

'AN' and Australian Health Practitioner Regulation Agency (Freedom of Information)



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

Applicant	'AN'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/14522023
Decision date	11 July 2024
Catchwords	FREEDOM OF INFORMATION – Whether documents contain deliberative matter prepared for a deliberative purpose – Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency – Whether it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 ss. 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

1. Under s. 55K I affirm Ahpra's decision of 14 August 2023.

Background

2. The Applicant made a notification to Ahpra and the Medical Board of Australia (the Medical Board) about a medical practitioner (the Practitioner).
3. The Medical Board decided to take no further action in relation to the notification.
4. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant clarified their request to:
 - documentation provided by [the Practitioner] and any other persons i.e., other Doctors, Specialist submitted to the Board in response to my [notification]
 - documentation Ahpra requested from [the Practitioner] and any other persons i.e. other Drs, Specialist, etc in relation to my case

- the minutes, records of the board’s meetings, decisions, and other actions paper for notification [notification number]. Everything that resulted in the Board’s decision and what was provided to [the Practitioner] and any other persons in relation to that decision.
5. In its decision letter dated 14 August 2023, Ahpra identified four documents that fell within the scope of the Applicant’s request. Ahpra decided to:
- release one document in full
 - exempt two documents in part under ss. 47E(d) and 47F
 - exempt one document in full under ss. 47C, 47E(d) and 47F.
6. On 13 September 2023, the Applicant sought a review of Ahpra’s decision under s. 54L.

Scope of the review

7. The issues I have decided in this review are:
- whether the document that Ahpra found to be exempt under s. 47C is 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 fully or partially exempt under s. 47E(d) are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the documents that Ahpra found to be fully or partially exempt under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
8. Where I have found one exemption ground applies to a document, I have not considered whether any additional exemptions ought to also apply.
9. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.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
10. 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.
11. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government by requiring agencies to publish that information and by providing for a right of access to documents.³

¹ s. 55D(1).

² ss. 55 and 55K.

³ s. 3(1).

Review of the exemptions

Section 47C: Documents subject to deliberative processes

12. Ahpra found document two (an assessment report prepared for the Medical Board’s consideration in relation to the notification) to be conditionally exempt in full under s. 47C.
13. 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.⁴
14. The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.⁵
15. The main requirements of this conditional exemption are that:
 - the document contains or relates to ‘deliberative matter’⁶
 - the document was prepared for a ‘deliberative purpose’⁷
 - the document contains material that is not ‘purely factual’ or non-deliberative⁸
 - it would be contrary to the public interest to give access at the time of the decision.⁹
16. 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.¹⁰
17. The Office of the Australian Information Commissioner’s FOI Guidelines (FOI Guidelines) explain that a ‘deliberative process’ generally refers to:

the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹¹

⁴ s. 47C(1).

⁵ *Parnell & Dreyfus and Attorney-General’s Department* [2014] AICmr71, [38].

⁶ *Ibid.*

⁷ *Ibid.*

⁸ s. 47C(2).

⁹ s. 11A(5).

¹⁰ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

¹¹ FOI Guidelines, [6.59]

Ahpra's submission

18. In its decision of 14 August 2023 Ahpra said:

The [Health Practitioner Regulation National Law (the National Law)] establishes the [Medical Board] as the responsible entity for the regulation of one of the 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 raised about registered health practitioners.

Ahpra provides administrative assistance and support to the [Medical Board] exercising its functions under the National Law. Amongst other things, Ahpra employees manage investigations and provide advice, recommendations and reports to the [Medical Board].

The exempt information that [Ahpra has] found in [document two] under section 47C would, if disclosed, disclose opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the deliberative processes of Ahpra and the [Medical Board]. The claim is made in respect of the report prepared by the Ahpra officer in relation to [the Applicant's] notification about [the Practitioner]. The report contains the Ahpra officer's summary, risk assessments, recommendations and other deliberative communications generated as part of Ahpra's functions in preparing material for consideration by the [Medical Board].

The deliberative material [Ahpra] have identified does not contain operational information (as defined in section 8A) or purely factual material. To the extent that it may contain factual elements, that information is so intertwined with the deliberative nature of the documents that their release would not be practicable. The deliberative material 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.

The Applicant's submission

19. The Applicant submitted in their application for review:

I would like access to the documentation/information to see if what the Doctor/s provided is true and correct. If it is not, then the option to reply or take further.

