

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



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

Applicant	'BA'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/05272025
Decision date	23 March 2026
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 a conditionally exempt document – 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 affirm Ahpra's decision of 6 December 2024.

## Background

2. 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.
3. The Applicant made a notification to Ahpra and the Medical Board about a medical practitioner (the Practitioner).
4. The Medical Board decided to take no further action in relation to the notification.
5. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant requested:
  - *All medical notes and records collected that relate to me or the case [notification number]*

- *All other information, evidence, notes related to the assessment of my case, including [the Practitioner's] response to any requests.*
6. In its decision letter dated 7 November 2024, Ahpra identified 2 documents that fell within the scope of the Applicant's request, being the:
    - Notification Report prepared by Ahpra for the Medical Board's consideration of the notification (Document 1). Ahpra decided to exempt Document 1 from release in full under ss. 47C and 47E(d)
    - Attachments to the Notification Report (Document 2). Ahpra decided to exempt Document 2 from release in part under ss. 47E(d) and 47F.
  7. On 8 November 2024, the Applicant requested an internal review of Ahpra's decision.
  8. In its internal review decision letter dated 6 December 2024, Ahpra affirmed its decision.
  9. On 17 March 2025, the Applicant sought a review of Ahpra's internal review decision under s. 54L. As the Applicant's application was made out of time, the Applicant requested an extension of time to apply for a review under s. 54T. The Applicant's request for an extension of time was granted as my office was satisfied that this was reasonable having regard to all the circumstances.<sup>1</sup>

## Scope of the review

10. The issues I have decided in this review are:
  - whether the document 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 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
  - whether the information Ahpra found to be exempt under s. 47F is exempt under that provision, and if so, whether giving access would be contrary to the public interest.
11. Where I have found that one exemption applies to a document, I have not considered whether any additional exemptions apply.
12. 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>2</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>3</sup>
13. The Applicant and Ahpra were invited to make written submissions about this review. I have considered all relevant communications and submissions received from the Applicant and Ahpra.

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<sup>1</sup> s. 54T(2).

<sup>2</sup> s. 55D(1).

<sup>3</sup> ss. 55 and 55K.

14. 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>4</sup>

## Review of the exemptions

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

15. Ahpra found Document 1 to be conditionally exempt in full under s. 47E(d). Ahpra also found Document 2 to be conditionally exempt in part under s. 47E(d), to the extent that it revealed the Practitioner's response to the notification and a Practice Information Form completed by the Practitioner.
16. 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>5</sup>
17. The Office of the Australian Information Commissioner's FOI Guidelines (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>6</sup>
18. 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>7</sup>
19. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.<sup>8</sup>

### Ahpra's operations

20. Under the *Health Practitioner Regulation National Law 2009* (as it applies in each State and Territory) (the National Law), the Medical Board oversees the receipt, assessment and investigation of notifications about persons who are or were registered as medical practitioners under the National Law.<sup>9</sup>
21. During the notification process, Ahpra supports the Medical Board by collecting and assessing relevant information. Ahpra provides this information to the Medical Board and the Medical Board is the regulatory decision-maker.
22. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.<sup>10</sup> 'Protected information' means any information that comes to a person's knowledge in

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<sup>4</sup> s. 3(1).

<sup>5</sup> s. 47E(d).

<sup>6</sup> FOI Guidelines, [6.90].

<sup>7</sup> *Ibid*, [6.18].

<sup>8</sup> *Ibid*, [6.92].

<sup>9</sup> For more information about the Medical Board's functions, see s. 35 of the National Law.

<sup>10</sup> National Law, s. 216.

the course of, or because of, the person exercising functions under the National Law.<sup>11</sup> This includes when handling notifications.

## Ahpra's submissions

23. Ahpra stated in its decision dated 7 December 2024:

The documents that [Ahpra has] found to be conditionally exempt from disclosure under section 47E(d) are the Notification Report (Document 1) prepared by an Ahpra officer to inform Board decision-making, and the practitioner submissions and Practice Information Form (PIF) which form part of the Attachments to the Notification Report (Document 2). These documents were considered by the Notifications Committee: Triage of the Medical Board of Australia at its meeting held on [date].

