



Case Reference: EA-2023-0355

NCN: [2024] UKFTT 00632 (GRC)

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

**Heard by Cloud Video Platform
Heard on: 25 June 2024
Decision given on: 22 July 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER EMMA YATES
MEMBER MIRIAM SCOTT**

Between

BRITISH BUSINESS BANK PLC

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) HELEN CROSS**

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Did not appear

For the Second Respondent: Mr. James Cornwell (Counsel)

Decision: The appeal is allowed.

Substituted Decision Notice:

Organisation: British Business Bank PLC

Complainant: Mrs Helen Cross

The Substitute Decision – IC-203376-CR41

1. For the reasons set out below:
 - 1.1. The following parts of the Commissioner’s decision remain:
 - 1.1.1. British Business Bank PLC (BBB) is entitled to rely on section 40 of FOIA to withhold the names of BBB employees below Non-Executive Director and Senior Leadership Team level.
 - 1.1.2. BBB is entitled to rely on section 43 of the names of recipients of Future Fund Financing.
 - 1.2. BBB is entitled to rely on section 40 to withhold the job title or role of BBB employees below Non-Executive and Senior Leadership Team level, where that job title or role is unique to one individual.
 - 1.3. BBB is entitled to rely on section 42 to withhold part of the requested information.
 - 1.4. BBB is entitled to rely on section 43 to withhold part of the requested information.
2. BBB is not required to take any steps.

REASONS

Introduction

1. This is an appeal by the British Business Bank (‘BBB’) against the Commissioner’s decision notice IC-203376-C4R1 of 5 July 2023 which held that the British Business Bank (‘BBB’) was entitled to rely on section 40(2) (personal information), section 42 (legal professional privilege - LPP) and section 43(2) (commercial interests) of Freedom of Information Act 2000 (FOIA) to withhold some of the requested information. The Commissioner held that BBB was not entitled to rely on section 43(2) in relation to some of the requested information. The Commissioner required BBB to disclosure some of the information to the second respondent (Helen Cross).

Factual background

2. BBB was established on 1 November 2014 by the UK Government. It is an economic development bank wholly owned by the Secretary of State for Business and Trade but independently managed.
3. One of BBB’s stated objectives is to make finance markets work better for businesses while managing taxpayer money efficiently within a robust risk management framework.
4. The Government and BBB have launched a number of schemes, these include:

- 4.1. the Future Fund Scheme ('FFS'). This scheme was established by the BBB to support innovative UK companies with good potential that typically relied on equity investment and which were affected by the COVID-19 pandemic. Applications for FF funding are now closed. However, previously companies could apply for a convertible loan of between £125,000 and £5 million, as long as they had access to the same amount (or more) from private investors in match funding.
 - 4.2. The Recovery Loan Scheme: this is a government-backed loan scheme designed to support access to finance for UK businesses as they look to invest and grow. This scheme aims to improve the terms on offer to borrowers;
 - 4.3. Enable Funding: this scheme is aimed at, amongst other things, improving the provision of asset and lease finance to smaller UK businesses.
 - 4.4. Enable Guarantees: this scheme is designed to encourage additional lending to smaller businesses. Participating institutions are incentivised by a government-backed portfolio guarantee which covers a portion of a designated lending portfolio's net credit losses in excess of an agreed "first first loss" threshold. The participating institution pays a fee for this guarantee;
 - 4.5. Coronavirus Large Business Interruption Loan Scheme: this scheme was designed to provide finance to mid-sized and larger UK businesses that were suffering disruption to their cashflow due to lost or deferred revenues during the COVID-19 outbreak. Financing was made available through a range of accredited lenders who delivered loans with the benefit of an 80% government-backed guarantee; and
 - 4.6. Bounce Back Loan Scheme: this scheme was similarly designed to enable businesses to access finance more quickly during the COVID-19 outbreak. It provided financial support to businesses across the UK that could benefit from £50,000 or less in finance. A lender could provide a six-year term loan from £2,000 up to 25% of a business' turnover. The maximum loan amount was £50,000. The scheme gave the lender a full (100%) government-backed guarantee against the outstanding balance of the facility (both capital and interest).
5. While some public funds are offered, generally the BBB does not operate by lending or investing directly into businesses. Instead, the Bank works with partners such as banks, funds and other financial institutions. These are referred to as "delivery partners". Businesses can apply for finance through these delivery partners, who because they work with the BBB, can lend and/or invest more. The BBB's delivery partners have an essential role in furthering the BBB's objective of increasing the supply of finance to smaller businesses.

The request for information

6. Helen Cooper requested the following information from BBB on 4 June 2022:
 - "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.

3) The minutes of any meetings of the Board of the company that were held during the 2021/22 financial year.”

7. BBB responded on 4 July 2022 confirming that it held the information and stating that it was extending time to respond to complete an assessment of the public interest balance under sections 42 and 43. It disclosed 5 sets of minutes in redacted form that it had previously disclosed under FOIA.
8. BBB responded substantively on 2 August 2022. It disclosed 20 sets of minutes, redacting some sections in reliance on section 40(2), section 42 and section 43(2).
9. BBB partially upheld its response on internal review, providing some revised redactions.
10. During the course of the Commissioner’s investigation, BBB disclosed some further information by way of further revised redactions.
11. During the course of the appeal BBB has disclosed further information. The information that remains in dispute is the information redacted from the open updated exhibit PBL1 at [OB/A270-A387].

Decision notice

12. In a decision notice dated 5 July 2023 the Commissioner:
 - 12.1. Upheld BBB’s reliance on section 40(2) in relation to the redacted names.
 - 12.2. Concluded that section 42 was not engaged because neither limb of LPP applied to the information.
 - 12.3. In relation to most of the information withheld under section 43(2) concluded that the exemption was not engaged. In relation to some of the information (the names of recipients of loans from the FFS) the Commissioner decided that section 43(2) was engaged and that the public interest favoured maintaining the exemption.
13. The Commissioner ordered BBB to disclose “all remaining withheld information to [Helen Cross], with the exception of the names of recipients of [FFS] financing”.

