

'AA' and Australian Health Practitioner Regulation Agency



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

Applicant	'AA'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	OCF/19/498
Decision date	22 December 2020
Catchwords	FREEDOM OF INFORMATION – Whether documents contain deliberative matter prepared for a deliberative purpose – Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency – Whether disclosure of personal information is unreasonable – Whether it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 ss. 47C, 47E(d) and 47F

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

Decision

- Under s. 55k, I vary the decision of Ahpra of 30 August 2019. I substitute my decision that:
 - Document 1 is exempt in full under ss. 47C and 47E(d) as Ahpra contends
 - Document 2 is exempt in full under ss. 47E(d) and 47F as Ahpra contends
 - Document 3 is exempt in full under ss. 47C, 47E(d) and 47F as Ahpra contends
 - Document 4 is not exempt in part under s. 47F as Ahpra contends
 - some material in Document 5 is not exempt under s. 47F as Ahpra contends.
- Ahpra must now provide the Applicant with a copy of the documents, edited only to the extent necessary to delete exempt or irrelevant material, within 28 days of this decision.
- The schedule of documents in **Annexure 1** sets out my decision in relation to each document.

Background

4. The Applicant made a notification to Ahpra and the Medical Board of Australia (the Board) about the performance of a medical practitioner (the Practitioner). After investigating the Applicant's notification, the Board decided to take no further action.
5. After receiving notice of the Board's decision, the Applicant provided Ahpra with additional information. Following an assessment, Ahpra determined that the information did not warrant the notification being reconsidered by the Board.
6. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant clarified their request. The Applicant's clarified request was for access to:
 - All relevant documents considered and reviewed by the Medical Board of Australia; and
 - Documents relevant to Ahpra's review of [the Applicant]'s notification and the Board's decision following the outcome of the notification.
7. In its decision letter dated 25 July 2019, Ahpra identified seven documents falling within the scope of the Applicant's request. Ahpra decided that:
 - Document 1 is exempt in full under ss. 47C and 47E(d)
 - Document 2 is exempt in full under ss. 47E(d) and 47F
 - Document 3 is exempt in full under ss. 47C, 47E(d) and 47F
 - Documents 4 and 5 are exempt in part under s. 47F
 - Documents 6 and 7 are not exempt under the FOI Act.
8. On 30 July 2019, the Applicant requested an internal review of Ahpra's decision. Ahpra affirmed its original decision in its internal review decision letter dated 30 August 2019.
9. On 27 August 2019, the Applicant sought this review of Ahpra's decision to refuse access to the fully exempt and partially exempt documents under s. 54L.

Scope of the review

10. The issues I will decide in this review are:
 - whether the documents that Ahpra found to be exempt under s. 47E(d) are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the documents that Ahpra found to be exempt under s. 47C are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the documents (or part of the documents) that Ahpra found to be exempt under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
11. 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

¹ s. 55D(1).

any information from any person, make any inquiries that I consider appropriate, and change the basis on which the decision is made.²

12. The Applicant and Ahpra were invited to make a written submission about this review. I have considered all relevant communications and submissions received from both the Applicant and Ahpra.
13. 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 exemptions

Section 47E(d): Documents affecting certain operations of agencies

14. A document is conditionally exempt under s. 47E(d) 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.⁴
15. The Office of the Information Commissioner's FOI Guidelines (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.⁵
16. The FOI Guidelines further explain that 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'.⁶ 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'.⁷
17. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.⁸

Ahpra's operations

18. Under the Health Practitioner Regulation National Law (the National Law), Ahpra and the Board handle notifications about registered health practitioners (that is, concerns raised about the health, conduct and/or performance of practitioners).⁹
19. During the notifications process, Ahpra supports the Board by collecting and assessing relevant information. Ahpra then provides this information to the Board and the Board decides whether to take regulatory action against the practitioner.

² ss. 55 and 55K.

³ s. 3(1).

⁴ s. 47E(d).

⁵ FOI Guidelines [6.101] - [6.103].

⁶ FOI Guidelines [5.20].

⁷ FOI Guidelines [5.20].

⁸ FOI Guidelines [5.21].

