

'AG' and Australian Health Practitioner Regulation Agency (Ahpra)



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

Applicant	'AG'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/02752020
Decision date	9 February 2022
Catchwords	FREEDOM OF INFORMATION – Whether material is irrelevant to the request — 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 it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 ss. 22, 47C and 47E(d)

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

Decision

- Under s. 55K I affirm Ahpra's internal review decision of 5 November 2020, namely:
 - the names and positions of the Ahpra officers in attendance at the meeting of the Psychology Board of Australia in document 12 are not relevant to the Applicant's FOI request and are deleted under s. 22
 - the details of Ahpra's risk assessment and recommendations in relation to the Applicant's notification about the Practitioner in document 18 are exempt under s. 47C
 - documents 2, 8, 10, 15 and 19 are exempt in full under s. 47E(d)
 - the following information is exempt under s. 47E(d):
 - the email and the letter from Ahpra to the Practitioner regarding the Applicant's notification about them in document 4
 - the Practitioner's response to the Applicant's notification about them and attachments, excluding a summary written by the Practitioner dated 8 August 2019, in document 9
 - the Practitioner's further response to the Applicant's notification about them and attachments, excluding an email from the Practitioner to the Applicant dated 29 March 2019, in document 11
 - the Practitioner's registration details contained in document 18.

2. Given the number of documents relevant to this decision, where I have found one exemption ground applies to a document, I have not considered whether any additional exemptions ought to also apply.
3. The schedule of documents in **Annexure 1** sets out my decision in relation to each document.

Background

4. The Applicant made a notification to Ahpra and the Psychology Board of Australia (the Psychology Board) about a health practitioner (the Practitioner).
5. The Psychology Board decided to take no further action in relation to the notification.
6. The Applicant made a request to Ahpra for access to:

All Board documents and other documents, decisions, letters, emails, notes, papers and the drafts of same contained in the Board's file in respect of the... decision [about the notification].
7. In its decision letter dated 21 September 2020, Ahpra identified 20 documents that fell within the scope of the Applicant's request. Ahpra decided to:
 - release nine documents in full
 - exempt six documents in part
 - exempt five documents in full.
8. On 8 October 2020, the Applicant requested an internal review of Ahpra's decision. In its internal review decision letter dated 5 November 2020 Ahpra affirmed its original decision.
9. The schedule of documents in **Annexure 1** sets out Ahpra's decision in relation to each document.
10. On 10 November 2020, the Applicant sought a review of Ahpra's decision under s. 54L.

Scope of the review

11. The issues I will decide in this review are:
 - whether the information that Ahpra found to be irrelevant to the request is irrelevant under (s. 22(1)(a)(ii))
 - 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 (or part of the documents) that Ahpra found to be exempt under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
12. Given the number of documents relevant to this review, where I have found one exemption ground applies to a document, I have not considered whether any additional exemptions ought to also apply.

13. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.¹ However, it is open to me to obtain any information from any person, make any inquiries that I consider appropriate, and change the basis on which the decision is made.²
14. The Applicant and Ahpra were invited to make a written submission as part of this review. I have considered all relevant communications and submissions received from the Applicant and Ahpra.
15. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government by requiring agencies to publish that information and by providing for a right of access to documents.³

Review of the exemptions

Section 22: Deleting irrelevant content from a document

16. Section 22 provides that an agency may prepare an edited copy of a document by deleting information 'that would reasonably be regarded as irrelevant to the request for access'.⁴
17. The implicit purpose of s. 22 is to facilitate efficient FOI processing through the deletion of material that can readily be deleted, and that an applicant has either agreed, or is likely to agree, is irrelevant.⁵
18. The Office of the Australian Information Commissioner's FOI Guidelines (FOI Guidelines) explain that a request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.⁶ Consideration should be given to consulting with the applicant before deciding to edit a document to delete irrelevant content.⁷
19. Ahpra found certain information in document 12 to be irrelevant to the request.