Summary of grounds of appeal and the respondents’ current positions

14. The Grounds of Appeal are:

Ground 1

15. It is agreed between all parties that the appeal should be allowed on this ground. Ground 1 is that the requirement to disclose all remaining withheld information with the exception of names of recipients of FFS financing is inconsistent with the

Commissioner's finding that BBB was entitled to withhold the other redacted names under section 40(2).

Ground 2 – job titles and roles

16. BBB submit that the Commissioner's findings in respect of section 40(2) should be extended to the information concerning job titles or roles of individuals below Non-Executive Director (NED) or Senior Leadership Team (SLT) level, where that information would identify the individual.
17. This is now conceded by the Commissioner but not by Helen Cross.

Ground 3 - LPP

18. BBB submit that the Commissioner wrongly found that the section 42 exemption was not engaged.
19. This is now conceded by the Commissioner but not by Helen Cross.

Ground 4 – commercial interests

20. BBB submit that the Commissioner was wrong to conclude that section 43 was not engaged in relation to some of the requested information.
21. This is now conceded by the Commissioner but not by Helen Cross.

The Commissioner's response

22. As the Commissioner now concedes all the above grounds it is not necessary to set out his response.

The response of Helen Cross (as amended)

Ground 1

23. Ms Cross concedes ground 1.

Ground 2 – job titles and roles

24. Ms Cross argues that 'role information' should not be exempt under section 40(2) because BBB has provided no evidence that the role information meets the definition of personal data. In some cases a job title will not be sufficient to identify a specific individual.
25. Further Ms Cross argues that even if an individual is identifiable the privacy implications of releasing an employee's job title may be quite different to those of releasing their name.

Ground 3 - LPP

26. Ms Cross argues that the information is not subject to legal professional privilege and that the Commissioner did not take an unduly narrow approach to the legal advice limb of privilege. She asserts that the Commissioner was correct to conclude that references to lawyers taking steps or advice being provided in the future are not communications that form part of the continuum of legal advice. She submits that the information was not created for the dominant purposes of giving or obtaining legal advice about proposed litigation and litigation privilege would therefore not apply.

Ground 4 – Commercial interests

27. Ms Cross does not dispute the Commissioner’s findings in relation to names of recipients of FFS funding.
28. Ms Cross submits that BBB has not provided sufficient evidence to demonstrate that the relevant legal tests are met to engage section 43.
29. Further she submits that as a number of BBB’s main lending schemes have been closed for new applications since 31 March 2021 it cannot reasonably be argued that the disclosure of information will put off new customers.

Public interest

30. Ms Cross submits that if section 42 or 43 is engaged the public interest favours disclosure.
31. Ms Cross argues that it is in the public interest to release fair and accurate information about a business even if this reduces the reputation of or the market confidence in a business, because that reputation/confidence was not well founded.
32. To the extent that any of the information relates to businesses that are in liquidation or in administration, the commercial sensitivity is likely to be lower.
33. In relation to the public interest in disclosure it is submitted:
- 33.1. Transparency is important because BBB is a publicly owned development bank and releasing details of the discussions of groups responsible for top-level strategy and oversight increases public understanding and accountability and helps to ensure those groups are acting in the public interest.
- 33.2. Disclosure may allow the public to be confident that the Bank has been responsibly managing taxpayer funds.
- 33.3. The minutes cover a period of time when the Bank oversaw the distribution and the investment of unprecedented levels of public money. Transparency regarding BBB's internal oversight and decision-making processes may enable the public to feel confident their investment has been properly governed. This is especially important given the concerns that were raised by the National Audit Office and Public Accounts Committee.

- 33.4. The Bank's Coronavirus support schemes were not normal commercial arrangements negotiated. The favourable terms under which these schemes were offered amount to a public subsidy for privately owned businesses which increases the importance of transparency.
- 33.5. BBB is not regulated either by the Financial Conduct Authority or the Prudential Regulation Authority.

Reply by BBB

34. BBB's skeleton argument is intended to supersede its reply, so it is unnecessary to set out the reply in this decision.

Legal Framework

Personal data

35. The relevant parts of s 40 of FOIA provide:
- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
 - (2) Any information to which a request for information relates is also exempt information if –
 - (a) It constitutes personal data which does not fall within subsection (1), and
 - (b) either the first, second or the third condition below is satisfied.
 - (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
would contravene any of the data protection principles, or...
36. Personal data is defined in s 3 of the Data Protection Act 2018 (DPA):
- (2) 'Personal data' means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
 - (3) 'Identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to—
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
37. The definition of "personal data" consists of two limbs:

- i) Whether the data in question "relate to" a living individual and
- ii) Whether the individual is identified or identifiable, directly or indirectly, from those data.

38. The tribunal is assisted in identifying 'personal data' by the cases of **Ittadieh v Cheyne Gardens Ltd** [2017] EWCA Civ 121; **Durant v FSA** [2003] EWCA Civ 1746 and **Edem v Information Commissioner** [2014] EWCA Civ 92. Although these relate to the previous iteration of the DPA, we conclude the following principles are still of assistance.

39. In **Durant**, Auld LJ, giving the leading judgment said at [28]:

“Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated.”

40. In **Edem** Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

“It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.”

41. The High Court in **R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police** [2013] EWHC 2575 held, whilst acknowledging the Durant test, that a Court should also consider:

“(2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:

- (i) "Content" in referring to the identity, characteristics or behaviour of the individual?
- (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?
- (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?
- (3) Are any of the 8 questions provided by the TGN are applicable?