⁹ For more information about the Board's functions see [s. 35 of the National Law \(Division 2, page 90\)](#).

20. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.¹⁰ '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 (including when handling notifications).¹¹

Ahpra's submissions

21. Ahpra found the following documents to be conditionally exempt under s. 47E(d):

- Ahpra's internal assessment of the notification made about the Practitioner (Document 1);
- Ahpra's internal file notes and emails about its internal assessment of the notification made about the Practitioner (Document 2)
- Ahpra's investigation report for the Board regarding the notification made about the Practitioner (Document 3), noting this document was incorrectly referred to as an 'Agenda Paper' in Ahpra's reasons for its decision.

22. Ahpra said in its decision:

... It is integral for the efficient management of notifications that the Board can continue to meet an individual's expectation of confidentiality over the communications and documents provided to assist the Board in its investigation... Internal documents... are made on the understanding that the documents, information and communication will be treated in a confidential manner and will only be used to assist the Board in undertaking its functions under the National Law...

If the documents were to be released under the FOI Act, this would likely have a significant impact on the future flow of information from practitioners, other government agencies and third parties, and Ahpra staff to the Board. In particular, practitioners may be reticent to express free, candid and complete responses in relation to notifications out of concern that their submissions may be subject to disclosure under the FOI Act. Similarly, Ahpra staff may be discouraged from keeping complete records of their deliberations,¹² or being more circumspect in their preliminary findings that are expressed to the Board because of public scrutiny.¹³ Other government agencies... and third-party organisations may also be discouraged from engaging in meaningful cooperation and sharing of information to assist investigations by the Board and Ahpra. This in turn would prejudice the integrity and robustness of the investigation processes.

Decisions by the Board are made after deliberations and consultations between Board members and in consensus. Board communications released under the FOI Act could expose the deliberations of the individual Board members which could lead to undue criticisms of individual Board members. This in turn would adversely affect the operations of agency in that Ahpra and the Board would not be able to properly and efficiently recruit and retain skilled individuals to the Board.

¹⁰ National Law, s.216.

¹¹ National Law, s.214 (definition of 'protected information').

¹² *Hanes v Australian Health Practitioner Regulation Agency* [2013] VCAT 1270, [30].

¹³ *Hassan v Australian Health Practitioner Regulation Agency* [2014] QCAT 414, [26].

As it is a core function of Ahpra under the National Law to conduct investigations, damage to Ahpra'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.

The Applicant's submissions

23. The Applicant made the following submissions in their application for review:

The FOI decision did not provide access to all the documents relevant to the review of the first Ahpra decision. I was unable to conclude from what documents I received that the review included all the new information I provided. This is because the documents made available to me were those used in making the first decision and they contained inaccuracies.

I seek access to all documents and conclusive evidence that my new information was considered.

24. The Applicant further submitted:

All along I have had a brevity of information on the justification of Ahpra's decision in my case. The intense secrecy in the whole process does not give me confidence that this matter has been fairly treated. I need to break down this secrecy and be informed for considered future actions. Hence, I need those five exempt documents or as much as possible that is not redacted.

... I stand by my complaint of the level of secrecy in this matter. What is galling is to be judged by a panel of faceless people of unknown qualifications and not having a transparent system of justice. Thus, I will never accept Ahpra's decision under such circumstances.

Application of the certain operations of agencies exemption

25. I am of the view that Documents 1, 2 and 3 were created in line with Ahpra's functions under the National Law, namely to:

- assess and investigate the Applicant's notification about the Practitioner's performance
- provide information to the Board about the notification to facilitate the Board's decision-making.

26. Ahpra officers must be willing to prepare information about the assessment and investigation of a notification. This, in turn, allows the Board to determine whether regulatory action is required to manage any risks posed by the relevant health practitioner's performance.