Ahpra's submission

20. Ahpra said in its original decision:

... [Ahpra] have removed material that is irrelevant to [the Applicant's] request. Specifically, document 12 is a Decisions and Actions paper of the Psychology Board... which contains a list of all Ahpra staff who attended that meeting. As this meeting involved the consideration of matters unrelated to [the Applicant's] notification about [the Practitioner], [Ahpra] decided to remove the information as irrelevant, redacting the names of staff who [Ahpra] could not confirm as being associated with [the Applicant's] matter. [Ahpra notes it] retained names of sitting Board members who decided the matter.

¹ s. 55D(1).

² ss. 55 and 55K.

³ s. 3(1).

⁴ s. 22(1)(a)(ii).

⁵ 'FM' and Department of Foreign Affairs and Trade [2015] AICmr 31, [15].

⁶ FOI Guidelines [3.54].

⁷ FOI Guidelines [3.99]

Application of the provision for deleting irrelevant content

21. I have examined an unedited copy of document 12. I found the information Ahpra decided was irrelevant to the request can be categorised as the names and positions of Ahpra officers in attendance at the relevant meeting of the Psychology Board.
22. I am satisfied that the relevant meeting involved the consideration of matters unrelated to the Applicant's notification about the Practitioner. I accept that the names and positions of Ahpra officers who Ahpra could not confirm were associated with the Applicant's matter are irrelevant to the Applicant's request.
23. As such, I am satisfied that this information would not reasonably be regarded as falling within the scope of the Applicant's request.

Finding

24. The names and positions of Ahpra officers in attendance at the Psychology Board meeting are irrelevant to the Applicant's request. As such, I am satisfied that the information Ahpra deleted from document 12 is irrelevant under s. 22.

Section 47C: Documents subject to deliberative processes

25. Ahpra found the following information in document 18 (an assessment report) to be conditionally exempt in part under s. 47C:
 - details of Ahpra's risk assessment of the Applicant's notification about the Practitioner
 - recommendations made by Ahpra to the Psychology Board for consideration in relation to the Applicant's notification about the Practitioner.
26. 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.⁸
27. The main requirements of this conditional exemption are that:
 - the document contains or relates to 'deliberative matter'⁹
 - the document was prepared for a 'deliberative purpose'¹⁰
 - the document contains material that is not 'purely factual' or non-deliberative¹¹
 - it would be contrary to the public interest to give access at the time of the decision.¹²

⁸ s. 47C(1).

⁹ Ibid.

¹⁰ Ibid.

¹¹ s. 47C(2).

¹² s. 11A(5).

28. The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.¹³
29. 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 explained 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.¹⁴

Ahpra’s submission

30. Ahpra said in its original decision:

... [document 18] ... is an [assessment report] containing recommendations made by the [Ahpra] Investigator in their report as part of providing information to the Board and details of Ahpra’s risk assessment of the notification.

The document was created by Ahpra as part of acting on and investigating a notification complaining about the performance of a health practitioner.

The National Law establishes the Board as a National Board that regulates one of 16 different health professions that fall within the jurisdiction of the National Law. It also provides a process for the receipt, assessment and investigation of notifications of health, performance and/or conduct concerns [of] registered health practitioners.

The deliberative material [Ahpra] have identified does not contain operational information (as defined in section 8A) or purely factual material. It also does not include reports of scientific or technical experts, reports of a prescribed body or organisation, or the record or reasons for a final decision given in the exercise of a power or adjudicative function.

31. During the review, Ahpra also submitted:

... [document 18] ... contains deliberations and preliminary assessments made by Ahpra officers in the course of, and for the purposes of, deciding what action to recommend to the Board. Ahpra is satisfied the disclosure of the document 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...

Application of the deliberative processes’ exemption

32. I have considered whether the following information in document 18 is conditionally exempt under s. 47C:

- details of Ahpra’s risk assessment of [the Applicant’s] notification about [the Practitioner]
- Ahpra’s recommendations to the Psychology Board for consideration in relation to the Applicant’s notification about the Practitioner.