These questions are as follows:

- (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
- (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?
- (iii) Is the data 'obviously about' a particular individual?
- (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?
- (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
- (vi) Does the data have any biographical significance in relation to the individual?
- (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
- (viii) Does the data impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)? Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?"

42. The data protection principles are set out Article 5(1) of the UKGDPR and s 34(1) DPA. Article 5(1)(a) UKGDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) UKGDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.
43. The only potentially relevant basis here is article 6(1)(f):
- “Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.”
44. The case law on article 6(1)(f)’s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows

- 44.1. Is the data controller or a third party pursuing a legitimate interest or interests?
- 44.2. Is the processing involved necessary for the purposes of those interests?
- 44.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?
45. Lady Hale said the following in **South Lanarkshire Council v Scottish Information Commissioner** [2013] 1 WLR 2421 about article 6(f)'s slightly differently worded predecessor:
- “27. ... It is well established in community law that, at least in the context of justification rather than derogation, ‘necessary’ means ‘reasonably’ rather than absolutely or strictly necessary The proposition advanced by Advocate General Poiares Maduro in *Huber* is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. ... “
46. Section 40(3A) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

Section 42 – Legal Professional Privilege.

47. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. Legal professional privilege covers both legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance. Litigation privilege covers documents brought into being for the dominant purpose of litigation. The privilege extends to evidence of the content of those communications or documents.
48. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant ‘in-built’ interest in the maintenance of legal professional privilege (**DBERR v O’Brien and Information Commissioner** [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that “although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption” (**DCLG v IC and WR** [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.
49. We adopt the approach set out in **DBERR** at para 53:
- ...the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed

to non- disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

Section 43(2) – Commercial interests

50. Section 43(2) provides:

“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)”

51. ‘Commercial interests’ should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person’s ability to participate competitively in a commercial activity.

52. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

Public interest balance

53. Sections 42 and 43 are qualified exemptions, so that the public interest test has to be applied.

54. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

55. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

“... when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This ... requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.”

The role of the tribunal

56. The tribunal’s remit is governed by section 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.

List of issues

57. The issues for the tribunal are as follows

Section 40(2)

58. In relation to the job/titles roles in dispute:

58.1. Is this information personal data i.e. does it relate to an identifiable individual?

58.2. Is the requestor pursuing a legitimate interest or interests?

58.3. Is the processing involved necessary for the purposes of those interests?

58.4. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Section 42

59. Is the following information covered by legal professional privilege:

Paragraph 4.8 (second sentence), paragraph 6.5 (final sentence), paragraph 6.8 (all), and paragraph 6.10 (second and final sentences) of the 8.4.21 Board Minutes, and paragraph 10.1 (all) and paragraph 10.3 (final sentence) in the 3.3.22 Board Minutes?

Section 43(2)

60. Would disclosure of the following information be likely to prejudice the commercial interests of BBB and/or third-party delivery partners:

(1) Risk Minutes – 14.9.21, paragraphs 10.1-10.2; 30.11.21, paragraph 5.4 (one phrase); (2) Audit Minutes – 18.5.21, paragraph 4.23; 21.6.21, paragraph 4.6; 29.7.21, paragraph 5.3; and (3) Board Minutes – 8.4.21, paragraph 5.8; 15.7.21, paragraphs 14.1-14.8; 9.12.21, paragraphs 3-3.4, 4-4.4; and 3.3.22, paragraphs 10.1 and 10.3 (final sentence)?

Public interest

61. Where section 42 and/or section 43 is engaged, in all the circumstances of the case, does the public interest in maintaining the particular exemption outweigh the public interest in disclosing the information? This includes:

61.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to cause, focussing on the public interests expressed in the particular exemption in issue.

61.2. Identifying what actual benefits the proposed disclosure would or would be likely to cause.

Evidence

62. We read an open and a closed bundle.

63. The closed bundle consists of:
- 63.1. The withheld information
 - 63.2. The closed witness statements detailed below.
64. The tribunal was satisfied that it was necessary to withhold this information under rule 14.
65. We read open and closed witness statements and heard closed and open oral evidence from:
- 65.1. Patrick Nathan Lye, BBB Chief Operating Officer (two witness statements)
 - 65.2. Salomon Jan Reinald de Monchy (referred to as Reinald de Monchy), BBB Managing Director, Guarantee and Wholesale Solutions.
 - 65.3. Oonagh Anne Hoyland, BBB Deputy General Counsel
66. The following gist of the closed session was prepared by BBB, approved by the tribunal and provided to the second respondent during the hearing:

“1. The Judge asked Mr Lye the five questions that Mrs Cross had raised. Mr Lye’s answers were:

2. *Did the Bank consult with the individuals whose job titles are in question regarding the potential disclosure of their job title?* Mr Lye: no, we didn’t. The same applied to those no longer employed by the Bank.
3. *If so, what was the nature and outcome of this consultation?* This question was not applicable.
4. *Has the Bank sought consent from these individuals for the release of their job titles in the context of these minutes?* Mr Lye answered: no, we have not.
5. *On a case-by-case basis, are there any specific circumstances that the Bank is aware of, relating to the individuals holding the job titles at the time of the relevant meetings, that would tip the balance in favour of non-disclosure under the legitimate interests test, such as security or safety considerations?* Mr Lye explained that the Bank had not taken it on an individual basis but on a bank-wide position aligned with government departments of not including anyone below Senior Civil Service. So anyone below exec or senior leadership team it had redacted. As an organisation that has grown rapidly, we have many unique roles, with LinkedIn it would be easy to identify these people. In response to a question from the Panel, whether BBB encourages its members of staff to put their information on LinkedIn, Mr Lye stated that the Bank didn’t have a policy, but we do encourage them to share certain information (updates from the Bank, etc.)
6. *In the event that any of the individuals is not employed by the Bank, has the Bank consulted with that individual's employer regarding the disclosure of their job title? Are any individuals not employed by the Bank?* Mr Lye stated that he did not believe so. Mr Cornwell stated that the personal data in respect of job titles which was in dispute, was of those employed by the Bank only. Mr Lye clarified that they were employed at the time of the meeting, but may not be now.
7. Mr de Monchy confirmed that the information in paragraphs 17(a) to (c) was not concerned with the COVID-19 schemes operated by the Bank. In paragraph 17(d) there

