



Australian Government

# Fair Work OMBUDSMAN

Our reference: FOI-1061

28 March 2019

Mr Henry Honner

Email: [foi+request-5284-b8662b6a@righttoknow.org.au](mailto:foi+request-5284-b8662b6a@righttoknow.org.au)

Dear Mr Honner

## FREEDOM OF INFORMATION REQUEST

### Consultation Notice under section 24AB of the *Freedom of Information Act 1982*

I refer to your email dated 1 March 2019 containing your request under the *Freedom of Information Act 1982 (Cth)* (**FOI Act**) for information held by the Office of the Fair Work Ombudsman (**FWO**).

#### Scope of request

I confirm you have sought access to -

1. *The number of audits carried out in the hospitality industry annually over the last 10 years by FWO. Annual figures to show any growth or decline in visitation numbers.*
2. *A breakdown of those audits instigated by employee complaints and those conducted randomly as part of normal operations if possible.*
3. *The cost to FWO of carrying out a random audit.*
4. *The cost to FWO of carrying out an average resolution for an employee complaint (in number of labour hours if financial costs are not known).*
5. *Percentage of complaints/underpayments that involved migrant workers over time.*
6. *Percentage of complaints that derived from migrant employers or employers from non-English speaking backgrounds over time.*

#### Purpose of this Notice

I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.

I confirm that my team has made a number of enquiries with several business units within the office of the FWO to understand what relevant documents the FWO holds in relation to your request. The most relevant business unit is the Proactive Compliance team (**Proactive Compliance**). As a result of these enquiries and as detailed further below, I have now formed the view that a practical refusal reason exists within the meaning of section 24AA of the FOI Act.

Subsection 24AA(1)(a) of the FOI Act states that a 'practical refusal' exists if the work involved in processing the request would 'substantially and unreasonably divert the resources of the agency from its other operations'.

If the FWO was to continue processing your request in its current form, we believe that it would take well over 100 hours just to locate and identify all relevant documents. A considerable amount of time (several hundred hours) would then be needed to review all those documents that may number well over 1000, undertake the required internal consultation and then prepare an appropriate decision in accordance with the FOI Act.

The purpose of this notice is to invite you to consider refining the scope of your request if you wish, as part of the request consultation process referred to in section 24AB. If, after the consultation process concludes, the FWO is satisfied that the practical refusal reason still exists, the FWO may refuse to give access to requested information in accordance with section 24A.

### **Why I consider a practical refusal reason exists**

In deciding whether the work involved in processing your request (in its current form) would meet the relevant voluminous threshold, I considered guidance provided by the Office of the Australian Information Commissioner (OAIC) (including Part 3 of the OAIC review decisions), and the FWO's staffing and resources involved in processing information access requests.

The OAIC's FOI guidelines state that practical refusal grounds operate to ensure that the capacity of agencies to discharge their normal functions is not undermined by processing unreasonably burdensome FOI requests. In deciding if a practical refusal reason exists, an agency must have regards to the resources required to perform a number of activities, including:

- identifying, locating or collating documents within the filing system of the agency;
- deciding whether to grant, refuse or defer access;
- consulting with other parties;
- notifying an interim or final decision to the applicant;
- the impact that processing a request may have on other work in an agency, including other information access requests;
- whether there is a significant public interest in the documents requested; and
- other steps taken by an agency or minister to publish information of the kind requested by an applicant.<sup>1</sup>

There is no set number of hours of processing time that determines whether a practical refusal reason exists, but rather each case should be assessed on its own merits and in light of relevant AAT or OAIC decisions. Recent decisions by the Australian Information Commissioner has affirmed decisions by departments and agencies to practically refuse requests when they entail approximately 70 or more hours of work.<sup>2</sup>

The FWO's information access team processes approximately 150 information access requests per annum. Approximately three team members work on information access (including FOI matters) on a full-time basis. On the assumption that if three of our staff members worked 90% of their time on FOI matters over a whole year, we would spend over 5,400 hours on FOI matters. On average, this means the processing time equates to roughly 36 hours per request. We estimate that it would take several hundred hours to process your FOI request in its current form, which is many times longer than an average FOI request.

---

<sup>1</sup> OAIC Guidelines, [3.115]-[3.117].

<sup>2</sup> For in 'NX' and Australian Trade and Investment Commission (Freedom of Information) [2018] AICmr 18 (2 February 2018), a practical refusal decision was issued for an FOI request involving an estimated further 63 hours of processing of 610 documents, and involving consultation with five external third parties. see: <https://www.oaic.gov.au/freedom-of-information/foi-decisions/ic-review-decisions/2018-aicmr-18>).

## Identifying relevant information

The preliminary enquiries that my team has made with Proactive Compliance and relevant searches have taken approximately six hours to date and included consultation with the following other FWO business units:

- Policy
- Community Engagement
- Website
- Strategic Research, Analysis and Reporting
- International Labour
- Media

Points 1 to 3 of your request scope include:

1. *The number of audits carried out in the hospitality industry annually over the last 10 years by FWO. Annual figures to show any growth or decline in visitation numbers.*
2. *A breakdown of those audits instigated by employee complaints and those conducted randomly as part of normal operations if possible.*
3. *The cost to FWO of carrying out a random audit.*

With respect to points 1 to 3, Proactive Compliance has advised that the FWO does not hold this information in documentary form and it would be a significant task to attempt to identify the numbers you are seeking given audits are not recorded with reference to specific industries or with reference to whether they were instigated by employees or randomly.

