

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



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

Applicant	'AR'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/11752022
Decision date	25 March 2025
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 disclosure of personal information is unreasonable – Whether it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 ss. 47C, 47E(d) and 47F

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

## Decision

1. Under s. 55K, I set aside Ahpra's decision dated 20 July 2022.
2. I substitute my decision that the documents in question are to be released to the Applicant in full except for the irrelevant information in Document 1.

## Background

3. The Applicant is a registered medical practitioner.
4. The Medical Board of Australia (the Medical Board) has responsibilities relating to the regulation of medical practitioners. Ahpra provides administrative assistance and support to the Medical Board in exercising its functions.
5. On 5 May 2022 the Applicant applied to Ahpra for access to documents in the following terms:
  1. Minutes of the meeting of the [Medical Practitioners Board of Victoria (MPBV)] relating to [the Applicant] held on 8/10/2009.

2. Two reports from [a staff member] provided to the [MPBV] for that meeting.
6. Ahpra identified 3 documents relevant to the request:
  - Document 1 – draft minutes of a meeting of the MPBV
  - Document 2 – an investigation report dated 4 August 2008
  - Document 3 – an investigation report dated 15 September 2009.
7. Each of the documents relate to a matter considered by the MPBV, a body which is now dissolved and superseded by the Medical Board.
8. In its decision letter dated 6 June 2022 (Original Decision), Ahpra decided to:
  - release Document 1 in part with irrelevant matter removed under s. 22
  - exempt Documents 2 and 3 in full under s. 47C and in part under ss. 47E(d) and 47F.
9. On 20 June 2022 the applicant sought an internal review by Ahpra of the Original Decision.
10. In its internal review decision letter dated 22 July 2022, Ahpra affirmed its Original Decision.
11. On 16 September 2022 the Applicant’s legal representatives sought a review of Ahpra’s internal review decision under s. 54L. The Applicant’s legal representatives explained that Documents 2 and 3 were previously released to the Applicant with only small portions deleted.
12. On 13 November 2022 the Applicant’s legal representatives provided a redacted copy of Documents 2 and 3 to my office in the manner they were previously released to the Applicant.
13. Ahpra subsequently advised my office that it had no objection to Documents 2 and 3 being released with the same redactions as had previously been made.

## Scope of the review

14. The issues I have decided in this review are:
  - whether the information that Ahpra found to be irrelevant in Document 1 is irrelevant (s. 22(1)(a)(ii))
  - whether the documents that Ahpra found to be exempt in full 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 in part 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 exempt in part under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
15. 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

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

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>

16. The Applicant and Ahpra were invited to make a written submission about this review of Ahpra's decision. I have considered all relevant communications and submissions received from the Applicant and Ahpra.
17. 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>

## Review of the exemptions applied to the documents

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

18. Ahpra found certain information in Document 1 to be irrelevant to the Applicant's request. Ahpra released an edited copy of Document 1 to the Applicant with the following information removed:
  - the names of MPBV members who were not present for the discussion regarding the Applicant at the meeting
  - information relating to other medical practitioners and other matters considered by the MPBV at the meeting.
19. Section 22 provides that an agency may prepare an edited copy of a document by deleting information 'that could reasonably be regarded as irrelevant to the request for access'.<sup>4</sup>
20. 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>5</sup>
21. 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>6</sup> Consideration should be given to consulting with the applicant before making a decision to edit a document to delete irrelevant content.<sup>7</sup>
22. In the application for review, the Applicant stated that he takes no issue with the removal of irrelevant matters, including removal of the names of MPBV members and attendees who were not present for the discussion regarding the Applicant, and information relating to other medical practitioners and other matters considered by the MPBV at that meeting which have no relevance to the Applicant.

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

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

<sup>4</sup> s. 22(1)(a)(iii).

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

<sup>6</sup> FOI Guidelines, [3.54].

<sup>7</sup> FOI Guidelines, [3.99].

## Finding

23. I have examined an unedited copy of Document 1. Based on my examination, I am satisfied that the information deleted in Document 1 is irrelevant to the Applicant's request.

