

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



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

Applicant	'AY'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/18462023
Decision date	10 December 2025
Catchwords	FREEDOM OF INFORMATION – Whether documents contain irrelevant matter – 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 would have a substantial adverse effect on the management or assessment of personnel – Whether it is contrary to the public interest to release conditionally exempt information – Freedom of Information Act 1982 ss. 22, 47C, 47E(c) 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 22 November 2023.

## Background

2. Ahpra has responsibilities relating to the regulation of health practitioners. The *Health Practitioner Regulation National Law* (National Law) establishes the Ahpra Board as the governing board for Ahpra. The Ahpra Board is responsible for developing and approving Ahpra policies and setting the strategic direction for the National Registration and Accreditation Scheme.<sup>1</sup>
3. As part of amendments to the National Law in 2022,<sup>2</sup> the Ahpra Agency Management Committee was renamed the Ahpra Board to better reflect its role and functions.

<sup>1</sup> National Law, s. 30.

<sup>2</sup> *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022*.

4. The Applicant made a request to Ahpra for access to certain documents in relation to Ahpra's COVID-19 Vaccination Policy for Ahpra staff (Vaccination Policy). Following consultation with Ahpra, the Applicant requested:

*'Agenda papers and Minutes from any and all meetings of the Agency Management Committee with respect to the development and approval of AHPRA's Covid 19 Vaccination Policy'.*
5. Ahpra identified 4 documents relevant to the request:
  - document 1 – a meeting record of the Agency Management Committee dated 19 October 2021
  - document 2 – an agenda paper dated 19 October 2021
  - document 3 – a meeting record of the Agency Management Committee dated 16 November 2021
  - document 4 – an agenda paper dated 16 November 2021.
6. In its decision letter dated 22 November 2023, Ahpra decided to:
  - release document 1 in full with irrelevant information removed under s. 22
  - exempt document 2 in part under ss. 47C, 47E(c) and 47E(d)
  - exempt document 3 in part under ss. 47C, 47E(c) and 47E(d), with irrelevant information removed under s. 22
  - exempt document 4 in part under ss. 47C, 47E(c) and 47E(d).
7. On 1 December 2023, the Applicant sought a review of Ahpra's decision under s. 54L.

## Scope of the review

8. The issues I have decided in this review are:
  - whether the information Ahpra found to be irrelevant in documents 1 and 3 is irrelevant (s. 22(1)(a)ii)
  - whether the information that Ahpra found to be exempt under s. 47C is exempt under that provision, and if so, whether giving access would be contrary to the public interest
  - whether the information that Ahpra found to be exempt under s. 47E(c) is exempt under that provision, and if so, whether giving access would be contrary to the public interest
  - whether the information that Ahpra found to be exempt under s. 47E(d) is exempt under that provision, and if so, whether giving access would be contrary to the public interest.
9. Where I have found that one exemption applies to the document, I have not considered whether any additional exemptions apply.
10. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.<sup>3</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>4</sup>

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<sup>3</sup> s. 55D(1).

<sup>4</sup> ss. 55 and 55K.

11. The Applicant and Ahpra were invited to make a written submission about this review. I have considered all relevant communications and submissions received from the Applicant and Ahpra.
12. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government, by requiring agencies to publish that information and by providing for a right of access to documents.<sup>5</sup>

## Review of the exemptions

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

13. Ahpra found certain information in documents 1 and 3 to be irrelevant to the Applicant's request. Ahpra released edited copies of documents 1 and 3 to the Applicant with the irrelevant information removed.
14. 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'.<sup>6</sup>
15. 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>7</sup>
16. The Office of the Australian Information Commissioner's FOI Guidelines (FOI Guidelines) explain that an FOI 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>8</sup> Consideration should be given to consulting with the applicant before deciding to edit a document to delete irrelevant content.<sup>9</sup>

### Finding

17. I have examined an unedited copy of documents 1 and 3. I found the information Ahpra decided was irrelevant to the request can be categorised as:
  - the names and positions of Ahpra staff that did not attend the relevant meetings of the Ahpra Board in relation to the development and approval of the Vaccination Policy
  - minutes recorded of agenda items unrelated to the development and approval of the Vaccination Policy.
18. I am satisfied that the names and positions of Ahpra staff who did not attend the relevant meetings and agenda items that are unrelated to the development and approval of the Vaccination Policy are irrelevant to the Applicant's request.
19. As such, I am satisfied that this information would not reasonably be regarded as falling within the scope of the Applicant's request.