27. 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. In discussing whether s. 47E(d) applied in that case, the Australian Information Commissioner stated:

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.¹⁴

28. 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 creates a reasonable expectation that information prepared by Ahpra officers in the course of Ahpra or the Board exercising their investigative functions will be treated confidentially. If Ahpra discloses the documents requested by the Applicant, a reasonable person could conclude that information prepared for the Board 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 are able to access may be less readily provided or more difficult to obtain.
29. In coming to my view, 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 s. 47E(d) specifically in the context of Ahpra's operations. In *Spragg*, the Tribunal found that disclosure of protected information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.¹⁵ In reaching their decision, the Tribunal stated:
- ... 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.¹⁶
30. I am satisfied that disclosing the relevant information in Documents 1, 2 and 3 could reasonably be expected to significantly affect the future flow of information from Ahpra officers to the Board. The Board relies on candid communication from Ahpra officers to carry out its role in ensuring public safety. The National Law imposes a duty of confidentiality in relation to protected information and I consider that release of the documents could reasonably affect confidence in Ahpra's ability to maintain the confidentiality of protected information.
31. I am further satisfied that if the documents are disclosed, Ahpra officers may be discouraged from keeping complete records or may be less candid in their communications to the Board. This in turn would prejudice the integrity and robustness of the notifications process and thereby have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Board.
32. Accordingly, I am satisfied Documents 1, 2 and 3 are conditionally exempt under s. 47E(d).
33. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt documents at this time.

¹⁴ *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

¹⁵ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

¹⁶ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

Section 11A(5): The public interest test

34. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed unless in the circumstances access to the document at that time would, on balance, be contrary to the public interest.¹⁷
35. 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.¹⁸

Factors favouring disclosure

36. The FOI Act outlines factors to be considered, including that disclosure would:
- promote the objects of the FOI Act
 - inform debate on a matter of public importance
 - promote effective oversight of public expenditure
 - allow a person access to his or her personal information.¹⁹
37. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.²⁰
38. In forming its decision, Ahpra considered the following factors in favour of disclosure:
- Disclosure would promote the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities.²¹ Public scrutiny of documents relevant to deliberations of Ahpra and the National Boards may improve the quality of advice and decision-making processes.
 - Disclosure would facilitate access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency (including investigation processes of Ahpra and the National Boards).
 - Disclosure would reveal information that informed a decision-making process.
 - Disclosure would allow a person access to their personal information, or information relating to matters that otherwise concern them.
39. I agree that the disclosure of Documents 1, 2 and 3 would promote the objects of the FOI Act and that increased public scrutiny of documents relevant to the deliberations of Ahpra and the Board may improve the quality of advice and decision-making processes.

¹⁷ s. 11A(5).

¹⁸ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

¹⁹ s. 11B(3).

²⁰ FOI Guidelines [6.19].

²¹ s. 3(2)(b).

40. While I agree there are public interest factors that favour the disclosure of the documents, 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

41. In its reasons for decision, Ahpra considered the following factors against disclosure:

- There is a public interest in protecting and maintaining the integrity of Ahpra's, the Board's and other similar agencies' assessment and investigative processes. Ahpra's ability to properly and efficiently investigate notifications related to the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law.
- Disclosure would have a significant adverse impact 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 would result in other agencies and organisations being discouraged from engaging in meaningful cooperation and information sharing to assist investigations by Ahpra and the Board.
- Disclosure could reasonably be expected to prejudice Ahpra's ability to seek responses from health practitioners as they would be more reluctant to engage with Ahpra in a frank and candid manner about their practices.
- Disclosure would prejudice an individual's right to privacy, particularly as the relevant material is not well known or publicly available. Disclosure could also expose third parties to unfair scrutiny in circumstances where they understood their personal information would be confidential.

42. I 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.²² Ahpra's submissions included that there is a public interest in protecting and maintaining the integrity of its investigative processes in relation to notifications and in ensuring its ability to investigate notifications is not hampered by the disclosure of confidential information, or the use of information for purposes extraneous to Ahpra's functions.²³ I consider this to be a persuasive point.

Balancing the public interest factors

43. 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 internal documents under the FOI Act.

44. I note the Applicant's submissions at paragraphs [23]-[24], namely their desire to determine whether the additional information they provided to Ahpra after the Board made its decision was put to or considered by the Board. Section 11(2)(a) provides that a person's right of access is not affected by any reasons the person gives for seeking access to a document. However, if I were to consider the

²² *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

²³ *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

Applicant's reasons for applying for a review of Ahpra's internal review decision, I note that Ahpra advised the Applicant that it:

- considered the additional information provided and determined the information was not sufficient to alter the Board's decision to take no further action against the Practitioner
- was of the view that the additional information provided did not warrant reconsideration by the Board and therefore the Applicant's notification did not return to the Board.

