

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



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

Applicant	'AH'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/04802021
Decision date	14 September 2022
Catchwords	FREEDOM OF INFORMATION – Whether material is irrelevant to the request – Whether documents contain deliberative matter prepared for a deliberative purpose – Whether it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 ss. 22 and 47C

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 decision of 1 April 2021.

## Background

2. The Applicant made a request to Ahpra for access to:

A copy of all documentation prepared for, and provided to, the Physiotherapy Board of Australia in relation to the applicant's application for a review of the conditions on their registration dated 29 November 2020.
3. Ahpra identified two documents that fell within the scope of the Applicant's request in its decision letter dated 1 April 2021:
  - Agenda paper, prepared by Ahpra for consideration by the Physiotherapy Board of Australia (the Physiotherapy Board)
  - Agenda paper attachments.
4. Ahpra decided to exempt the two documents in part under ss. 22 and 47.
5. On 31 May 2021 the Applicant sought a review of Ahpra's decision under s. 54L.

## Scope of the review

6. 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
  - 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.
7. 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>
8. 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.
9. 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>

## Findings

### Section 22: Deleting irrelevant content from a document

10. Ahpra found certain information in document two (the agenda paper attachments) to be irrelevant to the request.
11. 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'.
12. 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.<sup>4</sup>
13. 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.<sup>5</sup> Consideration should be given to consulting with the applicant before deciding to edit a document to delete irrelevant content.<sup>6</sup>

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

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

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

<sup>4</sup> *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31, [15].

<sup>5</sup> FOI Guidelines [3.54].

<sup>6</sup> FOI Guidelines [3.99]

## Application of the provision for deleting irrelevant content

14. I have examined an unedited copy of document two. I found the information Ahpra decided was irrelevant to the request can be categorised as the names of Board Members in ‘apologies’ at the relevant meeting of the Physiotherapy Board.
15. I am satisfied that these Board members did not consider the Applicant’s matter and therefore are irrelevant to the Applicant’s request.
16. During the course of the review, the Applicant expressed that they agree the information is irrelevant.
17. Given this, I am satisfied that this information would not reasonably be regarded as falling within the scope of the Applicant’s request.

## Finding

18. The names of Board Members in apologies at the relevant meeting of the Physiotherapy Board are irrelevant to the Applicant’s request. As such, I am satisfied that the information Ahpra deleted from document two is irrelevant under s. 22.

## Section 47C: Documents subject to deliberative processes

19. Ahpra found the following information in the two documents to be conditionally exempt in part under s. 47C:
  - recommendations prepared by Ahpra and submitted to the Physiotherapy Board about the Applicant’s application for a review of the conditions on their general registration as a physiotherapist
  - Ahpra’s advice to the Physiotherapy Board in relation to the Applicant’s compliance with the conditions on their registration.
20. A document is conditionally exempt under s. 47C if its disclosure would disclose deliberative matter in the nature of, or relating to, either:
  - an opinion, advice or recommendation that has been obtained, prepared or recorded
  - a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister.<sup>7</sup>
21. The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.<sup>8</sup>
22. The main requirements of this conditional exemption are that:
  - the document contains or relates to ‘deliberative matter’<sup>9</sup>
  - the document was prepared for a ‘deliberative purpose’<sup>10</sup>

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<sup>7</sup> s. 47C(1).

<sup>8</sup> *Parnell and Attorney-General’s Department* [2014] AICmr71, [38].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

- the document contains material that is not ‘purely factual’ or non-deliberative<sup>11</sup>
- it would be contrary to the public interest to give access at the time of the decision.<sup>12</sup>

23. 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.<sup>13</sup>

## The Applicant’s submissions

24. The Applicant submitted:

Fundamental to my [freedom of information] request is a concern that Ahpra and the Physiotherapy Board of Australia (the Board) are repeatedly failing to comply with legislative requirements, and failing to conduct fair and objective decision-making processes, and this is having a significant negative flow-on effect to many individuals, including multiple health practitioners in [location] (and subsequently negatively impacting on patient care).

I believe it is important, that there is a review of Ahpra and the Board’s decision-making processes, including the advice and recommendations provided by Ahpra to the Board during decision-making processes.

...

Considering the exempt information relates to advice and recommendations provided by Ahpra to the Board, it would seem inevitable that disclosure of the information would allow for increased scrutiny and review of Ahpra’s actions, and in particular, scrutiny of the quality of the advice/recommendations provided by Ahpra to the Board, and how this informed the Board’s decision.