## Section 47C: Documents subject to deliberative processes

24. Ahpra found Documents 2 and 3 to be conditionally exempt in full under s. 47C. However, during this review Ahpra advised that it has no objections to Documents 2 and 3 being released with the same redactions as had previously been made.
25. 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>8</sup>
26. The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.<sup>9</sup>
27. The main requirements of this exemption are that:
- the document contains or relates to 'deliberative matter'<sup>10</sup>
  - the document was prepared for a 'deliberative purpose'<sup>11</sup>
  - the document contains material that is not 'purely factual' or non-deliberative<sup>12</sup>
  - it would be contrary to the public interest to give access at the time of the decision.<sup>13</sup>
28. In the Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet (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>14</sup>
29. The 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.<sup>15</sup>

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<sup>8</sup> s. 47C(1).

<sup>9</sup> *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr71, [38].

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

<sup>11</sup> *Ibid.*

<sup>12</sup> s. 47C(2).

<sup>13</sup> s. 11A(5).

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

<sup>15</sup> FOI Guidelines, [6.54].

## Ahpra's submissions

30. In the Original Decision, Ahpra stated:

The documents that I have found to be conditionally exempt in full, under section 47C of the FOI Act, are investigation reports prepared by an officer of the former Board. The documents contain advice and recommendations prepared for consideration by the former Board, in the course of, and for the purposes of, responding to and investigating the matter relating to [the Applicant].

I am satisfied that disclosure of the exempt information would disclose deliberative matter in the nature of, and relating to, advice and recommendations that were prepared, in the course of, or for the purposes of the deliberative processes involved in the functions of the former Board.

The deliberative material I have identified does not contain operational information (as defined in section 8A) or purely factual material. To the extent that the information is of a factual nature, such information is an integral part of the deliberative content and purpose of the documents or is otherwise so embedded in or integral part of the deliberative content and purpose of the documents or is otherwise so embedded in or intertwined within the deliberative content such that it is impracticable to separate it.<sup>16</sup> The deliberative material also does not include reports of scientific or technical experts, reports of a prescribed body or organization, or the record or reasons for a final decision given in the exercise of a power or adjudicative function.

I note that the National Health Practitioner Privacy Commissioner (the Commissioner) in its review decision of '*AC*' and *Australian Health Practitioner Regulation Agency (Ahpra)*<sup>17</sup> considered the case of *Crowe and Department of Prime Minister and Cabinet*.<sup>18</sup> In the case of *Crowe*, the Australian Information Commissioner (the AIC) stated that:<sup>19</sup>

*many sentences in the IGB [Incoming Government Brief] that mirror comments that are already in the public domain or that could individually be released without consequence. However, as I noted in Parnell & Dreyfus at [82], the confidentiality that attaches to deliberative content in an IGB has less to do with the character of individual sentences or comments, and more to do with their inclusion in a document of a special nature.*

I consider that the nature of investigation reports prepared for the former Board are inherently deliberative in the context of its agency operations, such that they fall within a class of documents of a 'special nature' within the meaning contemplated by *Crowe*. The nature of the document sought under the current FOI application cannot be distinguished in substance from those considered by the Commissioner in '*AC*' and *Ahpra*.

Accordingly, I find that the relevant documents are conditionally exempt in full under section 47C of the FOI Act.

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<sup>16</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72, [27].

<sup>17</sup> '*AC*' and *Australian Health Practitioner Regulation Agency (Ahpra)* (National Health Practitioner Privacy Commissioner, Richelle McCausland, 4 March 2021), [58].

<sup>18</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72.

<sup>19</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72, [39].

## Applicant's submissions

31. The Applicant's legal representatives provided the following submissions:

[The Applicant] is seeking the release of the documents in order to understand the regulator's actions during the preparation of the investigation reports 14 years ago. It is in [the Applicant]'s personal interest to access documents pertaining to him. Given the specific circumstances for which a significant period of time that has passed since the deliberation and the Medical Practitioners Board of Victoria has been superseded by Ahpra the documents should be released irrespective of whether they contain deliberative matter.