45. Based on the information available, I am satisfied that the public interest factors against disclosure outweigh the factors in favour of disclosure. As such, I am satisfied that giving the Applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Finding

46. I am satisfied that Documents 1, 2 and 3 are exempt in full under s. 47E(d).

Section 47C: Documents subject to deliberative processes

47. A document is conditionally exempt under s. 47C if its disclosure would disclose deliberative matter in the nature of, or relating to, either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister.²⁴

48. The main requirements of this conditional exemption are that:

- the document contains or relates to 'deliberative matter'²⁵
- the document was prepared for a 'deliberative purpose'²⁶
- the document contains material that is not 'purely factual' or non-deliberative²⁷
- it would be contrary to the public interest to give access at the time of the decision.²⁸

49. The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.²⁹

50. In the Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, Deputy President Forgie explains that:

...the meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.³⁰

²⁴ s. 47C(1).

²⁵ Ibid.

²⁶ Ibid.

²⁷ s. 47C(2).

²⁸ s. 11A(5).

²⁹ *Parnell and Attorney-General's Department* [2014] AICmr71, [38].

³⁰ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

51. The FOI Guidelines explain:

In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.³¹

Ahpra's submissions

52. Ahpra found the following documents to be conditionally exempt under s. 47C:

- Ahpra's internal assessment of the notification made about the Practitioner (Document 1)
- Ahpra's investigation report for the Board regarding the notification made about the Practitioner (Document 3).

53. Ahpra said in its decision:

... [Documents 1 and 3] contain advice and recommendations prepared by Ahpra for consideration by the Board and information which discloses deliberations (including preliminary assessments) by Ahpra and the Board.

Therefore, disclosure of [Documents 1 and 3] would disclose deliberative matter in the nature of, and relating to, advice and recommendations that were prepared, and deliberation that has taken place, in the course of, or for the purposes of the deliberative processes involved in the functions of Ahpra and the Board under the National Law.

The deliberative material ... identified does not contain operational information (as defined in s. 8A) or purely factual material. To the extent that the information is of a factual nature, such information is an integral part of the deliberative content and purpose of [Documents 1 and 3] or is otherwise so embedded in or intertwined with the deliberative content such that it is impracticable to separate it.

Application of the deliberative processes' exemption

54. I agree with Ahpra that Documents 1 and 3 contain deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation that is recorded or reflected by Ahpra officers for consideration by the Board under the National Law. Moreover, it is apparent that the documents do not constitute the Board's final decision on the relevant investigation.

55. While I agree that Documents 1 and 3 contain deliberative matter, I am also of the view that the documents contain information that is non-deliberative in nature, such as the details surrounding the Applicant's notification. However, I consider the non-deliberative matter to be an integral part of the deliberative process for which the documents were prepared.

56. In coming to this view, I considered the Australian Information Commissioner's reflection on non-deliberative matter in *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014):

... there are many sentences in the Incoming Government Brief (IBG) that mirror comments that are already in the public domain or that could individually be released without consequence. However,

³¹ FOI Guidelines, [6.58] – [6.59].

... the confidentiality that attaches to deliberative content in an IGB has less to do with the character of individual sentences or comments, and more to do with their inclusion in a document of a special nature...³²

57. In line with the Australian Information Commissioner's reflection, I consider that the confidentiality attached to the deliberative matter in Documents 1 and 3 extends to the non-deliberative matter that is an integral part of Ahpra's deliberations.
58. Accordingly, I am satisfied that Documents 1 and 3 are conditionally exempt under s. 47C.
59. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt documents at this time.

Section 11A(5): The public interest test

Factors favouring disclosure

60. I consider paragraphs [36] to [40] to be of particular relevance here.
61. I agree that disclosure of Documents 1 and 3 would promote the objects of the FOI Act and reveal information that informed a decision-making process, which may in turn improve the quality of advice and decision-making processes of Ahpra and the Board.

