

Decision Notice

Decision 08/2020: Bermuda Monetary Authority

Staff recruitment plan records

Reference no: 20181025-02

Decision date: 24 August 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Monetary Authority (**BMA**) for records related to its staff recruitment plan. The BMA refused the request in full under section 37(1) of the PATI Act because disclosure was prohibited by section 31(1) of the Bermuda Monetary Authority Act 1969 (**BMA Act**).

During the Information Commissioner's review, the BMA changed its position for one set of the requested records, related to an analysis of its recruitment plan, based on the potential additional staff's Bermudian or non-Bermudian status. The BMA refused to confirm the existence or non-existence of the responsive records under section 38(1) of the PATI Act because, if the records existed, they would be exempt under section 37(1) of the PATI Act and the public interest did not require disclosure of their existence or non-existence.

The Information Commissioner has reversed the BMA's reliance on section 38(1) of the PATI Act and ordered the BMA to disclose the existence or non-existence of records on its recruitment plan, analysed by the additional staff's Bermudian and non-Bermudian status. The Information Commissioner further ordered the BMA to process this particular part of the PATI request in accordance with the provisions of the PATI Act. Finally, the Information Commissioner has affirmed the BMA's reliance on section 37(1) of the PATI Act to deny access to the remaining records.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 37 (disclosure prohibited by other legislation); section 38 (non-disclosure of existence of record).

Public Access to Information Regulations 2014: regulation 2 (public interest definition).

Bermuda Monetary Authority Act 1969: 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

1. In August 2018, the Bermuda Monetary Authority (**BMA**) published a Consultation Paper – Proposed Fee Changes (**Consultation Paper**)¹ “to set out the fee revisions which the [BMA] proposes to implement across supervised sectors in a phased implementation in 2019 and 2020”. In the Consultation Paper, the BMA stated that the proposal to revise the supervisory fees was based upon the findings of a comprehensive target operating model (**TOM**) review undertaken with the assistance of an international management consultant. The Consultation Paper further explained that, based on the TOM review, the BMA had determined that it required up to 39 additional full-time employees by 2020 to enable the BMA to continue to discharge its statutory duties effectively. Exhibit 2 to the Consultant Paper “summarises the activities for which additional human resources are required and the proposed level of increase relative to the current state”.
2. On 31 August 2018, shortly after the release of the Consultation Paper, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the BMA asking for records related to:
 - [1] [An] analysis of the extra staff required, as discussed in the BMA Annual Report to Government², (**item 1**);
 - [2] Analysed by Bermudian/non-Bermudian (**item 2**);
 - [3] Analysed by department in the BMA (**item 3**); and
 - [4] Reasons for increased staff in each department (**item 4**).
3. On 9 October 2018, the BMA refused the Applicant’s request under section 37(1) of the PATI Act because disclosure was prohibited by section 31(1) of the Bermuda Monetary Authority Act 1969 (**BMA Act**).
4. On 10 October 2018, the Applicant sought an internal review by the head of the BMA.
5. On 24 October 2018, the BMA upheld the refusal for the same reason.

¹ Available at: <https://www.bma.bm/viewPDF/documents/2019-06-07-14-06-21-Consultation-Paper---Proposed-Fees-for-2019-and-2020.pdf>.

² The analysis of the need for additional staff was also discussed in greater detail in the BMA’s Consultation Paper.

6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the BMA's internal review decision refusing the PATI request.

Investigation

7. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid 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 was justified.
9. On 5 November 2018, the Information Commissioner's Office (**ICO**) notified the BMA of the Applicant's valid application and sought copies of the requested records.
10. The BMA clarified that it was relying on section 38 of the PATI Act to refuse to confirm or deny the existence of records responsive to item 2 of the request. The BMA also provided copies of the remaining responsive records. The Applicant was informed of the Information Commissioner's acceptance of the BMA's late reliance on section 38(1) of the PATI Act.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The ICO invited the BMA and the Applicant to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The BMA was further asked specific questions to justify its reliance on sections 37(1) and 38(1) of the PATI Act. Both the BMA and the Applicant made submissions.

