

# What documents and information can a third party obtain for a BVI company?

Last reviewed: January 2023

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One of the factors that makes the British Virgin Islands (**BVI**) an attractive place in which to incorporate a private company is that a BVI company may keep documents and information about its ownership, management and financial affairs confidential if it wishes to do so.

Although confidentiality is desirable from the company's perspective, it means that only limited documents and information about the company are publicly available. This guide examines the documents and information about a BVI company (which is not a regulated person) that a third party can obtain from public and third party sources.

## Why seek documents or information?

The main reasons why a third party may want to obtain documents or information about a company are to:

- carry out due diligence on the company before entering into a transaction with it;
- carry out due diligence on the company before buying or merging with it;
- find out about the company's ownership, management or financial position in connection with litigation or potential litigation; or
- trace the company's assets in connection with a claim or potential claim.

## What documents and records must a company keep?

The documents and records that a company must keep under the BVI Business Companies Act, 2004 (as amended) (the **Act**) include:

- its memorandum and articles of association (the **M&A**);
- a register of directors which sets out details about its directors;
- a register of shareholders which sets out details about its shareholders, including the nature of any voting rights (unless included in the M&A);
- a register of charges which sets out details about any security created by it over any of its assets;
- a copy of each notice or other document filed by it with the BVI Registrar of Corporate Affairs (the **Registrar**) in the previous ten years;
- minutes of all meetings, and all written resolutions, of its shareholders or any class of them;
- minutes of all meetings, and all written resolutions, of its directors or any committee of them;
- an annual financial return (**Annual Return**) (which shall contain such information and be in such form as may be prescribed by relevant regulations)<sup>1</sup>; and

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<sup>1</sup> This requirement to file Annual Return under the Act shall not apply to (a) a listed company; (b) a company that is regulated under a BVI financial services legislation and provides financial statements to the FSC under that legislation; or (c) a company that files its annual tax return with the BVI Inland Revenue Department with accompanying financial statements.

- records and underlying documents (including accounts and records like invoices, contracts and similar documents) that are sufficient to show and explain its transactions and enable its financial position to be determined with reasonable accuracy at any time.

A company must keep the original or a copy of each document or record mentioned above at the office of its registered agent, or at its registered office, in the BVI other than:

- shareholder and director meeting minutes and written resolutions; and
- records and underlying documents,

but if the originals or copies are not kept at the office of its registered agent, the company must give its registered agent written notice of the location where the originals are kept and (in the case of records and underlying documents) the name of the person who maintains and controls them.

A company must file its Annual Return with its registered agent<sup>2</sup> within nine months after the end of the calendar year (or, if the company's financial year is not a calendar year, the company's financial year). The requirement for a company to comply with its Annual Return obligations is one of the conditions to maintaining 'good standing'. Failure to file an Annual Return could also lead to a fine of up to US\$5,000. See 'Registered agents' below for more details of this requirement.

For more information on the documents and records a BVI company must keep, refer to our guide '[What documents and records must a BVI company keep?](#)'.

### **Confidentiality**

In general, only the company, its registered agent, or any person authorised in writing by the company shall have access to the company's registers.

Though filed with the Registrar, save for the list of director names (see 'What documents and information are publicly available? – General information' below), unless the company elects to make the register of directors publicly available, the register itself will remain confidential and will not be available for public inspection, except on an order of the High Court, or on a written request by a competent authority.

If a company elects to make its register of directors or register of shareholders public, the registers may be inspected by the public by carrying out a company search on VIRRGIN<sup>3</sup> (**company search**), the BVI Financial Services Commission's (FSC) internet based information network, which is only accessible by account holders. See 'What documents and information are publicly available?' below for more details on information that can be obtained from a company search.

A company's registered agent is bound by a duty of confidentiality and, except as noted under 'Disclosure orders' and 'Foreign competent authorities' below, will not disclose to a third party any documents or information relating to the company held by it.

### **What documents and information are publicly available?**

#### **General information**

A company is required to make very few filings under the Act. Consequently, only limited documents and information about the company can be obtained from a search of the records kept by the Registrar by carrying out a company search.

