

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2024

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

Decision (including any steps ordered)

1. The complainant requested information relating to emergency COVID loan schemes. British Business Bank (BBB/the Bank) provided some information and denied holding some. It refused to provide the remainder, citing sections 29 (prejudice to the national economy), 31 (law enforcement) and 43 (commercial interests) of FOIA.
2. The Commissioner considered its application of section 43 to the withheld information. He also considered whether the Bank holds information within the scope of part 4.3 of the request.
3. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 43(2) of FOIA. He also finds that, on the balance of probabilities, the Bank does not hold information in scope of part 4.3 of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The Commissioner understands that the loan schemes referenced in the request were overseen by the Bank¹:

“In early 2020, the Government established three main schemes to provide loans to businesses of different sizes affected by coronavirus:

The Coronavirus Business Interruption Loan Scheme (CBILS) offered loans of up to £5m for businesses with a turnover under £45 million. The loans were 80% backed by the Government.

The Coronavirus Larger Business Interruption Loan Scheme (CLBILS) extended the standard CBILS approach to larger businesses.

The Bounce Back Loans Scheme (BBL) offered up to £50,000 or 25% of turnover, with streamlined application procedures and a 100% Government guarantee.

The Government-owned British Business Bank (BBB) oversaw the schemes”.

6. With reference to the wording of the request, the Commissioner understands that removal of the guarantee is in general instigated when a lender submits a request to remove a guarantee to BBB.

Request and response

7. On 28 September 2023, the complainant wrote to the Bank and requested information in the following terms (numbers added to component parts of 4 for ease of reference):

“1. Please can BBB disclose the total number of loans offered under the BBL, CBIL and CLBIL schemes where it has removed the government guarantee?

¹ <https://commonslibrary.parliament.uk/research-briefings/cbp-8906/#:~:text=The%20Coronavirus%20Business%20Interruption%20Loan,CBILS%20approach%20to%20larger%20businesses.>

2. Please can BBB disclose the total value of loans offered under the BBL, CBIL and CLBIL schemes where it has removed the government guarantee?
3. Please can you additionally provide a breakdown for the above data supplied for questions 1 and 2 by lender?
4. (4.1) Please can you disclose the names of banks who have been subject to BBB audits regarding their COVID lending and recovery processes?

(4.2) Please can you disclose how many audits each lender has been subject to?

(4.3) Please can you disclose the number of audits which uncovered unacceptable lending practices and/or suboptimal treatment of customers?"
8. The Bank responded on 26 October 2023. It confirmed it holds information about the Covid-19 loan schemes performance. It provided information in scope of parts 1 and 2 of the request. It refused to provide the information in scope of part 3, citing section 43 (commercial interests) of FOIA. It provided some information in scope of part 4, denied holding some of the requested information and refused to provide the remainder, citing section 43(2).
9. The complainant requested a review of the decision to withhold information in scope of parts 3 and 4 of the request.
10. Following an internal review, the Bank wrote to the complainant on 11 December 2023, maintaining its application of section 43.

Scope of the case

11. The complainant contacted the Commissioner to dispute BBB's handling of parts 3, 4.2 and 4.3 of the request.
12. They dispute that disclosure would jeopardise commercial interests, telling the Commissioner that the government already publishes information per lender across other categories, including the amount of suspected fraud identified per lender and the amount in arrears.
13. The Commissioner wrote to the complainant acknowledging their complaint, specifically BBB's handling of parts 3, 4.2 and 4.3 of the request.
14. During the course of the Commissioner's investigation, BBB clarified its response to part 4.3 of the request. With respect to the wording of that

part of the request, it told the Commissioner that 'unacceptable lending practices' and 'suboptimal treatment' are not categories that are recorded by the Bank. It therefore confirmed that it does not hold information within the scope of that part of the request.