Information Commissioner's analysis and findings

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 BMA and the Applicant. 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 public access to a record if disclosure of the requested record is prohibited by any statutory provision other than the PATI Act.
14. If the exemption in section 37(1) of the PATI Act applies to a record, the public authority need not consider the public interest test.
15. To rely on section 37(1) of the PATI Act, a public authority must ask the following questions³:
 - [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 burden is on the public authority to show that, on the balance of probabilities, it has provided sufficient support to justify applying section 37(1) of the PATI Act.

Public authority's submissions

17. The BMA submitted that disclosure of records related to items 1, 3 and 4 is prohibited by section 31(1) of the BMA Act. Section 31 of the BMA Act creates a mandatory prohibition on disclosure as it does not provide any room for discretion and disclosure can only be made for the BMA's performance of its functions under the BMA Act or its other relevant statutory provisions. The Applicant's PATI request does not fall within any of these gateways.
18. With respect to the scope of section 31(1) of the BMA Act, the BMA argued that this secrecy provision applies not only to all matters relating to confidential information which the BMA received in its role as a financial regulator, but also to its operations. The BMA has been reading this provision consistently in this manner because it believes that section 31(1) is necessary to ensure that the BMA's operations can be performed at the highest level possible. The BMA asserted that its confidentiality regime is comparable to those imposed on its peers.

³ See Decision 05/2017, Bermuda Monetary Authority.

19. The BMA argued that records responsive to the request for further details of its analysis of the additional staff required (item 1), the analysis of additional staffing needs by department (item 3), and the reasons for additional staff in these departments (item 4) relate to the affairs of the BMA.
20. The BMA further explained that it has a mandate under section 3(1)(b) of the BMA Act to regulate, supervise and inspect financial institutions. In accordance with section 4A of the BMA Act, the BMA Board of Directors are charged with setting the BMA's vision to ensure that it discharges these statutory obligations. In accordance with section 5 of the BMA Act, the BMA may employ such officers as it deems fit, which are necessary to carry out its duties and to exercise the functions imposed on it.
21. The records underlying the Consultation Report resulted from the BMA's work to further its mandate to prudently supervise financial institutions.
22. The BMA acknowledged that most of the information sought by the Applicant was already provided in the Consultation Paper. The Consultation Paper sets out the rationale for the staffing increase, i.e., succession planning and additional matters listed in a chart at paragraph 13 of the Consultation Paper. Under "Key activity", the Consultation Paper also outlines the projects to be undertaken by various BMA departments, e.g., Banking, Trust, Corporate Service Providers and Investments, Anti-Money Laundering and Insurance Supervision departments. The BMA intentionally published a summary of its analysis and rationale rather than publish the more detailed findings in the underlying records.

Applicant's submissions

23. The Applicant submitted that the requested records do not contain information that is of significance which, if disclosed, would endanger Bermuda or other countries' security or reveal information regarding licensed entities or their individual oversight.
24. The Applicant further explained that the BMA provides information to the general public on a regular basis. The PATI request is asking for records containing information that employees would provide in their normal course of business.
25. The Applicant also argued that the BMA's claim that section 37(1) of the PATI Act prevents it from disclosing any information regarding its operations, is not appropriate.

Discussion

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

26. As explained in Decision 05/2017, Bermuda Monetary Authority, at paragraph 27, the Information Commissioner is satisfied that section 31(1) of the BMA Act is a statutory prohibition on disclosure within the meaning of section 37(1) of the PATI Act.

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

27. Section 31(1) of the BMA Act reads:

Except in so far as may be necessary for the due performance of his functions under the Act or other statutory provisions, 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.

28. As noted above in paragraph 22, the records responsive to items 1, 3 and 4 involve more detailed analysis of the information presented in the BMA's Consultation Paper about the BMA's staffing needs and the proposed approach to meeting those needs, including the fee increases. These matters relate to the affairs of the BMA.

