

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 5 July 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested British Business Bank (BBB) to disclose the minutes of all Risk Committee, Audit Committee and Board meetings for the financial year 2021/22. BBB disclosed some information but withheld the remainder in accordance with section 40, 42 and 43 of FOIA.
2. The Commissioner's decision is that BBB is entitled to rely on section 40 of FOIA. It is also entitled to rely on section 43 for the names of recipients of Future Fund financing, as referenced throughout the withheld information. For all remaining withheld information, the Commissioner is not satisfied that sections 42 and 43 of FOIA apply.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose all remaining withheld information to the complainant, with the exception of the names of recipients of Future Fund financing.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 4 June 2022, the complainant requested BBB to provide the following information:  
  
"1) The minutes of any meetings of the Risk Committee that were held during the 2021/22 financial year.  
2) The minutes of any meetings of the Audit Committee that were held during the 2021/22 financial year.  
2) The minutes of any meetings of the Board of the company that were held during the 2021/22 financial year."
6. BBB responded on 4 July 2022 and informed the complainant that it required additional time to consider the public interest test. It also attached the minutes for five of the meetings, which it had disclosed previously.
7. BBB provided a further response on 2 August 2022. It disclosed some information but withheld the remainder citing sections 40, 42 and 43 of FOIA.
8. The complainant requested an internal review on 17 August 2022.
9. BBB carried out an internal review and notified the complainant of its findings on 14 October 2022. It upheld its position.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 22 November 2022 to complain about the way their request for information had been handled.
11. During the Commissioner's investigation BBB disclosed further information to the complainant. It however still remained of the view that sections 40, 42 and 43 applied to the remainder.
12. The Commissioner considers the scope of his investigation to be to establish whether or not BBB is entitled to rely on sections 40, 42 and 43 of FOIA in relation to the remaining withheld information.

## Reasons for decision

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### Section 40 – personal data

13. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
14. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. BBB has withheld the names of BBB colleagues below Non-Executive Director and Senior Leadership Team level. The Commissioner is satisfied that this information constitutes personal data. A person can quite obviously be identified from their name.
17. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
18. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
19. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
20. BBB confirmed that information about its Senior Leadership Team and Board Members is publicly available because they are the bank’s decision makers. BBB confirmed that the Board Committees will invite colleagues to attend on specific matters whereby the Board will make decisions as appropriate. It argued that while some of the invited colleagues may not be junior members of staff per se, they are more junior to the Board Members and its Senior Leadership Team. BBB considers that it is not necessary to disclose the names of the individual

colleagues that attend on a particular matter because the decisions are made by Board or Committee Members.

21. The Commissioner accepts that the complainant is pursuing a legitimate interest in the disclosure of this information. Disclosure would reveal the details of all members of staff who were involved in the meetings and contributed to the contents of the withheld information. However, in this case the Commissioner does not consider disclosure of the withheld information is necessary to meet that interest. As BBB has said these attendees are not the decision makers. They may contribute but ultimately the decisions lie with the Board or Committee Members. As Board or Committee Members' details are publicly available and they are the relevant decision makers, current disclosure provides the necessary transparency and accountability. Disclosure of other attendees would not add any further accountability to the decisions made because the publicly available information already provides that.
22. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to consider the balance between those interests and the right and freedoms of the individuals concerned. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
23. The Commissioner has therefore decided that DHSC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## **Section 42 – legal professional privilege**

24. This exemption has been applied to paragraphs 4.8 and paragraphs 6.5 through to 6.10 of the April 2021 Board Minutes and paragraph 11.2 of the May 2021 Board Minutes.
25. Section 42 states that a public authority is entitled to refuse to disclose information if it is subject to legal professional privilege (LPP). There are two types of LPP – advice privilege and litigation privilege.
26. The Commissioner has reviewed the relevant paragraphs and he does not agree that they are subject to LPP. BBB has stated that they refer to legal advice on an issue in anticipation of potential litigation. It has argued that the legal advice was provided by legal advisers to inform members of the Board. It believes the paragraphs are confidential communications made for the purpose of obtaining legal advice about proposed or contemplated litigation.
27. For advice privilege to apply the confidential communications between client and lawyer must have been made for the dominant purpose of

seeking or giving legal advice. The paragraphs are neither the request for legal advice or the provision of legal advice between client and lawyer. They discuss a particular matter which the BBB anticipates maybe subject to legal challenge in the near future, but the contents are an update on the current situation and nothing more. There is no request for legal advice. There is also no legal opinion or advice on any matter of law from a legal adviser in the contents.