- was a sideways connection to the COVID-19 schemes but little relationship. The delivery partners may assist on other schemes as well as the COVID-19 schemes.
8. Mrs Hoyland updated the Tribunal in respect of possible litigation in respect of the redacted passages of the 8 April 2021 Board minutes.
 9. The Tribunal discussed with Mrs Hoyland who was present at the Board meetings when the discussions in respect of which the Bank seeks to rely on s.42 FOIA took place. In respect of the 8 April 2021 meeting, Mrs Hoyland stated that she considered the client to be the Board but also members of the executive. There were also present the minute taker and the chief financial officer and the chief risk officer, who Mrs Hoyland would regard as holding executive positions. They would usually sit throughout board meetings as executive members and Mrs Hoyland would regard them, the executive committee, as the client also. Apart from the executive committee and the board she was not aware of anyone else being present.
 10. In respect of the 3 March 2022 Board Minutes, apart from the Board and Executive the only one present was the chief impact officer who wasn't there for that item and she would regard that everyone else as being as board or executive and therefore the client. Mrs Hoyland thought that the chief impact officer would only attend for relevant items.
 11. Mr Cornwell then made closed submissions. His submissions on Ground 2 (s.40(2) FOIA) will be repeated in open. On s.42(1) in respect of the litigation limb of LPP, there was clearly a strong anticipation of litigation that easily satisfies the “*in contemplation*” described in *Three Rivers* and *Starbev*. In respect of the advice limb of LPP, the client is the company who acts through the board and executives. There has been no waiver. These are the most senior members of the company. There was a client/lawyer relationship (relevant only for legal advice limb of LPP). The communications recorded in the minute are clearly on the continuum. Both limbs are clearly engaged. Public interest to be spoken to in open.
 12. On s.43, a clear explanation from Mr Lye in respect of suppliers to the Bank and in relation to delivery partners there was a clear explanation from Mr de Monchy as to how prejudice would be likely to arise. The Bank is only applying its exemption to granular information that is particularly commercially sensitive. It is plainly important that a commercial organisation can engage in frank discussions, about risk and so on but those kinds of discussions will have a potentially adverse effect. There is a derivative but still important prejudice to BBB's commercial interests.”

Submissions

BBB's oral submissions/skeleton argument

Section 40(2) – job titles/roles

67. BBB submitted that where the job title or role uniquely identifies an individual (or would do so in combination with other information), then it also amounts to the individual's personal data for the purposes of section 3 DPA 2018 as it directly and/or indirectly identifies them as having attended the relevant meeting.
68. For each of the relevant meetings, all of the job titles/roles that are unique are set out in Mr Lye's CLOSED witness statement at PNL WS1/24 [CB/B8-B11], together with the individual holding the role.

69. Where the information does amount to personal data, then BBB submitted that precisely the same analysis that the Commissioner adopted at DN, paragraphs 2, 20-22 in respect of the names (which Helen Cross agrees is exempt - see Amended Response, paragraph 4 [OB/A39]) establishes that the job titles/roles are also exempt under section 40(2). Whilst Ms Cross has a legitimate interest in the disclosure of the requested information, BBB argued that it is not necessary for that interest that the job titles/roles be disclosed for the same reasons that it was not necessary to disclose the names. Accordingly, there is no lawful basis for disclosure and it is thus exempt under section 40(2).
70. As to the supposed difference as to the privacy considerations in respect of job titles and names, BBB submitted that there is no material difference between the two sufficient to undermine the contention that the unique job titles should be exempt under section 40(2). BBB submitted that disclosure of a job title on social media or in an email signature is not the same as disclosing the fact that a particular individual attended a particular meeting.

Engagement of section 42

71. BBB now contends that section 42(1) is engaged in respect only of paragraph 4.8 (second sentence), paragraph 6.5 (final sentence), paragraph 6.8 (all), and paragraph 6.10 (second and final sentences) of the 8.4.21 Board Minutes, and paragraph 10.1 (all) and paragraph 10.3 (final sentence) in the 3.3.22 Board Minutes.
72. BBB submitted that the parts of paragraphs 4.8, 6.5, 6.8, and 6.10 of the 8.4.21 Board Minutes referred to above describe BBB's then General Counsel (a barrister) informing the Board of BBB (i.e., the client) of the steps being taken in order to advise on legal risks and the client (i.e., the Board) discussing those steps.
73. It was submitted that although these passages do not themselves contain a report of legal advice, they describe a lawyer discussing with her client the steps that will be taken to provide advice and plainly fall within the continuum of communications relating to the giving and receiving of such advice and so were covered by the legal advice limb of LPP.
74. Furthermore, it was submitted that the steps referred to above were being taken in respect of reasonably anticipated litigation involving BBB. It contains a description of steps taken in respect of anticipated litigation and it was submitted that it is therefore subject to the litigation privilege limb of LPP.
75. BBB submitted that paragraph 10.1 (all) and paragraph 10.3 (final sentence) in the 3.3.22 Board Minutes describe BBB's Deputy General Counsel (a solicitor) and then General Counsel discussing with the Board (as their client) matters that are properly subject to both the legal advice and litigation limbs of LPP.
76. In relation to the amended response of Ms Cross, it was submitted that Ms Cross seeks to rely on the Commissioner's reasoning notwithstanding that the Commissioner no longer stands by that reasoning. BBB submitted that restricting the continuum of giving and receiving legal advice to the request for advice and the advice itself is too narrow.

77. BBB submitted that the evidence shows that there has been no waiver and Ms Cross has provided no basis to contradict that position.