¹³ *Parnell and Attorney-General’s Department* [2014] AICmr71, [38].

¹⁴ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

33. After inspecting the information listed in paragraph [32], I am of the view that such information contains deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation in relation to the functions of Ahpra and the Boards under the National Law.
34. Although some of the information listed in paragraph [32] is information of a similar nature to that released to the Applicant in documents 12 and 14, the information is deliberative material and is therefore subject to s. 47C.
35. Accordingly, I am satisfied that the information listed in paragraph [32] is conditionally exempt under s. 47C.
36. 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

37. 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.¹⁵
38. 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.¹⁶

Factors favouring disclosure

39. 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.¹⁷
40. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.¹⁸
41. In forming its decision, Ahpra considered the following factors in favour of disclosure:

¹⁵ s. 11A(5).

¹⁶ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

¹⁷ s. 11B(3).

¹⁸ FOI Guidelines [6.19].

- promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government’s activities¹⁹
 - public scrutiny of documents relevant to deliberations of Ahpra and the 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 notification processes of Ahpra and the Boards)
 - revealing information that informed a decision-making process.
42. I agree that disclosure of the information listed in paragraph [32] 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 Boards.
43. While I agree there are public interest factors that favour disclosure of the information listed in paragraph [32], these factors must be balanced against any public interest factors opposing disclosure when determining whether access should be given to conditionally exempt information.

Factors against disclosure

44. Ahpra put forward the following factors against disclosure:
- the public interest in protecting and maintaining the integrity of Ahpra’s investigative processes. Ahpra’s ability to receive, assess and investigate notifications in respect of the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law. There is a strong public interest in ensuring proper processes for consumer protection,²⁰ and that only suitable practitioners in various fields of the health profession are able to provide services to the public²¹
 - the public interest in Ahpra and the National Boards being able to carry out their statutory functions as efficiently and effectively as possible. Disclosure could reasonably be expected to affect Ahpra’s ability to obtain information from third parties in the future, thereby making the assessment and investigation of notifications more difficult
 - the prejudice to an individual’s right to privacy, particularly where the information is not well known, or publicly available and 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’ privacy²²
 - that disclosure could reasonably be expected to prejudice the conduct of future investigations, by discouraging staff from keeping complete records of their deliberations,²³ or being more circumspect in their preliminary findings that are expressed to Ahpra because of public scrutiny²⁴

¹⁹ s. 3(2)(b).

²⁰ *Ah Teo v Pacific Media Group* [2016] VSC 626, [30].

²¹ *Hanes v Ahpra* [2013] VCAT 1270, [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

²² *Re Veale and Town of Bassendean* [1994] WAICmr 4.

²³ *Hanes v Ahpra* [2013] VCAT 1270, [30].

²⁴ *Hassan v Ahpra* [2014] QCAT 414, [26].

- that disclosure of an investigator’s preliminary analysis, before it has been considered and tested, may generally undermine confidence in the health regulation system and health practitioners
- it is in the public interest, and vital to the functions of Ahpra in assessing notifications, that respondents to notifications are able to freely express in confidence the matters they believe in good faith are relevant to the fair assessment of the notification at hand without fear of reprisals of collateral litigation or concern that the information provided will be used to their detriment in other forums. Their inability to be open and honest will in turn have an adverse effect on the proper and efficient conduct of the operations of Ahpra and the Board.²⁵

45. 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. 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. I consider this to be persuasive.

Balancing the public interest factors

46. The National Law creates a reasonable expectation of confidentiality over the communications and documents relevant to the Boards in their investigation of notifications. The deliberative matter in the form of opinions, advice, preliminary findings and recommendations to the Boards, are made on the understanding that they will be treated confidentially and will only be used to assist the Boards in undertaking functions under the National Law.

47. If information containing the opinions, advice, preliminary findings and recommendations of Ahpra and the Boards were released under the FOI Act, it is reasonable to expect that officers may be less frank and candid in the future. This would negatively affect the Board’s decision-making processes. This would be contrary to its statutory obligations.