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<sup>5</sup> s. 3(1).

<sup>6</sup> s. 22.

<sup>7</sup> *FM and Department of Foreign Affairs and Trade* [2015] AICmr 31, [15].

<sup>8</sup> FOI Guidelines, [3.52].

<sup>9</sup> *Ibid*, [3.84].

## Section 47C: Documents disclosing deliberative processes

20. Ahpra found documents 2, 3 and 4 to be conditionally exempt in part under s. 47C.
21. 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>10</sup>
22. The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.<sup>11</sup>
23. The main requirements of this exemption are that:
- the document contains or relates to ‘deliberative matter’<sup>12</sup>
  - the document was prepared for a ‘deliberative purpose’<sup>13</sup>
  - the document contains material that is not ‘purely factual’ or non-deliberative<sup>14</sup>
  - it would be contrary to the public interest to give access at the time of the decision.<sup>15</sup>
24. 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>16</sup>
25. 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>17</sup>

### Ahpra’s submissions

26. In its decision, Ahpra stated:
- ...the documents are comprised of material relating to preliminary consultation and deliberations of the Ahpra Board recorded in the process of developing the [Vaccination] Policy as part of Ahpra’s broader human resources policies and staff management activities. The documents contain

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<sup>10</sup> s. 47C(1).

<sup>11</sup> *Parnell & Dreyfus and Attorney-General’s Department* [2014] AICmr71, [38].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> s. 47C(2).

<sup>15</sup> s. 11A(5).

<sup>16</sup> *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

<sup>17</sup> FOI Guidelines, [6.54].

opinions, advice and recommendations recorded and tabled before the Ahpra Board for their consideration as the decision-maker. The documents also contain feedback from key stakeholders such as staff, and preliminary comments on in-progress drafts of the [Vaccination] Policy with the aim of testing and approving the [Vaccination] Policy for approval, publication and implementation.

I am of the view that this information is clearly deliberative and was utilised by the Ahpra Board in the course of its deliberative functions with respect to the development of an Ahpra human resources policy.

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

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 the documents or is otherwise so embedded in or intertwined with the deliberative content such that it is impracticable to separate it.

I note that the National Health Practitioner Privacy Commissioner (the Commissioner) in its review decision of 'AC' and Ahpra (FOI),<sup>18</sup> considered the case of Crowe and Department of Prime Minister and Cabinet at [39]. In the case of Crowe, the Australian Information Commissioner (the AIC) stated that:

*"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."*<sup>19</sup>

I consider that the nature of the communications subject to this FOI decision are inherently deliberative in the context of the operations of Ahpra and the Ahpra Board, such that they are a class of document of a 'special nature' within the meaning contemplated by Crowe.

In respect of the draft in-progress documentation which was tabled to the Ahpra Board, I refer to *BKXP and Department of Foreign Affairs and Trade [BKXP]*, where in that case, Deputy President Rayment OAM QC at paragraph 27 noted:

*My inspection of the drafts and associated documents including source documents, satisfies me that all of them are conditionally exempt under both s.47C and s.47E(d) of the FOI Act. From the earliest draft to the penultimate draft, they are documents of a deliberative nature. They are classified, a matter which is known to those who prepare them, and they are progressively amended, supplemented, and refined as they pass through the drafting proceed. Each draft is in effect a recommendation by its author or authors, intended to be submitted to others in due course for their consideration. They therefore engage s.47C.*<sup>20</sup>

I consider that the nature of draft documents provided to decision-makers in the exercise of a decision-making function are inherently deliberative for reasons analogous to those articulated by

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<sup>18</sup> 'AC' and the Australian Health Practitioner Regulation Agency (Freedom of Information) [2020].

