

'MS' and Australian Health Practitioner Regulation Agency (Freedom of Information) – 6 February 2020

Decision and reasons for decision of the National Health Practitioner Ombudsman and Privacy Commissioner

Applicant	'MS'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Decision date	6 February 2020
Reference number	OCF/19/272
FOI request	Applicant seeks access to all documents provided to Ahpra by a registered health practitioner in response to the applicant's notification about the practitioner's performance

Decision

1. Under section 55K of the Commonwealth *Freedom of Information Act 1982* (FOI Act), I affirm the decision of the Australian Health Practitioner Regulation Agency (Ahpra) dated 15 May 2019 to exempt the document under sections 47E(d) and 47F of the FOI Act.

Background

2. The applicant made a notification to Ahpra and the Medical Board of Australia (the Board) about a medical practitioner. The Board decided to take no further action in relation to the notification and Ahpra communicated this decision to the applicant.
3. On 5 April 2019, the applicant applied to Ahpra under the FOI Act for access to all documents which the practitioner provided to Ahpra and the Board in response to the applicant's notification.
4. Ahpra identified two documents relevant to the request:
 - the practitioner's response to the applicant's notification
 - the practitioner's registration information.
5. On 15 May 2019, Ahpra communicated to the applicant its decision to fully exempt both documents under sections 47E(d) and 47F of the FOI Act.

6. Also on 15 May 2019, the applicant applied to my office, the office of the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC), under section 54L of the FOI Act for a review of Ahpra's decision.
7. On 16 May 2019, the applicant provided the NHPOPC with a submission explaining the reasons the applicant did not agree with Ahpra's decision to exempt the documents.
8. On 6 June 2019, the applicant expressed their intention to forgo Ahpra's internal review process and proceed with a review by the NHPOPC.
9. On 18 July 2019, the applicant confirmed to the NHPOPC that the applicant sought review of Ahpra's decision in relation to the practitioner's response to the applicant's notification only, and not the other document Ahpra identified to be in scope of the request.
10. For convenience, I refer to the document at issue – the practitioner's response to the applicant's notification – as 'the document' throughout this decision.

Scope of the review

11. The issues to be decided in this review are:
 - whether the document that Ahpra found to be exempt under section 47E(d) of the FOI Act is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest (**Issue 1**)
 - whether the document that Ahpra found to be exempt under section 47F of the FOI Act is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest (**Issue 2**).
12. In making my decision, I have had regard to the following:
 - applicant's FOI review application and submissions to the NHPOPC regarding the review
 - Ahpra's decision dated 15 May 2019 and its reasons for decision
 - the document at issue (the practitioner's response to the notification made to Ahpra by the applicant)
 - submissions from the applicant and Ahpra in relation to the review
 - third party submissions from the legal representative of the practitioner who authored the document at issue
 - FOI Act, sections 3, 4, 11A(5), 11B(3), 27A, 47E(d), 47F, 55D, 55K
 - Privacy Act 1988 (Cwlth), section 6
 - Health Practitioner Regulation National Law (National Law), as enacted in all states and territories of Australia, sections 35, 214, 216
 - Office of the Australian Information Commissioner FOI Guidelines (FOI Guidelines)
 - Relevant cases including:
 - Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information) [2019] AICmr 64 (31 August 2019)
 - Re Chandra and Minister for Immigration and Ethnic Affairs [1984] AATA 437 (5 October 1984)
 - Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information) [2019] AICmr 29 (6 June 2019)
 - Spragg and Australian Health Practitioner Regulation Agency [2017] WASAT 103 (26 July 2017)
 - *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013).

Issue 1: Effective operations of agencies conditional exemption (s 47E(d))

13. A document is conditionally exempt under section 47E(d) of the FOI Act if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
14. The FOI Guidelines explain that the predicted effect needs to be reasonably expected to occur and that there must be more than merely an assumption or allegation that damage may occur if the document were to be released.¹

15. The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.ⁱⁱ The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.ⁱⁱⁱ
16. A decision-maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons. Ahpra bears the onus of establishing that its decision to exempt the document under section 47E(d) is justified.^{iv}

Ahpra's operations

17. Ahpra and the Board have powers under the National Law to handle notifications about registered health practitioners (that is, concerns raised about the health, conduct and/or performance of practitioners).^v The Board may decide to investigate a practitioner and in some cases, may take regulatory action against a practitioner.
18. The document was provided to Ahpra following the applicant's notification about a practitioner. This is because Ahpra and the Board, in the course of assessing the applicant's notification, sought a response from the practitioner.