48. 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.²⁶

49. In my view, the functions of Ahpra and the Board and the confidentiality provisions found in the National Law provide special and specific circumstances.

50. 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.

²⁵ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103; ‘JH’ and *Australian Health Practitioner Regulation Agency (Freedom of Information)* (2020) NHPOPC; ‘MS’ and *Australian Health Practitioner Regulation Agency (Freedom of Information)* (2020) NHPOPC.

²⁶ FOI Guidelines, [6.83].

Finding

51. I am satisfied that the information listed in paragraph [32] is exempt under s. 47C.

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

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

- draft unsigned letter from Ahpra (document 2)
- file note of telephone calls between Ahpra and the Practitioner (document 8)
- email from Ahpra to the Practitioner (document 10)
- email from Ahpra to the Practitioner advising of the outcome of the Applicant's notification about the Practitioner (document 15)
- the Practitioner's registration history (document 19).

53. Ahpra also found the following information to be conditionally exempt in part under s. 47E(d):

- the email and the letter from Ahpra to the Practitioner regarding the Applicant's notification about them (document 4)
- the Practitioner's response to the Applicant's notification about them and attachments, excluding a summary written by the Practitioner dated 8 August 2019 (document 9)
- the Practitioner's further response to the Applicant's notification about them and attachments, excluding an email from the Practitioner to the Applicant dated 29 March 2019 (document 11)
- the details of Ahpra's risk assessment and recommendations in relation to the Applicant's notification about the Practitioner, and the Practitioner's registration details (document 18).

54. I found the information listed in paragraph [32], namely, the details of Ahpra's risk assessment of [the Applicant's] notification about [the Practitioner] and Ahpra's recommendations to the Psychology Board for consideration in relation to the Applicant's notification about the Practitioner to be exempt under s. 47C. I will therefore not consider whether such information is also exempt under s. 47E(d).

55. 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.²⁷

56. 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.²⁸

57. 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'.²⁹ The word 'substantial', taken in the context of substantial loss or damage, has been

²⁷ s. 47E(d).

²⁸ FOI Guidelines [6.101] - [6.103].

²⁹ FOI Guidelines [5.20].

interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.³⁰

58. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.³¹

Ahpra’s operations

59. Under the National Law, Ahpra and the Boards accept and process notifications about registered health practitioners.³²

60. During the notifications process, Ahpra supports the Boards by collecting and assessing relevant information. In general, Ahpra provides this information to the Boards and the Boards decide whether to take regulatory action in relation to the notification.

61. Under the National Law, all ‘protected information’ must be treated confidentially, subject to specific exceptions.³³ ‘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. This includes when handling notifications.³⁴

Ahpra’s submission

62. Ahpra said in its original decision:

... the information ... [Ahpra] have found to be conditionally exempt in part from disclosure under section 47E(d) consists of:

- practitioner submissions and correspondence made to Ahpra and the Board in the context of responding to the issues raised in the notification. Submissions and correspondence are provided on the understanding that the material would be used by Ahpra and the Board in certain contexts only and for the purposes of assisting the investigation into the matters raised
- documentation relating to preliminary recommendations made by Ahpra officers sharing deliberative matter as part of preparing recommendations to the Board
- information relating to [the Practitioner’s] personal affairs, such as biographical information and education history.

[Ahpra] are satisfied that the disclosure of the relevant documents would, or could be reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Board, for the following reasons:

- it is integral for the efficient management of notifications that Ahpra can continue to meet an individual practitioner’s expectation of confidentiality over the communications and documents comprising their submissions, which are provided to Ahpra to assist in its

³⁰ FOI Guidelines [5.20].

³¹ FOI Guidelines [5.21].

³² For more information about the Board’s functions see [s. 35 of the National Law \(Division 2, page 90\)](#).

³³ National Law, s.216.