Factors against disclosure

62. Paragraphs [41] to [42] are relevant here.

Balancing the public interest factors

63. The National Law creates a reasonable expectation of confidentiality over the communications and documents provided to assist the Board in its investigation of notifications. The deliberative matter in the form of opinions, advice, preliminary findings and recommendations to the Board, are made by Ahpra officers on the understanding that such documents, information and communication will be treated in a confidential manner and will only be used to assist the Board in undertaking its functions under the National Law.
64. If documents containing the opinions, advice, preliminary findings and recommendations of Ahpra officers to the Board were released under the FOI Act, it is reasonable to expect that officers may be less frank and candid in the future, which would negatively affect the Board's decision-making processes. This would be contrary to its statutory obligations.
65. I note the FOI Guidelines explain that:

Agencies should start with the assumption public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities. Special and specific circumstances must exist in order for a 'frankness and candour' claim to be a relevant factor when applying s. 47C.³³

³² *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014), [39].

³³ FOI Guidelines, [6.83].

66. In my view, the National Law provides special and specific circumstances in relation to Ahpra and the Board.
67. While I acknowledge the Applicant's interest in obtaining access to Documents 1 and 3, I accept there is a stronger public interest in Ahpra and the Board's ability to perform their functions in a way that is consistent with their statutory duties and the legislative framework.
68. I am satisfied that giving the Applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Finding

69. I am satisfied that Documents 1 and 3 are exempt in full under s. 47C.

Section 47F: Documents affecting personal privacy

70. A document is conditionally exempt under s. 47F if its disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person).³⁴
71. The main requirements of this conditional exemption are that:
- a document contains 'personal information'
 - disclosure in response to the applicant's FOI request would be unreasonable³⁵
 - it would be 'contrary to the public interest' to release the material at the time of the decision.³⁶

Personal information

72. '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; and
 - whether the information or opinion is recorded in a material form or not.³⁷

73. The FOI Guidelines explain:

The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person's name or signature may, however, reveal personal information about them depending on the context. For example, a person's name may appear in a list of benefit recipients, and given that context, the information would be personal information. Conversely, where information does not say anything about that person the information would not be personal information.³⁸

³⁴ s. 47F.

³⁵ s. 47F(1).

³⁶ s. 11A(5).

³⁷ s. 4(1) (definition of 'personal information'); *Privacy Act 1988* (Cwlth), s. 6 (definition of 'personal information').

³⁸ FOI Guidelines, [6.143].

Unreasonable disclosure of personal information

74. In determining whether the disclosure of the information would involve an unreasonable disclosure of personal information, s. 47F(2) provides that a decision-maker must have regard to:
- the extent to which the information is well known
 - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
 - the availability of the information from publicly assessable sources
 - any other matters that the agency or minister considers relevant.
75. The FOI Guidelines explain that other relevant factors include:
- the nature, age and current relevance of the information
 - any detriment that disclosure may cause to the person to whom the information relates
 - any opposition to disclosure expressed or likely to be held by that person
 - the circumstances of an agency's collection and use of the information
 - any submission an applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information
 - whether disclosure of the information might advance the public interest in government transparency and integrity
 - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.³⁹
76. The FOI Guidelines explain that the test of 'unreasonableness' under s. 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.'⁴⁰

Ahpra's submissions

77. Ahpra found the following documents to be conditionally exempt in part under s. 47F:
- Ahpra's internal file notes and emails about its internal assessment of the notification made about the Practitioner (Document 2)
 - Ahpra's investigation report for the Board regarding the notification made about the Practitioner (Document 3).
78. The remaining material that Ahpra contends is exempt under s. 47F is found in Document 4 (the Applicant's notification to OHO) and Document 5 (the Practitioner's submission to Ahpra about the notification). Specifically, Ahpra found the following information to be conditionally exempt under s. 47F:
- the name of an officer from the Office of the Health Ombudsman (OHO) in Document 4
 - the identity and contact details of the Practitioner's professional indemnity insurer in Document 5
 - the identity and contact details of the Practitioner's solicitor in Document 5.

³⁹ FOI Guidelines, [6.143].

