

'AB' and Australian Health Practitioner Regulation Agency



Decision and reasons for decision of the National Health Practitioner Privacy Commissioner, Richelle McCausland

Applicant	'AB'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	OCF/20/237
Decision date	23 December 2020
Catchwords	FREEDOM OF INFORMATION – Whether an agency could produce a written document containing the information in discrete form – Whether reasonable steps taken to find documents – Freedom of Information Act 1982 ss. 17 and 24A

All references to legislation in this document are to the *Freedom of Information Act 1982* (Cwlth) (FOI Act) unless otherwise stated.

Decision

1. Under s. 55K, I affirm the decision of Ahpra of 9 April 2020 under ss. 17 and 24A to refuse access to the documents requested.

Background

2. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant clarified their request:

I am requesting under the FOI Act any documents held by Ahpra that reveal, for each of the past three years:

1. The total amount spent on travel, hotel accommodation, transfers and other associated expenses for:

- Members of registrant Boards; and,
- Executive level staff (National Director and above)

(This includes special regard for travel to and from Melbourne, and overseas, including any documents that reveal a direct payment, application of subsidy, reimbursement, special allowance/remuneration or other means, and the financial value of these benefits).

2. The total value of any non-hotel/temporary accommodation benefit for:

- Members of registrant Boards; and,
- Executive level staff (National Director and above)

This means any apartments, housing and other ongoing benefits (either remuneration, subsidy, rebate, reimbursement, salary sacrifice or other related benefit), for any property but with special regard for any property located in Melbourne.

3. The total amount spent on catering services, conferences, speakers, and events for or at the behest of:

- Members of registrant Boards; and,
- Executive level staff (National Director and above).

4. The total cost of all building expenses for each Ahpra office located outside of the state of Victoria (rent, fit-out etc.).

3. In its decision letter dated 16 March 2020, Ahpra advised the Applicant that there were no discrete documents available that meet their request. Ahpra considered whether it could, in accordance with s. 17, produce a written document containing the information in discrete form by the use of a computer. Ahpra advised that:

- it could not produce a written document containing the information requested in points 1, 3 and 4 in discrete form
- the information requested in points 2 did not exist.

4. On 26 March 2020, the Applicant requested an internal review of Ahpra's decision. In its internal review decision letter dated 9 April 2020, Ahpra decided to affirm its original decision.

5. On 25 May 2020, under s. 54L the Applicant sought a review of Ahpra's internal review decision to refuse access.

Scope of the review

6. The issues I will decide in this review are:

- whether Ahpra has taken all reasonable steps to find documents within the scope of the request in accordance with s. 24A.
- whether Ahpra could produce a written document containing the information in discrete form by the use of a computer or other equipment that is ordinarily available to it in accordance with s. 17.

7. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.¹ However, it is open to me to obtain any information from any person, make any inquiries that I consider appropriate, and change the basis on which the decision is made.²

¹ s. 55D(1).

² ss. 55 and 55K.

8. The Applicant and Ahpra were invited to make a written submission about the review. I have considered all relevant communications and submissions received from both the Applicant and Ahpra.
9. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government, by requiring agencies to publish that information and by providing for a right of access to documents.³

Review of the provisions

Section 24A: Whether reasonable steps were taken to find documents

10. Section 24A requires that an agency take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether ‘all reasonable steps’ have been taken is a question of fact in the individual case to be decided, having regard to matters such as the terms of an applicant’s request, the document creation and retention practices in an agency, and the steps taken by the agency to identify and locate documents requested by the applicant.⁴
11. The FOI Guidelines explain:

Agencies ... are responsible for managing and storing records in a way that facilitates finding them for the purpose of an FOI request. The steps taken to search for documents should include the use of existing infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate documents.⁵

Ahpra’s submissions

12. Ahpra advised:

... it has taken all reasonable steps to find the document(s) requested, however, no document exists that contain the financial information and comparisons that fall within the terms of [the Applicant]’s request.
13. Ahpra further advised that there were no costs concerning point 2 of the Applicant’s request and submits:

It is important to understand that the FOI Applicant sought any documents that revealed the total value. Once the relevant area of Ahpra was consulted and no documents containing that information were located no further searches were undertaken. However, to ensure Ahpra’s advice to [the Applicant] was not inaccurate both the Chief Finance Officer and Regulatory Operations were advised of the proposed decision prior to its finalisation.

Has Ahpra taken all reasonable steps to find the documents?

14. I have examined a copy of the search evidence provided by Ahpra which comprises email correspondence between the decision-maker and relevant Ahpra staff members identified as being

³ s. 3(1).

⁴ FOI Guidelines, [3.85] – [3.94].

⁵ FOI Guidelines, [3.91].

potentially able to assist with searches. Having regard to the search evidence and Ahpra's submissions, I accept that the requested information does not exist in a discrete form.

15. I note that Ahpra referred the Applicant to publicly available information such as its annual financial reports to assist the Applicant with their request.