Ahpra's submissions

19. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.^{vi} 'Protected information' means any information that comes to a person's knowledge in the course of, or because of, the person exercising functions under the National Law.^{vii}

20. In its reasons for decision to the applicant dated 15 May 2019, Ahpra explained that:

"Information that comes to the knowledge of Ahpra and/or the National Boards in the course of, or because of, the exercise of functions under the National Law is subject to confidentiality obligations under the National Law. Consistent with these obligations, information relating to notifications and related investigations is treated by Ahpra and the National Boards in a confidential manner. The maintenance of confidentiality is also important to encourage practitioners, notifiers, and other government agencies and third parties to assist Ahpra in investigations and other processes relating to the enforcement of the National Law.

If the documents were released under the FOI Act, without the express consent of the relevant parties, this would likely have a significant adverse impact on the future flow of information from practitioners and other government agencies. Pertinently, this may inhibit individuals from expressing freely and providing complete and frank information out of concern that their communications may be subject to disclosure under the FOI Act."

21. Ahpra submitted to the NHPOPC on 6 August 2019 that:

"Practitioners provide submissions to their occupational regulator on the understanding that the documents are prepared for the Board to exercise its decision-making functions. The National Law imposes obligations of confidentiality, subject to exceptions, over information that is obtained in the exercise of functions. If these documents are routinely released to third parties and by that to the world at large through the FOI Act, this disclosure would result in practitioners being less candid and open in their submissions or opinions either in the context of a notification or their other dealings with the Board. Practitioners may also become more cautious in expressing their views and tailor their responses to external audiences, out of concern that such documents could be subject to disclosure under the FOI Act. This cautiousness would impede the free flow of information to Ahpra and the Board and prejudice the integrity and robustness of the investigation process...

Disclosures of the documents of this nature would diminish practitioners' trust in the Board's ability to undertake its functions in an independent and procedurally fair manner... Since it is a core function of Ahpra and the Board under the National Law to conduct investigations, damage to Ahpra and the Board's ability to properly and efficiently conduct such investigations would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency."

Applicant's submissions

22. The applicant argued that refusing access to the document impedes the applicant's ability to acquire information that proves the applicant's civil and human rights were limited contrary to the *Crimes Act 1958* (Vic), *Medical Treatment Act 1988* (Vic), *Medical Treatment Planning and Decisions Act 2016* (Vic) and *Wrongs Act 1958* (Vic).

23. In a submission dated 4 November 2019, the applicant stated:

"By refusing access to the FOI request you are impeding [the applicant] acquiring this information that will help [them] prove [their] civil and human rights were limited...

You stated when considering the matter under the public interest test, it has been decided that the impact of releasing the document, on the ability of Ahpra to carry out its roles (due to a potential lack of cooperation from practitioners in the future) supersedes the benefits of releasing the document.

It has been brought to your attention that not releasing the document...limits the ability of the notifier to provide the necessary information required by Ahpra, with relation to this case, to accurately and comprehensively carry out its primary functions. Effectively, ruling the document exempt under FOI, equally inhibits the agencies [sic] ability to carry out its functions."

24. The applicant further submitted that the access refusal decision means that the practitioner's response cannot be assessed for accuracy or truthfulness, the lawfulness of the actions described, or the honesty of the statement provided. The applicant raised concerns that:

"this is a public safety risk as this means practitioners can lie to Ahpra and there is no mechanism by which this dishonesty can be identified. By withholding this information Ahpra is inhibiting its own ability to function. Thereby putting the public in danger and also impeding the primary functions of the agency."