Public interest balance in respect of section 42(1)

78. It was submitted that the balance favoured withholding the information because:
- 78.1. Of the significant in-built weight attached to the exemption.
 - 78.2. The Request was made relatively soon after the information was created.
 - 78.3. There was considered to be a distinct possibility of litigation at the time involving BBB and disclosure could potentially have prejudiced BBB's position in such litigation.
 - 78.4. There is nothing unusual in the circumstances, or in the contents of the information, to increase the PI in disclosure or to reduce the in-built significant PI weight attaching to maintenance of LPP.

Section 43(2)

79. BBB confirmed that section 43(2) is now relied on only in relation to:
- (1) Risk Minutes – 14.9.21, paragraphs 10.1-10.2; 30.11.21, paragraph 5.4 (one phrase); (2) Audit Minutes – 18.5.21, paragraph 4.23; 21.6.21, paragraph 4.6; 29.7.21, paragraph 5.3; and (3) Board Minutes – 8.4.21, paragraph 5.8; 15.7.21, paragraphs 14.1-14.8; 9.12.21, paragraphs 3-3.4, 4-4.4; and 3.3.22, paragraphs 10.1 and 10.3 (final sentence).
80. BBB submitted that disclosure would be likely to cause prejudice to the commercial interests of BBB and its third-party delivery partners.
81. In respect of the commercial interests of BBB's delivery partners it was submitted that the passages contain often frank and detailed discussion about identified or identifiable delivery partners ("DPs"), suppliers, borrowers or other third parties.
82. It was submitted that disclosure would involve disclosing commercially sensitive information about such third parties that would be likely to prejudice the commercial interests of such third parties, in particular, by:
- 82.1. Publicly disclosing their financial position or other non-public commercially sensitive information, thus adversely affecting their reputation or market confidence in them.
 - 82.2. BBB's negative perceptions or details of their commercial agreements or negotiations with BBB being publicly disclosed thus adversely affecting their reputation or market confidence in them.
 - 82.3. BBB's negative perceptions or details of their commercial agreements or negotiations with BBB being publicly disclosed thus adversely affecting their ability to refinance or otherwise secure finance.

- 82.4. BBB's position as a state economic development bank giving additional impact to any views attributed to it.
83. It was submitted that where the prejudice would arise from the disclosure of frank internal discussions by the Board or its Committees about actual or potential DPs or suppliers, it would plainly be impractical and unrealistic to expect BBB to go to them and ask them what the effect of disclosure would be on their interests.
84. It was submitted that BBB's own commercial interests would also be likely to be prejudiced by disclosure of the above information in three ways:
- 84.1. Disclosure of information which would be likely to prejudice the commercial interests of third parties would also be likely to damage BBB's ongoing relations with those third parties. That would be likely to prejudice BBB's commercial interests if its dealings with its partners were thereby rendered more difficult.
- 84.2. Disclosure of commercially sensitive information about third parties would be likely to damage BBB's position as a trusted counterparty, thereby limiting the pool of those willing to deal with it and, hence prejudicing its commercial interests.
- 84.3. In respect of the 21.6.21 Audit Minutes, paragraph 4.6 and 3.3.22 Board Minutes, paragraph 10.1 and paragraph 10.3 (final sentence), disclosure would not be likely to prejudice the interests of third parties, but it would be likely to prejudice BBB's commercial interests by disclosing information concerning its enforcement, litigation and/or risk management strategies.
85. It was submitted that detailed evidence has now been provided and the Commissioner must be taken to consider this evidence to be sufficient. Ms Cross' submission that the schemes are closed to new customers is of no relevance to the information BBB now seeks to withhold.

Public interest balance under section 43(2)

86. BBB submitted that there is a strong public interest in commercial interests not being prejudiced. That is particularly so in this case because, inter alia:
- 86.1. BBB is a publicly funded body whose role is to work with the financial services industry and encourage investment in small and medium enterprises, which are critical to the successful functioning of the UK economy.
- 86.2. BBB has a duty to manage public money efficiently.
- 86.3. In order to pursue its objectives BBB needs to be able to work with private sector third parties and those partners should be able to do that without their commercial interests being prejudiced.
87. It was submitted that BBB already publishes significant amounts of information and substantial amounts of information have now been disclosed by BBB in response to

the Request. it was submitted that this substantially serves to address the public interest in disclosure of the requested information.

88. In respect of the 3.3.22 Board Minutes, paragraphs 10.1 and 10.3 (final sentence) BBB relies on both section 42(1) and section 43(2). Whilst BBB's primary submission is that the public interest in favour of maintaining each of those exemptions independently outweighs the public interest in favour of disclosing this information, in the alternative, it is submitted that the aggregated public interest under both exemptions would have that effect.
89. BBB submitted that the premise of the Amended Response, paragraph 27 that none of the information is incorrect, misleading or unreliable, is not sound. Mr Lye makes the point that some of the information is open to being misinterpreted with a potential adverse effect on the commercial interests of business partners. In any event, it was submitted that even the disclosure of accurate information that is not misleading may cause prejudice to a party's commercial interests, which properly has to be considered in the public interest assessment.
90. BBB clarified that it has not sought to rely on section 43(2), in respect of the information now in dispute, on the basis of prejudice to the commercial interests of Greensill Capital Pty Limited, but on the basis of prejudice to BBB's own commercial interests or those of other third parties.
91. BBB did not dispute the existence of the general public interest considerations of transparency. However, it was submitted that in respect of the specific information in dispute, those considerations are outweighed by the specific commercial prejudice, particularly given the limited extent to which those public interest considerations would be served by the requested further disclosure.
92. It was submitted that the assumption that the information relates to the distribution of funds through the COVID-19 support loans is very largely misplaced.

