IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000
BETWEEN:

Appeals No. EA/2022/0014 & EA/2022/0061

(1) SPOTLIGHT ON CORRUPTION (EA/2022/0014)
(2) JAMES FRANCIS PEARCE (EA/2022/0061)

Appellants

– and –

(1) THE INFORMATION COMMISSIONER
(2) THE BRITISH BUSINESS BANK

Respondents

SKELETON ARGUMENT FOR THE FIRST APPELLANT
for hearing of 28-30 November 2022

- *References starting [A] are to the page numbers of the hearing bundle.*
- *Suggested Reading List (1/2 day): Spotlight's FOI request [**A300**]; statements of case [**B/A47 – A167**]; FOI requests [**A200-A219**]; Witness Statements of David Clarke (Spotlight) [**A458**]; George Havenhand (Spotlight) [**A654**]; Alice Carpenter (BBB) [**A1306**]; Richard Bearman (BBB) [**A1360**]; Reinald de Monchy (BBB) [**A2392**] and Keira Shepperson (BBB) [**A2586**]; and the parties' written submissions.*

INTRODUCTION

1. This skeleton argument is filed on behalf of Spotlight on Corruption ("**Spotlight**") in its appeal under section 57 of the Freedom of Information Act 2000 ("**FOIA**") against the Decision Notice dated 14 December 2021 [IC-66308-P4M4] ("**the Decision Notice**") [**A5**]. That Decision Notice upheld the refusal by the British Business Bank ("**BBB**") dated 12 August 2020 ("**the FOIA Refusal**") [**A201**] to provide Spotlight with the information requested in its FOIA Request dated 15 July 2020, being the *names of companies* that received loans under the UK Government's four Covid-19 state-aid loan schemes ("**the FOIA Request"**) [**A200**].

2. Spotlight requests that the Tribunal allow the appeal, or alternatively, substitute such other notice as has been served by the Commissioner in favour of Spotlight: s58 FOIA.

RELEVANT BACKGROUND

The parties

3. The BBB is a business development bank established by the UK government and wholly owned by the Secretary of State for the Department for Business, Energy, and Industrial Strategy ("**BEIS**"). It was incorporated as a public limited company on 18 July 2013. The BBB's '*About the British Bank*' section states that the BBB is not authorized or regulated by the Prudential Regulation Authority (PRA) or the Financial Conduct Authority (FCA); "*British Business Bank plc and its principal operating subsidiaries are not banking institutions and do not operate as such"* [see, for e.g., **A1402**].

4. Spotlight is an anti-corruption charity that advocates for strong, transparent, and accountable institutions that hold corruption in check and for robust enforcement of anti-corruption rules and laws. It was registered as a charity on 18 October 2019.

Covid-19 context

5. On 1 March 2020, the World Health Organization declared Covid-19 to be a pandemic.

6. Also on 1 March 2020, the Chancellor of the Exchequer, Rishi Sunak, announced a series of measures designed to support public services and the economy during the Covid-19 outbreak, which included his intention for the BBB to launch the Coronavirus Business Interruption Loan Scheme ("**CBILS**"). At that time, it was announced that CBILS would provide loans of up to £1.2 million for small businesses, and that the Government would guarantee 80% of the loan [**A1396**].

7. On 17 March 2020, the European Commission announced that it was working on a temporary State Aid framework to support Member States' economies in the context of the Covid-19 outbreak ("**the Temporary Framework**") [**A1317**].

8. From 18 March 2020, the BBB was engaged in ongoing discussions with the Commission and preparing draft state notifications for CBILS [**A1309/§12**].

9. On 19 March 2020, the European Commission published the Temporary Framework **[A1308/§§10-11].** That Temporary Framework was published in various iterations. The version relevant to this appeal was published on 29 June 2020 [**A1561**].

10. On 23 March 2020, the BBB submitted to the European Commission its State aid notifications for CBILS [**A1309/§12; A1320; A1330]**.

CBILS

11. On 23 March 2020, the government launched CBILS under the Temporary Framework. The details of the scheme are set out in paragraph 5 of the ICO's Decision Notice [**A5**], but in sum, Spotlight submits that the key details of the CIBLS scheme are as follows:

    - Applied to eligible companies with an annual turnover of up to £45 million.
    - The scheme provided loans up to a maximum value of £5 million.
    - The finance was provided by 130 accredited lenders [**A2401**].
    - The government backed loans by way of 80% guarantee to the Lender.
    - The government paid interest & any lender-levied fees for first 12 months.
    - The scheme was subject to the CBILS Guarantee Agreement [**A2411**].
    - *By 19 July 2020, 55,674 facilities out of 112,212 applications had been approved under the CBILS, with a total value of* ***£12.2 billion****.*

12. On 26 March 2020, the Commission approved CBILS [**A1309/§13; A1320; A1330**].

13. On 6 April 2020, the Commission approved the 'Umbrella Notification', which was an overarching notification to allow granting authorities in the UK to design their own schemes without a separate requirement to notify the Commission [**A1310/§18; A1336**].

CLBILS

14. On 20 April 2020, the government launched the Coronavirus Large Business Interruption Loan Scheme ("**CLBILS**") under the Temporary Framework. The details of the scheme are set out in paragraph 6 of the ICO's Decision Notice [**A6**], but in sum, Spotlight submits that the key details of the CLIBLS scheme are as follows:

    - Applied to eligible companies with an annual turnover in excess of £45 million.
    - The scheme provided finance up to a maximum value of £50 million (and for some larger lenders, up to £200 million).
    - Government backed loans by way of 80% guarantee to the Lender.
    - The finance was provided by 130 accredited lenders [**A2401**].
    - The scheme was subject to the CLBILS Guarantee Agreement [**A2484**].
    - *By 19 July 2020, 428 facilities out of 831 applications had been approved under the CLBILS with a total value of* ***£2.89 billion****.*

BBLS

15. Following the launch of the CBILS on 23 March 2020, and the CLBILS on 20 April 2020, the Government identified the need for a further loan scheme to support smaller businesses: see paragraph 7 of the ICO Decision Notice [**A6**].

