



AUSTRAC policy

Access to AUSTRAC information by non-designated Commonwealth agencies

1. Introduction

From time to time, AUSTRAC receives requests from officials of non-designated Commonwealth agencies for access to AUSTRAC information for the purposes of an investigation or a proposed investigation.

This policy sets out the AUSTRAC Chief Executive Officer's (CEO) approach to requests for release of AUSTRAC information to officials of non-designated Commonwealth agencies in accordance with Part 11, section 129 of the [Anti-Money Laundering and Counter-Terrorism Financing Act 2006](#) (AML/CTF Act).

The policy also provides AUSTRAC's position on circumstances where an official of a designated agency receives a request for certain classes of AUSTRAC information from an official of a non-designated Commonwealth agency for the purposes of an investigation or a proposed investigation. The policy does not cover AUSTRAC's position on the disclosure of AUSTRAC information by an official of a designated agency to a person who is neither an official of another designated agency nor an official of a non-designated Commonwealth agency.

2. Background

AUSTRAC's objectives include fulfilling Australia's international obligations, including to combat money laundering and the financing of terrorism. AUSTRAC seeks to achieve this through two independent but complementary functions: first, as Australia's national anti-money laundering and counter-terrorism financing regulator and second, as Australia's financial intelligence unit.

AUSTRAC contributes to Australia's international obligations by implementing the 40 Recommendations of the Financial Action Task Force and administering the provisions of the [Financial Transaction Reports Act 1988](#) (FTR Act) and the AML/CTF Act.

The Secrecy and Access provisions at Part 11 of the AML/CTF Act provide that the Australian Taxation Office and designated agencies may access AUSTRAC information. 'Designated agencies' are prescribed at section 5 in the AML/CTF Act or specified in the Regulations.¹ Authorisations for designated agencies to access AUSTRAC information are made by the AUSTRAC CEO under section 126 of the AML/CTF Act.

¹ To date, no regulations have been made specifying agencies as designated agencies.

AUSTRAC recognises that not all Commonwealth agencies are 'designated agencies' and therefore certain Commonwealth agencies do not have access to AUSTRAC information for the purposes of performing their role and functions.

Under section 129 of the AML/CTF Act the AUSTRAC CEO can exercise discretion to authorise officials from Commonwealth non-designated agencies to access AUSTRAC information. This policy outlines the framework under which the AUSTRAC CEO considers requests for AUSTRAC information by Commonwealth non-designated agencies.

3. Legal framework

Under the provisions of section 129, an official of a non-designated Commonwealth agency may submit a request to the AUSTRAC CEO for access to AUSTRAC information for the purposes of:

- an investigation of a possible breach of a law of the Commonwealth; or
- a proposed investigation of a possible breach of a law of the Commonwealth.

If an official of a non-designated Commonwealth agency requests access to AUSTRAC information, the AUSTRAC CEO may, in writing, authorise the official to have access to AUSTRAC information for those purposes. The AUSTRAC CEO must state the AUSTRAC information or class of AUSTRAC information to which the non-designated Commonwealth agency officials have access.

A decision to release the AUSTRAC information to a non-designated Commonwealth agency official is at the discretion of the AUSTRAC CEO.

Section 129 of the AML/CTF Act does not permit disclosures of AUSTRAC information to officials of non-designated state and territory agencies.

3.1. Key terms

For the purposes of this policy, all terms used are consistent with the AML/CTF Act.

AUSTRAC information is defined at section 5 of the AML/CTF Act to mean:

- a) eligible collected information; or
- b) a compilation by the AUSTRAC CEO of eligible collected information; or
- c) an analysis by the AUSTRAC CEO of eligible collected information.

A **non-designated Commonwealth agency** means an authority or agency of the Commonwealth that is not a 'designated agency' for the purposes of section 5 of the AML/CTF Act.

An **official** of a non-designated Commonwealth agency is defined in section 22 of the AML/CTF Act. In this section 'official' is given a broad meaning and may also include contractors or consultants.

