

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



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

Applicant	'AE'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	OCF/19/664
Decision date	31 May 2021
Catchwords	FREEDOM OF INFORMATION – Whether disclosure would endanger the life or safety of a person – 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. 37(1)(c), 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 24 September 2019 to exempt document 2 from release under ss. 37(1)(c), 47E(d) and 47F.

## Background

2. The Applicant made a notification to Ahpra and the Medical Board of Australia (the Board) about 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:  
the two responses [from the Practitioner] submitted to Ahpra in May/June 2017, in response to the notification made about [them] (ref: [notification number]).
5. In its decision letter dated 30 July 2019 Ahpra identified two documents that fell within the scope of the Applicant's request. Ahpra decided to exempt both documents (Document 1 and Document 2) under ss. 47E(d) and 47F.

6. On 29 August 2019, the Applicant requested an internal review of Ahpra’s decision. In its internal review decision letter dated 24 September 2019 Ahpra decided to:
  - release Document 1 in full
  - exempt Document 2 in full under ss. 37(1)(c), 47E(d) and 47F.
7. On 22 November 2019 the Applicant sought a review under s. 54L of Ahpra’s internal review to exempt Document 2 in full.

## Scope of the review

8. This review considers Ahpra’s decision to exempt in full Document 2 – the Practitioner’s secondary response to the notification the Applicant made about them.
9. The issues I will decide in this review are:
  - whether Document 2 that Ahpra found to be exempt under s. 37(1)(c) is exempt under that provision
  - whether Document 2 that Ahpra found to be exempt under s.47E(d) is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
  - whether Document 2 (or part of the document) that Ahpra found to be exempt under s. 47F is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
10. 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>
11. 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.
12. 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 37(1)(c): Documents affecting law enforcement and public safety

13. Section 37(1)(c) provides that a document is exempt from release if its disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person.
14. The Office of the Australian Information Commissioner's FOI Guidelines (FOI Guidelines) explains:

Under s 37(1)(c) a document is exempt if its disclosure would, or could reasonably be expected to, make a person a potential target of violence by another individual or group. That is, whether release of the documents could be expected to create the risk, not whether the documents reflect an existing credible threat. This exemption requires a reasonable apprehension of danger which will turn on the facts of each particular case. For example, the disclosure of the name of an officer connected with an investigation about threats made by the applicant will not be sufficient<sup>4</sup>. A reasonable apprehension does not mean the risk has to be substantial, but evidence is necessary. For instance, intemperate language and previous bad behaviour, without more, does not necessarily support a reasonable apprehension.

### Ahpra's submissions

15. Ahpra found Document 2 to be exempt in full under s 37(1)(c).
16. On 24 September 2019, Ahpra explained in its internal review decision:

[Document 2] ... is a response provided by [the Practitioner] to Ahpra, in relation to the notification [the Applicant] made about [the Practitioner]. As there is some indication there has been a relationship breakdown between [the Applicant] and the [the Practitioner], that may have involved an apprehension of harm at a particular point in time, I am satisfied disclosure of the documents would or could reasonably be expected to, create a risk<sup>5</sup> to a third-party individual.

### The Applicant's submissions

17. On 23 April 2020, the Applicant submitted:

Ahpra has provided no evidence whatsoever of any apprehension or risk of harm by myself to another person and there is no possible basis for concluding that the release of [Document 2] could reasonably be expected to endanger the life or physical safety of another person.

The suggestion that a relationship breakdown creates a reasonable expectation of physical endangerment is redolent of the discredited assumption that any male who undergoes a relationship break down is potentially violent or dangerous. In addition, the elliptical reference to a possible apprehension of harm at a particular point in time is not substantiated or explained..., and, in any event, cannot justify the conclusion that the release of [Document 2] could reasonably be expected to create any such risk.

[The Applicant] also notes that [Document 1] was released to [them] on 7 May 2018 but it has not resulted in any attempt by [them] to communicate with [the Practitioner] or [the Practitioner's]

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<sup>4</sup> *Re Boehm and Department of Industry Technology and Commerce* [1985] AATA 60.

<sup>5</sup> *'I' and Australian National University* [2012] AICmr 12 at [15].

solicitors nor has it caused [them] to engage in any conduct that could conceivably give rise to a possible apprehension of any harm to [the Practitioner]...