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In my view, material that cannot be classified as deliberative matter, such as extracts of the *Health Professions Registration Act* (HPR Act) and similar non-deliberative material, should be released. The HPR Act is available to the public and it is unreasonable that relevant excerpts of legislation that may have contributed to the former board's deliberations be concealed.

## Application of the deliberative processes exemptions

32. After considering Documents 2 and 3, I am of the view that these documents contain deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation in relation to the functions of the now superseded MPVB under the *Health Professions Registration Act 2005* (Vic).

33. While I am of the view that Documents 2 and 3 contain deliberative matter, I am also of the view that they contain information that is non-deliberative in nature, such as:

- the Practitioner's registration details
- extracts of legislation
- chronological information
- extracts for medical newspapers.

34. However, I consider this non-deliberative matter to be an integral part of the deliberative process for which the document was prepared.<sup>20</sup>

35. 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.

36. 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. The applicant in that case sought documents related to the investigation of their conduct,

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<sup>20</sup> 'AN' and Australian Health Practitioner Regulation Agency (Ahpra) [National Health Practitioner Privacy Commissioner, Richelle McCausland, 11 July 2024].

including an investigation report prepared by an investigation officer for consideration by a committee of the Medical Board of Queensland. 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.

37. 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.
38. Considering the nature of Documents 2 and 3 as investigation reports relating to the assessment of concerns regarding a medical practitioner and containing recommendations regarding how to respond to those concerns, I am satisfied that they are conditionally exempt under s. 47C.
39. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt documents at this time.

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

40. 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>21</sup>
41. 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>22</sup>

### Factors favouring disclosure

42. The FOI Act provides public interest factors to be considered, including that disclosure would:
- promote the objects of the FOI Act (including all the matters set out in ss. 3 and 3A)
  - inform debate on a matter of public importance
  - promote effective oversight of public expenditure
  - allow a person access to his or her personal information.<sup>23</sup>

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<sup>21</sup> s. 11A(5).

<sup>22</sup> *Seven Network (Operations Limited) and Australian Competition and Consumer Commission (Freedom of Information)* [2019] AICmr 29 (6 June 2019), [47].

43. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>24</sup>

44. In forming its Original 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. Public scrutiny of Ahpra, the Medical Board and the MPBV's deliberations may improve the quality of advice provided in those processes 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.

45. The Applicant's legal representatives submitted that:

We consider disclosure of the documents would fairly promote the objects of the FOI Act, namely increasing scrutiny, discussion, comment and review of Ahpra's investigative processes so as to further promote greater transparency and better-informed decision making.<sup>25</sup> In addition, Ahpra's non-disclosure of the remaining investigation report is a gross denial of Dr Schnapp's right to access his own personal information.<sup>26</sup>

Given the public interest test is weighted towards disclosure, and the factor of frankness and candour holds little weight in relation to the public interest, it appears that the factors raised in favour of disclosure outweigh those against it.

46. I agree the disclosure of Documents 1 and 2 would promote the objects of the FOI Act and reveal information that informed a decision-making process.

47. I also identified the following factors in favour of disclosure:

- the fact that the Applicant already has access to most of Documents 2 and 3, except for a few redacted parts
- the effluxion of time since Documents 2 and 3 were prepared causing the sensitivity of the documents to be reduced
- the release of Documents 2 and 3 would unlikely impact the integrity, efficiency and effectiveness of Ahpra or the Medical Board's processes
- much of the information in these documents was disclosed in public hearings before VCAT and is included in its published decisions.

48. I consider that the effluxion of time since the creation of Documents 1 and 2 is a compelling factor in favour of disclosure.

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<sup>23</sup> s. 11B(3).

<sup>24</sup> FOI Guidelines, [6.231].

<sup>25</sup> s. 3(2)(b).

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

49. However, these factors must be balanced against any public interest factors opposing disclosure when determining whether access should be given to a conditionally exempt document.