Subsection 22(1) of the AML/CTF Act defines an official of a designated agency or a non-designated Commonwealth agency as a person who is –

- a. the chief executive officer (however described) of the agency; or
- b. a member or acting member of the agency; or
- c. a member of the staff of the agency; or

- d. an officer or employee of the agency; or
- e. an officer, employee or other individual under the control of the chief executive officer (however described) of the agency; or
- f. an individual who, under the regulations, is taken to be an official of the agency for the purposes of this Act;
and includes
- g. in the case of the Australian Crime Commission—a person who is an examiner of the Australian Crime Commission; and
- h. in the case of a Commonwealth Royal Commission—a person who is:
 - i. a legal practitioner (however described) appointed to assist the Commission;
and
 - ii. a person authorised under subsection (2); and
- i. in the case of a State/Territory Royal Commission—a person who is:
 - i. a legal practitioner (however described) appointed to assist the Commission; and
 - ii. a person authorised under subsection (3).

The term 'official' includes consultants or contractors.

The **functions of the AUSTRAC CEO** are set out at section 212 of the AML/CTF Act. Subsections 212(3) and (4) require the AUSTRAC CEO to have regard to certain matters in the performance of his/her functions under the AML/CTF Act, including the integrity of the financial system, crime reduction, economic efficiency, privacy and certain international obligations (conventions and treaties).

4. Requirements for requests from non-designated Commonwealth agencies

4.1. *Written request*

The AUSTRAC CEO requires that written requests be approved by an official of a non-designated Commonwealth agency at the level of Senior Executive Service officer or its equivalent, unless otherwise agreed to by the AUSTRAC CEO, and where exceptional circumstances exist.

Where a request is submitted by an official of the non-designated Commonwealth agency who is not a Senior Executive Service officer or its equivalent, AUSTRAC will advise the officer of its policy and recommend that the request be approved at the appropriate level and resubmitted.

AUSTRAC has developed a form to be completed by an official of the Commonwealth non-designated agency when making a request to the AUSTRAC CEO for AUSTRAC information in accordance with section 129 of the AML/CTF Act. While it is AUSTRAC's preference that the form be used, other forms of written request will be considered provided the request includes the information required by the AUSTRAC CEO.

4.2. *'Possible breach' of Commonwealth law*

Subsection 129(1) provides that the AUSTRAC CEO may authorise an official of a non-designated Commonwealth agency to access AUSTRAC information for the purposes of an investigation or a proposed investigation of a 'possible breach' of a law of the Commonwealth.

The AUSTRAC CEO will rely on the submissions of the official of the non-designated Commonwealth agency as to the nature of the alleged conduct and why it constitutes a possible breach of a law of the Commonwealth.

In assessing requests for AUSTRAC information by an official of a non-designated Commonwealth agency investigating a possible breach of a law of the Commonwealth, the AUSTRAC CEO may consider the nature, seriousness and scale of the alleged offence or potential criminal activity.

4.3. *Evidence of an investigation*

The AUSTRAC CEO must be satisfied that the request for AUSTRAC information is for the purposes of an investigation or a proposed investigation involving a possible breach of a law of the Commonwealth.

The term 'investigation' for the purposes of section 129 of the AML/CTF Act is not defined. However, it excludes gathering intelligence to identify events or circumstances to warrant an investigation or initiate an investigation.

Accordingly, an official of a non-designated Commonwealth agency requesting access to AUSTRAC information should submit to the AUSTRAC CEO information concerning:

- Details of the breach or possible breach of a law of the Commonwealth and the appropriate legislative provisions.
- Documented evidence that provides the AUSTRAC CEO with confirmation concerning the conduct of an investigation or a proposed investigation(s). This may include a briefing that provides a summary of the alleged breach and how AUSTRAC information will assist an investigation, or an information report or affidavit (as appropriate).
- Details and the nature of the investigative powers (including coercive powers) available to the non-designated Commonwealth agency.
- Details of the involvement of any other designated or non-designated Commonwealth agencies that may be involved or assisting in the investigation.²
- Details of any other entities or agencies, prosecuting and disciplinary bodies that may be the recipients of the AUSTRAC information.
- Details of how AUSTRAC information will assist or contribute to the investigation or proposed investigation.
- Information on the controls that will be applied to prevent unauthorised access to the AUSTRAC information.