29. The records responsive to items 1, 3 and 4 are part of the records underlying the Consultation Report. The Information Commissioner agrees with the BMA that these underlying records came to the knowledge of the BMA in the course of fulfilling its duties under section 3(1)(b) of the BMA Act to regulate financial institutions. The Consultation Paper itself explains in paragraphs 8-12:

8. The Authority has recognised that, in order to maintain its capability to meet ever more demanding international standards and expectations for financial supervisors, and continue to deliver on its strategic objectives while it faces the increasing complexities characterising the supervised sectors, it needs to further enhance its operations and augment its supervisory resources to support key activities.

9. As part of its strategic response to the above, the Authority undertook a comprehensive target operating model (TOM) review with the assistance of an international management consulting firm. The result of this review was a multiyear plan to effect improvements in the organisation and operations of the BMA. In keeping with the plan developed, the Authority has already begun to implement changes to the way we work and the way we are organised to align the Authority's human capital and business procedures with its changing strategic priorities.
10. One important aspect of the TOM review involved an analysis of the BMA's structure and staffing levels, and an examination of the costs related to supervising different elements within all sectors of the financial services community. As part of this analysis, the external consulting firm conducted an independent third-party benchmarking exercise in which they studied peer jurisdictions to ascertain the fees charged for comparable supervisory activities to those performed by the Authority, in addition to reviewing the staffing levels needed to effectively perform these activities.
11. The report produced as a result of the benchmarking exercise highlighted that human and financial resource levels within the Authority are below expected levels given the organisation's continually expanding mandate and what it will need to achieve in the future.
12. Based on the TOM review performed, the Authority has determined it will require up to 39 additional full-time employees by 2020 to continue to effectively discharge its duties. It is proposed that these new employees be added in a phased manner over the course of 2019 and 2020. . .
30. Although the Applicant argues that disclosure of the requested records would not endanger Bermuda or other countries' security or reveal information about the entities that the BMA oversees or the BMA's oversight, this is not the test under section 37(1) of the PATI Act.
31. Once a public authority properly identifies a statutory prohibition on disclosure, the query is whether the requested records fall within that particular statutory provision.

Here, section 31(1) of the BMA Act does not require the BMA to show that disclosure of the requested record would cause the harms the Applicant discusses. Regardless of whether from a policy perspective disclosure would or would not be warranted, section 31(1) of the BMA Act allows the BMA to maintain the confidentiality of the requested records, which came to its knowledge while fulfilling its duties as a financial regulator.

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

32. Section 31 of the BMA Act has a number of gateway provisions that allow disclosure of BMA records in certain circumstances. Most of these circumstances are not applicable in this case. Specifically, some provisions refer to disclosure of records to specific entities, e.g., the Financial Intelligence Agency or the Registrar of Companies, or permit disclosure for specific purposes, e.g., the prevention, detection, investigation and prosecution of crimes. The only gateway provision that might be applicable is section 31(1AA)(c) of the BMA Act, which allows disclosure if the relevant information is or has been available to the public from other sources.
33. As the BMA explained, it set out in the Consultation Paper some of the information that the Applicant seeks. The BMA also explained that the Consultation Paper provided a high-level summary of this information, and the BMA has not disclosed the more detailed information in the requested records. The requested records do not fall within the gateway to public disclosure in section 31(1AA)(c) of the BMA Act.

Conclusion

34. The Information Commissioner is satisfied that the BMA was justified in relying on section 37(1) of the PATI Act to deny access to records responsive to items 1, 3 and 4 because their disclosure is prohibited by section 31(1) of the BMA Act.

Non-disclosure of the existence of a record – section 38(1)

35. Section 38(1) of the PATI Act allows a public authority to refuse to disclose whether a record exists. Similar provisions in other public access laws are referred to as ‘neither confirm nor deny’ provisions.⁴

⁴ See, for example, Decision 116/2019, Mr N and Fife College (Scottish Information Commissioner), available at <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900468.aspx>.