Application of the agency operations conditional exemption

25. I have considered the parties' submissions. I have also considered relevant Australian Information Commissioner and Tribunal decisions, as well as commentary in the FOI Guidelines, in relation to the application of the agency operations conditional exemption.

26. The FOI Guidelines provide a relevant example of when this conditional exemption may apply in relation to information provided to investigative bodies:

"The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations."^{viii}

27. I am of the view that just as people must feel free to make confidential notifications about health practitioners, people must be willing to provide their response and professional opinions about a notification to Ahpra and the Board.

28. I have considered the Australian Information Commissioner's decision in *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019). In that case, the request was for access to all documents relevant to investigations conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular building fund. The Australian Information Commissioner affirmed the ACNC's decision to exempt documents falling within the scope of the request.

29. In discussing whether the section 47E(d) conditional exemption applied in that case, the Australian Information Commissioner stated at paragraph [22]:

"The fact that s 150-25 of the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act) protects information provided to or obtained by the ACNC under the ACNC Act from disclosure, leads me to be satisfied that the ACNC, as it contends, relies on sensitive information being provided to it on a voluntary basis and on the understanding that the information will not be disclosed to third parties. As the ACNC explained in its reasons for decision..., I accept that the rationale for this secrecy provision is to establish a regulatory

regime where the ACNC can discharge its regulatory functions in an environment of trust and engagement with the not-for-profit sector.”^{ix}

30. It is my view that similarities can be drawn between provisions of the ACNC Act and the confidentiality provisions in the National Law. Section 216 of the National Law creates a reasonable expectation that information provided by a person to Ahpra or the Board in the course of exercising their investigative functions will be treated confidentially. If Ahpra discloses the document requested by the applicant in circumstances where the practitioner has not consented to the release of that document, a reasonable person could conclude that any documents they provide to Ahpra in the future may not be treated confidentially, despite the duty of confidentiality under the National Law. This in turn could reasonably be expected to impact how effectively Ahpra and the Board can carry out their functions, as the information they can access could be less readily provided and more difficult to obtain.
31. I also draw similarities between this matter and the case before the State Administrative Tribunal in *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017). Notably, this matter considered the application of section 47E(d) specifically in the context of Ahpra’s operations. In *Spragg*, the Tribunal found that disclosure of information provided to Ahpra by a practitioner who is the subject of a notification could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.^x
32. Relevantly, paragraph [78] of the Tribunal’s decision in *Spragg* states:
- “The Tribunal finds that the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies [sic] operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information. The Tribunal finds that this is particularly the case in the instance of these Documents. Here, the Practitioner objects to the disclosure of the Documents...”^{xi}
33. I am satisfied that Ahpra has discharged the onus of establishing the particulars of the predicted adverse effect of disclosure, including that the effect would be substantial and that it could reasonably be expected to occur. Ahpra has clearly described the impact of the reasonably expected substantially adverse effect on the conduct of its operations.
34. Accordingly, I am satisfied that the document is conditionally exempt under section 47E(d) of the FOI Act.
35. I am now required to consider whether it would be contrary to the public interest to give the applicant access to the conditionally exempt document at this time.

The public interest test (s 11A(5))

36. The FOI Act states that, if a document is conditionally exempt, it must be disclosed unless in the circumstances access to the document at this time would, on balance, be contrary to the public interest.^{xii}
37. In *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019) the Australian Information Commissioner explained that the public interest test does not require a decision-maker to consider whether disclosure of conditionally exempt material would be in the public interest. Rather, a decision-maker must start from the position that access to a conditionally exempt document must be given, unless giving access to the document, at the time of the decision would, on balance, be contrary to the public interest.^{xiii}

Factors favouring disclosure

38. Section 11B(3) of the FOI Act provides a list of public interest factors favouring disclosure. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.^{xiv}

39. In its reasons for decision, Ahpra identified the following public interest factors in favour of disclosure:
- promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act)
 - public scrutiny of documents relevant to deliberations of Ahpra and the Board may improve the quality of decision-making processes
 - facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency
 - revealing information that informed a decision-making process
 - allowing a person access to their personal information, or information relating to matters that otherwise concern them.
40. I have considered the factors above in favour of disclosure. I agree that disclosure of the document would promote the objects of the FOI Act. In particular, I agree that increased public scrutiny of documents relevant to the deliberations of Ahpra and the Board may improve the quality of decision-making processes.
41. While I agree there are public interest factors that favour disclosure of the practitioner's response, these factors must be balanced against any public interest factors opposing disclosure when determining whether access should be given to a conditionally exempt document.

