

# 'AC' and Australian Health Practitioner Regulation Agency (Ahpra)



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

Applicant	'AC'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	OCF/20/113
Decision date	4 March 2021
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

1. Under s. 55K I affirm Ahpra's internal review decision of 30 September 2019 to exempt the documents from release under ss. 47C, 47E(d) and 47F.

## Background

2. The Applicant made a notification to Ahpra and the Medical Board of Australia (the Board) about the conduct of a medical practitioner (the Practitioner).
3. The Board decided to take no further regulatory action in relation to the notification.
4. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant clarified their request to:
  - a copy of the Practitioner's response(s) to the notification
  - any notes or documents recorded by the complaint handling officer regarding [the Applicant's] complaint
  - a copy of the Applicant's original complaint
  - copies of all supporting documents presented by the Practitioner, and

- any further documents provided by the Practitioner’s colleagues or employers.
5. Ahpra identified eight documents falling within the scope of the request in its decision letter dated 16 September 2019. Ahpra decided to:
    - release two documents in full
    - fully exempt the remaining six documents from release under one or more of ss. 47C, 47E(d) and 47F.
  6. On 23 September 2019 the Applicant requested an internal review of Ahpra’s decision. Ahpra affirmed its original decision in its internal review decision letter dated 30 September 2019.
  7. On 21 February 2020 the Applicant sought a review of Ahpra’s internal review under s. 54L.

## Scope of the review

8. The issues I will decide in this review are:
  - 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 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. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
9. 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.<sup>1</sup> 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.<sup>2</sup>
10. The Applicant and Ahpra were invited to make a written submission about the review. I have considered all relevant communications and submissions received from the Applicant and Ahpra.
11. 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.<sup>3</sup>

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<sup>1</sup> s. 55D(1).

<sup>2</sup> ss. 55 and 55K.

<sup>3</sup> s. 3(1).

## Review of the exemptions

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

12. 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.<sup>4</sup>
13. The Office of the Australian 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.<sup>5</sup>
14. 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'.<sup>6</sup> 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'.<sup>7</sup>
15. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.<sup>8</sup>

### Ahpra's operations

16. 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).<sup>9</sup>
17. 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 in relation to the notification.
18. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.<sup>10</sup> '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).<sup>11</sup>

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<sup>4</sup> s. 47E(d).

<sup>5</sup> FOI Guidelines [6.101] - [6.103].

<sup>6</sup> FOI Guidelines [5.20].

<sup>7</sup> FOI Guidelines [5.20].

<sup>8</sup> FOI Guidelines [5.21].

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

<sup>10</sup> National Law, s.216.

<sup>11</sup> National Law, s.214 (definition of 'protected information').

## Ahpra's submissions

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

- internal working documents prepared by Ahpra about the assessment of issues raised in the Applicant's notification (Documents 3 and 4)
- the Practitioner's response to the Applicant's notification (Document 6)
- reports prepared by Ahpra for the Board in relation to the Applicant's notification about the Practitioner (Documents 7 and 8).

20. 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 [Documents 3, 4 and 6 to 8] 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. Similarly, Ahpra staff may be discouraged from keeping complete records of their deliberations,<sup>12</sup> or being more circumspect in their preliminary findings that are expressed to the Board because of public scrutiny<sup>13</sup>. Other government agencies and third parties may also be discouraged from engaging in meaningful cooperation and sharing of information to assist with investigations and enquiries by agencies like the Board. This in turn would prejudice the integrity of investigations.

21. Ahpra further submitted:

...Decisions by National Boards 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 agency operations, in that Ahpra and the National Boards would not be able to properly and efficiently recruit and retain skilled individuals to the National Boards.

## The Applicant's submissions

22. In their request to Ahpra for an internal review of its decision, the Applicant submitted:

... I would like to know how did [the Practitioner] respond to my complaint and what actions were taken by Ahpra in order to come to the decision of not taking any action against [the Practitioner] and also to decide if I can take this issue [the Practitioner] [sic] to courts of law.