² If it is intended that a designated agency (as listed at section 5) is to assist in the investigation or provide support then this may impact on the decision of the AUSTRAC CEO to authorise the release of AUSTRAC information

- Details of any undertakings offered by the official of the non-designated Commonwealth agency (see part 7.2 below).

4.4. *Other matters the AUSTRAC CEO may take into account*

In performing the AUSTRAC CEO's functions, section 212 imposes certain requirements on the AUSTRAC CEO, including the following:

- to consult with those persons, where appropriate, listed at subsection 212(2) of the AML/CTF Act; and
- to have regard to those matters at subsection 212(3) with particular emphasis on crime reduction and privacy.

Where an official of a non-designated Commonwealth agency submits subsequent requests for AUSTRAC information under section 129, the AUSTRAC CEO may also consider any comments or feedback received from an official of a non-designated Commonwealth agency concerning the most recent release (or releases) of AUSTRAC information.

5. Information sharing between designated agencies and non-designated Commonwealth agencies

If the Australian Taxation Office or a designated agency assesses that it is necessary for AUSTRAC information to be shared with a non-designated Commonwealth agency for the purpose of an investigation or proposes investigation, the Australian Taxation Office or designated agency can share the information in accordance with subsection 128(8).

The Australian Taxation Office or designated agency cannot, however, share information regarding Suspicious Matter Reports (SMRs) or Suspect Transaction Reports (SUSTRs). In circumstances where an official of a designated agency has accessed AUSTRAC information under:

- section 41 of the AML/CTF Act (SMRs)
- section 49 of the AML/CTF Act (that relates to information obtained under section 41), or
- section 16 of the FTR Act (SUSTRs)

and the official believes that the matter is relevant to an investigation being conducted (either jointly or singly) by a non-designated Commonwealth agency, the official should not disclose the existence of that AUSTRAC information to an official of the non-designated agency³. In these circumstances, it is AUSTRAC's view that:

- the official of the designated agency should bring the matter to AUSTRAC's attention;
- requests or inquiries for AUSTRAC information concerning SMRs or SUSTRs from an official of a non-designated Commonwealth agency to an official of a designated agency prescribed at section 5 of the AML/CTF Act should not be processed by any official of a designated agency;

³ See subsections 128(8) and 128(9) of the AML/CTF Act.

- and requests made by an official of a non-designated Commonwealth agency for information relevant to SMRs or SUSTRs should be directed to the AUSTRAC CEO. These requests will be considered within the conditions prescribed by section 129 of the AML/CTF Act.

6. Authorisation for disclosure

Subsection 129(3) of the AML/CTF Act provides that an authorisation under subsection (1) must state the AUSTRAC information, or the class of AUSTRAC information, to which the official of the non-designated Commonwealth agency official is to have access.

The authorisation instrument is a separate and distinct document that must be signed by the AUSTRAC CEO. AUSTRAC information cannot be accessed by an official of a non-designated Commonwealth agency unless the AUSTRAC CEO (or delegate) has signed the authorisation.

7. Disclosure

7.1. Restrictions on further disclosure

Section 130 of the AML/CTF Act provides that a person (that is, an entrusted Commonwealth agency official), who is or was an official of a non-designated Commonwealth agency, commits an offence if the official has obtained access to information in a manner set out in subsection 130(4) of the AML/CTF Act, and then discloses that information to another person, and none of the exceptions at subsection 130(3) apply.