<sup>19</sup> Crowe and Department of Prime Minister and Cabinet [2014] AICmr 72 (30 July 2014), [39].

<sup>20</sup> BKXP and Department of Foreign Affairs and Trade [2022] AATA 423 (2 March 2022).

the Administrative Appeals Tribunal in BKXP and clearly attract the conditional exemption provided for by section 47C of the FOI Act.

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

## The Applicant's submissions

### 27. The Applicant submitted:

...the whole point of Freedom of Information is to release information to the public, the taxpayer, the registered health care professionals and to those employed by AHPRA or anyone else who might make an application for information.

AHPRA have decided to make vaccination for COVID mandatory under the threat of "separation" which is inconsistent with the concept of Informed Consent and the Nuremburg Code.

...I would like all Agenda papers and Minutes from any and all meetings of the Agency Management Committee with respect to the development and approval of the AHPRA's COVID 19 Vaccination Policy.

If the Agency Management Committee believes it can make COVID 19 Vaccination mandatory they need to stand by their decision and release all the information on which they based their decision. To do otherwise only leads to conspiracy theories and suspicion that they were acting outside their remit.

## Application of the deliberative processes exemption

28. After considering documents 2 and 4, I am of the view that they contain preliminary consultation and deliberations of the Ahpra Board relating to the development of the Vaccination Policy for final publication.
29. I am also of the view that documents 2 and 4 contain feedback from key stakeholders, such as Ahpra staff, the Ahpra Board and comments on drafts of the Vaccination Policy, provided with the aim of testing and approving the Vaccination Policy for final publication.
30. I agree with Ahpra that the decision of the Administrative Appeals Tribunal (AAT) in *BKXP* is relevant when considering the draft versions of the Vaccination Policy that Ahpra found were exempt in documents 2 and 4.
31. Consistent with the findings of the AAT in *BKXP*, I accept that documents 2 and 4 contained draft versions of the Vaccination Policy that were progressively amended, supplemented and refined as they passed through the drafting process. I also accept that each draft is a recommendation by its authors intended to be submitted to others in due course for consideration.
32. I am therefore satisfied that disclosure of the exempt information in the documents would disclose deliberative matter in the form of opinion, advice, recommendation, consultation, and deliberation in relation to the functions of the Ahpra Board.

33. While I am of the view that the documents 2 and 4 contain deliberative matter, I am also of the view that they contain factual material that is non-deliberative in nature, such as:
- summaries of published information issued by the Australian Government and jurisdictional governments regarding COVID-19 vaccination and restrictions
  - legislation citations.
34. However, I consider this non-deliberative matter to be an integral part of the deliberative process for which documents 2 and 4 were prepared.<sup>21</sup>
35. In coming to this view, I considered the AIC's reflections 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>22</sup>
36. In line with the AIC's reflection, I consider that the confidentiality attached to the deliberative matter in the documents extends to the non-deliberative matter that is an integral part of the Ahpra Board's deliberations.
37. Accordingly, I am satisfied that the documents 2 and 4 are conditionally exempt in part under s. 47C.
38. 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

39. 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>23</sup>
40. In *Seven Network (Operations Limited) and Australian Competition and Consumer Commission (Freedom of Information)* [2019] AICmr 29 (6 June 2019), the AIC 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>24</sup>

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<sup>21</sup> 'AN' and Australian Health Practitioner Regulation Agency (Ahpra) [National Health Practitioner Privacy Commissioner, Richelle McCausland, 11 July 2024].

<sup>22</sup> *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014), [27].

<sup>23</sup> s. 11A(5).

<sup>24</sup> *Seven Network (Operations Limited) and Australian Competition and Consumer Commission (Freedom of Information)* [2019] AICmr 29 (6 June 2019), [47].