A company search will generally reveal the following information and documents in respect of a company:

- the name and address of its registered agent;
- the location of its registered office;
- its certificate of incorporation and any certificate of change of name;
- its memorandum and articles of association and any amendment to, or restatement of, them;

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<sup>2</sup> Where a BVI company is part of a group of companies that prepares and maintains consolidated accounts, this filing requirement is satisfied if such company: (a) files the consolidated accounts of the group if the consolidated accounts show the accounts of such company; or, in the case of more than one company, acts in accordance with (a) above or makes a single filing which shows the annual returns attributable to each company required to make a filing of annual financial returns under the Act.

<sup>3</sup> Virtual Integrated Registry and Regulatory General Information Network (VIRRGIN).

- its status with the Registrar (which if it is in good standing, will be 'active');
- a list of director names based on the register of directors filed with the Registrar; and
- whether it has paid its annual fee in the current year.

### Other information

A company search may also reveal the following in respect of a company:

- particulars of security for any security created by the company over any of its assets that have been registered under the Act (see 'Optional filings' below);
- a copy of its register of shareholders showing particulars of security created over the company's shares if a shareholder has created security over any of its shares and the company has elected (or has been required by the secured party) to file the register (see 'Optional filings' below);
- a copy of its register of directors if the company elects to make the copy filed with the Registrar publicly available;
- articles of arrangement if the company has entered into an arrangement;
- articles of merger if the company has merged, or proposes to merge, with another company or foreign body corporate;
- a court order sanctioning a scheme of arrangement where the company has entered into a compromise or an arrangement with its creditors and/or shareholders (or any class of them); or
- a notice of appointment filed by a liquidator or receiver.

### Optional filings

A company may elect to file a copy of its register of shareholders with the Registrar. If it does so, it must file an amended register each time any changes are made to the register (including where shares are transferred on the enforcement of security) until it files a notice electing to cease filing changes to the register.

### Security over shares

Where a shareholder creates security over shares in a company, the secured party will typically require the company to file with the Registrar a copy of its register of shareholders that is annotated to record particulars of the security created over its shares by the shareholder. This is often required by the secured party to put third parties that inspect the Register (as defined below) on notice of the secured party's security over the shares.

### Security created by a company

Where a company creates security over any of its assets, the company or the secured party may elect to file particulars of security with the Registrar. If particulars of security are not filed, the security will be valid, but (as mentioned below) its priority under the Act may be affected.

A properly advised secured party will normally file particulars of security itself or insist that the company does so because:

- under the Act, the priority of competing security interests created over the same asset is determined by the date and time on which particulars of security for the security interests were registered; and
- it puts third parties on notice of the security interest and, under the Act, a person is taken to have notice of any particulars of security created by the company that have been registered with the Registrar irrespective of whether they have actually searched the Register (as defined below).

### Certificate of good standing

It is possible for any person with access to VIRRGIN to request the Registrar to issue a certificate of good standing in respect of a company.

The certificate will confirm the following matters in relation to the company:

- its name is recorded in the Register of Companies (the **Register**) maintained by the Registrar under the Act;
- it has paid all fees and penalties due and payable under the Act;

- it has filed with the Registrar a copy of its register of directors which is complete;
- it has filed its Annual Return in accordance with the Act;
- whether, at the date of the certificate:
  - it has filed any articles of merger or consolidation, or articles of arrangement, that have not yet become effective;
  - it is in voluntary (ie solvent) liquidation under the Act;
  - it is in insolvent liquidation, or receivership, under the Insolvency Act, 2003 (as amended);
  - it is in administrative receivership; or
  - proceedings to strike the company's name off the Register have been instituted.

### Eastern Caribbean Supreme Court

The Eastern Caribbean Supreme Court keeps details about legal proceedings brought in the High Court (which includes the commercial division) and the Court of Appeal. A search of these records will reveal, in relation to any legal proceedings involving a company, any:

- claim form;
- notice of appeal; and
- judgment or order given or made in court.

It is also possible to obtain a copy of any other document held by the court with the leave of the court.

### Disclosure order

#### Against whom?

Documents and information held by an agent or a service provider of a company, like its registered agent, bank or broker (a **third party**), are confidential and may not be disclosed without the consent of the company.