⁴⁰ FOI Guidelines, [6.138].

79. With respect to whether disclosure of the information identified above would involve an unreasonable disclosure of personal information, Ahpra said in its decision:

Although [the Practitioner] is known by [the Applicant] to be associated with the matters dealt with in the documents, the specific information and personal views expressed by [the Practitioner] is not known to [the Applicant], nor is that information publicly accessible or well known. Furthermore, [Ahpra] is satisfied from [its] own enquiries that the personal information about [the Practitioner] and other associated third parties is not well known or publicly available. Ahpra and the Board obtained the documents in question to facilitate the investigation into the notification [the Applicant] made about [the Practitioner]. There is an expectation that the personal information provided by these individuals would only be used by Ahpra and the Board in this context.

[Ahpra] also considered whether the information would shed light on the workings of government, in particular the investigations process and evidence that was taken into account. However, when balanced against the relevant factors, [Ahpra] is satisfied that disclosure of the relevant third-party information would be unreasonable in the circumstances.

80. Ahpra submitted in relation to Document 4:

Ahpra maintains the name of an OHO officer is exempt from release under s. 47F. Staff working for the OHO, as a participant in the National Registration and Accreditation Scheme (NRAS), experience the same 'special circumstances' as those experienced by Ahpra and National Boards.

...[Ahpra] also maintain that the release of OHO staff members names may be detrimental to Ahpra's relationship with that state government entity and is also exempt on that basis.

81. Ahpra further submitted in relation to Document 5:

Ahpra agrees that [the Practitioner's] consultation response could be interpreted to consent to the release of information identifying his professional indemnity insurer. [Ahpra] do not oppose the release of information on this basis. However, [Ahpra] also note[s] that the information is inconsequential and could be withheld under s. 22 of the FOI Act.

Application of personal privacy exemption

82. Based on my examination of the information Ahpra found exempt under s. 47F, I am of the view all the information, with the exception of the identity and contact details of the Practitioner's professional indemnity insurer in Document 5, says something about third-party individuals and thus constitutes personal information for the purposes of s. 47F.

83. In coming to this view, I considered the Australian Information Commissioner's decision in *'RK' and Department of Defence (Freedom of information)* [2019] AICmr 73 (17 December 2019). In that case, the Australian Information Commissioner found that:

The hyperlinks, and information relating to third-party organisations including the name, logo, contact details, Australian Business Number and website⁴¹ does not identify any individual and does not comprise personal information.⁴²

⁴¹ *'RK' and Department of Defence (Freedom of information)* [2019] AICmr 73 (17 December 2019), [39].

⁴² *Ibid*, [49].

84. Based on this, I will not consider the application of the personal privacy exemption to the identity and contact details of the Practitioner's professional indemnity insurer. I will now determine whether access to the remaining identified personal information would involve unreasonable disclosure.

Name of the OHO officer (Document 4)

85. Document 4 contains a file note detailing a telephone conversation between an officer of the OHO and a family member of the Applicant. Ahpra released Document 4 to the Applicant in part, exempting only the name of the OHO officer under s. 47F.

86. From my examination of Document 4, it is apparent that the name of the OHO officer was provided to the Applicant's family member during their telephone conversation. In addition, it is reasonable to expect from the words 'I will call [the Applicant] to follow up the case' that the OHO officer and the Applicant engaged in a telephone conversation. As such, I consider it highly likely the name of the OHO officer would be known to the Applicant.

87. Given this, I am of the view that the disclosure of the name of the OHO officer would not be unreasonable in these circumstances.

88. In coming to this view, I considered the recent decision of the Administration Appeals Tribunal (AAT): *Warren; Chief Executive Officer, Services Australia and (Freedom of Information)* [2020] AATA 4557 (*Warren*).⁴³ The information under review in this decision comprises the names and telephone numbers of various officers of Services Australia contained in a Risk Management Plan, Open Issues Summary, Progress Report and Issues Summary. The AAT found such information to be exempt under s. 47F.

89. In particular, the AAT found:

- the conditional exemption in s. 47F can apply to employees of an agency⁴⁴
- when determining whether access would involve unreasonable disclosure, regard is to be had to the considerations and factors listed above at paragraphs [74] and [75].