### Factors favouring disclosure

41. 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>25</sup>
42. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>26</sup>
43. In forming its decision, Ahpra identified 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 activities (s. 3(2)(b)). Public scrutiny of Ahpra's performance and human resources information may contribute to transparency generally
  - 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 an administrative process.
44. I agree that disclosure of the information in documents 2 and 4 would promote the objects of the FOI Act and reveal information that informed an administrative process.
45. While I agree there are public interest factors that favour disclosure of the information in documents 2 and 4, 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

46. Ahpra put forward the following factors against disclosure:
- the public interest in Ahpra and the Ahpra Board being able to carry out their statutory functions as efficiently and effectively as possible. The public interest in protecting and maintaining the integrity of consultation processes with key stakeholders on the development of new policy, as well as Ahpra's ability to properly and efficiently support the Ahpra Board in carrying out functions under the National Law. Disclosure could reasonably be expected to affect Ahpra's ability to obtain information in the future, harming other consultation processes and making the development of new policies, codes or guidelines more difficult and less reflective of stakeholder feedback
  - disclosure of such documents under the FOI Act could reasonably be expected to prejudice the conduct of future consultations by discouraging key stakeholders, the National Boards and Ahpra staff from keeping complete records of their correspondences and discussions,<sup>27</sup> or being more circumspect in their feedback and recommendations that are expressed because of public scrutiny.<sup>28</sup> As a consequence, this would have an adverse effect on the quality of information and

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<sup>25</sup> s. 11B(3).

<sup>26</sup> FOI Guidelines, [6.231].

<sup>27</sup> *Hanes v Ahpra* [2013] VCAT 1270, [30].

<sup>28</sup> *Hassan v Ahpra* [2014] QCAT 414, [26].

feedback generated and obtained in these processes, and on the conduct of robust and informed consultations relevant to the development of policy

- disclosure may also discourage some parties from providing any consultation contribution at all, particularly if their views and suggestions may be unconventional, controversial, challenging or novel. Such an effect would severely harm Ahpra's ability to receive and consider viewpoints from a wide perspective and would in turn detriment the functions of the agency.
- disclosure of such documents could reasonably be expected to prejudice to Ahpra's ability to obtain similar information in the future, as workers may be reluctant to participate in deliberative processes due to concerns that confidentiality may not be guaranteed. Ahpra's inability to canvass the free and frank advice and options of stakeholders would substantially affect its ability to generate future policy documentation.

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

47. In balancing the public interest in this case, I have considered the factors for and against disclosure, including the relevant factors favouring disclosure set out in s. 11B(3).
48. I acknowledge that the COVID-19 pandemic and COVID-19 vaccinations have been, and continue to be, high profile issues and matters of public importance.
49. I consider that releasing the information in the documents 2 and 4 would serve the public interest in that it would provide greater transparency in relation to the role and functions of Ahpra and the Ahpra Board in its response to the COVID-19 pandemic.
50. I also consider that releasing the information would promote the objects of the FOI Act by facilitating access to documents generally, as well as facilitating access to information that allows members of the public to be satisfied that proper processes have been followed and revealing information that informed an administrative process.
51. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the Ahpra Board's processes in relation to the consultation and development of new policies, codes or guidelines. There is a strong public interest in Ahpra and the Ahpra Board being able to carry out their statutory functions as efficiently and effectively as possible.
52. I am also satisfied that the relevant material involves a flow of information from key stakeholders, Ahpra officers and Ahpra Board members and that disclosure of the material could reasonably be expected to prejudice their ability to obtain similar information in the future.
53. I accept that the work of those who prepared the drafts of the Vaccination Policy and provided feedback or comments on the drafts did so on the basis that it would only be considered by those involved in the consultation and development of the Vaccination Policy. Ahpra submitted that if the relevant material was disclosed, individuals may be more circumspect in the feedback and recommendations they express because of public scrutiny, or may be discouraged from providing any consultation contribution at all.
54. The issue of frankness and candour, and how it relates to s. 47C and the public interest, has been considered by the former AIC in *'GI' and Department of Prime Minister and Cabinet* [2015] AICmr 51:  
... 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>29</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>30</sup>