16. On 27 April 2020, the Chancellor announced the BBLS, stating: "*Providing lenders with a 100% government-backed guarantee and standardising the application form is expected to lead to a faster process with many loans becoming available within days*" [**A1363/§13; A1400**].

17. On 1 May 2020, the BBB sent a Reservation Notice to the Secretary of State, raising concerns as to the high risk of error and fraud in the BBLS [**A1418**]. That Notice raised concerns on "*propriety, value for money, and faesability*" and stated that the scheme was "v*ulnerable to abuse by individuals and by participants in organised crime*". On the same day, the Secretary of State responded to the Reservation Notice, confirming approval to proceed with the introduction of the scheme "*as soon as practicable*" [**A1420**].

18. On 4 May 2020, the government launched the Bounce-Back Loan Scheme ("**BBLS**") under the Temporary Framework [**A1400**]. The details of the scheme are set out in paragraph 7 of the ICO's Decision Notice [**A6**], but in sum, Spotlight submits that the key details of the BBLS scheme are as follows:

    - The scheme applied to 'smaller businesses' that were not eligible for either CBILS or the CLBILS schemes and provided loans of between £2,000 and the lower of 25% of turnover of £50,000.
    - The government guaranteed 100% of the loan.
    - The government paid the interest rate of 2.5% per annum for the first 12 months.
    - The scheme was run through 28 accredited lenders [**A1378/§61**].
    - The government's intention was to release money within 48 to 72 hours of an application being made, but "*within the BBB, the intention was for the majority of loans to be delivered within 24 hours of an application*" [**A1364/§14**].
    - The scheme was subject to the BBLS Guarantee Agreement [**A1422].**
    - The scheme relied on self-certification in place of credit or affordability checks.
    - *By 19 July 2020, 1,047,611 facilities out of 1,282,639 applications were approved under the BBLS with a total value of* ***£31.7 billion****.*

FFS

19. Following the launch of the CBILS on 23 March 2020, the CLBILS on 20 April 2020, and the BBLS on 4 May 2020, the Government "*remained concerned that early-stage businesses which would not be eligible for assistance under the existing three schemes, as they were either pre-revenue or pre-profit, would face real economic hardship due to the pandemic"* [**A2588/§9**].

20. On 18 May 2020, the BBB sought a Ministerial Direction to proceed with a scheme to assist early-stage businesses, given the "*uncertainty surrounding whether the scheme would generate a positive economic benefit to cost ratio*" [**A2588/§10**]. On the same day, the BBB also issued a press release announcing that the scheme would be open for applications from Wednesday 20 May [**A2603**].

21. On 19 May 2020, the Secretary of State confirmed support for FFS [**A2601**].

22. On 20 May 2020, the government launched the Future Fund Scheme ("**FFS**"). The FFS was not launched under the Temporary Framework. The details of the scheme are set out in paragraph 9 of the ICO's Decision Notice [**A6**], but in sum, Spotlight submits that the key details of the FFS scheme are as follows:

    - The scheme was aimed at 'early-stage businesses' who would not be eligible for assistance under the CBILS, CLBILS or BBLS, and who met certain criteria.
    - The aim of the scheme was to provide an incentive for equity funds, angel investors and other investors to continue to back innovative, high-growth businesses that would have received investment, but for the pandemic, and were struggling to raise their next funding round [**A2588/§9**].
    - Government provided loans ranging from £125,000 to £5 million directly to UK companies, subject to at least equal match funding from private investors [**A2588/§12].**
    - FFS loans could convert to shares in the company, as set out in a Convertible Loan Agreement ("**CLA**") [**A2607**]. A specific company, UK FF Nominees Limited, was set up by the BBB to be the legal titleholder to the FFS loans and any shares resulting from their conversion [**A2590/§16**].
    - *By 23 June 2020, convertible loans had been approved for 252 companies in the sum of* ***£236.2 million****.*

FOIA Request and Refusal

23. On 16 June 2020, Spotlight, together with Transparency International UK and the Fraud Advisory Panel, wrote to the Chancellor of the Exchequer, requesting the publication of the names of companies who had received CBILS and BBLS [**A669**]. That request was refused on 6 July 2020 [**A671]**.

24. Accordingly, on 15 July 2020, Spotlight submitted the FOIA request, asking the BBB to provide Spotlight with the following four categories of information [**A200**]:

    24.1. The "*names of all those companies*" that received loans under the CIBLS.

    24.2. The "*names of all those companies*" that received loans under the CLBILS.

    24.3. The "*names of all those companies*" that received a loan under the BBLS.

    24.4. The "*names of all those companies*" that received loans under the FFS.

    The FOIA request was limited to names of companies: i.e., the identities of parties (to the extent that they were a company) who utilised, and received public funds from, the government's four Covid-19 financial assistance schemes. The FOIA request did not request the names of other legal entities such as sole traders and partnerships.

25. On 12 August 2020, the BBB refused the FOIA Request, relying only upon the s43(2) exemption of 'commercial interests' ("**the First Refusal**") [**A201**]. No other exemptions were relied upon in the First Refusal.

26. On 8 October 2020, following a request for internal review by Spotlight dated 18 August 2020 [**A203**], the BBB refused the FOIA Request on the same s43(2) ground and considered that additional exemptions were applicable, being section 40 (personal data) and section 31 (law enforcement) ("t**he Second Refusal**") [**A204**].

