

## Decision Notice

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**Decision 12/2019: Bermuda Monetary Authority**

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**Beneficial ownership registry**

**Reference no: 06062017-01**

**Decision date: 29 May 2019**

## Summary

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The Applicant made a request to the Bermuda Monetary Authority (**BMA**) for the registry of beneficial company ownership held by the BMA. The BMA's internal review decision denied public access to the record on the basis of section 37(1) of the Public Access to Information (**PATI**) Act 2010 because disclosure was prohibited by other legislation, namely section 31(1) of the Bermuda Monetary Authority Act 1969 (**BMA Act**).

The Information Commissioner affirmed the BMA's internal review decision, finding that the records are properly withheld under section 37(1) of the PATI Act because disclosure is prohibited by section 31(1) of the BMA Act.

## Relevant Statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 37 (disclosure prohibited by other legislation).

Bermuda Monetary Authority Act 1969 (**BMA Act**), section 31 (secrecy).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

## Background

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1. On 8 February 2017, the Applicant made a PATI request to the BMA for 'the registry of beneficial company ownership held by the' BMA.
2. The BMA invited the Applicant to discuss the request so it could better understand the nature of the request. The Applicant declined, but explained by email that the request sought the 'register of beneficial company ownership' referred to by the then-Minister of Finance in a public statement.
3. On 15 February 2017, the BMA issued an initial decision refusing the PATI request under section 37 of the PATI Act, applicable when disclosure is prohibited by other legislation. The BMA relied upon section 31(1) of the BMA Act, which requires employees, servants, and other agents of the BMA to preserve and aid in preserving secrecy.
4. On 22 March 2017, the Applicant sought an internal review of the initial decision.

5. On 23 May 2017, the BMA issued an internal review decision upholding the denial of access for the same reasons set out in its initial decision.
6. On 6 June 2017, the Applicant submitted a request for an independent review by the Information Commissioner, challenging the BMA's denial of access to the registry and reliance on the exemption in section 37(1) when disclosure is prohibited by other legislation.

## **Investigation**

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7. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the BMA to determine whether its reliance on the exemption in section 37(1) was justified.
9. On 29 June 2017, the Information Commissioner's Office (**ICO**) notified the BMA that the Applicant had made a valid application.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and applicant an opportunity to make representations. The BMA and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The BMA was further asked specific questions to justify its reliance on section 37(1) of the PATI Act and the Information Commissioner reviewed the database which holds the records responsive to the request.
11. Both the Department and Applicant provided submissions.

## **Information Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and the BMA. She is satisfied that no matter of relevance has been overlooked.

*Disclosure prohibited by other legislation– section 37(1)*

13. Section 37(1) of the PATI Act allows public authorities to refuse a PATI request if disclosure of the responsive records is prohibited by ‘any statutory provision’ that is not the PATI Act.
14. The exemption in section 37(1) is absolute, which means that it is not subject to the public interest test.
15. As set out by the Information Commissioner in Decision 05/2017, Bermuda Monetary Authority and Section 12/2018, Ministry of Finance Headquarters, to rely appropriately on the exemption in section 37(1) of the PATI Act, a public authority must ask:
  - [1] What is the statutory provision creating the mandatory prohibition on disclosure?
  - [2] Does the record fall within this statutory provision?
  - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
16. The mandatory prohibition on disclosure in a provision may be indicated by the use of the word ‘shall’ and an accompanying provisions setting out penalties for unauthorised disclosures.
17. If the relevant statutory prohibitions only apply when particular functions or duties of a public authority have been engaged, the public authority must identify these functions or duties and explain how the records fall within the prohibition.
18. Finally, the burden is on the public authority to satisfy the Information Commissioner that, on the balance of probability, it has provided sufficient support to justify applying an exemption.

*Public authority’s submissions*

19. The BMA explained that its database contains the information sought in the PATI request in addition to other information related to corporate entities in Bermuda. It clarified that it does not have a physical register containing ultimate beneficial ownership information.
20. The BMA submitted that disclosure of the records containing information requested by the Applicant is prohibited by section 31(1) of the BMA Act. The BMA further explained that this prohibition is mandatory and does not allow for discretionary disclosure. This can be concluded, the BMA stated, from the use of the word ‘shall’ in the provision. A breach of

the prohibition in section 31(1) of the BMA Act is also a criminal offense under section 31(1A) of the Act.