15. Also during the course of the Commissioner's investigation, BBB revised its application of exemptions, additionally citing sections 22 (information intended for future publication), 29(1) (the economy) and 31(1) (law enforcement) of FOIA. However, it subsequently confirmed that it is no longer relying on section 22.
16. It confirmed that the exemptions at sections 29(1), 31(1) and 43(2) apply equally to the information in scope of part 3 of the request, namely the number of, and value of, guarantee removals by lender.
17. It also confirmed that the exemptions at sections 29(1), 31(1) and 43(2) apply equally to the information in scope of part 4.2 of the request, namely the number of audits each lender has been subject to.
18. With respect to the requested audit information, it told the complainant that the names of all lenders, requested at part 4.1, have been published in tables on the gov.uk website. It provided the complainant with the relevant link.
19. While acknowledging BBB's revised position, the complainant confirmed that they were dissatisfied with the revised response and wished to pursue their complaint. They re-iterated their view that there is a public interest in disclosure.
20. In light of the above, the following analysis considers whether BBB was entitled to withhold the requested information in scope of parts 3 and 4.2 of the request.
21. The Commissioner has also considered whether, on the balance of probabilities, BBB holds information in scope of part 4.3 of the request.

Reasons for decision

Section 1 general right of access to information

22. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled, under subsection (a), to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
23. With respect to its handling of part 4.3 of the request, the complainant considers it is in the public interest for BBB to disclose the number of

audits that have uncovered sub-standard lending practices “and that it should be possible to do so”.

24. BBB told the complainant:

“We do not hold data relating to ‘unacceptable lending practices and/or suboptimal treatment of customers.’ Under the terms of the respective guarantee agreements of the BBL, CBIL and CLBIL schemes, BBB has the right to conduct an audit of the Lender’s compliance with the guarantee agreement and the purpose of the audits is not to look for ‘unacceptable lending practices and/or suboptimal treatment of customers’.

BBB assesses the audit activity to be undertaken in each financial year based upon how the risks of the scheme have evolved”.

25. Similarly, it told the Commissioner that ‘unacceptable lending practices’ and ‘suboptimal treatment’ are not categories that are recorded by the Bank: “nor is there any similar extractable term in the information held”.

26. It also explained:

“The Bank is not a financial regulator and thus the audits do not examine questions around the practices or the treatment of businesses by lenders. Rather, the audits have the purpose of examining whether the rules of the relevant schemes were followed”.

The Commissioner’s view

27. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant’s request.

28. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

29. In reaching his decision in this case, the Commissioner has taken account of the views put forward by the complainant. He has also considered the explanations BBB provided as to why the information is not held.

30. The Commissioner recognises that section 1 of FOIA requires a public authority to confirm whether it holds information of the description specified in the request.
31. Based on the evidence provided to him, the Commissioner is satisfied that, on the balance of probabilities, BBB does not hold recorded information falling within the scope of part 4.3 of the request.
32. He is therefore satisfied that BBB complied with the requirements of section 1 of FOIA in this case.
33. The Commissioner has next considered BBB's application of section 43(2) to the information in scope of parts 3 and 4.2 of the request.

Section 43 commercial interests

34. Section 43(2) exempts information whose disclosure would, or would be likely to, prejudice the commercial interests of any legal person (an individual, a company, the public authority itself or any other legal entity).

The Bank's position

35. BBB considers that the withheld information is exempt from disclosure on the basis that it would prejudice commercial interests.
36. In that respect, the Bank told the Commissioner that, having reconsidered its handling of the request, it had increased its assessment of the probability of prejudice occurring from "would be likely to", to "would".
37. The Commissioner acknowledges that, in its submission to him, BBB provided separate arguments to differentiate the prejudice in relation to the different types of information specified in the request, ie lender-specific removal and audit information. It explained how, and why, it considers disclosure has the potential to prejudice commercial interests.
38. In the course of its correspondence, it referred to prejudice to the commercial interests of various parties, notably lenders, the Government (as Guarantor under the schemes) and BBB (which administers the schemes on behalf of the Government).
39. It argued that disclosure would have an adverse impact on the relationship between the Bank, the Government and lenders.
40. BBB provided detailed submissions on its reasoning with regard to each group. These are quoted from those submissions as follows:

Lenders

"Lenders play an integral part in the delivery of the Covid Loan Schemes. They remove loans from cover under the guarantee voluntarily and often after discussion with BBB and acting in good faith for reasons such as data correction, data error and reasons where the lender has determined the loan to potentially be ineligible. We consider that identifying the data outlined in question 3 would breach the commercial confidentiality of Lenders and adversely impact BBB's ability to negotiate with Lenders in good faith in the future.