Finding

16. I am satisfied that Ahpra has taken all reasonable steps to find the documents that fall within the scope of the request as it was required to do by s. 24A and may be satisfied that the documents do not exist in a discrete form.

Section 17: Requests involving the use of computers

17. Where information is stored in an electronic form, s. 17 requires the agency to undertake a search of its databases to identify whether a written document can be produced from its data before the request can be refused under s. 24A.

18. The FOI Guidelines explain:

Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded.⁶

The obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information⁷, or making a transcript from a sound recording⁸, and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations.⁹

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.¹⁰

19. The Full Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 (*Collection Point*) considered the interaction between the two limbs of s. 17:

There is considerable potential overlap between factual matters relevant to the questions under s 17(1)(c)(i) (whether the use of a computer or other equipment is ordinarily available) and s 17(2) of the Act (whether compliance with the obligation to produce the requested document would be a substantial and unreasonable diversion of the agency's resources). The two inquiries nevertheless arise sequentially. The satisfaction of the conditions under s 17(1) is a pre-condition for the application of s 17(2). Nor, despite the overlap, are the questions interchangeable. The

⁶ FOI Guidelines, [3.204].

⁷ s. 17(1)(c)(i).

⁸ s. 17(1)(c)(ii).

⁹ s. 17(2).

¹⁰ *Ibid.*

satisfaction of the conditions of s 17(1)(c)(i) does not ensure satisfaction of the conditions of s 17(2), and vice versa.¹¹

20. The Full Federal Court's judgment has been considered in a number of cases including most recently by the Administrative Appeals Tribunal in *Neilson and Secretary, Services Australia (Freedom of Information)* [2020] AATA 1435. While that case considered the meaning of 'ordinarily available' in relation to the use of a computer program, the Tribunal applied *Collection Point*, finding that the obligations in s. 17 'arise sequentially even though they may overlap'.¹²
21. In simple terms, the conditions in s. 17(1) must be met before those in s. 17(2) can be considered.
22. In relation to s. 17(1)(c)(i), the Federal Court in *Collection Point* held that:

[It] is directed at ensuring that an agency will not be obliged to produce a document unless the effective and comprehensive means of doing so are ordinarily available to it for the specified purpose. In that context, the computer or other equipment ordinarily available for the specified purpose must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.¹³

The Applicant's submissions

23. The Applicant submits:

The grounds are identical to what originally prompted the initial internal review, namely:

The grounds are a grossly malfeasant and utterly indefensible misapplication of the FOI Act that flies in the face of both common practice and common sense.

I submit that the information that Ahpra is seeking to withhold would be made readily available in any Government or statutory agency, regardless of scale, and including those manifolds more expansive and complex than Ahpra.

The information requested is simple financials, fundamental to the most basic probity of any public sector entity.

24. The Applicant further submits:

What is being asked for is basic financials which would have to be provided at any ordinary estimates hearing. The notion thousands of transactions would need to be gone through manually 'because there is no code' demonstrates a deep ignorance about how modern financial management systems work. Ahpra can produce these figures in an afternoon, they simply do not want to and we all know why.

Even if that were the case, which it most certainly is not, the information sought is not a divergence from the agency's function - but information that any public agency would need to report on to demonstrate basic public sector accountability and probity. Thus the reason it would take so long is not because the information sought is not part of their core function, but because they had failed

¹¹*Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, [39].

¹²*Neilson and Secretary, Services Australia (Freedom of Information)* [2020] AATA 1435, [29].

¹³*Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, [44].

to fulfil a core function adequately. Confessed incompetence is not an adequate excuse for avoiding legal obligations under FOI.

Ahpra's submissions

25. Ahpra submits:

Ahpra also considered if a discrete document could be produced in accordance with section 17(1) of the FOI Act and concluded that Ahpra is unable to readily or easily produce a report containing the information [the Applicant] seeks.

Ahpra maintains it currently does not create or is require[d] to create a report comprising the information requested. To create [a] new program, or script to produce such a report would involve the use of a computer in a manner that is not ordinarily available to Ahpra. That is, Ahpra would have to use its computer and software resources in a manner that is extraordinary. Utilising its IT and other resources to writing a script is not something that Ahpra routinely does. In addition to writing [a] script, there is a further element to this in that manual intervention would be required to identify each relevant transaction. The time and effort required to produce the information would substantially divert Ahpra's resources away from the achievement of its statutory objectives and functions, as it would largely involve staff compiling extracts of data from various sources and recording it in a form that would facilitate the analysis set out in [the Applicant]'s request.

26. Ahpra submitted in relation to point 4 of the Applicant's request:

...the production of the information would still require Ahpra's finance team to allocate resources to determine a methodology to produce a report or new document containing the requested information, programming Ahpra's accounting software to produce the requested information, excluding information falling outside the specific factors identified by the Applicant, preparing a discrete document to facilitate the release of information and undertaking quality control processes.