21. The BMA also stated that the phrase ‘all matters’ in section 31(1) of the BMA Act reflects the breadth of the prohibition. This phrase should be read in accordance with its ordinary dictionary meaning. The BMA submitted that there are no limiting criterion or conditions under the BMA Act, or any other law applicable to the BMA, to be taken into account in relation to interpreting the definition of ‘all matters’.

22. Section 31(1) of the BMA Act, it explained, applies to the responsive record because the information regarding beneficial ownership of corporate entities in Bermuda would fall within a matter that was provided to the BMA in furtherance of carrying out its duties and performing its functions. These relevant duties and functions include:

- reviewing company applications and making recommendations to the Minister of Finance in accordance with section 21(1)(d) of the BMA Act;
- acting as a depository on behalf of the Registrar of Companies, in accordance with the Companies Act 1981.
- acting as the Controller of Foreign Exchange in accordance with the Exchange Control Act 1972.

23. The BMA further detailed its various duties to fulfil these functions.

24. With respect to the gateway provisions in section 31(1AA), the BMA explained that none of the gateway provisions was applicable to allow for public disclosure. It specifically noted that none of the information was in the public domain, section 31(1AA)(c), because there is no known publication of the beneficial ownership information by either the BMA or other person, or in any forum. The gateway provisions are limited to permitting disclosure to fulfil BMA’s duties and functions, and to assist designated statutory bodies, Government officials, or foreign regulatory authorities with functions similar to those of the BMA.

#### *Applicant’s submissions*

25. The Applicant submitted that the BMA Act allows the information to be disclosed to the relevant Minister in circumstances when the disclosure is in the public interest.

26. The Applicant also highlighted that the Foreign Affairs Committee of the UK Parliament recommended that the UK require all of the overseas territories to make public their

beneficial ownership registers. The Applicant cited the Committee's statement urging the Foreign Secretary to move this policy forward in the territories.

### *Discussion*

27. What is in question in this case are records related to beneficial ownership of corporate entities in Bermuda held by the BMA in its database, which was the Corporate Registration Processing (CRP) system at the time of the request and is now a new system, INTEGRA.

[1] *What is the statutory provision creating the mandatory prohibition on disclosure?*

28. As previously decided, the Information Commissioner agrees with the BMA that section 31(1) of the BMA Act creates a mandatory, and not discretionary, prohibition on disclosure<sup>1</sup>. According to this provision, the officers, servants, and advisors of the BMA 'shall preserve and aid in preserving secrecy' of certain records. The provision does not allow a discretionary disclosure. Any unauthorised disclosure amounts to a criminal offense in accordance with section 31(1AA) of the BMA Act.

[2] *Does the record fall within this statutory provision?*

29. In the absence of a specific definition of 'all matters' in the BMA Act or Interpretation Act 1951, the Information Commissioner agrees with the BMA that the phrase should be read in its ordinary meaning. 'All' refers to the whole quantity or extent of a particular group or things and 'matter' means 'a subject or situation under consideration'<sup>2</sup>. The breadth of the phrase 'all matters' in section 31(1) of the BMA Act is therefore very broad.

30. The Information Commissioner disagrees with the BMA's suggestion that no limiting criterion or conditions need be taken into account when applying section 31(1) of the BMA Act because of the breadth of 'all matters'. The broad scope of this phrase is limited by the remainder of the section 31(1), which requires the matters to both (a) relate to the affairs of Government, the BMA or any person and (b) come into the knowledge of an officer, servant, agent, or advisor of BMA in the course of carrying out their duties.

31. The Information Commissioner considers these requirements in turn. First, section 7(1) of the Interpretation Act provides that a corporate entity or a company constitutes a legal

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<sup>1</sup> Decision 05/2017, Bermuda Monetary Authority, para. 25.

<sup>2</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

‘person’. Information concerning the ultimate beneficial ownership of corporate entities is a matter relating to ‘any person’s affairs’ in section 31(1) of the BMA Act.

32. Second, the BMA has also identified with specificity and in further detail the relevant duties it has fulfilled, during which the information came to the knowledge of its officers. The Information Commissioner has carefully reviewed these submissions.

33. The Information Commissioner is satisfied that information concerning ultimate beneficial ownership of corporate entities contained in the records requested by the Applicant is therefore a matter relating to any person’s affairs that has come to the knowledge of the BMA during the course of fulfilling its statutory functions.

34. The Information Commissioner is further satisfied that the information falls within the secrecy provision in section 31(1) of the BMA Act.

[3] *Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?*

35. Section 31(1AA) of the BMA Act contains a number of gateway provisions, which are exceptions to the prohibition on disclosure. The Applicant referred to section 31(1AA)(a), which allows for disclosure to the Minister if it is in the public interest.

