

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



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

Applicant	'AD'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	OCF/19/460
Decision date	24 February 2021
Catchwords	FREEDOM OF INFORMATION – Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency – Whether it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 s. 47E(d)

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 vary Ahpra's internal review decision of 12 June 2019.
2. I substitute my decision that the material in document 4b that Ahpra found to be exempt under ss. 46 and 47F and contends is exempt in the alternative under ss. 47B(a) and/or 47E(d), is exempt under s. 47E(d)
3. During this review, the Applicant advised they no longer seek access to documents 3, 4a and 5 to 8. Accordingly, they are irrelevant to this review.
4. The schedule of documents in **Annexure 1** sets out my decision in relation to each document.

## Background

5. The Applicant made a notification to Ahpra and the Psychology Board of Australia (the Board) about the performance of a psychologist (the Practitioner) as a single expert witness in Family Court proceedings.
6. The Board decided to take no further regulatory action in relation to the notification.
7. The Applicant made a request to Ahpra for access to the information considered by the Board in making its decision.

8. In its decision letter dated 10 May 2019, Ahpra identified eight documents that fell within the scope of the Applicant's request. Ahpra decided to:
  - release documents 1 and 2 in full
  - exempt documents 3, 4b, 5 and 6 in full
  - exempt documents 4a, 7 and 8 in part.
9. On 21 May 2019, the Applicant requested an internal review of Ahpra's decision. Ahpra affirmed its original decision in its internal review decision letter dated 12 June 2019.
10. On 14 August 2019, the Applicant sought a review of Ahpra's internal review under s. 54L.

## Scope of the review

11. During the review, the Applicant advised they no longer seek access to documents 3, 4a and 5 to 8. As such, this review relates solely to document 4b.
12. Document 4b (the Document) comprises of attachments to the Practitioner's submission to Ahpra in response to the Applicant's notification.
13. In its internal review decision, Ahpra found the Document was exempt in full under ss. 46(a) and 47F.
14. During the review, Ahpra submitted that the Document is alternatively exempt in full under ss. 47B(a) and/or 47E(d).
15. The primary issue to be considered in this review is whether the Document is exempt under s. 46 and ss.47F or in the alternative under 47B(a) and/or 47E(d), and if so, whether giving access would be contrary to the public interest.
16. 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>
17. 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.
18. 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

19. During the review, Ahpra submitted that the Document is exempt in full under s. 47E(d).
20. 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>
21. 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>
22. 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>
23. 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

24. 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>
25. 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.
26. 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

27. On 13 July 2020, Ahpra submitted:

The information contained in [the Document] comprises [of] 'protected information', being information that Ahpra obtained from [the Practitioner] in the course of exercising functions under the National Law (specifically, the investigation of a notification about [the Practitioner]).

Ahpra is established as a State agency in each jurisdiction under the National Law. It supports National Boards in relation to the administration of their functions under the National Law, including investigating notifications concerning the conduct of health practitioners. The effective administration of these functions requires the cooperation of third parties in providing Ahpra with information that may be relevant to investigation and decision-making processes. Ahpra requires the assistance of certain third parties such as State Governments and State Government authorities on a regular basis, and therefore maintaining strong working relations is an integral part of the effective administration of the National Law.

The Family Court of Western Australia (FCWA) is an authority of the State Government of Western Australia and is an entity with whom Ahpra regularly interacts in relation to matters under the National Law. In the circumstances, disclosure of [the Document] would, or could reasonably be expected to, cause damage to relations between Ahpra and the FCWA, on the basis that:

- (a) the FCWA would have a reasonable expectation that any documents concerning the FCWA proceedings that are provided to Ahpra (whether by the FCWA or another person) will be protected from disclosure, having regard to the confidentiality obligations imposed on Ahpra under the National Law, as well as the restriction on the dissemination of documents relating to FCWA proceedings under section 243 of the *Family Court Act 1977 (WA)* (FC Act);<sup>12</sup>
- (b) if Ahpra were to release the relevant material to [the Applicant] without the express agreement of the FCWA, this would have an adverse effect on the continued level of trust and cooperation between Ahpra and the FCWA; and
- (c) the FCWA may be less forthcoming or willing to engage with Ahpra in the future due to concerns about Ahpra's ability to maintain the confidentiality of protected information, which would prejudice the flow of information that is relevant to and necessary for the proper and efficient conduct of Ahpra's investigative functions under the National Law.

Disclosure could also have a chilling 'ripple effect' across other WA government agencies, as well as State Governments and State Government authorities in other jurisdictions, who for similar reasons may be more reticent in their future dealings and engagement with Ahpra.