36. A public authority can rely on section 38(1) when the record, if it existed, would fall within an exemption and disclosure of the existence or non-existence of the record—as opposed to its contents—is not required by the public interest.
37. In considering whether a public authority’s reliance on section 38(1) is justified, the analysis begins by considering whether such a record is or would be exempt under another provision of the PATI Act, if it exists or were to exist. In actuality, however, the record may or may not exist. When relying on section 38(1), it is this fact of existence or non-existence that is being withheld from the public.
38. Even if the content of the record may not be subject to disclosure because it is exempt or would be exempt if it existed, the balance of the public interest may require a public authority to acknowledge whether or not the requested record exists.
39. To rely upon section 38(1) to refuse to disclose the existence or non-existence of a record, a public authority must consider the following questions:
 - [1] If the record exists or were to exist, would it fall under any of the exemptions in Part 4 of the PATI Act?
 - [2] If so, is disclosure of the existence or non-existence of the record in the public interest?
40. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying section 38(1).

Public authority’s submissions

41. The BMA invoked section 38(1) to refuse to confirm the existence or non-existence of records responsive to item 2 relating to an analysis of the staffing needs by Bermudian or non-Bermudian status (**Bermudian analysis**). The BMA submitted that if records responsive to item 2 exist or were to exist, they are or would be exempt under section 37(1) of the PATI Act, because their disclosure is or would be prohibited by section 31(1) of the BMA Act.
42. The BMA further urged that disclosure of the existence or non-existence of records responsive to item 2 is not in the public interest. The BMA explained that the key stakeholders were apprised of the rationale for the increase in hires. Parliament and other appropriate bodies also scrutinised the policy rationale for the additional hires and subsequent fee increase. Further, Parliament made the final decision concerning the increase of fees to support the hiring of additional staff. Consequently, no other

person should have access to the analytical information—if it exists or were to exist—used by the BMA in establishing positions to support its regulatory activities.

43. The BMA also submitted that the public interest factors set out in regulation 2 of the Public Access to Information Regulations 2014 (**PATI Regulations**) are not applicable in this case. The BMA reasoned it is inappropriate to consider subsections (a) to (f) of the PATI Regulations because the BMA is an independent body and not part of the Government of Bermuda and the regulations refer to “government”. Subsection (h) is irrelevant in this case. The BMA finds subsections (g) and (i) are inapplicable because none of the information for the rationale for the increase in staff amounts to misinformation nor was it untrue, incomplete or misleading. The BMA again emphasised that Parliament and other Government stakeholders reviewed the rationale for the increase in staff.

Applicant’s submissions

44. The Applicant is certain that the recruitment plan records held by the BMA include an analysis on whether the additional staff would be Bermudian or non-Bermudian, but did not provide a basis for this certainty. The Applicant argued that section 38(1) of the PATI Act has no relevance in this case. Finally, the Applicant urged that the disclosure of this information is in the public interest.

Discussion

45. When section 38(1) is under consideration, the Information Commissioner must ensure that her decision does not confirm one way or another whether the requested records actually exist. This means that she is unable to comment in any detail on the BMA’s reliance on the exemption in section 37(1) of the PATI Act, or on any other matters which would have the effect of indicating whether the records actually exist.
46. Also, this decision summarises the arguments presented by the Applicant, who believes the BMA holds the requested records. It should not be understood from the Applicant’s submissions that the Applicant is necessary correct in that view.

[1] *If the record exists or were to exist, would it be exempt under any of the provisions in Part 4 of the PATI Act?*

47. The BMA relies upon section 37(1) of the PATI Act and has identified section 31(1) of the BMA Act as the relevant statutory prohibition on disclosure. The questions that must be considered for section 37(1) of the PATI Act are set out in paragraph 15, above, and the Information Commissioner has recognised that section 31(1) of the BMA Act is a statutory prohibition on disclosure under section 37(1) of the PATI Act as explained in paragraph 26 above.
48. If records responsive to item 2 existed, the records would be included in those underlying records to the Consultation Paper which contain the staffing analysis. The records would therefore fall within section 31(1) of the BMA Act under the same reasoning as above.
49. Finally, if the records responsive to item 2 existed, they would not fall within any of the gateways in section 31(1AA) of the BMA Act for the reasons outlined in paragraphs 32-33 above.
50. Accordingly, if records responsive to item 2 exist, these records would fall within the exemption in section 37(1) of the PATI Act.