27. On 23 October 2020, Spotlight submitted a complaint to the Information Commissioner.

28. On 14 December 2021, the Information Commissioner issued its Decision Notice, upholding the BBB's refusal [**A5**].

29. On 11 January 2022, Spotlight submitted its notice and grounds of appeal [**A47**].

30. Spotlight's appeal was later joined with the appeal brought by the Second Appellant [**A181**] and listed for three days to be heard 28-30 November 2022 [**A198**].

Legal principles

General right of access to information

31. The basic premise of the FOIA is that there is a general right of access to information held by public authorities. FOIA s1 includes:

> *(1) Any person making a request for information to a public authority is entitled –*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him.*

32. The right under s1 is subject to absolute exemptions (which protect an entire class of information) and qualified exemptions (where a prejudice test is applied, and a public interest balancing exercise is conducted). Three exemptions are relevant on this appeal.

Relevant qualified exemptions

33. The two qualified exemptions relevant to this appeal are:

    33.1. Section 43(2), pursuant to which information is exempt if its disclosure under FOIA "*would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it"*).

    ("**the commercial interests exemption**")

    33.2. Section 31(1)(a), pursuant to which information is exempt if its disclosure under FOIA "*would, or would be likely to, prejudice… the prevention or detection of crime*".

    ("**the law enforcement exemption**")

34. For the purposes of the commercial interest exemption, 'commercial interests' is construed relatively broadly and can include loss of income, profits, and donations, but is not so broad as to include additional public spending or additional costs incurred in the administration of a publicly-funded scheme: *Department of Work & Pensions v Information Commissioner & Zola* [2016] EWCA Civ 758, [2017] 1 WLR [18] and [21].

35. The Tribunal in *Hogan and Oxford City Council v Information Commissioner* (Appeal nos. EA/2005/2006 and EA/2005/0030) [§§28-35] set out a three-stage approach to the application of the prejudice test, which was cited with approval by the Court of Appeal in *Zola* [§22; §27] (emphases added):

> "First, there is a need to **identify the applicable interest(s)** within the relevant exemption…
>
> "Second, **the nature of the 'prejudice' being claimed must be considered**. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, 'real, actual or of substance'. If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met.
>
> "A third step for the decision-maker concerns **the likelihood of occurrence of prejudice** […] There are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

36. Section 2(2)(b) requires that any prejudice which 'would' occur (i.e., 'more probable than not') or 'would be likely' to occur (i.e., 'a real and significant risk of prejudice) under the commercial interests and law enforcement exemptions, be balanced against the public interest in disclosing the information in "*all the circumstances of the case"*.

37. The public interest balancing test must be considered on each of the commercial interests and law enforcement exemptions separately; it is not permissible to aggregate public interests under different exemptions: *Montague v ICO & DIT* [2022] UKUT 104 (AAC).

38. The relevant date for the purposes of applying any public interest balancing test is the date on which the request for information was first refused: *Montague*. However, if there are facts and matters which a) existed at the date of the original refusal or b) throw light on the grounds now given for refusal, then such facts and matters may be admissible and relied upon: *R (Evans) v Attorney General* [2015] UKSC 21.

Relevant absolute exemption

39. The absolute exemption relevant to this appeal is Section 40(2), which states, insofar as is relevant for present purposes:

> *(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 is –*
>
> *(a) it constitutes personal data which does not fall within subsection (1), and*
>
> *(b) the first, second or 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 –*
>
> *(a) would contravene any of the data protection principles,*
>
> *[…]*
>
> *(7) In this section –*
>
> *"the data protection principles" means the principles set out in –*
>
> *(a) Article 5(1) of the GDPR, and*
>
> *(b) section 34(1) of the Data Protection Act;*
>
> *[…]*
>
> ("**the personal data exemption**")

40. Section 3 of the Data Protection Act 2018 ("**DPA 2018**") defines personal data, insofar as relevant, as follows:

> *"(2) "Personal data" means any information relating to an identified or identifiable living individual.*
>
> *(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."*

41. Information about companies or public authorities is not personal data: see the ICO Guide to the General Data Protection Regulation (GDPR) (14 October 2022), pg16.

42. Recital 14 of the GDPR states that:

> "The protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data.
>
> "This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person."

43. Article 5(1) of the GDPR states, insofar as relevant:

> *"(1) Personal data shall be:*
>
> *(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'); […]*

44. Article 6(1) of the GDPR states, insofar as relevant:

> *"(1) Processing shall be lawful only if and to the extent that at least one of the following applies:*
>
> *(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; […]*
>
> *(c) processing is necessary for compliance with a legal obligation to which the controller is subject; […]*
>
> *(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; […]*

45. Paragraph 8 of part 2, chapter 2 of the DPA 2018, insofar as relevant, states that:

> *(8) In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority includes processing of personal data that is necessary for— […]*
>
> *(d) the exercise of a function of the Crown, a Minister of the Crown or a government department, or*
>
> *(e)an activity that supports or promotes democratic engagement.*

Contingent exemptions

46. In addition to the commercial interests, law enforcement, and personal data exemptions, the BBB relies on a contingent basis on two provisions which disapply the s1 duty:

    46.1. Section 12(1) provides that:

    > *Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

    46.2. Section 14(1) provides that:

    > *Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

47. The relevant 'appropriate limit' for the purposes of section 12 is £600 as prescribed by section 3 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("t**he Regulations**").

48. The Regulations state that where costs are to be attributed to the time which persons are expected to spend on specified activities, then those costs are to be estimated at a rate of £25 per person per hour: section 4(4) of the Regulations.

49. Per section 4(3) of the Regulations, the specified activities that a public authority may take into account costs of are in:

    49.1. determining whether it holds the information,

    49.2. locating the information, or a document which may contain the information,

    49.3. retrieving the information, or a document which may contain the information, and

    49.4. extracting the information from a document containing it.