Helen Cross' skeleton argument/oral submissions

Section 40(2)

93. Ms Cross noted that it was for BBB to prove that the role information in this case meets the statutory definition of personal data. She argued that the privacy implications of disclosing an employee's job title are materially different from those of disclosing their name. Job titles are not inherently personal in the same way as people's names. The disclosure of a job title, without an associated name, strikes a fair balance between transparency and personal privacy.

LPP

94. Ms Cross submitted that it was far from clear that the material forms part of the continuum of communications between lawyer and client for the purpose of giving or receiving legal advice. It was argued that mere references to future legal advice or steps that may at some future time be taken by the Appellant's legal team are insufficient to attract legal advice privilege.

95. In relation to litigation privilege Ms Cross submitted that the mere mention of potential future litigation is not enough - there must be a real likelihood of proceedings, not just a vague possibility. She submitted that even if some litigation was contemplated, BBB must show that the dominant purpose of the communications was to obtain advice or evidence in relation to that litigation.
96. Given the passage of time since the relevant meetings took place it was submitted that any litigation that the Bank had been seriously contemplating might well have been initiated or even concluded by now.
97. Ms Cross asked the tribunal to approach the claims with caution and ensure that they are supported by proper evidence.

Commercial interests

98. Ms Cross argued that BBB has not provided sufficient evidence to demonstrate that the criteria are met in respect of the disputed information. She submitted that disclosure of information cannot conceivably deter customers from entering schemes which are no longer open for applications.
99. Ms Cross submitted that the BBB's arguments that disclosure would damage its relationships with delivery partners and impair its commercial interests are speculative and overstated. It was submitted that BBB's sophisticated commercial partners will expect transparency and accountability. Ms Cross submitted that partners have strong incentives to continue accessing the Bank's support, making complete withdrawal unlikely. Suppliers will also have strong commercial incentives to continue working with the Bank which are likely to include exit penalties in contracts.

Public interest balance

100. Ms Cross submitted that the public interest favoured disclosure for the following reasons:
 - 100.1. To the extent that disclosure of fair and accurate information lowers the undeserved reputation or market standing of any business, this serves the public interest in remedying misperceptions.
 - 100.2. To the extent that disclosure of fair and accurate information results in a higher interest rate being charged that is more representative of the risk to the lender, this serves the public interest in ensuring the proper functioning of capital markets.
 - 100.3. The commercial sensitivity of any information relating to the now-insolvent Greensill Capital group is considerably diminished by its entering into liquidation. The collapse of Greensill Capital exposed potential regulatory gaps and raised questions about the Bank's oversight of COVID-19 support schemes, making transparency around the Bank's discussions and decisions in this area particularly important.

- 100.4. There is an acute public interest in transparency regarding the discussions and decisions of the board and committees of the Bank, as a publicly owned body. Board-level accountability is crucial.
- 100.5. Disclosure would provide public assurance as to the Bank's responsible stewardship of the vast sums of public money entrusted to it during the pandemic, serving the public interest in ensuring proper use of public resources.
- 100.6. The COVID-19 schemes operated by the Bank were subsidies rather than normal commercial arrangements, heightening the importance of transparency.
- 100.7. As a state-owned development bank, the Bank is not subject to regulatory oversight of a type that would ordinarily apply to a private sector financial services company such as regulation by the Financial Conduct Authority and Prudential Regulation Authority, making direct public scrutiny all the more essential as a safeguard.

Discussion and conclusions

Section 40(2)

Are the individuals identifiable – is it personal data?

101. Mr. Lye's evidence was that [25]:

“The BBB is a reasonably small and well-connected organisation, and job titles are employee's both contained in employee's email signatures and also published on a corporate directory contained on our intranet. Furthermore, many of our employees utilise online networking websites, such as LinkedIn, and post their job titles on these. Given this context, the release of the Role Information would be akin to releasing the names of attendees of the meetings, in that individuals can be identified as having attended the relevant meeting.”

102. We accept on the basis of this evidence that it would be possible to identify a particular individual from each of the withheld job titles or roles. Even if only other employees of BBB were able to identify the individual, that is sufficient for the individual to be identifiable. On that basis we find that the information is personal data, because it relates to an individual who is identifiable indirectly from that data.

Is disclosure reasonably necessary for the purposes of a legitimate interest?

103. We accept that Mrs Cross is pursuing a legitimate interest. The legitimate interest is in transparency and accountability of decision-making by BBB.

104. We do not accept that processing is reasonably necessary for the purposes of those interests. Mrs Cross argued that it was reasonably necessary, because it sheds light on

the people who were advising the board at the time key decisions were made – ‘who was in the room’ when those decisions were made.

105. However for the purposes of transparency and accountability of BBB’s decision making, it is, in our view, not reasonably necessary to know the identity of everyone who was present. In our view the identity of the decision makers suffices. The content of any advice or information provided by others present has, in the main, been released. It is not, we find, reasonably necessary to also know the identity of those who provided that advice or information for the purposes of transparency and accountability.
106. We agree with the Commissioner that it is not reasonably necessary to know the identity of those employees below Non-Executive Director (NED) or Senior Leadership Team (SLT) level.
107. Because we have found that processing is not reasonably necessary, we do not need to go on to consider whether the above interests are overridden by the interests or fundamental rights and freedoms of the data subject. We do not therefore need to consider Mrs Cross’ other arguments on this issue.
108. We find that BBB were entitled to rely on section 40(2) to withhold the job titles of individuals below Non-Executive Director (NED) or Senior Leadership Team (SLT) level, where those job titles would identify the individual concerned.