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<sup>12</sup> See *Hanes v Australian Health Practitioner Regulation Agency* (Review and Regulation) [2013] VCAT 1270 at [30].

<sup>13</sup> See *Hassan v Australian Health Practitioner Regulation Agency* [2014] QCAT 414 at [26].

23. In their application for review, the Applicant submitted:

...I'll be glad if you can consider my request to have the requested information released for me to be able to explore my further legal options against [sic] doctor who threatened me not to take my child to [the Practitioner's] hospital.

## Application of the certain operations of agencies exemption

24. I am of the view that Documents 3, 4 and 6 to 8 were created in line with Ahpra's functions under the National Law, namely to:

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

25. Notifiers, practitioners, Ahpra officers and other government bodies must be willing to provide information necessary to facilitate Ahpra and the Board's assessment or investigation of a notification. This allows the Board to determine whether regulatory action is required to manage any risks posed by the relevant health practitioner's performance.

26. As I considered in my decisions in 'AA', 'JH' and 'MS'<sup>14</sup>, I draw on 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) (*Mahony*). In *Mahony*, 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.<sup>15</sup>

27. 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 prepared 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. This in turn could reasonably be expected to impact how effectively Ahpra and the

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<sup>14</sup> <https://www.nhpo.gov.au/foi-review-decisions>.

<sup>15</sup> *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

Board can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.

28. In reaching 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) (*Spragg*). Notably, in *Spragg* the Tribunal considered the application of s. 47E(d) specifically in the context of Ahpra's operations. In that case, 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.<sup>16</sup> In making 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. 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...<sup>17</sup>

29. I am satisfied that disclosing the relevant information in Documents 3, 4 and 6 to 8 could reasonably be expected to significantly affect the future flow of information to Ahpra and the Board. Ahpra and the Board rely on candid communication from relevant parties to carry out their role in ensuring public safety.
30. In addition, the National Law imposes a duty of confidentiality in relation to protected information and I consider that release of Documents 3, 4 and 6 to 8 could reasonably affect the confidence of the relevant parties in Ahpra's ability to maintain the confidentiality of protected information.
31. I consider that disclosure of Documents 3, 4 and 6 to 8 would prejudice the integrity and robustness of the notifications processes 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 that Documents 3, 4 and 6 to 8 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 material at this time.

## 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.<sup>18</sup>
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

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<sup>16</sup> *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

<sup>17</sup> *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

<sup>18</sup> s. 11A(5).

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.<sup>19</sup>

### 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.<sup>20</sup>

37. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>21</sup>

38. In forming its decision, Ahpra considered the following 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<sup>22</sup>
- 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 (including investigation processes of Ahpra and the Board)
- 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.

39. I agree that disclosure of Documents 3, 4 and 6 to 8 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 decision-making processes.

40. While I agree there are public interest factors that favour the disclosure of Documents 3, 4 and 6 to 8, 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. Ahpra put forward the following factors against disclosure:

- It is in the public interest to protect and maintain the integrity of Ahpra, the Board and other similar agencies' assessment and investigative processes. For example, Ahpra's ability to investigate notifications properly and efficiently is integral to the maintenance and enforcement of the

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<sup>19</sup> *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

<sup>20</sup> s. 11B(3).

<sup>21</sup> FOI Guidelines [6.19].

<sup>22</sup> s. 3(2)(b).

National Law. There is a strong public interest in ensuring proper processes for consumer protection,<sup>23</sup> and that only suitable practitioners in various fields of the health profession can provide services to the public.<sup>24</sup>

- It is in the public interest for Ahpra and the Board to carry out their statutory functions as efficiently and effectively as possible. It is essential that Ahpra and the Board consult with internal stakeholders and practitioners subject to notifications to assist with any necessary preliminary assessments and investigations. 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 and duties in an effective manner. Ahpra's ability to investigate notifications properly and efficiently is integral to the maintenance and enforcement of the National Law. Disclosure could reasonably be expected to prejudice Ahpra's ability to seek responses from health practitioners, as practitioners would naturally be more reluctant to engage with Ahpra in a frank and candid manner about their practices, with the knowledge their responses would be made publicly available. Disclosure could therefore affect Ahpra's ability to obtain similar information in the future thereby making assessment and investigations of notifications more difficult.
- Disclosure could reasonably be expected to prejudice to the protection of an individual's right to privacy, particularly as the relevant material is not well known or publicly available.