Factors against disclosure

42. In relation to public interest factors against disclosure, Ahpra identified:
- the public interest in protecting and maintaining the integrity of Ahpra and the Board's assessment and investigative processes. For instance, Ahpra's ability to properly and efficiently investigate notifications in respect of the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law. There is a strong public interest in ensuring proper processes for consumer protection, and that only suitable practitioners in various fields of the health profession are able to provide services to the public
 - the public interest in Ahpra and the Board being able to carry out their statutory functions, including any necessary preliminary assessments and investigations, as efficiently and effectively as possible. Disclosure could affect Ahpra's ability to obtain similar information in the future thereby making assessment and investigations of notifications more difficult
 - the significant adverse impact that disclosure would have on the integrity and robustness of the assessment and investigation processes, and the ability of Ahpra and the Board to carry out their functions in an effective manner. Disclosure could reasonably be expected to affect the candour and frankness of the opinion and advice prepared by Ahpra for consideration of the Board as part of an investigation. Candour is essential when conducting investigations and making decisions relating to notifications. If documents of the kind relating to this matter were to be disclosed, Ahpra officers and other third parties, including practitioners, may be cautious in expressing candid views and providing frank advice, and may draft documents tailored to a potential external audience rather than for the benefit of the Board, out of concern that such documents could be subject to disclosure under the FOI Act. This would compromise the functionality of the Board in having available to it complete and unrestricted advice as part of the Board's decision-making process
 - the prejudice to the protection of an individual's right to privacy, particularly as the relevant material is not well known or publicly available.
43. I have also considered the Victorian Civil and Administrative Tribunal's decision in *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013). In that case, the Tribunal accepted Ahpra's submissions that disclosure of the relevant material would be contrary to the public interest.^{xv} Ahpra's submissions included that there is a public interest in ensuring its ability to receive and investigate notifications is not hampered by the disclosure of confidential information, or the use of information for purposes extraneous to Ahpra's functions.^{xvi} I consider this to be a persuasive point.

Balancing the public interest factors for and against disclosure

44. I am of the view that disclosure of the document could reasonably be expected to prejudice Ahpra's ability to obtain confidential or similar information from practitioners in relation to notifications in the future.
45. The proper and efficient assessment and investigation of notifications is an integral function of Ahpra and the Board under the National Law. It would be contrary to the public interest if these processes (and by extension, the Board's core function to ensure the protection of the health and safety of the public) are prejudiced as a result of the disclosure of a practitioner's response to a notification under the FOI Act without the consent of the practitioner.
46. I do not agree with the applicant's submissions at paragraphs [22] – [23] above. The notification process is not an avenue for a notifier to prosecute a practitioner. Instead, Ahpra and the Board take the information provided by a notifier and consider whether the relevant practitioner's practice of the profession, or their professional conduct, is or may be unsatisfactory. The notifications process is not designed to allow a notifier to rebut information provided to the Board by the practitioner in response to a notification. The purpose of seeking a response from a practitioner is to provide the practitioner with an opportunity to express their point of view to the Board in relation to the relevant incident. It is for the Board to then determine whether it should take regulatory action or make further enquiries.
47. Importantly, a notifier is not a party to the interactions between Ahpra (or the Board) and the relevant practitioner. A notifier does not have a right to obtain information provided to Ahpra by a practitioner in relation to a notification. I note the following comments of the Tribunal in *Spragg*:

"[Ahpra] found that the Documents were collected for the purpose of the investigation undertaken by the Board under the National Law and that the information was to assist the Board in its deliberations.