28. Ahpra further submitted:

For the reasons discussed above...we consider disclosure of [the Document] would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of Ahpra and the National Boards in relation to the administration of functions under the National Law. Any prejudice to the level of cooperation and flow of information from the FCWA, and other State Government bodies, would adversely impact on the ability of Ahpra and the National Boards

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<sup>12</sup> [Family Court Act 1997 \(WA\)](#).

to properly investigate and make fully informed decisions in relation to allegations concerning the conduct of health practitioners. Disclosure in this instance may also raise wider concerns amongst:

- (a) health practitioners more broadly, who may similarly be less cooperative or forthcoming with Ahpra in relation to investigations; and
- (b) potential notifiers who may be less willing to come forward and notify Ahpra of allegations against health practitioners.

## The Applicant's submissions

29. In their application for review, the Applicant said:

...By not allowing the full access to the documents I cannot determine where the investigation has gone wrong and so cannot influence the correct end to the matter, which, I believe, is that all people whom have potentially impacted be advised by the incorrect process that [the Practitioner] used in compiling [the Practitioner's] family court reports not using the correct process.

I can also say it is somewhat disturbing that I cannot review communications between [the Practitioner] and his solicitors [sic] letters to the Psychology Board to determine if they are correct or in some way improperly attempt to influence the findings of the Psychology Board.

30. On 31 March 2020 the Applicant added:

...please be certain if you are going to advise [the Practitioner] and the Board are not required to supply all information to me so I can assess where they may have gone wrong in their conclusion and why the board did not look any further than my case despite [the Practitioner's] admission [the Practitioner] used the incorrect system in 50 other family court matters.

31. On 10 July 2020 the Applicant submitted:

Looking at these correspondences it is not clear if supplementary questions which form part of [the Practitioner's] reports were included in the information provided to Ahpra. In essence if the supplementary questions and [the Practitioner's] response to those question [sic] for the 2008 report and 2010 report were not included then Ahpra did not have what constitutes a full report for their consideration of the matter.

32. On 15 October 2020 the Applicant further submitted:

I do need in the very least the list of documents from section 4 [the list of documents which comprise the Document] and page numbers. This is due to the clearly incorrect and or misleading information that [the Practitioner] and [the Practitioner's] Solicitor have provided that is currently available. While I understand some need for privacy of the practitioners as per the cited case law my view is this can only be reasonable in a situation where incorrect and or misleading information is not provided or there is limited scope for the board to be mislead [sic]. I also say the matter broadly is quite complex by way of the sheer volume of material and so there is significant scope for the board to be mislead [sic]. Of concern is that the board seems to have accepted [the Practitioner's] submission that [the Practitioner] was not an experienced practitioner of this test but made representations to the court at the time that [the Practitioner] was.

...

In short as there is evidence of the board being actively misled with the information at hand it is important to assess how else the board may have been misled by having a full listing of the documents supplied to the board. As to access of the material I do have access to it however I do not know what important information may have been left out and so a listing will not breach any privacy issues but simply inform me of what has or has not been considered.

## Application of the certain operations of agencies exemption

33. I am of the view that the Document was prepared by the Practitioner to assist Ahpra with undertaking its functions under the National Law, namely to:

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

34. As an attachment to the Practitioner's submission, the Document contains various documents relating to the relevant FCWA proceedings involving the Applicant and the Practitioner.

35. Third parties such as notifiers, practitioners, Ahpra officers and other government bodies must be willing to provide information necessary to facilitate Ahpra and the Board's assessment and 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.

36. As I considered in my decisions in 'JH', 'MS' and 'LV'<sup>13</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>14</sup>

37. 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 by third parties in the course of Ahpra or the Board exercising their investigative functions will be treated confidentially. If Ahpra discloses the Document 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

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<sup>13</sup> <https://www.nhpo.gov.au/foi-review-decisions>.

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

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.

38. 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>15</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.<sup>16</sup>

39. I note that s. 216(2) of the National Law provides a number of exceptions to the duty of confidentiality prescribed in s. 216(1). Section 216(2)(d) states that the duty of confidentiality does not apply if disclosure is with the agreement of the person to whom the information relates.
40. I note that the Practitioner consented to the disclosure of the Document to the Applicant, provided that the Practitioner's personal information such as their contact details were removed.
41. I accept that consent plays an important role when establishing whether disclosure of a document could reasonably be expected to have a substantial adverse effect on an agency's operations. However, it is not a determining factor for disclosure. I must still consider the adverse effects of disclosure on the operations of Ahpra and the Board.
42. Taking all relevant factors into consideration, I am satisfied that disclosing the Document could reasonably be expected to affect the future flow of information from third parties to Ahpra and the Board. Ahpra and the Board rely on candid communication from relevant third parties to carry out their role in ensuring public safety.
43. I consider that disclosure of the Document 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.
44. I am satisfied that the Document is conditionally exempt under s. 47E(d).
45. 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.