55. 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>31</sup>
56. I accept that, although I give it less weight than other factors, disclosure may inhibit the frankness and candour of key stakeholders, Ahpra officers and Ahpra Board members in their provision of similar advice relevant to the development of new policies, codes or guidelines in the future. This in turn could prejudice the consultation processes and the development of similar documents in the future.
57. Taking into consideration all relevant factors, I consider that the public interest factors against disclosure outweigh the public interest factors favouring disclosure.
58. I am satisfied that giving the Applicant access to the conditionally exempt information at this time would, on balance, be contrary to the public interest.

## Finding

59. I am satisfied that documents 2 and 4 are exempt in part under s. 47C.

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

60. Ahpra found documents 2 to 4 to be conditionally exempt in part under s. 47E(d). As I have found that documents 2 and 4 are exempt in part under s. 47C, I have not considered whether they are also exempt under s. 47E(d).
61. I have considered whether document 3 is conditionally exempt in part under s. 47E(d).
62. Document 3 is a record of a meeting of the Ahpra Board. The relevant information is a summary of the Ahpra Board's discussions leading to its decision to approve the Vaccination Policy.
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.<sup>32</sup>
64. The FOI Guidelines explain that the predicted effect needs to be reasonably expected to occur and that there must be more than merely an assumption or allegation that damage may occur if the document were to be released.<sup>33</sup>

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<sup>29</sup> *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51, [52].

<sup>30</sup> *Ibid*, [20].

<sup>31</sup> FOI Guidelines, [6.248].

<sup>32</sup> s. 47E(d).

<sup>33</sup> FOI Guidelines, [6.90].

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.<sup>34</sup>
66. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.<sup>35</sup>

## Ahpra Board’s operations

67. Under the National Law, the Ahpra Board’s functions include:

- subject to any directions of the Ministerial Council, to decide the policies of Ahpra
- to ensure that Ahpra performs its functions in a proper, effective and efficient way
- any other function given to it by or under the National Law.<sup>36</sup>

## Ahpra submission

68. In its decision, Ahpra stated:

Ahpra is the national agency that provides support to the 15 National Boards to help protect the public by regulating Australia’s registered Health Practitioners. Alongside the National Boards, Ahpra’s primary role is to protect the public...Ahpra is governed by the Ahpra Board, who amongst other things, make decisions on the approval of significant human resources policies that relate to Ahpra workers.

The development and approval of such policies by the Ahpra Board is reliant on the provision of comprehensive information and feedback by policy owners and other key stakeholders obtained in the course of policy development.

I am satisfied that the disclosure of the relevant documents would, or could be reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the National Boards, for the following reason:

- 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’.<sup>37</sup>
- Feedback and information shared between Ahpra, its workers and the Ahpra Board during the process for developing policy is communicated and deliberated on with the understanding that it will be treated in a confidential manner. The ability to deliberate on, and seek feedback from key stakeholders is critical to ensuring that the policy development process is carried out both efficiently and effectively. Documents disclosing preliminary comments and consultation feedback in relation to proposed policies would negatively impact on the ability of Ahpra and the Ahpra Board to obtain similar feedback in future

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<sup>34</sup> Ibid, [6.18].

<sup>35</sup> Ibid, [6.92].

<sup>36</sup>National Law, s. 30.