Section 42 – legal professional privilege

109. The first set of redactions are to the minutes of the board meeting on 8 April 2021. Elizabeth O’Neill, General Counsel to BBB was present at that meeting. We find that these redactions are of material that is covered by litigation privilege. Litigation privilege relates to communications at the stage when litigation is pending or in reasonable contemplation.
110. On the basis of Mrs Hoyland’s evidence and on the basis of the content of the withheld information, we accept that adversarial litigation was reasonably contemplated at the date of the meeting. Some of the redactions explicitly refer to the risk of litigation, for example that there were ‘very real risks’ of litigation.
111. We accept, on the basis of Mrs Hoyland’s evidence and on the basis of the content of the redacted sections, that the redactions are a record of BBB’s General Counsel setting out to their client the steps that will be taken to provide advice in relation to reasonably contemplated litigation. They are a record of communications that were made for the dominant purpose of that contemplated litigation.
112. The second set of redactions are to the minutes of the board meeting on 3 March 2022. Elizabeth O’Neill, General Counsel was at that meeting and so was Oonagh Hoyland, Deputy General Counsel. We find that these redactions are a record of confidential communications between a lawyer and their client. We accept on the basis of Ms Hoyland’s evidence that those present were either the client or those who would be expected to be present during confidential communications of that nature.

113. We accept that the communications took place in a relevant legal context. It is not possible to specify that legal context without revealing the withheld information but it is clear from the heading of paragraph 10 and the substantive redacted wording. On the basis of Ms Hoyland's evidence we accept that it was anticipated that the matter discussed in those paragraphs might, in the future, lead to litigation, and that was why certain steps were being taken.
114. A broad indication of the legal context, without revealing the content of the withheld information, can be gleaned from the open section of the minutes, which refers to 'incidents of potential disputes' and refers to a proposal in the future of regular updates on matters such as 'investigations, potential defaults and enforcement action'.
115. 'Legal advice' is not limited to telling the client the law. It includes advice as to what should "prudently and sensibly be done in the relevant legal context" (**Balabel v Air India** [1998] Ch 317 CA at [330G]). Further, "there will be a continuum of communication and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach." (**Balabel** [330F]'
116. In **Three Rivers DC v Bank of England (No 7) (HL(E))**, at [111] Lord Carswell agreed with the following statement of principle, that "all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client."
117. In the redacted section of the March 2022 minutes, General Counsel and the Deputy Counsel were providing an update on a matter which was clearly part of their function as lawyers and involved the use of their legal skills if it was to be performed properly. The update was directly related to the performance of their professional duty as the client's legal advisor, and it was information passed between lawyer and client as part of the continuum aimed at keeping both informed so that advice may be sought and given as required.
118. For all those reasons we are satisfied that legal advice privilege applies to the information redacted from the March 2022 minutes.
119. We find that section 42 is engaged in relation to both sets of minutes.

Public interest balance

120. There is always a strong inherent public interest in not disclosing information that is covered by legal professional privilege. In addition, in this particular case, there remained a live prospect of litigation at the relevant time. In relation to the redactions to the April 2021 minutes litigation was reasonably in contemplation, and in relation to the March 2022 minutes there was at least a risk of litigation. Overall, we find that there is a very strong public interest in maintaining the exemption.

121. We accept that transparency is important in relation to the operation of BBB because it is a publicly owned development bank. It provides guarantees that would have to be paid out of public funds and in some cases directly invests or lends public funds. We accept that the minutes are from period of time when the Bank oversaw the distribution and the investment of unprecedented levels of public money. We accept that transparency regarding BBB's internal oversight and decision-making processes may enable the public to feel confident their investment has been properly governed. We accept that concerns that were raised by the National Audit Office and Public Accounts Committee. We accept that there is a very strong public interest in transparency in relation to the BBB's coronavirus support schemes. Finally we accept that it is relevant that BBB is not regulated either by the Financial Conduct Authority or the Prudential Regulation Authority.
122. We accept that the redactions to the April 2021 minutes do, to some extent, illuminate some of those issues. The redactions to the March 2022 minutes do so to a much more limited extent. Overall we find that the very strong public interest in maintaining the exemption outweighs the significant public interest in disclosure in relation to both sets of minutes.

Section 43

123. Section 43(2) is now relied on only in relation to:
- (1) Risk Minutes – 14 September 2021, paragraphs 10.1-10.2 (CB/B57)
 - (2) Risk Minutes 30 November 21, paragraph 5.4 (one phrase) (CB/B63)
 - (3) Audit Minutes – 18 May 2021, paragraph 4.23 (CB/B79)
 - (4) Audit Minutes 21 June 2021, paragraph 4.6 (CB/B86)
 - (5) Audit Minutes 29 July 2021, paragraph 5.3 (CB/B90)
 - (6) Board Minutes – 8 April 2021, paragraph 5.8 (CB/B108)
 - (7) Board Minutes 15 July 2021, paragraphs 14.1-14.8 (CB/B130)
 - (8) Board Minutes 9 December 21, paragraphs 3-3.4, 4-4.4 (CB/B156-157)
 - (9) Board Minutes 3 March 2022, paragraphs 10.1 and 10.3 (final sentence)
124. We do not need to consider section 43(2) in relation to paragraph 10 of the board minutes of 3 March 2022 because we have found that BBB are entitled to withhold that information under section 42.
125. The asserted prejudice is to the commercial interests of:
- 125.1. BBB
 - 125.2. Third party suppliers of services to BBB
 - 125.3. Third-party delivery partners
126. In essence BBB argues that the redacted sections of the minutes contain frank discussions about the perceptions of BBB of those third-parties, disclosure of which would (a) damage the third party and (b) damage the trust in BBB of that third party and potential future delivery partners/suppliers.
127. There is no formal requirement to produce evidence from a third party in an appeal where the prejudice relied on is prejudice to a third party's commercial interests. In

cases such as this where the prejudice is said to arise, in part, from disclosure of the withheld information to the third party, it would defeat the purposes of the proceedings to disclose the information to the third party in order to seek their views on the potential prejudice flowing from disclosure. In the absence of any indication of the third party's views there may, or there may not, be sufficient evidence to persuade the tribunal of likely prejudice to the third party's commercial interests. It will depend on the evidence in any particular case. However there is certainly no rigid rule to the effect that a public authority cannot rely on prejudice to a third party's commercial interests without evidence from that third party.