We recommend you consider the information available on the FWO website about campaigns relating to the hospitality industry (see below) and other more recent campaigns. Each campaign conducted by the FWO can involve hundreds or thousands of audits of particular businesses, depending on the campaign's breadth and focus.

Proactive Compliance also advised that it would not be possible to determine whether a specific campaign involved businesses in the hospitality industry without looking at the business details of each employer audited as part of that campaign. For example, a regional campaign might involve businesses in the hospitality industry, but one could not ascertain this without searching through the employer details of every single business contacted or visited as part of that campaign. It would not be practical or reasonable, in light of the hundreds of campaigns over the last 10 years, to review every audit conducted, in order to establish the statistics you are seeking.

The FWO is not obliged to create documents in order to respond to an FOI request. However, the FWO will consider taking steps to produce some requested documents if the resources required are not onerous. That is not the situation here given the significantly large amount of resources need to analyse a very large amount of data.

Another complicating factor is that the FWO's data is matched with that from the Australian Business Register database, which may not correctly identify the industry in which a particular business operates. For example, a business that is in the hospitality industry may not be listed as such. Additionally, we would have to review all documents associated with each audit to determine how they were instigated. There may also be a requirement to consult a number of third parties depending on what the documents contained.

If the FWO was to process your request in its current form, in addition to the several hundred hours needed to search for relevant information held in databases managed by Proactive Compliance's databases, we would also need to check several other document management

systems managed by the above-mentioned FWO business units. This will in turn extend the search and retrieval timeframe.

Points 4 to 6 of your request scope cover:

4. *The cost to FWO of carrying out an average resolution for an employee complaint (in number of labour hours if financial costs are not known).*
5. *Percentage of complaints/underpayments that involved migrant workers over time.*
6. *Percentage of complaints that derived from migrant employers or employers from non-English speaking backgrounds over time.*

With respect to points 4 to 6, I have found that the FWO does not hold any documents that explicitly address these questions. However, there is more information on the FWO website (detailed below) that addresses your requests relating to statistics of complaints by migrant workers.

### **Request consultation process**

Before I make a final decision in response to your request, you have the opportunity to revise the request in accordance with the 'request consultation process' referred to in section 24AB of the FOI Act.

The OAIC's FOI Guidelines note that a 'broadly worded request is more likely to constitute an unreasonable diversion of resources than a request that is narrowly focused'. Revising your request can mean narrowing the scope of the request to make it more manageable or explaining in more detail the documents you wish to access.

By providing more specific information about exactly what documents you are interested in, we may be able to pinpoint the documents more quickly and avoid using excessive resources to identify and review irrelevant documents.

### **Publically available information**

Please see below links to publically available documents created by the FWO. Whilst these documents do not expressly convey the precise statistical information you are seeking, you may find them useful to your purposes.

In relation to:

1. *The number of audits carried out in the hospitality industry annually over the last 10 years by FWO. Annual figures to show any growth or decline in visitation numbers.*

The following links refer to the FWO's Hospitality industry campaigns since 2012:

[Hospitality campaign-takeaway foods report](#)

[National hospitality industry campaign report - restaurants cafes and catering industries](#)

[National hospitality campaign report 2012- 2013](#)

Additionally, on 1 May 2018, former FWO, Natalie James, addressed the Annual National Policy Influence Reform Conference discussing a number of points related to our experience with the hospitality industry. You may find the information in this article useful, in particular her comments on page 5 of the report where she speaks to the campaigns listed above:

[AIG PIR speech 2018](#)

The Fair Work Ombudsman's annual reports also contain information about the hospitality industry. Please review the following link to information that may be useful to you about our Fast Food, Restaurants and Café's strategy: [Annual Report 2017-18](#)

In relation to:

2. *A breakdown of those audits instigated by employee complaints and those conducted randomly as part of normal operations if possible.*

The FWO produced the following campaign reports last year about the hospitality industry which you may wish to review:

[Food Precincts Activities Report](#)

[Western Sydney Campaign Report](#)

[National Compliance Monitoring Campaign Report](#)

Finally, in relation to the last two points of your request scope:

5. *Percentage of complaints/underpayments that involved migrant workers over time and*
6. *Percentage of complaints that derived from migrant employers or employers from non-English speaking backgrounds over time.*

The FWO's [Annual Report 2017-18](#) contains the above information on page 17.

The following public reports are also available relating to migrant workers:

[Inquiry into the procurement of cleaners in Tasmanian supermarkets](#)

[Harvest trail inquiry](#)

[417 visa inquiry report](#)

More broadly, other content on the website might be relevant such as the following reports that contain lists of all the finalised reports for our campaigns, inquiries and other activities.

[Campaign reports](#)

[Inquiry reports](#)

[Activity reports](#)

## Next steps

Under the legislation, you have 14 days to respond to this notice from the day after it is received in one of the ways set out below. Before the end of the consultation period, you are required to, in writing:

- withdraw your request;
- make a revised request; or
- tell us why you do not wish to revise your request.

During this period, please consider seeking the FWO's assistance to revise your request scope. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, we will recommence processing it straight away.

As mentioned in our initial response to you, if you wish to provide any further information or discuss the scope of your request, please consider contacting the FWO's FOI team from a private email address with alternative contact details. I would be happy to discuss the matter with you too if you wish if you provide a suitable contact telephone number.

Please also be aware that the FWO may still decide to issue a charges notice to cover the cost of processing this matter.

## Contact details

I can be contacted via [foi@fwo.gov.au](mailto:foi@fwo.gov.au).

Sincerely



Annabel Kent  
Director (a/g) – Customer Feedback and Information Access  
**Fair Work Ombudsman**