³⁴ National Law, s.214 (definition of ‘protected information’).

investigation. This maintenance of confidentiality is critical to ensuring that investigations are carried out both efficiently and effectively. In *Spragg v Australian Health Practitioner Regulation Agency* at [78], the tribunal remarked that:

“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 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.”³⁵

[Ahpra] note the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC) has recently considered these issues in its review decisions of *'MS' and Ahpra (FOI)*³⁶ and *'JH' and Ahpra (FOI)*³⁷. The NHPOPC noted the strict confidentiality obligations imposed by section 216 of the National Law and commented on the reasonable expectation that information provided to Ahpra or the Board in the course of exercising its investigative functions will be treated confidentially.

The nature of the documents sought under the current FOI application cannot be distinguished in substance from those considered by the Tribunal in *Spragg*.

If the documents 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 those parties. 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. This would reduce the effectiveness of practitioner submissions and in turn make the investigation of notifications less effective, slower and more costly.

- Similarly, correspondence between Ahpra and practitioners is conducted on the understanding that they are required to provide assistance to Ahpra and cooperate in good faith. It is not within the reasonable contemplation of those individuals that their correspondence would be disclosed to wider audiences or used in other forums. Release of this correspondence would damage Ahpra's ability to obtain information in the future as those individuals would become more circumspect and less forthright in their disclosures to Ahpra, reducing the quality of the information received.
- In its role as a regulator, Ahpra holds private biographical information of health practitioners and their registration history. This information is held and relied upon for the primary purpose of regulating the health professions. Disclosure of personal information relating to an individual through the FOI process would frustrate the operations of the agency by undermining individuals' faith in Ahpra's ability to maintain confidence over the conditionally held information it possesses. This would in turn cause individuals to be more

³⁵ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103, [78].

³⁶ *'MS' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020] NHPOPC.

³⁷ *'JH' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020] NHPOPC.

cautious in their disclosures to Ahpra out of concern that their information could be released more broadly.

63. During the review, Ahpra also submitted:

The practitioner's 10 September 2020 response to Ahpra's consultation notice should be further noted as expressing a clear intention that the documents comprising his submissions not be released.

Similarly, Ahpra staff may be discouraged from keeping complete records of their deliberations or being more circumspect in their preliminary findings that are expressed to other officers or the Board because of public scrutiny. The maintenance of confidentiality over certain internal communications is essential to ensure that staff are able to thoroughly discuss and deliberate on relevant issues in order to reach the most preferable outcome under the National Law. As it is a core function of Ahpra under the National Law to regulate health professionals, damage to Ahpra's ability to properly and efficiently conduct such regulation would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

Application of the certain operations of agencies exemption

64. I have considered whether the following documents are exempt in full under s. 47E(d):

- draft unsigned letter from Ahpra (document 2)
- file note of telephone calls between Ahpra and the Practitioner (document 8)
- email from Ahpra to the Practitioner (document 10)
- email from Ahpra to the Practitioner advising of the outcome of the Applicant's notification about the Practitioner (document 15)
- the Practitioner's registration history (document 19).

65. I have also considered whether the information described below is exempt in part under s. 47E(d):

- the email and letter from Ahpra to the Practitioner regarding the Applicant's notification about them (document 4)
- the Practitioner's response to the Applicant's notification about them and attachments, excluding a summary written by the Practitioner dated 8 August 2019 (document 9)
- the Practitioner's further response to the Applicant's notification about them and attachments, excluding an email from the Practitioner to the Applicant dated 29 March 2019 (document 11)
- the Practitioner's registration details (document 18).

66. After inspecting the relevant information and documents, I am of the view that documents 2, 8, 10, 15 and 19 and the relevant information in documents 4, 9, 11 and 18 were provided and/or created while Ahpra was 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 support the Board's decision-making.

67. 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 health, conduct or performance.

68. As outlined in my decisions of 'AA' 'AC', 'AD', 'AE', 'JH' and 'MS'³⁸, 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.³⁹

69. 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 Boards in relation to an investigation of a notification will be treated confidentially. If Ahpra discloses the documents requested by the Applicant, a reasonable person could conclude that information prepared for the Boards in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the Boards can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.