## Application of the law enforcement and public safety exemption

18. Based on my examination of Document 2, I am of the view that disclosure of Document 2 in this case could reasonably be expected to put the Practitioner's emotional and physical safety at risk. To protect the confidentiality of the Practitioner, I will not provide extensive detail about the nature of the threat to their personal safety.
19. In coming to this view, I considered the Australian Information Commissioner's decision in *'I' and Australian National University* [2012] AICmr 12 (26 April 2012) (*'I'*).<sup>6</sup> In that case, the Information Commissioner expresses a balanced view of the considerations required to establish whether a real and objective apprehension of risk may have existed. The Information Commissioner discussed the following factors:
  - any history of violence or other threats to personal safety
  - whether interactions are insulting or threatening
  - the link between release of information and the possibility of future threats to physical safety.
20. In that case, the Information Commissioner decided that the documents containing abuse were not exempt under s 37(1)(c) for the reason that there was no evidence in that case that disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person.<sup>7</sup>
21. However, distinct from the facts and the circumstances in *'I'*, in the present case, there is evidence about the Practitioner's fears for their safety if the Applicant is given access to Document 2. Allegations have been made regarding a wide range of abuse by the Applicant and it is clear that the Practitioner believes the Applicant is likely using the FOI process to continue the alleged abuse.
22. My examination of available information found evidence that the Applicant has demonstrated a persistently threatening pattern of behaviour toward the Practitioner.
23. As such, I agree with Ahpra that disclosure of Document 2 in this case would reasonably be expected to put the Practitioner's emotional and physical safety at risk.
24. Accordingly, I am satisfied Document 2 is exempt in full under s. 37(1)(c).

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

25. 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>8</sup>

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<sup>6</sup> *'I' and Australian National University* [2012] AICmr 12 (26 April 2012).

<sup>7</sup> *'I' and Australian National University* [2012] AICmr 12 (26 April 2012).

<sup>8</sup> s. 47E(d).

26. The FOI Guidelines explain that the predicted effect needs to be reasonably expected to occur and that there must be more than merely an assumption or allegation that damage may occur if the document were to be released.<sup>9</sup>
27. 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>10</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>11</sup>
28. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.<sup>12</sup>

## Ahpra’s operations

29. Under the Health Practitioner Regulation National Law (the National Law), Ahpra and the Board accept and process notifications about registered health practitioners (that is, concerns raised about the health, conduct and/or performance of practitioners).<sup>13</sup>
30. 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.
31. Under the National Law, all ‘protected information’ must be treated confidentially, subject to specific exceptions.<sup>14</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>15</sup>

## Ahpra’s submissions

32. Ahpra found Document 2 to be conditionally exempt under s. 47E(d).
33. In the reasons for its decision dated 30 July 2019 Ahpra explained:

... 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. This maintenance of confidentiality is critical to ensuring that investigations are carried out both efficiently and effectively.

If [Document 2] was 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

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<sup>9</sup> FOI Guidelines [6.101] - [6.103].

<sup>10</sup> FOI Guidelines [5.20].

<sup>11</sup> FOI Guidelines [5.20].

<sup>12</sup> FOI Guidelines [5.21].

<sup>13</sup> For more information about the Board’s functions see [s. 35 of the National Law \(Division 2, page 90\)](#).

<sup>14</sup> National Law, s.216.

<sup>15</sup> National Law, s.214 (definition of ‘protected information’).

communications may be subject to disclosure under the FOI Act. Other government agencies and third parties, including practitioner's [sic] subsection to notifications, 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.

34. Ahpra further submitted:

Ahpra maintains [Document 2] is exempt from release under section 47E(d) of the FOI Act because disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Board.

## The Applicant's submissions

35. On 23 April 2020 the Applicant submitted:

...It is nonsensical to suggest that the release of a single relatively short letter is likely to make it more difficult for Ahpra or the Board to obtain information that would inform regulatory decision-making. The expression "substantial adverse effect" has been held by Weinberg J. to connote an effect that is 'serious' or 'significant'.<sup>16</sup>

The threshold for concluding that the release of documents could reasonably be expected to have a substantial adverse effect on the functioning of an agency is extremely high. In *Re Department of Social Security v Eric Bernard Dyrenfurth*<sup>17</sup> the Full Court of the Federal Court observed that –

while it may be easy to conclude that in the present case there may well be some undesirable effects arising from disclosure, it is a big step to conclude that disclosure of the particular information in these particular documents could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency. The difficulties in establishing such a case were said ... to be formidable.