In addition, Lender-by-Lender breakdown of removals could give the misleading impression of poor Lender performance whereas the Lender could be demonstrating a prudent and conservative approach".

"Banking services are a commercial venture and competitive in nature....Information which provides insight into the way that those services are offered or operated is information which would have a bearing on a lender's ability to compete for customers and against other lenders or investors... Partial information in relation to the services offered or how they are operated may result in inappropriate conclusions being drawn".

41. BBB argued strongly that disclosure of the audit information it holds may lead to inappropriate conclusions being drawn, for example on risk appetite or commercial decision making.
42. It told the Commissioner that, where unreliable information comes into the public domain, suggestive of a higher risk profile of lenders, this can lead to rumours and a subsequent withdrawal of custom or investment from that private institution.
43. With respect to the requested audit information, BBB explained that audits take place "in a range of circumstances" with the overall purpose of checking that Scheme rules are being applied.
44. It told the complainant that disclosure of the requested audit information "could incorrectly imply some Lenders have a higher risk profile which may not be the case" and hence may be commercially sensitive and damaging.
45. Similarly, with respect to information about guarantee removal at lender level, BBB told the Commissioner that, while there are many reasons why a guarantee may be removed, it does not hold that information. It argued, therefore, that if numbers of removals were published on a lender-by lender basis, this could give a misleading impression because there are variable thresholds for guarantee withdrawal.

BBB/HM Government

46. With respect to its view that prejudice to the commercial interests of lenders would, in turn, prejudice the commercial interests of HM Government and the Bank, BBB said:

“The release of the requested information under FOIA would be likely to prejudice the commercial interests of the Government and BBB in that Lenders may choose not to engage with BBB or wider Government initiatives because of concerns that their commercial information will be released to the general public. Should the private sector refrain from engaging with BBB or government, this would prejudice the commercial interests of the Government in its ability to introduce and launch any future finance schemes, and the commercial interests of BBB in its ability to achieve its objective of increasing the availability and diversity of finance for UK businesses”.

“Disclosure of information might lead to partner organisations not working with BBB which would prevent BBB from achieving its objective of increasing the availability and diversity of finance for UK businesses”.

47. With respect to the requested audit information, in particular, BBB argued that the disclosure of information about how lenders were audited would erode trust in guarantee schemes. It argued that, as a consequence of lenders losing trust:

“... participation with government-backed guarantee schemes would decline, which would reduce the lending available to businesses”.

48. BBB expanded on the above arguments in its submission to the Commissioner. As it considers that disclosure would prejudice the commercial interests not only of the Bank itself, but also of other parties, it provided him with evidence that it had consulted with third parties to obtain their views on disclosure.
49. As well as providing evidence that its arguments are a genuine reflection of the concerns of the third party lenders, it also explained why disclosure of the requested information would be likely to prejudice its own commercial interests.
50. The Bank also explained that, as Guarantor under each of the BBLs, CBILs and CLBILs, the Government’s interests would be prejudiced as a result of disclosure.

The Commissioner's position

51. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
- first, 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 must 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 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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.
52. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Bank relates to the interests which the exemption contained at section 43(2) is designed to protect.
53. The Commissioner has next considered the second and third criteria.
54. Having considered the content of the withheld information, along with BBB's submissions and the evidence of concerns of third party lenders, the Commissioner is satisfied that disclosure of the withheld information presents a real and genuine risk of harming the commercial interests of third party lenders.
55. With respect to BBB and HM Government, the Commissioner understands that the prejudice flows from lenders being deterred from engaging with BBB in the future as a result of the disclosure of this information. This, in turn, would impede the Government's ability to set up a similar scheme in the future.
56. The Commissioner notes the concerns set out by BBB regarding commercial prejudice to the Government and BBB. He understands the need for private sector engagement with these schemes and others to

achieve BBB's objectives to increase the availability and diversity of finance for UK businesses.