Also, would like to review the steps that Ahpra took to investigate my [notification]. What they actually did, who they spoke to, what information they required to review the case, what was discussed, how they got to their decision etc.

When a doctor admits to doing wrong... then I believe I should be able to view all documentation in relation to my [notification] with AHPRA.

Application of the deliberative processes' exemption

20. I am of the view that document two contains deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation in relation to the functions of Ahpra and the Medical Board under the National Law.

21. While I am of the view that document two contains deliberative matter, I am also of the view that it contains information that is non-deliberative in nature, such as the Practitioner's registration details.

However, I consider the non-deliberative matter to be an integral part of the deliberative process for which the document was prepared.

22. In the case of *Hassan v Australia Health Practitioner Regulation Agency* [2014] QCAT 414 (Hassan), the Queensland Civil and Administrative Tribunal (QCAT) found an investigation report and other documents to be exempt under the former s. 36 (internal working documents exemption). This exemption provided that an exempt document is a document that would disclose matter in the nature of or relating to opinion, advice, recommendation, consultation or deliberation occurring or recorded as part of the deliberative processes involved in the functions of an agency and release would be contrary to the public interest.
23. In *Hassan*, the applicant was a registered medical practitioner whose conduct had been investigated after a number of complaints were received. The investigation was undertaken by the then Health Quality Complaints Commissioner, who ultimately referred the matter to the Medical Board of Queensland (which subsequently became the Medical Board). The applicant in that case sought documents related to the investigation of their conduct, including an investigation report prepared by an investigation officer for consideration by a committee of the Board. It contained an analysis of evidence and other factual information, as well as the investigator's findings and recommendations. In finding the document to be exempt, the QCAT stated:

...The investigator's findings are not the Committee's findings and it is up to the Committee to come to its own conclusions about the investigation. Similarly, the recommendation made by the investigator does not necessarily have to be adopted by the Committee it is a matter for it to consider with all of the other relevant information.
24. In the case of *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013) (Hanes), the Victorian Civil and Administrative Tribunal (VCAT) noted the tribunal had on many occasions found documents exempt under the internal working documents exemption when they concerned the investigation of a complaint.
25. Considering the nature of document two as a report relating to the assessment of a notification and containing recommendations for the Medical Board's consideration, I am satisfied that it is conditionally exempt under s. 47C.
26. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt document at this time.

Section 11A(5): The public interest test

27. 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.¹²

¹² s. 11A(5).

28. 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.¹³

Factors favouring disclosure

29. 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.¹⁴

30. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.¹⁵

31. 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 Ahpra's activities¹⁶
- facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by an agency
- allowing a person to access information relating to matters that concern them.

32. I agree that disclosure of document two 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 Medical Board.

33. While I agree there are public interest factors that favour disclosure of document two, 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

34. 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,

¹³ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

¹⁴ s. 11B(3).

¹⁵ FOI Guidelines [6.19].

¹⁶ s. 3(2)(b).

performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law

- the prejudice to an individual's [namely the Practitioner's] right to privacy, particularly where information is not well known or publicly available. Disclosure could also expose individuals to unfair scrutiny, in circumstances where there was a reasonable expectation of confidentiality, or where they otherwise understood their personal information would be confidential.
 - the information is protected information within the meaning of section 214 of the [National Law]. Disclosure of the information possessed by Ahpra would in this instance harm community confidence in Ahpra's ability to protect the conditionally held information that it holds only by virtue of its role as occupational regulator. Further, disclosure may, in this instance, give rise to a privacy complaint given the stringent protections placed on documents held by Ahpra.
35. The Hanes decision is also relevant when considering factors against disclosure. 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.
36. The Tribunal noted how disclosure of information relating to notifications would make investigations more difficult and suggested that the broad public interest centres around Ahpra's role in protecting the public in terms of regulating the provision of medical services. I consider this to be a persuasive point.