70. 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.⁴⁰ 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

³⁸ <https://www.nhpo.gov.au/foi-review-decisions>.

³⁹ *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

⁴⁰ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

circumstances where the practitioner has confidence that the information provided is protected information...⁴¹

71. Taking all relevant factors into consideration, I am satisfied that disclosing the documents listed in paragraph [64] and the information identified above in paragraph [65] could reasonably be expected to affect the future flow of information from third parties, practitioners and Ahpra officers to Ahpra and the Boards. Ahpra and the Boards rely on candid communication from relevant parties to carry out their role in ensuring public safety.
72. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the documents listed in paragraph [64] and the information identified above in paragraph [65] could reasonably be expected to reduce third party, practitioner and Ahpra officer' confidence in Ahpra's ability to maintain the confidentiality of protected information.
73. I consider that disclosure of the documents listed in paragraph [64] and the information identified above in paragraph [65] 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 Boards.
74. Accordingly, I am satisfied that the documents listed in paragraph [64] and the information identified above in paragraph [65] are conditionally exempt under s. 47E(d).
75. 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

Factors favouring disclosure

76. I consider paragraphs [41] to [43] to be of particular relevance here.
77. I agree that disclosure of the documents listed in paragraph [64] and the information identified above in paragraph [65] would promote the objects of the FOI Act and reveal information that informed a decision-making process.

Factors against disclosure

78. I consider paragraphs [44] and [45] to be of particular relevance here.
79. I agree there is a strong public interest in protecting and maintaining the integrity of Ahpra's investigative processes in relation to the health, conduct and performance of health practitioners.

Balancing the public interest factors

80. The proper and efficient assessment and investigation of notifications is an integral function of Ahpra and the Boards 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 documents listed in paragraph [64] and the information identified above in paragraph [65] under the FOI Act.

⁴¹ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

81. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
82. 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

83. I am satisfied that the documents listed in paragraph [64] and the information identified above in paragraph [65] are exempt under s. 47E(d).

Section 47F: Documents affecting personal privacy

84. Ahpra found the following documents to be exempt in part under s. 47F:
 - the email and letter from Ahpra to the Practitioner regarding the Applicant's notification about them (document 4)
 - file note of telephone calls between Ahpra and the Practitioner (document 8)
 - the Practitioner's response to the Applicant's notification about them (document 9)
 - email from Ahpra to the Practitioner (document 10)
 - the Practitioner's further response to the Applicant's notification about them (document 11)
 - email from Ahpra to the Practitioner advising of the outcome of the Applicant's notification about them (document 15)
 - assessment report (document 18)
 - the Practitioner's registration history (document 19).
85. I found documents 4, 8, 10, 15 and 19 to be exempt in full under s. 47E(d) and I will therefore not consider whether the documents are also exempt under s. 47F.
86. I found the information exempt in documents 9, 11 and 18 to be exempt in part under s. 47E(d) and will therefore not consider whether the information is also exempt under s. 47F.

Conclusion

87. Under s. 55K I affirm Ahpra's internal review decision of 5 November 2020, namely:
 - the names and positions of the Ahpra officers in attendance at the Decisions and Actions meeting of the Psychology Board not relevant to the Applicant's FOI request in document 12 is deleted under s. 22
 - the following information is exempt under s. 47C:
 - details of Ahpra's risk assessment of the Applicant's notification about the Practitioner in document 18
 - recommendations made by the Ahpra Investigator in their report as part of providing information to the Psychology Board for consideration of the Applicant's notification about the Practitioner in document 18

- documents 2, 8, 10, 15 and 19 are exempt in full under s. 47E(d)
- the following information is exempt under s. 47E(d):
 - email from Ahpra to the Practitioner containing notice of the Applicant’s notification about them in document 4
 - the Practitioner’s response to the Applicant’s notification about them in document 9
 - the Practitioner’s further response to the Applicant’s notification about them in document 11
 - the Practitioner’s registration details contained in the assessment report in document 18.