The FOI Act does not require an agency to produce documents in this manner in response to applications made under the Act. Accordingly, Ahpra's decision to refuse access was made on the basis that no existing document existed that fell within the scope of the Applicant's request and that the information could not be readily produced through computerised means in the manner contemplated by paragraph 3.2 of the OAIC FOI Guidelines.

27. Ahpra further submitted in relation to point 4 of the Applicant's request:

If Ahpra were to produce a report containing such information, it would require the FPT [Finance and Procurement Team] to allocate resources to determine a methodology to produce a report or new document containing the information. The collection of the information will involve significant manual review of transactions. There are two reasons for the manual review:

- The information requested sits across two separate ledgers (expense and capital).
- Over this period of time Ahpra underwent a significant restructure and changes in the accounting treatment for lease assets resulting in the information being across different cost centres and accounts.

Application of the requests involving the use of computers provision

28. One of the issues to be decided in this review is whether Ahpra could produce a written document containing the information in discrete form using a computer or other equipment that is ordinarily available to it for retrieving or collating stored information (that is, whether s. 17(1)(c)(i) applies).
29. In considering the term ‘computer or other equipment that is ordinarily available’, the Federal Court of Australia held the view in *Collection Point* that the computer is not merely computer hardware. Rather, it means a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available.¹⁴
30. The Federal Court discussed the scope of the term ‘ordinarily available’ in *Collection Point* in relation to s. 17(1)(c)(i). It was the Federal Court’s view that:

...while an “ordinarily available” computer or “other equipment” is not limited to that currently in the agency’s possession, it does not include that which is or may become available to the agency for the specified purpose only outside the ordinary course of its operations. Whether an item is ordinarily available will depend upon the facts of the particular case, which may include whether access to it would involve a departure from the agency’s ordinary or usual conduct and operations.¹⁵

31. The Federal Court also considered that a computer might in some cases be ordinarily available within the meaning of s. 17(1)(c)(i) even if a new computer were required to produce the document requested. An agency might, for example, routinely commission or retain staff to produce new computer programs of the necessary kind.¹⁶
32. I have taken into account both the Applicant’s and Ahpra’s submissions, including other relevant information supplied for this review.
33. I note that Ahpra has explained that to produce a document containing the information requested by the Applicant, it would need to create a new program or write a script. This is not something Ahpra routinely does and doing so would require the use of computer or equipment not ordinarily available to it for that purpose.
34. I further note, in addition to its submissions, Ahpra provided my office with an extract of its general ledger for the year 2018-19 under its Travel and Entertainment account. Ahpra explained:

For example, that there is one account for travel and entertainment and that there is no single account code to identify the travel-related expenses requested in point 1 of the request.

It would need to manually review the relevant transactions in the Travel and Entertainment account to identify the requested information in point 1. For the 2018-19 financial year, Ahpra estimated it would need to manually review over 30,000 travel and accommodation-related transactions within the account to identify the information requested in point 1 of the request.

35. I am of the view that the need to manually review its stored information to identify the information sought by the Applicant further demonstrates Ahpra’s lack of ability to retrieve or collate the relevant stored information using a computer or equipment ordinarily available to it. In addition, once the

¹⁴ *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, [43].

¹⁵ *ibid*, [48].

¹⁶ *ibid*, [49].

relevant information was identified Ahpra would also need to create a new program to produce the requested documents.

36. Given this, I am of the view that providing access to the requested documents would involve a departure from Ahpra's ordinary or usual conduct and operations.
37. In coming to this view, I consider the Federal Court's view in *Collection Point* that:
- ... the need for a new computer program to enable the computer ordinarily available to the agency for retrieving and collating stored material to produce the requested document is a fact capable of meaning that the agency cannot, by the use of a computer ordinarily available, produce the requested document.¹⁷
38. Having regard to Ahpra's submissions and for the reasons set out above, I am satisfied that Ahpra has discharged its onus to establish that the decision given in respect of the Applicant's FOI request is justified.
39. I am satisfied Ahpra cannot produce a written document containing the requested information in discrete form using a computer or equipment that is ordinarily available to it for retrieving or collating stored information.

Finding

40. I am satisfied that s. 17(1) does not apply. Ahpra is therefore not required to produce a written document containing the requested information in discrete form.

Conclusion

41. I am satisfied that Ahpra has taken all reasonable steps to find the documents that fall within the scope of the request as it was required to by s. 24A and may be satisfied that the documents do not exist in a discrete form.
42. I am satisfied that Ahpra cannot produce a written document containing the requested information in discrete form using a computer ordinarily available to it in accordance with s. 17(1).

Richelle McCausland

National Health Practitioner Privacy Commissioner

¹⁷ *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, [52].

Rights

Review rights

If a review party is not satisfied with a review decision of the National Health Practitioner Privacy Commissioner (NHPPC), the party may apply to a relevant tribunal under s. 57A 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 NHPPC if the party believes the NHPPC incorrectly interpreted and applied the FOI Act.

An appeal must be made either:

- within 28 days after the day a review party receives the NHPPC'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 NHPPC (other than findings resulting from an error of law), and it appears to be convenient for the Supreme Court.

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