Balancing the public interest factors

37. In balancing the public interest in this case, I have considered the factors for and against disclosure, including relevant factors favouring disclosure set out in s. 11B(3) of the FOI Act. In particular, I consider that releasing document two would promote the objects of the FOI Act by facilitating access to documents generally, as well as facilitating access to information that allows individuals to be satisfied that proper processes have been followed, revealing information that informed a decision-making process, and allowing a person to access information relating to matters that concern them.
38. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's processes for receiving, assessing and investigating notifications in respect of the health, performance and/or conduct of registered health practitioners. There is a strong public interest in Ahpra and the Medical Board being able to carry out their statutory functions as efficiently and effectively as possible.
39. I also note that the National Law creates a reasonable expectation of confidentiality over the communications and documents relevant to the assessment and investigation of notifications. I acknowledge that the deliberative matter in the form of opinions, advice, preliminary findings and recommendations to the Medical Board are made on the understanding that they will be treated confidentially and will only be used to assist the Medical Board in undertaking its functions under the National Law.
40. While I acknowledge the Applicant's interest in obtaining access to document two, I accept there is a stronger public interest in Ahpra and the Medical Board's ability to perform their functions in a way that is consistent with their statutory duties and legislative framework.

41. 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

42. I am satisfied that document two is exempt in full under s. 47C.

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

43. Ahpra found document one (the Practitioner's submissions to the Applicant's notification) and document three (the attachments to the assessment report) to be conditionally exempt in part under s. 47E(d).
44. I note that Ahpra also found document two (the assessment report) to be conditionally exempt in full under s. 47E(d). As I have found document two to be exempt in full under s. 47C, I will not consider whether the document is also exempt under s. 47E(d).
45. 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.¹⁷
46. 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.¹⁸
47. The term 'substantial adverse effect' is broadly taken to mean an adverse effect which is not insubstantial and which is sufficiently serious or significant to cause concern to a properly concerned reasonable person.
48. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.¹⁹

Ahpra's operations

49. Under the National Law, Ahpra and the Medical Board accept and manage notifications about registered medical practitioners.²⁰
50. During the notifications process, Ahpra supports the Medical Board by collecting and assessing relevant information. In general, Ahpra provides this information to the Medical Board and the Medical Board decides whether to take regulatory action in relation to the notification.
51. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.²¹ 'Protected information' means any information that comes to a person's knowledge in

¹⁷ s. 47E(d).

¹⁸ FOI Guidelines [6.101] - [6.103].

¹⁹ FOI Guidelines [6.103].

²⁰ For more information about the Board's functions see [s. 35 of the National Law](#).

²¹ National Law, s.216.

the course of, or because of, the person exercising functions under the National Law. This includes when handling notifications.²²

Ahpra's submission

52. In its decision of 14 August 2023 Ahpra said:

The information conditionally exempt under [s.] 47E(d) also relates to submissions and other personal information relating to [the Practitioner].

[Ahpra is] satisfied that disclosure of this information 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:

- the FOI Act does not restrict the subsequent use of information released to an applicant under the FOI Act. In Australia there is case law relating to disclosure of information under the FOI Act, for example, the Administrative Appeals Tribunal (AAT) has stated that 'access to a document under the FOI Act must be considered not on the basis of the identity and the qualities of the person who seeks that access but on the basis that it may be seen by anybody. As it is usually expressed, access under the FOI Act, is access to the world at large'.²³
- information received, generated or otherwise held by Ahpra and the National Boards is held on the understanding that it will be treated in a confidential manner and used in accordance with the National Law and the *Privacy Act 1988* (Cth) (the Privacy Act). The information in this instance is protected information within the meaning of section 214 of the National Law. It is an offence to disclose protected information unless an exemption applies.²⁴
- practitioner submissions and correspondence are provided to Ahpra and the Board in the context of responding to the issues raised in the notification. Submissions 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 assessment of matters raised. In *YJI v Australian Health Practitioner Regulation Agency* at [66], the Tribunal remarked that:

it is important that third parties such as notifiers, practitioners and other government bodies be willing to provide information necessary to facilitate Ahpra and the Board's efficient 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 on the basis of all relevant information.²⁵
- it is integral for the efficient management of complaints that Ahpra can continue to meet an individual practitioner's expectation of confidentiality over the communications and documents comprising their correspondence and submission, which are provided to Ahpra to assist in the assessment of notifications. The maintenance of confidentiality is crucial to ensuring that the investigation process is carried out both efficiently and effectively. In *[Spragg and Australian*

²² National Law, s.214 (definition of 'protected information').

²³ *Meschino and Centrelink* [2002] AATA 627 [23].

²⁴ Health Practitioner Regulation National Law (as in force in each state and territory), s. 216.

²⁵ *YJI v Australian Health Practitioner Regulation Agency* [2023] VCAT 206 at [66].