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.<sup>25</sup> 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.<sup>26</sup> 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 submission at paragraphs [22-23] and respectfully disagree with their submission. The notifications 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

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<sup>23</sup> *Ah Teo v Pacific Media Group* [2016] VSC 626 at [30].

<sup>24</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67] quoting *Hulls and Victorians Casino and Gaming Authority* (1998) 12 VAR [48] 3.

<sup>25</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

<sup>26</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].



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 up to the Board to then determine whether it should take regulatory action against the practitioner or make further enquiries.

45. Based on the information available, I am satisfied that the public interest factors against disclosure outweigh the factors in favour of disclosure.
46. 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

47. Accordingly, I am satisfied that Documents 3 and 4, 6 to 8 are exempt in full under s. 47E(d).

## Section 47C: Documents subject to deliberative processes

48. 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.<sup>27</sup>

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

- the document contains or relates to ‘deliberative matter’<sup>28</sup>
- the document was prepared for a ‘deliberative purpose’<sup>29</sup>
- the document contains material that is not ‘purely factual’ or non-deliberative<sup>30</sup>
- it would be contrary to the public interest to give access at the time of the decision.<sup>31</sup>

50. The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.<sup>32</sup>

51. 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.<sup>33</sup>

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<sup>27</sup> s. 47C(1).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> s. 47C(2).

<sup>31</sup> s. 11A(5).

<sup>32</sup> *Parnell and Attorney-General's Department* [2014] AICmr71, [38].

<sup>33</sup> *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39].

52. 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.<sup>34</sup>

## Ahpra's submissions

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

- internal working documents prepared by Ahpra about the assessment of issues raised in the Applicant's notification (Documents 3 and 4)
- reports prepared by Ahpra for the Board in relation to the Applicant's notification about the Practitioner (Documents 7 and 8).

54. Ahpra said in its decision:

I am satisfied the disclosure of [Documents 3, 4, 7 and 8] 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 I have identified does not contain operational information<sup>35</sup> 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 the documents or is otherwise so embedded in or intertwined with the deliberative content such that it is impracticable to separate it. The deliberative material also does not include reports of scientific or technical experts, reports of a prescribed body or organization, or the record or reasons for a final decision given in the exercise of a power or adjudicative function. Accordingly, I find that [Documents 3, 4, 7 and 8] are conditionally exempt in full, or in part, under section 47C of the FOI Act.

55. Ahpra made the following submission in response to the Applicant's application for review:

Ahpra maintains its position with respect to [Documents 3, 4, 7 and 8] found to be conditionally exempt in full under section 47C of the FOI Act. The documents identified are papers prepared by Ahpra that contain advice and recommendations to be considered by the Board and information which discloses deliberations (including preliminary assessments) by Ahpra, in the course of, and for the purposes of, responding to the notification [the Applicant] made about [the Practitioner]. Ahpra is satisfied the disclosure of [Documents 3, 4, 7 and 8] 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...

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<sup>34</sup> FOI Guidelines, [6.58] – [6.59].

<sup>35</sup> s. 8A.

## Application of the deliberative processes exemption

56. I agree with Ahpra that Document 3, 4, 7 and 8 contain deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation that is recorded by Ahpra officers for the Board's consideration under the National Law.
57. While I agree that Documents 3, 4, 7 and 8 contain deliberative matter, I am also of the view that they contain information that is non-deliberative in nature, such as the Practitioner's registration details and 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.
58. 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 (IGB) that mirror comments that are already in the public domain or that could individually be released without consequence. However, ... 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...<sup>36</sup>
59. In line with the Australian Information Commissioner's reflection, I consider that the confidentiality attached to the deliberative matter in Documents 3, 4, 7 and 8 extends to the non-deliberative matter that is an integral part of Ahpra's deliberations.
60. Accordingly, I am satisfied that Documents 3, 4, 7 and 8 are conditionally exempt under s. 47C.
61. 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