#### **Factors against disclosure**

50. The FOI Act does not list any factors weighing against disclosure, but the conditional exemptions themselves recognise that harm may result from disclosure in certain circumstances, for example where disclosure could prejudice an investigation.
51. As an example, some factors against disclosure include whether disclosure could reasonably be expected to:
- prejudice public health or safety
  - impede the flow of information to a regulatory authority
  - prejudice the ability of officers to express frank and fearless opinions and have their recommendations protected from scrutiny given they are recommendations only and it is for the relevant decision-maker to make the decision
  - prejudice the ability to obtain confidential or similar information in the future.
52. There is overall a strong public interest in protecting and maintaining the integrity of Ahpra's regulatory processes by protecting its ability to receive, assess and investigate notifications relating to the health, performance and/or conduct of registered health practitioners. This facilitates Ahpra and the Medical Board being able to carry out their statutory functions as efficiently and effectively as possible.
53. Also, under s. 11B(4), there are certain factors that must not be taken into account, namely whether:
- disclosure could result in embarrassment to the Commonwealth Government
  - disclosure would result in any person misinterpreting or misunderstanding the document
  - the author of the document was of high seniority in the agency
  - access to the document could result in confusion or unnecessary debate.
54. In Ahpra's Original Decision, the following factors against disclosure were considered:
- 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 [*Health Practitioner Regulation National Law Act*]. There is a strong public interest in ensuring proper processes for consumer protection,<sup>27</sup> and that only suitable practitioners in various fields of the health profession are able to provide services to the public.<sup>28</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 consulting with individuals such as practitioners subject to a notification, to assist with any necessary preliminary assessments and investigations. Disclosure could reasonably be expected to affect Ahpra's ability to obtain

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

<sup>28</sup> See *Hanes v Ahpra* [2013] VCAT 1270 at [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

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 party's privacy.<sup>29</sup>
- that disclosure could reasonably be expected to prejudice the conduct of future investigations, by discouraging staff from keeping complete records of their deliberations,<sup>30</sup> or being more circumspect in their preliminary findings that are expressed to Ahpra because of public scrutiny.<sup>31</sup>
- that disclosure of an investigator's preliminary analysis, before it has been considered and tested, may generally undermine the public's confidence in the health system and health practitioners.<sup>32</sup>

55. Further to the 'frankness and candour' factor against disclosure, the Applicant's legal representatives gave the following submissions:

The key factor relied upon was that the release of material could reasonably be expected to impact the integrity of Ahpra and the National Boards' processes. [Ahpra] stated that by releasing the documents under the FOI Act, Ahpra officers providing analysis and recommendations to the Board may be less 'frank and candid' in the future which in turn could negatively affect the Board's decision-making processes.

The heavy reliance on the argument of frankness and candour affecting the Board's processes is inappropriate in assessing whether the release of documents is in the public interest. As noted in the FOI guidelines:

'frankness and candour has been significantly affected by the 2010 reforms to the FOI Act, as demonstrated by a number of post reform AAT and Information Commissioner decisions.'<sup>33</sup>

I further rely on the ATT decision in *Rovere and Secretary, Department of Education and Training* [2014] to support this view. In considering frankness and candour in relation to the public interest test, the AAT stated:

'In my view, a 'frankness and candour' claim – in the words of Howard, a claim that disclosure will inhibit frankness and candour in future pre-decisional communications – cannot be a factor against access.'<sup>34</sup>

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<sup>29</sup> *Re Veale and Town of Bassendean* [1994] WAICmr 4.

<sup>30</sup> See *Hanes*, [30].

<sup>31</sup> See *Hassan v Ahpra* [2014] QCAT 414, [26].

<sup>32</sup> See *Hassan*, [25].

<sup>33</sup> 'Part 6: Conditional exemptions', *Australian Government Office of the Australian Information Commissioner*, (Web page, December 2016) 6.79 < <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-6-conditional-exemptions#inhibition-of-frankness-and-candour> >.

<sup>34</sup> *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 (30 June 2015).