[The] consideration of the public interest test is also flawed...the release of the document in question could prejudice the relationship between Ahpra and the Board, and health practitioners, and therefore impede the flow of information between is illogical and unsupported by any evidence. [This] argument is applicable to documents that may be provided by such persons as 'whistle blowers' or other persons that may have relevant information for Ahpra or the Board. in the present case, [the consideration] is the release of a document provided by the person who is the subject of a complaint, the document having been relied upon to dismiss the complaint. The public policy underlying [freedom of information] legislation is transparency, not concealment.

...

Section 216(1) of the National Law prohibits the disclosure of protected information. However, ss. 216(2)(a) provides that the prohibition does not apply if "the information is disclosed in the exercise of a function under, or for the purposes of, this Law" and ss 2(c) permits disclosure if "the disclosure is otherwise required or permitted by law". These subsections clearly apply to the release of documents under the Act.

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<sup>16</sup> Jorgensen v Australian Securities & Investments Commission [2004] FCA 143.

<sup>17</sup> [1988] FCA 148.

## Application of the certain operations of agencies exemption

36. I am of the view that Document 2 was prepared by the Practitioner to assist Ahpra with undertaking its functions under the National Law, namely to:

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

37. Third parties such as notifiers, practitioners and other government bodies must be willing to provide information necessary to facilitate Ahpra and the Board's assessment 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 health, conduct or performance.

38. As I considered in my decisions in 'AA' 'AC', 'AD', 'JH' and 'MS'<sup>18</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>19</sup>

39. It is my view that similarities can be drawn between provisions of the ACNC Act and the confidentiality provisions in the National Law. Section 216 of the National Law creates a reasonable expectation that information provided to Ahpra or the Board by a third party in relation to a notification 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 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.

40. 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

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<sup>18</sup> <https://www.nhpo.gov.au/foi-review-decisions>.

<sup>19</sup> *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

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>20</sup> 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. Here, the Practitioner objects to the disclosure of the documents...<sup>21</sup>

41. Taking all relevant factors into consideration, I am satisfied that disclosing Document 2 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.
42. In addition, the National Law imposes a duty of confidentiality in relation to protected information and I consider that release of Document 2 could reasonably be expected to reduce third parties' confidence in Ahpra's ability to maintain the confidentiality of protected information.
43. I consider that disclosure of Document 2 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. Accordingly, I am satisfied that Document 2 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.

### 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>22</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>23</sup>

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<sup>20</sup> *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

<sup>21</sup> *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

<sup>22</sup> *Freedom of Information Act 1982* (Cwlth), s 11A(5).

<sup>23</sup> *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].



### 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>24</sup>
49. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>25</sup>
50. 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>26</sup>
  - public scrutiny of documents relevant to deliberations of Ahpra and the National Boards may improve the quality of advice and 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.
51. I agree that disclosure of Document 2 would promote the objects of the FOI Act and reveal information that informed a decision-making process.
52. While I agree there are public interest factors that favour disclosure of Document 2, 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:
- 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 National Law. There is a strong public interest in ensuring proper processes for consumer protection,<sup>27</sup> and that only suitable practitioners in various fields of the health profession can provide services to the public.<sup>28</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

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<sup>24</sup> Section 11B(3).

<sup>25</sup> FOI Guidelines [6.19].

<sup>26</sup> s. 3(2)(b).

<sup>27</sup> *Ah Teo v Pacific Media Group* [2016] VSC 626 at [30].

<sup>28</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.

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. Disclosure would result in practitioners, other agencies and organisations being similarly discouraged from engaging in meaningful cooperation and information sharing to assist investigations by Ahpra and the Boards.
- 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.

54. 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>29</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>30</sup> I consider this to be a persuasive point.

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

55. 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 Document 2 under the FOI Act.

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

57. 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**

58. Accordingly, I am satisfied that Document 2 is exempt in full under s.47E(d).

### **Section 47F: Documents affecting personal privacy**

59. 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>31</sup>

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

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<sup>29</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

<sup>30</sup> *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013), [67].

<sup>31</sup> s. 47F.

- a document contains ‘personal information’
- disclosure in response to the applicant’s FOI request would be unreasonable<sup>32</sup>
- it would be ‘contrary to the public interest’ to release the material at the time of the decision.<sup>33</sup>

## Personal information

61. ‘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>34</sup>

62. 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>35</sup>

## Joint personal information

63. 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>36</sup>

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

## Unreasonable disclosure of personal information

65. 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 accessible sources

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<sup>32</sup> s. 47F(1).

