ and ‘later stage’. Both fund managers have responded to say that they do not hold the data requested by the Complainant but that they do hold the data required by BBSFL ...which was provided previously...”

The Decision Notice

16. In a decision notice dated 31 January 2023 the Commissioner decided that the BBB held no further information within the scope of the request on the balance of probabilities and that Maven and Mercia do not hold information on behalf of BBB.

Notice of Appeal

17. The Grounds of Appeal are, in essence, that BBB held the relevant information at the material time, or it was held on their behalf by Maven and Mercia, or BBB were obliged to get the information from Maven and Mercia.
18. Mr Davies makes the following points
 - 18.1. The fact that the Commissioner took 20 months to conclude its investigation may have contributed to the absence of information;
 - 18.2. BBB supplied the information to a third-party (SQW);
 - 18.3. The information is held by Maven and Mercia who were sub-contracted to BBB;
 - 18.4. BBB were obliged to get the information from Maven and Mercia. The contractual relationship between BBB and Maven and Mercia puts the information in scope of the FOI request.
19. Mr Davies also complains about the length of time it took the Commissioner to complete its investigation. As explained below under discussion and conclusions, this is outside our remit.

The Commissioner's response

20. The Commissioner understands on the basis of the information provided by BBB on 5 September 2022 (see above) that neither Mercia nor Maven hold the requested information. They only hold information in the same format as BBB, namely, in the format agreed at the outset of the NPIF project. In any event, as set out in paragraph 13 of the Decision Notice, as Mercia and Maven are not agents or subcontractors,

nor has BBB outsourced any obligations to them, they would not hold information on behalf of BBB.

21. The Commissioner notes that BBB in its internal review states that pre and post revenue is not the same as pre and post commercial sale. The definition of start-up used by BBB is pre-commercial sale, not pre-revenue. The headings used in the spreadsheet provided to Mr Davies and in the SQW report and the explanation in FN25 on page 14 of that report are consistent. The request refers to pre-revenue start-ups.
22. In relation to the complaint of delay, the Commissioner submits that this is outside the remit of the tribunal. The tribunal has no power to remit the matter to the Commissioner for a further investigation.

The reply of Mr. Davies

23. Whilst the tribunal notes that Mr Davies feels strongly about the delay in dealing with his case, this is outside the remit of the tribunal and therefore these aspects of the reply are not set out here.
24. Mr Davies also makes a number of other points which fall outside the remit of the Tribunal, including allegations of wrongdoing and breaches of policies and procedures by BBB.
25. The most relevant points made by Mr Davies are as follows:
 - 25.1. Mr Davies states that the use of the 'pre-revenue' term in the request was intended as synonymous with 'prior to first commercial sale'.
 - 25.2. BBB should have provided the information supplied to SQW in response to a request using the definition 'prior to the first commercial sale'.
 - 25.3. If BBB do not have the information then their previous claims and reporting are wrong, if they do have it, or the means to go and get it, it should be supplied to Mr Davies.
 - 25.4. BBB were in breach of the section 46 Code of Practice on records management.
 - 25.5. Maven and Mercia should be bound by the provisions of FOIA.

Legal framework

26. Section 1(1) FOIA provides:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case to have that information communicated to him."

27. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The role of the tribunal

28. The tribunal's remit is governed by s.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.

Issues

29. The issues for the tribunal to determine are:

- 29.1. What was the scope of the request?
- 29.2. On the balance of probabilities did BBB hold information within the scope of the request?
- 29.3. On the balance of probabilities did Maven or Mercia hold information within the scope of the request?
- 29.4. If so, did Maven or Mercia hold that information request on behalf of BBB?

Submissions

30. Mr. Davies made helpful submissions which the tribunal has taken into account, where relevant to the issues we have to decide. Mr. Davies made the following main points in his oral submissions.

31. Mr. Davies submits that the NPIF involves the use of a large amount of taxpayers money. It was to be dispersed to achieve a number of aims, with specific emphasis on start-ups (see p 29). His technical start-up was refused funding by Maven and Mercia on the basis that it was at an early stage (see p 179). He was told orally that they would not invest in pre-revenue companies. He is aware that material has been circulated to stakeholders which states that they will not invest in start-ups. He has been unable to find any evidence online of a single start-up that has received NPIF investment. Mr. Davies suspects that this is because start-ups present the most risk, and that they have 'de-scoped' the ones that present the most risk.