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

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

## Section 11A(5): The public interest test

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

### Factors favouring disclosure

48. The FOI Act provides public interest factors to be considered, including that disclosure would:
- promote the objects of the FOI Act (including all the matters set out in ss. 3 and 3A)
  - 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>19</sup>
49. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>20</sup>
50. In forming its decision, Ahpra considered the following factors in favour of disclosure:
- promoting the objects of the FOI Act, insofar as disclosure would facilitate access to information held by Ahpra generally, and may promote transparency in the investigation and decision-making processes relating to the notification about [the Practitioner]
  - to the extent that [the Document] contain[s] [the Applicant's] own personal information – allowing [the Applicant] to access that information.
51. I agree that disclosure of the Document would promote the objects of the FOI Act and, in particular, reveal information that informed a decision-making process.
52. While I agree there are public interest factors that favour disclosure of the Document, 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

53. Ahpra put forward the following factors against disclosure:

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<sup>17</sup> *Freedom of Information Act 1982* (Cwlth), s 11A(5).

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

<sup>19</sup> Section 11B(3).

<sup>20</sup> FOI Guidelines [6.19].



- the reasonable expectation of prejudice to Ahpra’s ability to obtain information from third parties in the future
- the consequential prejudice to:
  - Ahpra’s investigative processes, and its ability to undertake its investigation functions in an effective, efficient and robust manner
  - the ability for Ahpra and the National Boards to make fully informed decisions based on all relevant evidence
- the risk that health practitioners may be less likely to cooperate in investigations, and that members of the public may be deterred from coming forward with notifications, out of concern that the information they provide may not be treated in a confidential manner
- the detriment to the protection of public health and safety arising out of alleged improper conduct by health practitioners, if Ahpra’s ability to obtain information from practitioners, members of the public or third parties is prejudiced in any way
- prejudice to the protection of the right to privacy by third-party individuals.

54. I agree that disclosure of the Document would not be consistent with the reasonable expectation that information provided to Ahpra will be treated confidentially and this would have a substantial adverse effect on Ahpra’s investigations and the Board’s decision-making processes.

55. 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) (*Hanes*). In *Hanes*, the Tribunal accepted Ahpra’s submissions that disclosure of the relevant material would be contrary to the public interest.<sup>21</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>22</sup> I consider this to be a persuasive point.

### **Balancing the public interest factors**

56. 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) were prejudiced as a result of the disclosure of the Document under the FOI Act.

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

58. 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**

59. Accordingly, I am satisfied that the Document is exempt in full under s.47E(d).

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<sup>21</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

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

## Section 46: Documents disclosure of which would be in contempt of court

60. Ahpra found the Document to be exempt under s. 46. As discussed above, I am satisfied the Document is exempt in full under s.47E(d). It is therefore not necessary for me to separately consider whether the Document is also exempt under s.46.

## Section 47F: Documents affecting personal privacy

61. Ahpra found the Document to be conditionally exempt in part under s. 47F. As previously explained, I have found that the Document is exempt in full under s.47E(d). It is therefore not necessary for me to separately consider whether the Document is also exempt under s.47F.

## Section 47B(a): Documents affecting State-State relations

62. During the review, Ahpra submitted that the Document is exempt in full under s. 47B(a). As I am satisfied that the Document is exempt in full under s.47E(d), it is not necessary for me to separately consider whether the Document is also exempt under s.47B(a).

## Conclusion

63. I vary Ahpra's internal review decision of 12 June 2019.

64. I substitute my decision that the material in the Document that Ahpra found to be exempt under ss. 46 and 47F and contends is exempt in the alternative under ss. 47B(a) and/or 47E(d), is exempt under s. 47E(d).

**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 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 NHPPC (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.	15 February 2014	Notification form from [the Applicant]	9	<b>Released in full</b>	<b>Not subject to review</b>
2.	26 February 2014	Email from [the Applicant] to Ahpra	2	<b>Released in full</b>	<b>Not subject to review</b>
3.	29 August 2016	Correspondence from the Family Court of Western Australia (FCWA) to Ahpra	2	<b>Exempt in full</b> ss. 47B and 47E(d)	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review
4a.	7 July 2017	[The Practitioner's] submissions	4	<b>Exempt in part</b> s. 47F	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review
4b.	7 July 2017	The attachments to [the Practitioner's] Submission (the Document)	395	<b>Exempt in full</b> ss. 46 and 47F; or in the alternative 47B(a) and/or 47E(d)	<b>Exempt in full</b> s. 47E(d)

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
5	16 September 2011	Transcript of [the Practitioner's] FCWA testimony	102	<b>Exempt in full</b> s. 46	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review
6.	30 October 2017	Correspondence from the FCWA to Ahpra	72	<b>Exempt in full</b> ss. 47B and 47E(d)	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review
7.	20 October 2018	Email and attachments from [the Practitioner's] lawyer to Ahpra	15	<b>Part exempt</b> s. 47F	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review
8.	30 October 2018	Email and attachments from [the Practitioner's] lawyer to Ahpra	8	<b>Part exempt</b> s. 47F	<b>Not subject to review</b> The Applicant agreed to exclude this document from the review