



Australian Government

AUSTRAC

Reference: PIAT-3892

21 October 2021

Mr Frank Lee

Sent by email to: foi+request-7846-789875c4@righttoknow.org.au

Dear Mr Lee,

Freedom of Information Request Decision

The Australian Transaction Reports and Analysis Centre (AUSTRAC) refers to your Freedom of Information request (FOI request) that was received on 9 September 2021, in which you, sought access to documents under the provisions of the *Freedom of Information Act 1982* (FOI Act), that you understood to be held by AUSTRAC.

The documents you requested are:

"I am looking for documents regarding InvestbyBit Pty Ltd (ABN 98 621 652 579), registered with AUSTRAC as a Digital Currency Exchange Provider, and currently operating under the name Binance Australia.

I am looking for the following documents:

- (a) written notices to this company regarding the potential of money laundering/terrorist financing or compliance with AML/CTF law*
- (b) infringement notices for breaches of the AML/CTF Act*
- (c) ML/TF financing risk assessments provided to AUSTRAC*
- (d) audit reports provided to AUSTRAC*
- (e) enforcement actions taken against this company*
- (f) registration actions taken against this company"*

For convenience I have labelled the categories of documents within scope of your FOI request in alphabetical order as above. Searches conducted within AUSTRAC identified **six (6)** documents within scope that respond to categories (a) and (c); there are no documents found that meet the description of documents sought in categories (b), (d), (e) or (f).

I have examined the documents identified to be within scope and have decided to exempt two documents in full and four documents in part on the basis of s 47G and s 22 of the FOI

Act, as relevant (see **Attachment B**).

Section 26 of the FOI Act requires AUSTRAC to provide a statement of reasons in support of a decision. My reason for this decision is set out in **Attachment A**.

The FOI Act provides a number of avenues for review if you are dissatisfied with any aspect of this decision. Your review rights are set out in **Attachment C**.

If you have any questions or require further information, please contact me via email at
info_access@austrac.gov.au

Yours sincerely



Jennifer Ermert

Authorised Decision Maker
AUSTRAC

Enclosures

- Attachment A – Statement of Reasons
- Attachment B – Schedule of Documents
- Attachment C – Review Rights

ATTACHMENT A

Statement of Reasons

I, Jennifer Ermert, am an officer authorised under s 23 of the FOI Act to make a decision in relation to your request. The following is my decision and the reasons for that decision.

Overview

The documents sought by you in this request raise in my mind the question of whether an exemption applies in relation to the disclosure of information contained in the documents, specifically business information relating to InvestbyBit Pty Ltd trading as Binance Australia (hereafter referred to as “the third party”).

In matters where disclosure of business information is in issue, there is a two-step process that I am required by the FOI Act to follow in determining whether to release the documents requested. That process comprises:

- Firstly, determining whether the documents requested are conditionally exempt under s 47G of the FOI Act; and
- Secondly, determining whether giving access to the documents would be contrary to the public interest for the purposes of s 11A(5) of the FOI Act.

Step One: Conditional Exemption under s 47G

I am required to consider whether the release of business information relating to the third party would be unreasonable in the circumstances.

The FOI Act sets out the following:

Section 47G – Public interest conditional exemptions – business

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
- (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional*

affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

- (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*
- (2) *Subsection (1) does not apply to trade secrets or other information to which section 47 applies.*
- (3) *Subsection (1) does not have effect in relation to a request by a person for access to a document:*
 - (a) *by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or*
 - (b) *by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or*
 - (c) *by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.*
- (4) *A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:*
 - (a) *the Commonwealth or a State; or*
 - (b) *an authority of the Commonwealth or of a State; or*
 - (c) *a Norfolk Island authority; or*
 - (d) *a local government authority.*
- (5) *For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.*

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

Consideration of Section 47G

Section 47G(1)(a)

I note in relation to the information under consideration the following facts:

- The information relates to the third party, which is an “organisation” for the purpose of the FOI Act;
- The information under consideration relates to internal business activities of the third party, which fall under “business, commercial or financial affairs” for the purpose of the FOI Act.

This brings the information into consideration under s 47G of the FOI Act. The question, therefore, is whether disclosure of the information “*would, or could reasonably be expected to, unreasonably affect [...] that organisation or undertaking in respect of its lawful business, commercial or financial affairs*”.

AUSTRAC holds particularly high value on business information received for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)* and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) (AML/CTF Rules)*. This includes information of the kind sought. With that in mind, AUSTRAC can be reasonably expected to protect the information it holds, including the information sought.

I have considered all the documents in scope. Except for document 5 which is a reasonably standard letter that AUSTRAC sends to reporting entities it regulates to advise that AUSTRAC intends to conduct an AML/CTF compliance assessment, and which does not otherwise contain specific business information pertaining to the third party and for that reason may be disclosed with redactions applied to information irrelevant to the FOI request, for the other documents in scope I have taken into account the fact that your FOI request did not include any disclosure consent from the third party that would indicate an absence of objection to you being given access to the documents.