36. That specific gateway provisions, however, only speaks to a limited disclosure to the Minister, not to the public at-large. The Information Commissioner accepts that section 31(1AA)(a) of the BMA Act is not applicable in this case.

37. For the same reason, the limited disclosures to specific statutory bodies in sections 31(1AA)(aa), (ab), and (ac) are also not applicable. The Information Commissioner has considered the remaining gateway provisions and is satisfied these provisions only allow for limited disclosures for specific purposes or to specific entities.

38. After conducting a search of public information, the Information Commissioner accepts the BMA’s assertion that the information relating to beneficial ownership of corporate entities in Bermuda is not and/or has not been available to the public. Section 31(1AA)(c) is inapplicable in this case.

39. The Information Commissioner notes that the statements by the Foreign Affairs Committee of the UK Parliament concern a policy proposal and do not reflect the existing legislation

applicable in Bermuda. The statements by the Committee do not carry any weight in this review.<sup>3</sup>

40. The Information Commissioner is satisfied that section 31(1AA) does not contain a gateway to public disclosure applicable to the records in this review.

### ***Conclusion***

41. The Information Commissioner is satisfied that the records responsive to the request are exempt from disclosure under section 37(1) of the PATI Act because they fall within a statutory prohibition on disclosure found in section 31(1) of the BMA Act. The Information Commissioner is further satisfied that the BMA's denial of public access to the records was justified.

## **Decision**

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The Information Commissioner finds that the BMA complied with Part 3 of the Public Access to Information Act 2010 in responding to the request for access to public records. Specifically, the BMA properly justified its reliance on section 37(1) of the PATI Act to refuse public access to the records.

In accordance with section 48(1)(a), the Information Commissioner affirms the Department's internal review decision.

## **Judicial Review**

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The Applicant, the BMA, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court according to section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez  
Information Commissioner  
29 May 2019

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<sup>3</sup> The Information Commissioner further notes that the Legislature has amended a number of Acts in the last few years, which now contain additional provisions specifically removing records concerning beneficial ownership information from the scope of the PATI Act. See, e.g., section 98R of the Companies Act 1981; section 65P of the Limited Liability Company Act 2016; and section 4ZB of the Partnership Act 1902.



## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Section 37 – Disclosure prohibited by other legislation

(1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

(6) For the avoidance of doubt a record held by the Attorney General or the Director of Public Prosecutions, that is the subject of legal professional privilege, shall be an exempt record and shall not be subject to public disclosure of any kind.

### Bermuda Monetary Authority Act 1969

#### Section 21 – Relations with Government

(1) The Authority –

...

(d) may, in connection with the incorporation of companies, which propose to carry on any restricted business activity as set out in the Ninth Schedule to the Companies Act 1981 [*title 17 item 5*] the establishment or formation of partnerships, investment funds as defined in section 2 of the Investment Funds Act 2006, sole traders or other entities or in respect of an application for a permit pursuant to section 134 of the Companies Act 1981 [*title 17 item 5*] or pursuant to section 4 of the Overseas Partnerships Act 1995, process applications and make recommendations to the Minister or in respect of all matters relating, ancillary or consequential thereto occurring before or after such incorporation, establishment, formation or application make recommendations to the Minister.

#### Section 31 – Secrecy

(1) Except in so far as may be necessary for the due performance of his functions under the Act or other statutory provision, and subject to subsections (1AA), (1B), (1C) and (1D) any person who is, or is acting as, an officer, a servant, an agent or an adviser of the Authority shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of the Government or the Authority or of any person that may come to his knowledge in the course of his duties.

(1A) Any such officer or servant who communicates any such matter to any person other than the Minister, the Board or an officer of the Authority authorized in that behalf by that Chairman or suffers or permits any unauthorized person to have access to any books, papers or other records relating to the Government or the Authority, or to any person, commits an offence.

Punishment on summary conviction: a fine of \$50,000 or imprisonment for two years or both.

Punishment on conviction on indictment: a fine of \$100,000 or imprisonment for five years or both.

(1AA) Subsection (1) does not preclude the disclosure of information—

(a) to the Minister in any case in which the disclosure is for the purpose of enabling or assisting him to discharge his statutory functions or is in the public interest;

...

(c) if the information is or has been available to the public from other sources;

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**Information Commissioner for Bermuda  
Valerie T. Scott Building  
60 Reid Street  
Hamilton, HM 12  
[www.ico.bm](http://www.ico.bm)  
441-294-9181**