## Balancing the public interest factors for and against disclosure

56. In balancing the public interest in this case, I have considered the factors for and against disclosure.
57. I acknowledge that it is generally the case that, for investigation reports, there are compelling public interest factors weighing against their disclosure. However, in this case, the Applicant has already been granted access to most of Documents 2 and 3, and otherwise, much of the information contained in these documents is in the public domain.
58. Also, in relation to the effluxion of time factor, I considered the recent decision by the South Australia District Court in *Tiiu Mary Kannussaar v Australian Health Practitioner Regulation Agency* (Kannussaar),<sup>35</sup> where a key consideration for the public interest test was the effect of time on the sensitivity of documents. In that case, Ahpra conceded the appeal and made submissions to the effect that the effluxion of time meant the sensitivity of the conditionally exempt material had reduced. Hence, the release of such documents would no longer impact the integrity, efficiency and effectiveness of Ahpra's and the National Boards' processes. The Court accepted these submissions and made its decision to release the documents to the Applicant.
59. Similarly, having regard to the above factors and the effluxion of time, I am satisfied that the public interest factors in favour of disclosure outweigh those against disclosure at this time.
60. I am satisfied that granting access to Documents 2 and 3 to the Applicant at this time would not be contrary to the public interest.

## Finding

61. I am satisfied that Documents 2 and 3 are not exempt under s. 47C on the basis that disclosure would not be contrary to the public interest for the purposes of s. 11A(5).

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

62. Ahpra found Documents 2 and 3 to be conditionally exempt in part under s. 47E(d).
63. 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.
64. The FOI Guidelines explain that the predicted effects need to be reasonably expected to occur and that there must be more than merely an assumption or allegation that damage may occur if the document were to be released.<sup>36</sup>
65. 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.
66. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reason.<sup>37</sup>

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<sup>35</sup> Unreported, South Australia District Court, Sutcliffe J, 13 March 2024, page 4.

<sup>36</sup> FOI Guidelines, [6.90].

<sup>37</sup> FOI Guidelines, [6.92].

## Ahpra's operations

67. Under the *Health Practitioner Regulation National Law Act 2009* (as it applies in each state and territory) (the National Law), Ahpra and the Medical Board accept and process notifications about registered health practitioners (that is, concerns raised about the health, conduct and/or performance of practitioners).<sup>38</sup>
68. During the notifications process, Ahpra supports the Medical Board by collecting and assessing relevant information. Ahpra then provides this information to the Medical Board and the Medical Board is the regulatory decision-maker.
69. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.<sup>39</sup> 'Protected information' means any information that comes to a person's knowledge in the course of, or because of, the person exercising functions under the National Law. This includes when handling notifications.<sup>40</sup>

## Ahpra's submissions

70. As mentioned above, during this review, Ahpra advised that it has no objections to Documents 2 and 3 being released with the same redactions as had previously been made.
71. While the documents relate to the now dissolved MPBV, Ahpra submitted that the same considerations that apply under the FOI Act to Ahpra and the current Medical Board, continue to apply to documents of the MPBV.
72. Ahpra said in its Original Decision:

The documents that I [Ahpra] have found to be conditionally exempt from disclosure under section 47E(d) contain information relating to preliminary recommendations made by an officer of the former Board, sharing deliberative matter as part of preparing recommendations for the former Board. The documents also contain the personal information of third parties.

I am satisfied that disclosure of the exempt information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra, the Board and the former Board for the following reasons:

There is an expectation that deliberative material contained within investigative reports prepared by officers of the former Board, and similarly, agenda papers prepared by Ahpra staff, would only be used for the purposes of guiding recommendation and not forming the basis of recommendation itself. Ahpra staff may be discouraged from keeping complete records of their deliberations or may become more circumspect in their preliminary findings that are expressed to the Board because of concerns of public scrutiny. The maintenance of confidentiality over deliberative documents and communications is essential to ensure that staff are able to thoroughly discuss and deliberate on relevant issues in order to provide robust and defensible information to the decision makers.