Although consent is not a prerequisite for release of government held information captured within a FOI request, consent of the third party to whom the information relates holds

considerable weight in determining the reasonableness of releasing the third party's information to you.

There is no evidence before me to suggest there is any relationship between you and the third party, nor any information that would persuade me that it is reasonable to disclose the third party's information to you in the absence of consent.

Further and more importantly, because the documents in scope relate to the third party's compliance with its obligations under the AML/CTF legislation and its assessment of the ML/TF risks of the designated services it provides that underpins the design and implementation of its AML/CTF program, I consider that disclosure of the documents (other than document 5) would reveal confidential and commercially sensitive information about the processes, systems and controls the third party has to comply with its obligations under the AML/CTF legislation including the underlying ML/TF risk assessments it has conducted.

I consider that disclosing the documents could be reasonably expected to unreasonably affect the third party's lawful business, commercial or financial affairs because if the documents were made public under FOI, it could lead to potential prejudices to the third party such as competitive disadvantage, reputational damage, and/or the prevailing risk for the digital currency exchange sector of de-banking, particularly if the documents were misconstrued out of context or misused for purposes other than that for which the documents were created. Malevolent actors could also use knowledge of the information in the documents to circumvent and undermine the third party's AML/CTF processes, systems and controls and expose the third party's business to increased risk of criminal abuse.

For the reasons set out above, I have decided that the documents sought are conditionally exempt under s 47G(1) of the FOI Act.

Step two: whether giving access to the documents would be contrary to the public interest

Having decided that the documents are conditionally exempt under s 47G(1) of the FOI Act with the exception of document 5, I am required to determine under s 11A(5) of the FOI Act whether access to the documents would, on balance, be contrary to the public interest.

Section 11A – Access to documents on request

Scope

(1) This section applies if:

- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
- (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access – general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects – information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document

(6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:

- (a) conditionally exempt document; and
- (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

Section 11B of the FOI Act sets out factors that are relevant to the determination of whether access to the document would, on balance, be contrary to the public interest for the purposes of s 11A(5) of the FOI Act. It sets out as follows.

Section 11B – Public interest exemption – factors

Scope

- (1) *This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).*
- (2) *This section does not limit subsection 11A(5).*

Factors favouring access

- (3) *Factors favouring access to the documents in the public include whether access to the document would do any of the following:*
 - (a) *promote the objects of the Act (including all the matters set out in sections 3 and 3A);*
 - (b) *inform debate on a matter of public importance;*
 - (c) *promote effective oversight of public expenditure;*
 - (d) *allow a person to access his or her own personal information.*

Irrelevant factors

- (4) *The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:*
 - (a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;*
 - (b) *access to the document could result in any person misinterpreting or misunderstanding the document;*

- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

In relation to the matters sets out in s 11B(3) of the FOI Act as favouring access (set out above), I note the following:

- The release of the documents is nominally in line with the objects of the FOI Act set out in s 3 of that Act. That is, the documents do constitute information held by the Government. However, the information in the documents does not relate to government policy, governance or decision making and therefore has no capacity to advance public participation in government processes, or otherwise subject the Government to increased scrutiny.
- The documents in question are not likely to inform public debate. Whilst recent parliamentary inquiries such as the Senate Select Committee on Australia as a Technology and Finance Centre¹ have examined opportunities and risks in the digital asset and cryptocurrency sector, I do not consider the documents in question would inform public debate on this issue. This is because the documents relate specifically to the third party's AML/CTF compliance and the risk assessments that underpin the third party's AML/CTF program; the documents are not about, and do not bear on, the opportunities and risks of cryptocurrency generally.
- The documents in question do not relate to public expenditure, therefore this consideration is not applicable.
- Access to the third party's business information would not provide the FOI applicant with access to their own personal information.

I also note the following factors that do not favour access:

- There is no evidence before me that indicates there is a relationship between you and the third party such that they would contemplate or agree to AUSTRAC giving you access to their business information.

¹ [Australia as a Technology and Financial Centre – Parliament of Australia \(aph.gov.au\)](http://www.aph.gov.au)

- As discussed at length already in my consideration of s 47G, it is my view that disclosure of the documents could be reasonably expected to unreasonably affect the third party's ongoing business operations insofar as disclosure would reveal details about the third party's AML/CTF processes, systems and controls and the underlying risk assessments. In addition, I consider that disclosure could also reasonably be expected to prejudice the integrity of the digital currency exchange sector. In circumstances where the protection of Australia's financial system from criminal abuse requires AML/CTF efforts by all or at least as many as possible of the players in the system, disclosure of the documents about the third party could create opportunities for malevolent actors to indirectly and adversely affect the broader digital currency exchange sector via exploitation of perceived weaknesses or gaps in the third party's AML/CTF processes, systems and controls.