The Tribunal agrees. The information was not collected by the applicant. Nor was it proper to provide the information to the applicant. The applicant was not charged with the responsibility of investigating the notification. There is no obligation upon the Practitioner to provide the information to the applicant...

The applicant's submissions appeared to have been made on the basis that he was a party to [Ahpra's] investigation of his complaint. He was a notifier and not a party. The applicant's submissions were misconceived. They demonstrated a misunderstanding of legal principle: *Laurent and Commissioner of Police* [2009] WASAT 254 at [23], namely the applicant sought to obtain the Documents by reason of his pursuit of his private interest in circumstances where the matter that arose for consideration was the public interest.

The applicant did not address either the FOI Act or the National Law in support of his application and relied entirely on his categorisation of fairness."^{xvii}

48. I note that under section 11(2)(a) of the FOI Act, a person's right of access is not affected by any reasons the person gives for seeking access to a document. However, if I was to entertain the applicant's submission in relation to the public interest, I point to the Tribunal's decision in *Hanes* (which I discuss at paragraph [43] above). I agree there is a public interest in ensuring Ahpra's ability to receive and investigate notifications is not hampered by the disclosure of confidential information, or the use of information for purposes extraneous to Ahpra's functions. I do not accept the applicant's submissions that disclosure of the document at this time would be in the public interest.
49. Consistent with previous decisions of tribunals variously in *Graham Mahoney*, *Hanes* and *Spragg*, I give greater weight to the public interest factors against disclosure. Giving the applicant access to conditionally exempt material at this time would, on balance, be contrary to the public interest.

Finding

50. The document is exempt under section 47E(d) of the FOI Act.

Issue 2: Personal privacy conditional exemption (s 47F)

51. A document is conditionally exempt under section 47F of the FOI Act if disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This exemption is intended to protect the personal privacy of individuals.^{xviii}

Personal information

52. Personal information has the same meaning as in the *Privacy Act 1988* (Cwlth), which provides that:

“personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- whether the information is true or not;
- whether the information or opinion is recorded in a material form or not.”^{xxix}

53. That is, the information needs to convey or say something about a person, rather than just identify them.

54. The FOI Act states that this conditional exemption does not apply if the personal information is only about the applicant.^{xx} This is not the case here. The document contains information from and about the practitioner the subject of the applicant’s notification. As was the case in *Spragg*, the issue in this review is whether the disclosure of the document would involve the unreasonable disclosure of personal information about any person other than the applicant.^{xxi}

Whether disclosure would be unreasonable

55. The FOI Guidelines explain:

The test of ‘unreasonableness’ implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.^{xxii}

56. The FOI Guidelines set out matters which an agency must have regard to when determining whether disclosure of a document would involve an unreasonable disclosure of personal information. These are:

- the extent to which the information is well known
- whether the person to whom the information related is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible resources
- any other matters that the agency or minister considers relevant.^{xxiii}

57. The FOI Guidelines go on to list the following key factors for determining whether disclosure is unreasonable:

- the author of the document is identifiable
- the document contains third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release.^{xxiv}

Joint personal information

58. The FOI Guidelines state that where it is not possible to separate an applicant’s personal information from a third party’s personal information, the exemption may be claimed if it is unreasonable to release the information.^{xxv}

59. Whether it is unreasonable to release the information may depend on the relationship between the individuals.

Ahpra’s submissions

60. Ahpra found the document to be exempt under section 47F of the FOI Act. Ahpra considered that disclosure of the document would involve an unreasonable disclosure of third party personal information.

61. Ahpra’s reasons for decision demonstrate consideration of the factors which I listed above in paragraph [56]. In addition, Ahpra also considered:

- the nature of the information
- the circumstances in which Ahpra obtained the information
- the reasonable expectation of confidentiality of an individual to whom the information relates

- the intrusion into the practitioner’s privacy and potential reputational harm that may occur if the information in the documents were to be more widely disseminated, particularly in circumstances where no further action was taken against the practitioner
- whether the information would shed light on the workings of government and the current relevance of the information.

62. Ahpra further submitted that the document contains joint personal information about the applicant and the practitioner which is so intertwined that it is not reasonably practicable to separate.

