

How to preserve confidential information in BVI proceedings

How do litigants mitigate the risk of their confidential information becoming public during proceedings in the British Virgin Islands? The Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 (**EC CPR**) apply to proceedings before the BVI Supreme Court. The EC CPR is the primary source of the tools for preserving confidentiality in BVI proceedings.

Are all hearings held in public in the BVI?

EC CPR Part 2 sets out the court's discretion as to where, when and how it deals with cases. It provides that the court may direct a hearing, or any part of a hearing, to take place in private or in public. The default position is that a hearing in the BVI court will proceed in public under principles of open justice and transparency.

Hearings that take place "in chambers" (ie without members of the public present) will be treated as a hearing that took place in public, unless the court orders otherwise.

Which hearings can be held in private?

Unless the court otherwise orders, a hearing will be deemed to have taken place in private where it:

- concerns the welfare of a minor or a person under disability
- is an application by a trustee or a court appointed officer concerning the administration of a trust, asset or an estate
- concerns arbitration

In addition to these specific circumstances, the Court may also direct a private hearing where:

- publicity would defeat the object of the hearing
- it relates to matters of national security
- it involves confidential information where publicity would damage that confidentiality
- it is for a without notice (ie *ex parte*) application
- it considers it necessary in the interests of justice

An applicant seeking to have a matter heard in private bears the burden of displacing the general principle of open justice.

Ex parte hearings

In situations where interim relief is being sought, particularly in cases where there is a risk of dissipation of assets, it is possible to make an application on an *ex parte* basis. The respondent will receive no notice of the application and an application can be granted without hearing from the other side. There is a consequential duty to give full and frank disclosure, essentially presenting the other side's case for them, failing which any order obtained can be set aside.

Does the BVI have a practice of hearing proceedings in chambers?

In chambers hearing are common in the BVI. The default position, noted above, is that hearings in chambers will be treated as public. However, the EC CPR also provides that where a hearing takes place in public, the court is not required to make any special arrangements to enable the public to enter the hearing.

An order made in chambers shall have the same effect as an order made in open court, and a court sitting in chambers shall have the same power to enforce, vary or deal with any such order, as if sitting in open court.

When do hearings generally take place in chambers in the BVI?

Directions hearings or case management hearings typically proceed in chambers, but no categories of hearings must proceed in chambers by default.

What documents filed in court in the BVI are publicly available?

EC CPR 3.13(1) provides that any person has the right, upon payment of the prescribed fee, to inspect and copy the following documents:

- statements of case, being claim forms, statements of claim, defences, counterclaims, ancillary claim forms and defences, replies and any Part 34 further information responses (but not documents filed with or attached to the statement of case)
- notices of appeal
- judgments and orders
- notices of application seeking a remedy (i) before proceedings started, (ii) relating to proceedings in another jurisdiction, (iii) a Norwich Pharmacal order, or (iv) enforcement of an arbitration award

This rule applies to documents filed after 31 July 2023, when the current EC CPR came into force. The prior rules will apply to documents filed before then (which was limited to claim forms, notices of appeal, and judgments and orders).

The EC CPR excludes the following from public inspection:

- documents in proceedings relating to a minor's welfare, a patient or any other person for whose benefit an order has been made protecting them or their identity
- settlement agreements
- documents protected by statute from disclosure or inspection
- documents where an application has been filed to restrict access to the court file is pending

Is it possible to obtain access to any other court documents?

The court may grant leave to inspect and copy any other document upon an application made without notice to the parties. An applicant may ask for the application to be considered on the papers, without a hearing.

Applicants must identify with reasonable precision the documents they seek permission to inspect and lay before the court the grounds upon which inspection is sought. The applicant must establish that it has a legitimate interest in inspecting the documents and must identify the document or class of documents that they wish to inspect. A general request to inspect is not sufficient.