Health Practitioner Regulation Agency [2017] WASAT 103 (26 July 2017) (Spragg) 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 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.²⁶

- [Ahpra] noted [the National Health Practitioner Privacy Commissioner (the Commissioner)] considered these issues in several of its review decision.²⁷ In these review decisions, the Commissioner noted the strict confidentiality obligations imposed by section 216 of the National Law and commented on the reasonable expectation that correspondence shared with Ahpra or the National Boards in the course of exercising their functions will be treated confidentiality.
- as it is a core function of Ahpra under the National Law to regulate health professional, 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

53. I have considered whether document one and document three are conditionally exempt in part under s. 47E(d).
54. I am of the view that document one and document three were provided to Ahpra 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 Medical Board to support the Medical Board's decision-making in relation to the notification.
55. Practitioners must be willing to provide information necessary to facilitate Ahpra and the Medical Board's assessment and investigation of a notification. This allows the Medical Board to determine whether regulatory action is required to manage any risks posed by the relevant medical practitioner's health, conduct or performance.
56. As outlined in my decisions of 'AA', 'AC', 'AD', 'AE', 'AF', 'AG', 'AI', 'AM', 'JH' and 'MS'²⁸, 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 investigators conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular

²⁶ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 at [78]

²⁷ *AD' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2021]; *AC' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2021]; *AA' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020]; *MS' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020]; *JH' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020].

²⁸ <https://www.nhpo.gov.au/foi-review-decisions>

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.²⁹

57. 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 Medical Board 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 provided to Ahpra and the Medical Board in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the Medical Board can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.
58. In reaching my view, I also draw similarities between this matter and the case before the State Administrative Tribunal in *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.³⁰ In making their decision, the Tribunal stated:
- ...the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies [sic] operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information...³¹
59. Taking all relevant factors into consideration, I am satisfied that disclosing the information exempted in document one and document three could reasonably be expected to affect the future flow of information from practitioners to Ahpra and the Medical Board. Ahpra and the Medical Board rely on candid communication from practitioners to carry out their role in ensuring public safety.
60. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the information exempted in document one and document three could

²⁹ *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

³⁰ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

³¹ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

reasonably be expected to reduce practitioner confidence in Ahpra's ability to maintain the confidentiality of protected information.

61. I consider that disclosure of the exempted information in document one and document three 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 operation information of Ahpra and the Medical Board.
62. Accordingly, I am satisfied that document two and document three are conditionally exempt in part under s. 47E(d).
63. 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

64. I consider paragraph [29] to be of particular relevance here.
65. I agree that disclosure of the exempted material in document one and document three would:
 - promote the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of Ahpra's activities³²
 - facilitate access to information to members of the public that allows them to be satisfied that proper processes have been followed by an agency
 - allow a person to access information relating to matters that concern them.

Factors against disclosure

66. I consider paragraphs [34] to [36] to be of particular relevance here.
67. Further in relation to document one in particular, Ahpra submitted that it is in the public interest, and vital to the functions of Ahpra in managing 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 Medical Board.³³
68. In particular, I consider there is a strong public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's assessment and investigative processes. Disclosure of the exempted information in document one and document three could have a significant adverse impact on the integrity and robustness of assessment and investigation processes, and the ability of Ahpra and the Medical Board to carry out their functions and duties in an effective manner.

³² s. 3(2)(b).

³³ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103; *'JH' and Australian Health Practitioner Regulation Agency (Freedom of Information)* NHPPC (2000) and *'MS' and Australian Health Practitioner Regulation Agency (Freedom of Information)* NHPPC (2000).

Balancing the public interest factors for and against disclosure

69. The proper and efficient management and investigation of health practitioners is an integral function of Ahpra and the Medical Board under the National Law. It would be contrary to the public interest if these processes (and by extension, the core function to ensure the protection of the health and safety of the public) were prejudiced as a result of the disclosure of exempted information in document one and document three under the FOI Act.
70. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
71. 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

72. I am satisfied that document one and document three are partially exempt under s. 47E(d).

Section 47F: Documents affecting personal privacy

73. I found document one and document three to be exempt in part under s. 47E(d) and document two to be exempt in full under s. 47C. I will therefore not consider whether the documents are also exempt under s. 47F.

Conclusion

74. Under s. 55K I affirm Ahpra's decision of 14 August 2023.

Richelle McCausland

National Health Practitioner Privacy Commissioner

Rights

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.³⁴

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.³⁵

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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GPO Box 2630

Melbourne VIC 3001

Phone 1300 795 265

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³⁴ s. 57A.

³⁵ s. 60(3).