62. I consider paragraphs [36] – [40] to be of particular relevance here.
63. I agree that disclosure of Document 3, 4, 7 and 8 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

64. I consider paragraphs [41] – [42] to be relevant here.

### Balancing the public interest factors

65. 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

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<sup>36</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014), [XX].

treated in a confidential manner and will only be used to assist the Board in undertaking its functions under the National Law.

66. 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.

67. 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.<sup>37</sup>

68. In my view, the National Law provides special and specific circumstances in relation to Ahpra and the Board.

69. While I acknowledge the Applicant's interest in obtaining access to Documents 3, 4, 7 and 8, 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.

70. 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

71. I am satisfied that Documents 3, 4, 7 and 8 are exempt in full under s. 47C.

## Section 47F: Documents affecting personal privacy

72. 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).<sup>38</sup>

73. 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 unreasonable<sup>39</sup>
- it would be 'contrary to the public interest' to release the material at the time of the decision.<sup>40</sup>

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<sup>37</sup> FOI Guidelines, [6.83].

<sup>38</sup> s. 47F.

<sup>39</sup> s. 47F(1).

<sup>40</sup> s. 11A(5).

## Personal information

74. '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:

- (a) whether the information is true or not;
- (b) whether the information or opinion is recorded in a material form or not.<sup>41</sup>

75. 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.<sup>42</sup>

## Joint personal information

76. 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.<sup>43</sup>

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

## Unreasonable disclosure of personal information

78. 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.

79. 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

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<sup>41</sup> *Freedom of Information Act 1982* (Cwlth), s 4(1) (definition of 'personal information'); *Privacy Act 1988* (Cwlth), s 6 (definition of 'personal information').

<sup>42</sup> FOI Guidelines, [6.143].

<sup>43</sup> FOI Guidelines [6.150].

- 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; and
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.<sup>44</sup>

80. 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.’<sup>45</sup>

## Ahpra’s submissions

81. Ahpra found the following documents to be conditionally exempt in part under s. 47F:

- Internal working documents prepared by Ahpra about the assessment of issues raised in the Applicant’s notification (Document 3 and 4)
- A document containing information about the Practitioner (Document 5)
- The Practitioner’s response to the Applicant’s notification (Document 6)
- Reports prepared by Ahpra for the Board in relation to the Applicant’s notification about the Practitioner (Document 7 and 8).

82. 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 and about [the Practitioner] are not known to [the Applicant], nor are they publicly accessible or well known. Furthermore, I am satisfied from my own enquiries that the personal information about [the Practitioner] is not well known or publicly available.

Ahpra and the Board obtained this information to facilitate its 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 other considerations discussed above, [Ahpra is] satisfied that disclosure of the relevant third-party personal information would be unreasonable in the circumstances.

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<sup>44</sup> FOI Guidelines, [6.143].

<sup>45</sup> FOI Guidelines, [6.138].

83. Ahpra further submitted:

Section 47F(3) of the FOI Act, provides that a document is not conditionally exempt under s47F(1) of the FOI Act, simply because it contains information about [the Applicant]. I have not found any documents to be conditionally exempt on this basis.

In this instance, there are documents that fall within the scope of [the Applicant's] request that contain joint personal information about [the Applicant] and [the Practitioner]. The information is so intertwined that it is not reasonably practicable to separate [the Applicant's] information from [the Practitioner's] personal information...