50. For the purposes of section 14, the term 'vexatious' is not defined in the FOIA. In *Dransfield v Information Commissioner & another* [2015] 1 WLR, the Court of Appeal held that a request for information under FOIA s1 is 'vexatious' within s14(1) if, assessed to an objective standard, there was "*no reasonable foundation*" for thinking that the information sought would be of value to the requester or to the public or any section thereof, and that the decision-maker should consider "*all the circumstances*" to reach a balanced conclusion on whether a request is vexatious.

SUBMISSIONS

Whether the commercial interests exemption is engaged – CBILS, CLBILS, BBLS

51. In its First Refusal [**A201**], the BBB considered that the disclosure of the names of companies who had taken out CBILS / CLBILS / BBLS loans would prejudice the commercial interests of three separate groups: the BBB; lenders on the CBILS / CLBILS / BBLS; and the recipients of CBILS / CLBILS / BBLS loans.

52. As to the first group, the BBB, in its Decision Notice, the Information Commissioner ("**the Commissioner**") was not convinced by the BBB's assertion that the commercial interests of the BBB would itself be prejudiced [**A21/§69**]. The Commissioner recognised that the BBB's objectives would be '*hindered'* if the private sector were to refrain from engagement with the BBB; but did not consider that this amounted to commercial harm as a result of the disclosure.

53. As to the second group, CBILS / CLBILS / BBLS lenders, the Commissioner was also not convinced by the BBB's assertion that the commercial interests of lenders would be prejudiced [**A16/§§62-63].** The Commissioner considered that the likelihood of scenarios in which loan recipients would '*lose confidence in financial services'* leading to fewer lenders applying to work with the BBB in future, or where disclosure would lead to the deduction of lenders' industry preferences, were both somewhat '*remote'*. In any event, Spotlight notes that in relation to the BBLS, the majority of lender names have now been published [**A1608**]. That publication runs directly contrary to the redaction of lender identities [**A1374/§45**] and the BBB's evidence on naming lenders [**A1377/§56-66**].

54. It was the third group, CBILS / CLBILS / BBLS loan *recipients*, where the Commissioner accepted that the likelihood of prejudice to commercial interests arose [**A21/§60**]. The Commissioner placed particular reliance on the potential impact that disclosure would have on consumer confidence; however, at the same time, the Commissioner also agreed with Spotlight's assertion that many members of the public would support and understand the position that struggling businesses would have been in [**A21/§61**].

55. Hence, the engagement of the commercial interests exemptions arose on the basis that there was a likelihood of prejudice to *recipients* of CBILS / CLBILS / BBLS loans, stemming in particular from the likelihood of a loss in consumer confidence.

56. Spotlight submits that the commercial interests exemption was not engaged in respect of loan recipients of the CBILS / CLBILS / BBLS loans for the following reasons:

56.1. First, companies who used the CBILS / CLBILS / BBLS would have been aware that these schemes were not 'usual' financial loan schemes, but rather amounted to State Aid provided by the government under the Temporary Framework, utilising public funds, in the context of an unprecedented global pandemic. Similar to the Tribunal case of *Davies v Information Commissioner* [2022] UKFTT 00375 (GRC) (where the requested information related, in part, to the names of companies in the renewable energy sector who had received investment from a local authority), all entities entering into the CBILS / CLBILS / BBLS loan schemes would have been taken to understand that entering into agreements with a public authority would mean that any confidentiality attaching to the schemes would inevitably be subject to FOIA [*Davies*, **§78**].

56.2. Contrary to the BBB's evidence [at, for example, **A2399/§§30-34**], Spotlight submits that all loan recipients would have reasonably understood that the relationship entered into under the CBILS / CLBILS / BBLS was between the government, the lending bank, and the company itself as a recipient of State Aid, and that this amounted to a different financial arrangement with different expectations as to confidentiality, reporting and transparency. Spotlight challenges the BBB's assertion that recipients of CBILS / CLBILS / BBLS loans would have understood the schemes to have been a "*routine transaction*" and/or that they would have "*expected the loan to be treated with the same level of commercial confidence as any other transaction with their bank"* [**A2400/§31**].

56.3. Second, the FOIA Request was as narrow and limited as possible. The FOIA request was limited to *names* of companies: i.e., the identities of parties (to the extent that they were a company) who utilised, and received public funds from, the government's four Covid-19 financial assistance schemes. In contrast, the Tribunal in *Davies* found that there was no, or at least very little, commercial sensitivity in a much wider range of information (including company names), being: "***the identities of the parties with whom the Council [had] entered into borrowing lending and investment transactions*** [emphasis added]*, the general nature of those transactions, the sums involved, the duration of the various*

contracts, the forms of finance employed and, in the cases of investments, the sources of information which led the Council to enter into the relevant transaction with the party concerned" [*Davies*, **§70**].

56.4. In that case, the Tribunal was careful to focus intensely on the categories of information sought in the relevant request, and to consider whether each category amounted to a potential risk of prejudice to commercial interests. Hence, although the Tribunal found that the information cited at paragraph 56.3 did not amount to a likelihood of prejudicing commercial interests, they took a different view in relation to "*the interest rate and forecast returns information*" [*Davies*, **§71**]. Spotlight submits that the BBB, and the Commissioner in upholding the BBB's refusal, did not place sufficient focus on the alleged risk of prejudice arising out of the specific category of information requested, being the disclosure of only the *names* of companies who had utilised the schemes.

56.5. Third, the fact that a company would 'prefer' their involvement in the CBILS / CLBILS / BBLS to be suppressed is not sufficient for the commercial interests exemption to be engaged. As identified by the Tribunal in *Davies*, the evidence as to prejudice to commercial interests has to "*bridge the substantial gap between an unfulfilled preference or even expectation of privacy and real, actual and substantial prejudice to commercial interests*" [*Davies*, **§70**].