Applicant’s submissions

63. The FOI Guidelines state that it is not settled whether the motives and identity of the applicant are relevant when considering reasonableness in the context of the personal privacy conditional exemption.^{xxvi}
64. Notwithstanding this, I have considered the applicant’s reasons for seeking access and their intended or likely use of the information. In the applicant’s submission dated 16 May 2019, the applicant explains:

“We requested these files because we are concerned that the full and correct information may not have been provided to Ahpra. Having received statements from the doctor via [another organisation], I wanted to make sure that Ahpra was given that same information and not a different version of events. The information provided by the doctor at different stages of this process has been inconsistent. We have made inquiries about this to Ahpra multiple times. They have not address [sic] these questions and the exclusion of these documents do not alleviate our concerns.”

65. I understand why the applicant may seek clarity in relation to these specific issues. However, this reason does not respond to the exemptions in the FOI Act applied by Ahpra to refuse access to the document. In deciding whether this conditional exemption applies, I am limited to considering the applicant’s request based on the requirements of the FOI Act. This means I need to determine whether the document contains third party personal information.

66. In relation to personal information specifically, the applicant submits:

“Considering [the applicant’s] complaint and statements were shown to the doctor without any issues, we do not see why the same courtesy should be given to the [applicant]. [The applicant’s] personal information was able to be provided without concern for privacy, so we don’t quite understand why there are privacy concerns with [the applicant] accessing this information through FOI. The lack of transparency in this manner indicates a public safety issue. I.e. if a complainant cannot access information pertaining to them then any doctor could say anything or simply “I didn’t do it”... The public would have no way of knowing what was said about them or their incident if information is withheld in this manner. The public must be able to trust Ahpra as an impartial body to keep them safe.

We are not after any personal details and understand concerns with privacy. As stated previously we are happy for any identifying and personal details to be redacted.”

67. The applicant emphasises:

“Finally and most importantly the information we are requesting is about [the applicant]. Information pertaining to a medical procedure that was performed on [the applicant] that nearly cost [the applicant’s] life. This should not be withheld from [the applicant].”

Application of the personal privacy exemption

68. In considering whether disclosure of personal information is unreasonable, the Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 stated that this requires:

“a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by

the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...”

69. I am satisfied that the document contains the practitioner’s expressed opinions in response to the allegations raised in the applicant’s notification. This is personal information about the practitioner that is neither known to the applicant nor publicly accessible. While the response could be seen to contain personal information about the applicant by virtue of responding to allegations about the care and treatment provided to the applicant by the practitioner, I accept Ahpra’s submission that any personal information of the applicant is intertwined with the practitioner’s personal information to the extent that it is not possible to separate it.
70. I do not believe it would be possible to redact the practitioner’s personal information as suggested by the applicant. The personal information in the document is not limited to only the practitioner’s contact information. The entire response constitutes personal information.
71. I note the FOI Guidelines also indicate that disclosure may be unreasonable if the person provided the information on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information. In this regard, I refer to my comments above in relation to the duty of confidentiality in the National Law and note the practitioner has not consented to the release of the document.
72. On balance, I am satisfied that the document is conditionally exempt for the purposes of section 47F of the FOI Act.
73. The FOI Act says that, if a document is conditionally exempt, it must be disclosed unless access to the document at this time would, on balance, be contrary to the public interest. I am therefore now required to consider whether it would be contrary to the public interest to give access to the document at this time.