84. Ahpra further submitted:

Ahpra maintains its position with respect to [Documents 3 to 8] being exempt ... under section 47F of the FOI Act, because [Documents 3 to 8] contain personal information relating to [the Practitioner] and other third-party individuals. Ahpra acknowledges [the Practitioner] is known by [the Applicant] to be associated with the matters dealt with in [Documents 3 to 8], however the specific information is not known to [the Applicant], nor is it publicly accessible or well known. Ahpra and the Board obtained this information to facilitate its investigation into the notification [the Applicant] made to Ahpra about [the Practitioner] and there is an expectation that the information provided would only be used by Ahpra and the Board in this context. Ahpra also acknowledges that some of the documents contain joint personal information about [the Applicant] and other third-party individuals and that the information is so intertwined that it is not reasonably practicable to separate [the Applicant's] information from that of these third-party individuals.

## Application of personal privacy exemption

85. Based on my examination of Documents 3 to 8, I am of the view that these Documents contain information relating to the Practitioner's registration, opinions expressed by the Practitioner and individuals such as Ahpra officers, as well as other information of a personal nature. I am of the view such information says something about other individuals and thus constitutes personal information for the purposes of s. 47F.
86. I will now determine whether access to the identified personal information would involve unreasonable disclosure.
87. From my examination of the information available, it is apparent that the identified personal information is not known to the Applicant and is not publicly available.
88. Given this, I am of the view disclosure of the identified personal information would be unreasonable in these circumstances. The Practitioner's response to the Applicant's notification could be seen to contain personal information about the Applicant because it responds to the Applicant's allegations. However, 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.
89. 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*).<sup>46</sup> The information under review in this decision comprised the names and telephone

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<sup>46</sup> (9 November 2020).

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.

90. In particular, the AAT found:

- the conditional exemption in s. 47F can apply to employees of an agency<sup>47</sup>
- when determining whether access would involve unreasonable disclosure, regard is to be had to the considerations and factors listed above at paragraphs [78] and [79].

91. Other relevant factors the AAT considered included:

- 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
- any public interest in transparency and accountability is outweighed by public interests in the rights of individuals not to have personal information unreasonably disclosed.

92. On the facts of *Warren*, the personal information in the documents was conditionally exempt under s. 47F on the basis that there was no suggestion that the individuals' names are well-known outside the agency, the individuals were not those responsible for the matters noted, and disclosure would not contribute to increased scrutiny of the program.<sup>48</sup>

93. 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.

94. For these reasons, I am satisfied it has been established that disclosure of the identified personal information in Documents 3 to 8 would be an unreasonable disclosure of personal information for the purposes of s. 47F.

95. 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

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

97. I agree with the public interest factors identified by Ahpra. In particular, I agree that disclosure would promote the objects of the FOI Act by enhancing transparency in Government's activities.

98. While I agree there are public interest factors that favour disclosure of 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.

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<sup>47</sup> *Warren; Chief Executive Officer, Services Australia and (Freedom of Information)* [2020] AATA 4557 (9 November 2020), [43].

<sup>48</sup> *Ibid*, [112]-[116].



### Factors against disclosure

99. Regarding the public interest factors against disclosure, I note the factors described at paragraph [41-42] above in relation to the application of s. 47E(d). Ahpra identified the following factor against disclosure that relates specifically to s. 47F:

[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 parties' privacy.

100. I accept that there is public interest in ensuring the health and safety of an agency's workforce and the protection of an individual's right to privacy. I also consider that disclosure could reasonably be expected to prejudice the management function of an agency.<sup>49</sup>

### Balancing the public interest factors

101. I have considered the nature of the conditionally exempt information and the circumstances in which it was provided to Ahpra. In these circumstances, I find that greater weight should be given to the factors against disclosure. As such, I find that disclosure at this time would, on balance, be contrary to the public interest.

### Finding

102. Accordingly, I am satisfied that the personal information identified in Documents 3 to 8 is exempt under s. 47F.

## Conclusion

103. I affirm Ahpra's internal review decision of 30 September 2019.

### Richelle McCausland

National Health Practitioner Privacy Commissioner

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<sup>49</sup> FOI Guidelines, [6.22].

# Rights

## Review rights

If a review party is not satisfied with a review decision of the National Health Practitioner Privacy Commissioner (the 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 NHPPC if the party believes the Commissioner 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 Commissioner (other than findings resulting from an error of law), and it appears to be convenient for the Supreme Court.

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