56.6. Spotlight submits that the BBB's evidence on alleged prejudice to borrowers under the CBILS / CLBILS / BBLS schemes is at the bottom of this scale, amounting to 'preference' and comes nowhere close to the threshold of 'real, actual and substantial prejudice', particularly in circumstances where the BBB *knew*, at the time of the FOIA Refusal, that it would in any event be subject to reporting obligations under the Temporary Framework and that it would, in practice, be publishing the names of a substantial portion of CBILS and CLBILS loan recipients (and to a lesser extent, BBLS loan recipients) in due course.

56.7. Fourth, Spotlight in any event disputes the assertion that consumers would feel less 'confident' in a company just because it had utilised the CBILS / CLBILS / BBLS scheme and/or that disclosure of the names of companies who had utilised the scheme would lead to "*speculation about the business's financial position and acumen*" [**A2398/§25**]. It could, for example, be equally asserted

that consumers might feel *more* confident in a company that had taken steps to secure its financial position and to ensure the sustainability of its business. The BBB's evidence as to consumer confidence and 'speculation' about a company's position and acumen is inconsistent with its recognition that many borrowers would have sensibly utilised the CBILS / CLBILS / BBLS schemes as a "*precautionary measure*" [**A2398/§28**].

56.8. Sixth, the BBB's evidence does not include evidence of any direct consultation with loan recipients [**A1376/55**] and relies entirely on the third-party evidence of lenders [**A2399/§§26-35; A1373/43-54**]. The BBB has instead engaged with an individual who "*styles himself as a champion to represent the interests of BBLS borrowers, called* 'Mr Bounceback'" [**A1376/55**]. This evidence is not sufficient to demonstrate that there is a causal relationship between the disclosure of the *names* of companies and the prejudice alleged to be suffered, which must be real, actual or of substance.

56.9. Seventh, the BBB's evidence as to the alleged prejudice likely to be suffered by borrowers runs contrary to the fact that in June 2020, figures were published by the Treasury together with eight 'case studies' which named companies that had utilised the CBILS and BBLS schemes (together, in fact, with the names of the lenders and the amounts of money received) [**A463/§§28-29; A581**].

56.10. The question of whether the commercial interests exemption is engaged in relation to borrowers under the CBILS / CLBILS / BBLS is to be assessed on the 'would likely to' test and the lower threshold standard of whether there was a 'real and significant risk of prejudice'. For all the reasons outlined above, Spotlight submits that this threshold has not been met and that the exemption is not engaged. In the absence of the BBB being able to satisfactorily discharge this burden, its reliance on prejudice should be rejected: *Hogan*.

Public interest balancing test – CIBLS/CLIBLS/BBLS

57. In the alternative, if the commercial interest exemption is engaged in respect of borrowers on the CBILS/CLBILS/BBLS schemes, Spotlight submits that it is only *weakly* engaged (for the reasons set out above) and that it is overwhelmingly outweighed by the public interest in disclosure for the following reasons:

57.1. First, the importance of the subject matter. The FOIA Request was made in the context of wide-ranging public concerns as to the Covid-19 loan schemes, which had (necessarily) been rolled out at speed, put significant sums of public funds at risk, and were known to carry high error and fraud risks [**§§A655/9-13**]. Those are important matters on the highest levels of public interest.

57.2. Second, the significance of the unique context. The use of public funds and the fast-paced development of public schemes in the course of a pandemic and economic crisis is a context in which governmental decision-making warrants the closest scrutiny. The rapid pace at which the CBILS, CLIBLS and BBLS schemes had to be developed and launched necessitates an even greater need for a commitment to transparency and scrutiny by a range of stakeholders. The information sought has a bearing on the propriety of the government's use of vast sums of public money. That is a matter of significant public interest.

57.3. Third, the exceptional scale of public money involved. As would have been known to the BBB at the time of refusing the FOIA Request, the BBB had in a period of approximately 3-4 months approved loans under the three schemes to a value of £46.79 billion (in circumstances where those schemes had been developed and launched in a matter of weeks). As would also have been known to the BBB at the time of refusing the FOIA Request, in relation to the BBLS, the BBB was anticipating the scheme to suffer a loss of between 35% and 60% [**A1522-1526**]; and that in July 2020, the Office for Budget Responsibility had estimated across the CBILS / CLBILS / BBLS 'central case scenario' losses of £16.9 billion and 'worse-case scenario' losses of £33.7 billion [**RDB2/77**].

57.4. Fourth, the awareness that the schemes were high-risk. The CBILS, CLBILS and BBLS schemes were all rolled out in full knowledge and awareness of concerns that they carried high levels of risk, as the BBB had itself raised in the Ministerial Directions. It is not in the public interest for a public authority to *itself* recognise that three publicly-funded schemes are potentially flawed and/or high-risk, and then not allow the public to scrutinise them. Contrary to the BBB's apparent assertion that the existing scrutiny mechanisms are sufficient [**A1390/§110**], it is in the public interest for that scrutiny to be conducted by organisations in what the Tribunal in *Davies* described as the "*freedom of information machinery*" [**§80**].

57.5. Fifth, the schemes were set up under State Aid rules. CBILS, CLBILS and BBLS were all set up under the Temporary Framework and all amounted to State Aid. There is an inherent public interest in the delivery of State Aid being transparent and scrutinised by a wide range of stakeholders, including those in the 'freedom of information machinery'.

57.6. Sixth, the schemes were set up on the basis that reporting obligations would arise under the Temporary Framework. These obligations would have been known at the time of refusing the FOIA Request. In any event, it would have been known to the BBB at the time of refusing the FOIA Request that not only would it in due course be required to publish the names of companies in receipt of loans under the schemes in the course of its reporting obligations under the Temporary Framework, but that names of some companies had already been published and were in the public domain [**A463/§§28-29; A581**].