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

- The FOI Act does not restrict the subsequent use of information released to an applicant under the FOI Act. In Australia there is case law relating to disclosure of information under the FOI Act, for example, the Administrative Appeals Tribunal (AAT) has stated that *'access to a document under the FOI Act must be considered not on the basis of the identity and the qualities of the person who seeks that access but on the basis that it may be seen by anybody. As it is usually expressed, access under the FOI Act, is access to the world at large'*;<sup>12</sup>
- Information received, generated, or otherwise held by Ahpra and the National Boards is held on the understanding that it will be treated in a confidential manner and used in accordance with the National Law and the *Privacy Act 1988* (Cth) (the Privacy Act). The information in this instance is protected information within the meaning of section 214 of the National Law. It is an offence to disclose protected information unless an exception applies;<sup>13</sup>
- Practitioner submissions and other correspondence are provided to Ahpra and the Board in the context of responding to the issues raised in the notification. Submissions are provided on the understanding that the material would be used by Ahpra and the Board only for the purposes of assisting in the assessment of the matters raised. In *YJI v Australian Health Practitioner Regulation Agency* at [66], the Tribunal remarked that:

*"It is important that third parties such as notifiers, practitioners and other government bodies be willing to provide information necessary to facilitate Ahpra and the Board's efficient assessment of a notification. This allows the Board to determine whether regulatory action is required to manage any risks posed by the relevant health practitioner's health, conduct or performance on the basis of all relevant information."*<sup>14</sup>

It is integral to the efficient management of complaints that Ahpra can continue to meet an individual practitioner's expectation of confidentiality over the communications and

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<sup>11</sup> National Law, s. 214 (definition of 'protected information').

<sup>12</sup> *Meschino and Centrelink* [2002] AATA 627, [23].

<sup>13</sup> National Law, s. 216.

<sup>14</sup> *YJI v Australian Health Practitioner Regulation Agency* [2023] VCAT 206, [66].

documents comprising their correspondence and submissions, which are provided to Ahpra to assist in the assessment of notifications. This maintenance of confidentiality is critical to ensuring that the investigation process is carried out both efficiently and effectively. In *Spragg v Australian Health Practitioner Regulation Agency* at [78], the Tribunal remarked that:

*“The proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information.”<sup>15</sup>*

The Commissioner has considered these issues in several of its review decisions. In these review decisions, the Commissioner noted the strict confidentiality obligations imposed by section 216 of the National Law and commented on the reasonable expectation that correspondence shared with Ahpra or the National Boards while exercising their functions will be treated confidentially.

- In its role as a regulator, Ahpra receives and holds private information relating to health practitioners and their registration, employment, and education history. This information is held and relied upon for the primary purpose of regulating the health professions. Disclosure of personal information relating to an individual through the FOI process would frustrate the operations of the agency by undermining individuals’ faith in Ahpra’s ability to maintain confidence over the conditionally held information it possesses. This would in turn cause individuals to be more cautious in their disclosures and dealings with Ahpra out of concern that their information could be released more broadly;
- Similarly, Ahpra staff may be discouraged from keeping detailed and fulsome records of their deliberations or being more circumspect in their preliminary findings that are expressed to other officers or the Board because of public scrutiny. The maintenance of confidentiality over 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; and
- As it is a core function of Ahpra under the National Law to regulate health professionals, damage to Ahpra’s ability to conduct such regulation properly and efficiently would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

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<sup>15</sup> *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103, [78].

## The Applicant's submissions

24. In response to my office's preliminary view on this matter, the Applicant submitted (amongst other things):

I understand from your preliminary view that the primary exemption relied upon is s 47E(d). I do not believe that justifies blanket withholding of the Notification Report. Sensitive passages can be removed, but the remainder should be released. Reasons include:

- The underlying practitioner notification is concluded. There is no ongoing risk of interfering with that assessment... Releasing factual content will not compromise Ahpra's completed process but will support oversight and accountability.
- Editing can mitigate risks. Internal workflows or instructions can be removed while leaving neutral summaries of evidence.
- Transparency is necessary to build confidence. At present I have no visibility of what was before the Board. Withholding everything undermines trust, whereas releasing factual content would improve confidence in the system.
- The public interest is broader than my own. Patients and the community need assurance that safety complaints are assessed properly, which requires at least some transparency about the material considered.