28. In terms of litigation privilege, again this applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. For information to be covered, it must be created for the main purposes of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. The contents do not fall within this definition for similar reasons to above. The sections from the minutes provide an update on a current area of concern (and BBB has stated that it anticipated potential litigation at that time), but these paragraphs were not created for the dominant purpose of requesting or receiving legal advice on that particular issue. The issue is just referenced as part of the overall meeting, with the minutes providing an update on that particular concern.
29. For these reasons the Commissioner does not consider these elements of the remaining withheld information are exempt under section 42 of FOIA.
30. BBB has applied section 43 of FOIA as well to some of these paragraphs. So those paragraphs will be considered below in the Commissioner's analysis of that exemption.

### **Section 43 – commercial interests**

31. Section 43 of FOIA states that a public authority is entitled to refuse to disclose information if disclosure would or would be likely to prejudice the commercial interests of BBB and/or a third party. It is also subject to the public interest test.
32. BBB addressed various sections of the withheld information by paragraph and said that disclosure would be likely to:
  - Reveal BBB's approach to negotiating and executing commercial transactions and this would impact on BBB's ability to act commercially in future, both with the relevant counterparties and other market applicants.
  - Some paragraphs relate to BBB's risk strategy. It has said that third parties could work around the identified risks and the discussed mitigants, solution systems and processes, thereby putting taxpayer money at risk.

- Other paragraphs relate to BBB's public policy objectives and it considers disclosure would be likely to prejudice its position and ability to implement its programmes.
  - It has argued that disclosure of some of the withheld information would fetter BBB's ability to freely negotiate with counterparties. BBB confirmed that it felt disclosure would also create inaccurate inferences or expectations and fetter the committees' ability to discuss matters freely and independently.
  - Some information has been withheld because it references evaluations of delivery partners and their business proposals. It has argued that disclosure would be likely to undermine delivery partners' competitive positions in the market. It commented that this argument equally applies to recipients of Future Fund financing. It felt disclosure of the names of any Future Fund recipients would be likely to prejudice their commercial interests (subject to exceptions, for example, it said it would publish the names if the company goes into administration or the loan converts to equity). It referred to a previous decision and appeal to the First-tier Tribunal in support.
33. These are the extent of BBB's arguments, despite being asked to provide detailed submissions explaining why the withheld information would be likely to have the effects described. It has said that it considers disclosure would be likely to undermine BBB's ability to act commercially in the future or implement its programmes, that third parties could work around BBB's risk strategy if disclosed and that disclosure would be likely to damage the commercial interests of delivery partners and Future Fund recipients. BBB has however provided insufficient evidence to demonstrate how the withheld information (and the specific paragraphs referenced) could be used in this way or have the effects described if they were disclosed.
34. It is also noted that section 43 of FOIA was applied to paragraphs 6.5 to 6.10 of the April 2021 Board minutes (also withheld under section 42 of FOIA and addressed above). Following BBB's response which details which exemption is applied to which paragraph, section 43 was not applied to the other paragraphs withheld under section 42.
35. BBB has not said why these paragraphs would be likely to damage its commercial interests or those of a third party. The Commissioner cannot consider section 43, as an alternative to section 42, when no submissions have been made.
36. BBB has also made arguments on behalf of third parties (delivery partners) but it has not demonstrated that these arguments originated

from those third parties themselves. For section 43 to apply on this basis, BBB would need to demonstrate that those arguments have originated from those third parties.

37. With the exception of the names of Future Funding recipients (which the Commissioner will address next), the Commissioner cannot make a determination based on the information he has. The onus is on a public authority to provide the necessary evidence and submissions in sufficient depth and detail. Despite being given opportunities to do this, BBB has not provided sufficient information.
38. The Commissioner therefore has no alternative but to conclude that section 43 of FOIA is not engaged. As he considers the exemption is not engaged, there is no need to go on to consider the public interest test.
39. With regards to the names of Future Funding recipients, the Commissioner has already considered disclosure of this type of information in a previous decision notice, which can be accessed here:  
[Decision notice \(ico.org.uk\)](#)
40. In this decision he agreed that section 43 applied. The Commissioner considers the same rationale applies in this case and therefore that this information should be withheld.

## Right of appeal

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41. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**