The public interest test (s 11A(5))

74. In its decision dated 15 May 2019, Ahpra identified the following public interest factors in favour of disclosure:
- promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government’s activities (section 3(2)(b) of the FOI Act)
 - public scrutiny of documents relevant to deliberations of Ahpra and the Board may improve the quality of decision-making processes
 - facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency
 - revealing information that informed a decision-making process
 - allowing a person access to their personal information (noting in this case, the document contains joint personal information).
75. I accept the factors identified above in favour of disclosure. In particular, I note the applicant’s submissions at paragraph [66] above in relation to public confidence in the processes of Ahpra and the Board. I also agree that disclosure of the document would reveal information that informed Ahpra and the Board’s decision-making process and would allow the applicant to access their personal information.
76. I agree that disclosure of the document would further the objects of the FOI Act, in particular to increase public scrutiny of Government processes. I also agree that disclosure would facilitate access to information that allows members of the public to be satisfied that proper processes have been followed by the agency.
77. In regard to public interest factors against disclosure, I note the factors described at paragraph [42] above in my discussion of the public interest test in relation to the application of section 47E(d) of the FOI Act. In addition, Ahpra identified the following factor against disclosure that relates specifically to section 47F:
- disclosure could reasonably be expected to prejudice the protection of a third party individual’s right to privacy.

Balancing the public interest factors for and against disclosure

78. I have considered the nature of the information contained in the document, the circumstances in which it was provided to Ahpra and that the practitioner has not consented to disclosure. In these circumstances, I find that greater weight should be given to the protection of third party personal information than factors favouring disclosure, such as revealing information that informed a decision-making process.
79. I have given particular weight to the context in which the document was provided to Ahpra in forming this view, namely, to assist Ahpra and the Board to carry out their investigative functions. I also give weight to the fact that the information was provided to Ahpra on an understanding it would be kept confidential. I find that the duty of confidentiality in section 216 of the National Law is a compelling factor weighing against disclosure.
80. I am satisfied that giving access to the document would, on balance, be contrary to the public interest.

Finding

81. The document is exempt under section 47F of the FOI Act.

Conclusion

82. I affirm Ahpra's decision dated 15 May 2019 to exempt the document under sections 47E(d) and 47F of the FOI Act.

Richelle McCausland

National Health Practitioner Ombudsman and Privacy Commissioner

Rights

Review rights

If a review party is not satisfied with a review decision of the NHPOPC, the party may apply to a relevant tribunal under section 57A of the FOI Act to have the decision reviewed. An application must be made within 28 days after the day the party receives this decision.

Appeal rights

A review party may appeal to the Supreme Court on a question of law from a decision of the NHPOPC if the party believes the NHPOPC incorrectly interpreted and applied the FOI Act.

An appeal must be made either:

- within 28 days after the day a review party receives the NHPOPC's review decision, or
- within further time that the Supreme Court or another appropriate court allows, and
- in any way that is prescribed by rules of court made under the relevant legislation of the Supreme Court or another appropriate court.

In determining a question of law, the Supreme Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the NHPOPC (other than findings resulting from an error of law), and it appears to be convenient for the Supreme Court.

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- ⁱ FOI Guidelines [6.101].
- ⁱⁱ FOI Guidelines [5.20].
- ⁱⁱⁱ FOI Guidelines [5.20].
- ^{iv} *Freedom of Information Act 1982* (Cwlth), s 55D(1).
- ^v For more information about the Board's functions see National Law, s 35.
- ^{vi} National Law, s 216.
- ^{vii} National Law, s 214 (definition of 'protected information').
- ^{viii} FOI Guidelines [6.122].
- ^{ix} *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].
- ^x *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [75].
- ^{xi} *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].
- ^{xii} *Freedom of Information Act 1982* (Cwlth), s 11A(5).
- ^{xiii} *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].
- ^{xiv} FOI Guidelines [6.19].
- ^{xv} *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].
- ^{xvi} *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].
- ^{xvii} *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [16]-[17], [31]-[32].
- ^{xviii} FOI Guidelines [6.124].
- ^{xix} *Freedom of Information Act 1982* (Cwlth), s 4(1) (definition of 'personal information'); *Privacy Act 1988* (Cwlth), s 6 (definition of 'personal information').
- ^{xx} *Freedom of Information Act 1982* (Cwlth), s 47F(3).
- ^{xxi} *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [40].
- ^{xxii} FOI Guidelines [6.138].
- ^{xxiii} FOI Guidelines [6.140].
- ^{xxiv} FOI Guidelines [6.140].
- ^{xxv} FOI Guidelines [6.150].
- ^{xxvi} FOI Guidelines [6.146].