[2] *Is disclosure of the existence or non-existence of the records in the public interest?*

51. The Information Commissioner is not persuaded by the BMA's arguments that the public interest does not require acknowledgement of whether or not records responsive to item 2 exist. As an initial matter, the BMA appears to emphasise the fact that the public interest factors listed in regulation 5 of the PATI Regulations reference "government". Regulation 5 states that it is a non-exhaustive list, and therefore serves to illustrate only some of the factors that any public authority, including the BMA, should properly consider when evaluating the balance of the public interests.
52. The BMA highlights that particular stakeholders were advised of the rationale for the staffing increase and it has published its Consultation Paper, but neither of these points addresses the public interest in disclosure of the existence or non-existence of records responsive to item 2. The question here is not whether the content of records responsive to item 2 should be disclosed, but whether disclosure of the existence or non-existence of those records is in the public interest.
53. The question of a Bermudian analysis in the recruitment and succession plan for any public authority is a topic of widespread public discussion and impact, particularly with respect to critical public authorities such as the BMA. Although the BMA has correctly asserted that section 37(1) would exempt the content of any such records

underlying its Consultation Paper, there is a strong public interest in knowing whether records concerning a Bermudian analysis exist or do not exist as part of the BMA's analysis of its staffing needs, recruitment and succession planning.

54. Finally, in the face of a strong public interest supporting disclosure, it is difficult to identify a countering public interest in the non-disclosure of the existence or non-existence of these records.

Conclusion

55. The Information Commissioner is not satisfied that the BMA justified its reliance on section 38(1) because the public interest requires disclosure of the existence or non-existence of the records responsive to item 2 of the PATI request.

Conclusion

56. The Information Commissioner is satisfied that records responsive to items 1, 3 and 4 are exempt under section 37(1) of the PATI Act because they fall within the statutory prohibition on disclosure in section 31(1) of the BMA Act.
57. The Information Commissioner is not satisfied that the BMA has justified its reliance on section 38(1) of the PATI Act to refuse to confirm the existence or non-existence of records responsive to item 2 of the PATI request.

Decision

The Information Commissioner finds that the BMA justified its reliance on the exemption in section 37(1) of the Public Access to Information (**PATI**) Act 2010 to deny access to records responsive to items 1, 3 and 4 of the PATI request. The Information Commissioner also finds that the BMA did not justify its reliance on section 38 of the PATI Act with respect to item 2 of the PATI request because the public interest requires disclosure of the existence or non-existence of any records related to an analysis of the BMA's need for staffing increases based on Bermudian or non-Bermudian status.

In accordance with section 48 of the PATI Act, the Information Commissioner affirms the BMA's reliance on section 37(1) of the PATI Act for items 1, 3 and 4 of the PATI request. The Information Commissioner further reverses the BMA's reliance on section 38(1) of the PATI Act for item 2 and orders the BMA to provide an initial decision disclosing the existence or non-existence of records responsive to item 2 and processing the request in accordance with the PATI Act, as directed by this Decision and the accompanying Order **on or before Monday, 5 October 2020**.

Judicial Review

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 in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the BMA fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez
Information Commissioner
24 August 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Public interest test

- 21 For the purposes of this Part, the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

Disclosure prohibited by other legislation

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

...

Non-disclosure or existence of a record

- 38 (1) A public authority may refuse to disclose whether a record exists if the record itself, if it exists or were to exist, is or would be an exempt record.
- (2) The existence or non-existence of a record shall be disclosed if disclosure of it is in the public interest.

Public Access to Information Regulations 2014

Interpretation

- 2 In these Regulations—

...

“public interest” means but is not limited to things that may or tend to—

- (a) promote greater public understanding of the process or decisions of public authorities;
- (b) provide reasons for decisions taken by the Government;
- (c) promote accountability of and within the Government;

- (d) promote accountability for the public expenditure or the more effective use of public funds;
- (e) facilitate public participation in decision-making by the Government;
- (f) improve the quality of services provided by the Government and the responsiveness of the Government to the needs of the public or of any section of the public;
- (g) deter or reveal wrong-doing or maladministration;
- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority.

Bermuda Monetary Authority Act 1969

Secrecy

31 (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 the 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—

...

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

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