



GOVERNMENT OF THE
VIRGIN ISLANDS



FACTS ABOUT **Discretionary Powers** **Policy Guide** IN THE VIRGIN ISLANDS



SCAN ME
FOR POLICY



What is a legal Discretionary Power?

The term discretion means the freedom to choose between courses of action. The essence of discretion is that the decision maker is not bound by any rule to reach a specific result, but is clearly given a choice as to outcomes, which include the possibility of not acting at all.

A legal discretionary power refers to when a statute provides a Minister, public official or authority with the authority or capacity:

- to choose between various competing options;
- to establish broad standards and guidelines for achieving the selected options;
- the ability to vary the broad standards and guidelines in appropriate circumstances to attain the chosen objective; and
- a recognition that he has the requisite authority to create and vary the broad standards and guidelines within the legal and political environment.

Discretionary powers in law are often conferred by the use of the word **“may”**. Other language that may be used to confer discretionary powers in law include the following:

- if the Minister in any case so directs;
- if the Minister is authorised;
- if the Minister is satisfied; or
- it shall be lawful for the Minister.

Why are legal Discretionary Powers Necessary?

Government is often directly involved in or is expected to step in to help solve all kinds of complicated problems in everyday life, from employment and education to healthcare, the environment, transportation and more. However, the legislature lacks the capacity to legislate on every matter to deal with all those issues effectively and efficiently. It has therefore become necessary for the Legislature to confer discretionary powers on Ministers, public officials, or authorities to enable such officials to use a non-rule-based system or mechanism (the exercise of discretion), which has the necessary and requisite flexibility to handle the myriad of issues associated with the growth of the modern state.

What are some examples of Discretionary Powers in BVI Law?

The following is an example of discretionary powers under legislation in the Virgin Islands:

Telecommunications Act, 2006 (No. 10)

Section 15 (3) – The Commission may grant or refuse any application for a licence based on applicable policies and Regulations.

Land and House Tax Act (Cap. 207)

Section 13 – It shall be lawful for Cabinet to

- (a) remit the whole or a part of any tax payable under the provisions of this Ordinance in any case where he is satisfied that it shall be just and equitable to do so.

Physical Planning Act 2004

“The Authority may

- (a) grant development permission unconditionally;
- (b) grant development permission subject to such conditions as it thinks fit; or
- (c) refuse development permission

In case of (b) or (c) the Authority must give a statement of the reasons for the determination within sixty days”.

S32(1) On the advice of the Authority and Chief Planner, and with the agreement of any other Government authority who may be party to the agreement, the Minister may enter into an agreement containing such terms and conditions as he thinks fit...

What to understand about the proper administration of discretionary powers?

When administering discretionary power, it is critical that it is well defined, appropriately controlled and has safeguards devised and introduced in government to minimize its abuse. Such systems are to be structured with enforceable checks and balances to forestall or mitigate the risk of corruption, malpractices, and abuse of power in the discharge of public duties. Unlawful, unsound, or arbitrary decisions expose the decision

maker to legal challenges, including criminal proceedings. A key principle in the lawful exercise of discretionary powers is that Ministers may not always take action personally. Therefore, it is both expected and legally permissible for senior designated officials to exercise these powers, unless the law requires otherwise.

How should discretionary decisions be made?

The policy provides extensive guidance on how to make proper and legal discretionary decisions. The exercise of discretion should not violate or be contrary to any statutory provision. This means that other relevant legislation may need to be considered during the decision-making process.

The exercise of discretion should be within the decision maker's authority whether the source of the power is a statute or regulation empowering the decision maker to decide.

The 10-step approach below is provided to give brief insight into what to consider during the discretionary decision-making process.

10 Steps to Making a Discretionary Decision

When making a discretionary decision there are 10 key steps that public officers can take to ensure transparency, accountability and integrity in the decision-making process. The steps taken below are adapted from "Exercise of Discretion in Administrative Decision-making" Ombudsman Western Australia, Oct 2009.

A decision maker needs to:

1. **Ensure that he or she has the discretionary power** – Consult the relevant legislation to determine whether the decision maker has the power to act or to make the **decision**.
2. **Follow statutory and administrative procedures** – A Minister, official or public authority who is conferred with public discretionary power, with discretionary power, must follow the statutory and administrative procedures and policies prescribed by statute. If there are requirements for the exercise of the discretion such as requiring consultation or advertisement of a proposal and to receive and consider submissions before a decision is made, those requirements must be followed.

3. **Gather information and establish facts** – Before the exercise of discretion, it is essential to gather all relevant information and establish the facts. Complementary information may be obtained through inquiries or investigation. This may require the following steps: Review documents; Undertake a site inspection; or seek specialist advice.
4. **Evaluate the evidence** – Evaluate and weigh the evidence to determine the relevant considerations and key facts. A key fact is something whereby the existence or non-existence of the fact can affect the decision.
5. **Apply the standard of proof** -In administrative matters, the standard of proof to be applied is generally ‘on the balance of probabilities’, that is to say: an event or fact is more likely than not to have happened.
6. **Act reasonably and fairly without bias** – When exercising a discretionary power, it is necessary that the decision maker act reasonably and impartially. A decision maker must refrain dealing with matters in which he or she has an actual or from apparent conflict of interest.
7. **Observe the rules of procedural fairness** – Before taking any decision, a decision maker must observe the principle of procedural fairness by providing to everyone who is likely to be adversely affected by the outcome, the opportunity to be heard.
8. **Consider the merits of the case and make a judgement** – Although policies, previous decisions, court and tribunal decisions may exist to guide the decision-making process, it is important that a decision maker consider the matter or still application on its merits and to take a judgement about the matter under consideration. He or she must resist any form of influence.
9. **Keep parties informed of the outcome and provide reasons for the decision** – The parties concerned need to be kept informed in a timely manner of the decision reached and the justifications provided.
10. **Create and maintain the records** – Proper accountability demands the recording of the reasons for any decision, any circumstance and the reasons for not following any established standards and policies. The recording may be made either in

the minutes of proceedings where the decision was taken, in a report on the proposal in which such non-compliance was recommended, or in a file note or memorandum attached to the relevant file.

Can Discretionary Powers be challenged?

The Courts can control the exercise of administrative decisions or executive discretion conferred on Ministers and public officials by statutes or regulations, through a mechanism known as judicial review. The subject of any judicial review is a decision made by a person or body of persons (the decision-maker) which affects another person or body of persons other than the decision-maker him/herself in specified ways identified in the policy guidance for example by altering rights or obligations of that person, which are enforceable by or against him in private law.

How to be informed and involved:

1. Read **A Guide to the Proper and Lawful Exercise of Discretionary Powers in the Virgin Islands** which may be found at the following link: *VI Government Launches Discretionary Powers Policy Guide Government of the Virgin Islands*
2. Become familiar with Ministries and Departments legislative provisions on discretionary powers.
3. Participate in the opportunities to be sensitised and trained on discretionary powers and ethical decision-making.
4. Adequately assist decision-makers in the proper exercise of discretion and seek advice where required.
5. Hold decision-makers accountable for applying the policy's standards and procedural fairness.

The Guide to the Proper and Lawful Exercise of Discretionary Powers in the Virgin Islands was developed to enhance good governance practices and decision-making mechanisms to maintain a culture of transparency, accountability and integrity within the Government of the Virgin Islands.



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