<sup>33</sup> s. 11A(5).

<sup>34</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>35</sup> FOI Guidelines, [6.143].

<sup>36</sup> FOI Guidelines [6.150].

- any other matters that the agency or minister considers relevant.
66. 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
  - that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.<sup>37</sup>
67. 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>38</sup>

## Ahpra's submissions

68. Ahpra found the following information in Document 2 to be conditionally exempt in part under s. 47F:
- [the Practitioner's] contact details
  - the opinions expressed by [the Practitioner]
  - other information of a personal nature.
69. With respect to whether disclosure of the information identified above would involve an unreasonable disclosure of personal information, Ahpra said in its decision:

... [the Practitioner] is known to [the Applicant], to be associated with the matters dealt with in the documents, however, the specific information and personal views expressed by [the Practitioner] are not known to [the Applicant], nor are they publicly accessible or well known. Furthermore, [Ahpra] is satisfied from [its] 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] to Ahpra and there is an expectation that the information provided 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>37</sup> FOI Guidelines, [6.143].

<sup>38</sup> FOI Guidelines, [6.138].

70. 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 [Document 2] to be conditionally exempt on this basis.

In this instance, [Document 2] contains 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.

## The Applicant's submissions

71. On 23 April 2020 the Applicant submitted:

... [the Practitioner's] contact details can easily be redacted. The assertion that [the Practitioner's] entire submission represents personal information is a distortion of the Act and the principles that are set out in Part 6 of the FOI Guidelines. An opinion expressed in a document will only constitute personal information if it is an opinion about an identified or identifiable person. In the present case any opinion expressed by [the Practitioner] would only be conditionally exempt personal information if it was an opinion regarding herself or another person. If it is an opinion regarding myself or in any way relating to me then it would not satisfy the requirement as I consent to its release or publication.

...the conclusion that any submission which is provided to Ahpra or the Board, and which contains an opinion regarding the issue/s being considered by those organisations, represents personal information in its entirety which is therefore conditionally exempt from disclosure because it would be an unreasonable disclosure of personal information. This determination cannot be defended either as a legitimate interpretation of the [freedom of information] legislation or from a perspective of public policy.

## Application of personal privacy exemption

72. I am of the view that Document 2 contains [the Practitioner's] contact details as well as opinions expressed by [the Practitioner] and other information of a personal nature. I am of the view that this information says something about other individuals and thus constitutes personal information for the purposes of s. 47F.
73. I will now determine whether access to the identified personal information would involve unreasonable disclosure.
74. 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.
75. Given this, I am of the view that 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.

76. 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>39</sup> The information under review in this decision comprised 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.
77. In particular, the AAT found when determining whether access would involve unreasonable disclosure, the factors listed above at paragraphs [65] and [66] must be considered.<sup>40</sup>
78. 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 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.
79. 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>41</sup>
80. 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.
81. For these reasons, I am satisfied that disclosure of the identified personal information in Document 2 would be an unreasonable disclosure of personal information for the purposes of s. 47F.
82. 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

83. Regarding the public interest factors for disclosure, I note the factors described at paragraphs [48-50] above in relation to the application of s. 47E(d). Ahpra also identified the following factor for disclosure that relates specifically to s. 47F:

allowing a person to access their personal information, or information relating to matters that otherwise concern them (noting that in this case, [Document 2] contains joint personal information).

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<sup>39</sup> (9 November 2020).

<sup>40</sup> *Warren; Chief Executive Officer, Services Australia and (Freedom of Information)* [2020] AATA 4557 (9 November 2020), [43].

<sup>41</sup> *Ibid*, [112]-[116].

84. I agree with the public interest factor identified by Ahpra. In particular, I agree that disclosure would allow a person to access joint personal information.
85. 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.

#### **Factors against disclosure**

86. Regarding the public interest factors against disclosure, I note the factors described at paragraph [53] above in relation to the application of s. 47E(d). Ahpra also 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.

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

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

88. 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**

89. Accordingly, I am satisfied that the personal information identified in Document 2 is exempt under s. 47F.

## **Conclusion**

90. I affirm Ahpra's internal review decision of 24 September 2019.

#### **Richelle McCausland**

Acting 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 Commissioner 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 Commissioner'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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