“Sealing” proceedings

If confidentiality needs to be preserved, a party should apply to the court to seal the relevant court document or file, as the situation requires. A “sealing order” prevents court staff from giving the public access to the proceedings. Any person identified in a statement case may similarly apply to restrict access to the court file or documents within it.

Practice Direction No 1 of 2022 - Directions for Effective Use of the Electronic Litigation Portal sets out how sealed cases are to be dealt with on the E-Litigation Portal. Prior to filing a sealed statement of case or application, the party must contact the Registrar to determine the acronyms to be used in place of the parties' names. Once the case has been created on the Portal, the party must contact the Registrar to ask for the entire case to be sealed.

The grant of a sealing application is at the court's discretion. It requires that the court be satisfied that the (i) sensitivity and (ii) confidentiality of the matter merits such sealing. The court may order that a non-party may not inspect any document on the court file, restrict the persons or classes of persons that may inspect the court file, or order that a

person or classes of persons may only inspect the court file that have been edited in accordance with the directions of the court (ie redacted).

All hearings in sealed BVI proceedings are held in private.

Seal and gag orders

The court may also grant seal and gag orders where there are confidentiality and/or privacy concerns. The "seal" part of the order refers to sealing court proceedings, ensuring confidentiality by prohibiting public access to the court records. The "gag" aspect of the order restrains parties involved from disclosing the existence or details of the proceedings to prevent "tipping off" any third party. Essentially, a seal and gag order is designed to maintain the confidentiality of legal proceedings and sensitive information related to a case, particularly in situations involving investigations, fraud, or the discovery of hidden assets.

Although gagging orders can be difficult to police, they offer comfort in that any breach of the order has serious consequences. The party breaching the order may be held in contempt of court and may be held liable for any loss it causes by tipping off the third party.

Accessing documents in a sealed court file

The test when considering an application to access documents in a sealed court file is whether it is in the interests of justice for the seal to be maintained without a higher requirement for "necessity". For example, the court will maintain the seal where the documents were expressly provided on a confidential basis (*Jeremeieva v Eстера Corporate Services BVI Limited* BVIHCM 118/2017 (4 April 2019)).

What if the parties want to keep a settlement secret?

Settlement agreements are now expressly excluded from documents available for inspection by non-parties under the EC CPR. Generally, parties will use a "Tomlin" order, by consent, to keep the terms of a court-ordered settlement confidential. Tomlin orders typically refer to the existence of a confidential settlement agreement but do not exhibit the agreement itself. It should be noted that the fact of the settlement itself would still be publicly accessible information indicated in the court order.

If parties want to avoid public court proceedings, are there other dispute resolution mechanisms that can be used?

Proceedings started according to the BVI Arbitration Act 2013 will proceed confidentially. Whether the parties have an automatic recourse to arbitration and the preferred (i) seat and (ii) law of the arbitration are likely to be determined by the underlying document that governs their legal relationship.

Privilege

Privilege attaches to certain documents in BVI proceedings. The following two types of privilege may be relied upon to preserve confidentiality:

- **Legal advice privilege.** This covers confidential communications between a litigant and their legal practitioners made to give and receive legal advice.
- **Litigation privilege.** This privilege is broader in practice and covers confidential communications between a litigant and their legal practitioners, professional advisers and other third parties when the dominant purpose of such communications is actual or reasonably contemplated litigation.

Disclosed documents

Once a document has been read to or by the court, or referred to in open court, the generally rule is that any party may use it outside of the proceedings in which it was disclosed. For confidential documents, a party may apply for an order restricting or prohibiting the use of any disclosed document.

Conclusion

There are several ways in which a BVI litigant can preserve confidentiality during BVI proceedings. One of the most effective ways to preserve confidentiality is to apply to “seal” the court file to prevent public inspection of the court file and attendance at court hearings.

Clients seeking to commence BVI litigation proceedings discreetly and confidentially should seek urgent advice on how to issue such proceedings in line with this objective. Reach out to us if you have a specific question you would like answered.

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