57.7. Seventh, disclosure of the requested information would enable wider investigation into potential fraud and other unlawful activities. As is set out in the evidence of David Clarke [**A458**], disclosure of the requested information would enable a range of investigations to be conducted into potentially unlawful activities, such as insider fraud, all of which would be in the public interest.

57.8. Eighth, there is an inherent public interest in transparency and accountability. There is a public interest in public authorities being open and transparent about their activities and being accountable for them.

57.9. In sum, at the time of refusing the FOIA Request, the BBB had full knowledge that: a) the request had a bearing on matters of significant public interest; b) the sums of public money were exceptional and had been delivered at speed; c) the schemes carried high levels of risk (see paragraph 57.3 above); d) the schemes amounted to State Aid and had been set up under the Temporary Framework; e) that the names of companies receiving loans would in any event be published under the Temporary Framework reporting obligations; f) that the names of some companies receiving loans were already in the public domain; and g) that providing the requested information would enable investigation into fraud and other matters which would be in the public interest.

57.10. In those circumstances, while disclosure of the requested information may well have been uncomfortable for the BBB, the factors in favour of public interest overwhelmingly outweighed the perceived prejudice and ought to have been decided as such; the exemptions from the right to freedom of information cannot be invoked to "*avoid the embarrassment which public scrutiny of remarkable financial activities would be likely to involve*" [*Davies,* **§83**].

57.11. For all the reasons set out above, Spotlight submits that the prejudice-public interest balance falls compellingly in favour of disclosure of the information. In the alternative, Spotlight submits that the likelihood of prejudice and the public interest in disclosure of the information are at least equally balanced, and that the balance should therefore tip in favour of disclosure: [*Hogan* **§56**].

Whether the commercial interests exemption is engaged – FFS

58. In its First Refusal [**A201**], the BBB considered that the disclosure of the names of companies who had utilised the FFS would prejudice the commercial interests of three separate groups: the BBB; FFS lenders/investors; and FFS loan recipients.

59. As to the first group, the BBB, in its Decision Notice the Commissioner considered that the commercial interests of the BBB would itself be likely to be prejudiced on the basis that there was potential for "*creating hesitancy or reluctance of private sector investors to work with the BBB as a result of disclosure"* [**A22/§72**].

60. As to the second group, the FFS lenders/investors, the Commissioner considered that their commercial interests would be likely to be prejudiced on the basis that "*if the named businesses are commercially prejudiced then those investing in those businesses, as a commercial opportunity, would in turn be commercially prejudiced*" [**A22/§71**].

61. As to the third group, FFS loan recipients, the Commissioner accepted that the likelihood of prejudice to commercial interests arose, despite acknowledging that those benefitting from FFS loans were made aware of the BBB's obligations under FOIA and that companies converting their loan into equity would have their company name published [**A21/§70**]. The Commissioner considered the exemption to be engaged on the basis that "*those businesses names not published could be assumed to have been less successful and as a result may be commercially prejudiced*" [**A21/§61**].

62. Hence, on the FFS, the engagement of the commercial interests exemption arose on the basis of a likelihood of prejudice to *"some if not all the groups cited"* [**A22/§73**]. Spotlight submits that the commercial interests exemption was not engaged in respect of any of the three groups for the following reasons.

63. As to the alleged likelihood of prejudice to the BBB:

63.1. The BBB has from September 2021 published on its website on a rolling basis the names of all FFS borrowers where the loan has converted to equity [**A2590/§17; A2629**]. The 2021 publication is relevant for the purposes of understanding that it is clearly only in relation to the borrowers where loans have *not* converted to equity that the BBB has concerns as to the likelihood of prejudice.

63.2. By having already published names of those companies where loans have converted to equity, it can already by inference be established that there are other loans which have not. To the extent that there is any commercial prejudice attached to that fact (which Spotlight submits there is not for reasons set out below), then any such commercial prejudice will arise from knowledge of that *fact* and would not be exacerbated and/or effected in any way by the publication of the company names to whom that existing fact applies.

63.3. In effect, the BBB made its refusal decision on the basis that it had issued FFS loans to various companies but *did not yet know* which of those loans would convert to equity, and that if some loans did *not* convert to equity, then it might at that point be likely to suffer commercial prejudice. Spotlight submits that that line of reasoning is remote, speculative, and insufficient to demonstrate a causative link between disclosure and likelihood of prejudice that is 'real, actual or of substance'.

63.4. In any event, Spotlight submits that private sector investors would not be '*hesitant'* or '*reluctant'* to work with the BBB as a result of disclosure of the requested information [**A2596/§40**], for similar reasons to those outlined at 56.1-56.2 above (save that the FFS was not launched under the Temporary Framework). Further, Spotlight disputes the BBB's assertion that disclosure of the requested information would increase the likelihood of FFS borrower companies "*failing*" [**A2596/§41**]; this assertion is based on the assumption that consumers would draw an adverse inference from the fact that an FFS company had not yet converted its loan to equity. Spotlight disputes that such an inference could reasonably be drawn.

64. As to the alleged likelihood of prejudice to the FFS lenders/investors:

64.1. Disclosure of the names of the companies who received FFS loans would not necessarily lead to publication of the names of the other lenders who had invested through the scheme. This apparent causal connection has not been made out. The BBB's concern appears to be that "*in some cases*" (emphasis added), disclosure of the names of BBB borrowers whose loans had not converted to equity "*could"* – when put together with Companies House information – lead to publication of information about investors, and that this "*could*" impact on investors' commercial decision-making such that "*future potential*" transactions which investors "*may*" enter into with BBB "*may be harmed*" (emphasis added) [**A2595/§38**]. Spotlight repeats the submission made at 56.3 above, in relation to the narrow nature of the FOIA request: only the *names* of FFS companies were requested.