This is further supported by the FOI Guidelines...it would be a rare case in which disclosure would not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government’s activities.<sup>14</sup>

There is also strong public interest that Ahpra and the Board comply with their statutory duties and legislative requirements, and this includes, undertaking fair and objective decision-making processes.

...

Although Ahpra has relied on a ‘frankness and candour claim to justify non-disclosure’, the FOI Guidelines would suggest that ‘special and specific’ circumstances would need to apply for this to be a relevant factor.

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<sup>11</sup> s. 47C(2).

<sup>12</sup> s. 11A(5).

<sup>13</sup> *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

<sup>14</sup> FOI Guidelines [6.18].

Considering, disclosure could reasonably be expected to enhance the efficiency of the agency's statutory functions, and particularly lead to improvements in Ahpra and the Board's decision-making processes, it would seem unlikely that 'special and specific' circumstances could be used to justify non-disclosure and hide poor processes (as this would erode confidence in the regulator and place the integrity of the organisation at risk).

In this instance, there is a strong public interest towards scrutinising and reviewing the information and advice that informed the Board's decision-making process, since disclosure would likely lead to improvements in the quality of information provided by Ahpra and enhance the efficiency and effectiveness of the agency's processes.

## Ahpra's submissions

25. Ahpra said in its decision:

Ahpra provides administrative assistance and support to the [Physiotherapy] Board in exercising its functions under the [Health Practitioner Regulation] National Law. Amongst other things, Ahpra (on behalf of the Board) manages investigations into the health, professional conduct and/or performance of registered health practitioners, including managing compliance with imposed conditions.

[Documents one and two] contain advice and recommendations prepared by Ahpra for consideration by the Board, in the course of, and for the purpose of, [the Applicant's application for a] review of the conditions on [their] registration.

[Ahpra] are satisfied that disclosure of [documents one and two] would disclose deliberative matter in the nature of, and relating to, advice and recommendations that were prepared, in the course of, or for the purpose of the deliberative process involved in the functions of Ahpra and the Board under the National Law.

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

It 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.

## Application of the deliberative processes' exemption

26. I have considered whether the relevant information in the two documents is conditionally exempt under s. 47C.

27. After inspecting the information listed in paragraph [18], I am of the view that such information contains deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation in relation to Ahpra and the Physiotherapy Board's consideration of the Applicant's application for a review of the conditions on their registration under the Health Practitioner Regulation National Law (the National Law).

28. While I am of the view that the information contains deliberative matter, I am also of the view that it contains information that is non-deliberative in nature, such as extracts of the National Law that were relevant to the Physiotherapy Board's deliberations. However, I consider the non-deliberative matter to be an integral part of the deliberative process for which the documents were prepared.
29. In coming to this view, I have considered the Australian Information Commissioner's reflection on non-deliberative matter in *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014):
- ... Some of the material that has not been released is factual in nature. However, ... it is factual material that is either an integral part of the deliberative process content of the [document] or is embedded in or intertwined with that content and is impractical to excise. As such, it qualifies for conditional exemption under s 47C.<sup>15</sup>
30. Accordingly, I am satisfied that the two documents are conditionally exempt in part under s. 47C.
31. 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

32. 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>16</sup>
33. 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>17</sup>

### Factors favouring disclosure

34. The FOI Act provides public interest factors to be considered where relevant, 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>18</sup>

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<sup>15</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014), [27].

<sup>16</sup> s. 11A(5).

<sup>17</sup> *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

<sup>18</sup> s. 11B(3).

35. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>19</sup>
36. 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>20</sup>
  - public scrutiny of documents relevant to deliberations of Ahpra and the National Boards (including the Physiotherapy Board) 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
  - revealing information that informed a decision-making process
  - allowing a person to access their personal information, or information relating to matters that otherwise concern them.
37. I agree that disclosure of the documents 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 the decision-making processes of Ahpra and the National Boards.
38. While I agree there are public interest factors that favour disclosure of the documents, 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**

39. Ahpra put forward the following factors against disclosure:
- the public interest in protecting and maintaining the integrity of Ahpra, the National Boards (including the Physiotherapy Board's) and other similar agencies' assessment and investigative processes. For example, Ahpra's ability to properly and efficiently grant registration to suitable 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,<sup>21</sup> and that only suitable practitioners in various fields of the health profession can provide services to the public<sup>22</sup>
  - the public interest in Ahpra and the National Boards being able to carry out their statutory functions as efficiently and effectively as possible, including being able to prepare and consider reports containing deliberative material and recommendations. Disclosure could reasonably be expected to interfere with the free flow of advice between Ahpra and the National Boards, thereby undermining the overall quality of advice provided to the National Boards and the effectiveness of Ahpra.<sup>23</sup>

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<sup>19</sup> FOI Guidelines [6.19].

