

Decision Notice

Decision 10/2020: Bermuda Monetary Authority

Contract or memorandum of understanding with Shyft Network

Reference no: 20181025-03

Decision date: 28 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 any contract or memorandum of understanding with Shyft Network Inc. The BMA refused the request in full in accordance with 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 to rely on section 38(1) of the PATI Act because the record, if it exists or were to exist, is or would be exempt under section 37(1) of the PATI Act, and the public interest did not require disclosure of the fact of the existence or non-existence of the record.

The Information Commissioner has varied the BMA's internal review decision to refuse the PATI request in accordance with section 38(1) of the PATI Act on the grounds that the record, if it exists or were to exist, would be exempt under section 37(1) of the BMA Act, and the public interest does not require disclosure of its existence or non-existence.

Relevant statutory provisions

Public Access to Information Act 2010: 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. On 7 September 2018, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Monetary Authority (**BMA**) asking for records related to:

[1] Any contract or memorandum of understanding (**MOU**) between the BMA and Shyft Network Inc. (**Shyft Network**);

- [2] If either exists, the total costs and intended outcome of the services; or
 - [3] Alternatively, if no such record exists, any project that the BMA has agreed to participate in with Shyft Network as an advisor, and the expected cost and outcome.
- 2. 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**).
- 3. On 10 October 2018, the Applicant sought an internal review by the head of the BMA.
- 4. On 24 October 2018, the BMA upheld the refusal for the same reason.
- 5. 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

- 6. 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.
- 7. 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.
- 8. On 5 November 2018, the Information Commissioner's Office (**ICO**) notified the BMA of the Applicant's valid application.
- 9. During the review, the BMA clarified that it was relying on section 38 of the PATI Act to refuse to confirm or deny the existence of a record responsive to the PATI request. The Applicant was informed of the Information Commissioner's acceptance of the BMA's late reliance on section 38 of the PATI Act.
- 10. 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 section 38 of the PATI Act. Only the BMA made submissions.

Information Commissioner's analysis and findings

11. 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. She is satisfied that no matter of relevance has been overlooked.
12. The Information Commissioner strives to provide as full a public explanation of her reasoning and decision as possible. Section 53 of the PATI Act, however, prevents discussion of some matters in a public decision. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

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

13. 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 a 'neither confirm nor deny' provision.¹
14. A public authority can rely on section 38(1) when the record, if it exists or were to exist, is or 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.
15. 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.
16. Even if the content of the record may not be subject to disclosure because it is exempt or would be exempt if it were to exist, the balance of the public interest may require a public authority to acknowledge whether or not the requested record exists.
17. Regulation 2 of the PATI Regulations 2014 provides a non-exhaustive list of public interest factors in favour of disclosure which public authorities should take into account in conducting the public interest test. In addition to these factors, public

¹ 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>.

authorities should consider the purposes of the PATI Act set out in section 2 to further the public's access to public information and transparency to the greatest extent possible within the provisions of the PATI Act.

18. 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?

19. 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

20. The BMA argues that the requested record, if it exists or were to exist, would be exempt under section 37(1) of the PATI Act because its disclosure would be prohibited under section 31(1) of the BMA Act.
21. The BMA also identified the provisions of the BMA Act that establish its relevant functions that are or would be carried out when receiving the requested record, if the record exists or were to exist.
22. Finally, the BMA provided extensive submissions on its consideration of the public interests.

Applicant's submissions

23. As noted above, the Applicant did not make submissions. The Information Commissioner notes that the Applicant is not under any burden to prove the right to access public records.

Discussion

24. 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 record actually exists. 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 record actually exists.

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

25. 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.
26. 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.
27. 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.
28. To rely on section 37(1) of the PATI Act, in turn, a public authority must ask the following questions²:

[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?

29. As explained in Decision 05/2017, Bermuda Monetary Authority, 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.
30. 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.

31. The Information Commissioner has carefully reviewed the submissions from the BMA and is satisfied that if the record exists or were to exist, it would relate to the affairs of the BMA and would have come to the BMA's knowledge in the course of its

² See Decision 05/2017, Bermuda Monetary Authority.

functions under specific provisions of the BMA Act identified by the BMA. Consequently, if the record exists or were to exist, the record would fall within the secrecy provision in section 31(1) of the BMA Act.

32. The Information Commissioner has carefully considered each gateway to public disclosure in section 31(1)(1AA) of the BMA Act, including, for example, section 31(1)(1AA)(c), which allows disclosure when the information is available to the public from another source. If the record exists or were to exist, none of the gateway provisions are or would be applicable.
33. Accordingly, the Information Commissioner agrees with the BMA that if the requested record exists or were to exist, the record would be exempt under section 37(1) of the PATI Act.

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

34. The Information Commissioner notes that the Shyft Network is a company that is generally involved in services that are related to artificial intelligence³, a potential technology that could be used by the BMA in carrying out its regulatory activity.
35. The public does have an interest in understanding, in broad terms, how the BMA operates. The BMA provides a wide range of information on its website and publications for licensees and other stakeholders that is also available to the general public. Students of finance, independent policy analysts, potential new licensees and potential vendors, for example, may have an interest in this information.
36. Since at least 2017, though, the BMA has satisfied this public interest by providing the general public with updates on its consideration of technology in supervision or 'suptech'. As it explained in its 2017 Annual Report, page 5:

One of the topics that will increasingly preoccupy us is the rise of fintech, a subject which was much in the forefront in 2017. The BMA is affected in two primary ways: the need to create a regulatory framework for fintech, and consideration of how technology can help us execute our strategy more effectively.

It's still early days and we are not yet clear where this will lead but we are examining the use of Artificial Intelligence to become a more forward-looking supervisor. Not so long ago, supervisors spent an

³ Information about Shyft Network is available on its website, <https://www.shyft.network/>.

enormous amount of time calculating ratios, and other metrics to benchmark companies and perform risk assessments. Much of this work is now automated, freeing up supervisory resources to spend more time adding value rather than long hours in the back office. Some time-consuming manual analysis of qualitative information will still be required to evaluate risk. Overall, the work product will improve with better technology.

Like the industry we regulate, the BMA prides itself on being innovative. Using technology, we aim to expand our ability to detect issues as they are beginning to develop so that appropriate supervisory measures can be taken before major problems arise.

37. Subsequent BMA Annual Reports continue to update the public on these developments.
38. Although, in general, the public does have some interest in knowing if records related to a specific vendor exist or do not exist, disclosure of the existence or non-existence of records related to a specific vendor, Shyft Network, would provide information that is involved in the core details of how the BMA carries out its regulatory activities, including information that could compromise the security of its systems. The public has an interest in a key financial regulator being able to perform its functions in a secure and effective manner.
39. The Information Commissioner is satisfied that the information the BMA currently publishes sufficiently fulfils the public interest in having a broad understanding of how the BMA operates. The disclosure of the existence or non-existence of a record related to specific vendors under the circumstances of this case is not required.

Conclusion

40. The Information Commissioner is satisfied that the BMA has justified its reliance on section 38(1) of the PATI Act because the requested record, if it exists or were to exist, would fall within the exemption in section 31(1) of the BMA Act, and the public interest does not require disclosure of the existence or non-existence of a record responsive to the PATI request.

Decision

The Information Commissioner finds that the BMA justified its reliance on section 38(1) of the Public Access to Information (**PATI**) Act 2010.

In accordance with section 48(1) of the PATI Act, the Information Commissioner varies the BMA's internal review decision to deny access to the requested record in accordance with section 38(1) of the PATI Act.

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.



Gitanjali S. Gutierrez
Information Commissioner
28 August 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

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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