88. Given the large number of documents relevant to this decision, where I have found one exemption ground applies to a document, I have not considered whether any additional exemptions ought to also apply.

89. The schedule of documents in **Annexure 1** sets out my decision in relation to each document.

Richelle McCausland

National Health Practitioner Privacy Commissioner

Review rights

If a review party is not satisfied with the Commissioner’s review decision, the party may apply to the relevant tribunal to have the decision reviewed. This application must be made within 28 days after the party receives the Commissioner’s decision.⁴²

Where an application for a review is made to the relevant tribunal, the proper respondent to such a proceeding is the agency to whom the freedom of information request was initially made (not the Commissioner). In this case, the respondent is Ahpra.⁴³

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:

- within 28 days after a review party receives the Commissioner’s review decision
- within further time that the Supreme Court or another appropriate court allows
- 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.

⁴² s. 57A.

⁴³ s. 60(3).

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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.	16 July 2019	Online notification received from [the Applicant] relating to [the Practitioner]	70	Released in full	Not subject to review
2.	16 November 2019	Draft unsigned letter – [notification number]	1	Exempt in full s. 47E(d)	Exempt in full s. 47E(d)
3.	27 November 2019	Attachment to [the Applicant's] online notification relating to [the Practitioner] - [notification number]	65	Released in full	Not subject to review
4.	27 November 2019	Email from Ahpra to [the Practitioner] – Notice of Notification - [notification number]	72	Exempt in part ss. 47E(d) and 47F	Exempt in part s. 47E(d)
5.	9 December 2019	File Note – Telephone call – [the Applicant]	1	Released in full	Not subject to review

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
6.	10 December 2019	Draft letter to [the Applicant] – Assessment of notification - [notification number]	4	Released in full	Not subject to review
7.	11 December 2019	Section 150 Consultation – from Ahpra to [the Practitioner] - [notification number]	71	Released in full	Not subject to review
8.	20 January 2020	File Note – Telephone calls – [the Practitioner] - [notification number]	2	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)
9.	2 February 2020	Email from [the Practitioner] to Ahpra – [the Practitioner's] response to [the Applicant's] notification - [notification number]	14	Exempt in part ss. 47E(d) and 47F	Exempt in part s. 47E(d)
10.	11 May 2020	Email from Ahpra to [the Practitioner] - [notification number]	11	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
11.	18 May 2020	Email from [the Practitioner] to Ahpra - [the Practitioner's] further response - [notification number]	10	Exempt in part ss. 47E(d) and 47F	Exempt in part s. 47E(d)
12.	15 June 2020	The Decisions and actions of the Psychology Board - [notification number]	2	Exempt in part s. 22	Exempt in part s. 22
13.	29 June 2020	File Note – Telephone calls - [the Applicant] - [notification number]	1	Released in full	Not subject to review
14.	30 June 2020	Email from Ahpra to [the Applicant] - Outcome of their notification - [notification number]	3	Released in full	Not subject to review
15.	30 June 2020	Email from Ahpra to [the Practitioner] – Outcome of [the Applicant's] notification - [notification number]	3	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
16.	17 July 2020	Email from [the Applicant] to Ahpra – FOI request for the Psychology Board's file - [notification number]	3	Released in full	Not subject to review
17.	20 July 2020	Email from Ahpra to [the Applicant] – Responding to [the Applicant's] FOI request - [notification number]	4	Released in full	Not subject to review
18.	Undated	Assessment Report - [notification number]	3	Exempt in part ss. 47C, 47E(d) and 47F	Exempt in part ss. 47C and 47E(d)
19.	Undated	Registration history of [the Practitioner]	1	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)

Document No.	Date of document	Document description	Number of pages	Ahpra's decision	National Health Practitioner Privacy Commissioner's decision
20.	Various dates	Attachments to the Assessment Report - [notification number]	92	Exempt in part ss. 47E(d) and 47F	Not subject to review The exempt material in document 20 is a replica of documents 9 and 11. As such document 20 is not subject to review.