However, where a company is involved in a wrongdoing and a third party innocently becomes involved in the wrongdoing, the injured party may apply to the High Court for an order requiring the third party to disclose documents (sometimes called a *Norwich Pharmacal* order) concerning the company held by it.

#### Getting an order

To get a disclosure order, the applicant must first show that:

- a wrong has been, or arguably been, committed by an ultimate wrongdoer;
- there is a need for an order to allow an action to be brought against the ultimate wrongdoer; and
- the third party against whom the order is sought:
  - has become mixed up or involved in the wrongdoing and is not merely a witness or an innocent bystander; and
  - is able, or likely to be able, to provide the documents or information necessary to allow an action to be brought against the ultimate wrongdoer.

The order is discretionary, so once the applicant has satisfied these requirements, the applicant must then show that disclosure is necessary in the interests of justice and proportionate in the circumstances.

### Registered agents

A company's registered agent, in particular, can be a rich source of information about the company. As mentioned above, the company's registered agent keeps copies of documents relating to the company which may include records and underlying documents, details and decisions of its directors and shareholders as well as correspondence and instructions.

As mentioned above, a company is required to file its Annual Return with its registered agent which shall, upon the request of the FSC, provide the FSC or other competent authority with a copy of such Annual Return. However, the registered agent will not be required to file a company's Annual Return with the Registrar and it will not be available to the public. Where a company fails to file its Annual Return in accordance with the Act, the registered agent shall (not later than 30 days after the filing is due) notify the

Registrar in writing of such failure by stating the company's name, the financial year to which the Annual Return relates and the last time such company filed its Annual Return.

In addition, the registered agent is required under the Beneficial Ownership Secure Search System Act, 2017 (as amended) (the **Beneficial Ownership Act**) (except in respect of 'exempt persons' as defined under the Beneficial Ownership Act) to identify and collect specified 'prescribed information' in relation to each 'corporate and legal entity' (**CLE**) for which it acts and the beneficial owners and registrable legal entities of each such CLE (each as defined under the Beneficial Ownership Act) for both beneficial ownership and economic substance purposes. Beneficial ownership information contained in a registered agent's database is not accessible to the public but may be accessed via the beneficial ownership secure search system by one or more authorised designated bodies and certain BVI authorities as provided under the Beneficial Ownership Act. Note that the economic substance information contained in a registered agent's database may only be accessed by the BVI International Tax Authority (**ITA**). For more information on the BVI beneficial ownership and economic substance regimes, refer to our guides '[BVI beneficial ownership legislation](#)' and '[BVI economic substance legislation](#)'.

Where a company is involved in a wrongdoing, its registered agent (by reason of its role in creating and maintaining the company) has been considered by the Court of Appeal<sup>4</sup> as having facilitated the wrongdoing (albeit innocently) and therefore is under a duty to disclose to the injured party documents and information in its possession.

### Foreign competent authorities

The BVI government has entered into a number of arrangements with foreign governments under which it may be required to disclose information about a company to a foreign competent authority. These arrangements include being a party to the Organisation for Economic Co-operation and Development's (**OECD**) multilateral convention on mutual administrative assistance in tax matters and tax information exchange agreements with foreign governments.

The ITA was established to deal with cross-border tax matters that affect BVI entities and the practical aspects of tax information exchange. The ITA established reporting systems to facilitate different information exchange regimes, including reporting obligations under the US Foreign Account tax Compliance Act (**FATCA**), OECD's Common Reporting Standard (**CRS**) and Country-by-Country Reporting (**CbC Reporting**)<sup>5</sup>.

In addition, in appropriate circumstances, the BVI government will provide information about a company to a competent authority in connection with investigations relating to anti money laundering, terrorist financing and other financial crimes or financial services business.

To enable it to meet its international obligations, the BVI government has various statutory powers to require BVI persons (including banks and registered agents) to provide it with the information that is being sought by a foreign competent authority.

### Contacts

A full list of contacts specialising in BVI law can be found [here](#).

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<sup>4</sup> *JSC BTA Bank v Fidelity Corporate Services & Ors* (Appeal No. HCVAP 2010/035, 21 February 2011).

<sup>5</sup> CbC Reporting is to give effect to OECD's Base Erosion and Profit Sharing Action 13.