57. The Commissioner accepts that if the private sector refrained from engagement with the BBB, the BBB's objectives would be hindered. However, he is not persuaded that the private sector would refrain from engagement in future schemes, to the extent that the Government's ability to set up a similar scheme would be compromised, particularly if the circumstance of similar guarantees were in place.
58. The Commissioner is not satisfied that the Bank has demonstrated that disclosure in this case would, or would be likely to, prejudice the commercial interests of HM Government.
59. However, the Commissioner accepts that there is a causal link between disclosure of the information and prejudice occurring to the lenders' commercial interests and to the Bank's own commercial interests. He accepts that banking services are a commercial venture and competitive in nature. He also recognises that information which provides insight into the way that those services are offered or operated is information which would have a bearing on a lender's ability to compete for customers and against other lenders or investors. He therefore finds the second criterion is met on that basis.
60. In respect of the third criterion, the Commissioner is prepared to accept that the likelihood of prejudice is more probable than not.
61. In light of the above, the Commissioner finds the exemption engaged in respect of lenders and the Bank and has carried the higher level of likelihood through to the public interest test.

Public interest test

62. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest arguments in favour of disclosure

63. The complainant argued that "the use of taxpayer money in schemes administered by these banks via the BBB should necessitate full transparency". In support of that view, they noted that the Government already publishes information per lender across other categories.
64. They told the Commissioner that, while they appreciate the exceptional circumstances under which emergency loan schemes were conceived

and administered, this does not negate the need for transparency where public money is involved.

65. They also argued that it is in the public interest that lessons are learned where schemes have fallen short, in the event similar schemes ever need to be deployed again.
66. The Bank recognises that there is always a general public interest in transparency and how Government and public authorities operate, make decisions, and spend money.
67. Specifically in relation to this case, it acknowledged that there is a public interest in all Covid schemes due to the number and value of the loans and the potential impact on the public purse where the guarantee is called upon.

Public interest in maintaining the exemption

68. The Bank considers that existing published data provides significant transparency for the public and some detailed information on each lender. It said that the Bank is proactive in reviewing, on an ongoing basis, to determine whether additional information can be published.
69. It also argued that the requested information itself is high level in nature and would not significantly add to the transparency of the potential impact on the public purse. It further considered that disclosure might create inappropriate or misleading conclusions due to the potential for varying interpretation which would not be in the public interest.
70. It also argued that removed guarantees do not present any potential risk of taxpayer loss or detriment. It told the Commissioner that any potential financial loss is borne in full by the private lender. It argued that disclosing information about guarantee removals "will deter lenders from removing guarantees proactively, leaving a greater proportion of loans backed by the guarantee and thus increasing the risk and burden to the public purse". It considers that this would not be in the public interest.

Balance of the public interest

71. The Commissioner acknowledges the public interest in openness, transparency and accountability. In that respect he recognises that the schemes have been subject to formal scrutiny by the National Audit Office. He is also mindful that information about the schemes is published on the gov.uk website and that the data which is to be published is kept under review.

72. With respect to the risk to lenders if misleading information was to be disclosed, the Commissioner acknowledges that there is undoubtedly a public interest in allowing public authorities to withhold information which, if disclosed, would negatively affect their, or someone's, ability to negotiate or to compete in a commercial environment.
73. He also considers that disclosure would not be in the public interest if the availability of financial support to small and medium sized enterprises was reduced as a result of lenders being deterred from participating in future schemes or programmes.
74. Similarly, after careful consideration, he considers that there is a clear public interest in preventing prejudice to the commercial interests of the Bank. Taking into account the particular information in this case, and the consequences of disclosure, the Commissioner considers this to be a compelling argument.
75. The Commissioner has considered the public interest arguments and accepts that disclosure would help to increase openness and transparency. However, given the nature of the commercial harm that would occur should the information be disclosed, the Commissioner finds that the balance of the public interest favours maintaining the exemption at section 43(2) of FOIA.
76. The Commissioner's decision is, therefore, that the Bank was entitled to rely on section 43 of FOIA to withhold the information.

Other exemptions

77. In light of his decision, above, on section 43 the Commissioner has not proceeded to consider the other exemptions cited by BBB in relation to the same information.

Right of appeal

78. 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

79. 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.

80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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