If full release is not possible, a clear factual summary or gist would still provide transparency without risking operational harm.

## Application of certain operations of agencies exemption

25. I have considered whether Document 1 is conditionally exempt in full and Document 2 is conditionally exempt in part under s. 47E(d).

26. After inspecting the documents, it is my view that the documents were provided to or created by Ahpra while Ahpra was undertaking its functions under the National Law, namely to:

- assess the notification about the Practitioner
- provide information to the Medical Board to support the Medical Board's decision-making in relation to the notification.

27. Notifiers, practitioners, Ahpra officers and other third parties must be willing to provide information necessary to facilitate Ahpra and the Medical Board's assessment or 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.

28. As outlined in my decisions of 'AA', 'AC', 'AD', 'AE', 'AF', 'AG', 'AI', 'JH', 'MS', 'AM', 'AN', 'AO', 'AP' and 'AQ', 'AR', 'AS', 'AT', 'AU' and 'AZ',<sup>16</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 2019) (Mahony). In Mahony, the request was for access to all documents relevant to investigations conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular building fund. The Australian Information Commissioner

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<sup>16</sup> The Commissioner's decisions are published on her office's website: <https://www.nhpo.gov.au/foi-review-decisions>.

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>17</sup>

29. 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 provided to Ahpra and the Medical Board in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the Medical Board can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.

30. In reaching my view, I also draw similarities between this matter and the case before the State Administrative Tribunal in *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017) (Spragg). Notably, in Spragg the Tribunal considered the application of s. 47E(d) specifically in the context of Ahpra's operations. In that case, the Tribunal found that disclosure of protected information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.<sup>18</sup> As noted above by Ahpra in its submission at paragraph [23], in making its decision, the Tribunal stated:

...the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies [sic] operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information...<sup>19</sup>

31. Taking all relevant factors into consideration, I am satisfied that the disclosure of Document 1 and the exempted information in Document 2 could reasonably be expected to affect the future flow of information to Ahpra and the Medical Board. Ahpra and the Medical Board rely on candid communication from relevant parties to carry out their role in ensuring public safety.

32. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the exempt information in Documents 1 and 2 could reasonably be expected

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<sup>17</sup> Mahony, [22].

<sup>18</sup> Spragg, [35] and [75].

<sup>19</sup> Spragg, [78].

to reduce the confidence of relevant parties in Ahpra's ability to maintain the confidentiality of protected information.

33. I consider that disclosure of the exempt information would prejudice the integrity and robustness of the notification process and thereby have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Medical Board.
34. Accordingly, I am satisfied that Document 1 is conditionally exempt in full and Document 2 is conditionally exempt in part under s. 47E(d).
35. 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

36. 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.
37. 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>20</sup>

### Factors favouring disclosure

38. 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>21</sup>
39. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.<sup>22</sup>
40. In forming its decision, Ahpra identified the following factors in favour of disclosure:
  - promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities<sup>23</sup>

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<sup>20</sup> *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

<sup>21</sup> s. 11B(3).

<sup>22</sup> FOI Guidelines, [6.231].

<sup>23</sup> s. 3(2)(b).

- facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency (including assessment and investigation processes of Ahpra and the National Boards)
- allowing a person access to information relating to matters that concern them.

41. The Applicant submitted the following factor in favour of disclosure:

... the matter involves patient safety and consent issues where transparency is critical... withholding everything undermines public trust and discourages people from making notifications.

42. I agree that disclosure of the relevant material in Documents 1 and 2 would promote the objects of the FOI Act and reveal information that informed a decision-making process, which may in turn improve the quality of advice and decision-making processes of Ahpra and the Medical Board.

43. While I agree there are public interest factors that favour disclosure of the documents, these factors must be balanced against any public interest factors opposing disclosure when determining whether access should be given to the conditionally exempt information.