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<sup>38</sup> For more information about the Medical Board's functions refer to s. 35 of the National Law.

<sup>39</sup> National Law, s. 216.

<sup>40</sup> National Law, s. 214 (definition of 'protected information').

The relevant documents contain information received from third parties more than a decade ago in circumstances where the ordinary expectation of confidentiality would have existed. 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 in possesses. This would in turn cause individuals to be more cautious in their disclosures and dealings with Ahpra out of concern that their information could be released more broadly. Consequently, there would likely be a significant adverse impact on the future flow of information from third parties to Ahpra. Pertinently, individuals such as practitioners or witnesses may be inhibited 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 submission and witness statements, and in turn make the investigation of notifications less effective, slower and more costly.

As it is a core function of Ahpra under the National Law to conduct investigations and regulate health professionals, damage to Ahpra's ability to properly and efficiently conduct such investigations and regulations would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

## Applicant's submissions

73. On the issue that disclosure may cause Ahpra officers to be less candid or willing to provide information to facilitate investigations, the Applicant's legal representatives submitted that 'the provision of advice by Ahpra officers is a requirement of their role and should not be impacted by transparency of Ahpra or the Board'.

74. Further, the Applicant's legal representatives submitted:

It must be considered that [the Applicant] is seeking the release of documents of the former Board, prepared 14 years ago. The circumstances of this request can be distinguished from a request for recently prepared documents by Ahpra. The release of documents prepared 14 years ago is unlikely to impact the willingness of Ahpra officers or third parties from providing information to Ahpra and the Board in future. In considering the circumstances of [the Applicant]'s request, it could not be reasonably expected that release of the documents would have a substantial adverse effect on the proper and efficient operations of Ahpra or the Board.

## Application of the agency operations conditional exemption

75. I have considered whether Documents 2 and 3 are conditionally exempt under s. 47E(d).

76. After inspecting the documents, I am of the view that the documents were provided to the MPBV while it was undertaking its legislative functions, namely to assess concerns raised about the Applicant. The management of these types of concerns is now the responsibility of Ahpra and the Medical Board.

77. Third parties and 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 health practitioner's health, conduct or performance.

78. As outlined in my decisions of ‘AA’, ‘AC’, ‘AD’, ‘AE’, ‘AF’, ‘AG’, ‘AI’, ‘JH’, ‘MS’, ‘AM’, ‘AN’, ‘AP’ and ‘AQ’<sup>41</sup>, I draw on the Australian Information Commissioner’s decision in *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2010) (Mahony). In Mahony, the request was for access to all documents relevant to investigations conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular building fund. The Australian Information Commissioner affirmed the ACNC’s decision to exempt documents falling within the scope of the request. In discussing whether s. 47E(d) applied in that case, the Australian Information Commissioner stated:

The fact that s. 150-25 of the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act) protects information provided to or obtained by the ACNC under the ACNC Act from disclosure, leads me to be satisfied that the ACNC, as it contends, relies on sensitive information being provided to it on a voluntary basis and on the understanding that the information will not be disclosed to third parties. As the ACNC explained in its reasons for decision..., I accept that the rationale for this secrecy provision is to establish a regulatory regime where the ACNC can discharge its regulatory functions in an environment of trust and engagement with the not-for profit sector.<sup>42</sup>

79. 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 documents requested by the Applicant, a reasonable person could conclude that information communicated to the Medical Board or included in a report by 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.

80. In reaching my view, I also draw similarities between this matter and the case before the State Administrative Tribunal (SAT) in *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017) (Spragg). Notably, in Spragg the SAT considered the application of s. 47E(d) specifically in the context of Ahpra’s operations. In that case, the SAT found that disclosure of protected information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.<sup>43</sup> The SAT stated:

...the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies [sic] operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information...<sup>43</sup>

81. Taking all relevant factors into consideration, I am satisfied that disclosing parts of Documents 2 and 3 could reasonably be expected to affect the future flow of information from health practitioners to

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<sup>41</sup> The Commissioner’s decisions are published on her office’s website: <https://www.nhpo.gov.au/foi-review-decisions>.