<sup>37</sup> *Meschino and Centrelink* [2002] AATA 627, at [23],

- If the documents were to be released under the FOI Act, this would likely have a significant impact on the future flow of information between Ahpra, the Ahpra Board and other key stakeholders during the policy development process. Key stakeholders may be reticent to engage in meaningful cooperation and to express free, candid, and complete responses out of concern that their contributions may be subject to disclosure under the FOI Act and potentially release to the world at large. Similarly, Ahpra and the Ahpra Board may be discouraged from seeking input and feedback from key stakeholders and from keeping fulsome records of their deliberations,<sup>38</sup> or being more circumspect in their preliminary proposals and drafts that are expressed because of unfair scrutiny.<sup>39</sup> This in turn would prejudice the integrity and robustness of processes in relation to the development of policy and thereby hamper the exercising of Ahpra and the Ahpra Board's functions under the National Law;
- As it is an important function of entities exercising powers under the National Law to be able to develop and approve policy, damage to that ability to properly and efficiently develop such policies would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

## The Applicant's submission

69. I have detailed the Applicant's submission at [27].

## Application of the certain operations of agencies exemption

70. After inspecting document 3, I am of the view that the exempt information was generated by the Ahpra Board while it was undertaking its functions under the National Law, specifically in relation to the development and approval of Ahpra policies.
71. The Ahpra Board must be willing to outline its discussions regarding the development and approval of Ahpra policies, as this facilitates an efficient and effective policy development process.
72. There is evidence of an expectation that information outlined during an Ahpra Board meeting in relation to policy development and approval will be treated confidentially. For example, the document is marked 'in confidence'. If Ahpra discloses the information requested by the Applicant, a reasonable person could conclude that the information outlined during policy development and approval may not be treated confidentially in the future. This, in turn, could reasonably be expected to affect how effectively the Ahpra Board can carry out its functions by limiting its ability to properly and effectively develop and approve policies.
73. I consider that disclosure of the relevant information in document 3 would prejudice the integrity and robustness of processes associated with policy development and approval, and as a result, have a substantial adverse effect on the proper and efficient conduct of the operations of the Ahpra Board.
74. Accordingly, I am satisfied that the information in document 3 is conditionally exempt in part under s. 47E(d).
75. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt material at this time.

<sup>38</sup> See *Hanes v Australian Health Practitioner Regulation Agency* [2013] VCAT1270 at [30].

<sup>39</sup> See *Hassan v Australian Health Practitioner Regulation Agency* [2014] QCAT 414 at [26].

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

### Factors favouring disclosure

76. I consider paragraphs [41] to [45] to be of particular relevance here.
77. I agree that disclosure of the information identified above in paragraph [62] would promote the objects of the FOI Act and reveal information that informed a decision-making process.

### Factors against disclosure

78. I consider paragraph [46] to be of particular relevance here.
79. I agree there is a strong public interest in protecting the Ahpra Board's ability to carry out their statutory functions as efficiently and effectively as possible.

### Balancing the public interest factors

80. I have considered the factors for and against disclosure. My consideration of public interest factors in paragraphs [47] to [58] is also relevant here.
81. In particular, I note that releasing the information in document 3 would serve the public interest in that it would provide greater transparency in relation to the role and functions of Ahpra and the Ahpra Board in its response to the COVID-19 pandemic.
82. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the Ahpra Board's processes in relation to the development and approval of new policies, codes or guidelines.
83. On balance, the impact of the release of the information in document 3 on Ahpra and the Ahpra Board being able to carry out their statutory functions as efficiently and effectively as possible weighs heavily against disclosure.
84. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
85. 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

86. I am satisfied that the document 3 is exempt in part under s. 47E(d).

## Section 47E(c): Documents affecting the management and assessment of personnel

87. I have found documents 2 and 4 to be exempt in part under s. 47C and document 3 to be exempt in part under s. 47E(d). I will therefore not consider whether the documents are also exempt under s. 47E(c).

## Conclusion

88. Under s. 55K, I affirm Ahpra's decision of 22 November 2023.

**Richelle McCausland**

National Health Practitioner 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 to have the decision reviewed. The application must be made within 28 days after the day the party receives the Commissioner's decision.<sup>40</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>41</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>40</sup> s. 57A.

<sup>41</sup> s. 60(3).