Exceptions to the offence are set out in subsection 130(3), as follows:

- where the entrusted non-designated Commonwealth agency official (that is, an official of a Commonwealth agency that is not a designated agency) makes a disclosure in connection with the performance of their duties in connection with the (proposed) investigation and the person to whom the information is to be disclosed has given an undertaking that they will comply with the Information Privacy Principles⁴ contained in the Privacy Act 1988. Disclosure of information obtained under section 41 or section 49 (relating to information obtained under section 41) of the AML/CTF Act, or section 16 of the FTR Act is not authorised under this provision;
- where the disclosure is a communication of AUSTRAC information under section 131. Section 131 provides for the disclosure of AUSTRAC information by a non-designated Commonwealth agency official to another official of the same agency for the purposes of the performance of the second official's duties in connection with the (proposed) investigation, or to a person for the purposes of, or in connection with, (proposed or possible) court or tribunal proceedings connected with the investigation.
- there are limits placed on the person who has AUSTRAC information disclosed to him or her pursuant to subsection 131(3). If the person obtains the AUSTRAC information under subsection 131(3) they can only disclose the information for the

⁴ From 14 March 2014, the Information Privacy Principles will become the *Australian Privacy Principles*.

purposes of, or in connection with the court or tribunal proceedings mentioned in subsection 131(3). Further, disclosure of information obtained under section 41 or section 49 of the AML/CTF Act, or section 16 of the FTR Act is not authorised.

7.2. *Undertakings*

In assessing whether to make a disclosure of AUSTRAC information to an official of a non-designated Commonwealth agency, the AUSTRAC CEO will consider the undertaking(s) made by the official regarding any further disclosure, in particular, a disclosure contemplated by subsection 131(3):

- where the disclosure by the AUSTRAC CEO includes information obtained under section 41 or obtained under section 49 that relates to information obtained under section 41 – an undertaking that such information will not be disclosed in connection with court or tribunal proceedings; and/or
- where the disclosure by the AUSTRAC CEO includes information obtained under section 16 of the FTR Act – an undertaking that such information will not be disclosed in connection with court or tribunal proceedings.

8. AUSTRAC expectations

8.1. *Non-designated Commonwealth agencies*

The AUSTRAC CEO expects that all requests from non-designated Commonwealth agencies will:

- be submitted in writing, addressed to the AUSTRAC CEO and approved by a Senior Executive Service officer or its equivalent of the non-designated Commonwealth agency setting out a business case;
- clarify the nature of the AUSTRAC information sought in accordance with paragraphs 129(1)(a) or (b) – the AUSTRAC information or class of information;
- provide details of the objectives, role and functions of the non-designated Commonwealth agency including relevant legislation administered by the agency;
- specify the relevant legislation under which the non-designated Commonwealth agency operates including reference(s) to the appropriate investigative powers and secrecy and access provisions (if appropriate);
- specify the AUSTRAC information or class of information which the official of the non-designated Commonwealth agency is seeking access from the AUSTRAC CEO;
- specify the alleged or actual breach that is the subject of an investigation and how the AUSTRAC information will assist the non-designated Commonwealth agency;
- provide evidence of the investigation or proposed investigation of a possible breach of a law of the Commonwealth (refer to 4.3 above);
- specify the proposed arrangements by the non-designated Commonwealth agency for the security, integrity and privacy of the AUSTRAC information.

AUSTRAC also expects that officials of a non-designated Commonwealth agency will provide feedback to the AUSTRAC CEO on compliance with the obligations set out in the AML/CTF Act.

8.2. AUSTRAC

A non-designated Commonwealth agency can expect that the AUSTRAC CEO will:

- assess all requests in a thorough and consistent manner using the criteria set out in this policy;
- ensure that each request is considered on its merits;
- provide assistance to a non-designated Commonwealth agency in its request for AUSTRAC information; and
- undertake additional research where appropriate to complement any request for the purposes of assessing the request.