<sup>42</sup> *Mahony*, [22].

<sup>43</sup> *Spragg*, [35], [75].

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.

82. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of Documents 2 and 3 could reasonably be expected to reduce practitioner confidence in Ahpra's ability to maintain the confidentiality of protected information. This, in turn, would likely have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Medical Board.
83. Accordingly, I am satisfied that parts of Documents 2 and 3 are conditionally exempt under s. 47E(d).
84. I am 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. I will consider this further below.

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

### Factors favouring disclosure

85. I consider paragraphs [42] and [47] to be of relevance here.
86. Paragraphs [44] and [45] respectively set out Ahpra and the Applicant's submissions on the public interest factors in favour of disclosure.
87. I agree that disclosure of Documents 2 and 3 would:
- promote the objects of the FOI Act
  - facilitate access to information that allows individuals to be satisfied that proper processes have been followed
  - reveal information that informed a decision-making process
  - allow a person to access their personal information or information relating to matters that otherwise concern them.

### Factors against disclosure

88. Paragraphs [51] and [52] set out the relevant factors against disclosure.
89. Paragraph [54] sets out Ahpra's submissions on the factors against disclosure.
90. Paragraph [55] sets out the Applicant's objections to the 'frankness and candour' factor considered relevant to the public interest weighing against disclosure.

### Balancing the public interest factors for and against disclosure

91. While there is a strong public interest in protecting and maintaining the integrity of Ahpra and the National Boards' investigative processes, I am of the view that any adverse impact in the release of Documents 2 and 3 is weakened by the fact that:
- much of the information in these documents is already known to the Applicant
  - the sensitivity of the information is reduced by the effluxion of time (taking into consideration the Kannussaar case referred to in paragraph [58])

- the information in these documents is unlikely to have current relevance as the relevant matter was the subject of now concluded VCAT proceedings.

92. On balance, I am satisfied that granting access to Documents 2 and 3 to the Applicant at this time would not be contrary to the public interest.

## Finding

93. I am satisfied that Documents 2 and 3 are not exempt under s. 47E(d) on the basis that disclosure would not be contrary to the public interest for the purposes of s. 11A(5).

## Section 47F: Documents affecting personal privacy

94. Ahpra found Documents 2 and 3 to be conditionally exempt in part under s. 47F.

95. A document is conditionally exempt under s. 47F if its disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person).<sup>44</sup>

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

- a document contains ‘personal information’
- disclosure in response to the Applicant’s FOI request would be unreasonable<sup>45</sup>
- it would be contrary to the public interest to release the material at the time of the decision.<sup>46</sup>

97. The FOI Guidelines explain:

The information needs to be ‘about’ an individual – there must be a connection between the information and the person. This is a question of fact and depends on the context and circumstances. Some information is clearly about an individual – for example, name date of birth, occupation details and medical records. A person’s signature, home address, email address, telephone number, bank account details and employment details will also generally constitute personal information. Other information may be personal information if it reveals a fact or opinion about the person in a way that is not too tenuous or remote. Invoices related to the purchase of alcohol for Prime Ministerial functions do not disclose personal information about the Prime Minister if it is possible that a staff member made the purchases based on something other than the Prime Minister’s preferences. Examples of when information is not ‘about’ a person and therefor the information is not personal information for the purposes of s 6 of the Privacy Act, include the colour of a person’s mobile phone or their network type (e.g., 5G)<sup>47</sup>

## Joint personal information

98. The FOI Guidelines state that where it is not possible to separate an applicant’s personal information from a third party’s personal information, the exemption may be claimed if it is unreasonable to release the information.<sup>48</sup>

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<sup>44</sup> s. 47F.

<sup>45</sup> s. 47F(1).

<sup>46</sup> s. 11A(5).

<sup>47</sup> FOI Guidelines, [6.131].

<sup>48</sup> FOI Guidelines, [6.144].