#### **Factors against disclosure**

44. Ahpra put forward the following factors against disclosure:

- the public interest in protecting and maintaining the integrity of Ahpra's investigative processes. Ahpra's ability to receive, assess and investigate notifications in respect of the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law
- the public interest in Ahpra and the [Medical] Board being able to carry out their statutory functions as efficiently and effectively as possible. Disclosure could reasonably be expected to affect Ahpra's ability to obtain information from third parties in the future, thereby making the assessment and investigation of notifications more difficult
- disclosure could reasonably be expected to prejudice the conduct of future investigations, by discouraging staff from keeping detailed and fulsome records of their deliberations,<sup>24</sup> or being more circumspect in their preliminary findings that are expressed to Ahpra because of public scrutiny<sup>25</sup>
- disclosure of an officer's preliminary analysis, before it has been considered and tested by decision-makers, may generally undermine confidence in the health regulation system and health practitioners
- the prejudice to an individual's right to privacy, particularly where information is not well known or publicly available. Disclosure could also expose individuals to unfair scrutiny, in circumstances where there was a reasonable expectation of confidentiality, or where they otherwise understood their personal information would be confidential.

45. Ahpra referred to *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013) (Hanes). In Hanes, the Tribunal accepted Ahpra's submissions that disclosure of the relevant material would be contrary to the public interest. Ahpra's submissions

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<sup>24</sup> Hanes, [30].

<sup>25</sup> *Hassan v Australian Health Practitioner Regulation Agency* [2014] QCAT 414 (10 July 2014), [26].

included that there is a public interest in protecting and maintaining the integrity of its investigative processes in relation to notifications and ensuring its ability to investigate notifications is not hampered by the disclosure of confidential information.

46. In Hanes, the Tribunal noted how disclosure of information relating to notifications would make investigations more difficult and suggested that broad public interest centres around Ahpra's role in protecting the public in terms of regulating the provision of medical services. I consider this to be a persuasive point.
47. I consider there is a strong public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's assessment and investigative processes. Disclosure of the exempt information could have a significant adverse impact on the integrity and robustness of assessment and investigation processes, and the ability of Ahpra and the Medical Board to carry out their functions and duties in an effective manner.

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

48. In balancing the public interest in this case, I have considered the factors for and against disclosure, including relevant factors favouring disclosure set out in s. 11B(3).
49. I note that 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.
50. I consider that releasing Documents 1 and 2 would promote the objects of the FOI Act by:
  - facilitating access to documents generally
  - facilitating access to information that allows individuals to be satisfied that proper processes have been followed
  - 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.
51. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's processes for receiving, assessing and investigating notifications about the health, conduct and/or performance of registered health practitioners. There is a strong public interest in Ahpra and the Medical Board being able to carry out their statutory functions as efficiently and effectively as possible.
52. The proper and efficient management and investigation of health practitioners is an integral function of Ahpra and the Medical Board under the National Law. It would be contrary to the public interest if these processes (and by extension, the core function to ensure the protection of the health and safety of the public) were prejudiced as a result of the disclosure of the exempt information in Documents 1 and 2 under the FOI Act. In addition, the prejudice to the protection of the Practitioner's privacy weighs heavily against disclosure.

53. Based on the available information, I am satisfied that that the public interest factors against disclosure outweigh those in favour of disclosure.
54. 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

55. I am satisfied that Document 1 is conditionally exempt in full and Document 2 is conditionally exempt in part under s. 47E(d).

## Section 47C: Documents subject to deliberative processes

56. I have found Document 1 to be conditionally exempt in full under s. 47E(d). I will therefore not consider whether the document is also exempt under s. 47C.

## Section 47F: Documents affecting personal privacy

57. I have found Document 2 to be exempt in part under s. 47E(d). I will therefore not consider whether the document is also exempt under s. 47F.

## Conclusion

58. I affirm Ahpra's decision of 6 December 2024.

### **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>26</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>27</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:

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<sup>26</sup> s. 57A.

<sup>27</sup> s. 60(3).

- 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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