Weighing up the competing interests

After weighing up all the relevant factors, I consider that giving you access to the s 47G conditionally exempt documents within scope would be contrary to the public interest. I consider that the factors in favour of the disclosure, that the release is nominally in line with the objects of the FOI Act, are not sufficient to support a full disclosure. I consider that greater relative weight should be applied to the factors against disclosure of the requested documents. Crucially, in weighing the factors, I have applied considerable weight to the prospect that disclosure could reasonably be expected to prejudice the future effectiveness of the third party's business operations and have consequential implications for the broader digital currency exchange sector, given the size of the third party's market share compared to other digital currency exchange providers.

Consultation under section 27

For completeness I note that I have not consulted the third party in relation to my decision with respect to the documents subject to s 47G conditional exemption, pursuant to s 27 of the FOI Act.

Under s 27, consultation with the person, organisation or undertaking whose business information is sought is required only if it appears that the person, organisation or proprietor of the undertaking might reasonably wish to make a contention that the document containing the business information is conditionally exempt under s 47G and access to the document would, on balance, be contrary to the public interest.

In the present case, I have decided that all the documents (except document 5) are conditionally exempt under s 47G. Of these, documents 1 and 6 are exempt in full whilst documents 2, 3 and 4 are exempt in part. It is unnecessary to consult the third party with respect to documents 1 and 6 given my decision to exempt those documents in full, and to the extent that I propose to only exempt documents 2, 3 and 4 in part, I do not consider it is necessary to consult the third party (or any other affected entities) with respect to the information contained therein that is proposed to be disclosed, because that information is information which is available publicly already.

Decision

I have decided that s 47G of the FOI Act applies to conditionally exempt the documents in scope, with the exception of document 5 which I have decided may be disclosed with the details of individuals appearing therein redacted under s 22 because that information is reasonably considered to be irrelevant to the FOI request.

Further, I have decided that it would be contrary to the public interest to disclose the conditionally exempt documents. Given I do not propose to give access to the conditionally exempt documents, it is not necessary for me to consult the third party as required under s 27(4) of the FOI Act.

Evidence/Material on which my findings are based

In reaching my decision with regard to the documents in scope, I relied on the following documentary evidence:

- *Freedom of Information Act 1982*;
- Guidelines issued by the Australian Information Commissioner;
- the scope of the FOI request received by AUSTRAC from you on 9 September 2021;
- the documents identified to be within scope of the FOI request.

ATTACHMENT B

SCHEDULE OF DOCUMENTS

Document	Description	Exemption applied
1	Risk Assessment Matrix	s 47G (in full)
2	Blueshyft Risk Assessment	s 47G (in part)
3	Digital ID Risk Assessment	s 47G (in part)
4	Rapid ID Risk Assessment	s 47G (in part)
5	Compliance Assessment Part 1	s 22 (in part)
6	Compliance Assessment Part 2	s 47G (in full)

ATTACHMENT C

Review Rights

The following review rights apply.

Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents. An application for a review of the decision must be made in writing within 30 days of receipt of this letter. No particular form is required; however, it would assist the decision maker if the application grounds on which it is considered that the decision should be reviewed were set out.

Under s 53A of the FOI Act you may have ground for review under s 54 if you can establish that there are other documents held by AUSTRAC which have not been released.

Applications for review of the decision should be addressed to info_access@austrac.gov.au or via mail to:

Australian Transaction Reports and Analysis Centre
Freedom of Information
PO BOX 5516
WEST CHATSWOOD NSW 1515

It is preferred you seek internal review before seeking review of the decision by the Australian Information Commissioner.

Office of the Australian Information Commissioner

One of the three primary functions of the Office of the Australian Information Commissioner is the oversight of the Freedom of Information Act 1982 and review of decisions made by agencies and ministers under that Act. If you are dissatisfied with the result of an FOI request, you may seek an Information Commissioner (IC) review.

IC review applications can be made to enquiries@oaic.gov.au or via mail to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

For further information about IC reviews please refer to the OAIC website.

Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal (AAT) after the OAIC has made a decision. The AAT may also review a decision by the OAIC not to undertake a review. An application must be submitted to the AAT within 28 days of being notified of the decision by the OAIC. The AAT can be contacted on 1300 366 700.

Complaints

If you are not satisfied with the way AUSTRAC has processed your Freedom of Information request, you can complain to the OAIC. A complaint must be made in writing and must identify AUSTRAC as the agency that made the decision. There is no particular form required to make a request, however, the complaint should set out the grounds on which it is considered the action taken in relation to the FOI request should be investigated. Complaints can be made to the OAIC at the address listed above.

For up to date information please visit the OAIC website at <https://www.oaic.gov.au>