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

## Unreasonable disclosure of personal information

100. In determining whether the disclosure of the information would involve an unreasonable disclosure of personal information, s. 47F(2) provides that a decision-maker must have regard to:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources
- any other matters that the agency or minister considers relevant.

101. The FOI Guidelines explain that other relevant factors include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- any submission an applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information
- whether disclosure of the information might advance the public interest in government transparency and integrity
- that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.<sup>49</sup>

102. The FOI Guidelines explain that the test of 'unreasonableness' under s. 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals'.<sup>50</sup>

## Ahpra's submissions

103. Ahpra said in its Original Decision:

I am satisfied from my own enquiries that the exempted personal information of the relevant individuals is not well known or publicly available. The former Board obtained or generated this information to facilitate its management of the notification raised about you, and in undertaking its functions under the HPR Act. There is an expectation that the personal information provided would be used by the former Board in the context of its regulatory operations only and that the Board act consistently with the Privacy Act and the Australian Privacy Principles.

I note that the relevant documents contain joint personal information regarding you and other third parties. Where this applies, I have considered whether or not it would be possible to separate

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<sup>49</sup> FOI Guidelines, [6.138].

<sup>50</sup> FOI Guidelines, [6.133].

the intertwined joint personal information in a way that does not diminish or impair the quality or completeness of your personal information.<sup>51</sup>

I have also considered whether the information would shed light on the workings of government, in particular the investigation process and evidence that was taken into account. However, when balanced against the other considerations discussed above, I am satisfied that disclosure of the relevant third-party personal information would be unreasonable in the circumstances.

## Application of personal privacy exemption

104. Having considered Documents 2 and 3, I am of the view that they both contain personal information of third parties including:

- the notifier
- other health practitioners referred to in the investigation reports.

105. I am also satisfied that much of the third party personal information is intertwined with information about the Applicant. Given the relationship between the Applicant and the third parties, it is unreasonable to separate the Applicant's information from the third party personal information.

106. However, I am not satisfied that disclosure of the personal information is unreasonable having regard to the following:

- the fact that the Applicant has received most of Documents 2 and 3 with a small amount of personal information redacted from each
- the notification was referred to the VCAT for determination, which then resulted in 2 decisions that are publicly available. Some of the opinions recorded in Documents 2 and 3 are mentioned in the VCAT decisions, including the names of witnesses who gave the opinions
- the age of the information and the likelihood that it does not have current relevance on the basis that the notifications made against the Applicant were resolved by the VCAT's decisions.

107. Given the above factors, particularly the effluxion of time and that the information that is now largely in the public domain, I am of the view that Documents 2 and 3 are not conditionally exempt under s. 47F.

## Finding

108. I am of the view that Documents 2 and 3 are not conditionally exempt under s. 47F. Given this finding, I am not required to consider whether it would be contrary to the public interest to give the Applicant access to this information.

## Conclusion

109. Under s. 55K of the FOI Act, I set aside Ahpra's internal review decision of 20 July 2022.

110. I substitute my decision that:

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<sup>51</sup> *Re Anderson and Australian Federal Police* [1986] AATA 79; *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

- information in Document 1 that is not relevant to the request is deleted under s. 22
- Document 2 is to be released to the Applicant
- Document 3 is to be released to the Applicant.

**Richelle McCausland**

National Health Practitioner Ombudsman and Privacy Commissioner

## Rights

### Review rights

If a review party is not satisfied with a review decision of the Commissioner, the party may apply to a relevant tribunal under s. 57A to have the decision reviewed. An application must be made within 28 days after the day the party receives this decision.

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>52</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 either:

- within 28 days after the day a review party receives the Commissioner's review decision, or
- within further time that the Supreme Court or another appropriate court allows, and
- in any way that is prescribed by rules of court made under the relevant legislation of the Supreme Court or another appropriate court.

In determining a question of law, the Supreme Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the Commissioner (other than findings resulting from an error of law), and it appears to be convenient for the Supreme Court.

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<sup>52</sup> s. 60(3).

