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Confidentiality in the BVI: What records are available?

Despite the popular myth of the secrecy of BVI companies, the reality on the ground paints a different picture. Comprehensive details of ownership and other information are available, especially to the victims of fraud and those seeking to trace assets. In addition, the record keeping obligations applicable to BVI companies are broad and continually evolving to keep ahead of global regulatory initiatives. This article outlines the records that BVI companies are obliged to keep and how they can be accessed.

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Confidentiality in the BVI

What is the law on confidentiality and data protection in the BVI?

There are no rules or obligations on banking secrecy or data protection in the BVI. Instead, rules on confidentiality fall back on English common law principles, which the BVI courts observe as a result of the fact that the BVI is an Overseas Territory of the UK.

Under common law principles, a duty of confidentiality will be imposed in three primary circumstances:

- (a) where there is an agreement between the parties that information should be kept confidential;
- (b) where the relationship between the parties is one which the law imposes a duty of confidentiality with respect to; and
- (c) where the nature and circumstances of the person obtaining the information make it such that the law will require that they keep the information confidential.

In general terms, and with the exception of expressly agreed confidentiality agreements, information will only be held to be

confidential where it has a 'necessary quality of confidence' about it. Understanding this is not easily and suffice to say that, in broad terms, only information which is not in the public domain or else readily accessible by the general public will fall into this category.

Confidentiality agreements and obligations

As an exception to the position above, agreements between parties to treat information as confidential will generally be observed by the courts so long as the agreement is enforceable as a matter of the law of contract. However, once information has become public that may change the effect of a breach or threatened breach of a confidentiality clause. The courts will not normally issue an injunction to prevent breach of a confidentiality clause where the information is ostensibly no longer confidential. Similarly, although breach of the clause will ordinarily sound in damages, if the information is public in any event, it may be difficult for the claimant to establish loss.

BVI Business Companies

What ownership and governance documents must a BVI company maintain publicly and privately?

The BVI Business Companies Act 2004 (the **BVIBCA**) provides that the Memorandum and Articles of Association of a BVI company must be held publicly with the Registrar of Corporate Affairs. Effective 1 April 2016 the BVIBCA requires registers of directors to be held centrally with the Registry. Further information such as share registers may be held with the Registry, though the practice has been that such documents are instead held solely with the company's registered agent or company secretary.

In addition, it is a mandatory requirement under anti-money laundering laws in the BVI for registered agents, all regulated by the BVI Financial Services Commission (**BVIFSC**), to maintain up to date KYC information on directors, shareholders and beneficial owners of BVI companies. In the event of a request for information on beneficial owners of a BVI company from the competent authorities a registered agent will have no more than seven days in which to provide the authorities with such KYC documents. Failure to deliver the information can result in severe levies being imposed on such agents, including ultimately the revocation of operating licences issued by the BVIFSC.

What is the law on keeping and retaining records?

The BVIBCA requires every company to keep "records and underlying documentation". Such records and underlying documentation may be kept at the office of its registered agent or at such other place or places, within or outside the BVI but if not kept at the office of the registered agent, a record of the location where they are kept must be given to the registered agent. Every BVI company must retain the records and underlying documentation for a period of at least five years from the date of completion of the transaction to which the records and underlying documentation relate; or the company terminates the business relationship to which the records and underlying documentation relate.

Records and underlying documentation of the company should be in such form as would be sufficient to show and explain the company's transactions; and will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

What records and documents must be kept by companies and what is the minimum standard?

The nature of records and documents to be kept depends on the business undertaken by the company. A holding company with very few transactions must keep the underlying documentation of those transactions (invoices, contracts and similar documents) but provided that the financial position of the company could

promptly be determined from those documents would not generally have to do much more than that. A trading company, on the other hand, which enters into many transactions, would need to keep both the underlying documentation and accounting records which would enable it to determine the financial position of the company. There is no prescribed form for those accounting records but they typically would include general ledger entries and a cash book as a minimum. What is clear is that there is no statutory or regulatory requirement to produce financial statements although, of course, many companies will choose to do so in the interests of their stakeholders.

What document retention policies should be adopted by BVI companies?

The directors of a company will need to ensure that the company complies with its obligations under both the BCA. Most notably, companies are subject to a requirement to retain records for at least five years. In practice, of course, since the limitation period for most actions under contract law is six years it has always made sense to retain records despite the previous absence of any express requirement.

Where are documents located?

In the event that records and underlying documentation of a company are kept at a place other than at the office of the company's registered agent, the company must provide the registered agent with a written record of the physical address of the place or places at which the records and underlying documentation are kept and must know the name of the person holding such records.

Under section 99 of the BCA the records of the company may be kept either wholly or partly as electronic records complying with the requirements of the Electronic Transactions Act 2001. The requirements for electronic record keeping have remained unaffected.

Mutual legal assistance in the BVI

The BVI is a cooperative member of the international community in the fight against financial crime and civil wrongs. Mutual legal assistance is generally offered between countries, including the BVI, in three principle areas in this regard: firstly, in tax matters and investigations, secondly, in investigations into money laundering and other financial crime, and thirdly, in relation to enquiries related to financial services. Other more esoteric areas of inter-government assistance do exist, such as in relation to sanctions-busting investigations or in extradition matters, but those are not considered here.

Tax matters

The BVI adheres to the latest OECD initiatives for the exchange of information in tax matters, most recently in the form of automatic exchange (**AEOI**) under FATCA and the Common Reporting Standard (**CRS**), BVI being an Early Adopter. In addition, the BVI has negotiated 27 bilateral tax information exchange agreements (**TIEAs**) with foreign countries. It is also a party to the OECD's multilateral Convention on Mutual Administrative Assistance in Tax Matters (the **Convention**) that covers 94 countries and territories from around the world, many of which have not negotiated a bilateral TIEA with the BVI.

In accordance with the requirements of the TIEAs or the Convention, requests for information are sent by overseas authorities to the BVI Financial Secretary. The Secretary delegates the administration of processing such requests to the BVI International Tax Authority (the **ITA**). The ITA's remit is governed by the BVI Mutual Legal Assistance (Tax Matters) Act 2003 (**MLAT**). The MLAT is the corner-stone legislation governing exchange of tax information by the BVI authorities with the outside world from FATCA and CRS through to TIEAs and the EU Savings Tax Directive.

Anti-money laundering and financial crime

The principal body dealing with financial crime in the British Virgin Islands is the Financial Investigation Agency (the **FIA**). The FIA is the financial intelligence unit – FIU – for the BVI and is regulated by the Financial Investigation Agency Act 2003. The FIA is vested with significant powers under the Proceeds of Criminal Conduct Act 1997. The criteria for cooperation of the FIA with overseas authorities is subject to significant discretion under the legislative framework although in general the FIA will engage with equivalent FIUs which are members of the Egmont Group of FIUs and on the basis of reciprocity.

Financial services investigations

Finally, the BVI Financial Services Commission, the principle regulatory authority in the jurisdiction, may accept requests for information or documentation exchange from equivalent overseas authorities under the section 32 of the Financial Services Commission Act 2001. These are known as **Section 32 Notices** and are requests to produce information and/or documents from any persons engaged in, or related to, any financial services business.

A Section 32 Notice can be sent to any person over whom the FSC has jurisdiction and may specify: the information or type of information required; the documents or types of documents required; the place where, and the period within which, the information or documents should be produced; the format in which the information or documents are to be sent; the person to whom information and/or documents should be provided to; or that any information provided be verified or authenticated in such manner as the FSC may require.

For more information please contact:

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