<sup>20</sup> s. 3(2)(b).

<sup>21</sup> *Ah Teo v Pacific Media Group* [2016] VSC 626, [30].

<sup>22</sup> *Hanes v Ahpra* [2013] VCAT 1270, [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

<sup>23</sup> *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 at [48].

## Balancing the public interest factors

40. I acknowledge that disclosure of the information listed in paragraph [18] would serve the public interest in that it would provide greater transparency in relation to the role and functions of Ahpra and the National Boards in their assessment of applications for a review of the conditions on the registration of health practitioners. However, I accept Ahpra's submissions that disclosure of the material:
- could reasonably be expected to impact on the integrity of Ahpra and the National Boards' processes
  - could reasonably be expected to prejudice consumer protection, public health or public safety
  - could reasonably be expected to affect the efficient and effective operations of Ahpra and the National Boards
  - could reasonably be expected to prejudice their ability to obtain similar information in the future.
41. Having considered the nature of the relevant material and Ahpra's submissions, I consider that the public interest weighs against disclosure of the material. In particular, I am satisfied that disclosure of the relevant material could reasonably be expected to impact on the integrity of Ahpra and the National Boards' processes in relation to their assessment of applications for a review of the conditions on the registration of health practitioners. I consider that disclosure would negatively impact Ahpra and the National Boards' ability to assess applications in the future and that would adversely affect the efficient and effective operations of the functions of Ahpra and the National Boards.
42. I note that Ahpra's contentions with respect to the public interest also relate to a reasonable expectation of interference with the 'free flow of advice between Ahpra and the National Boards'. This suggests that disclosure of the material could inhibit frank and candid advice from Ahpra officers and National Board members in the future.
43. I note that the issue of frankness and candour, and how it relates to s. 47C and the public interest, has been considered by the former Australian Information Commissioner in "*GI' and Department of Prime Minister and Cabinet* [2015]<sup>24</sup>:
- ... a more recent decision of the Administrative Appeals Tribunal, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 has held that 'A frankness and candour claim, made in circumstances where there is no (other) factor against access... cannot be a factor against access when applying the public interest test'.<sup>25</sup> I read that as a comment only that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.<sup>26</sup>
44. I note that the FOI Guidelines consider that frankness and candour in relation to the s. 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and possibly as the sole factor where the public interest is clearly heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.<sup>27</sup>

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<sup>24</sup> AICmr 51.

<sup>25</sup> 52.

<sup>26</sup> '*GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 at [20].

<sup>27</sup> FOI Guidelines [6.82].



45. I accept that, although I give it less weight than the other factors, disclosure may inhibit the frankness and candour of Ahpra officers and National Board members in their similar assessments of applications for a review of the conditions on the registration of health practitioners in the future and could in turn prejudice the efficient and effective operations of the functions of Ahpra and the National Boards.
46. Further, the National Law creates a reasonable expectation of confidentiality over the communications and documents relevant to the National Boards in exercising their functions under the National Law,<sup>28</sup> including their assessment of applications for a review of the conditions on the registration of health practitioners. The deliberative matter in the form of opinions, advice and recommendations to the National Boards, are made on the understanding that they will be treated confidentially and will only be used to assist the National Boards in undertaking functions under the National Law.
47. If information containing the opinions, advice and recommendations of Ahpra and the National Boards were released under the FOI Act, it is reasonable to expect that Ahpra officers may be less frank and candid in the future. This would negatively affect the National Boards' decision-making processes. This would be contrary to their 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.<sup>29</sup>
49. In my view, the functions of Ahpra and the Physiotherapy 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.

## Finding

51. I am satisfied that the information listed in paragraph [18] is exempt under s. 47C.

## Conclusion

52. Under s. 55K I affirm Ahpra's decision of 1 April 2021.

**Richelle McCausland**

National Health Practitioner Privacy Commissioner

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<sup>28</sup> National Law, s. 216.

<sup>29</sup> FOI Guidelines, [6.83].

## 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.<sup>30</sup>

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.<sup>31</sup>

## 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.

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<sup>30</sup> s. 57A.

<sup>31</sup> s. 60(3).