Suppliers - risk minutes of 14 September 2021 and 30 November 2021 and audit minutes of 18 May 2021

128. On the basis of (a) the content of the withheld information and (b) the evidence of Patrick Lye in paragraphs 35-38 of his witness statement we are satisfied that there is a causative link between disclosure and a real and significant risk of prejudice to the commercial interests of particular suppliers. Mr. Lye explains in his closed witness statement the detailed background to each redaction and we accept that evidence. We accept that these are frank discussions including information on the performance of suppliers, their significance to BBB, value for money, risks, and management of the relationship going forward (including potential termination of contracts).
129. We accept that disclosure of this information would be likely to adversely affect a supplier's reputation to the extent that there is a real and significant risk of harm to their commercial interests because the market is likely to heed the views of BBB.

Delivery partners – audit minutes of 19 July 2021, board minutes of 8 April 2021, 15 July 2021 and 9 December 2021.

130. On the basis of (a) the content of the withheld information and (b) the evidence of Reinald de Monchy in paragraphs 17 of his witness statement we are satisfied that there is a causative link between disclosure and a real and significant risk of prejudice to the commercial interests of particular delivery partners. Mr. de Monchy explains in his closed witness statement the detailed background to each redaction and we accept that evidence. We accept that these are often frank and detailed discussions including, inter alia:
- 131. BBB's perception of delivery partners and their performance, including their financial positions, their creditworthiness, their perceived significance to BBB, their value for money and concerns about their performance and/or risk to BBB.
 - 132. Steps being taken, or proposed to be taken, to improve or manage underperformance by delivery partners.
 - 133. BBB's intentions in respect of future engagement (or non-engagement) with such third parties (including actions that have been proposed but not yet implemented or were not implemented).

134. Steps taken in respect of third parties that are not public knowledge, including as to funding and guarantees.
135. We accept that disclosure of this information would be likely to adversely affect a delivery partner's reputation to the extent that there is a real and significant risk of harm to their commercial interests because the market is likely to heed the views of BBB.

BBB – loss of trust

136. Any current or potential suppliers or delivery partners will be aware of FOIA and BBB's transparency obligations. However, if BBB had disclosed this particular frank discussion and critique of delivery partners and suppliers at the date of the response to the request, rather than relying on section 43 to withhold it, we accept that it would have been likely to impact on the trust that current and future partners had in BBB to handle commercially sensitive information. Although we are not satisfied that companies would be likely to refuse to work with BBB, we are satisfied that this loss of trust would be likely to impact on BBB's ability to enter into contracts with suppliers or delivery partners on the best possible terms.
137. On that basis we accept that there is a causative link between disclosure and a real and significant risk of harm to BBB's own commercial interests.

BBB - audit minutes of 21 June 2021 and board minutes of 3 March 2022

138. In relation to paragraph 4.6 of the 21 June 2021 audit minutes, on the basis of the content of the information and the evidence of Oonagh Anne Hoyland at paragraph 25(b) we accept that there is a causative link between disclosure and a real and significant risk of prejudice to the commercial interests of BBB. Ms Hoyland sets out a detailed explanation in paragraph 25(b) of the particular circumstances surrounding the discussion and why disclosure of this information would be likely to damage BBB's commercial interest, and we accept this explanation.

Public interest in maintaining the exemption

139. There is a strong public interest in ensuring that BBB is able to perform the task that the government decided it should perform to the best of its ability. A large part of its role is to work with the financial services industry and encourage investment in small and medium enterprises, which are critical to the successful functioning of the UK economy. BBB is dependent on working with commercial partners to pursue its objectives. Further there is a strong public interest in the efficient management of public money.
140. For all those reasons, there is a strong public interest in not prejudicing its ability to reach the best possible deal in negotiations with suppliers and delivery partners and in avoiding other harm to BBB's commercial interests. There is, in addition, a clear public interest in not causing damage to the commercial interests of those private companies who work with public bodies.

Public interest in disclosure

141. We accept that transparency is important in relation to the operation of BBB because it is a publicly owned development bank. It provides guarantees that would have to be paid out of public funds and in some cases directly invests or lends public funds. We accept that the minutes are from a period of time when the Bank oversaw the distribution and the investment of unprecedented levels of public money. We accept that transparency regarding BBB's internal oversight and decision-making processes may enable the public to feel confident their investment has been properly governed. We accept that concerns that were raised by the National Audit Office and Public Accounts Committee. We accept that there is a very strong public interest in transparency in relation to the BBB's coronavirus support schemes. Finally we accept that it is relevant that BBB is not regulated either by the Financial Conduct Authority or the Prudential Regulation Authority.
142. The extent to which the above public interests are served by the redacted information is limited in relation to most of it, and moderate in relation to some of it. Much of the withheld information does not relate to the Covid 19 schemes and where it does, it contributes only a moderate amount to informing the public debate or illuminating the operation of those schemes.
143. The public interest in transparency is already met to some extent by the amount of information that BBB already publish and have published in response to the request.
144. BBB does not rely on damage to the commercial interests of Greensill Capital and therefore the fact that they are no longer in operation is irrelevant.
145. We accept that the information would provide insight into BBB's view of suppliers and delivery partners. Whilst the withheld information does not provide a holistic and balanced assessment of a company's performance, and some of the information might, taken alone, be misleading, we do accept that it does provide at least some information that would be of value to other companies, to other public authorities or to the market in general in relation to the performance of the suppliers or delivery partners in question. That adds some weight to the public interest in disclosure.

Section 43 - conclusion on public interest balance

146. Taking all the above into account we take the view that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Signed

Date:

Sophie Buckley

15 July 2024

Promulgated on: 22 July 2024