32. Given that Mr. Davies clarified in his reply that his use of the term 'pre-revenue' in his request was intended to be synonymous with 'prior to the first-commercial sale', I asked him in the hearing if the information in the table at p 196 was the information that he was seeking. This information was provided to him at the internal review stage. Initially Mr. Davies did not recall having seen the table before, and therefore we adjourned the hearing to allow him to consider the position.

33. He confirmed that he had received the table at internal review stage and that the information in the table answered the request, but that he did not accept that the figures were accurate or true for a number of reasons. First:

- 33.1. It did not seem to match the figures provided in the SQW report;
- 33.2. It was not supported by any evidence;
- 33.3. It is inconsistent with the fact that he has been unable to find evidence of investment in a single start up;
- 33.4. BBB have refused to provide the names of companies invested in on the basis of commercial confidentiality;
- 33.5. It is inconsistent with the narrative provided by BBB that it does not hold the requested information.

Discussion and conclusions

The Commissioner's investigation

34. Mr. Davies raised a number of issues about delays and other matters relating to the adequacy of the Commissioner's investigation. These matters are outside our jurisdiction.

Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 ('the Code')

35. Mr. Davies raised the issue of the Commissioner's statutory duty to promote good practice and compliance with the Code, and his power to issue a 'practice recommendation' under section 48 FOIA to public authorities whose practice does not comply with the Code. It is not within our jurisdiction to consider whether or not the Commissioner should have issued a practice recommendation.

What was the scope of the request?

36. Mr. Davies requested data in relation to 'pre-revenue start-ups' and 'later stage' applications'. He defined 'later stage' as 'anything that isn't pre revenue'.

37. In our view this is a clear request. It does not just ask for data about 'start-ups' or 'later stage applications' without defining its terms. It explicitly asks for data about pre-revenue start-ups and it explicitly defines 'later stage' as anything that is not pre-revenue. Objectively construed, in the light of the surrounding circumstances, we find that the request means what it says.

38. Mr. Davies attempted to clarify his request in his reply to the Commissioner's response, but he did not clarify his request in communication with BBB at the time, and they have not had the opportunity to reply to any clarified request. We must consider the request as responded to by BBB.

Did BBB or Maven and Mercia hold the requested information?

39. There is no evidence before us to suggest that either BBB or Maven or Mercia records data which is classified by whether the start-up is pre- or post revenue. There is compelling evidence before us that they do not. They consistently adopt a different classification system. It is the same system that is used in the SQW report. It is the same system that BBB told Mr. Davies about in its response and in the internal review. They record data under the categories of start-up (defined as 'prior to the first commercial sale'), early stage (defined as 'operating in the market for less than seven years'), expansion (defined as 'new markets or products) and growth. Having recorded the information in that way, it is not possible to determine from the information they hold whether a start-up was pre- or post revenue.
40. For those reasons we accept that neither BBB or Maven and Mercia hold the requested data. For those reasons the appeal must fail. There is no need for us to determine whether the information was or would be held by Maven and Mercia on BBB's behalf. The appeal is dismissed.

Observations

41. BBB did hold data on the number of start-ups that had been funded. They could provide the data requested in relation to start-ups. However, they used a slightly different definition of start-up to Mr. Davies and therefore the data could not be divided into pre- and post revenue figures. It could only be divided into the categories under which it had been recorded, which used the first commercial sale rather than revenue as the dividing line. As BBB explained in the response to the internal review, this could be different. A grant, for example, counts as revenue but is not a commercial sale.
42. The definitions adopted by BBB and Mr. Davies are different, but only slightly different. In those circumstances, although BBB had to tell Mr. Davies that they did not hold the requested data, the tribunal would have expected them to inform Mr. Davies that they could provide data in relation to the very similar category of start-ups prior to the first commercial sale. They did this in their internal review. They provided the requested figures under the slightly different categories (see the table at p B196). Subject to the fact that Mr. Davies disputes the accuracy of the figures, he accepted that that they were what he had requested.
43. Thus if the tribunal is wrong in its interpretation of the scope of the request, and the request should have been construed more broadly, BBB have provided the requested information in any event.

Signed Sophie Buckley

Date: 18 September 2023

Judge of the First-tier Tribunal