64.2. In any event, even if such a causal connection was made out, Spotlight submits that no likelihood of prejudice arises. The submission made at 63.4 above is repeated. The BBB's evidence cited in paragraph 64.1 above [**A2595/§38**] and evidence that damage that is "*likely*" to occur to the relationship between investors and the BBB "*may*" harm "*future*" commercial transactions [**A2595/§37**] is remote, speculative, and insufficient to demonstrate either a causal connection between disclosure and harm, or a likelihood of prejudice that is 'real, actual or of substance'.

65. As to the alleged likelihood of prejudice to the FFS loan recipients:

65.1. Recipients of FFS loans would have reasonably understood that the relationship entered into under the FFS was between the government, the lender/investor, and the company itself as a recipient of public funds (in part), for similar reasons to those outlined at 56.1-56.2 above (save that the FFS was not launched under the Temporary Framework). As was recognised by the Commissioner [**A21/§70**], FFS borrowers were aware that the BBB had FOIA obligations which could arise irrespective of whether a company had converted its loan to equity.

65.2. The fact that an FFS company had not converted its loan into equity would not necessarily draw an adverse inference either on the basis that not reaching the threshold was "*indicative*" of not being commercially successful [**A2593/30**], or on the perception that a FFS loan was a "*bail out*" [**A2595/35**]. Spotlight disputes that such an inference would be drawn, for similar reasons to those at 56.7 above.

Public interest balancing test – FFS

66. In any event, even if the commercial interest exemption was engaged in respect of one or more of the three groups involved in the FFS, Spotlight submits that it was only *weakly* engaged (for the same reasons set above) and is overwhelmingly outweighed by the public interest in disclosure for the following reasons:

66.1. First, Spotlight repeats the submissions made at 57.1-57.2 and 57.7-57.8 above.

66.2. Second, the exceptional scale of public money involved. As would have been known to the BBB at the time of refusing the FOIA Request, the BBB had in a 1-month period (from the launch of the scheme on 20 May to the data published on 23 June) approved convertible loans under the FFS to 253 companies to a value of £236.2 million. Scrutiny of the roll-out of these publicly-funded loans and/or investments is a significant matter of public interest. As to the assertion that the BBB would itself be prejudiced, additional public spending and/or costs incurred in the administration of a publicly-funded scheme do not amount to 'commercial interests' for the purposes of the exemption: *Zola.*

66.3. Third, the awareness that the scheme was potentially poor value for money such that the BBB had sought a Ministerial Direction [**A2588/10; A2601]**]. It is not in the public interest for a public authority to *itself* recognise that a publicly-funded scheme risks not being good value for money, and to then not allow the public to scrutinise it. It is in the public interest for that scrutiny to be conducted by organisations in the "freedom of information machinery".

66.4. Fourth, the government has previously published data in relation to other schemes designed to use public funds to support innovation. The 16 June 2020 letter sent to the Chancellor on behalf of Spotlight on Corruption, the Fraud Advisory Panel, and Transparency International, referred to the fact that the government had published details (including the amount awarded) of all 39,286 grants made to UK companies under the 'Innovate UK' scheme since 2004 [**A579**]. It is clearly in the public interest for the government to be transparent about where public funds are being used in the context of 'innovation' and for government-supported innovation to be scrutinised by a wide range of stakeholders, including those in the 'freedom of information machinery'.

66.5. In those circumstances, while disclosure of the requested information may well have been uncomfortable for the BBB, as at the time of the request it did not know how many of the FFS loans would convert to equity (notwithstanding Spotlight's position that no prejudice arises in any event), the factors in favour of public interest overwhelmingly outweigh any prejudice and ought to have been decided as such; the exemptions from the right to freedom of information cannot be invoked to "*avoid the embarrassment which public scrutiny of remarkable financial activities would be likely to involve*" [*Davies,* **§83**].

67. In the alternative, Spotlight submits that the likelihood of prejudice and the public interest in disclosure of the information are at least equally balanced, and that the balance should therefore tip in favour of disclosure: [*Hogan* **§56**].

Whether the law enforcement exemption is engaged – CBILS/CLBILS/BBLS

68. A few preliminary matters are relevant to this exemption:

68.1. In its Decision Notice, the Commissioner did not proceed to consider whether the law enforcement exemption was engaged because the decision had been reached to maintain the commercial interests exemption [**A30/§99**].

68.2. The law enforcement exemption was not relied upon in the First Refusal; it was only considered in the Second Refusal [**A208**]. Therefore, for the purposes of the public interest balance, the relevant date for any public interest consideration in relation to the law enforcement exemption is 8 October 2020.

68.3. This exemption is not relied upon in relation to the FFS [**A2592/§26**].

69. The law enforcement exemption appears to be relied upon on the assumption that disclosure of the requested information, being company names (as to which, the submissions at paragraphs 56.3-56.4 above are repeated) would be likely to lead to an "*increase in fraud*" [**A1382/§79**] to such an extent that the exemption is engaged. Notwithstanding the fact that the BBB did not initially rely on the law enforcement exemption, and only decided it was relevant having considered the matter for a second time, Spotlight submits that it appears somewhat ironic for the BBB to have knowingly rolled out three high-*fraud*-risk loan schemes yet then resisted disclosure of the names of companies who used those schemes on the basis that it would 'increase fraud'.