90. Also, the AAT considered other relevant factors, including:

- whether the individuals are responsible for the matters canvassed in the documents
- whether disclosure would contribute to increased scrutiny or rather whether the public interest has been met in the form of the disclosure of the substance of the documents; and
- any public interest in transparency and accountability is outweighed by public interests in the rights of individuals not to have personal information unreasonably disclosed.

91. The facts of *Warren* can be differentiated from this case on the basis that:

- it is highly likely that the name of the OHO officer would be known to both the Applicant and the Applicant's family member
- the OHO officer was clearly responsible for the management of the Applicant's complaint made to the OHO as demonstrated by the file note of the telephone conversation.

⁴³ (9 November 2020).

⁴⁴ *Warren; Chief Executive Officer, Services Australia and (Freedom of Information)* [2020] AATA 4557 (9 November 2020), [43].

92. I consider that the disclosure of the name of the OHO officer would do no more than confirm the name of the officer previously in contact with the Applicant and the Applicant's family member.
93. Additionally, my office consulted the OHO regarding the possible disclosure of the staff member's name to the Applicant. The OHO did not object to the disclosure, noting that disclosure would be consistent with principle 11(1)(a) of the *Information Privacy Act 2009* (Qld). Principle 11(1)(a) provides that that an agency may disclose personal information if the individual the personal information is about would reasonably likely have been aware that it is the agency's usual practice to disclose the type of personal information to the relevant entity.
94. For these reasons, I am not satisfied that it has been established that disclosure of the name of the OHO officer would be an unreasonable disclosure of personal information.
95. As I am not satisfied that the material is conditionally exempt under s. 47F, I am not required to consider whether giving the Applicant access to the OHO officer's name would be contrary to the public interest under s. 11A(5).

Contact details of the Practitioner's solicitor (Document 5)

96. Document 5 contains the Practitioner's submission to Ahpra in response to the notification. From my examination of the identified personal information contained in Document 5, I am of the view that the disclosure of the identity and contact details of the Practitioner's solicitor would be unreasonable in the circumstances.
97. In coming to this view, I considered the Australian Information Commissioners comments in *Shane Dowling and National Library of Australia* [2015] AICmr 24 (26 March 2015) in relation to the reasonableness of disclosing personal information about a third party's legal representative under s. 47F. The Australian Information Commissioner explained:
- Giving full access to documents 1 and 2 would necessarily disclose personal information about the third party and his legal representative, specifically their names and their associations with this matter...[T]his information is already in the public domain. For this reason, I do not consider that the disclosure of this personal information would be unreasonable.⁴⁵
98. The Australian Information Commissioner's analysis above reasonably lends to the conclusion that disclosure would be unreasonable where the names of third parties and their associations with a matter are not in the public domain.
99. As the identity and contact details of the Applicant's solicitor are neither known to the Applicant nor publicly available, I am satisfied that disclosing this information would involve an unreasonable disclosure of personal information for the purposes of s. 47F.
100. The identity and contact details of the Applicant's solicitor is conditionally exempt under s. 47F.
101. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt information at this time.

Personal information about Ahpra officers (Document 2)

102. Document 2 contains internal file notes and emails about Ahpra's internal assessment of the notification made about the Practitioner. From my examination of Document 2, I am satisfied that it

⁴⁵ *Dowling and National Library of Australia* [2015] AICmr 24 (26 March 2015), [81].

contains personal information such as the names, contact details and expressed opinions of Ahpra officers.

103. I am of the view that disclosure of this information would be unreasonable in the circumstances.

104. In coming to this view, I considered the recent decision of the ATT: *Warren*.⁴⁶ The facts of *Warren* are analogous to this case on the basis that:

- the identified personal information is not known to the Applicant
- disclosure would not contribute to increased scrutiny.

105. For these reasons, I am satisfied that it has been established that disclosure of the identified personal information would be an unreasonable disclosure of personal information for the purposes of s. 47F.

106. Document 2 is conditionally exempt under s. 47F.

107. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt information at this time.