70. In any event, Spotlight submits that the law enforcement exemption is not engaged for the following reasons.

71. First, the BBB takes issue with the fact that disclosure of the requested information will "*arm*" fraudsters with a list of 1.6 million borrowers which will enable criminals to defraud borrowers through various mechanisms [**A1384/§§87-96**]. However, as at 31 December 2021, the details of 49,248 CBILS facilities, 543 CLBILS facilities, and 36,911 BBLS facilities had been published on the Transparency Database pursuant to the Framework [**A1368/9**]. In sum, the BBB has published the names of at least 86,702 borrowers and would have had this in their contemplation at the time of refusing the FOIA Request. In those circumstances, the BBB's evidence as to why publication of company names would lead to increased fraud is misplaced. The BBB has not explained why existing (or forthcoming) publication of company names would *not* prejudice law enforcement; but that the information contained in the narrow FOIA Request *would.*

72. Second, the FOIA Request related to the names of *companies* who had used the CBILS, CLBILS or BBLS. Other legal entities (the majority of which would have utilised the BBLS) do not fall subject to the FOIA Request and/or the risks that the BBB allege would arise as to fraud. The concerns arising out of the publication of a "*list of 1.6 million borrowers*" does not arise. The fact that many BBLS borrowers will not fall subject to the FOIA Request also addresses the concern raised in the BBB's evidence as to the "*heightened"* risk of successful phishing scams in the BBLS [**A1386/§95**].

73. In any event, no likelihood of prejudice to law enforcement arises. The BBB's third-party evidence that disclosure of company names "*could*" leave companies open to impersonation fraud, or that the risk of lender impersonation "*may*" be heightened [**A1388/§§98-99**] is remote, speculative, and insufficient to demonstrate either a causal connection between disclosure and harm, or a likelihood of prejudice that is 'real, actual or of substance'.

Balancing the law enforcement exemption against public interest

74. In any event, if the law enforcement exemption was engaged, Spotlight submits that it was only *weakly* engaged (for the reasons set above) and is overwhelmingly outweighed by public interest in disclosure for the reasons outlined at paragraphs 57.1-57.11 above.

Whether the personal information exemption is engaged – CBILS/BBLS

75. A few preliminary matters are relevant to this exemption:

    75.1. In its Decision Notice, the Commissioner did not proceed to consider whether the personal information exemption was engaged because the decision had been reached to maintain the commercial interests exemption [**A30/§99**].

    75.2. The personal information exemption was not relied upon in the First Refusal; it was only considered in the Second Refusal [**A208**]. In that Second Refusal, the BBB appeared to only rely on the personal information exemption in the context of the BBLS, stating: "*In this case, a proportion of the Bounce Back Loan Recipients are sole traders and limited partnerships, and the release of the business names or trading names would identify individuals or make them more identifiable*" (emphasis added). However, in its evidence, the BBB clearly relies on the personal information exemption in the context of CBILS borrowers also [**A2407/§§60-61**]. On that basis, Spotlight has proceeded on the assumption that the BBB's reliance on the personal information exemption is limited to concerns arising in the context of the BBLS and CBILS specifically.

    75.3. This exemption is not relied upon in relation to the FFS [**A2592/§26**].

76. Spotlight's primary submission on the personal information exemption is that the BBB's reliance upon it is misconceived because the FOIA request was limited to names of companies who received public funds from the Covid-19 financial assistance schemes. The FOIA request did not request the names of other legal entities such as sole traders and partnerships. Accordingly, the personal information exemption is not relevant. Company names are not 'personal data' for the purposes of the GDPR/DPA 2018; and neither does publication of company names amount to 'processing'.

Submissions on section 12

77. The BBB is relying on section 12 for the first time before the Tribunal. Reliance on this exemption arises where a) the commercial interests and/or law enforcement exemptions have been held to not apply; but b) the personal information exemption has been held to apply; and therefore c) the BBB is required to 'siphon off' from the requested information, that which is personal data covered by the personal information exemption.

78. Notwithstanding its position as to whether the personal information exemption is of any relevance (as to which, see paragraphs 72-74 above), Spotlight submits that the BBB's reliance on s12 is based entirely on its assertion that it will need to "*manually check*" all the data points for all 1.5 million loans individually [**A1393/§118**]. This appears to arise from the fact that the BBB anticipates "*administrative errors"* such that some legal entities have been "*incorrectly entered onto the portal by lenders*" and asserts that "*this would increase the time taken to check the records for personal data*" [**A2408/§63**]. The BBB asserts that it will need to "*double check*" that the legal entity stated is "*correct*" and then possibly also "*cross-check*" it with other sources. This all appears to be entirely a product of the BBB's own procedural failings within its own dataset. The BBB must not be permitted to withhold data under the FOIA as a result of its own administrative errors and procedural failings within its own dataset.

79. In any event, the task is presumably sufficiently feasible for the BBB to have undertaken it in the course of publishing some BBLS loans pursuant to the European Framework; as at 31 December 2021, the details of 36,911 BBLS facilities had been disclosed on the EU Transparency Database [**A1368/§27**]. The BBB has also for the purposes of its evidence been able to establish that of the 100,000 CBILS borrowers, approximately 3,150 are sole traders and 1,500 are limited liability partnerships [**A2408/§63**].

Submissions on section 14

80. The BBB is relying on section 14 also for the first time before the Tribunal. The reasons given above all demonstrate – to the objective standard – that Spotlight had a *more* than reasonable foundation for believing that the requested information would be of value not only to Spotlight but to the wider public: *Dransfield*. The public interest submissions at paragraphs 57 and 66 above are relied upon, as are paragraphs 3 and 4. Accordingly, the section 14 exemption does not apply and ought not to have been relied upon.

CONCLUSION

81. For the reasons set out above, Spotlight respectfully submits that the Tribunal allow the appeal, or in the alternative, substitute such other notice as has been served by the Commissioner in favour of Spotlight: s58 FOIA.

GEMMA MCNEIL-WALSH, 5RB
14 November 2022