Personal information about the Practitioner (Document 3)

108. Document 3 contains Ahpra's investigation report for the Board regarding the notification made about the Practitioner. From my examination of Document 3, I am satisfied that it contains personal information about the Practitioner in the form of expressed opinions in response to the Applicant's notification and the expressed opinions of Ahpra officers.

109. I am of the view that disclosure of this information would be unreasonable in the circumstances for the reasons provided in paragraphs [102] to [104].

110. Document 3 is conditionally exempt under s. 47F.

111. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt information at this time.

Section 11A(5): The public interest test

Factors favouring disclosure

112. I consider the public interest factors in favour of disclosure identified by Ahpra at paragraph [38] above to be relevant here.

113. I agree that disclosure of the conditionally exempt information would further the objects of the FOI Act and enhance public scrutiny of documents relevant to the deliberations of Ahpra and the Board which may improve the quality of decision-making processes.

Factors against disclosure

114. Regarding the public interest factors against disclosure, I note the factors described at paragraph [41] above in relation to the application of s. 47E(d). Ahpra identified the following factor against disclosure that relates specifically to s. 47F:

⁴⁶ *Warren; Chief Executive Officer, Services Australia and (Freedom of Information)* [2020] AATA 4557 (9 November 2020).

[Disclosure would] ... prejudice... an individual's right to privacy, particularly as the relevant material is not well known or publicly available. Disclosure could also expose third parties to unfair scrutiny, in circumstances where they understood their personal information would be confidential. The personal privacy exemption is designed to prevent the unreasonable invasion of a third party's privacy.

115. I consider that the prejudice to the protection of an individual's privacy is a factor that weighs heavily against disclosure.

Balancing the public interest factors

116. I have considered the nature of the conditionally exempt information and the circumstances in which it was provided to Ahpra. In the circumstances, I find that greater weight should be given to the factors against disclosure.

117. I find that disclosure at this time would, on balance, be contrary to the public interest.

Finding

118. I am not satisfied that the name of the OHO officer and the identity and contact details of the Practitioner's professional indemnity insurer are exempt under s. 47F.

119. I am satisfied that the personal information identified in Documents 2 and 3 and the identity and contact details of the Practitioner's solicitor in Document 5 are exempt under s. 47F.

Conclusion

120. I vary the decision of Ahpra of 30 August 2019.

121. I substitute my decision that:

- Document 1 is exempt in full under ss. 47C and 47E(d) as Ahpra contends
- Document 2 is exempt in full under ss. 47E(d) and 47F as Ahpra contends
- Document 3 is exempt in full under ss. 47C, 47E(d) and 47F as Ahpra contends
- Document 4 is not exempt in part under s. 47F as Ahpra contends
- some material in Document 5 is not exempt under s. 47F as Ahpra contends.

Richelle McCausland

National Health Practitioner Privacy Commissioner

Rights

Review rights

If a review party is not satisfied with a review decision of the National Health Practitioner Privacy Commissioner, 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 National Health Practitioner Privacy Commissioner if the party believes the FOI Act has been incorrectly interpreted and applied.

An appeal must be made either:

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

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Annexure 1 – Schedule of Documents

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
1.	5 June 2019	Ahpra internal assessment	3	Exempt in full ss. 47C and 47E(d)	Exempt in full ss. 47C and 47E(d)
2.	Various	Ahpra internal correspondence	6	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d) and 47F
3.	7 November 2018	Investigation Report (previously referred to as an Agenda Paper)	7	Exempt in full ss. 47C, 47E(d) and 47F	Exempt in full ss. 47C, 47E(d) and 47F
4.	21 April 2017	[The Applicant]'s notification to the Office of the Health Ombudsman (OHO)	14	Exempt in part s. 47F	Release in full

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
5.	7 June 2017	[The Practitioner]'s submission to Ahpra	16	Exempt in part s. 47F	Release in part s. 47F The document is to be released to the Applicant with the following information deleted as it is exempt under s. 47F: the identity and contact details of the Practitioner's solicitor. The remaining pages are to be released in full.
6.	Various	[The Applicant]'s medical records from [location] Eye Specialists	17	Released in full	Not subject to review
7.	Various	[The Applicant]'s medical records from [another practitioner]	29	Released in full	Not subject to review